



Neutral Citation Number: [2023] EWHC 706 (Ch)

Case No: IL-2021-000043

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/03/2023

Before :

MR JUSTICE MILES

Between :

ICONIX LUXEMBOURG HOLDINGS SARL

Claimant

- and -

(1) DREAM PAIRS EUROPE INC
(2) TOP GLORY TRADING GROUP INC
(each a company incorporated in the state of New
Jersey, United States of America)

Defendants

Thomas St Quintin (instructed by Brandsmiths) for the Claimant
Theo Barclay (instructed by Stobbs (IP) Limited) for the Defendants

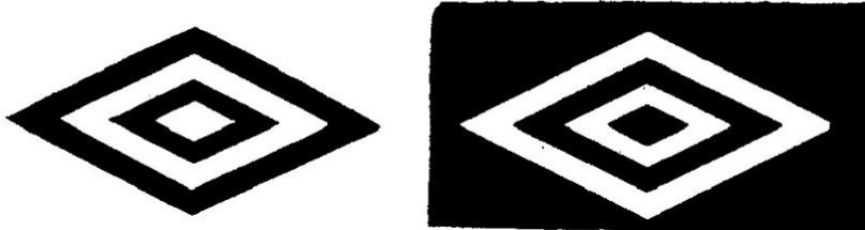
Hearing dates: 14 and 16 March 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 28 March 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

Mr Justice Miles :

1. These are trade mark infringement proceedings.
2. The claimant owns the Umbro brand. It relies on two trade mark registrations (one of which is for a series of two marks).
3. Those registrations protect the following Marks:
4. Mark 1 (1st of series) Mark 1 (2nd of series)



5. Mark 2



6. Mark 1 (UK registration 991668) is registered for “articles of clothing for use in sports, athletics or gymnastics”; Mark 2 is registered for various goods, including “footwear” (and all clothing). Mark 2 arises from a mark originally registered as an EU trade mark, but since the departure of the UK from the EU it has become a national right, deemed registered as of its filing date in 2003.
7. The Marks are each registered in monochrome. They therefore cover use in any colour (see e.g. *Phones 4U v Phone4U.co.uk Internet Ltd* [2007] RPC 5 at [70]).
8. The Marks have been in use on sportswear in the UK since at least 1973, and have been used on the kit of national and professional football teams since that time, as well as on kits of rugby union and rugby league teams. They have been used on footwear since 1987, and in particular on football boots. Professional footballers including Alan Shearer and Michael Owen have worn boots bearing the Marks.
9. Sales of goods bearing the Marks in the UK with a value of more than US\$60 million were made in each of the years 2016 to 2018.
10. The defendants admit that the Marks have some reputation and some enhanced distinctive character as a consequence of the use made of them, but the extent of that reputation and enhanced distinctive character is in issue. In broad terms, the defendants admit that use on football kit has resulted in the Marks becoming known by members of the public interested in football boots but that there is no broader reputation.

11. The claimant complains about the defendants' use of a logo in relation to footwear sales in the UK since December 2018.
12. The defendants have registered the following trade mark:



13. The logo element (without the words) is referred to below as “the DP logo” or “the Sign”.
14. The defendants have used the DP logo (sometimes with and sometimes without the words Dream Pairs) for football boots and other active footwear, and have also used it on some types of non-sports/active footwear. The claimant contends that all such use is infringing.
15. The most important aspect of the claimant’s pleaded case complains about football boots and other active footwear, but it also extends to any type of footwear that bears the DP logo. The claimant accepted that there may be different considerations for each, because of questions about the goods to which the claimant’s reputation applies. In broad terms the allegedly infringing goods can be grouped as football boots; children’s trainers; other active footwear such as hiking sandals; snow boots; and other footwear (including slippers and ladies’ fashion footwear) bearing the Sign.
16. The defendants’ use of the DP logo in the UK commenced around December 2018. It started selling in the UK about February 2019. The use of the DP logo has been almost exclusively in the advertisement and offer for sale of footwear through the Amazon UK website (“Amazon UK”). There have also been small volumes of sale through eBay’s UK site.
17. Some examples of the defendants’ presentation of the DP logo, taken from images on Amazon, are identified in the particulars of claim and are reproduced in the annex to this judgment. Some of the shoes carry the name Dream Pairs, others do not.
18. The defendants have also sold a wide variety of footwear under the Dream Pairs name without using the Sign, and have sold a wide variety of footwear under other names (Bruno Marc, and Nortiv8) without using the Sign. The claimant does not complain about those activities.
19. Infringement is alleged under sections 10(2)(b) and 10(3) of the Trade Marks Act 1994 (“the Act”).
20. The claimant also alleges that two trade mark registrations obtained by the second defendant in 2020, were invalid because they conflict with the claimant’s Marks. The parties agreed that the validity of these registrations stands or falls with the infringement case.

21. The claimant alleges and the defendants accept that if infringement is made out, the defendants are jointly and severally liable.

Witnesses

22. The claimant called two witnesses, Mr Anthony Little and Mrs Helene Hope. Both give evidence relevant to the extent of the reputation of the Marks and to the extent to which their distinctive character has been enhanced through use.
23. Mr Little gave evidence about his roles at Umbro; the claimant's business, explaining how the claimant works with associated companies and licensees to exploit its brand; the financial value of sales of goods bearing the Marks; marketing and sponsorship activities; the presentation of the Marks (which Mr Little calls "the double diamond logo") on the claimant's goods; and the variety of consumers of the claimant's goods.
24. Mr Little generally did his best to assist the court. There was one series of questions in cross-examination about a spreadsheet showing sales of categories of goods where I found some of his answers to be unconvincing. There were entries of zero for some types of goods in certain years. Mr Little said that the figures were accurate and that it was realistic that there were no sales of the relevant goods in those periods. Those answers seemed surprising. On further analysis it emerged that there had indeed very probably been sales of the relevant goods but that they had been lumped with others into another category. It seemed to me that Mr Little was a little too fast to come up with answers to justify the spreadsheet. Despite this part of his evidence, I concluded that he was generally trying to assist the court.
25. Mrs Hope gave evidence about her role at Umbro, where she is the Head of Global Brand Marketing; the history of the Umbro brand; some of the use made of the Double Diamond Logo, including collaborations with other brands; the Umbro consumer; and examples of the marketing and promotion of the Umbro brand and the Marks. She was a straightforward and credible witness.
26. The defendants called Mr Chuan Shan Cao. He is the founder and Chairman of the defendants, and is involved in the day to day running of both companies. He gave evidence about the corporate structure and growth of the defendants; the commencement of the defendants' trade in the UK and details of how it operates its UK sales through Amazon UK and eBay; the creation of the Sign complained about (referred to by him as the DP Logo), its use, potential changes to it, and the adoption of a different logo from some children's shoes; and his knowledge of Umbro.
27. The claimant submitted that his evidence was evasive and that he deliberately failed to answer the questions. I did not reach that conclusion. His evidence was rather a mixed bag. Though he has lived in the US for some years, English is not Mr Cao's first language. I take this into account in assessing his evidence: my impression was that at times he did not immediately understand the questions. There were some areas where he volunteered information which might have been thought helpful to the claimant, such as his description of a visit in 2018 to a Chinese factory where Umbro goods were being made. On the other hand, I thought that some of his answers about the resemblances between Dream Pairs shoes and other well known brands (including a pair of boots which had a Puma-type marking) were somewhat defensive and unconvincing. He clearly found these questions hard to answer and appeared stumped

for a response. Overall I concluded that Mr Cao was doing his best to assist the court but approached some of his evidence with reservations.

