

O-058-15

**TRADE MARKS ACT 1994
IN THE MATTER OF
APPLICATION NO 3059176
BY YPS PROPERTY LTD
TO REGISTER THE TRADE MARK**

ANAMOR

**IN CLASS 25
AND
OPPOSITION THERETO (UNDER NO. 600000152)
BY
BROOKSBURNETT INVESTMENTS LTD**

BACKGROUND

1) On 10 June 2014, YPS Property Ltd ('the applicant') applied to register the trade mark shown on the cover page of this decision in respect of 'Clothing; footwear; headgear; knitwear' in class 25.

2) The application was published on 11 July 2014 in the Trade Marks Journal and notice of opposition, under the fast track opposition procedure, was subsequently filed by BrooksBurnett Investment Ltd ('the opponent').

3) For the benefit of the applicant who is without legal representation, I will explain that opposition proceedings before the Tribunal are governed by the Trade Marks Act 1994 ('the Act'). The Act implements, inter alia, Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks ('the Directive') (as it is now). Consequently, interpretation of the Act is made on the basis of judgments of the Court of Justice of the European Union ('CJEU') and the General Court ('GC'), both with their seats in Luxembourg, as well as those of the courts in the United Kingdom. All of the judgments of the GC (previously known as the Court of First Instance) and the CJEU can be found at the following url (judgments preceded by the letter C are from the CJEU and judgments preceded by the letter T are from the GC. The former is the higher court):

<http://curia.europa.eu/juris/recherche.jsf?language=en>

Decisions of the appointed persons, who are one of the two fora for appeal from decisions of the registrar, can be found on the website of the Intellectual Property Office at the following url:

<http://www.ipo.gov.uk/t-challenge-decision-results.htm>

The other fora of appeal are the High Court of England and Wales, the High Court of Northern Ireland and the Court of Session (in Scotland). Judgments of courts in the United Kingdom can be found at the following url:

<http://www.bailii.org/>

4) The opponent claims that the application offends under section 5(2)(b) of the Act. It relies upon the Community Trade Mark ('CTM') shown in the table below:

CTM details	Goods relied upon
CTM No: 009727074 INNAMORE Filing date: 10 February 2011 Date of entry in the register: 23 September 2012	<i>Class 25: Clothing, footwear, headgear.</i>

5) The trade mark relied upon by the opponent is an earlier mark in accordance with section 6 of the Act and, as it had been registered for less than five years before the date on which the applicant's mark was published in The Trade Marks Journal, it is not subject to the proof of use requirements, as per The Trade Marks (Proof of Use, etc) Regulations 2004.

6) The applicant filed a counterstatement in which it denies that its mark is similar to the opponent's.

7) Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

8) The net effect of these changes is to require parties to seek leave from the registrar in order to file evidence in fast track oppositions. No leave was sought in the instant proceedings. Accordingly, the “two pieces of merchandise” (which constitutes evidence) attached to the applicant's submissions of 17 December 2014 have had no bearing on my decision.

9) Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if the Office requests it or if either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise written arguments will be taken. A hearing was neither requested nor considered necessary. Accordingly, I make the following decision based on the papers before me, giving full consideration to the written submissions of the parties and making reference to the same as, and when, I consider it appropriate.

DECISION

10) Section 5(2)(b) of the Act provides:

“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,

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

11) The leading authorities which guide me are from the CJEU: *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales*

Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.

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 be dominated by one or more of its components;
- (f) however, it is also 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 creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

12) Both parties' specifications include 'clothing, footwear and headgear' which are, self-evidently identical. Further, in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM Case T-133/05) ('Meric'), the GC held:

"29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedial v OHIM – France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42)."

As the applicant's 'knitwear' is encapsulated by the opponent's 'clothing, footwear and headgear', these goods are also identical in accordance with *Meric*.

Average consumer and the purchasing process

13) It is necessary to determine who the average consumer is for the respective goods and the manner in which they are likely to be selected. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

"60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

14) The average consumer for the goods at issue in this case is the general public. 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 the GC stated:

"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 trade marks 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.”

15) As stated by the GC, items of clothing (and, by extension, footwear and headgear) will vary greatly in price. A polyester t-shirt, for instance, may be considerably less expensive than a pure cashmere jumper. Accordingly, the purchase may not always be particularly considered. That said, as the consumer may wish to try on the goods, or to ensure that they are of a preferred colour, size or material (for example), it is likely, in my view, that at least a reasonable degree of attention is still likely to be afforded, even for those goods which carry a more inexpensive price tag. The purchasing act will be primarily visual on account of the goods being commonly purchased based on their aesthetic appeal; they are likely to be selected after perusal of racks/shelves in retail establishments, or from photographs on Internet websites or in catalogues. However, I do not discount aural considerations which may also play a part.

