TRADE MARKS ACT 1994

IN THE MATTER OF Trade Mark Registration Nº: 2238249 in the name of Zorbit Babycare Limited and

An Application under Nº: 12468 for a Declaration of Invalidity by Personality Quilts Limited.

1. The proprietor of registration Nº. 2238249 - BO BO's - is listed as Zorbit Babycare Limited (ZBL), Trencherfield Mill, The Pier Wigan, Lancashire, WN3 4EF, United Kingdom. The goods specified with the registration are:

> 'Bedding, towels; textile piece goods; bedding; towels; blankets; bed linen; coverings for furniture; curtains; fabric; household linen; table linen',

all in Class 24. The mark was applied for on 5th July 2000.

2. On 27th April 2001 Personality Quilts Limited (PQL) applied for invalidation of the mark under s. 47(2)(a) of the Act, alleging that it was likely to be confused with an earlier trade mark under s. 5(2)(b) of the Act. The earlier mark cited is BEEBO, Nº 1207408, registered for:

> 'Towels (textile) for babies; cot covers; blankets and sheets, all for cots or perambulators; textile piece goods',

also in Class 24, and applied for on 18th November 1983.

3. A Counterstatement was provided by the registered proprietor, denying the above ground. Both parties ask for costs to be awarded in their favour.

4. The matter was to be heard on 26th June 2002. Mr. Buchan of Eric Potter Clarkson appeared for the registered proprietors (ZBL); while Mr. Mitcheson of Counsel appeared for the applicants (PQL).

EVIDENCE

5. In a Witness Statement Mr. Jeremy Peter Turner, the Managing Director of PQL, states that the mark BEEBO has been used since 1983 'in respect of towels (textile) for babies; cot covers; blankets and sheets for cots or perambulators'. Turnover figures are provided:

Year	Turnover
1985	1,013,709
1986	1,151,525
1987	1,269,114
1988	1,383,217
1989	1,500,246
1990	1,743,895
1991	1,882,806

1992	1,705,996
1993	1,250,847
1994	1,414,226
1995	1,597,904
1996	2,545,787
1997	2,250,028
1998	1,902,190
1999	1,910,702
2000	2,809,770

Mr. Turner explains that approximately 5% of these figures represent goods exported (mainly to Ireland). Apparently the applicants commenced use of the name BEEBO, in relation to clothing for babies and children, in 1994 and the turnover since then has included sales of clothing, amounting to approximately 20% of that shown.

6. PQL's remaining evidence consists of a survey. This is appended to the Witness Statement of Mr. John Gordon Lawrence, a retired partner of the applicants' agents, who describes the survey, and its results, in the following terms:

> '2. On 28 June 2001, I sent a letter and Questionnaire to fifty customers of Personality Quilts Limited. Accompanying this Statement, and marked Exhibit JGL 1, are copies of that letter and Questionnaire.
>
> 3. Twenty-seven Questionnaires were returned to my firm. Accompanying this Statement, and marked Exhibit JGL 2, are copies of those twenty-seven Questionnaires.
>
> 4. On 12 July 2001 I wrote to three randomly selected respondents to my letter of 28 June 2001. Accompanying this Statement, and marked Exhibit JGL 3, are copies of those three letters.
>
> 5. I received three replies to my letters of 12 July 2001. Accompanying this Statement, and marked Exhibit JGL 4, are copies of those replies.'

7. A copy of the questionnaire is shown at the Annex to this Decision.

8. I have carefully studied the responses to this document and note that, as Mr. Lawrence states, 27 replies were received. Of these, 19 associated the BO-BO's mark with PQL. On solicitation, three of these gave their reasons for this association in the following terms:

> 'Further to your letter of 12th July I confirm my reasons for my belief that a BO-BO product could be manufactured or supplied by Personality Quilts Limited, is that we have ranged bedding produced with packaging under the brand BEE BO. The goods in question are also bedding products and the name is very similar, hence the connection.'
>
> 'Further to .. the questionnaire we completed we can confirm that immediately we saw the name "Bo Bo" we thought of Personality Quilts. We have been purchasing goods from Personality Quilts for over 10 years and the brand name that is used for their goods is "Bee Bo" which at first glance is very similar to the name "Bo Bo".'