Law

The Legislation

28. In relevant part, s.10 of the Act provides as follows:

“(2) A person infringes a registered trade mark if he uses in the course of trade a sign where because—

(a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) A person infringes a registered trade mark if he uses in the course of trade, in relation to goods or services, a sign which—

(a) is identical with or similar to the trade mark,

(b) [deleted by amendment]

where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

(3A) Subsection (3) applies irrespective of whether the goods and services in relation to which the sign is used are identical with, similar to or not similar to those for which the trade mark is registered.

...

(4) For the purposes of this section a person uses a sign if, in particular, he—

(a) affixes it to goods or the packaging thereof;

(b) offers or exposes goods for sale, puts them on the market or stocks them for those purposes under the sign, or offers or supplies services under the sign;

(c) imports or exports goods under the sign;

(ca) uses the sign as a trade or company name or part of a trade or company name;

(d) uses the sign on business papers and in advertising; or

(e) uses the sign in comparative advertising in a manner that is contrary to the Business Protection from Misleading Marketing Regulations 2008.”

29. The Act was enacted (as its introductory text explains) to implement the EU trade marks Directive (which harmonised the registration and protection of national trade marks registered in member states' own registries), and to make provision in connection with the EU trade marks Regulation (which provided for an EU-wide registered trade mark, and for a central office to administer their registration). The interpretation of the Act is therefore guided by decisions of the CJEU concerning the various codifications of the Directive and the Regulation.
30. That remains the case after the exit of the UK from the EU – s.2(1) of the European Union (Withdrawal) Act 2018 provides that withdrawal does not affect EU-derived domestic legislation (which includes the relevant provisions of the Act), and s.6(7) of that Act provides that principles laid down in cases of the European Court with effect in EU law immediately prior to IP Completion Day are “retained EU Case law”. Retained EU case law is binding on this court when sitting as a court of first instance. Decisions of the European Court decided after IP Completion Day are persuasive (but none were relied on by the parties here).

Section 10(2)(b)

31. In *Sky v Skykick* [2018] EWHC 155 (Ch) at [285], Arnold J restated the six requirements infringement under section 10(2)(b): (a) there must be use of a sign by a third party within the UK; (b) the use must be in the course of trade; (c) it must be without the consent of the proprietor of the trade mark; (d) it must be of a sign which is at least similar to the trade mark; (e) it must be in relation to goods or services which are at least similar to those for which the trade mark is registered; and (f) it must give rise to a likelihood of confusion on the part of the public.

The average consumer's perspective

32. The questions of similarity and likelihood of confusion (and link for s.10(3), see below) are to be considered from the point of view of the notional “average consumer”.
33. Kitchin LJ set out guidance on the average consumer test in *Comic Enterprises v Twentieth Century Fox* [2016] EWCA Civ 41 at [34]:

“i) the average consumer is a hypothetical person or, as he has been called, a legal construct; he is a person who has been created to strike the right balance between the various competing interests including, on the one hand, the need to protect consumers and, on the other hand, the promotion of free trade in an openly competitive market, and also to provide a standard, defined in EU law, which national courts may then apply;

ii) the average consumer is not a statistical test; the national court must exercise its own judgment in accordance with the principle of proportionality and the principles explained by the Court of Justice to determine the perceptions of the average consumer in any given case in the light of all the circumstances; the test provides the court with a perspective from which to assess the particular question it has to decide;

(iii) in a case involving ordinary goods and services, the court may be able to put itself in the position of the average consumer without requiring evidence from

consumers, still less expert evidence or a consumer survey. In such a case, the judge can make up his or her own mind about the particular issue he or she has to decide in the absence of evidence and using his or her own common sense and experience of the world. ...”

Similarity of sign and mark

34. Similarity of sign and mark is a threshold requirement before infringement can be found (Kitchin LJ in *Maier v ASOS* [2015] EWCA Civ 220 at [73]).

35. In *J.W. Spear & Sons v Zynga Inc* [2015] EWCA Civ 290, Floyd LJ stated at [58]-[60]:

“58. ... Where there is some overall similarity, even faint, then it is necessary to carry out the global assessment, taking account of all relevant circumstances. Moreover, in such cases, the enhanced distinctive character of the mark may play a role in increasing the likelihood of confusion.

59. On the other hand the cases do show that the General Court has said that where there is (a) average visual and phonetic similarity, but no conceptual similarity (*Wesergold*), or (b) a number of visual and phonetic features which precluded the signs from being perceived as similar (*Ferrero*), or (c) no visual or phonetic similarity but a low degree of conceptual similarity (*Lufthansa*), or (d) a common suffix (*Kaul*), there may yet be no similarity overall between mark and sign. I have no difficulty with these conclusions: it is only overall similarity which counts.

60. Thus I would summarise the position in the following way:

i) The court should assess the phonetic, visual and conceptual similarity of mark and sign and decide whether, overall, mark and sign would be perceived as having any similarity by the average consumer.

ii) If no overall similarity at all would be perceived, the court would be justified in declining to go on and consider the likelihood of confusion applying the global appreciation test, as Article 9(1)(b) is conditional on the existence of some similarity. Such situations are not likely to occur often in contested litigation, but where they do occur, it is not legitimate to take account of any enhanced reputation or recognition of the mark.

iii) Where the average consumer would perceive some overall similarity, however faint, the court must go on to conduct the global appreciation test for the likelihood of confusion, taking account where appropriate of any enhanced reputation or recognition of the mark.

iv) In conducting the global appreciation test the court must take forward its assessment of the degree of similarity perceived by the average consumer between mark and sign.”

Likelihood of confusion

36. The general approach to be adopted was explained by the Court of Appeal in *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] EWCA Civ 24 at [51]-[52]. The Court of Appeal set out (at [52]) a summary, developed by the Trade

Marks Registry, of key principles derived from cases of the CJEU. That approach has been endorsed by the Court of Appeal in later cases (e.g. in *J. W. Spear* at [33]):

“(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

37. The exercise in an infringement case is to compare the actual use made of the sign with the mark as registered. The infringement test is founded upon the mark as registered and not upon material which the proprietor may have used in connection with it, and the court must consider the notional use of the mark in question across the whole range of goods for which it is registered: see *Maier* at [77] and [78].

38. At [78] of *Maier* Kitchin LJ said,

“Of course [the mark] may have become more distinctive as a result of the use which has been made of it. If so, that is a matter to be taken into account for, as the Court of Justice reiterated in *Canon* at [18], the more distinctive the earlier mark, the greater the risk of confusion. But it may not have been used at all, or it may only have been used in relation to some of the goods or services falling within the specification, and such use may have been on a small scale. In such a case the proprietor is still entitled to protection against the use of a similar sign in relation to similar goods if the use is such as to give rise to a likelihood of confusion.”

