

# O-618-17

## TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION No. 3180666

IN THE NAME OF KEVIN HICKEY

TO REGISTER THE FOLLOWING TRADE MARKS IN CLASS 25

TEEN. & TEEN (SERIES OF TWO)

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### DECISION

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1. This is an appeal against decision O-302-17 dated 4 July 2017 of Morwenna Bell acting as the Registrar's Hearing Officer ("the Decision") which rejected an application for the marks TEEN. & TEEN in class 25 for clothing, footwear, headgear based upon sections 3(1)(b) and (c) of the Trade Marks Act 1994 ("the Act").
2. The Applicant has represented himself in these proceedings. His form T55 stated in the box "Reasons for Appeal": "*The Decision of Examiner Morwenna Bell contains distinct and material errors of principle and is clearly wrong*". In communications shortly before the hearing of the appeal was due to take place I indicated to the Applicant that his form TM55 was insufficiently specified and that he needed to identify the distinct and material errors of principle it is alleged are contained in the Decision.
3. I am grateful to the Applicant for providing written submissions on the morning that the hearing was due to take place. These do adequately set out the basis for the appeal and I consider them in more detail below.
4. At the same time the Applicant explained that he could no longer attend the hearing and requested as follows: "*I would therefore seek postponement or in the alternative I am happy for a Decision to be found on my attached submissions and any submissions that Mr Abraham wishes to make in response*".
5. Mr Abraham representing the IPO indicated that he was content to make submissions in response in writing and in the circumstances I cancelled the hearing and have dealt with the matters on the papers. I have considered carefully the

## O-618-17

written submissions of the Applicant and Mr Abraham's response on behalf of the IPO in coming to my decision. I have also considered a written reply from the Applicant.

### THE DECISION

6. The Decision of the Hearing Officer concerned the inherent characteristics of the mark applied for, and the objections raised under ss.3(1)(b) and (c) of the Act:

"3. - (1) The following shall not be registered -

...

- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

7. In particular the Decision concerned the objection by the examiner that the mark(s) *"consist(s) exclusively of a sign which may serve in trade to designate the kind and intended purpose of the goods e.g. clothing for teenagers"*.

8. Before the examiner, the Applicant raised the following arguments:

- The marks are not an abbreviation of the word 'teenager';
- The word 'teen' is a suffix in the English language and features mostly at the end of numbers i.e. from 'thirteen' through 'nineteen';
- His 'teen' brand caters for all sizes and ages, is not aimed at those wanting a youthful look, and is not limited to products being worn by teenagers;
- By suggesting that his clothing was for teenagers, the Registrar was seeking to restrict his brand;
- The Registrar has previously registered a 'Boy' trade mark (UK Registration Number 2268730) which, in the applicant's view, was on a par with his own;
- Specifically in respect of section 3(1)(b), his marks were clearly distinctive.

