

What do Six Nations Rugby Union referees have in common with the UK IPO Appointed Person?

There is huge pressure on referees to make the right decisions in big sports matches, and the Television Match Official (TMO) in Rugby Union has been cited as an example of how technology can help with this process.

The speed of the modern game makes it almost impossible for the referee to see everything, even with the help of the two touch judges, and often the final moments before a try is scored can be frenetic. As the attacking team surges over the line any number of questions can arise, such as whether the ball was grounded or whether the foot of the try scorer was in touch.

If the referee is not certain of the correct decision, the referee can consult the TMO who will have up to 20 possible different camera angles. The TMO can display slow motion replays on the screen for the referee to review.

However, before a question is referred to the TMO regarding a potential try, the referee will make an on-field decision based on what saw during the live play. It is only if the replays provided by the TMO clearly show that this on-field decision was wrong that the decision will be overturned.

This leads us to the decision in [O/837/21](#) in which Dr Brian Whitehead sat as the Appointed Person, hearing an appeal of an opposition decision issued by the UK IPO. In the original decision, the Hearing Officer held that the marks DIAMOND FELINE for pet litter and various DIAMOND marks for pet food were not similar and rejected the opposition.

The appeal explored five points, with the Appellant asserting:

- a) First, the Hearing Officer was wrong to decide that there is only a low degree of similarity of the goods.
- b) Secondly, she erred in the assessment of inherent distinctiveness of S&K's DIAMOND marks.
- c) Thirdly, she erred in finding the evidence to be insufficient to demonstrate that the DIAMOND marks had enhanced distinctiveness.
- d) Fourthly, she erred in finding no likelihood of direct or indirect confusion.
- e) Finally, the totality of all errors led to a result no reasonable Hearing Officer could reach.

From the decision on points a) to d) it is clear that Dr Whitehead's views are not completely aligned with the decision of the Hearing Officer, but he nonetheless holds that the Hearing Officer's decision on each point was not obviously wrong and so there is no appealable error of principle.

In relation to the last point Dr Whitehead commented:

"Were I deciding this matter myself from scratch, I would probably have held that there is a likelihood of at least indirect confusion, and would therefore probably have upheld the opposition. Of course, though, my own views are irrelevant unless I am satisfied that the Hearing Officer was wrong ... Accordingly, although not without some reservations, I must reject this final ground of appeal."

Coming back to the Rugby Union analogy, the on-field decision by the Hearing Officer/referee was that the opposition should not succeed and on review by the Appointed Person, this

decision was not clearly wrong. The original decision was therefore upheld and the appeal dismissed.

This decision highlights the fact that appeals to the UK Appointed Person are a review of the decision, not a reassessment, making it difficult to successfully appeal as further explained in these previous articles. [\[Links\]](#)

If you need input in relation to the merits of an appeal from the UK IPO then please contact the author for expert advice.