



Neutral Citation Number: [2021] EWHC 1936 (IPEC)

CLAIM NO: IP -2020-000085

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

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

Date: 9 July 2021

Before :

DAVID STONE
(sitting as a Deputy High Court Judge)

Between :

(1) LUTEC (UK) LIMITED

(2) NINGBO UTEC ELECTRIC CO., LTD
(a company incorporated under the laws of the
People's Republic of China)

(3) LAMPEKONSULENTEN A/S
(a company incorporated under the laws of Norway)

Claimants

- and -

(1) CASCADE HOLDINGS LIMITED

(2) FORUM LIGHTING SOLUTIONS LIMITED

Defendants

Mr David Ivison (instructed by **Briffa**) for the **Claimants**
Mr Nick Zweck (instructed by **BBS Law Limited**) for the **Defendants**

Hearing date: 25 June 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment is to be handed down by the deputy judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 09 July 2021.

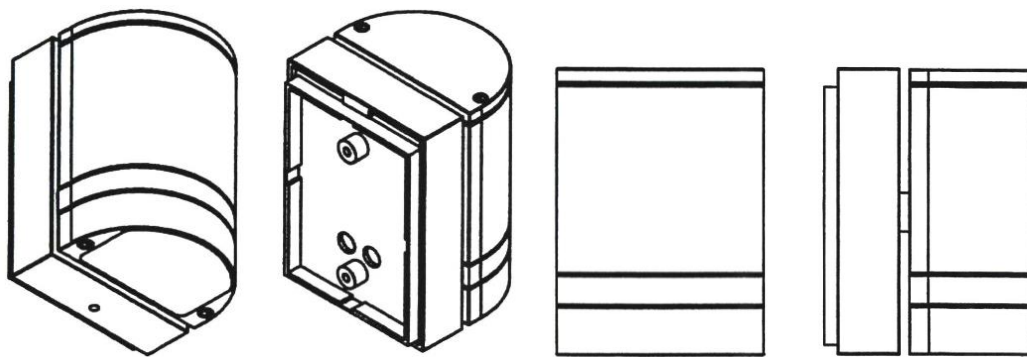
David Stone (sitting as a Deputy High Court Judge) :

1. At the liability trial of this matter on 25 June 2021, I held that all four pleaded registered designs were infringed by two of the Defendants’ outdoor light fittings. These are the reasons for my decision.

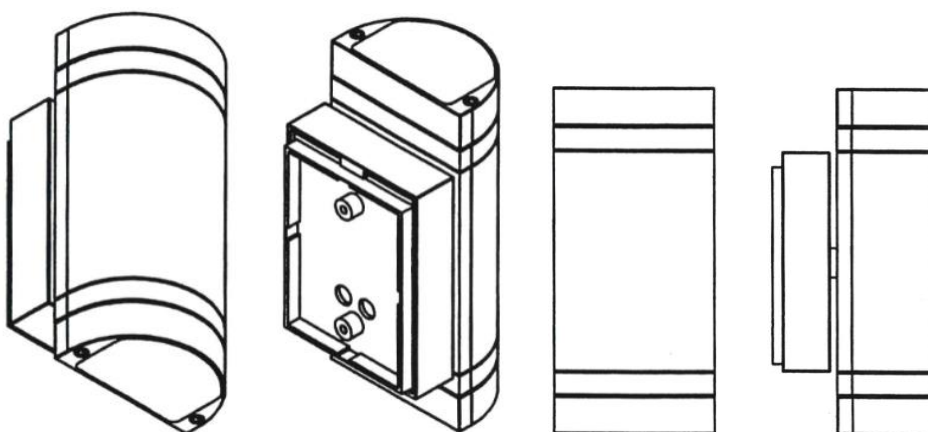
Background

2. By a claim form dated 14 August 2020, the First Claimant, Lutec (UK) Limited (**Lutec**) and the Second Claimant, Ningbo Utec Electric Co Limited (**Ningbo**) sued the First Defendant, Cascade Holdings Limited (**Cascade**) and the Second Defendant, Forum Lighting Solutions Limited (**Forum**) for infringement of two registered Community designs (**RCDs**) numbered 000540927-0001 (**0001**) and 000540927-0002 (**0002**). The RCDs were filed on 5 June 2006 and each lists “exterior lights” as the product to which the designs are to be applied. Each RCD contains 4 images, which are shown here (images not shown to scale):

- i) RCD 000540927-0001; and



- ii) RCD 000540927-0002.



