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The Purple Reign: Sweet taste of relief for Cadbury in the High Court

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The ongoing dispute, originally instigated by Nestlé, surrounding Cadbury's trade mark applications for the colour purple has recommenced. Mr Justice Meade of the High Court recently handed down judgment in *Société des Produits Nestlé S.A. v Cadbury UK Limited [2022] EWHC 1671 (Ch)*. Meade J decided in Cadbury's favour on two counts, allowing the registration of two of its applications for colour. The third application was refused.

Background

This decision centres around three new applications to protect the colour Pantone 2685C, each with a slightly different description around use.

1. Application No. 3019362 (“**the 362 mark**”)
 1. The colour purple (Pantone 2685C), as shown on the form of application, applied to the whole visible surface of the packaging of the goods.
2. Application No. 3019361 (“**the 361 mark**”)
 1. The colour purple (Pantone 2685C), as shown on the form of application, applied to the packaging of goods.
3. Application No. 3025822 (“**the 822 mark**”)
 1. The colour purple (Pantone 2685C), as shown on the form of application.

Under Article 3 of EU Directive 2015/2436, a colour may be registered as a trade mark. In practice, however, this can be difficult to achieve because case law (*Libertel*) dictates that in order to achieve protection, a colour must constitute a ‘sign’ indicative of trade origin.

This is an issue that Cadbury has faced in previous proceedings. The Court of Appeal in 2013 decided against Cadbury relating to its colour mark with the description “*The colour purple applied to the whole visible surface, or being the **predominant** colour applied to the whole visible surface of the packaging*”. The Court of Appeal held that the ‘predominant’ wording created uncertainty and so the mark could not be registered.

The case

This case relates to three applications which were opposed on the basis that the colour had no distinctive character and was too broad for a range of goods.

The 362 mark was allowed for being sufficiently descriptive so as to provide a badge of origin of the goods.

In relation to the 361 mark, Meade J was not satisfied that the removal of ‘predominant’ from the mark description was sufficient to render the colour a sign that could indicate trade origin. The description is still too vague and the application of the colour to the goods was still unlimited.

In relation to the 822 mark, the question is whether the mark can constitute a sign where there is no description of the mark in relation to its use. The *Libertel* judgment allows a single colour to be a sign without the context of use where that colour is sufficiently distinctive of trade origin. The crucial difference between the 361 mark and the 822 mark is that the 361 mark offers a broad protection and the description “as applied to the packaging of the goods” was not sufficiently specific. This is also in contrast to the 362 mark; “applied to the whole visible surface of the packaging” provided enough certainty so as to constitute a sign.

Comment

The decision establishes in the UK that a colour is, in principle, validly registerable – the thing that harmed Cadbury’s applications was the broad descriptions which define the sign for registration.

Upon first consideration it seems nonsensical that removing a description around the context of use would provide for more legal certainty. My initial reaction was that removing the description would only widen the scope of protection. However, here the Court has concluded that in not defining the context, protection is provided to the colour as a badge of origin in principle as the colour itself is definable and so there is no vagueness in it for the purposes of defining the sign. This is not dependant on the nature of use.

Going forward, applications for a colour trade mark are therefore possible in the UK where they protect a single colour as a sign or badge of origin. However, the colour definition per se is specific whilst also being very broad, so establishing that a consumer will link a non-traditional trade mark such as colour as a badge of origin will be difficult to prove, and brand owners should be prepared to produce large amounts of evidence to prove this.

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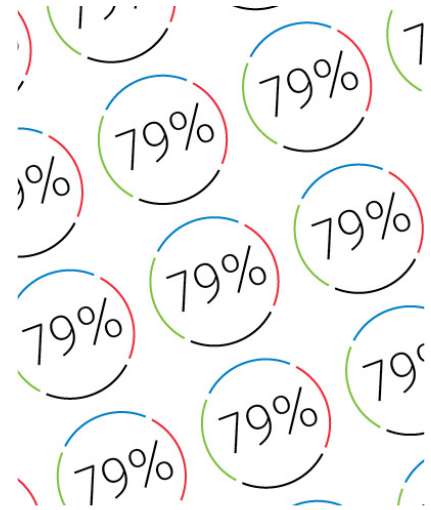
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