39. At [79] Kitchin LJ said that in assessing the likelihood of confusion, the court

“...must take into account all the circumstances of that use that are likely to operate in that average consumer’s mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context.”

40. In *Comic Enterprises Ltd* Kitchin LJ summarised the position at [34 (v)]:

“...if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then it may properly find infringement.”

41. In *Jack Wills v House of Fraser* [2014] EWHC 110 (Ch), Arnold J noted at [85] that,

“As has frequently been recognised in trade mark cases involving clothing, clothing is primarily purchased on the basis of visual inspection.”

Actual confusion

42. Kitchin LJ said in *Maier* at [80]:

“If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side-by-side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other.”

43. In *Jack Wills*, Arnold J said at [99],

“*No evidence of actual confusion.* Counsel for House of Fraser relied strongly on the absence of any evidence of actual confusion. As I have said in a number of judgments, absence of evidence of actual confusion is not necessarily fatal to a claim under art.5(1)(b). The longer the use complained of has gone on in parallel with use of the trade mark without such evidence emerging, however, the more significant it is. Other relevant factors are the scale of the use complained of and the likelihood of actual confusion being detected.”

Section 10(3)

44. In *Comic Enterprises* at [11] Kitchin LJ set out the nine requirements for infringement under section 10(3): (a) the trade mark must have a reputation in the UK; (b) there must be use of a sign by a third party within the UK; (c) the use must be in the course of trade; (d) the use must be without the consent of the proprietor of the trade mark; (e) the use must be of a sign which is at least similar to the trade mark; (f) the use must be in relation to goods or services; (g) the use must give rise to a “link” between the sign and the trade mark in the mind of the average consumer; (g) the use must give rise to one of three types of injury, that is to say: (i) detriment to the distinctive character of the trade mark; (ii) detriment to the repute of the trade mark; or (iii) unfair advantage being taken of the distinctive character or repute of the trade mark; and (i) the use must be without due cause.
45. A likelihood of confusion is not a requirement of section 10(3) (e.g. *Intel Corp Inc v CPM United Kingdom Ltd* [2009] ETMR 13 at [30]).
46. The existence of a ‘link’ will be assessed globally. If the sign complained of calls the earlier mark to the mind of the average consumer, who is well informed and reasonably circumspect, that is tantamount to the existence of a link (*Maier* at [120]).
47. Detriment to distinctive character (also known as dilution) occurs where the ‘link’ weakens the ability of the relevant mark to identify the goods for which it is registered. One way in which this form of injury will occur is when the mark, which at one time aroused immediate association with the goods for which it is registered, is no longer as capable of doing so (*Comic Enterprises* at [113]-[118]). The mere presence of a similar sign in the market cannot in itself, however, be the basis of a finding of detriment or a risk of detriment to the distinctive character of the marks (*Maier* at [127]).
48. Detriment to the reputation of the mark (also known as tarnishment) occurs when goods for which the sign complained of is used may be perceived by the public in such a way that the power of attraction of the mark is reduced. This occurs particularly where the goods offered under the sign complained of have a characteristic or quality which is liable to have a negative impact on the earlier mark (*Comic Enterprises* at [119]).
49. A further requirement of ‘dilution’ and ‘tarnishment’ is that there is at least a serious risk of a change in the economic behaviour of the average consumer of the goods for which the mark is registered. That serious risk can be established by deduction, but not by supposition (*Comic Enterprises* at [118]).
50. Unfair advantage will occur when the defendant uses a sign that is similar to a mark with a reputation and rides on the coat-tails of the mark to benefit from its power of attraction, reputation and prestige and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain its image. This covers, in particular, cases where the image of a mark or a characteristic it projects is transferred to the defendant’s goods: see Arnold J in *Enterprise Holdings v Europcar* [2015] EWHC 17 (Ch) at [125]-[126].
51. Where unfair advantage is claimed the claimant need not show a likelihood of a change in the economic behaviour of customers for which the mark is registered (as it would for dilution or tarnishment) but it should be sufficient to show a change in the

economic behaviour of customers for the defendant's goods or services in order to show that the use of the sign is taking unfair advantage: see *Argos v Argos Systems* [2018] EWCA 2211 at [107].

52. Mere advantage will not be enough to give rise to infringement. There must be something that makes that advantage unfair. That can be a deliberate intention to imitate but can be some other factor (Lloyd LJ in *Whirlpool v Kenwood* [2009] EWCA Civ 753 at [136]).
53. The use must be without due cause. The defendants did not rely on this as a separate point in the present case.

Further background and findings of fact

The Umbro brand and the use of the Marks

54. Umbro commenced business in 1924. Both teams in in the 1934 FA Cup Final, Manchester City and Portsmouth, wore Umbro kit.
55. At the 1966 World Cup Finals, 15 of the 16 teams, including the winning England team, wore kit made by Umbro. The victorious Brazil team at the 1958 World Cup wore Umbro kit.
56. During the 1960s 85% of all professional football teams in the UK played in Umbro kit.
57. In 1958 Roger Bannister broke the 4-minute mile wearing Umbro.
58. Umbro has since the commencement of its business used a stretched-out diamond logo to designate its goods.
59. The Marks were adopted at the turn of the 1960s and 1970.
60. At the 1973 FA Cup final, won by Sunderland, both teams wore Umbro kit bearing Mark 1.
61. At that time, and then again from 1984 until 2012, the England national football team wore Umbro kits, all carrying Mark 1. That period covered England's participation in international competitions including the World Cups in 1986, 1990, 1998, 2002, 2006, and 2010, and the European Football Championships in 1988, 1992, 1996 (in England), 2000, 2004 and 2012. The Welsh, Scottish, and Irish national football teams have also worn kit branded with the Marks.
62. Umbro has also sponsored many professional football teams at the highest level in England and other European leagues. That sponsorship has extended to branding at football stadia. In 2005, Umbro became a founding partner of the new Wembley stadium.
63. From 1987 and continuously since then, the Marks have been used on football boots. Boots carrying the Marks have been worn by high profile players in the UK and internationally, in particular, by Alan Shearer, Michael Owen, and many others. Those boots have been advertised widely, for example in matchday programmes.

