

O-509-13

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 2631674  
BY  
ITALIAN FASHION ACCESSORIES LTD**

The logo for Fred & Ginger features the brand name in a serif font. 'Fred' is on the top line and 'Ginger' is on the bottom line. To the right of 'Fred' is a purple square containing a white ampersand (&).

**TO REGISTER THE TRADE MARK**

**IN CLASS 18**

**AND**

**THE OPPOSITION THERETO  
UNDER NO 104620  
BY  
FRED AND GINGER LONDON LTD**

## BACKGROUND

1. On 16 August 2012, Italian Fashion Accessories Ltd (the applicant) applied to register the above trade mark in class 18 of the Nice Classification system<sup>1</sup> for the following goods:

Class 18  
Handbags

2. Following publication of the application, on 14 December 2012, Fred and Ginger London Ltd (the opponent) filed notice of opposition against the application.

3. The grounds of opposition were brought under sections 5(2)(a), 5(2)(b), 5(3) and 5(4) of the Trade Marks Act 1994 (the Act). The opponent relies upon the marks shown below in so far as they are registered for the following goods:

Mark details and relevant dates	Goods
TM:2436407 Mark: FRED AND GINGER Filed: 23 October 2006 Registered: 20 April 2007	Class 25 Clothing
CTM: 8503898 Mark: Fred and Ginger Filed: 29 September 2009 Registered: 1 March 2010	Class 25 Clothing

4. For the purposes of its opposition under section 5(4)(a) the opponent relies on the words 'FRED AND GINGER' which it states have been used nationally since 3 October 2006. The opponent states that the mark has been used in respect of "clothing".

5. In the first paragraph of its statement of grounds, with regard to 5(2)(b), the opponent submits:

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<sup>1</sup> *International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).*

*“The Opponent is the proprietor of the word mark “FRED AND GINGER” in the UK and Europe (the “Trade Marks”). The Applicant’s Mark is identical to the Trade Marks. The Trade Marks comprise of the word “AND” between “FRED” and “GINGER”. The Applicant’s mark uses the “AND” symbol (being “&”) between the words “FRED” and “GINGER”. The “&” is uniformly used to denote the word “AND”. Accordingly, this ‘difference’ is so insignificant that it would go unnoticed by the average consumer. This symbol and the stylised font used by the Applicant’s Mark adds very little distinctive value in a trade mark sense. Accordingly, the Applicant’s Mark is identical to the Trade Marks.*

*The Trade Mark is protected for (amongst other goods) clothing and the goods claimed by the Applicant (handbags) are similar to the goods covered by the Trade Marks. The goods claimed by the Applicant are sold via the same channels and to the same market as the goods covered by the Trade Marks. They are fashion goods and would have the same purpose.”*

6. With regard to the opposition under 5(3) the opponent states:

*“The relevant public will likely make an economic connection between the users of the trade marks given their high similarity both in terms of the marks and the goods covered.*

*The Opponent has built up extensive goodwill and reputation in the Trade Marks in respect of clothing in the United Kingdom and Europe over the last 5 years and 4 years respectively. In view of this reputation and given that the mark that is the subject of the Application is identical, or at the very least highly similar, to the Trade Marks and the goods claimed are highly similar, use without due cause of the Application would take unfair advantage of or be detrimental to the distinctive character or repute of the Trade Marks.*

*The Applicant claims that its goods, sold under the Applicant’s mark, are low-end. The Opponent has spent considerable sums and resources in building a brand and goods that are premium or high end. Given that the marks are identical and the goods claimed by the Applicant are highly similar to those covered by the Trade Marks, it is inevitable that the association by the public of the two marks would lead to and result in detriment to the reputation of the Trade Marks and the Opponent...It is likely that there would be a reduced willingness on the part of consumers to purchase goods sold under the Trade Marks.*

*The relevant public is likely to be confused as to an association between the parties and the Applicant is likely to gain advantage from the Opponent’s extensive marketing, premium sales retail positions, online presence and general reputation and goodwill built up over years and as a result of substantial investment and resources.”*

7. With regard to its opposition under section 5(4)(a) of the Act the opponent submits:

*“The Opponent is a successful lingerie designer and sells its goods online and in many boutiques and prestige department stores in the United Kingdom and Europe.*

*The Opponent first used the Trade Mark in October 2006 in the United Kingdom and September 2009 in Europe and has continuously used the marks since those dates.*

