

# **O-935-21**

## **REGISTERED DESIGNS ACT 1949 (AS AMENDED)**

**IN THE MATTER of Registered Designs Nos. 6013763, 6013764, and 6013769 (for Treasure Chests) in the name of Craft Sales Ltd**

**and**

**APPLICATIONS TO INVALIDATE (Nos. 27/19, 32/19 and 34/19) by MyEveryDayHome.com Ltd**

### **DECISION**

1. This is an appeal from decision O-399-20 dated 13 August 2020 by the Hearing Officer (Heather Harrison) acting for the Registrar of Designs. She dealt with applications by MyEveryDayHome.com Ltd to invalidate eight registered designs, all in the name of Craft Sales Ltd.
2. The Hearing Officer found five of the registered designs to be invalid. There is no appeal from that decision, so I am not concerned with those five registered designs on this appeal. She rejected the applications to invalidate in respect of three of the designs, and the applicant for invalidation now appeals to me against those rejections.
3. The hearing of the appeal was held online on 16 August 2021. The applicant/appellant was represented before me by Mr. Maciej Topolski of Lidia Ignatowska, Attorney at Law, of Sopot, Poland.

4. On the morning of the hearing I was notified that a letter had been received by the appeal secretariat from United Legal Experts, who were on the record as representatives of the Respondent. That letter stated that they were withdrawing and that all further communications should be sent direct to the Respondent proprietor. At the beginning of the hearing, Mr. Topolski indicated that according to his clients' information the Respondent company had been dissolved.
5. I decided that the appeal hearing should nevertheless proceed. It is in the public interest that the validity of the designs in issue should be considered. If they stay on the register it is still possible that they could be asserted by someone who acquires them as *bona vacantia* from the Crown, or if the dissolved company were to be restored for some reason.
6. All three appeals involve a common issue about the admissibility in evidence of pages from commercial websites which have been identified by internet links. I will explain how the issue arises in the first of these appeals, relating to registered design No. 6013763. This is described on the register as a "*plain wooden box treasure chest style with specific top*". It has 6 representations which are set out below:



7. The fourth picture seems to be simply a repeat of the first (main) illustration.
8. The validity of this registered design was challenged on the basis of lack of novelty, or alternatively lack of individual character, in the light of prior art listings on Amazon of a product whose picture<sup>1</sup> was as follows:-



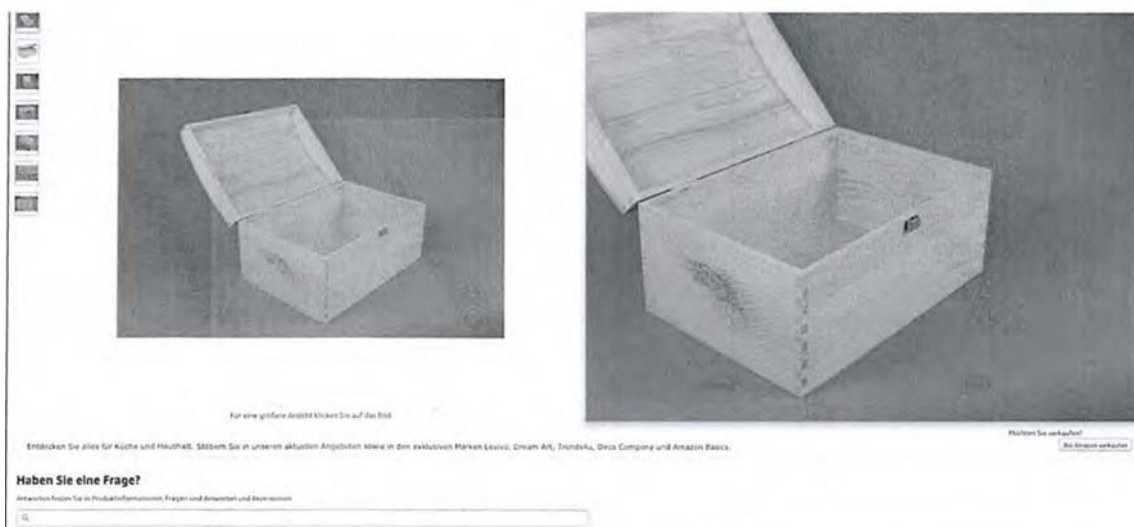
9. The above prior art picture is monochrome and not of the highest quality. There is a reason for that. The Hearing Officer took that picture from the applicant's Statement of Case to which printed monochrome screen shots of the prior art listings were attached. No evidence was filed by the applicant apart from the Statement of Case itself and its attachments. One would normally expect the grounds of invalidity pleaded in the Statement of Case to be further substantiated and elaborated upon at the evidence stage, but that was not done in this case.
10. The respondent proprietor filed a counterstatement which generally denied the allegations that the designs in issue had been prior published, and suggested that Amazon is unreliable to use for any legal purpose and that an expert should be brought in to assist in showing "*how things can be manipulated*" on Amazon. However, no evidence (expert or otherwise) was filed by the respondent to substantiate these denials and suggestions of possible manipulation.