64. The defendants have admitted that the long use of Mark 2 in relation to football kit has contributed to it becoming known by a significant part of the public concerned with football boots.
65. Mr Little's evidence shows that goods have sold under the Marks in the UK with a value of over \$60 million in each of 2016-2018.
66. The money spent on and promotion has also been very large.
67. Umbro has also collaborated with other well-known fashion brands, including Pretty Green, Palace, Supreme and Off-White for the creation of fashion wear. I find that that has happened because of the pre-existing fame of the brand, and of the Marks.
68. More generally I find that the Umbro brand is famous in the UK in relation to sportswear. It is particularly well known in relation to football kit and boots. I also find that the Marks have developed a high level of distinctiveness in the UK through the use made of them.
69. The claimant operates a licensing model. The licensee for the UK market is a company known as GLD. The evidence shows that its goods are sold at various price levels, reflecting their differences in quality and price. The witnesses described a distribution pyramid with three pricing levels. Umbro products are sold through online retailers and bricks and mortar shops including (at the lower-middle end) sports discounters; and (at the bottom end) Supermarkets like Asda.
70. I was shown Umbro branded football boots being sold through Sports Direct online for £23 and trainers being sold through another retailer for £12.
71. Umbro has commissioned a number of branding studies (which include survey evidence). The most common associations among the public with Umbro were with football boots and kit and performance wear, rather than sportswear (i.e. leisure or casual wear). As to pricing, according to studies between 2008 and 2012, the most common association was that Umbro goods were cheap and likely to be found in sports discount shops.
72. As to sales of footwear other than football boots bearing the Marks, the evidence was not entirely clear. A spreadsheet produced by the claimant, recording declarations of sales by GLD, did not break out types of footwear sales, instead lumping them together as "lifestyle footwear". This made it hard to know the precise level of football boot and other footwear sales. Despite some reservations about the evidence I am satisfied that there have been and remain significant sales of football boots and other performance footwear.
73. Mrs Hope explained that there have been some sales of trainers bearing the Marks in Asda, between 2016 and 2018. The collaboration with Pretty Green also included trainers bearing the Marks.
74. Mr Little's evidence also showed that Umbro's trade in footwear in the UK has diminished from the heights reached at the beginning of the 2010s to a significantly lower figure now.

75. Overall I find that Umbro has a substantial reputation for football boots and kit with a somewhat lesser reputation for other performance wear. It is less well known for sportswear than other brands like Lacoste, Converse or Fred Perry. It is commonly associated by the UK consuming public with sports discounters and does not enjoy a special reputation for high-end or high quality goods.

The defendants' sales of footwear and the creation of the DP logo

76. The defendant companies were founded by Mr Cao, who still controls them.
77. Mr Cao set up the first defendant, Top Glory, to sell Chinese-manufactured footwear in the US. The factory, main operations, IT infrastructure and administration were at all material times based in China.
78. Mr Cao personally designed and created the DP logo in 2015. As he explained in oral unchallenged evidence, the purpose of designing the logo was so that the brand could have a US trade mark.
79. Mr Cao explained that, having come up with the name, he wanted a logo that referenced the initials 'DP' and would be protectable in the US. He experimented with some other logos but chose this one. He visualised the logo as an outer "D" and an inner "P".
80. Mr Cao gave evidence that when he designed the DP logo he did not know about the Umbro logo or its brand. This was not challenged.
81. The DP logo was then used for sales in the US. Mr Cao considered changing it in 2017 but did not do so. The Dream Pairs brand has been reasonably successful in the US. In 2022, over 6.5 million pairs of Dream Pairs shoes were sold in the US in a mixture of online and bricks-and-mortar sales.
82. In 2018 Mr Cao decided to launch the Dream Pairs brand in the UK. He explained in evidence that he was invited to do so by Amazon (and this was not challenged).
83. The first Dream Pairs branded shoes were offered for sale online in the UK in February 2018.
84. Since then Dream Pairs branded shoes have been sold online in the UK through Amazon UK. They have never been sold in shops in the UK.
85. Mr Cao moved back to China in around May 2018. He explained that it was some time after this that he came to see the Umbro logo for the first time. He said (and I find) that he saw the Umbro logo on goods being made in a Chinese factory.
86. In 2020 the defendants protected the DP logo in the UK by registering UK trade marks (see [12.] above).
87. Almost all of the sales of Dream Pairs in the UK have been through Amazon UK.
88. There was a dispute about the level of sales of Dream Pairs shoes in the UK. The defendants relied on a spreadsheet. Mr Cao accepted that he had not prepared it or supervised its preparation. It had been prepared by his accounts department. The

spreadsheet gives figures for UK sales. It also records the great majority of these sales as made through an Amazon account called “TopshoesUS”. Mr Cao accepted in his evidence however that all sales via Amazon UK have been through the “DreamPairsEU” account and none have been through the TopshoesUS account. This raises some concerns about the overall reliability of the spreadsheet.

89. However, Mr Cao was not specifically taken to this apparent anomaly in the spreadsheet in the course his evidence. It seems to me that the most likely explanation is that the reference in the column to sales being through Top Shoes is erroneous. This seems a more probable explanation than that the defendants accountants would have come up with erroneous figures (which are stated precisely) for the level of UK sales. Mr Cao was not asked about this. Nor was it suggested to Mr Cao that there had been no significant sales of Dream Pairs football boots in the UK. It would not in my view by right to disregard the spreadsheet altogether. I find on balance that the numbers of sales set out in the spreadsheet are some approximation of sales of Dream Pairs shoes.
90. The spreadsheet records that between December 2018 and December 2022 there have been net sales (after returns) of shoes, including: 2,844 children’s trainers complained of by the claimant; 4,802 of the relevant adult football boots; 2,262 of the relevant children’s football boots; and 1,453 of the relevant children’s hiking sandals.

The allegedly infringing uses of the Sign

91. As explained, in the Re-Amended Particulars of Claim (“RAPOC”) the claimant specifically complains about the use of the DP logo on certain specific products: see the annex for images. The claim is not however limited to those cases. The claimant seeks relief for all uses of the DP logo for footwear sold in the UK.
92. Counsel for the defendants has prepared a spreadsheet of different types of Dream Pairs footwear bearing the DP logo and being offered for sale on Amazon in August 2022. The claimant agreed that the court should use this as a way of identifying the kinds of footwear being sold under the DP logo. The goods can be broken down into football boots, children’s trainers, sports sandals and slides, Chelsea boots, flats, snow boots and women’s fashion shoes.
93. The DP logo is used in various ways. In some cases (such as the football boots) it is printed on the outside boot as a part of the decoration; in some it is printed on the outer sole or the insole; in some it is on a label which is stitched onto the outside of the shoe; in others it is on a label inside the shoe.

Presentation on Amazon UK

94. The complaints advanced at trial focused primarily on the presentation of the DP logo when advertised and/or offered for sale on the Amazon UK website. This was not the only allegation of infringement and the claimant relied on all possible uses of the DP logo (including advertising, offering for sale and selling the goods) and on post-sale confusion. No differences were in the event drawn between these stages in the sale journey. I shall return to post-sale uses where relevant later.
95. Potential consumers who arrive at the relevant Amazon UK page for a Dream Pairs product will see a main image of the shoe. To the left they will see a series of smaller

panels containing images of the shoe from other angles – they can click on these to expand the images. These smaller image panels may also contain a video icon, which if clicked, shows the shoe from various angles. Next to the main image is text which identifies the “brand” as “Dream Pairs”, and gives the serial number and a short description of the shoe and the price. There is then another clickable icon for sizes and (in some cases) a choice of colours. Again these can be clicked on to bring up another image in the chosen colour(s). There is then a description of the features of the shoe. To the right there is the usual clickable icon for adding goods to the shopping basket.