*The use made by the Applicant of the mark that is the subject of the Application amounts to a misrepresentation of the Applicant's goods and is liable to lead to confusion amongst the public as to the origin of the parties' respective goods. Accordingly, this misrepresentation would cause damage to the Opponent's reputation and goodwill and the Opponent's goods, including, but not limited to the Applicant would be able to unduly trade off the Opponent's goodwill."*

8. On 8 May 2013, the applicant filed a counterstatement. It denies the grounds on which the opposition is based and requests the opponent provide proof of use of its mark. It states:

*"It is highly unlikely any confusion will exist in the respective markets served between the two distinct and different Trade marks. This is argued on the basis that:*

*The mark trading styles are totally different (Fred & Ginger vs. Fred & Ginger London) and the actual trade marks are distinctively different.*

*The Logos are fundamentally different and distinctive from one another in their respective artwork.*

*The market is literally awash with Fred & Ginger offerings with products and services ranging from textiles to handbags to beauty treatments.*

*The public have been consulted and our evidence suggests no confusion between either the brands or the products offered. This evidence will be presented in further defence of the application.<sup>2</sup>"*

9. Both parties filed evidence; neither party asked to be heard or filed written submissions in lieu of attendance at a hearing.

## **EVIDENCE**

### **The opponent's evidence**

10. The opponent's evidence consists of a witness statement, dated 4 July 2013, by Victoria Holt who is the founder and Director of Fred and Ginger London Ltd. Attached to the witness statement are 5 exhibits.

### **The applicant's evidence**

11. The applicant's evidence consists of a witness statement, dated 4 September 2013, by Nigel Steele, of Italian Fashion Accessories. Much of it takes the form of submissions along with 1 exhibit.

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<sup>2</sup> *This evidence has not been submitted in these proceedings.*

12. For reasons that will become clear, I do not intend to summarise the evidence filed but will refer to it as necessary in this decision.

## DECISION

13. I will deal first with the opposition under section 5(2)(b) of the Act which reads as follows:

“5. - (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, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

14. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade mark” means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

15. The opponent relies on two earlier marks, a UK mark, ‘FRED AND GINGER’, which is subject to proof of use; and a Community mark, ‘Fred and Ginger’ which is not subject to proof of use. I intend to consider the community trade mark as if it cannot succeed with this mark, it is in no better position relying on its UK registration.

### Section 5(2)(b) case law

16. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the CJEU cases mentioned) on the basis indicated below:

#### The CJEU cases

*Sabel BV v Puma AG* [1998] RPC 199; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77; *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-6/01; *Medion AG v. Thomson Multimedia Sales Germany &*

### The principles

“(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

## **The average consumer and the nature of the purchasing act**

17. In accordance with the above cited case law, I must determine who the average consumer is and also identify the nature of the purchasing process. The average consumer is reasonably well informed and reasonably circumspect and observant but with a level of attention likely to vary according to the category of goods. The attention paid is likely to vary depending on price and, to some extent, the nature of the goods and the frequency of the purchase.

18. The average consumer of the goods at issue will be a member of the general public or a trade buyer. The purchase is likely to be primarily visual as it is likely to be made from a website, catalogue, or directly from a shelf. The specifications of goods cover a range of products which vary in price and frequency of purchase. Consequently, the level of attention is likely to vary: a luxury leather handbag is likely to be a fairly expensive, infrequent purchase. It will demand a higher level of attention to be paid than, for example, buying an everyday t-shirt.

19. Specifically, in respect of the goods in class 25, in considering the level of attention that will be paid to such a purchase and the nature of the purchasing act, I am mindful of the decision of the General Court (GC) in *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs) Joined cases T-117/03 to T-119/03 and T-171/03*, in which it commented:

"43 It should be noted in this regard that the average consumer's level of attention may vary according to the category of goods or services in question (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trademarks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected.

...

53. Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion."

20. The selection process for each of the goods is primarily visual, though I do not discount the fact that there may be an aural element given that some articles may be selected with the assistance of a member of staff. The goods may be purchased on the high street, online or by mail order and the level of attention paid will be reasonable, the consumer paying the attention necessary to obtain, inter alia, the correct size, colour and style.