3. The claim alleged that 0001 was infringed by the Defendants’ Helios Up Or Down light (**Helios U/D**) and that 0002 was infringed by the Defendants’ Up And Down light (**Helios U&D**). The two allegedly infringing lights are shown here:



4. The Defendants admit that they have sold the Helios U/D and the Helios U&D in the United Kingdom, but deny that such sales infringe the RCDs.
5. The claim was initially issued in this court, which was at that time a Community Design Court, under the Community Designs Regulation (EC) 06/2002. A CMC took place before HHJ Hacon on 25 January 2021, shortly after the United Kingdom left the EU-wide regime for design protection at 11pm on 31 December 2020 (**IP Completion Day**), so the Court had ceased to be a Community Design Court. Lutec and Ningbo therefore sought permission from His Honour in a subsequent application to amend their claim expressly to assert reliance upon the RCD equivalents which came into being on IP Completion Day. Those new UK rights were given the numbers 90005409270001 and 90005409270002. As it is not necessary to distinguish between the RCDs and the equivalent UK rights, I will for ease refer to both each RCD and its UK equivalent as if they were one. I add for completeness that validity of the registered rights was not in issue before me.
6. Lutec and Ningbo also sought permission to add the proprietor of all four registered designs as a claimant in the proceedings. His Honour gave permission and thus Lampekonsulenten A/S (**Lampekonsulenten**) became the Third Claimant.
7. As is usual in the IPEC, His Honour set out a list of issues to be determined at the liability trial, which by the time of the trial read as follows (I have updated some defined terms):

- “2. Did the designer of the RCDs benefit from a very considerable degree of design freedom in developing those designs as at the date of application for the RCDs?
3. Does the Helios U/D produce upon the informed user a different overall impression from that produced by 0001?
4. Does the Helios U&D produce upon the informed user a different overall impression from that produced by 0002?”
8. The trial was conducted remotely using Microsoft Teams. Mr David Ivison appeared for the Claimants. Mr Nick Zweck appeared for the Defendants. In addition to the images of the Helios U/D and the Helios U&D, I was provided with actual examples of both lights.
9. At the start of the trial, I dealt with two procedural matters. First, I dismissed, for the reasons I gave then, the Defendants’ application dated 15 June 2021 for permission to adduce late a witness statement of Mr Andrew Higginson and for relief from sanctions. Second, I declined to hear, for the reasons I gave then, the Defendants’ submissions concerning the licensing arrangements between Lampekonsulenten and Ningbo on the one hand, and between Ningbo and Lutec on the other.
10. Further, counsel for the Defendants had stated in his skeleton argument for this trial that the Defendants now accepted that the designer of the RCDs had a very considerable degree of design freedom. Issue 2 in the list of issues ordered by HHJ Hacon therefore also fell away, leaving only the questions for trial of (a) whether the Helios U/D infringes 0001 and (b) whether the Helios U&D infringes 0002.

The Law

11. The parties were agreed on the law to be applied to determine infringement.
12. Article 10 of the Design Regulation provides:
- “1. The scope of the protection conferred by a Community design shall include any design which does not produce on the informed user a different overall impression.
2. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration.”
13. In *Dyson Limited v Vax Limited* [2011] EWCA Civ 1206, Sir Robin Jacob, with whom Jackson and Black LJ agreed, said this on the question of whether an allegedly infringing product produces on the informed user the same overall impression:
- “8. Not only is that question apparently straightforward, but, I think, it actually is. It is possible to produce much elaborate argument and evidence—some of which seems to touch upon

metaphysics—but generally none of that matters. What really matters is what the court can see with its own eyes. I said (with the other members of the court concurring) as much in *Procter & Gamble Co v Reckitt Benckiser (UK) Ltd* [2007] EWCA Civ 936; [2008] ECDR 3; [2008] FSR 8:

“[3] The most important things in a case about registered designs are:

- (i) The registered design;
- (ii) The accused object;
- (ii) The prior art.

And the most important thing about each of these is what they look like.

Of course parties and judges have to try to put into words why they say a design has ‘individual character’ or what the ‘overall impression produced on an informed user’ is. But ‘it takes longer to say than to see’ as I observed in *Philips Electronics NV v Remington Consumer Products Ltd (No.1)* [1998] ETMR 124; [1998] RPC 283 at 318. And words themselves are often insufficiently precise on their own.”