Comparison of marks

16) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

It would therefore be wrong to artificially dissect the marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

17) For ease of reference, the marks to be compared are:

Opponent's mark	Applicant's mark
INNAMORE	ANAMOR

18) Neither mark lends itself to deconstruction into separate components; their respective overall impressions are based solely on the single word of which they consist.

19) From a visual perspective, there is some degree of visual similarity owing to the presence of the letters 'NAMOR' in the same order in both marks. However, in the applicant's mark, those letters are preceded by the letter 'A' whereas, in the opponent's mark, they are preceded by the two letters 'IN' and followed by the letter 'E'. It is a general rule of thumb that the beginnings of words will tend to have the greatest impact on the consumer's perception¹. In my view, the rule is applicable in this case. The difference in the appearance of the letters at the beginnings of the marks, which are the first to strike the eye, creates a clear point of visual contrast between the marks. This point of difference coupled with the additional 'E' at the end of the opponent's mark which is absent from the applicant's mark (a further point of visual difference), makes the marks in their totalities quite different to look at, notwithstanding the common presence of the letters 'NAMOR' in the middle of the marks. Considering the marks in totality, I do not agree with the opponent that the marks are visually "very similar". In my view, the degree of visual similarity, overall, is low.

20) Turning to the aural aspect, the applicant submits, in its counterstatement that the opponent's mark will be pronounced as INA-MORAY. I disagree. In my view the average consumer in the UK is likely to pronounce the opponent's mark as IN-AH-MOR. The applicant's mark will pronounced as AN-AH-MOR. The second and third syllables of the marks are aurally identical and the first is highly similar. Overall, there is a high degree of aural similarity between the marks.

21) In terms of the conceptual comparison, the opponent submits:

"Conceptually, the two trade marks are easily confused, since neither of them have a meaning in the English language, and they simply bring to mind something to do with love, but nothing concrete, because of the AMOR element."

A conceptual message is only relevant if it is capable of immediate grasp². I am not persuaded that either mark will bring to mind the idea of love on account of the presence of the letters 'AMOR' within the marks. This not only assumes that the average consumer will be aware that AMOR means 'love' (which I am not convinced

¹ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 [81] - [83],

² 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.

they will), but moreover requires far too analytical approach to the marks which the consumer is unlikely to undertake. Viewing the marks as a whole, both have the appearance of invented words and therefore neither will evoke any concept in the mind of the consumer. Thus, the marks are neither conceptually similar nor dissimilar; the conceptual position is neutral.

Distinctive character of the earlier mark

22) The distinctive character of the earlier mark must be considered. The more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“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 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR 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).”

23) There is no evidence before me in this case and therefore, I can only take into account the inherent qualities of the opponent’s mark. As I have already concluded that the opponent’s mark is likely to be perceived as an invented word, it follows that it neither describes nor alludes to the goods covered by its registration in any way and I find it to be possessed of a high degree of inherent distinctive character.

Likelihood of confusion

24) I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors:

- the interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*);
- the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and;

- the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*).

25) Important factors weighing in favour of finding a likelihood of confusion are that the respective goods are identical and that the earlier mark has a high degree of inherent distinctive character. However, weighing against this is my finding that the respective marks share only a low degree of visual similarity. This latter factor is particularly important (more so than the high degree of aural similarity) in the global assessment since the purchasing act is likely to be a primarily visual process³. Further, whilst there is no concept portrayed by either mark to assist the consumer in packing the marks away in their mind (potentially increasing the effects of imperfect recollection), my finding that the average consumer is likely to pay at least a reasonable degree of attention during the purchase militates to some degree against this; such a level of attention may mean the consumer is capable of recalling the marks more perfectly. Weighing all of these factors against each other, and keeping in mind the importance of the low degree of visual similarity in this particular case, I find that the consumer is unlikely to mistake one mark for the other (there is no likelihood of direct confusion). I also cannot see any basis for concluding that the consumer is likely to believe that the respective goods emanate from the same or linked undertaking(s) (there is no indirect confusion). **The opposition fails.**

COSTS

26) As the applicant has been successful, it is entitled to a contribution towards its costs. Using the guidance in Tribunal Practice 4/2007 as a guide, but bearing in mind that the applicant has not incurred the expense of legal representation, I award the applicant £100 for considering the opponent's statement and preparing the counterstatement.

27) I order BrooksBurnett Investment Ltd to pay YPS Property Ltd the sum of **£100**. 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 this 4th day of February 2015

**Beverley Hedley
For the Registrar, the Comptroller-General**

³ In *New Look Ltd v OHIM* Joined cases T-117/03 to T-119/03 and T-171/03, the GC stated: "49 However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs."