

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION m 2022203
BY ARSHAD JAVED
TO REGISTER THE TRADE MARK



AND

IN THE MATTER OF OPPOSITION
THERE TO UNDER OPPOSITION m 44459 BY
MOHAMMED HANIF

TRADE MARKS ACT 1994

IN THE MATTER of trade mark
application m2022203 by
Arshad Javed

5 and

IN THE MATTER OF opposition
thereto under opposition m44459
by Mohammed Hanif

DECISION

10 Arshad Javed applied on 25 May 1995 to register the mark HURRY ME A CURRY (in the form shown below) in classes 29 and 42. The class 29 application was in respect of :

“Chilled and frozen Indian meals consisting of meats and vegetables with rice and a curry sauce.”

The class 42 application was in respect of:

15 “Providing of food and drinks.”

The mark, reproduced below, was advertised for opposition purposes on 24 January 1996.



The application (in both classes) is opposed by Mohammed Hanif. I summarise the grounds of opposition as follows:

- 5 Ž Section 5(2) - The opponent is the proprietor of an earlier registration of the mark HURRY CURRY in respect of curry powder.
- Ž Section 5(3) - Insofar as the goods/services of the application in suit are not similar to the opponent's earlier registration, it is claimed that the opponent's mark has a reputation in the United Kingdom, and that use of the mark applied for would take unfair advantage of or be detrimental to the distinctive character or the repute of the earlier trade mark.
- 10 Ž Section 5(4)(a) - The opponent claims to be able to prevent use of the applicant's mark by virtue of the law of passing off.
- Ž Section 3(6) - The opposition under section 3(6) is based on the conduct of the applicant and/or the nature of the mark in suit.

15 In response, the applicant filed a counterstatement admitting the existence of the opponent's prior registration, but denying each of the grounds pleaded.

Both parties ask for an award of costs in their favour.

Neither party has requested a hearing; accepting instead that the Registrar should make his decision on the basis of the written evidence. Acting on the Registrar's behalf and after a careful study of the papers, I now give this decision.

20 The Evidence

Only the opponent filed evidence in these proceedings. For the most part, the evidence is concerned with establishing the extent to which the opponent's earlier trade mark has been used and the reputation established as a result of that use. As such, the evidence has been adduced in support of the opposition under section 5(3) and section 5(4)(a). (At this stage I will simply note that there appears to be no evidence in support of the opposition under section 3(6) — bad faith.)

30 However, in the circumstances I have decided this matter solely on the basis of the section 5(2) ground of opposition, having regard to the opponent's earlier registration. It is well established that the similarity, or otherwise, of two marks is a jury question and it is for the judicial eye alone to decide. Consequently, the evidence has played no part in this decision, and I do not propose to review it in detail, other than to extract the following information concerning the opponent's earlier registration:

<u>No</u>	<u>Mark</u>	<u>Class</u>	<u>Goods</u>
1152822	HURRY CURRY	30	Curry Powder

Section 5(2)(b)

This section of the Act reads:-

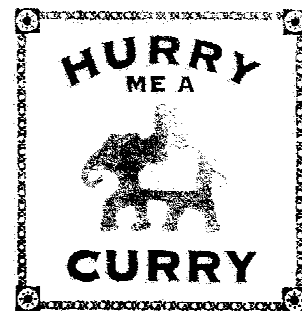
‘(2) A trade mark shall not be registered if because -

(a)

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.’

Mr Justice Jacob has proposed a test for similar goods in the “Treat” case¹, but on this occasion I have not found it necessary to rely upon any test because it is clear to me that the specifications overlap. The goods specified in the application in suit are “chilled and frozen Indian meals consisting of meats and vegetables with rice and **a curry sauce**”. The opponent’s prior registration, dated 21 April 1981, covers “curry powder”; an obvious and essential ingredient, it seems to me, of any meal including a curry sauce. The service (in class 42) identified in the application in suit concerns the “providing of food and drinks”. Having regard to the opponent’s registration covering curry powder, I think that there must be a significant likelihood of confusion on the part of the public if a similar mark were to be registered in respect of a service providing food and drinks.

Comparing the two marks, I note immediately that the two words of the opponent’s mark, HURRY CURRY, are also the most distinctive elements of the applicant’s mark (reproduced right for convenience).



As part of the process of comparing these marks, it is also appropriate that I bear in mind the decision of the Court of Justice of the European Communities in *Sabel v Puma*², and in particular paragraph 23 which reads:

“23. That global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components. The wording of Article 4(1)(b) of the Directive — “... there exists a likelihood of confusion on the part of the public ...” — shows that the perception of marks in the mind of the average consumer of the type of goods or services in question plays a decisive role in the global appreciation of the likelihood of confusion. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details.”

¹British Sugar plc v James Robertson & Sons Ltd [1996] RPC 281.

²Sabel BV v Puma AG, Rudolf Dassler Sport [1998] ETMR 1

I am mindful too, of the words of the Privy Council in *de Cordova and others v Vick Chemical Co*³ at page 106:

5 “A trade mark is undoubtedly a visual device; but it is well-established law that the
ascertainment of an essential feature is not to be by ocular test alone. Since words can form part
or indeed the whole, of a mark, it is impossible to exclude consideration of the sound or
significance of those words..... The likelihood of confusion or deception in such cases is not
disproved by placing the two marks side by side and demonstrating how small is the chance of
error in any customer who places his order for goods with both the marks clearly before him, for
orders are not placed, or are often not placed, under such conditions. It is more useful to observe
10 that in most persons the eye is not an accurate recorder of visual detail, and that marks are
remembered rather by general impressions or by some significant detail than by any photographic
recollection of the whole.”

15 In the light of these authorities I find that, however I approach the applicant’s mark (whether I
analyse the various features or whether I assimilate the general impression of the mark as a
whole), it shouts out the two words — HURRY CURRY. Thus in my view the applicant’s mark
is similar to the opponent’s earlier registered mark; so similar that, having regard also to the
similarity of goods/services, there is a likelihood of confusion on the part of the public.
Consequently the opposition under Section 5(2)(b) succeeds.

20 There is now no need for me to decide whether the opposition would also have succeeded under
the remaining grounds of opposition and in the circumstances I decline so to do. In other
circumstances I might have felt obliged to express an opinion nonetheless; for example, to assist
an appellate court in the event that I am found to be wrong in relation to section 5(2)(b).
However, the likelihood of confusion between these two marks is so apparent to my mind that if I
am found to be wrong on this point, then any opinion I might tender regarding the other grounds
25 pleaded would clearly be of little value to a higher Court.

Costs

30 It seems to me that the Registrar accepted this application in error, and for that reason I am
reluctant to award costs against either of the two parties in these proceedings. Nevertheless, the
opponent has been successful in these proceedings and he is entitled to a contribution towards the
cost of opposing the application. I therefore order the applicant (Arshad Javed) to pay to the
opponent (Mohammed Hanif) the sum of **£350**.

Dated this 19th day of June 1998

35 **Mr S J Probert**
Principal Hearing Officer
For the Registrar, the Comptroller-General

³[1951] 68 RPC 103. Page 106 lines 17-23.