9. I added this:

“[4] It follows that a place for evidence is very limited indeed. By and large it should be possible to decide a registered design case in a few hours.””

14. The law on overall impression was considered in detail in *Cantel Medical (UK) Limited v ARC Medical Design Limited* [2018] EWHC 345 (Pat) at paragraphs 169 to 182. Relying on the judgment of the General Court in Case T-525/13 *H&M Hennes & Mauritz BV & Co KG v OHIM* EU:T:2015:617; [2015] ECDR 20, HHJ Hacon (sitting as a Judge of the Patents Court) provided a convenient six stage summary at paragraphs 181 and 182:

“181. I here adapt the four-stages prescribed by the General Court in *H&M Hennes* for assessing the individual character of a Community design to the comparison of an RCD with an accused design, adding other matters relevant to the present case. The court must:

- (1) Decide the sector to which the products in which the designs are intended to be incorporated or to which they are intended to be applied belong;
- (2) Identify the informed user and having done so decide (a) the degree of the informed user’s awareness of the prior art and (b) the

level of attention paid by the informed user in the comparison, direct if possible, of the designs;

(3) Decide the designer's degree of freedom in developing his design;

(4) Assess the outcome of the comparison between the RCD and the contested design, taking into account (a) the sector in question, (b) the designer's degree of freedom, and (c) the overall impressions produced by the designs on the informed user, who will have in mind any earlier design which has been made available to the public.

182. To this I would add:

(5) Features of the designs which are solely dictated by technical function are to be ignored in the comparison.

(6) The informed user may in some cases discriminate between elements of the respective designs, attaching different degrees of importance to similarities or differences. This can depend on the practical significance of the relevant part of the product, the extent to which it would be seen in use, or on other matters.”

Interpretation of the RCDs

15. There was an issue between the parties as to what the images in the RCDs show, and therefore, what is “claimed” as part of the protected designs. The parties were agreed as to the law I should apply. As Lord Neuberger PSC said in *Magnetic Limited v PMS International Group PLC* [2016] UKSC 12 (*Trunki*) at paragraph 30:

“when it comes to deciding the extent of protection afforded by a particular Community Registered Design, the question must ultimately depend on the proper interpretation of the registration in issue, and in particular of the images included in that registration.”

16. The proper interpretation of the RCDs is a matter for the Court, and not for the informed user or any experts: *Sealed Air Limited v Sharp Interpack Limited and Anor* [2013] EWPC 23 at paragraphs 20 and 21. I add that it is a question of fact, to be determined taking into account all the relevant material before the tribunal, the most important of which will be what the drawings look like: *Rothy's Inc v Giesswein Walkwaren AG* [2020] EWHC 3391 (IPEC) at para 55.

17. As is apparent from the images set out above, both RCDs are line drawings. The space between the lines on the curved surface of the light is blank. Counsel for the Defendants submitted that this was a difference between the RCD and the two allegedly infringing products, which, as can be seen from the images above, have a surface of multiple parallel ridges or grooves. He urged me to interpret the RCDs such that the only surface decoration claimed

was the parallel lines running around the curve, such that the blank spaces were, in effect, a claim to absence of surface decoration. He submitted that I should not let my knowledge of the product colour my interpretation of the RCDs, something I have kept clearly in mind. His submission put squarely in issue the question of whether the line drawings in the RCDs claim an absence of surface decoration. If the RCDs claim an absence of surface decoration, then, he said, the ridged surface of the Helios U/D and the Helios U&D produce a very different overall impression on the informed user.

18. The issue of whether or not a registered design claimed an absence of surface decoration was discussed in the judgment of Lord Neuberger in *Trunki*. That case differs from this one because the registered design in issue in *Trunki* was a Computer-Aided Design (CAD) image shown in grey-scale, not a line drawing as shown in 0001 and 0002. Lord Neuberger (with whom Lords Sumption, Carnwath, Hughes and Hodge agreed) said this at paragraphs 44 to 47 (emphasis added):

44. In those circumstances, anything I say as to whether a Community Design can include an absence of decoration, would be obiter. Nonetheless, it is worth expressing some views on the topic, as it was fully canvassed. First, despite Magmatic's argument to the contrary, it seems plain to me that absence of decoration can, as a matter of principle, be a feature of a registered design. Simplicity or minimalism can notoriously be an aspect of a design, and it would be very curious if a design right registration system did not cater for it.

45. Secondly, whether absence of ornamentation is a feature of a particular design right must turn on the proper interpretation of the images on the registered design. Thirdly, I accept that it may sometimes be hard to decide if absence of ornamentation is a feature of a particular registered design, because article 36(3) of the Principal Regulation and article 4(1) of the Implementing Regulation preclude any verbal descriptions (see paras 8 and 9 above). Fourthly, if absence of ornamentation is a feature of a registered design, that does not mean that because an item has ornamentation, it cannot, for that reason alone, infringe the registered design in question: it merely means that the fact that an allegedly infringing item has ornamentation is a factor which can be taken into account when deciding whether or not it does infringe that design.

46. Two domestic cases are worth mentioning in this connection. In *Procter & Gamble*, the registered design was illustrated by line drawings, which were clearly concerned purely with external shape. Both Lewison J ([2007] FSR 13) and the Court of Appeal held, as Jacob LJ put it at [2008] FSR 8, para 40, that "[t]he registration is evidently for a shape. The proper comparison is with the shape of the alleged infringement. Graphics on that (or on the physical embodiment of the design) are irrelevant." Many line drawings simply show a physical shape, as in *Procter & Gamble*,

but while they can show colouring and decoration, they are generally less appropriate for that purpose than photographs or CAD images, which can easily show subtle shadings and contours, as well as decoration, such as colours and ornamentation. Accordingly, while each Community Registered Design image must be interpreted in its own context, **a line drawing is much more likely to be interpreted as not excluding ornamentation than a CAD image**. That is consistent with what Dr Schlötelburg wrote in the article from which I have already quoted, namely that “[b]asically, the broadest claims can be achieved by drawings showing only the contours of the design. In contrast, a photo specifies not only the shape, but the surface structure and the material as well, thereby narrowing the scope of protection accordingly” - [2003] EIPR 383, 385.

47. The notion that absence of ornamentation can be a feature of a registered design, even where the images consist of line drawings, was accepted by His Honour Judge Birss QC and the Court of Appeal (albeit that it was not in dispute between the parties in the case) in *Samsung Electronics (UK) Ltd v Apple Inc* [2013] ECDR 1 and [2013] FSR 9. In that case, the line drawings included one or two small features (an opening catch and a rim around the edge), and the natural implication was that no other ornamentation was intended, a view supported by the fact that the plainness and transparency of the surface was subtly indicated by a few pairs of short lines suggesting the incidence of light on that surface. As Jacob LJ put it at para 18 in that case, “If an important feature of a design is *no* ornamentation, as Apple contended and was undisputed, the judge was right to say that a departure from no ornamentation would be taken into account by the informed user”.

48. I note that the same view was taken of the same Community Registered Design by the Düsseldorf Court of Appeal (I-20W, 141/11, 24 July 2012, pp 2, 22, 26 - “without a pattern” and “without any patterning”), and the Hague Court of Appeal (Case number 200.094.132/01, *Apple Inc v Samsung Electronics Co Ltd*, 24 January 2012, paras 5.1B and 5.3B1 and 6.4 - “without any embellishment” and “without any ornamentation”). Further, the Sixth Chamber of the General Court of the CJEU also appears to have taken the same view in the context of a different design in *H & M Hennes & Mauritz BV & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Cases T-525/13 and T526/13), 10 September 2015, GC, para 37, when contrasting one design’s “formal simplicity” with another’s “surface ... which is adorned with ornamental motifs”.

19. As counsel for the Claimants pointed out, Lord Neuberger’s comments on claims of absence of surface decoration were obiter. He also directed me to the section of Lord Neuberger’s judgment which I have highlighted above – a line drawing is much less likely to indicate a claim to absence of surface

decoration than a CAD image. Lord Neuberger’s judgment refers to two Court of Appeal cases where line drawings in registered designs were in issue. In *Procter & Gamble*, there was no doubt (as Lord Neuberger sets out) that the line drawing in the registered design was a claim only to shape – and not to an absence of surface decoration. In *Samsung v Apple*, as Lord Neuberger notes, an absence of surface decoration was claimed by the owner of the registered design (Apple). It is worth examining this in more detail. As is apparent from paragraph 16 of the judgment of HHJ Birss QC (as he then was) (emphasis added):

“Apple submitted that the similarities between the design and the Samsung tablets could be divided into the following seven features:

- i) A rectangular, biaxially symmetrical slab with four evenly, slightly rounded corners;
- ii) A flat transparent surface **without any ornamentation** covering the entire front face of the device up to the rim;
- iii) A very thin rim of constant width, surrounding and flush with the front transparent surface;
- iv) A rectangular display screen surrounded by a plain border of generally constant width centred beneath the transparent surface;
- v) A substantially flat rear surface which curves upwards at the sides and comes to meet the front surface at a crisp outer edge;
- vi) A thin profile, the impression of which is emphasised by (v) above;
- vii) Overall, a design of extreme simplicity without features which specify orientation.”

20. Thus, Apple interpreted its own registered design as being without ornamentation on the front screen. HHJ Birss went on to undertake the comparison with the accused Samsung products, noting at paragraphs 114 and 115:

“114. The very low degree of ornamentation is notable. However a difference is the clearly visible camera hole, speaker grille and the name Samsung on the front face. Apple submitted that the presence of branding was irrelevant and cited a copy in Spanish of an OHIM decision dated 8th November 2006 between *Isogona S.L v Centrex SAU* Case R 216/2005-3. I was provided with a translation of part of one sentence in paragraph 26. As I read it the point in that case was not approached as a matter of principle, it was concerned with the facts. In that case the branding did not form part of the design. However in the case before me, the unornamented nature of the front face is a

significant aspect of the Apple design. The Samsung design is not unornamented. It is like the LG Flatron. I find that the presence of writing on the front of the tablet is a feature which the informed user will notice (as well as the grille and camera hole). The fact that the writing happens to be a trade mark is irrelevant. It is ornamentation of some sort. The extent to which the writing gives the tablet an orientation is addressed below.

115. The Samsung tablets look very close to the Apple design as far as this feature is concerned but they are not absolutely identical as a result of a small degree of ornamentation.”

21. The fact that the accused Samsung products were not unornamented may explain why Samsung was prepared to accept Apple’s feature analysis claiming a lack of ornamentation. The court was not asked to decide the point, and did not. Neither did the German or Netherlands courts referred to by Lord Neuberger. Therefore, I do not consider that *Samsung v Apple* can be taken to say that designs depicted in line drawings claim an absence of surface decoration.
22. Finally, Lord Neuberger’s judgment refers to two decisions of the General Court relating to handbag designs (the *H&M Hennes* cases referred to by HHJ Hacon in *Cantel*). However, the registered designs in those cases were not line drawings – in T-525/13, the registered design consisted of one line drawing and five colour photographs and in T-526/13 all six views in the registered design were colour photographs. So the registered designs in those two cases each claimed not only shape, but also colour, materials and texture. The prior design was a line drawing for a handbag – and the “ornamental motifs” referred to by the General Court were “a collar edged with gatherings in the upper part of the bag, a vertical seam dividing the bag into two sections and pleats at the bottom of the bag”. So none of the designs at issue could be said (or was said) to claim an absence of surface decoration.
23. Following the Supreme Court’s decision in *Trunki*, the Court of Appeal decided the case of *Pulseon Oy v Garmin (Europe) Limited* [2019] EWCA Civ 138. The registered designs in that case were both depicted in line drawings. Neither was said to claim an absence of surface decoration.
24. It seems to me that it will be a very unusual case indeed in which a line drawing in a registered design claims an absence of surface decoration (and neither counsel pointed me to any). In my judgment, this is not such a case. As I interpret 0001 and 0002, they are a claim to shape, depicting, as they do, the overall shape of two exterior lights. Of the non-exhaustive list of “features” of a design listed in the Regulation, these images show only the lines, contours and shape, and do not show the colours, texture or materials of the product, or its ornamentation. I reject counsel for the Defendants’ argument that the only ornamentation shown is the parallel lines curving around the light casing. In my judgment, these delineate the different parts of the product. It is possible given that the UK registered design filing regime provides that the applicant

may file a description along with the images for her/his design, that a description could be used to claim an absence of surface decoration. No such description was filed in relation to these RCDs.