'The reason I associated the name Bo-Bo to Personality Quilts Ltd is that it is very similar sounding to P.Q.s name Bee-Bo with almost the same spelling.'

9. ZBL's evidence comes in one Witness Statement by their Finance Director, Mr. Richard G Bathurst. Mr. Bathurst explains the history of the registration of the mark in suit, and also gives his reasons why he believes that it will not be confused with the applicants' mark. I will refer to these submissions as they become relevant to this decision.

DECISION

10. S. 47(2)(a) states:

> 'The registration of a trade mark may be declared invalid on the ground –
>
> (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
>
> (b) …. ,
>
> unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.'

11. S. 5(2)(b) is cited by the applicants:

> '(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.'

12. Clearly, PQL's mark BEEBO is an earlier mark, under s. 6(1), for the purposes of s. 5(2)(b).

13. The case law in relation to this section is now well established. In particular, I consider the following relevant. In *Sabel BV v. Puma AG, Rudolf Dassler Sport* [1998] E.T.M.R. 1, paragraph 22 states:

> '…it is clear from the tenth recital in the preamble to the Directive that the appreciation of the likelihood of confusion "depends on numerous elements and, in particular, on the recognition of the trade mark on the market, of the association which can be made with the used or registered sign, of the degree of similarity between the trade mark and the sign and between the goods or services identified". The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case.'

This 'global appreciation' is, perhaps, something of a restatement of the passage cited by Mr. Buchan in *Pianotist Company Ltd. v Orchestrelle Company* [1906] 23 RPC 777, which

applied under the Old (pre-1938) Law (and is now not strictly applicable), but I have restated here, anyhow:

> 'You must take the two words. You must judge of them both by their look and by their sound. You must consider the goods to which they are to be applied. You must consider the nature and kind of customer who would be likely to buy those goods. In fact, you must consider all the surrounding circumstances; and you must further consider what is likely to happen if each of these trade marks is used in a normal way as a trade mark for the goods of the respective owners of the marks. If, considering all those circumstances, you come to the conclusion that there will be a confusion - that is to say - not necessarily that one will be injured and the other will gain illicit benefit, but that there will be a confusion in the mind of the public, which will lead to confusion in the goods - then you may refuse the registration, or rather you must refuse the registration in that case.'

Sabel, in paragraph 23, expands on elements of the comparison to be made, and on the importance of the customer in question:

> '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.'

14. *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV* (Case C-342/97) [1999] E.T.M.R. 690 provides further information on the characteristics of the 'average consumer', at paragraph 26:

> '26. For the purposes of that global appreciation, the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect (see, to that effect, Case C-210/96 *Gut Springenheide and Tusky* [1968] E.C.R. I-4657, paragraph 31). However, account should be taken of the fact that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind. It should also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question.'

15. I also note, from *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.* (Case C-39/97) [1999] E.T.M.R. 1, at paragraph 17,

> '17. A global assessment of the likelihood of confusion implies some interdependence between the relevant factors, and in particular a similarity between the trade marks and between these goods or services. Accordingly, a lesser degree of similarity between these goods or services may be offset by a greater degree of similarity between the marks, and *vice versa*. The interdependence of these factors is expressly mentioned in the tenth recital of the preamble to the Directive, which states that it is indispensable to

give an interpretation of the concept of similarity in relation to the likelihood of confusion, the appreciation of which depends, in particular, on the recognition of the trade mark on the market and the degree of similarity between the mark and the sign and between the goods or services identified.'

16. Finally, I also note the effect of the reputation a mark in the market place has on its 'potency' as an indicator of origin, as measured by the reaction of the average consumer. In *Sabel* (paragraph 22 and 23) the Court stated:

> '.. Article 4(1)(b) of the Directive does not apply where there is no likelihood of confusion on the part of the public. In that respect, it is clear from the tenth recital in the preamble to the Directive that the appreciation of the likelihood of confusion "depends on numerous elements and, *in particular, on the recognition of the trade mark on the market*, of the association which can be made with the used or registered sign, of the degree of similarity between the trade mark and the sign and between the goods or services identified". The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case
> ….
>
> …the more distinctive the earlier mark, the greater will be the likelihood of confusion. It is therefore not impossible that the conceptual similarity resulting from the fact that two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive character, *either per se or because of the reputation it enjoys with the public*.' (Emphasis mine).