96. Beneath that first band of information there are images, prices and star-ratings for other products inspired by the search or products related to the goods which are the main subject-matter of the page. Further down are images and information about Dream Pairs shoes. Below that are customer reviews.

Actual confusion: presence or absence of evidence

97. The defendants contend that despite significant parallel trading for some years there was no evidence of any actual confusion. They submit that this is evidence that there was no likelihood of confusion.
98. The claimant submits, first, that web searches have in fact produced evidence of actual confusion (or at least of linking); and, secondly, that the absence of other evidence about confusion should be given no or little weight because there were good reasons for supposing that, even if there had been confusion, it would not have come to light and been recorded in any disclosable documents.
99. I start with the claimant’s case that there is evidence of actual confusion or linking.
100. No witnesses were called to establish actual confusion.
101. Rather the claimant relied on the results of web searches using “dream pairs umbro” as a Google search term.
102. The first example is a listing on a reselling site called Poshmark. It is for a pair of Dream Pair boys football boots. It lists them as “Umbro Dream Pairs Size 5 Football Cleats Boys Mens”. The image does not appear to show either the Marks or the DP Logo. Poshmark is a US site and the listing is in dollars.
103. I do not give this evidence any significant weight. The person making the listing has not been called and approached to give evidence. The court is not therefore able to assess their level of attention or the reasons for their confusion. I therefore cannot assess whether they are representative of an average consumer or are an outlier. They appear to be in the US and are probably not representative of the average consumer for goods in the UK.
104. The second example is another US listing, on eBay. It shows a pair of Umbro boots (bearing the word Umbro in large letters on the side). The listing is for “UMBRO DREAM PAIR Boys Girls Outdoor Mix Color Soccer Cleats Lace Ups” and the price is in dollars. The claimant relies on this as an example of wrong-way-round confusion.

105. I do not give this search result any real weight either. The person listing the boots has not been called or approached, so I cannot assess their level of attention or the reasons for any confusion and whether they are representative of an average consumer. It also seems possible that they have used the words “dream pair” (not pairs) descriptively. In the further information at the bottom on the listing the brand is listed as Umbro and there is further text describing the boots as Umbro Unisex Outdoor Kids Soccer Shoes. The person making the listing also appears to be in the US, so they are probably not representative of the average UK consumer.
106. The third example was one of someone said by the claimant to be making an association (but not being confused). It is a YouTube video on SoccerReviewsForYou.com posted on 27 November 2020 and called “I bought the cheapest football boots on Amazon! – How bad are they?” The presenter reviews a pair of Dream Pairs football boots. At one point he refers to the DP logo as looking like the “at” symbol (i.e. the @ symbol). He then says that the DP logo “kind of looks like the Umbro logo if you’re squinting a little bit too hard”. The video superimposes the diamond shaped Umbro logo over the DP logo and then squashes the Umbro logo until it is square.
107. The maker of the video has not been called or approached as a witness. I do not consider that it has any significant evidential weight. The reviewer is making a video and has studied the Dream Pairs boots in detail (the video lasts more than 14 minutes). He wants to say lots about its appearance. He has noticed that the logo looks like the @ symbol and that if you squint “too hard” (i.e. view it unnaturally), it “kind of” looks like the Umbro logo. The reviewer appears to me to be saying that if you wanted for some reason to draw a comparison with another logo found on football boots the closest would be the Umbro logo. He is not remotely in the position of an average consumer of footwear who would not begin to scrutinise the boots in that way or seek to compare logos. It was indeed common ground that the reviewer is not representative of UK consumers of footwear.
108. For these reasons I do not consider that any real weight is to be given to this video as evidence of association or similarity.
109. I turn to the defendants’ contention that there is an absence of evidence of actual confusion despite parallel sales for several years.
110. The starting point under this head is that some caution is required in assessing the level of the actual sales.
111. The only source of the defendants’ sales into the UK is the spreadsheet referred to in [88.] above. As explained there, the claimant submitted that this cannot be taken as reliable evidence. I concluded there is some force in the claimant’s criticisms of the quality of the defendants’ evidence, but I am however satisfied on balance that there have been reasonable significant sales of Dream Pairs footwear in the UK, including thousands of football boots, since December 2018. These represent moderate parallel sales.
112. As already explained the absence of evidence of confusion does not necessarily tell one very much. It may be that even if there was confusion it would not have come to light or been recorded in disclosable documents.

113. The defendants submitted that if there had been confusion one would have expected to see some trace of it, if only in the reviews for the footwear on the Amazon website.
114. The defendants also argued that if there had been confusion of a significant number of consumers this would probably have shown up in complaints made to Umbro or GLD about the quality or fit of boots.
115. The claimant submitted that there is no reason to suppose that such evidence would have come to light. It pointed out that there was no evidence that the defendants had systems in place that would encourage or even permit complaints to be made about confusion. There is no evidence of any contact information for the defendants, whose relevant operatives are in China.
116. As to the absence of anything in reviews, the claimant submitted that even if consumers had realised they had been confused it is unlikely that they would have bothered to post a review. By then they would have received the goods and were most likely simply to use them. They might also have felt embarrassed and not wanted to publish that they had got things wrong. The claimant also pointed out that there had not been all that many reviews for Dream Pairs boots at all.
117. As to the absence of any record of complaints in the claimant's own records, the claimant submitted against this that if there had been any such complaints they would have been made to retailers and that the claimant (which operates a licensing business) would not have learnt about it or recorded it.
118. I prefer the claimant's submissions, essentially for the reasons they gave. Overall I consider that there are good reasons for concluding that if there was confusion between Umbro and Dream Pairs it would not have given rise to the kind of evidence that would have been recorded in documents likely to be captured by the disclosure process.
119. I therefore consider that the absence of evidence of confusion has no significant weight for the purposes of the court's assessment.

Assessment of the claims

The s.10(2)(b) claim

120. I have set out the requirements in [31.] above. In this case, only elements (d) and (f) were disputed.

The average consumer – degree of attention

121. As already explained the average consumer is a notional person deemed to be representative of the relevant public concerned with the goods in question who is reasonably careful, reasonably attentive and circumspect.
122. It was common ground that the public concerned with footwear is the UK adult population generally.
123. Though the average consumer is reasonably attentive, the degree of attention may vary according to the nature and price of the goods in issue.

124. The goods here are comparatively inexpensive. The football boots are in the £25-35 range. Some of the other products sell for around £40.
125. The claimant submitted that the level of attention of the average consumer would be low.
126. The defendants submitted that there were some features of shoes, particularly football boots, which mean that the average consumer would pay more than low attention. People usually own one pair at a time; fit and size matter; when buying boots for children a price of say £25 is significant.
127. I have concluded that the average consumer would exercise a moderate degree of attention.
128. The claimant accepted that the level of attention would be the same for post-sale use.

