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UK trade mark law post-Brexit: the UK Court of Appeal diverges from the CJEU in statutory acquiescence

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At the end of last year, and shortly before the Retained EU Law (Revocation and Reform) Act 2023 ('**REULA**') came into force in the UK on 1 January 2024 (the legislation that officially brought an end to the principle of supremacy of EU law in the UK), the UK Court of Appeal departed from CJEU case law on statutory acquiescence.

Industrial Cleaning Equipment (Southampton) Ltd v Intelligent Cleaning Equipment Holdings Co Ltd & Anor was a trade mark infringement claim in which the defendant had sought to rely on the defence of statutory acquiescence. At first instance, the High Court (IPEC) followed the CJEU's decision in *Budvar* which held that the acquiescence clock only began to run once the proprietor of the earlier trademark was aware that that later trademark had been registered AND that the later mark was being used.

The principal ground of the defendants' appeal was as to the date on which the period of acquiescence starts to run. Lord Justice Arnold delivered the leading judgment in the Court of Appeal. He noted that *Budvar* was 'retained EU case law' within section 6(7) of the European Union (Withdrawal) Act 2018 ('**the Withdrawal Act')**, meaning that it continued to form part of domestic law after Brexit and to bind lower courts. However, he also acknowledged the power of the Court of Appeal to depart from 'retained EU law' (under the powers given to it by the Withdrawal Act) on the same basis as the Supreme Court would be able to depart from one of its own decisions.

Lord Justice Arnold then examined a line of authority in the EUIPO and General Court that was different to *Budvar* and in which it had been concluded that the five year period starts to run once the proprietor of the earlier trade mark becomes aware of the use of the later trade mark, and the later trade mark is in fact registered, whether or not the proprietor of the earlier trade mark is aware of the registration of the later trade mark.

With this different line of authority in mind, he addressed the words of the s48 acquiescence defence as it appears in the TMA 1994 and interpreted it as only requiring knowledge of the use of the later trade mark and not of its registration. He therefore concluded that the EUIPO and General Court's reasoning should be preferred and, in a departure from the CJEU, held that provided that the later trade mark is in fact registered, time should run from the date on which the proprietor of the earlier trade mark becomes aware of use of the later trade mark, not from some later date.

In support of this analysis, Lord Justice Arnold agreed with the defendant's submissions that requiring knowledge of actual registration of the later trade mark (as well as its use) would give the proprietor of the earlier trade mark a perverse incentive not to consult the register in order to delay time running.

This is the first time the Court of Appeal has diverged from CJEU retained law and demonstrates that the UK courts are willing to revisit EU law and make changes where they consider that clarity is needed, or a different approach should be adopted. However, it is perhaps less drastic given that this was effectively the adoption of a different line of European authorities.

This decision (and the *Advancetrack* decision covered in our previous blog post) give some indication as to the way in which the senior UK courts will approach a post-REULA legal landscape. Indeed, at a recent conference at University College London, Lord Justice Arnold indicated that for settled areas of trade mark law, it is unlikely that there will be any significant change. However, where 'fault lines' already exist on more complex issues and where there is already tension between EU interpretation and UK law, change may be on the horizon. This is all subject, of course, to a potential change in UK government later this year, which could see a further post-Brexit legal shake-up.

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