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1. There was also a slightly enlarged but cropped version which I have not reproduced.

11. The parties did not request a hearing. Therefore the applications were decided by the Hearing Officer on the basis of the papers, which effectively consisted only of the applicant's Statement of Case with its attached pictures and the Respondent's Counterstatement. Those pictures constituted the only concrete evidence about the specific alleged prior art instances. The Statement of Case was verified by a signed declaration of truth on the applicant's form DF19A.
  
12. The Statement of Case alleges that the product was made available on the Amazon.co.uk website at the latest on 19 June 2011, which is more than 6 years before the date of registration of the design, and annexes a picture (Picture 1) taken from the Amazon UK website. It also alleges that the same product was sold in France since 2015 and in Germany since 2014, and annexes Pictures 2 and 3 from the Amazon websites in those countries. The Appellant's best case is on Picture 3, since it shows the largest and clearest picture of the chest and also shows thumbnail pictures of the chest from different angles. I reproduce Picture 3 below:

**Picture 3**



13. Below the picture of this Amazon web page is the word “Source”, followed by an internet link to a URL on [www.amazon.de](http://www.amazon.de).
14. It can be seen that (leaving aside the tiny thumbnails), only one view of the product is depicted. The Hearing Officer dealt with this prior art as follows at paragraphs 37 and 38 of her decision:

“37. The designs share the same oblong base shape, in the same proportions. They also share the same exposed joints at the corners and the same convex lid. In fact, the prior art appears to show an identical product to the first and fourth images in the registered design (which are also identical), even down to the wood grain visible. The second reproduction of the prior art is not particularly clear but it is apparent from the evidence that the bottom part of the clasp in the prior art is identical to that in the registered design.

38. Notwithstanding the identity of the prior art to certain of the illustrations of the registered design, the registered design also includes views of the top of the box. A design can be registered for the appearance of the whole or a part of a product. In this case, the registered design must be taken to be registered for both the internal and external parts of it in the representations filed, which includes the top of the lid. In the prior art, there is no view of the top of the lid. Whilst there are some thumbnails at picture 3 of the statement of case, they are too small to make out. Without a representation of the top of the lid, it cannot be said that the designs are identical. Nor am I able to conclude that the overall impressions are the same: it would be supposition on my part to assume that the top of the prior art has no surface decoration. The overall impression of the registered design must take into account its top surface. The overall impression of the prior art is based purely on the internal and side views visible. With that in mind, and even though I bear in mind the level of design freedom available, the overall impression of the registered design is not, in my view, the same as that of the prior art. The claim under s. 11ZA(1)(b) fails.”

#### **First ground of appeal - should the URLs have been followed?**

15. The Appellant contends that the Hearing Officer ought to have followed through the links given below the pictures annexed to the Statement of

Grounds, and that if she had done so then her difficulties regarding the other views of the product would have been resolved in the Appellant's favour. The Appellant annexes to its Notice of Appeal a series of other images of the product taken from the Amazon websites and in particular a view which shows the top of the chest as plain wood. This, the Appellant contends, would have put at rest the Hearing Officer's concern that the lid might have had surface decoration which could have altered the overall impression of the product to make it different from that of the registered design.

