

Bird & Bird

# Report of Trade Mark Cases

For the CIPA Journal

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# Trade mark decisions

## Section 10(3) infringement and passing off: the role of consumer evidence

*Lidl Great Britain Ltd & Anr v Tesco Stores Ltd & Anr* (Lewison, Arnold and Birss LJJ; [2024] EWCA Civ 262; 19 March 2024)

*The Court of Appeal dismissed Tesco's appeal from the decision of Joanna Smith J ([2023] EWHC 873 (Ch), reported in CIPA Journal June 2023) in which she held that Tesco's adoption in 2020 and subsequent use of its Clubcard Prices logo for its discount price scheme had infringed Lidl's trade mark rights and amounted to passing off. However, her decision on copyright infringement was overturned. Katharine Stephens reports.*

### Trade mark infringement and passing off: decision of the High Court

Lidl registered its logo as a trade mark in two different forms, one with text and one without, as shown below (together the "Trade Marks"):



The Mark with Text



The Wordless Mark

At first instance, Joanna Smith J held that Tesco's Clubcard Prices logo (referred to in her judgment as the "CCP Signs") infringed Lidl's Trade Marks under section 10(3) and amounted to passing off. An example of a CCP Sign is shown below:



The CCP Signs

Lidl's successful claim to infringement under section 10(3) was brought on the basis that Tesco's use was such as to suggest that the prices of their goods were the same or lower than in Lidl stores or were otherwise price matched with Lidl (referred to as the "price matching" allegation) i.e. Tesco was taking unfair advantage of the reputation of the Trade Marks.

The price matching allegation was also the basis on which Smith J also found there had been passing off. The evidence on which she relied came from various different sources and her treatment of this evidence was reviewed in detail by the Court of Appeal.

Lidl also claimed that Tesco's use was detrimental to the distinctive character of the Trade Marks. Smith J found that, due to the resemblance with the Trade Marks, the CCP Signs were plainly intended to convey value and thereby to influence the economic behaviour of supermarket shoppers. Although there was no direct evidence of the latter, there was evidence that Lidl had been forced to take evasive action in the form of corrective advertising.

### Unfair advantage and passing off: the price matching allegation

Tesco's main ground of appeal was that Smith J had been wrong to find that Lidl had made out the price matching allegation.

The Court of Appeal held that, since misrepresentation is a question of fact, it followed that Smith J's conclusion that the price matching message was being conveyed could only be overturned if it was rationally

insupportable, which it was not. As Lidl accepted that both the unfair advantage claim and the passing off claim were based on the price matching allegation, this disposed of both issues.

Arnold LJ, who gave the main judgment of the Court, noted that at first sight Smith J's conclusion was somewhat surprising and, indeed, Lewison LJ doubted whether he would have come to the same conclusion (but noted it was not open to him to simply substitute his own evaluation because Smith J's decision was not rationally insupportable). However, given Smith J's findings that the Wordless Mark had become distinctive of Lidl, that the CCP Signs called the Lidl logo to mind and that Lidl had an accepted reputation for low prices, it was, as Arnold LJ stated, less surprising.

### The role of consumer evidence

Smith J had been asked to consider, among other things, a range of consumer evidence, including various consumer reactions to seeing the CCP Signs. Arnold LJ explained that unless there was reason to think that the consumers in question were idiosyncratic (i.e. outliers of some sort), then consumer evidence could be of assistance. However, he noted that a judge has to evaluate it with caution and should not treat it as determinative of the issue(s) which the Court has to decide. Subject to those caveats, the Court could give such evidence whatever weight it considered appropriate in the circumstances of the case.

Arnold LJ reviewed the three main strands of evidence considered by Smith J in reaching her conclusion about the price matching allegation:

- the two consumer witnesses who gave evidence of their reaction to seeing the CCP Signs;
- the 'Vox Populi' of other consumer reactions when encountering the CCP Signs; and
- a market research survey commissioned by Tesco to gauge spontaneous reactions from consumers seeing the CCP Signs for the first time.

Arnold LJ concluded that Smith J had evaluated each piece of evidence with care and without treating any one piece of evidence as determinative of any issue which she had to decide. Rather, she treated each piece of evidence as assisting her to gauge the perceptions of ordinary consumers. She was therefore entitled to reach the view that the CCP Signs conveyed the price matching message to the average consumer based on the evidence before her.

### Detriment

While Lidl's trade mark infringement case succeeded on the basis of unfair advantage alone, Arnold LJ went on to consider whether it should also succeed on the basis of detriment. Here too, he was satisfied that Smith J was entitled to conclude from the evidence that there was the necessary change in economic behaviour for detriment to be established.

This was based on (i) Tesco's Clubcard campaign having slowed the switching from Tesco to Lidl; and (ii) Lidl having engaged in corrective advertising to counter the problem being caused by the use of the CCP Signs.

Although it made no difference to the outcome, Birss LJ differed from Arnold LJ on this issue. The price matching issue was crucial and without it there would be no basis for a conclusion of unfair advantage, nor would there be a case on passing off. If that had been the finding, the only way for Lidl to have succeeded would be to show detriment without due cause and, absent price matching, that would be very hard to distinguish from a case of pure dilution. Trade mark law had never gone that far and he would not wish to encourage it.

### (Without) due cause

There was some discussion as to the proper assessment of 'due cause' in the context of section 10(3) and whether this was to be assessed sequentially only after unfair advantage or detriment had been found (see *Leidseplein Beheer BV v Red Bull GmbH & anr*, Case C-65/12). Lewison and Birss LJ doubted such an approach could be correct because this would have seemingly made it possible for the defendant to be found to have taken unfair advantage, yet nonetheless have done so with due cause, an apparent contradiction in terms. Ultimately, the Court of Appeal did not need to decide the issue as the outcome did not turn on it.

### The Wordless Mark registrations revoked

Smith J held that certain of Lidl's historic trade mark registrations for its Wordless Mark were filed in bad faith despite her finding that that Lidl's Wordless Mark was distinctive of Lidl and the use that Lidl had made of it. The registrations were therefore revoked. Lidl appealed.

The Court of Appeal held that the circumstances in which these marks were filed gave rise to a prima facie indication of bad faith because:

- Lidl had never used the Wordless Mark in the form that it was registered;
- it was to be inferred that Lidl had not intended to use the Wordless Mark in the form registered;
- if Lidl was right that use of the Mark with Text amounted to use of the Wordless Mark, it did not need to register the Wordless Mark unless the purpose was to give Lidl wider or different protection; and
- it was to be inferred that the application to register the Wordless Mark was made solely for the purposes of using it as a legal weapon and not in accordance with its function of indicating origin.

In such circumstances, the evidential burden shifted to Lidl to explain its intentions when making these applications. The Court of Appeal agreed with Smith J that Lidl had been unable to prove that, at the time of filing each of these applications, it had the necessary intention to use the mark or that the mark had the necessary reputation. Consequently, the Court of Appeal concluded that Smith J had considered the available evidence from Lidl carefully and was entitled to reach the conclusion that Lidl had not discharged the burden of proving good faith. Lidl's appeal was therefore dismissed.

### Copyright infringement

Smith J held that copyright subsisted in the Mark with Text as an original artistic work, and that a substantial part of that work had been copied by Tesco's design agency in creating the CCP Signs.

While Tesco's appeal did not challenge Smith J's findings on either subsistence or copying, Tesco challenged whether a 'substantial part' of the work had been taken, an argument which had not been fully advanced before the Judge. The Court of Appeal upheld Tesco's appeal in this regard: the scope of protection afforded to the work was narrow and, by using a slightly different shade of blue and distance between the circle and the square, what Tesco had copied did not amount to a substantial part of the work.

