
BUNDLE

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Apart from that, there is a substantial dispute between the parties as to the consequences which flow from applying the CJEU's statement of the law to the facts found in the Main Judgment.

- 14 In considering this dispute, it is necessary for me to start by acknowledging an important point which I appear partly to have overlooked in the Main Judgment at [251] and [257]. This is that SkyKick did not allege that the Trade Marks had been applied for in bad faith in relation to two of the Selected Goods and Services, namely “telecommunications services” and “electronic mail services”. (SkyKick nevertheless contended that the Trade Marks were wholly invalid, but that was on the basis of their argument that bad faith in relation to some goods and services tainted the whole registration.)
- 15 Faced with this difficulty, SkyKick sought permission in their submissions in reply to amend their case to allege bad faith in relation to “telecommunications services” and “electronic mail services”. Unsurprisingly, this application was opposed by Sky. In my judgment it is far too late for SkyKick to seek to raise this allegation now. As Sky point out, bad faith is a serious allegation which must be distinctly pleaded and proved. Sky cannot be deprived of the opportunity of adducing evidence to answer such an allegation, which is the effect of what SkyKick are proposing. The only alternative would be to have a second trial on these issues, but SkyKick do not suggest taking that course and in any event to do so would in my view amount to an abuse of process. I would add that, in the case of “electronic mail services”, the allegation is a hopeless one anyway. Moreover, in the case of “telecommunications services”, it would not, for reasons that will appear, assist SkyKick even if they were successful in cutting down the scope of this term.
- 16 Given the consequences that this point has for the infringement case, as explained below, I propose to deal with the remaining issues under this head relatively briefly.
- 17 The next question to address is whether SkyKick have established that the Trade Marks were applied for in bad faith to any extent at all. Sky contend that, in the light of the CJEU's ruling, the answer to this question is no. SkyKick contend that the answer is yes.
- 18 In considering these contentions, it is necessary to set out more fully what the CJEU said in the relevant part of its judgment:

“74. The Court has held that in addition to the fact that, in accordance with its usual meaning in everyday language, the concept of ‘bad faith’ presupposes the presence of a dishonest state of mind or intention, regard must be had, for the purposes of interpreting that concept, to the specific context of trade mark law, which is that of the course of trade. In that regard, the EU rules on trade marks are aimed, in particular, at contributing to the system of undistorted competition in the European Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin (judgment of 12 September 2019, *Koton Mağazacılık Tekstil Sanayi ve Ticaret v EUIPO*, C-104/18 P, EU:C:2019:724, para. 45 and the case-law cited).

75. Consequently, the absolute ground for invalidity referred to in art. 51(1)(b) of Regulation No. 40/94 and art. 3(2)(d) of First Directive 89/104 applies where it is apparent from relevant and consistent indicia that the proprietor of a trade