Similarity/identity of goods

129. The Sign is being used to sell footwear. Mark 2 is registered for footwear and all clothing. Mark 1 is registered for clothing, but not footwear. The defendants argued that there might be a relevant difference between Mark 2 and Mark 1, the latter being more elongated than the former.
130. However this point largely fell away, as the defendants largely accepted that there was not much material difference between the two Marks. In any event, as the claimant contended, there is a high measure of similarity between clothing and footwear so that even for Mark 1 the statutory requirement of similarity would be met.

Comparison of the Marks and the Sign in use: similarity

131. I do not think that the YouTube video addressed at [106.] above adds anything to the analysis of similarity.
132. As for a visual comparison, the Marks consist of two concentric parallelograms with a space between them. They have been described in the claimant's internal marketing materials as the "double diamond". This is doubtless because they are elongated. Mark 1 is twice as wide as it is high and for Mark 2 the ratio is fourfold. The corners of the diamonds are relatively sharp. The diamond sits side-ways, on one of its angles.
133. The claimant submitted that while many consumers will perceive the overall impression of the Marks as two concentric diamonds, wider than they are tall, a significant number of people with the characteristics of the average consumer will perceive the Marks as an isometric view of flat concentric squares. I do not agree. I consider that effectively all consumers would perceive the marks as flat, elongated, diamonds and not as tilted squares.
134. The Sign, considered as a two-dimensional graphic image, is a square shape with rounded corners, tilted through 45 degrees so that it sits on one of its corners. It has an outer element with a break in it. There is a line from the outer element to the inner, which has a closed loop. Together the line between the elements and the loop have the form of a "P". I do not think that the average consumer would necessarily see a "D" in the outer shape; overall it is a broken square with a P-shape in the middle.

135. There is no aural or conceptual element to the Marks or the Sign. They are just shapes. While average consumers might think the P shape in the Sign had some point, I do not think that he or she would necessarily attribute a sound to it.
136. The claimant relied on the similarities in shape and angle of the two logos and the use of the two concentric dominant elements. Both logos rest on one of their corners or angles.
137. The claimant also argued that the Sign was not always presented (whether in the Amazon images or in actual use on shoes) straight on to a viewer. In some of the images, because of the angle from which it was shot, the Sign could appear rather more elongated. The claimants also submitted that a viewer of the Sign would not always be able to see the break in the outer shape or the P-like form in the middle. The claimant contended that there was a high degree of similarity between the Marks and the Sign.
138. I cannot accept this submission. It appears to me that even looking at the images most relied on by the claimant, the Sign presents as a tilted, broken, slightly rounded-off square with a P-like form in the middle. It hardly resembles (even in angled photos) a pair of sideways-sitting stretched-out diamonds. This is true even of the photos where the image is not square on and there is an element of perspective.
139. The claimant rested a good deal of its case on these angled images and the effect of perspective. But the set of images for each product includes in each case a square-on photo. I have summarised the presentation on the Amazon UK pages above. I find that an average consumer would review each of the images and would see the footwear from various angles including square-on. (I also repeat for emphasis the point made in the previous paragraph above that, even without these further images, even in the more angled photos where perspective plays some part there is only the faintest resemblance between the Sign and the Marks.)
140. I agree with the claimant that it is possible that for some presentations of the DP logo the consumer would not notice the break in the outer figure. I am unable to agree with the claimant however that the average consumer would not notice the P-like form in the middle of the DP logo. It is the distinctive and dominant element of the logo.
141. As to someone seeing the footwear itself being worn post-sale (in the street, on the football pitch or in the changing room) it appears to me that the Sign would again present as explained above; as a tilted, round-cornered, broken, square with P-form in the middle. It would not appear to a third party on a visual inspection as a pair of elongated sideways-sitting diamonds.
142. I do not however think that there is absolutely no similarity between the Marks and the Sign. They both involve rhomboid shapes with an outer and inner dominant element and both sit on one angle. But there are also multiple variances between the Marks and the Sign. I have reached the overall assessment (applying the average consumer perspective) that there is at most a very low degree of similarity between the Marks and the Signs - it is very faint indeed.

Distinctiveness of the Marks

143. There are no other logos or designs in general use which closely resemble the Marks. The Marks have no inherent meaning connected to the goods in issue. These features make the Marks inherently distinctive. Then there is the history of use of the Marks summarised above. The Marks have been extensively used in high profile football and other sporting events and have been widely publicised. The evidence shows that the Marks are very well known. Extensive use that has been made of them. I conclude that the Marks have a highly distinctive character.

Use of the Signs in context

144. When considering the use of the Signs the full context in which the average consumer would perceive them must be considered (see [39.] above).
145. The claimant's case was primarily concerned with the defendants' sales through Amazon UK. I have already described what appears on the relevant webpage. It is common ground that this constitutes relevant context.
146. As already explained that page carries a large number of images of the relevant footwear showing it from several angles. These include square-on images which show the Sign clearly.
147. The pages also identify the brand as Dream Pairs. The claimant contended that this information about the name of the brand was irrelevant. It submitted that since the Marks did not include any reference to Umbro (and indeed did not contain any language) it was impermissible when considering the context of use to take account of reference to another brand (in this case Dream Pairs).
148. I do not accept this argument. It seems to me that, when considering the likelihood of confusion it is potentially relevant to the perspective of the average consumer that the goods in question are branded as something other than that of the Marks. Of course there may be questions of sub-brands or collaborations (see below). But leaving these to one side, it appears to me to be relevant context that the brand of the goods are identified as other than that of the registered mark, at least where the average consumer would associate the mark with a known brand name. I find as a fact that the average consumer who was aware of the Marks would make a mental association between the Marks and the Umbro brand name. I base this conclusion on the evidence about the high level of distinctiveness of the Marks and the substantial fame of the Umbro brand in connection with their use. The average consumer would not simply see the Mark and think that it had something to do with an unknown brand – they would think of the Umbro name. In other words, I do not think there would be a significant part or proportion of the public who were aware of the Marks who would not make the association with the Umbro brand and its name. The average consumer would notice the references in the Amazon page to Dream Pairs and the fact that it says nothing at all about Umbro. Support for the view that the branding of the allegedly infringing goods is a potentially relevant part of the context is found in the decision of Arnold J in the *Jack Wills* case at [97] to [98].
149. For these reasons it appears to me that the references to Dream Pairs as the brand – and the absence of any reference to Umbro – are relevant context for assessing the question of confusion from the perspective of the average consumer.

150. I shall return to post-sale use below.

Actual confusion

151. I have addressed this already. I have concluded, first, that no real weight can be given to the examples said by the claimant to show confusion. I have also concluded that the absence of evidence of confusion is to be given no real weight as there is no reason to suppose that, had consumers been confused, this would have been recorded or reflected in the documents captured by disclosure.

Global assessment

152. The average consumer does not have the opportunity to make direct comparisons between the Marks and the Sign (or the other way round) and so must rely on their imperfect recollection of them that are kept in mind. So small differences between the Sign and the Marks will be lost.

153. The average consumer is reasonably circumspect and observant. These are not expensive goods and average consumers will be moderately attentive. The average consumer will also be aware that there are a great many different brands for footwear and that their goods may resemble one another to some extent. The average consumer will to my mind be reasonably observant about branding distinctions.

