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UK trade mark law post-Brexit: the *Advancetrack* case examines REULA and the TMA 1994

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The start of 2024 marked a significant change in the UK legal landscape post-Brexit – the entry into force of the Retained EU Law (Revocation and Reform) Act 2023 (**‘REULA’**). This is the first of two blogs looking at REULA, and at the UK Courts’ approach to EU law following the UK’s departure from the EU.

What is REULA?

From 1 January 2024, REULA abolished the principle of supremacy of EU law and other general principles of EU law (such as indirect effect) and revoked a limited list of EU laws. REULA also provides various statutory powers to revoke and replace ‘retained EU law’ (i.e. EU law that was retained post Exit Day under the European Union (Withdrawal) Act 2018 (**‘the Withdrawal Act’**), and includes CJEU case law made on or before 31 December 2020).

Article 6 of REULA, which (unlike the rest of the Act) is not yet in force, gives the UK Court of Appeal and Supreme Court extensive powers to depart from retained EU case law, and also from retained UK domestic case law. The lower UK courts and tribunals, including the UKIPO, are also given the power to refer points of law to the Court of Appeal and Supreme Court.

While the operation of REULA in practice remains to be seen, a recent UK High Court decision gives some insight as to how the UK courts might approach EU law in the post-Brexit landscape.

The *Advancetrack* decision

E-Accounting Solutions Ltd (t/a Advancetrack) v Global Infosys Ltd (t/a GI Outsourcing) was a 2023 High Court trade mark infringement dispute (concerning adwords). It was determined pre-REULA but Judge Tindal explored obiter whether his findings of infringement would be the same post-REULA.

He explained that post-REULA, the Trade Marks Act 1994 (and any other legislation derived from EU Directives) must be based on the orthodox principles of statutory interpretation – i.e. seeking the meaning of the words used by Parliament. He noted that where domestic legislation was enacted to implement an EU Directive, that Directive may be a relevant ‘external aid’ to its statutory interpretation on orthodox principles, but that this is very different to indirect effect.

In reviewing his infringement findings under s10(1), Judge Tindal observed that there is no

statutory requirement that use of a sign must ‘adversely affect the functions of the trade mark’. However, In *Arsenal*, the ECJ (as it then was) stated that the exclusive rights granted to a trade mark proprietor are “... *to enable the trade mark proprietor to protect his specific interests as proprietor, that is, to ensure that the trade mark can fulfil its functions. The exercise of that right must therefore be reserved to cases in which a third party’s use of the sign affects or is liable to affect the functions of the trade mark, in particular its essential function of guaranteeing to consumers the origin of the goods.*”. Judge Tindal acknowledged that this effectively amounts to a ‘gloss’ by the ECJ on the express words in 10(1).

He concluded that this is where a post-REULA purposive interpretation would come in – s.10 TMA was plainly intended to implement the Recast Directive which was intended to mean the same as the ECJ and CJEU had interpreted the Trade Marks Directive – so it is an ‘external aid’. Therefore, he concluded, the phrase ‘a person infringes a trademark’ in each of ss.10(1), 10(2) and 10(3) TMA can be interpreted to require ‘infringement’ in the sense of adverse effect on the trade mark. This would add little if anything to the other elements of s.10(2) and s.10(3) TMA, but it would add something to the other elements of s.10(1) TMA. He also noted that it cannot have been Parliament’s intention or purpose to render unlawful something which has no adverse impact whatsoever on a trade mark. He therefore also found trade mark infringement under s10(1) on a purposive interpretation.

The *Advancetrack* decision is a useful hypothetical as to how the UK courts might interpret trade mark law post-Brexit and provides guidance on ways in which purposive statutory interpretation can help the UK courts retain settled areas of EU law. It is very early days since REULA, so we are watching this space.

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