16. This contention raises important points about the law and practice of written evidence and internet links. It was entirely correct and appropriate that the Statement of Case contained links to the web pages from which the images had been taken. If it had not done so, it would make it difficult for the opposing party to investigate and verify or dispute the contentions made about what was on the websites. Indeed, a Statement of Case which relied on images from the internet without sufficiently identifying their source would be defective and liable either to be struck out, or at least to an order to provide further information.
17. However, the Appellant wishes to rely on the internet links for more than the purpose of providing a means by which its allegations can be checked. In effect, it seeks to rely on the contents of the web pages pointed to by the links as if those contents had formed part of, or had been attached or exhibited to, the written evidence. The Statement of Case identifies each of the URLs as the "source" of each image but does not in terms state that the internet resource pointed to by each URL should be treated as forming part of or annexed to the Statement of Case.

Leaving aside this rather narrow and technical point, the broader question is whether or not it is permissible as a matter of law and practice to treat those internet resources as if they were part of the Appellant's written evidence. Clearly the Appellant *could* have downloaded additional images and other matter from the website and attached them to its written evidence, either in the form of additional printed pages or as electronic files - but it did not do so.

18. Can a website, or part of a website, which is pointed to by a URL in written evidence be taken as forming part of that evidence? Is a court or tribunal receiving such evidence either required, or at least permitted, to follow up that URL so as to take into account the contents of the internet resource to which it points? Both the IP Office in *inter partes* proceedings and an Appointed Person on appeal exercise the same powers as the High Court in receiving evidence.<sup>2</sup> I consider that these questions fall to be decided by applying the general rules of evidence in the courts rather than any specific rule or practice pertaining to IP Office proceedings.

**Were website contents the same before the filing date?**

19. Before addressing the application of the rules of evidence to links and websites, I will briefly mention a related but different issue which often arises when internet publications are relied upon as evidence of prior art

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2. The Registered Designs Rules 2006, SI 2006/1975: rule 21(1) states that evidence in proceedings before the Registrar "*may be given (a) by witness statement, statement of case, affidavit, statutory declaration; or (b) in any other form which would be admissible as evidence in proceedings before the court.*" Rule 24 confers on the Registrar the powers of an Official Referee of the High Court as regards the attendance and examination on oath of witnesses.

in design or patent cases, or to prove prior use in trade mark cases. If a website is accessed at the time when evidence is gathered for the purpose of proceedings, this will almost inevitably be after the relevant filing or priority date. Can it be inferred that the website would have been the same or at least not relevantly different before that filing or priority date?

20. The Statement of Case does not say when the relevant URLs were accessed and the pictures were made, but presumably this took place soon before the filing of the Statement of Case and therefore well after the relevant filing dates. The Hearing Officer at paragraphs 23 to 26 considered the evidence from the Amazon websites and in particular took the “first available” dates where these appear on Amazon as an indication that products with the characteristics shown were on sale from those dates.
21. At paragraphs 26 and 27 she noted the respondent’s objection to evidence from ‘third party’ websites and its suggestion that Amazon website contents could be manipulated via “*seller and vendor back end portals*”. She held that the fact that the evidence was taken from a third party website does not make it unacceptable or unreliable. She accepted that in theory information held online may be manipulated but there is no reason to suppose that this is the case here. She pointed out that the respondent could have filed evidence to challenge the truth or accuracy of the applicant’s evidence but it had not done so.
22. There is no cross-appeal against this aspect of the decision. Indeed the Hearing Officer’s reasoning in this regard is similar to that in my own decision *Castor Wheel Sets* O-374-21 at paragraphs 57-64, where I held that absent evidence to the contrary, it could be inferred that in the normal



course Amazon listings would have shown the same design of product from the first available date even if individual product photographs might have been substituted by the vendor from time to time.

23. More generally, the subject of what inferences regarding prior art may properly be drawn from internet publications of various kinds has been addressed in a *Notice from the European Patent Office concerning internet citations*.<sup>3</sup> That Notice distinguishes between internet publications of different types, ranking as more reliable internet publications of technical journals or other periodicals, and publications by public institutions, international organisations and public institutions. However it acknowledges that dates given in ordinary commercial websites may also be reliable, depending upon the particular facts and circumstances.