## Comparison of goods

21. The goods to be compared are as follows:

The opponent's goods	The applicant's goods
<b>Class 25</b> Clothing	<b>Class 18</b> Handbags

22. The parties have made a number of comments about their respective areas of trade and their effect on the likelihood of confusion

23. I am mindful of the findings of the Court of First Instance (now General Court (GC)) in *Saint-Gobain SA v OHIM* Case T-364/05 where it said:

“67... it is important to reiterate that the comparison between the goods in question is to be made on the basis of the description of the goods set out in the registration of the earlier mark. That description in no way limits the methods by which the goods covered by the earlier mark are likely to be marketed.”

24. I am also mindful of the findings of the Court of First Instance (now General Court) in the case of *NHL Enterprises BV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-414/05:

“71 The Court considers, first, that that assessment by the Board of Appeal is not called in question by the particular conditions in which the applicant's goods are marketed, since only the objective marketing conditions of the goods in question are to be taken into account when determining the respective importance to be given to visual, phonetic or conceptual aspects of the marks at issue. Since the particular circumstances in which the goods covered by the marks at issue are marketed may vary in time and depending on the wishes of the proprietors of those marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, namely that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions of the trade mark proprietors - whether carried out or not - which are naturally subjective (see, to that effect, *NLSPORT*, *NLJEANS*, *NLACTIVE* and *NLCollection*, cited at paragraph 61 above, paragraph 49, and Case T-147/03 *Devinlec v OHIM –TIME ART (QUANTUM)* [2006] ECR II-11, paragraphs 103 to 105, upheld on appeal by the Court by judgment of 15 March 2007 in Case C-171/06 P *TIME ART v OHIM*, not published in the ECR, paragraph 59).”

It is clear from the above cases that the comparison I have to make is based on the specification of goods as registered (opponent's earlier mark) and applied for (applicant's application)



26. Factors which may be considered include the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 (hereafter *Treat*) for assessing similarity between goods and services:

- (a) the respective *uses* of the respective goods or services;
- (b) the respective *users* of the respective goods or services;
- (c) the physical nature of the goods or acts of service;
- (d) the respective trade channels through which the goods or services reach the market;
- (e) in the case of self-serve consumer items, where in practice they are found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) the extent to which the respective goods or services are competitive, taking into account how goods/services are classified in trade.

27. I also bear in mind the decision in *El Corte Inglés v OHIM Case T-420/03*, in which the court commented:

“96...goods or services which are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (*Case T-169/03 Sergio Rossi v OHIM-Sissi Rossi* [2005] ECR II-685)”

28. I also bear in mind the comments of Daniel Alexander, sitting as the Appointed Person, in O/255/13 when he said:

“18... the purpose of the test, taken as a whole, is to determine similarity of the respective goods in the specific context of trade mark law. It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

29. In making a finding in respect of these particular competing goods, I am mindful of the decision in *Gitana SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)(OHIM) Case T-569/11*, in which it was held:


“45. Moreover, in respect of the relationship between the ‘goods in leather and imitations of leather’ in Class 18 covered by the trade mark sought and the goods in Class 25 covered by the earlier mark, it is apparent also from settled case-law that the ‘goods in leather and imitations of leather’ include clothing accessories such as ‘bags or wallets’ made from that raw material and which, as such, contribute, with clothing and other clothing goods, to the external image (‘look’) of the consumer concerned, that is to say coordination of its various components at the design stage or when they are purchased.

Furthermore, the fact that those goods are often sold in the same specialist sales outlets is likely to facilitate the perception by the relevant consumer of the close connections between them and support the impression that the same undertaking is responsible for the production of those goods. It follows that some consumers may perceive a close connection between clothing, footwear and headgear in Class 25 and certain 'goods made of these materials [leather and imitations of leather] and not included in other classes' in Class 18 which are clothing accessories. Consequently, clothing, shoes and headgear in Class 25 bear more than a slight degree of similarity to a category of 'goods made of these materials [leather and imitations of leather] and not included in other classes' in Class 18 consisting of clothing accessories made of those materials."

30. The users of the opponent's class 25 goods and the applicant's handbags will likely be members of the general public. The uses are similar to the extent that the intention is to create a coordinated look. The trade channels may, in some cases, be the same and there is a degree of complementarity between them. In accordance with the findings above, handbags in the application can be considered to have 'more than a slight degree of similarity' to the opponent's goods in class 25, namely clothing. Consequently, I find the respective goods to possess a moderate degree of similarity.