Canon confirms this view:

> '18. … the more distinctive the earlier mark, the greater the risk of confusion … Since protection of a trade mark depends, in accordance with Article 4(1)(b) of the Directive, on there being a likelihood of confusion, marks with a highly distinctive character, either *per se* or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character.'

17. These various factors were brought together in *BALMORAL Trade Mark* [1999] R.P.C. 297, a decision of the Appointed Person, who constructed the following query:

> 'The tenth recital to the Directive and these observations of the Court of Justice indicate that an objection to registration under Section 5(2) of the Act should be taken to raise a single composite question: are there similarities (in terms of marks and goods or services) which would combine to create a likelihood of confusion if the 'earlier trade mark' and the sign subsequently presented for registration were used concurrently in relation to the goods or services for which they are respectively registered and proposed to be registered?'

18. In my view, for the marks at issue in this case, I must come to the conclusion that the answer to this question is no, and the application must fail. My reasons for coming to this result are as follows.

Distinctiveness, and inherent capacity to distinguish, of the earlier mark

19. It seems to me that the mark BEEBO possesses a tolerable inherent capacity to distinguish the goods at issue. It was suggested at the hearing that if the word had any semantic evocation at all, it might be taken as the sort of nonsense typically spoken by an adult to a very young child in mimicry of what might be called 'baby-talk'. Such 'nonsense' words makes some sense for the goods in this case: thus it is allusional, but not obviously so. This gives the mark a fair inherent capacity to distinguish. In other words, by nature, it is a reasonably strong mark.

20. Is this innate strength enhanced by its reputation in the marketplace? On the issue of distinctiveness in fact, I note the following from *Dallas Burston Healthcare Ltd's Trade Mark Application* [2001] WL 395219, a decision of the Appointed Person, at paragraph 14:

> 'In my judgment, I believe what the ECJ had in mind was the sort of mark which by reason of extensive trade had become something of a household name so that the propensity of the public to associate other less similar marks with that mark would be enhanced.'

On the basis of the evidence I have seen, I cannot come to the conclusion that PQL enjoy this level of reputation under their mark with purchasers of their products: the trade as a whole or with consumers in general. I note the following comments from the ECJ in *Lloyd*:

> '22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of May 4, 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v. Huber and Attenberger* [1999] E.C.R. I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).'

21. There is turnover evidence only. Mr. Mitcheson seemed to believe that this, coupled with the packaging in JPT 1, amounted to enough to find a reputation for the purposes of s. 5(2)(b). Mr. Buchan was sceptical about this, and so am I. There is some of the material cited in *Lloyd* before me. But not nearly enough. In particular, I have no idea of the market share held by PQL or the proportion of the relevant public that recognises their marks as a mark of trade. I do not believe that I can infer a reputation that enhances distinctiveness for the purposes of s. 5(2)(b). I thus an left with *a prima facie* comparison of an earlier mark, but one that is possessive of a fair, inherent capacity to distinguish.

Similarity of goods

22. The goods at issue are:

ZBL's goods	PQL's goods.
'Bedding, towels; textile piece goods; bedding; towels; blankets; bed linen; coverings for furniture; curtains; fabric; household linen; table linen', all in Class 24.	'Towels (textile) for babies; cot covers; blankets and sheets, all for cots or perambulators; textile piece goods.'

23. At the hearing, Mr. Mitcheson, for the applicants, considered the following goods in his clients' specification to be identical to those of ZBL's: Towels, blankets and textile piece goods. He also regarded cot covers and sheets as identical.. I agree. Certainly, this is where I will begin my comparison - on the basis of the principle that a lesser degree of similarity between goods may be offset by a greater degree of similarity between the marks, and *vice versa* (paragraph 15 above), the applicants cannot hope to succeed on the other goods listed, if they cannot win on these.

Similarity of the marks

24. I have no doubt that the marks in question are similar. The question is, are they confusingly so? The applicants cited the survey as evidence of confusion. I examine this next.