### **Written evidence and URLs**

24. In everyday life it is common to provide information by way of internet links both in private communications and in publications. Any reader who is interested in finding more detailed information or in verifying the accuracy of what is said can then follow up the link. Why then should this everyday, common and useful practice not be employed in written evidence, and the information pointed to by the link be taken to be incorporated within the written evidence as if it had be spelt out in the text or exhibited to it?
25. In my view there are two important reasons why what is pointed to by internet links should not be taken to be equivalent to material contained

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3. OJ EPO 2009, 456.

within or exhibited to the written evidence. The first reason is the changeability of what is pointed to, and the second is the need to give notice to the opposing party of exactly what does and does not form part of the evidence relied upon by the party who adduces the written evidence.

26. The problem of changeability applies to most ordinary commercial websites, whose contents may change from time to time for ordinary commercial reasons, leaving aside any questions of deliberate manipulation or falsification of evidence. (I say nothing about special case websites, such as online registers of patents, designs or applications which are provided by a body which is under a duty to maintain their accuracy.) A statement of truth can validly verify that the contents pointed to by a URL are true as of the date when the statement of truth is signed: it cannot in principle verify that those changeable contents will still remain true up to the date when a court or tribunal will later access the URL in reading the evidence. A party who wishes to rely on the contents of a commercial internet publication as evidence needs to capture the contents, whether in printed or electronic form, so that those contents can be presented unchanged to the court or tribunal when required to be read.
27. During the hearing of the appeal I agreed to look *de bene esse* at the additional pictures sought to be relied upon by the Appellant and at the websites themselves. This exercise demonstrated the problems caused by the changeability of commercial websites. The primary picture of the treasure chest in the Statement of Case (set out under paragraph 8 above) had disappeared from the Amazon UK website, and there were other

pictures which from the wood grain differences were definitely of a different chest albeit of the same or similar design.

28. The Appellant was keen to point out that, despite the disappearance from the website of the picture on which it had primarily relied, there were three other pictures which corresponded with photographs in the registered representations. But the problem posed by the differences is that it is not possible to say whether or not these photographs were present at the time when the website was accessed for the purpose of the Statement of Case. They might have been added or swapped later. We know that one photograph which was there at that time has been removed.
29. I have mentioned above the inherent problems which may have to be faced in reasoning or inferring backwards in time to what was the state of a website before the filing date. If the Appellant's preferred approach to internet links were to be adopted, the court or tribunal would be faced with the additional problem of not even having in evidence a stable and unchangeable snapshot of what the website looked like when accessed for the purpose of gathering evidence for the proceedings.
30. Thus, a court or tribunal can have no confidence when viewing an internet resource pointed to by a URL in written evidence that what it sees will be the same as what the URL pointed to when the written evidence was attested to and filed. Any findings made on the basis of such 'evidence' could be on quicksand rather than on firm ground.
31. The further principle which is also engaged is that the written evidence of one party should make it clear to the opposing party what is and what

is not included within the evidence upon which that party is seeking to rely. The opposing party is entitled, for example, to examine the evidence and conclude that it is insufficient to establish the first party's case, so does not need to be answered. The Appellant's attempted reliance on the material pointed to by the internet links would lead to the effective inclusion within the written evidence of an uncertain penumbra of additional material.

32. If the URL given in the Statement of Case below Picture 3 is entered in a browser, it generates a view similar to that shown above under paragraph 12, albeit that the main picture of the treasure chest has been replaced with a different picture as I have described above. The other views of the product are not visible, except as small thumbnails from which it is difficult or impossible to discern the features of the product.
33. The Appellant's contention is that the tribunal should go on to click on the thumbnails in order to display the enlarged pictures of each of the views of the product. This goes beyond the view which is actually generated by browsing to the URL. This may seem a small step, but if the Appellant is right, how far should one go? Should one navigate to related pages, such as those giving additional specifications or details of the product, or readers' comments which could provide further information?
34. I conclude that the Appellant should not be allowed as a matter of law to rely on these internet links in the way it seeks to do, which is effectively to regard the internet resources to which they point as if those resources had been incorporated within or annexed to its Statement of Case. That approach would effectively treat as incorporated within written evidence material which is not stable and is subject to being changed for all sorts

of reasons after the statement of truth has been signed. In addition, the lack of precision as to the scope of the material which is sought to be incorporated would mean that the opposing party could not tell exactly what material the Appellant is or is not relying on within its written evidence.

35. For these reasons I hold that the Hearing Officer was entitled not to regard the internet resources pointed to by these URLs as material which formed part of the written evidence in front of her. It would be wrong of me to exercise my power to permit additional evidence to be filed on appeal in order to allow the Appellant to rely on additional evidence which it could easily have filed in front of the Hearing Officer, when the Hearing Officer had not committed any error in not looking at it. I therefore refuse to admit the additional views and pictures which the Appellant seeks to introduce on the appeal.
36. My finding that the Hearing Officer was *entitled* not to have regard to the internet resources pointed to by the URLs does not mean that Hearing Officers in all circumstances must never follow up such URLs. Sitting at first instance, Hearing Officers have considerably greater flexibility than I have when dealing with an appeal, when I am normally bound by what the Hearing Officer has decided to do on procedural matters unless there has been an error.
37. There are many circumstances - such as when a witness is being cross examined at a hearing, or when representatives of the parties are debating what the evidence does or does not show - when a Hearing Officer might as a matter of discretion think it appropriate to go beyond the existing evidence and look at additional materials on the internet in

order to resolve doubts or difficulties. However this should normally be done in circumstances where the parties are aware that such additional material is being considered and have an opportunity to comment on it, and/or to adduce further relevant material which might contradict it or cast a different light on it. The Hearing Officer was dealing with the present case on a limited set of papers and without a hearing at which the parties were present. This would have made it difficult for her to pursue such a course even if she had been minded to do so.

38. I should also add that my decision relates to filing written evidence in opposed inter partes proceedings in the Office, where the Office is exercising similar powers to the court as regards receiving evidence. The reasoning does not necessarily – or maybe even at all – apply to other kinds of proceedings in the Office, such as representations made by applicants to examiners, or for example third party observations on patentability. In such cases, the Office or examiners may well have a power or even a duty to inquire into what materials can be discovered by following up internet links.

#### **Consideration of the evidence limited to the Statement of Case**

39. For the reasons I have explained, I consider that the Appellant is limited to relying on the written evidence contained in or attached to its Statement of Case and cannot be allowed to supplement this on appeal with additional material from the internet.
40. In view of the difficulties which the Hearing Officer encountered when looking at this written evidence, I asked the Office to supply to me the

actual originals of the Form DF19A and attached Statement of Case which the Appellant had filed with the Office, for each of the designs subject to the appeal. I did not want the Appellant's case to be disadvantaged as a result of my having to work from photocopies or scans of those originals on which the images might be degraded. In addition, as I told Mr Topolski at the hearing, I was willing to look at these filed documents with the aid of a magnifying glass.

41. Regrettably, I was no more successful than the Hearing Officer in making out what is shown in the small thumbnails. Therefore, like the Hearing Officer, I am left only with the view of the product set out at paragraph 8 above and have in evidence no views showing what the product looks like from other angles, or the top of its lid in particular.

**Second ground of appeal - inference from "exact same picture" in representation on the register and in prior art**

42. The Appellant relies on the Hearing Officer's finding in paragraph 37 that *"the prior art appears to show an identical product to the first and fourth images in the registered design, even down to the wood grain visible"*. It submits that the pictures from the prior art are the exact same pictures as the first and third of the registered representations, a point with which I agree.
43. The Appellant goes on to argue that *"the images are identical, therefore it should be reasonable to argue that the product of which the picture was taken was also the same, and therefore, the top of the lid would also be the same."*
44. The representations forming part of the registration are views of a wooden treasure chest from a number of different angles. It can be seen

from the wood grain patterns that these are different views of the exact same chest, not merely views of different chests with the same design. Presumably these photographs of the chest would all have been taken on the same occasion.

45. The photographs on the prior art Amazon listings show a view of the chest which corresponds to the first representation in the design registration. This is a view of the chest from half way between a front and side view, with the lid open. From examination of the wood grain patterns, it can be seen that this is not merely a photograph taken from a similar angle of a chest of the same or similar design, but is the exact same photograph of the exact same wooden chest as the first<sup>4</sup> representation on the register.
46. It seems to me that there are two plausible scenarios by which this photograph used for marketing purposes on Amazon ended up being filed as one of the representations of the registered design in issue. One is that the sellers of this product on Amazon were or were connected with the applicant for the registered design, and they deployed a picture originally created for marketing purposes when filing the design application. The second possible scenario is that the applicant for registration downloaded the photograph from a prior art internet listing and then used it to file its own application for design registration.
47. The Hearing Officer pointed out that the majority of the Amazon prior art listings went back beyond the one year “grace period” under section 1B(6)(d) of the Act. Therefore it does not matter which of these scenarios

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4. And duplicated fourth.



(neither of which redounds particularly to the credit of the applicant for registration) is correct and I do not need to consider their relative likelihood or plausibility.

48. The Hearing Officer postulated the possibility that the views of the prior art treasure chests from angles other than those shown in the single photograph might have been different from the views shown in the registered design representations. That would imply that the sellers of the prior art Amazon listings would have used the photograph corresponding to the first representation in the registration in conjunction with photographs of different boxes having a different appearance (for example, decoration on the lid) for one or more of the other views in the listings; but, by the time of filing the application for registration, reverted to using a complete set of photographs of this single box.
49. It is of course possible that such a substitution of photos of other views occurred between the prior art listings and the filing of the application for the design, but I tend to think that this is not particularly likely. I am therefore prepared to hold, on the balance of probabilities and by a slender margin, that it is likely in the ordinary course of things that the other photographs accompanying the Amazon prior art listings would have been the other photographs of the same box which were later used in the application for registration. The implication is that the boxes as actually sold under the listings would have had the same appearance from its various angles as the chest in that set of photographs.<sup>5</sup>

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5. It is possible to rely on a prior art advertisement (1) as constituting itself a disclosure which invalidates a design, or (2) as evidence of the appearance of the product sold, that product as such when put in the hands of the public being the invalidating disclosure.

In my

50. On this finding, it follows that registered design No. 6013763 is not novel over the Amazon listings. It is not necessary for me to consider the alternative ground of lack of individual character. I will therefore allow this appeal and declare registered design No 6013763 to be invalid.

**Registered design No. 6013769**

51. The representations of this registered design are as follows:-



52. The relevant Amazon prior art (picture as taken from the Appellant's Statement of Case) is as follows:-



53. The Hearing Officer dealt with this registered design as follows:

“44. I can see no difference between the image of the prior art and the first illustration in the registered design: both are of a rectangular box with a curved lid, in the same proportions. The clasps are

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view the Appellant's Statement of Grounds rely on the Amazon listings for both purposes.

identical. Both have exposed joints at the corners of the box. Moreover, the wood grain in both is identical, which suggests that the image is not just a representation of an identical design but a photograph of the same finished product.

45. There is, however, no representation in the prior art which shows the interior or the reverse of the box. Although the Spanish Amazon site has thumbnail images next to the main image, they are far too small to make out. The registered design must be taken as a whole: the design is registered not just for the front exterior but for the internal and rear features (or absence thereof). Without any images of the corresponding parts of the product featured in the prior art, it cannot be said that the designs are identical. Similarly, the overall impression of the prior art is of the front and upper features of a box. The overall impression of the registered design as a whole is of an entire box, including its side, rear and internal aspects. The overall impressions cannot, therefore, be regarded as the same. The invalidation under s. 11ZA(1)(b) fails.”

54. As with the previous registered design, the Appellant asks to supplement the picture within its Statement of Case with additional views of the product from the Amazon listing websites. For similar reasons I reject that request. I will deal with this appeal on the basis that the evidence is limited to that in the Statement of Case.
55. As noted by the Hearing Officer, this is another case where the same box with the same wood grain pattern appears in the representations in the registered design and in the prior art photograph. For the same reasons as I have set out in relation to the previous design, I am prepared to draw the inference on the balance of probabilities that the other views of the product in the Amazon prior art listing would also have matched the views in the registered representations.
56. On this finding, it follows that registered design No. 6013769 is not novel over the product the subject of the prior art Amazon listings. It is not necessary for me to consider the alternative ground of lack of individual

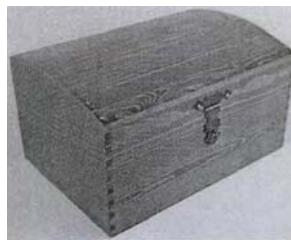
character. I will therefore allow the appeal and declare this registered design invalid.

**Design registration number 6013764**

57. The representations of this registered designs are as follows:



58. The prior art from the Appellant's Statement of Case is as follows:-



59. The Hearing Officer dealt with this design as follows:-

“48. The same difficulties arise for the applicant as above. The overall impression of the registered design is for the visible external and internal features of the box, whilst the overall impression of the prior art is confined to its exterior features. Thumbnail images which might have assisted the applicant are too small to make out. The designs cannot be said to be identical because there is no evidence to show whether the internal features of the prior art are the same or otherwise. The overall impressions are of the internal and external features in the registered design but only the external features in the prior art: they cannot result in the same overall impression. The application for invalidation fails.”

60. As before, the Appellant seeks to expand its evidence on appeal beyond the pictures attached to its Statement of Grounds and to include additional pictures and material from the Amazon website. As before, I reject that attempt.
61. In this case, unlike the two previous registered designs with which I have dealt, the prior art picture is not the same photograph as that forming the first or third of the representations in the registered design, despite the fact that those are taken from a similar but not identical angle, and show a box of the same design so far as one can tell from that angle of view. Close examination of the wood grain patterns demonstrates that the prior art photograph is of a different box from the box which was photographed for the purposes of the registered design representations.
62. In relation to the previous two registered designs, I was willing to draw an inference about the other views of the products from the fact that in each case the prior art pictures were identical photographs of the very same box as one of the registered representations. The basis for drawing that particular inference does not exist in this present case since the boxes in the photographs are different, although very similar.
63. In the absence of the linking factor of an identical photograph being in the prior art and among the registered representations, I agree with the Hearing Officer that it has not been proved on the evidence that the other views of the product sold under the Amazon listings were either the same as the registered representations or sufficiently similar to deprive the registered design of individual character. To hold the contrary would move beyond founding an inference on probabilities to founding it on speculation.

64. Accordingly I dismiss the appeal as regards this registered design.

### **Costs**

65. In normal circumstances the Appellant would be entitled to scale costs on the two appeals on which it has succeeded. Leaving on one side the fact that the Respondent has apparently been dissolved probably making any costs order academic, I am not prepared to make an order for costs in favour of the Appellant.

66. The Appellant brought the difficulties which resulted in these appeals on itself by failing to take the obvious and elementary step of following up its Statement of Case with evidence relating to the pleaded prior art items showing the different views of the products concerned. This failing converted what should have been a very simple case into one which presented the Hearing Officer with a difficult puzzle to solve, not just for the three designs which I have dealt with on appeal but for the others which she had to consider.

67. The fact that the Appellant has ended up being rescued from its own failings on two of the three appeals - by the slenderest of margins - does not in my view justify making a costs order in its favour. The Hearing Officer's costs order for the proceedings below took account of the Appellant's lack of success on the three designs which were the subject of this appeal. For the same reasons, I do not think it is justified to alter that costs order to make it more favourable to the Appellant.

### **Conclusions**

68. In conclusion:

- (1) The appeal is allowed as regards Registered Designs Nos. 6013763 and 6013769 and each is declared invalid on the ground that it is not new (section 1B(1) and (2) of the Registered Designs Act 1949 as amended);
- (2) The appeal is dismissed as regards Registered Design No. 6013764;
- (3) There shall be no order for the costs of the appeal, and the Hearing Officer's order for costs shall stand without revision.

*Martin Howe*

Martin Howe QC  
Appointed Person (Designs Appeals)  
23 December 2021