BL O/0524/26

REGISTERED DEIGNS ACT 1949

IN THE MATTER OF Registered Design No. 6369721 in the name of Freak Athlete Essentials LLP and Invalidation No. 244/24 brought by Slant Board Limited

AND IN THE MATTER OF Registered Design No. 6369724 in the name of Freak Athlete Essentials LLP and Invalidation No. 246/24 brought by Slant Board Limited

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DECISION

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1. This is the decision in respect of two appeals brought by Freak Athlete Essentials LLP ("FAE") against the decisions of Hearing Officer Al Skilton ("the Hearing Officer") each dated 22 January 2026 in respect of the applications to invalidate FAE's Registered Design No. 6369721 (Invalidation No. 244/24) and Registered Design No. 6369724 (Invalidation No. 246/24) brought by Slant Board Limited ("SBL"). In each case the Hearing Officer invalidated FAE's design registration in issue.

2. In each of the invalidation applications SBL relied on the fact that it had, prior to the filing date of the design in issue, dealt in products in the United Kingdom ("the SBL Products") that FAE accepted were identical to the designs in issue. The invalidations turned on the issue of whether those prior dealings by SBL constituted the making available to the public of those designs (and therefore a prior disclosure of the design in issue in each case) or whether SBL's Products were excluded from being such a disclosure by operation of sections 1B (5) and (6) of the Registered Designs Act 1949 ("the Act"). In short, FAE contended that the disclosure by way of the SBL Products amounted in each case to a disclosure "in consequence of information provided or action taken by" FAE for the purposes of s. 1B(6)(d) of the Act, more specifically that the SBL Products were copied from the design of earlier FAE products ("the FAE Products") which had themselves been made available by FAE within the 12

month grace period afforded by section 1B(6)(c) of the Act.

3. The relevant dates are as follows, in reverse chronological order;

   (a) FAE's registered designs were each filed on 3 June 2024.

   (b) The SBL Products relied on as prior art were made available in the UK on 12 and 13 April 2024.

   (c) The disclosure of the FAE Products (relied on by FAE as being disclosure of the registered designs in issue) took place on 17 July 3023 (for Design No. 6369721) and 6 September 2023 (for Design No. 6369724).

4. As the Hearing Officer records in his decisions, in each case both the written submissions of the parties and the evidence before him revealed a significant factual dispute between the parties as to whether or not the designs of the SBL Products relied on had been copied from the earlier FAE Products. In this regard SBL relied on a witness statement from Ms Niska Yang, a representative of its Chinese supplier Rizhao Aegis Fitness Equipment Co ("RAFE"). Ms Yang's evidence was that the designs of the SBL Products were variations to the designs of existing products offered by RAFE and had been created by employees of RAFE in association with SBL after contact by SBL on 14 November 2023. Ms Yang stated that the SBL Products were shipped to the UK on 20 November 2023.

5. In response to this evidence, FAE adduced a statement from Mr Taxak (Head of Product at FAE and co-designer of the FAE designs in issue) dated 13 March 2025 which stated his belief that the RAFE statement was a "misrepresentation" and his view that RAFE did no more than copy the FAE Products. In support of this position Mr Taxak exhibited what purports to be part of a WhatsApp conversation ("the Chat Evidence") said to be between a representative of FAE's Chinese manufacturer, Xiamen Jiameihua Fitness Equipment ("XJFE") and one Nigel Wuwei, apparently SBL's representative in Shanghai, together with an unofficial translation of the chat.

6. In that conversation Mr Wuwei is recorded as asking whether XJFE "*has a Mordic Hyper GHD that can be released to the UK*". The conversation is dated 28 March 2024, over 3 months after the date given in Ms Yang's evidence for the design and shipping of the SBL Products. In FAE's written submissions on the invalidation it relied on the Chat Evidence as showing that Mr Wuwei had expressly requested that

XJFE produce a replica of FAE's Nordic Hyper GHD.

7. Although the Chat Evidence might on its face be said to support a case that Mr Wuwei was seeking to source the FAE's Nordic Hyper GHD product for "release to the UK" by its manufacturer, it is not itself a request that that a replica be made of the FAE design. Further, the fact that the conversation took place some months after the SBL Products had been shipped to the UK (on Ms Yang's evidence) means that it is difficult to see how the Chat Evidence supports a case that the SBL Products were copied from the FAE Products unless Ms Yang's witness statement is to be disbelieved. The Chat Evidence might be said to raise possible questions about the provenance of the SBL Products but it does not on its face provide any evidence that the SBL Products were copied, despite FAE's reliance on it for that purpose.