**Comparison of marks**

31. The marks to be compared are as follows:

The opponent's mark - CTM: 8503898	The applicant's mark
Fred and Ginger	

32. In its counter statement the applicant submits:

*"The mark trading styles are totally different (Fred & Ginger vs. Fred & Ginger London) and the actual trade marks are distinctively different."*

33. In his witness statement for the applicant, Mr Steele states:

*"8...The opponents [sic] marketing style of the name is Fred & Ginger London. This style not only draws further distinction between the two parties' but appears to use a trading style not registered."*

34. For the purposes of this comparison under s.5(2)(b) of the Act I must compare the applicant's mark, as applied for, against the opponent's trade mark as registered.

35. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created

by them, bearing in mind their distinctive and dominant components<sup>3</sup>, but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

36. The opponent's mark consists of the three words 'Fred and Ginger'. No part of the words is stylised or emphasised in any way. The use of the conjunction 'and' means the three words hang together with the distinctiveness lying in the mark as a whole.

37. The applicant's mark consists of the word 'Fred' presented above the word 'Ginger'. To the right of the word 'Fred' there is a magenta square with three chamfered corners. Within that square is an ampersand. With regard to the presentation of its mark the applicant states:

*"7. The opponent suggests the applicant's logo is words only using a standard font. This is not the case. The Logo font and icon were designed by a creative agency at considerable cost using a unique design and unique font for which the rights to use had been exclusively purchased.*

*8. The applicants [sic] mark has multiple distinctions from the opponents [sic] mark. The opponent has registered Fred and Ginger while the applicant has used Fred & Ginger. The "&" represents a significant distinction."*

38. Whilst noting the applicant's comments regarding its mark, the assessment must be made through the eyes of the average consumer of the goods, to whom the typeface used for the words in the mark will appear to be fairly standard. The background square will be seen as decorative and is unlikely to be given any trade mark significance by the average consumer. The colouring of the background square does not have a bearing on the issue of similarity as neither party's mark is limited to any particular colour. The matter must be assessed on the similarity between the respective marks without regard to colour.<sup>4</sup>

39. In the European Court of Justice ("the ECJ") Case C-291/00 (*LJT Diffusion SA v Sadas Vertbaudet SA*) ("*Sadas*"), the Court said in relation to Art 5(1)(a):

*"Article 5(1)(a) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer."*

40. The '&' in the applicant's mark and the word 'and' in the opponent's mark both have the same meaning. The average consumer will be used to encountering them used one for the other. I consider these elements of the mark to be identical.

## **Visual similarities**

41. Both marks contain the word 'Fred' and the word 'Ginger' in the same order. The only differences rest in the presentation of the linking word 'and' which is 'and' in the

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<sup>3</sup> *Sabel v Puma AG, para.23*

<sup>4</sup>*Specsavers International Healthcare Ltd v Asda Stores Ltd (No.2) [2011] FSR 1, Mann, J.*

opponent's mark and '&' in the application. I have concluded above that these elements are identical in meaning but must also take account of the magenta background behind the '&' in the application. Whilst it is not distinctive or dominant, it does have a visual presence within the mark. Given the low degree of distinctiveness in the elements which contain any degree of difference, in my view, these marks are very highly similar.

### **Aural similarities**

42. Clearly, the marks are aurally identical.

### **Conceptual similarities**

43. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.<sup>5</sup> The assessment must be made from the point of view of the average consumer. The average consumer cannot be assumed to know the meaning of everything. In the *Chorkee* case (BL O-048-08), Anna Carboni, sitting as the Appointed Person, stated in relation to the word CHEROKEE:

“36...By accepting this as fact, without evidence, the Hearing Officer was effectively taking judicial notice of the position. Judicial notice may be taken of facts that are too notorious to be the subject of serious dispute. But care has to be taken not to assume that one's own personal experience, knowledge and assumptions are more widespread than they are.