## Non-infringement of a product label

*Thatchers Cider Company Ltd v Aldi Stores Ltd* (Judge Clarke, sitting as a Judge of the High Court; [2024] EWHC 88 (IPEC); 24 January 2024)

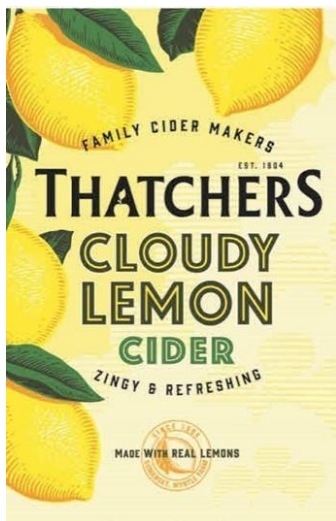
*In a case involving two cloudy lemon cider products, Judge Clarke held that Aldi had not infringed Thatchers' trade mark or passed its cider product off as Thatchers' cider product. Aldi admitted that it had "benchmarked" its cider product against the Thatchers' cider product, but the Judge held that Aldi had not reached the point of infringement. Sharon Mutizira and Fred Cascarini report.*

### Background

In February 2020, Thatchers released a cloudy lemon cider product, packaged in individual cans. Thatchers registered its product label (the 'Mark') for "Cider; Alcoholic beverages, except beer" in class 33. The Mark was applied to the outside of Thatchers' cans and the cardboard containers of four-can packs and was used in marketing.

In response to an emerging trend for lemon-flavoured alcoholic drinks, in May 2022, Aldi released its own cloudy cider lemon product (the 'Aldi Product'), sold under its TAURUS brand. It was also sold as four-can packs and had a similar colour palette and imagery of lemons and leaves, but the signage on the cans was not always visible through the cardboard packaging. A side-by-side comparison of the Mark and the Aldi Product can be found below:

## Thatchers' Mark



## Aldi's Product



### Infringement under Section 10(2)

The Judge observed that Thatchers had not been clear about the sign that it claimed that Aldi had infringed and held that Aldi's infringing sign was the overall appearance of an individual can (the 'Sign'), not the four-can pack nor merely one face of a can.

The Judge emphasised that where a registered mark is a two-dimensional mark (e.g., a label that goes on a physical product, but not the physical product itself that bears the label), and the infringing sign is a three-dimensional product, the court would not extend its comparison to the physical product which bears the mark.

Regarding the similarity of the Sign and Mark, the Judge found as follows:

1. The dominant features were the brand names TAURUS and THATCHERS. She concluded that, despite the two coinciding in the first and last letters, the visual similarities were too minimal to offset the aural and conceptual dissimilarities.
2. Of the remaining elements, much of the similarity rested in either highly descriptive components (e.g., the 'cloudy lemon cider' / 'cloudy cider lemon' wording) or in generic and non-distinctive elements (e.g., the pale yellow background, which is common among lemon flavoured beverages).
3. The remaining key component in both was the lemon imagery. Here the Judge noted that four lemons were in effectively the same position, but the styling of the lemons and leaves (3D and somewhat realistic in Thatchers, versus cartoon in Aldi) was substantially different, and the most prominent lemon in the Sign (to the lower right) was new.
4. Finally, the Judge noted that the TAURUS "swoosh" on the right of the Sign (which was a consistent branding across the TAURUS products) added a further noticeable distinction between the products.

Consequently, the Judge found there was only a low degree of similarity between the Sign and the Mark. This was despite finding that the Mark had enhanced distinctiveness. The Judge considered evidence from Thatchers of consumers calling the Aldi Product a Thatchers "rip-off" or a "knock-off brand". However, she noted that these were not instances of actual confusion, only merely a bringing to mind of the Mark, and the only evidence which suggested otherwise amounted to fleeting confusion. Thatchers' claim that there was infringement under section 10(2) therefore failed.

