

PASSING OFF CLAIM WIPED OUT IN IPEC

Deputy Enterprise Judge Amanda Michaels today (20/01/16) handed down a judgment in the IPEC illustrating the difficulty of succeeding in a claim for passing off based on get-up where there is prominent use of a distinctive trade mark on the allegedly offending product.

The Claimant, Gama Healthcare Limited, sued Pal International Limited for passing off, claiming that the get up adopted by Pal for two of its range of wet wipes, sold under the trade mark MEDIPAL, is so similar to Gama's equivalent wet wipes, sold under the trade mark CLINELL, that it would cause deception. Gama also claimed Pal was supplying instruments of deception because, although the major purchasers of the products, NHS Trusts, might not be confused, the nurses on the wards would. The get-up in which goodwill was claimed was green for disinfectant wipes and yellow for detergent wipes, in each case the colour scheme is such that the lower area is the appropriate product colour and the upper area is white with the two colour blocks being separated by a horizontal curved line.

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The Claimant's founder and chief witness accepted under cross-examination that the use of yellow for detergent wipes and green for disinfectant wipes was "the overriding industry norm" and that it was logical for others in the market to adopt colour coding to indicate the purpose or properties of particular wipes.

The Deputy Judge held that Gama had not proved it had goodwill in the pleaded get-up of either its disinfectant or detergent wipes, absent the CLINELL trade mark. The Deputy Judge further held that Pal intended to reference Gama's packaging and products to indicate the nature of its products as competing with Gama's. This was a decision to live dangerously but it did not establish that Pal had an intention to deceive or pass off. Gama adduced evidence of alleged deception but, after cross-examination, this was held to show a level of confusion but not that this was caused by the similarity of the claimed features of the get-up relied on. The claim that the packages were instruments of deception also failed.

Pal International were represented by **Roger Wyand QC** of **Hogarth Chambers** and Thomas Elias of Serle Court instructed by **John Buckby** of Spearing Waite LLP.

Gamahealth v Pal International [2016] EWHC 75 (IPEC)