8. Despite such a significant factual dispute on the evidence, neither party requested permission to cross-examine and the parties requested that a decision be taken by the Hearing Officer on the papers without an oral hearing.

9. In each of the invalidation applications the Hearing Officer rejected FAE's case that the prior disclosures by way of the SBL Products were excluded by operation of sections 1B(5) and (6) of the Act. In consequence he held that the SBL Products amounted to relevant prior disclosures and the invalidations necessarily succeeded in the light of FAE's concession that the designs of the SBL Products were identical to the registered designs in issue.

10. His reasons for that conclusion were essentially the same in each of his decisions, and can be summarised as follows;

    (a) That the designs of the FAE Products were materially different to the designs as later applied for (and registered in the name of) FAE.

    (b) That the SBL Products relied on had been made available to the public subject to the operation of s. 1B(6) of the Act.

    (c) That FAE had not proved on the balance of probabilities that the design of the SBL Products had been copied from the earlier FAE Products. In each of the decisions the Hearing Officer placed significant weight on the fact that the evidence of Ms Yang was not sought to be challenged by FAE in cross-examination.

11. However, as FAE points out, the Hearing Officer did not address expressly the operation of s. 1B(6)(d) of the Act, despite his rejection of FAE's case that the SBL designs had been copied from the FAE Products. Further, in coming to his conclusions under s 1B(6) he did not mention or apply the test under s. 1B(6)(d).

12. Before me FAE was represented by Mr Doherty of Albrights IP Limited and SBL by a director, Mr Corcoran.

SUMMARY OF THE ISSUES IN THE APPEAL

13. By the present appeals FAE contends that the Hearing Officer erred in his approach on each of the invaldations, failing properly to consider the application of section 1B(6)(d) of the Act. As part of that ground of appeal FAE submits that the Hearing Officer was wrong to hold that the SBL Products were not copied from the FAE Products. FAE also contends that the Hearing Officer erred in his comparison of the design of the FAE Products and the registered designs in issue and that such comparison was in any event not relevant to the issues before him under s. 1B(6) of the Act.

14. FAE also seeks to resile, insofar as necessary, from its concession that the designs of the SBL Products are identical to the FAE designs in issue, on the basis that if the Hearing Officer's assessment that the FAE Products are materially different to the FAE designs in issue is correct, then the designs of the SBL Products relied on cannot be identical to the FAE designs either.

15. In respect of the appeal against the decision in Invalidation No. 244/24, FAE applies for permission to adduce further evidence on appeal, which it relies on to bolster its case that the design of the SBL Product relevant to that invalidation was copied from the earlier FAE Product. The further evidence seeks to answer certain points relied on by the Hearing Officer in his analysis of the Chat Evidence which he relied on in coming to his conclusion that the SBL Product was not copied. It takes the form of a further statement from Mr Taxak, who had already given evidence for FAE in the invalidity applications as mentioned above.

16. SBL opposes the admission of further evidence and FAE's application to resile from its concession.

17. On 6 May 2026 I directed that FAE's application for permission to adduce further evidence would be addressed as preliminary issue in Appeal No. 244/24. At the hearing I heard that application first, but in light of the importance to my decision on the application of the extent to which the further evidence would, if admitted, have a material effect on the outcome of the appeal, I informed the parties that I would decide the application after hearing FAE's submissions on the substantive appeal to which the evidence related. In consequence the parties addressed me on the alternate bases that the further evidence was and was not admitted.

APPLICATION TO ADDUCE FURTHER EVIDENCE ON APPEAL

18. The principles governing admission of further evidence on appeal from IPO registry proceedings are well established, and neither party contended that there was any difference between those applicable in respect of trade marks and registered designs. Mr Doherty relied on the summary given by Henry Carr J in *Consolidated Developments Ltd v Cooper (TIN PAN ALLEY Trade Mark)* [2018] EHWC 1727; [2019] F.S.R. 2 at [25] to [27] and [33], which emphasises the importance of the three criteria set down by Denning LJ in *Ladd v Marshall* [1954] 1 W.L.R. 1489, while acknowledging that they are not a straightjacket to the exercise of the relevant discretion. The *Ladd v Marshall* criteria (adjusted to the context of registry hearings) can be summarised as follows:

    (a) The applicant must show that the evidence could not have been obtained with reasonable diligence for use at the earlier hearing;

    (b) The evidence must be such that, if allowed in, it would probably have an important influence on the outcome of the hearing, though it need not be decisive;

    (c) The evidence must be credible, though it need not be incontrovertible.