### Infringement under Section 10(3)

The Judge held that Thatchers had a reputation in the UK in relation to the whole Mark, not just the word Thatchers. The Judge accepted that the attractive force behind the Mark was not just the word elements, but the presence of whole lemons on the label too. This combination of elements was how Thatchers had chosen to communicate to customers exactly what the Thatchers product was.

She was satisfied that the public would have made a link between the Sign and the Mark.

However, there was no unfair advantage taken and no intention to exploit the reputation and goodwill of the Mark. Although Aldi had used the Thatchers' product as a "benchmark" when designing the Aldi Product, it had endeavoured to adopt a sign which was a safe distance away and which would be clearly seen as a TAURUS branded cider. She also found that the use of the Sign did not enable Aldi to benefit from the reputation and goodwill in the Mark. In so finding, she noted the low degree of similarity between the Sign and the Mark, and in particular that the similar elements were not distinctive because they were either descriptive (the text) or ubiquitous or commonplace for lemon-flavoured drinks (the yellow and green palette and use of lemons). Further, Thatchers had failed to establish that consumers had changed their economic behaviour, with the Aldi Product achieving similar sales as other products in its TAURUS family.

The Judge also concluded that the link was not sufficient to cause detriment either on the basis that the difference in taste would have meant that customers who disliked the Aldi Product would wrongly assume that the Thatchers' product would taste the same (which the Judge dismissed following a blind taste test where she noted they were similar, but also clearly different) or in relation to Aldi's use of the marketing line, "Made from Premium Fruit". Thatchers claimed the latter would cause consumers to distrust Thatchers' own "Made with real lemons" marketing line and Aldi use artificially added lemon. However, the Judge noted that, if anything, it could only have led consumers to distrust Aldi. Consequently, Thatchers' claim under section 10(3) failed.

### Passing off

The Judge did not spend much time on the passing off claim. While she found that Thatchers owned goodwill in the business of the sale of the Thatchers' cider associated with the Mark, she concluded that Aldi had not misrepresented itself as connected to Thatchers. Consequently, Thatchers' claim on this ground also failed.

## Invalidity under Section 3(4)

*Oatly AB v Dairy UK Ltd (Richard Smith J; [2023] EWHC 3204 (Ch); 14 December 2023)*

*Oatly's appeal from the UKIPO's partial declaration of invalidity against an application for POST MILK GENERATION based on section 3(4) was allowed. The Judge held that the term 'milk' was not used as a 'designation' in the mark, and therefore did not fall foul of Regulation (EU) No 1308/2013. Lauren Ensign reports.*

### Background

Oatly filed an application, which subsequently registered, for the mark POST MILK GENERATION (the 'Mark') for a range of oat-based food and beverage products across classes 29, 30 and 32 and for t-shirts in class 25. Dairy UK filed an application for a declaration of invalidity on the basis of sections 3(3)(b) and 3(4) against all of the registered goods. The Hearing Officer dismissed the section 3(3)(b) objection. However, the Mark was declared invalid on the basis of section 3(4), which precludes the registration of a mark where its use is prohibited in the UK by any enactment. Oatly appealed to the High Court.

### Regulation (EU) No 1308/2013

Regulation (EU) No 1308/2013 (the 'Regulation') aims to create marketing standards to promote fair and consistent presentation of agricultural products in the internal market. The Regulation has continuing effect in the UK as retained EU law. Article 78(2) requires various terms relating to agricultural products to be used exclusively in relation to those products when used as 'definitions, designations or sales descriptions' for the marketing of those products.

Part III of Annex VII of the Regulation specifically reserves the term 'milk', when used as a 'designation', to:

1. 'Normal mammary secretions';
2. Products derived from animal milk; and
3. Composite products in which milk is an essential part.

Point 5 of Part III prevents the term 'milk' from being used to describe products other than those listed above. Point 6 prevents the use of the term on labels, commercial documents, and publicity or advertising material in a way that 'claims, implies or suggests that the product is a dairy product' when it does not fall under the three designations mentioned above.

