

## Jack Wills' Pheasant Rules the Roost



Jack Wills has won its trade mark and passing off dispute against House of Fraser - [2014] [EWHC 110](#). Jack Wills complained that the rights in its logo comprising a side profile of a pheasant wearing a top hat with a cane in its claw had been infringed by House of Fraser's use of a logo on its own brand casual clothing comprising a side profile of a pigeon wearing a top hat. A comparison of the marks as they appeared on shirts is below.



Mr. Justice Arnold held that the House of Fraser pigeon was likely to cause confusion. There are several points of interest.

First is the identity of the average consumer. Although the goods were the same, the parties targeted different age groups. The Judge held that the average consumer included people in the Jack Wills target group, namely younger people, but also included older people, including those who purchased clothes as gifts for younger people. In general, he said the average consumer varies in age and socio-economic class. Similarly, it is rare for a trade mark to have precisely the same degree of distinctive character to all persons of whom the average consumer is representative. Some will know the trade mark and some will be ignorant of it. The Judge held that the pheasant logo had both inherent and acquired distinctiveness and because it had acquired distinctiveness to one segment of the class of persons represented by the average consumer, that acquired

distinctiveness would increase the likelihood of confusion in relation to that segment. The average consumer must be viewed as a whole though and not just the one sector for whom it has acquired distinctiveness.

Second is the role of intention in establishing unfair advantage. The Judge held that the court could consider not just the subjective intention of the competitor in using the sign but also the objective effect that the defendant would benefit from the use of its sign from the reputation and goodwill in the claimant's mark. Such objective effect could amount to an unfair advantage even if it is not proved that there was a subjective intention to exploit that reputation and goodwill.

Finally, the Judge concluded that there was no need to establish positive evidence that the economic activity of consumers of the defendant's goods and services was affected by the use of the sign. Logical deductions could be made as long as they were not mere supposition. The deductions should take into account the normal practice in the relevant commercial sector, as well as in the circumstances of the case.

Jack Wills was represented by [Roger Wyand QC](#) and [Andrew Norris](#) of **Hogarth Chambers** instructed by **Mishcon de Reya**.

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