19. Other points of particular relevance in the present case, taken from the summary given by Henry Carr J. under [33] of *TIN PAN ALLEY* are:

    (a) The admission of fresh evidence on appeal is the exception and not the rule.

    (b) Where the admission of fresh evidence on appeal would require that the case

be remitted for a rehearing at first instance, the interests of the parties and of the public in fostering finality in litigation are particularly significant and may tip the balance against the admission of such evidence.

20. The proposed further evidence seeks to address two issues. The first is whether the term "Nordic Hyper GHD" used in the Chat Evidence (which Mr Doherty contended and I accept was obviously what was intended by the reference to "Mordic Hyper GHD") was a specific reference to FAE's product rather than a generic term, and the second was whether the image of the product within the chat was of the FAE design in issue. These matters are relevant because at [41] of the Hearing Officer's decision in respect of design no. 6369721 he held that the Chat Evidence did not contain an express request by SBL that XJFE produce a replica of FAE's Nordic Hyper GHD, and in coming to that conclusion he held that the evidence did not establish that "Nordic Hyper GHD" was a proprietary name for FAE's product and further that the image of the product in the chat was "clearly not" FAE's design.

21. Both of these conclusions were open to the Hearing Officer on the evidence before him. However, Mr Taxak's further statement provides cogent evidence that the image of the product in the chat was indeed the FAE product and further shows the use of "Nordic Hyper GHD" as a brand name. For the purposes of considering FAE's application, I am prepared to assume that the further evidence establishes that the hearing officer was wrong in fact on those two subsidiary issues. Nevertheless, even on that assumption, I do not consider that allowing the evidence in on appeal would (without more) have an important influence on the outcome of the hearing.

22. In particular, even absent his decision on the two issues to which the further evidence goes, I do not see how the Hearing Officer's could have come to a different conclusion to that expressed at [41] of is decision, namely that the Chat Evidence "did not prove an express request by SBL for XJFE to provide a replica of the FAE design". It does not on its face amount to such a request, and furthermore, in light of the fact that the Chat Evidence post-dates the shipping date of the SBL Products attested to by Ms Yang's evidence, the proposed additional evidence could not further FAE's case on copying unless Ms Yang's evidence were disbelieved.

23. In my view, the further evidence does not satisfy the second of the *Ladd v Marshall* criteria. In particular, it could only materially assist FAE on the substantive issue of copying if it were combined with the remission of the invalidity applications to the

IPO and an application for permission to cross-examine Ms Yang. Mr Doherty stopped short of making such an application, but even if he had done so, such remission and cross-examination would have amounted to significant procedural prejudice to SBL and its affect on interests of the parties and of the public in fostering finality in litigation are would, on the principle set out under 19 (b) above, have amounted to a significant factor against admitting the evidence.

24. Furthermore, I do not consider that FAE has satisfied the first of the *Ladd v Marshall* criteria. Mr Doherty fairly accepted that the further evidence could have been adduced previously but submitted that the need for it only became apparent in the light of the Hearing Officer's decision. In particular, he contended that the points considered by the Hearing Officer were matters that were not raised by either party but had occurred to the hearing officer on his consideration of the matters on the papers, and in consequence FAE was not aware of the apparent lacunae in their evidence until they saw his decision.

25. Although a failure to establish the first *Ladd v Marshall* criterion (that the evidence was not reasonably available previously) is not an absolute bar to the admission of further evidence, the applicant must at least provide a good explanation for why the evidence was not adduced despite being available. I am sceptical that the fact that a party only realises a defect in their evidence when seeing the decision is capable of providing a good reason for adducing further evidence on appeal. As Lewison LJ observed in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] F.S.R. 29 at [114] (and Herny Carr J repeated at [19] of *TIN PAN ALLEY*), the trial is not a dress rehearsal: it is the first and last night of the show.

26. In any event, on the facts of the present case I consider that FAE has not provided a sufficiently good explanation for why the evidence was not adduced previously. The need for FAE to establish that its product was referred to specifically in the Chat Evidence was a fundamental point that underpinned the submission that they wished to make. As I have held, the conclusion reached by the Hearing Officer was open to him on the evidence before him. The fact that FAE did not provide further evidence that was available to them was a choice that they took at the time, and the fact that they did not realise the defect in their evidence at the time is not a good reason for them to be given a second bite of the cherry. In my judgment FAE's explanation does not provide justification for why proper evidence of the entirety of the factual matters

relied on by FAE in support of their case on the Chat Evidence was not provided in a timely fashion.

27. With those matters in mind, but particularly in light of the fact that the evidence would not (without cross examination of Ms Yang) have an important influence on the outcome of the invalidity applications, I refuse the Appellant's application for permission to adduce and rely on the further statement of Mr Taxak.

STANDARD OF APPEAL

28. There was no dispute between the parties as to the approach to be taken on this appeal. The principles are set out in the well-known cases of *Axogen v Aviv Scientific* [2022] EWHC 95 (Ch), *Lifestyle Equities v Amazon* [2024] UKSC 8 and *Iconix v Dream Pairs* [2025] UKSC 25. FAE in particular relied upon the principles recited by Joanna Smith J. in *Axogen* at [24]-[25]. SBL drew my attention to REEF [2003] RPC 5.

29. I have sought to apply those principles. Absent an error of law, it is not enough that a different tribunal might have reached a different conclusion; I must be satisfied that the Hearing Officer was plainly wrong in the conclusion he reached, in the sense of being outside of the bounds within which reasonable disagreement is possible. In the case of a multifactorial assessment (such as assessment of similarity between designs) in the absence of a distinct and material error in the approach of the Hearing Officer, the appellate tribunal should show real reluctance, though not the very highest degree of reluctance, to interfere (as explained in REEF).

APPEAL 244/24

30. Although the Hearing Officer approached the issues before him with care, I consider that FAE is correct in its primary submission that he fell into error in in failing to address s. 1B(6)(d) of the Act, and that in consequence he failed properly to consider whether the disclosure of the (admittedly identical) SBL Product on 12 April 2024 fell to be excluded by s. 1B(5) of the Act. The relevant parts of s. 1B provide as follows (emphasis added):

(1) A design shall be protected by a right in a registered design to the extent that the design is new and has individual character.

(2) For the purposes of subsection (1) above, a design is new if no identical design or no design whose features differ only in immaterial details has been made available to the public before the relevant date.

…

(5) For the purposes of this section, a design has been made available to the public before the relevant date if—

(a) it has been published (whether following registration or otherwise), exhibited, used in trade or otherwise disclosed before that date; and

(b) the disclosure does not fall within subsection (6) below.

(6) A disclosure falls within this subsection if—

….

(d) it was made by a person other than the designer, or any successor in title of his, during the period of 12 months immediately preceding the relevant date in consequence of information provided or other action taken by the designer or any successor in title of his; or

31. Without the assistance of an oral hearing, the Hearing Officer failed to focus on s. 1B(6)(d) of the Act, indeed he failed to set out the words of sub-section (6)(d) at any part of his decision, despite addressing other aspects of sub-section 6. However, it is important to note that although the Hearing Officer did not address s. 1B(6)(d) in terms, he carefully considered and rejected the only case advanced by FAE under that section, namely that SBL had copied the earlier FAE Products. In consequence, I was troubled as to whether or not the Hearing Officer's error was one of form rather than substance.

32. Having considered the detail of the Hearing Officer's judgment with care, and in particular the possibility that his comparison of the FAE Hyper Nordic GHD launched in July 2023 with the registered design (which in my view was not relevant to any issue before him) might have contaminated his consideration of the issues, I

have formed the view that his error was a substantive one, and that in consequence it falls to me to consider the evidence afresh. This has the further effect of rendering FAE's application to resile from its concession that the SBL Product was identical to the design otiose, in that I do not consider that the concession has any impact on the issue of copying for the purposes of s. 1B(6)(d).

33. The question for me is therefore whether FAE has discharged the burden upon it to establish that the SBL Product was copied from (or otherwise made in consequence of information derived from) the FAE Nordic Hyper GHD product published in July 2023. Taking into account all of the evidence that was before the Hearing officer, I share his conclusion that FAE has not proved such copying or derivation on the balance of probabilities.

34. As described above, there is clear conflict of evidence between the parties on this issue. SBL has adduced evidence that clearly states that the SBL Products were designed in November 2023 by RAFE in combination with Mr Corcoran of SBL, and were based on pre-existing RAFE designs. Although it is possible that the RAFE designs (whether before or after Mr Corcoran's involvement) were in some way derived from the FAE Products, it is equally possible that the reverse is true or that both sets of products derive from a common antecedent. When considering the likelihood of those scenarios, I recognise the force in Mr Doherty's submission that the similarities between the designs in issue suggest derivation of some sort, but in the absence of cross-examination of Ms Yang I am unable to conclude that her account is false, which it would have to be on the case advanced by Mr Doherty, namely that Mr Corcoran asked RAFE to copy the FAE Products. Further, it is possible that the "derivation" suggested may have taken place as a result of copying other way around (from RAFE's earlier product to FAE) or from a common antecedent. Without cross-examination it is not possible to determine which of these took place, if any, and the burden is on FAE to establish that s. 1B(6)(d) applies.

35. Mr Corcoran submitted that the similarities between the designs in issue were merely a result of the functional similarities between the products. Again, I recognise that this is a possibility, although it had not been advanced or addressed in evidence, but it seems unlikely to me that such very close similarities could be so explained. However, the fact remains that in the absence any application by FAE to challenge the evidence of Ms Yang by cross-examination, it would not be fair to go behind her

account, which is that RAFE designed the SBL Products in issue. In consequence there is a clear conflict of evidence and FAE has failed to establish the copying for which it contends.

36. In this regard, I agree with the following statement made by the Hearing Officer at [42] of his decision when considering the issue of copying:

"SBL filed a witness statement that supports its case, provided submissions that disagree with FAE's case and states that it is aware that FAE have accepted that SBL's prior disclosure is identical to the contested design. It has reiterated these points throughout the proceedings. I find nothing exceptional in this approach. If FAE wanted to challenge SBL's witness evidence the correct course of action would have been to request cross-examination of the witness in order to test their evidence or provide its own evidence that supported its case. It has not done so."

37. FAE has not established that SBL copied or otherwise derived the SBL Products from the FAE Products. The SBL Product is therefore not excluded from being a prior disclosure by operation of s. 1B(5) and (6)(d) of the Act In consequence, Registered Design No. 6369721 stands to be invalidated in light of SBL's concession that it is identical to the earlier SBL design. Appeal 244/24 is dismissed.

APPEAL 246/24

38. Although the Hearing Officer addressed the two invalidation applications separately, there is a strong commonality of reasoning between them, including in his failure to address s. 1B(6)(d) properly in his decision, but his finding that FAE has not established copying.

39. In consequence, and for the same reasons given above in the context of Appeal 244/24, I hold that the Hearing Officer did fall into error in his approach to the invalidations but that when I consider the evidence myself, I again reach the same conclusion as he on the issue of copying.

40. There was a conflict of evidence as to the provenance of the SBL Products, and in the absence of a challenge to the evidence of Ms Yang by cross-examination, FAE has FAE has failed to demonstrate on the evidence before the Hearing Officer that the SBL Products were copied or otherwise derived from the FAE Products.

41. The SBL Product is therefore not excluded from being a prior disclosure by operation of s. 1B(5) and (6)(d). In consequence, Registered Design No. 6369724 stands to be invalidated in light of SBL's concession that it is identical to the earlier SBL design. Appeal 246/24 is dismissed.

Conclusion

42. For the reasons given above I have dismissed both of the appeals before me. However, the finding that FAE has not established copying is based to a very significant effect on the procedural consequences of FAE not having chosen to cross-examine Ms Yang, and should not be taken to amount to a general finding that SBL or Ms Yang did not copy the FAE Products in issue. I expressly make no finding of fact on the issue of copying, finding the matter not proved either way. In consequence, I find only that FAE has not established in these proceedings that s. 1B(6)(d) applied to the SBL Products based on the issue of whether the SBL Products were copied from the particular YouTube disclosures relied on. I make no more general finding on the issue of derivation.

Disposition and costs.

43. The Appeals are dismissed.

44. In the proceedings below SBL failed to complete the required pro-forma for costs purposes when invited to do so by the Hearing Officer and in consequence were awarded costs limited to the official fee of £48 in each case. Mr Corcoran sought to persuade me that if the appeals were successful I should revisit the costs award at first instance but provided no good explanation for SBL's default and I decline to do so. The costs awards made by the Hearing Officer stand unchanged.

45. With regard to the appeal costs, SBL has provided a schedule in which it estimates its costs of preparing its response to the appeals at £570 (reflecting 30 hours work) and seeks a further sum of £190 in respect of the costs incurred "as a result of the need to consolidate submissions, review previously filed costs schedules, prepare [its costs submissions] and address procedural correspondence on reopening of this matter", for which it claims costs for a further 10 hours work.

46. SBL has not been successful in its attempt to recover costs of the first instance proceedings and any costs connected with that application and the calculation of its first instance costs are therefore not recoverable.

47. I therefore direct that FAE pay SBL;

(a) £570 in respect of the costs of the appeals; and

(b) £96 in respect of the proceedings before the Hearing Officer.

Amounting to a total of £666, to be paid within 21 days of the date of this decision.

Tom Moody-Stuart KC

The Appointed Person

23 June 2026