154. The Sign is used for goods identical to those for which Mark 2 is registered and similar to goods for which Mark 1 is registered. This tends to offset any lesser degree of similarity between the Marks and the Sign.

155. I have found that the Marks have a significantly distinctive character, both inherently (because the Marks have no inherent meaning connected to the goods in issue, and there is no evidence of any other mark for footwear that looks anything like the Marks), and because of the hugely extensive use that has been made of them. That tends towards a greater likelihood of confusion.

156. On the other hand I have found that there is only a very low degree of similarity between the Marks and the Signs. It is no more than very faint.

157. I also consider that the context on the relevant Amazon page tends against confusion. It shows that Dream Pairs is a separate brand and that there is no mention of Umbro or anything else to link the two brands.

158. On a global assessment, I am not satisfied that there is a likelihood of confusion among a significant proportion of the public interested in the goods in question and with the characteristics of the average consumer.

159. For the avoidance of doubt I would have reached this conclusion even ignoring the contextual information on the Amazon webpage for the relevant footwear, including the references to Dream Pairs as the brand and the absence of reference to Umbro.

160. I have reached the same conclusion in relation to the allegation of post-sale confusion. The claimant accepted that the degree of attention would be same. A potential consumer who saw someone wearing shoes branded with the DP logo would not to my mind confuse them with the Marks. I have explained the differences between the

Sign and the Marks and I consider that these would be apparent to someone with the characteristics of the average consumer who saw the relevant goods. I do not think that there is a material difference between this case and the pre-sale presentation.

161. I have also considered indirect as well as direct confusion. I do not think that a significant proportion of the public interested in the goods in question and with the characteristics of the average consumer would think that the goods came from the same source or from economically linked undertakings. I do not think there is any evidential basis for suggesting that Dream Pairs was a sub-brand or a licensee of Umbro or that its goods were part of a collaboration with Umbro.
162. The claimant contends that there is a likelihood of post-sale confusion. Consumers who saw people wearing Dream Pairs shoes would confuse them with Umbro shoes. The claimant accepts that the average consumer would have the same attentiveness as in the position where they were considering buying the goods. Therefore the only relevance of this point was that the context of the buying process (i.e. the various other images and other information on the relevant Amazon page) would be absent. The claimant submitted that the court should consider how the shoes with the DP logo would look to other consumers in realistically likely situations. The claimant relies on an image where a boot was muddy and argues that this approach is permissible because football boots might well be seen on the pitch or the changing rooms covered in mud. I see the force of this argument in principle. However it must be remembered that the claimant has to show that it is the use of the Sign (rather than the shape of the boot or anything else) which leads to the relevant confusion. I do not consider that a significant proportion of the public (having the characteristics of the average consumer) would see the DP logo, even when muddy, as more than very faintly similar to the Marks. I do not consider that a significant proportion of the public would confuse the DP logo with the Marks. Carrying out the global assessment reach the same conclusion for post-sale as for pre-sale confusion.
163. For these reasons the claim under s.10(2)(b) fails.

The s.10(3) claim

164. I have set out the nine elements of the claim at [44.] above.

Common points

165. The characteristics of the average consumer, the degree of similarity, and the reputation of the Marks have been addressed above. On the latter point I am satisfied that the Marks have a reputation in the United Kingdom for football boots and kit and performance wear.
166. The issues that remain are the existence of a link, and the three types of injury. No separate issue was raised about the absence of due cause.

Link

167. I have set out the principles earlier.
168. In assessing this element I take particular account of the following factors (some of which have already been addressed in relation to the s.10(2)(b) claims):

- i) The average consumer is reasonably observant. The average consumer would know that there are many footwear manufacturers and that they deploy branding.
- ii) The goods are either identical with or very similar to those for which the Marks are registered. This is a factor in favour of a link.
- iii) The Marks have a reputation and are distinctive. This again tends towards a link (other things being equal).
- iv) The degree of similarity between the Marks and the Sign is very low indeed.
- v) There is no evidence of actual linkage by consumers. In this regard the position is rather different from that of confusion. Consumers who have discovered that they were confused may not do anything about it. On the other hand where the question is whether there is a link or association it is of some relevance that nobody appears to have drawn attention to any link in any review. The evidence before me showed that online reviewers have sometimes commented on associations they have made between Dream Pairs shoes and other brands (such as Ugg and Dr Martens), while recognising that the brands are distinct (and not being confused). There are no similar comments drawing a link with Umbro or its Marks. I think that some weight should be given to this point, albeit it is far from decisive or even substantial.
- vi) I do not think that the YouTube review (see [106.] above) assists the claimant here. Apart from the fact that he was not called or approached as a witness (so that the evidence can be given little inherent weight), the reviewer was clearly looking to make associations or comparisons in order to fill up his video and make it interesting. He did not have the characteristics of an average consumer. Moreover he only suggested a link if the viewer distorted their eyesight by squinting too much.

169. Overall I am not satisfied that the use of the Sign would give rise to a link to the Marks in the mind of the average consumer. Essentially I do not consider that the other factors outweigh the very faint similarity. I have not been persuaded that a significant proportion of the public (applying the perspective of the average consumer) would make a mental association between the Sign and the Marks. I note also that I would have reached this conclusion even disregarding the factor set out in point (v) in the previous paragraph.

Injury

- 170. In case I am wrong I turn to consider the three relevant types of injury.
- 171. The first alleged injury is detriment to the distinctive character of the Marks.
- 172. In my judgment there is no evidence to establish a risk that the use of the DP logo has eroded or would erode the power of the Marks to identify footwear and clothing made by Umbro. Nor are there any facts on which to base an inference that it would or could do in future. The mere presence of a similar sign in the market cannot be the

basis of a finding of detriment or a risk of detriment to the distinctive character of the marks (see *Maier v Asos* at [127]).

173. The claimant has advanced no evidential or rational basis for suggesting that a significant proportion of the relevant public would no longer immediately associate the Marks with the goods for which they are registered. I see no reason to think that the associative power of the Marks is has been or will be diminished or diluted by the defendants' use of the Sign.
174. The claimant would also have had to prove that there is a serious risk that the dilution alleged would lead to a change in the economic behaviour of Umbro consumers (i.e., to reduced sales of Umbro products). It seems to me that any finding to that effect would be supposition rather than deduction. On the evidence I am simply not persuaded that a mental association of the kind alleged would undermine the attractive power of the Umbro marks or would result in average consumers being less inclined to buy Umbro goods. Nor do I think there is any risk of this happening to any extent.
175. The second alleged injury is detriment to the repute of the Marks.
176. The Claimant would need to show some negative feature of the goods to which the DP Logo has been applied has damaged and is damaging the image or characteristics of the Umbro Marks.
177. The claimant's pleaded case is: "[u]se by the Defendants in circumstances in which the claimant has no control over the quality of the goods provided by the Defendants under the Sign risks damaging the distinctive character and/or reputation of the Marks" (RAPOC [26.3]).
178. It is hard to see how the lack of control over the other party's goods would not be true in any trade mark dispute.
179. The claimant at trial advanced a rather different case, that the Dream Pairs goods were cheap and of poor quality and that the sale of its goods has damaged or will damage the reputation of the Marks.
180. I am not satisfied that this case is open to the claimant on the pleadings. Had it been pleaded the defendants would doubtless have addressed quality and pricing in their evidence. But I do not think that this case would have succeeded in any event, for these reasons:
 - i) The claimant failed adequately to explain how making a mental link between the Sign and the Marks (short of confusion) would lead consumers to think that Umbro shoes are of lower quality than otherwise would have been the case. There was no evidential basis for such a proposition.
 - ii) The evidence did not establish that Dream Pairs footwear is significantly cheaper than Umbro footwear. As already explained at least a large part of Umbro's sales are at the lower-mid and bottom end of their pricing pyramid (which is by definition broader at the base than the top). Their lower priced boots and trainers appear to sell through sports discounters or supermarkets for prices in the same order as Dream Pair shoes.