## The Appeal

The main point in dispute was whether the use of the term 'milk' in the Mark qualified as use as a 'designation'. Oatly argued it did not. The word 'milk' merely formed part of the Mark, rather than being used to describe the nature of the products.

By contrast, Dairy UK's position was that *any* use of the term 'milk' would constitute use of 'milk' as a designation. Accordingly, the use of 'milk' in a trade mark for goods not listed in the Regulation was an infringement of the Regulation and, therefore, the Mark had been registered contrary to section 3(4).

## The Decision

Dairy UK had relied upon the previous decision in *Verband Sozialer Wettbewerb eV v TofuTown.com GmbH* (Case C-422/16), where the CJEU held that designations such as 'plant cheese' and 'tofu butter' could not be used in marketing or advertising for plant-based products even if accompanied by a clarifying or descriptive term. However, the Judge held that the *TofuTown* decision comprised generic descriptive terms rather than, in this case, a trade mark.

As such, the Judge held that Oatly was correct to say that the term 'designation' connoted a generic description of the product. The Hearing Officer had erred by interpreting point 5 too widely and assuming that any use of the term 'milk' in the marketing of products was enough to constitute use as a designation. The Judge held that use of the term 'milk' alone in marketing did not constitute use as a designation unless the marketing was designed to identify the product as being milk or a milk-derived product. In this case, the use of 'milk' in the Mark did not qualify as use as a designation because the Mark was not being used to describe the product.

The Hearing Officer, under point 6, had held that the Mark was not liable to mislead consumers as to the nature or quality of the goods and that "the average consumer would have viewed the mark as an ironic way of saying its goods have moved on from conventional milk and are for...those who no longer consume dairy milk". Dairy UK had not appealed this part of the Hearing Officer's decision and the Judge confirmed this finding was one which was reasonably open to the Hearing Officer.

## Passing off: Misrepresentation by deception and damage to goodwill

*Yours Naturally Naturally Yours Ltd ('YNNY') v Kate Mclver Skin Ltd ('KMS') & Anr* (King, Arnold and Stuart Smith LLJ; [2023] EWCA Civ 1493; 19 December 2023)

*The Court of Appeal dismissed KMS's appeal from the decision of the Judge finding that KMS had passed off its skincare product as YNNY's product. Arnold LJ, giving judgment for the Court, agreed with KMS that they had not made all the misrepresentations set out in the first instance judgment, nevertheless the Judge was correct in finding that KMS had made misrepresentations giving rise to deception and damage to goodwill. Rachel Savin reports.*

## Background

An anti-aging serum named ELIXIR was brought to the market in 2015 by Ms Tang, the sole-director of the claimant skin care company, YNNY. Kate Mclver, owner of the first defendant, KMS, bought ELIXIR for her own use in 2017 after chemotherapy had caused her to suffer from severe skin irritation. Ms Tang allowed Ms Mclver to sell the ELIXIR product, initially permitted under Ms Tang's own label, with the ELIXIR mark present on the product.

Between April and June 2018, Ms Mclver sold the products bearing a label featuring the name KATE MCIVER and the word ELIXIR in prominent script, together with a description of the product, a list of contents and Ms Mclver's email address and post code. Ms Tang provided Ms Mclver with some text to market the product. Ms Mclver made several claims on social media suggesting she had created the formulation herself.

From 20 June 2018 to August 2018, Ms Mclver sold the serum under a label branded with the words SECRET WEAPON and KATE MCIVER. As before the label contained a description and ingredients, an email address and post code. For the first time it included in a small typeface the letters YNNY. The label no longer featured the mark ELIXIR, although Ms Mclver told the public it was still the serum that she had created.

On 20 August 2018, KMS was incorporated and sold the serum under the SECRET WEAPON labelling mentioned above. Ms Mclver then worked with a third party to reformulate the serum, and on 1 October 2018 she announced a new formula on social media. On 30 November 2018, KMS informed Ms Tang that it would cease to use her as a source of the serum with immediate effect. From 1 December 2018, KMS sold the new formula under the SECRET WEAPON branding, without any reference to ELIXIR. In early 2019, a second reformulation was created, and sold from March 2019 with the word 'original' featured prominently on the packaging. Ms Mclver died on 24 March 2019.

At the first instance, Judge Hacon [2023] EWHC 890 (IPEC), held that there had been passing off and copyright infringement (the latter is not reported here).

### Decision on appeal

The Court of Appeal dismissed the appeal.

Although, the Judge had been wrong to find that YNNY owned goodwill in the trade name "Elixir" because that had not been pleaded, the Court of Appeal accepted YNNY's submission that the Judge ought to have found that goodwill was associated with YNNY's product and with YNNY (as successor to Ms Tang) as the originator of that product.

Further, although Arnold LJ agreed with KMS that Ms Mclver and KMS had not made all the misrepresentations set out in the judgment, they had made actional misrepresentations.

Agreeing with KMS, the Court of Appeal held that insofar as the Judge's reasoning had been based on use of the trade name Elixir, no such case had been pleaded by YNNY and therefore this ground of appeal succeeded. However, although KMS correctly disputed the Judge's statement that "no alternative" interpretation of one of Ms Mclver's social media posts has been advanced, Arnold LJ agreed with YNNY that he evidently did not regard the interpretation as realistic.

Further, the Judge, as a specialist in this area, would have interpreted certain social media posts from the perspective of the relevant customer, despite not saying so. KMS had not identified any attributes of the relevant consumer that would have led them to interpret the statements in question in any different way to the Judge.

More importantly, the Judge was right to find Ms Mclver and KMS had misrepresented that the first and second reformulations were "the same serum as had been sold as the Elixir serum" i.e. Ms Tang's formulation. This clearly involved deception of KMS's customers into thinking that they were getting the same product as before when in fact they were getting a different product.

Finally, the Court of Appeal held that the Judge was right to find that there was a risk of damage to the reputation of YNNY's product and hence to YNNY's goodwill. There was evidence that at least one customer found the first reformulation unsatisfactory. As such, consumers who were deceived into thinking it was the same as YNNY's product would regard the latter with the same dissatisfaction.

## Passing off: damage and quantification of loss

*PSN Recruitments Ltd (t/a Cosmopolitan Recruitment) v Graeme Ludley & Anr* (Judge Clarke, sitting as a Judge of the High Court; [2023] EWHC 3153 (IPEC); 8 December 2023)

*Judge Clarke upheld PSN Recruitments Ltd's claim for passing off in a case where its former employee had falsely represented that his own business was a continuation of that of the claimant, and the employee had used the claimant's client information to make such representations. The Judge held that the employee had caused financial loss and damage and quantified the loss in the judgment at just under £60,000. Brendon Vyas reports.*

### Background

The first defendant, Graeme Ludley, was employed in early 2021 as a recruitment consultant at the claimant's recruitment agency, Cosmopolitan Recruitment, which specialised in the landscape, horticulture and gardening sector. Prior to his resignation in June 2021, Ludley sent himself various documents containing Cosmopolitan's client information, including client lists. He then resigned and set up a competing business called Greenscape



Specialist Recruitment Ltd ("Greenscape"), the second defendant, and contacted over 500 of Cosmopolitan's contacts. His email of 27 June 2021 is reproduced below, in which Ludley stated that Greenscape was Cosmopolitan's new trading name and referred Cosmopolitan's clients to his own 'greenscaper' email address:

*GreenScape. A New Name*

*A change of name and location, but no change in our commitment to matching the best candidates to jobs that will develop and advance their careers!*

*We never liked the name "Cosmopolitan Recruitment". It sounds like a cocktail, has no connection with what we do, and it's difficult to use on the telephone.*

*So, as we are more likely to have a pint and we work exclusively in the Landscaping and Gardens sector we felt that GreenScape was a much better alternative.*

*The contact number remains the same BUT the address and, importantly the e-mail have changed. GreenScape wasn't available as a domain so we've added an 'r' on the end for recruitment and become GreenScaper ([graeme@greenscaper.co.uk](mailto:graeme@greenscaper.co.uk)).*

Cosmopolitan launched claims for passing off and breach of confidence against Ludley (only the former claim is reported here).

### Goodwill and misrepresentation

Ludley accepted that Cosmopolitan had goodwill in the unregistered mark "Cosmopolitan Recruitment". Ludley also accepted that his 27 June email amounted to a misrepresentation that the services of Greenscape were those of Cosmopolitan. However, he denied that the email had caused any damage to Cosmopolitan, arguing that none of Cosmopolitan's clients had actually been misled to the extent that, when they did business with Greenscape, they thought they were dealing with Cosmopolitan.

At a case management conference on 8 December 2022, Judge Clarke directed that there be a first trial to determine whether Cosmopolitan had suffered loss and damage and if so, how much.

### Damage

Ludley contended that he was very well-known in the landscape and garden recruitment industry and that several of the clients who had placed business with Greenscape were his personal friends, so they would have followed him to Greenscape irrespective of the misrepresentation made in the 27 June email – in other words, there was no causation between the misrepresentation and Cosmopolitan's loss. The Judge rejected this because there was no evidence to support it, except Ludley's long career in the landscaping sector, though not always in recruitment.

The Judge held that Ludley had sent the 27 June email as the culmination of a plan of action to start his own business, which had started with transferring Cosmopolitan's documentation and information to his own accounts. The Judge considered it was precipitated by the departure of the only other recruitment agent at Cosmopolitan, which gave Ludley further opportunity to do what he did. Ludley had sent the 27 June email hoping that it would produce marketing leads for Greenscape and Greenscape had immediately won new business such that it was invoicing a Cosmopolitan client just over a month after the 27 June email. The Judge held that the 27 June email had caused confusion with some of Cosmopolitan's clients which resulted in work being diverted to Greenscape. The Judge held that there was damage amounting to both loss of profit and damage to reputation, and this was sufficient to complete the tort of passing off.

### Quantification of loss

Cosmopolitan claimed that its business had suffered immediately after the 27 June email had been sent. From having experienced steady growth, the landscaping income stopped overnight. Cosmopolitan submitted invoices showing that, in the twelve months before the email, a total of thirteen clients had each been invoiced between £2,000 and £12,000. After Ludley's email, these clients had failed to send over any work, and five went on to do business with Greenscape instead. Compared with the year before Ludley's email, Cosmopolitan had invoiced one particular client £84,000 less in the first year after Ludley's email, and £106,000 less in the year after that; Ludley disclosed that Greenscape had invoiced that client almost £50,000 over the two years following the email. The Judge accepted that Cosmopolitan had incurred 33 hours of wasted management time in dealing with the problems that Ludley had caused them. The Judge awarded Cosmopolitan £38,079.93

for the loss of profits of the business that it had suffered as a result of Ludley's email, £20,000 for its loss of reputation and £1,499.99 for lost management time.

The Judge approached the quantification for the loss of profits on a "top down" approach, i.e., one which involved looking at the reduction in Cosmopolitan's revenue in the landscaping sector in the period following the sending of the 27 June email, not limited to clients that placed business with Greenscape. This was in contrast to a "bottom up" approach which would have only looked at Cosmopolitan's lost chance of earning revenue from clients that had received Ludley's email and subsequently placed business with Greenscape. The Judge's decision to use the "top down" approach was influenced by Ludley's evasive conduct in respect of evidence disclosure. The Judge also stated that this approach was more likely to adequately compensate Cosmopolitan for the loss of profit it suffered, partly because the "bottom up" approach relied too heavily on proper disclosure by Ludley.

*All decisions are to be found on <https://www.bailii.org>*



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