The Survey

25. *KERLY'S LAW OF TRADE MARKS AND TRADE NAMES* (13th Edition; paragraph 16-105), draws a distinction between the statistical analysis of responses from a substantial number of persons asked a series of questions according to explicit detailed instructions (a 'survey' in the strict sense) and any organised exercise whose objective is to seek and obtain evidence from a number of members of the public or trade. The latter is really a 'witness collection programme' or 'witness gathering exercise'. The 'survey' submitted here falls, perhaps, between the two, with more of a nod in the direction of the latter.

26. I was referred to the Raffles criteria (see *Imperial Group plc v Philip Morris Ltd.* [1984] 17 RPC 293, at 302ff), and have thus decided to apply them. They are listed as follows, from the headnote in that case, as:

> 'If a survey is to have validity:
>
> (a) the interviewees must be selected so as to represent a relevant cross-section of the public;
>
> (b) the size must be statistically significant;
>
> (c) it must be conducted fairly;
>
> (d) all the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved;

(e) the totality of the answers given must be disclosed and made available to the defendant;

(f) the questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put;

(g) the exact answers and not some abbreviated form must be recorded;

(h) the instructions to the interviewers as to how to carry out the survey must be disclosed; and

(i) where the answers are coded for computer input, the coding instructions must be disclosed.'

27. Mr. Mitcheson was convinced that the survey carried out on behalf of his clients was not subject to the same criticisms directed at many of these exercises in the past. I'm not so sure, and see the survey as of little evidential value. I reach this conclusion from a consideration of the *Raffles* 'heads' as follows.

The interviewees must be selected so as to represent a relevant cross-section of the public

28. This is clearly not the case in this matter. In his Witness Statement, Mr. John Gordon Lawrence states that the letter on which the survey was based was sent to 'fifty customers of Personality Quilts Limited'. The applicants have made much of the sales of their products under the BEEBO name. There is little doubt that the 'population' of the survey is dominated by those familiar with the mark, which the response indicates, and little else, in my view.

29. This is largely because the criticism previously made of the sales data above – that the size of the market is not specified – can also be applied here. To what extent is '50 customers' of Personality Quilts Limited representative of the trade? And to what extent are *these* 50 customers representative of the trade as a whole? I do not know.

30. Finally, and Mr. Mitcheson recognised this, the survey has no comment to make on the reactions of the public. This constituency is completely ignored.

The size must be statistically significant

31. The criticism here is related to the first point. How can we know the survey has any statistical validity, without some idea of the size of this market, expressed in terms of the numbers of traders, or better still, the turnover of the traders contacted set against that of the relevant market as a whole?

It must be conducted fairly

32. This is a general requirement: in my view it governs the entire conduct of a survey as measured against the other *Raffles* heads. In short, a survey should not be unfair, both to those who take part (in the manner in which they are drawn into it, the interpretation given to their

responses and conclusions extracted from them), but also, in general, to the survey's construction, analysis and presentation. That is, in relation to all these facets, it must be impartial, and free from bias, discrimination and dishonesty.

33. Mr. Mitcheson has asked me to make various inferences from the survey. For example, on the species of confusion under s. 5(2)(b), he indicated there was direct confusion demonstrated, and confusion as to economic association. In my view these are findings 'too far' for a survey of this nature. I cannot help but feel that this survey is so flawed as to be almost completely unreliable, and that to draw from it the conclusions asked, would be an example of 'unfairness' to ZBL.

<u>All the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved; and the totality of the answers given must be disclosed and made available to the defendant; the exact answers and not some abbreviated form must be recorded; the instructions to the interviewers as to how to carry out the survey must be disclosed; and where the answers are coded for computer input, the coding instructions must be disclosed</u>

34. I have included these points together (though some are of no relevance to this survey) as they are really about the surrounding circumstances of the survey, and disclosure thereof. Mr. Mitcheson laid great store in this, stating that:

> 'Mr. Lawrence has adduced all the evidence in relation to this survey. In other words, he has exhibited the letter that he sent out, he has exhibited the blank survey, and he has exhibited all the responses which he received, and there is no suggestion that this is not the case….'

35. I'm not sure this helps the applicants. These particular *Raffles* heads are really about transparency: a survey must not only be fair, it must be seen to be fair. As a consequence, absence of the detail specified heads are capable of damning a survey with convincing results, but not able to save one that fails under the other heads.

36. In fact, full disclosure of the conduct of a survey might just show how flawed it was. As for this example, a lot of information has been given – not all, as Mr. Buchan pointed out – but this, of itself, is not enough to validate the survey anyway.

<u>The questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put.</u>

37. Mr. Mitcheson was convinced the one question asked in the letter was not leading; Mr. Buchan was convinced that it was. In *Raffles*, Whitford J states:

> 'Great importance inevitably attaches to the way in which the questions are cast. It is very difficult in connection with an exercise such as this to think of questions which, even if they are free from the objection of being leading, are not in fact going to direct the person answering the question into a field of speculation upon which that person would never have embarked had the question not been put.'

38. Mr. Mitcheson did state, however, that the question did encourage the respondents to speculate as to the origin of the goods. I accept that it is difficult not to enlist this response

and ask a question that has at least some relevance to the survey. However, I think the question goes beyond this for the following reasons.

39. A question can be 'leading' when asked of one person, but not of someone else, due to the experience and knowledge of one or the other. In the light of their previous trade with PQL, it is hardly a surprise many of the respondent's responses were such as they were.

40. The letter obviously was sent for a purpose; a response was required. Being presented with the mark in suit demands speculation at the very least. Even if this is evidence of s. 5(2)(b) confusion – which I regard as doubtful – it seems to me to have come about as a result of the familiarity with PQL's mark: in effect, the BEEBO mark benefited from the sort of enhanced reputation that increases the risk of confusion cited in *Canon* and *Sabel* above. Of course, I have found no evidence to show that such enhancement extends to the industry as a whole, or even a fraction of it. The 50 participants could be PQL's only customers in the trade, which I take to be very large indeed.

41. The response of Mr. Rajiv Kundra (the proprietor of a business called 'Sensations'; Exhibit JGL 2) sums up exactly what I mean; he states:

> 'At first glance, we would assume the goods to be from Personality Quilts. Only *because we are familiar with the above mentioned company*, and we have had dealings with them for a number of years, we would think twice. Or we may assume this to be an alternative range from the same supplier.' (Emphasis mine).

42. In summary, if I am to measure the benefit that Mr. Mitcheson wished to gain from the survey, then, in the content of the length of time he spent making submissions based on it, this would be significant. On the other hand, Mr. Buchan (unnecessarily so in my view) expended even more effort in dismissing it. Overall, I must agree with Mr. Justice Whitford in *Raffles* where he states (page 302):

> 'However satisfactory market research surveys may be in assisting commercial organisations as to how they can best conduct their business, they are by and large, as experience in other cases has indicated, an unsatisfactory way of trying to establish question of fact which are likely to be matters of dispute.'

The survey here is no exception to this criticism. I do not believe that I can conclude anything of significance from the exercise. There are too many imponderables and uncertainties associated with it. Mr. Mitcheson felt the weight of some of these, but argued that:

> '..it is accepted that the numbers involved could be criticised on statistical basis, we are not trying to rely on them as quantitative results, we are trying to rely on them as qualitative results as they indicate the general way and the nature in which people will consider use of the BO-BOs mark and, to that extent, we say that criticism of this survey is misplaced .. '

But even this goes too far in my view. As I have stated above, those asked the question in the survey were clearly addressed in their professional capacity as members of the baby-goods trade. They are asked to speculate on what associations that might be made with the mark, and came up with a trade mark of a manufacturer with which they were familiar. There is nothing to suggest here that they would be confused in the normal conduct of their business,

where actual purchases were made – presumably of large amounts of product, where commensurate care would be taken. As Jacob J states in *Neutrogena v Golden* [1996] R.P.C 473, at 486:

> '.. unless one can have some real evidence, tested in cross examination, one cannot really be sure of what was passing through people's minds. Those cases where surveys have proved to be useful have all involved some of the "pollees" coming to court.'