- iii) The reports commissioned by Umbro show that its target market most strongly associates the brand with the word cheap and the availability of its goods in sports discounters.
 - iv) The claimant has not established through evidence that Dream Pairs' footwear is lower quality than Umbro's. The claimant relied on the fact that there was a 20% return rate for Dream Pair shoes. But Mr Cao said (and I accept) that this was mainly a sizing issue. There was no benchmarking evidence to show that this was a higher than average return rate for online shoe sales. Nor was there any evidence about the level of return of Umbro shoes.
 - v) There are some negative reviews of Dream Pairs shoes on Amazon UK but most of the reviews are positive.
 - vi) The Claimant has not pleaded or advanced evidence that there is a serious risk that this allegedly detrimental association is likely to affect consumers and reduce the sales of Umbro products. I consider that any such argument would amount to supposition rather than a reasonable and soundly-based deduction from the facts.
181. The third alleged form of injury is taking unfair advantage of the reputation of the marks.
182. In para 26.1 of the RAPOC the claimant alleges that “[t]he First Defendant sells a range of shoes that are not footwear suitable for use in sport or as active wear, and does not use the Sign in respect of such shoes. The Claimant infers as a result that the Defendants have chosen to use the Sign in respect of footwear suitable for use in sport or active wear in order to exploit and profit from the reputation of each of the Marks”.
183. In para 26.2 of the RAPOC it is pleaded that “the Defendants have chosen to continue use of the Sign knowing of the reputation of the Marks and each of them, so as to exploit and profit from that reputation”.
184. In para 26.4 of the RAPOC it is alleged that by reason of the similarity of the Sign and Marks “the average consumer will be led to believe that the footwear in respect of which the Defendants have used the Sign is footwear that has the same characteristics of fit, performance and/or durability as footwear sold under or by reference to the Marks.”
185. As to the pleading at para 26.4, I am not satisfied that the claimant has advanced any admissible evidence that the Marks have acquired any special characteristics in the minds of an average UK consumer of “fit, durability or performance”. Mr Little explained that Umbro has a broad spectrum of consumers in the UK and sells goods at the top, mid-level and bottom of its distribution. These include sales through discounters and mass market retailers like Asda. As already stated, according to commissioned studies, the most common associations with the Umbro brand were that it was cheap and likely to be found in sports discounters.
186. Moreover, the claimant has not to my mind established that the defendants have obtained or will obtain any relevant advantage in these respects from any association with the Marks. Even if the Marks had the suggested special characteristics of fit,

durability or performance, there is no basis in the evidence to find that the average consumer would believe that goods bearing the DP Logo would have the same characteristics - and therefore be more likely to buy them. That would to my mind amount to supposition rather than sound deduction from the facts.

187. Furthermore even if it had been shown that goods bearing the Marks were associated by consumers with the characteristics of fit and quality, this cannot be said about the various ranges of Dream Pairs goods which have nothing to do with football boots or sportswear. It could not apply to the Dream Pairs' women's fashion boots, snow boots, sandals and slippers. I also find that the Marks do not have a reputation for those types of goods.
188. The claimant has not to my mind advanced any cogent evidence to establish that any association that consumers make between the DP Logo and the Marks would cause (or risk causing) a change in the economic behaviour of consumers of Dream Pairs goods.
189. The claimant has therefore failed to establish an advantage.
190. The claimant has also failed to show relevant unfairness:
 - i) The claimant has not established its pleaded case that the defendants have not used the Sign on non-sports or active wear. The defendants have in fact used it on a range of goods falling outside the scope of that description.
 - ii) I am not satisfied that in using the DP logo the defendant was seeking to exploit the reputation of the Marks. Mr Cao designed the DP logo at a time when he did not know about Umbro or the Marks.
 - iii) The claimant has not persuaded me that Mr Cao deliberately introduced Dream Pairs football boots to the UK using the Sign in order to profit from Umbro's reputation. The claimant did not directly suggest that he had done that. Instead they argued that Mr Cao knew of the Marks before he started sales of football boots in the UK and decided to use the DP logo for football boots in order to obtain an advantage. However, the evidence shows that the second defendant had sold football boots in the US in 2017, and it was not suggested to Mr Cao that he was aware at that date of the Marks or Umbro.
 - iv) I find as a fact that the defendants were already using the DP logo for football boots and other lines in the US in 2017; that Amazon suggested to Mr Cao that he should start selling into the UK and that was what prompted the opening of the Amazon UK account; and that from December 2018 he started doing so through the first defendant, including selling the same football boots as had previously been sold in the US. The claimant has not persuaded me that the defendants used the DP logo on sales in the UK to seek to take advantage of an association with the Marks.
191. The claimant submitted in closing that the defendants were serial copyists of brand indicators and of other brands designs. One example was the use of a Puma formstripe on a football boot. Another example was the resemblance of the shape of a Dream Pairs boot and the well-known UGG boot. The evidence shows that the second

defendant had been sued and settled proceedings in the US by the owners of the UGG brand. Another Dream Pairs product was a boot which looked like a Dr Marten's boot. The claimant also relied on a feature of the heel of a Dream Pairs boot which it said looked like an Umbro football boot: someone had left a comment on the YouTube review video (see [106.] above) pointing out that the heel looked like an Umbro UX-1 boot.

192. None of these serious allegations were pleaded or raised in openings. Had they been pleaded the defendants would have had the chance to adduce evidence addressing the case of copying. In my judgment the points should have been pleaded and it was not open to the claimant to advance these unpleaded points in support of its case of unfairness.
193. But in any event the claimant's case is about the use of the DP logo. It is not a passing off case or about copying the shape or get-up of other manufacturers' products. The case of unfairness must be restricted to the use of the logo. The claimant did not indeed suggest to Mr Cao that he had deliberately copied the Marks or that he was seeking to mislead consumers by using the DP logo. As I have just said, the defendants started using DP logo well before they made any sales in the UK. There were sales of the football boots in the US with the DP logo in 2017.
194. I am not satisfied that the claimant has established any other unfair conduct.
195. For these reasons the s.10(3) claims fail.

Disposal

196. The claims are dismissed.

Annex: allegedly infringing uses of the Sign identified in the RAPOC