37. I have no problem with the idea that judicial notice should be taken of the fact that the Cherokee Nation is a Native American tribe. This is a matter that can easily be established from an encyclopedia or internet reference sites to which it is proper to refer. But I do not think that it is right to take judicial notice of the fact that the average consumer of clothing in the United Kingdom would be aware of this. I am far from satisfied that this is the case. No doubt, some people are aware that CHEROKEE is the name of a native American tribe (the Hearing Officer and myself included), but that is not sufficient to impute such knowledge to the average consumer of clothing (or casual clothing in the case of UK TM no. 1270418). The Cherokee Nation is not a common subject of news items; it is not, as far as I am aware, a common topic of study in schools in the United Kingdom; and I would need evidence to convince me, contrary to my own experience, that films and television shows about native Americans (which would have to mention the Cherokee by name to be relevant) have been the staple diet of either children or adults during the last couple of decades.”

44. Similarly in this case, I am aware that 'Fred and/& Ginger' may refer to the iconic dancing partnership of Fred Astaire and Ginger Rogers, film stars of the 1930s. However, in the absence of any evidence from the parties to the contrary, I am not able to take judicial notice of the fact that the average consumer for the goods at issue would know this.

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<sup>5</sup> This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R. 29.

45. It is also possible that the marks will be seen as a combination of two first names or nicknames. In any event, however the average consumer considers the marks, the position will be the same for both parties' marks. They are conceptually identical.

### **Distinctive character of the earlier mark**

46. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been used as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger Joined Cases C-108/97 and C-109/97* [1999] ETMR 585.

47. 'Fred and Ginger' is a combination of names and will be perceived as such by the average consumer. It is not descriptive or allusive of the goods in class 25. It is, however, fairly common practice to sell clothing under the name of a single designer or a combination of designers. As a consequence the mark enjoys an average level of inherent distinctive character.

48. Throughout the opponent's evidence there are examples of sales of clothing in the form of lingerie in Harpers Bazaar, Vogue and many other titles. Marketing materials show that the brand is sold within the UK and abroad from its London store and from its website in respect of lingerie. However, the opponent has not provided any indication of turnover figures or advertising spend for its mark at all, either in the UK or Internationally. I also have no indication of the size of its share of what is likely to be a considerable market. Consequently, I am not able to determine that the distinctiveness of the earlier mark has been enhanced through its use or that there is any reputation.

### **Likelihood of confusion**

47. In its counter statement the applicant submits:

*"The market is literally awash with Fred & Ginger offerings with products and services ranging from textiles to handbags to beauty treatments."*

48. In his witness statement for the applicant, Mr Steele states:

*"6. I have found at least 6 internet locations offering FRED & GINGER fashion merchandise and handbags not belonging to the applicant."*

49. Mr Steele has not provided any evidence of these internet locations or any goods that may have been offered for sale or given details of which specific marks the sales have been made under, however, even if he had, the comparison I have to make is limited to the earlier mark as registered and the mark as applied for.

50. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.<sup>6</sup> I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the

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<sup>6</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa.

51. I have found the marks to be highly visually similar, aurally identical and conceptually identical. I have found the earlier mark to have an average level of inherent distinctive character and cannot conclude that the distinctiveness has been enhanced through the use made of it. I have found handbags in class 18 of the application to be similar to the opponent's goods in class 25, in accordance with settled case law, and my own findings following application of the relevant tests. I have identified the average consumer, namely a member of the general public and have concluded that no more than an average degree of attention will be paid to the purchase of such goods (which will be primarily visual), to the extent that the purchaser will consider, inter alia, size, colour, materials and so on.

52. Taking all of these factors into account, particularly the concept of imperfect recollection, in my view, the similarity of the marks is such that in the context of similar goods purchased, for the most part, visually, I have no hesitation in finding that there will be direct confusion (where one mark is mistaken for the other).

## **CONCLUSION**

### **53. The opposition succeeds under section 5(2)(b) of the Act:**

54. In view of my clear finding that the opposition has succeeded under s. 5(2)(b), I need not go on to consider the opposition in respect of the remaining grounds.

### **Costs**

55. The opposition having succeeded, the opponent, is entitled to a contribution towards its costs. In making an award I have taken into account that the opponent filed evidence and that no hearing took place. I make the award on the following basis:

Preparing a statement and considering the other side's statement:	£200
Preparing and filing evidence:	£500
Official fee:	£200
Total	£900

56. I order Italian Fashion Accessories Ltd to pay Fred and Ginger London Ltd the sum of £900. This sum is to be paid within seven days of 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 16<sup>th</sup> of December 2013**

**Ms Al Skilton  
For the Registrar,  
The Comptroller General**