Likelihood of confusion

43. It is a consequence of my considerations above, I am left with a *prima facie* comparison of the marks only to consider. In doing do, despite the identity of the goods at issue, I have come to the conclusion that the applicants' case under this ground must fail.

44. Visually the marks are similar: they both consist of two syllables, which begin with the letter 'B'. However, against that, the applicants' mark is one word, while PQL's is two words; I take little account of the apostrophe 's', as I consider it 'within the bounds of normal and fair use' to cite PQL's mark as BEEBO's. There remain, however, significant differences between them. The applicants' mark is made up of two identical syllables separated by a hyphen; PQL's mark shares the second syllable, but it is embedded within one word without separation. The use of the double 'e' – EE – in the first part of PQL's mark is a striking visual difference.

45. Aurally, the only similarity is the second syllable. I note the follow from the old *London Lubricants (1920) Limited's Application* [1925] 42 RPC 264 at page 279, lines 36-40, where it is stated:

> '.. the tendency of persons using the English language to slur the termination of words also has the effect necessarily that the beginning of words is accentuated in comparison, and, in my judgment, the first syllable of a word is, as a rule, far the most important for the purpose of distinction.'

Though Mr. Mitcheson resolutely argued against this, BEE is a strong aural prefix. with the propensity to emphasise the first part of a word, I do not see it as being lost on pronunciation.

46. Finally, conceptually. There is the possible link between the marks that I raised above: that of baby-talk. Both might be viewed, as I stated above of the applicants' mark, as the sort of non-sense an adult might speak to a baby. Mr. Mitcheson suggested this link made them 'conceptually indistinguishable'. However, I must set against this the observation that the nature of the goods in question somewhat reduces the 'fancy' nature of PQL's BEEBO mark and thus its potency when used on these products. The average consumer of the goods would not be surprised that products made for babies should allude to them in some manner.

47. And there are the goods at issue. Mr. Bathurst, in his Witness Statement on behalf of ZBL, refers to the cost of these items, stating that purchasers would take care in purchase, as the items were for babies (paragraph 10). Mr. Mitcheson stated:

> 'With respect, sir, the level of expense, £10 and he says to £40 or £50, is not so great such that people will not, in my submission, simply pick them off the shelf after a

relatively brief examination of the label, and in fact where babies are involved it is more likely that people are worried about the precise nature of the goods, whether it is cotton, polyester, advice on how to use them, than the brand names themselves, so in this respect we say that evidence does not really take the proprietor very much further.'

Mr. Buchan stated that £50 was a significant amount of money to the average consumer, and added:

'If you are buying baby goods for your child, you are going to want to make sure that they are safe, that they look good, that they are the right size, they are going to fit the right cot. Babies and children are very vulnerable, so you are going to take particular care over buying products of this sort of nature. .. This is not a bag of sweeties job where you are just going to waltz into a shop and pick up the first £10 cot blanket you see and waltz out again …'

I am inclined to agree with Mr. Buchan. I think care would be taken over these products, and that would extend to the labelling placed on them, including trade marks.

48. All in all, considering the question in paragraph 17, I do not believe that the similarities between the marks overrides the differences between them, and I do not find that confusion is, on a balance of probabilities, likely. The ground under s. 5(2)(b) fails, despite the identity between the goods at issue. This result also decides the action for the other goods specified by the registered proprietor, which do not possess the same degree of similarity with the applicants' goods.

49. There is this one ground, and the action thus fails. I order the applicants to make a contribution to the ZBL's costs of £1700. This sum is to be paid within seven days the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 20TH Day of August 2002.

Dr W J Trott
Principal Hearing Officer
For the Registrar

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Our ref: N01/0235/AD

Your ref:

28 June 2001

Dear Sirs

On behalf of one of our clients I should be obliged if you would take a few moments to complete the enclosed questionnaire and return it in the stamped addressed envelope provided.

Thank you for your help.

Yours faithfully
McNeight & Lawrence

J G Lawrence

Email: John.Lawrence@mcneight.com

QUESTIONNAIRE

1. NAME:

2. COMPANY:

3. POSITION:

4. If you were to see towels for babies; cot covers; blankets or sheets for cots or perambulators for sale under the name BO-BO's whom would you believe to be the manufacturer or supplier?

Signed: _____

Date: _____