

# Lights-out for LED design appeal

## **PulseOn Oy v Garmin (Europe) Limited [2019] EWCA Civ 138**

PulseOn's claim for infringement of two of its Community registered designs for the backs of wrist-worn heart rate monitors finally ended in the Court of Appeal in February 2019. The designs depict the apertures within the backs of such 'WHRM' devices that allow LED light to be shone into the wearer's skin, with the transmitted light signal being picked up by a photo sensor in a separate aperture. That light signal allows the device to pick up the changing blood volume in the skin, and hence the wearer's pulse rate.

A wide range of Garmin's devices were said to infringe, essentially by virtue of having three LED apertures arranged around three sides of an oblong photo sensor aperture. At first instance before Deputy High Court Judge Roger Wyand QC (of Hogarth Chambers), PulseOn's RCDs survived a validity 'squeeze' attack over two items of prior art, but the Judge held that the scope of protection of the designs was correspondingly insufficient to catch the alleged infringements. PulseOn appealed the finding of non-infringement, submitting that the Judge had approached the design corpus and degree of design freedom wrongly, and that he had conducted the comparison wrongly by referring to enlarged models rather than the devices themselves. It was also said that the Judge had attached too much weight to the fact that one of the apertures was at a greater distance from the photo sensor, this being a technically-driven feature that the informed user would have paid little attention to.

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The Court dismissed all of the grounds of appeal. There was nothing wrong in using the models for the comparison, particularly as the size and nature of the apertures made visual inspection difficult. Although the Judge had perhaps expressed the design constraints a little narrowly, he was essentially right that there were limited options, and that the arrangement in the RCDs was unremarkable in that context. As to the more distant LED aperture, even if the informed user worked out the technical reasons for the spacing, that would not lead them to ignore it, rather they would see it as a deliberate design choice. Moreover, it was a feature absent in the design corpus, and thus warranted attention. The Court added that, although it was not required to perform the assessment itself, it agreed with the Judge that the alleged infringements did not produce the same overall impression as the RCDs.

[Ben Longstaff](#) of Hogarth Chambers, instructed by Powell Gilbert, appeared as junior counsel for Garmin (led by Hugo Cuddigan QC) both at first instance and on the appeal.

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