25. I should add that counsel for the Claimants also took a pleading point – that the interpretation of the RCDs advanced by counsel for the Defendants had not been pleaded. Indeed, counsel for the Claimants submitted that the Defence accepted the interpretation of the RCDs put forward in the Amended Statement of Claim. Given my findings above, I do not need to decide this point, but were I to do so, I would not have found that the Defendants were excluded by their pleadings. As counsel for the Claimants recognised in his skeleton argument, the Defence asserts at paragraphs 10(e) and 16(e) that the RCDs have “a featureless appearance” whereas the corresponding Helios products have a “distinctive ridged appearance”.

Same Overall Impression on the Informed User

26. Having interpreted the design, I am now in a position to follow HHJ Hacon’s 6-stage test from *Cantel*, which I have re-ordered slightly.

(1) Decide the sector to which the products in which the designs are intended to be incorporated or to which they are intended to be applied belong.

27. The parties were agreed that the relevant sector was outdoor lights.

(2) Identify the informed user.

28. The parties were agreed on the identity of the informed user, describing her/him as “a member of the general public who is interested in purchasing outdoor light fittings for home and/or business premises.”

(3) Decide the designer’s degree of freedom in developing the design.

29. As set out above, the Defendants conceded before trial that the degree of freedom of a designer of outdoor lights was very considerable. This has the effect of requiring an allegedly infringing design to be further away from the registered design in order not to infringe, when compared to a product the designer of which has limited design freedom: *H&M Hennes*. Thus, counsel for the Defendants expressly accepted that the RCDs are entitled to a “wide scope of protection”.

(5) Features of the designs which are solely dictated by technical function are to be ignored in the comparison.

30. No features of the RCDs were said to be solely dictated by technical function.

(6) The informed user may in some cases discriminate between elements of the respective designs, attaching different degrees of importance to similarities or differences. This can depend on the practical significance of the relevant part of the product, the extent to which it would be seen in use, or on other matters.

31. Counsel for the Claimant submitted that the informed user will attach a higher degree of importance to the front of the light than to the rear. As HHJ Hacon said in *Cantel* at paragraph 179:

“Some design elements are thus more equal than others. An informed user may discriminate between elements of an RCD when comparing each with the corresponding element of an accused design. Greater or lesser significance may be attached to similarities or differences, as the case may be, depending on the practical significance of the relevant part of the product or on other reasons affecting the degree to which their appearance would matter to the informed user. What could be taken as an extreme example of this came in *Bell & Ross BV v OHIM* (T-80/10) EU:T:2013:214 (the so-called Wristwatch case referred to by the General Court in *H&M Hennes*). The design in issue was in fact of a watch which would be embedded in the dashboard of an aeroplane, leaving only the front face visible. The General Court said that those elements of the RCD that would not be visible in use, in particular the thickness of the case, would have little influence in the overall design produced on the informed user (at [133]-[135]).”

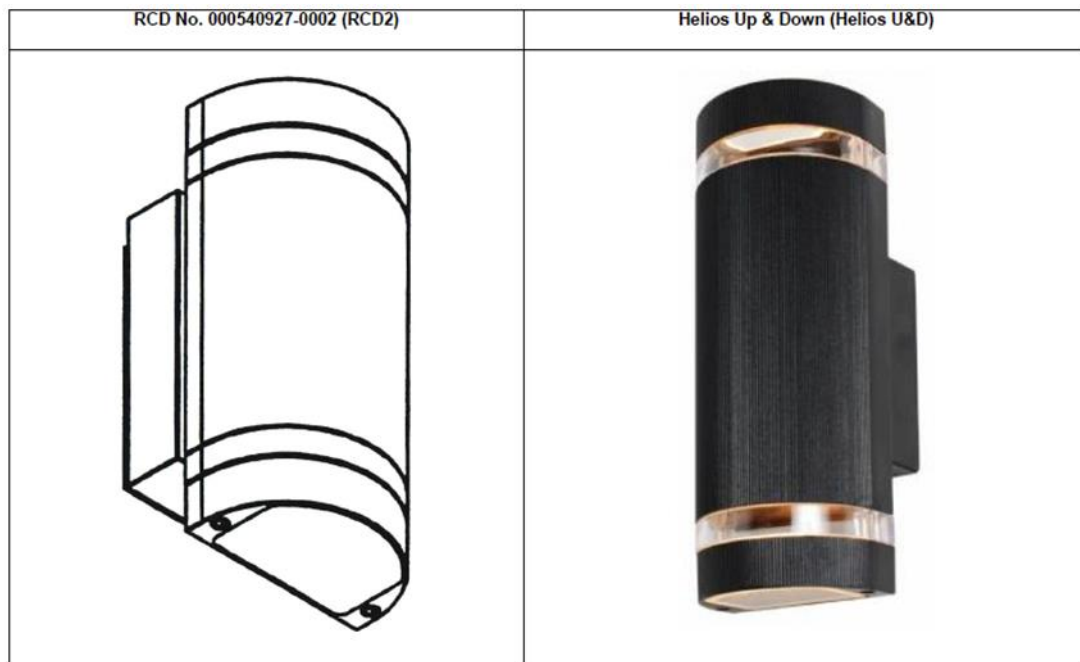
32. As will be apparent from the images above, both in the RCDs and the Helios products, the light itself is a separate element to the base or box by which the light is attached to the wall. Counsel for the Claimant submitted that the informed user will assess the design in light of how it is used, and I accept that submission: *Senz Technologies BV v OHIM*, Joined cases T-22/13 and T-23/13, EU:T:2015:310. The presence in both the designs and the Helios lights of attaching mechanisms on the rear of the base or box indicates clearly that the light is to be attached to a wall or other surface (perhaps a fence). When it is thus attached, it is the front of the light which will be most visible, and hence that is the part of the design to which the informed user will pay the most attention in her/his assessment. To adopt the words of HHJ Birss QC (as he then was) in *Samsung v Apple*, it is differences in those features of the design that will most strike the informed user.

(4) Assess the outcome of the comparison between the RCD and the contested design, taking into account (a) the sector in question, (b) the designer’s degree of freedom, and (c) the overall impressions produced by the designs on the informed user, who will have in mind any earlier design which has been made available to the public.

33. Taking into account the sector in question and the designer’s degree of freedom as agreed by the parties and set out above, I must now step in to the shoes of the informed user and assess the overall impression produced by the RCDs and by the Helios products. It must be remembered that the comparison is not a simple listing of the similarities and differences, nor a darting back and forth between them. Rather, having assessed the similarities and differences, I must stand back, and assess the overall impression. As Arnold J (as he then was) said at first instance in *Trunki* [2013] EWHC 1925 (Pat):

“Although it is proper to consider both similarities and differences between the respective designs, what matters is the overall impression produced on the informed user by each design having regard to the design corpus and the degree of freedom of the designer.”

34. I have also conducted the comparison using all four images in each of the RCDs and the accused objects – but I set out here one image from each RCD together with a photograph of each accused object taken from a similar angle.



35. Counsel for the Claimants listed the similarities between 0001 and the Helios U/D as follows:
- i) Both comprise a lamp housing with a cross section which is broadly semi-circular with narrow portions at opposite extremes of the semi-circle which are flattened and approximately parallel to one another;
 - ii) Both comprise a relatively narrow band feature around the entire outer perimeter of the lamp housing (in 0001 shown near the bottom) including the narrow flattened portions which in the case of the Helios U/D is a transparent aperture through which light is transmitted from the bulb within;
 - iii) One end of the lamp housing, nearest to the band contains a roughly “D” shaped feature occupying most of the area of the end with a screw hole on either side (which in the case of the Helios U/D is another transparent aperture through which light is transmitted from the bulb within);
 - iv) Both comprise a thin linear feature around the entire outer perimeter of the lamp housing including the narrow flattened portions at the end opposite the band; and
 - v) The lamp housing of 0001 and the Helios U/D is attached to the wall via a rectangular box.
36. Counsel for the Claimants added in his oral submissions that the screws are in the same place on 0001 and the Helios U/D.
37. The comparison between 0002 and the Helios U&D was very similar to the above, *mutatis mutandis*, other than that the “D” shaped aperture is at both ends of 0002 and the Helios U&D, and the similarity listed in (iv) above is not claimed in relation to 0002 and the Helios U&D.
38. Counsel for the Defendants did not disagree with these similarities. Rather, the Defence noted the following differences between 0001 and the Helios U/D:
- i) The Helios U/D is appreciably longer relative to its width;
 - ii) The “arced” part of the Helios U/D lamp housing is appreciably flatter (ie less semi-circular) than that of 0001;
 - iii) The flattened sides of the Helios U/D lamp housing are appreciably larger than those of 0001;
 - iv) The gap between the box feature and lamp housing of the Helios U/D is appreciably greater than the gap between the box feature and lamp housing of 0001; and
 - v) The “arced” part of the Helios U/D lamp housing has a distinctive ridged appearance, which is appreciably different to the featureless appearance of 0001.

39. The differences enumerated as between 0002 and the Helios U&D were, *mutatis mutandis*, the same.
40. I have set out above my interpretation of the RCDs including my judgment that they do not include a claim to absence of surface decoration. I therefore conclude that the ridged appearance of the Helios products is not a difference on which the Defendants can rely. As the RCDs make no claim to texture or materials, the ridging does not constitute a difference. That disposes of difference (v) above.
41. As for differences (i), (ii) and (iv): for my part, I found these very difficult to ascertain on a close inspection of the accused products side by side with the RCD images. It is not at all apparent to me that the Helios products are longer relative to their width, nor that the “arced” part is flatter, nor that the gap between the light housing and the box is greater, let alone “appreciably” so, in each case when compared with the RCDs. If these differences do indeed exist at all, they are not such as to make a difference to the overall impression produced on the informed user.
42. I consider that difference (iii) is made out – I consider the flattened sides of the Helios products to be larger than those in 0001 and 0002, but I do not consider that this is a difference that would strike the informed user, if it came to the attention of the informed user at all. This is a minor difference, on the side of the product that is less likely to play an important role for the informed user in assessing overall impression. It is to be remembered that the informed user is not a sectoral expert from patent law – but rather stands between that notional person and the reasonably circumspect consumer from trade mark law: *PepsiCo Inc v OHIM*, Case C-281/10 P, EU:C:2011:679.
43. In his oral submissions, counsel for the Defendants did not discuss these pleaded differences, but instead relied only on the absence of surface decoration point that I have dismissed above, and a further point on overall proportions. He said that differences in the size and placement of the box on the back of the light housing as between 0001 and the Helios U/D produce a different overall impression. In 0001, he said, the box is the same size as the housing, and so, set flat, it gives the impression of a small round tent on a plinth. By contrast, he submitted, the box on the back of the Helios U/D is neither as wide as the housing, nor as long, and is asymmetrically placed, so as to give the impression of a welding mask. Thus, he said, the overall impressions differed. He submitted that the difference as between 0002 and the Helios U&D was not as great, but it still gives a different visual perception, giving the impression that the Helios U&D is narrower than 0002.
44. Counsel for the Claimants submitted that this difference, properly considered, relates only to the shape and size of the box by which the light housing is attached to the wall. He described all four designs under consideration (two RCDs and two accused products) as being attached to the wall by “unremarkable, featureless, rectangular boxes”. Further, he submitted that these features are (a) less visible than the rest of the design (being hidden from view from most angles once the exterior light is installed on a wall) and (b) primarily functional in role, serving to hide the wiring and points of

attachment to the wall. He described is as “fanciful” to suppose that the overall impression of an informed user of an outdoor light would be significantly affected by design decisions such as these.

45. I accept the Claimants’ submissions. In my judgment, the features of the Helios products which will strike the informed user are those of the light housing. Those are the features that will be most visible once the light is installed. The box at the back will be seen by the informed user as of less importance, and whilst the differences might register with her/him, they will not be such as to produce on such an informed user a different overall impression as between 0001 and the Helios U/D and as between 0002 and the Helios U&D. This finding is reinforced by the Defendants’ concession that the RCDs are entitled to a “wide scope of protection”. Standing back, in my judgment, the Helios U/D infringes 0001 and the Helios U&D infringes 0002.
46. Had I admitted the late witness statement of Mr Higginson, my conclusions would not have differed. Using the Wayback Machine (www.archive.org) Mr Higginson found a number of exterior lights from before or around the time the RCDs were filed (5 June 2006). However, in my judgment, none of them is sufficiently close to the RCDs to narrow the scope of protection to which they are entitled.
47. The comment of Jacob LJ in *Proctor & Gamble Co v Reckitt Benckiser (UK) Ltd* [2007] EWCA Civ 936 that “[b]y and large it should be possible to decide a registered design case in a few hours” has been oft quoted, but rarely observed. This was one such case where the thorough preparation by the parties, the absence of evidence and (particularly) expert evidence, together with well-targeted skeleton arguments and to-the-point oral submissions meant that the trial was completed in just over an hour. The parties and those advising them are to be congratulated on their efficient and proportionate approach to the hearing.