## O-618-17

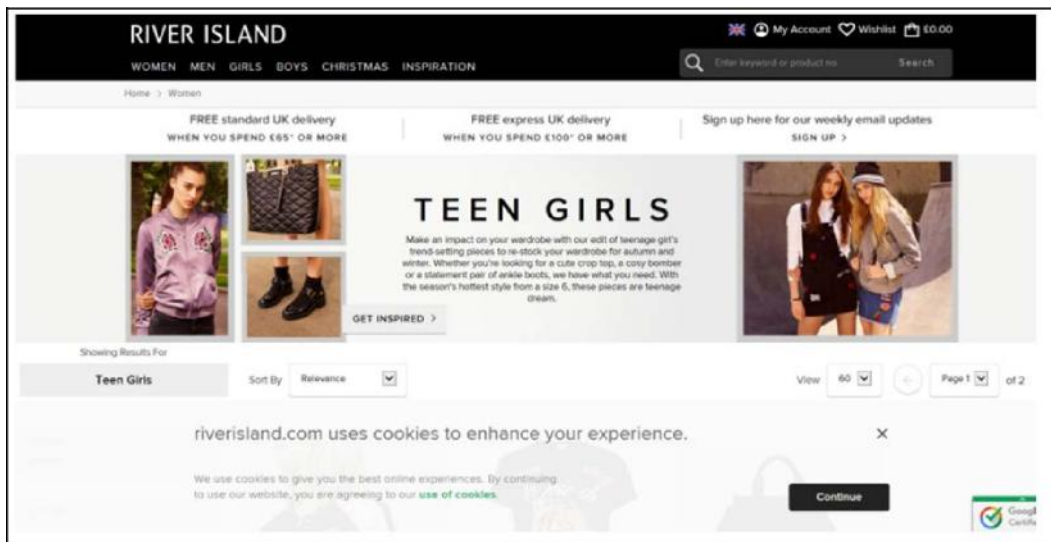
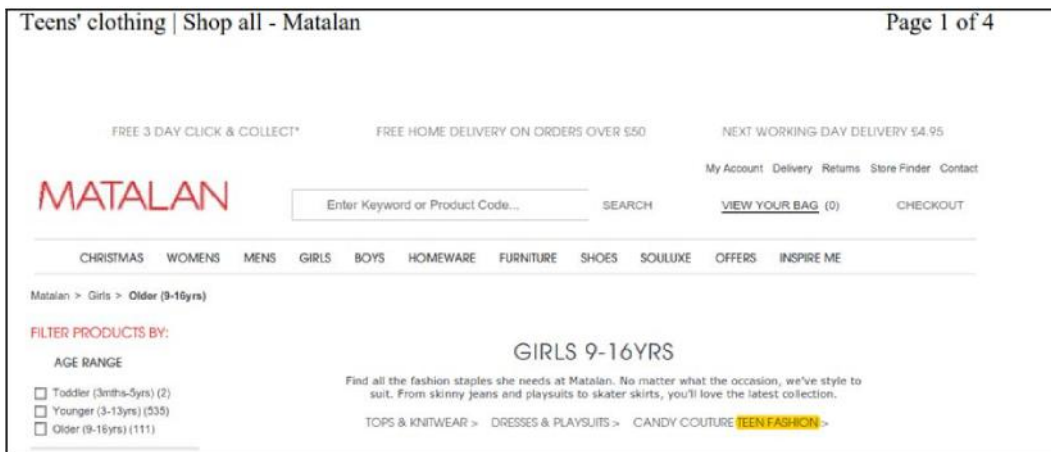
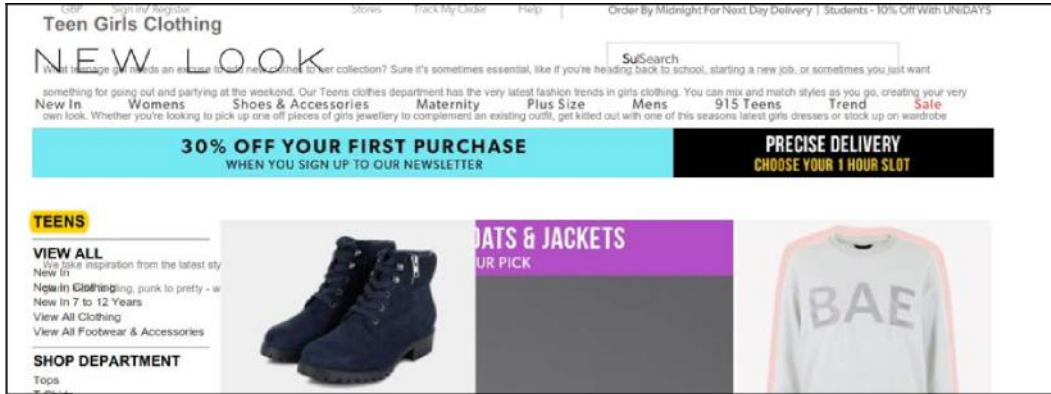
9. The Applicant submitted examples showing how the mark was intended to be used. However as no formal evidence of use had been adduced for the purposes of demonstrating acquired distinctiveness, the Decision was made based only on the *prima facie* case (§8). Even having considered the examples of proposed use, the Hearing Officer commented at §25 that they would have made no difference to the outcome of her decision.
10. The Hearing Officer set out the legal principles to be applied at §§10-14 of the Decision. Under s.3(1)(c) the Act she referred to extracts from *JanSport Apparel Corp v Office for Harmonisation in the Internal Market (Case T-80/07)*, *OHIM v Wrigley ('Doublemint') (Case C-191/01 P)*, *Matratzen Concord AG v Hukla Germany SA, C-421/04* and *Sykes Enterprises v OHIM ('Real People Real Solutions') [2002] ECT II-5 179*. In particular she cited §22 from *Jansport* as follows:
  22. It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the goods and services in question or one of their characteristics (see Case T-19/04 *Metso Paper Automation v OHIM (PAPERLAB) [2005] ECR II-2383*, paragraph 25 and the case-law cited)."
11. She identified the relevant public as the public at large and continued in §16:

These are general, non-specialised goods for use by all. The level of attention paid when purchasing them is likely to be moderate, as they are everyday items, not necessarily very expensive, and one would assume them to have a relatively short life span.
12. None of this is challenged on appeal.
13. The core of her decision is to be found in §17, which I reproduce below in full (with added emphasis):
  17. I must therefore determine how the average consumer, being the public at large, would perceive the marks (i.e. the word 'teen' both with and without a full stop) when seeing them used in relation to clothing. **In my opinion, when encountered in the prima facie case, the term 'teen' would merely be understood as an indication as to the kind or intended purpose of the goods, i.e. clothing, footwear and headgear suitable and/or sized for teenagers to wear.** Although the application seeks to protect variations of the word 'teen' (as opposed to 'teenager'), I refer to the definition provided in the Examination Report (taken from the Oxford Dictionary of

# O-618-17

English (3rd Edition)), which confirmed that the word 'teen' is both an adjective meaning 'relating to teenagers', and a noun meaning 'a teenager'.

14. The Hearing Officer also referred to some of the third party internet use of the word "teen" relied on by the examiner in support of the objection raised – for example on the New Look, Matalan and River Island websites, which I reproduce below:



## O-618-17

15. The Hearing Officer concluded in §22 that the term 'teen' is often used descriptively in relation to clothing. She held that it serves no different a purpose to widely recognized terms such as 'womens', 'mens' etc., all which are used to designate a sub-category of clothing. She also held that it was irrelevant that clothing can be worn by anyone regardless of age, and is therefore not specifically targeted at the teen market.
16. The Hearing Officer also dealt with a number of other submissions made by the Applicant at the hearing. In §18 she rejected the submission that because the word 'teen' is not presented as a 'search filter' on the websites referenced in the Examination Report, it could not be descriptive.
17. At §23 she dealt with the Applicant's reliance on the existence of a 'Boy' trade mark (registration number 2268730) which was said to hold precedent value in terms of the Applicant's own application. She referred to the line of case law in which it has been long held that the state of the register for other marks is not a relevant factor to be considered, citing the *TREAT* case [1996] RPC 281.
18. Finally under s.3(1)(c) she dealt at §§32-36 with the fact that one of the two marks contains a full-stop after the word TEEN. She cited the guidance issued by EUIPO on this topic as well as the decisions of the Appointed Person in *P.R.E.P.A.R.E.* RPC [1997] 884 and the CJEU in Case C-37/03, *BioID AG v OHIM* and concluded at §36:

...The impression created by the first mark 'TEEN.' is dominated by the word element. The full stop appears at the end of the word, and so its impact upon the whole sign is relatively insignificant. There is nothing inventive or quirky about the addition or placement of the full stop within the mark and it adds nothing to the distinctive character of it. The first mark is therefore treated as a 'teen' mark, exactly as the second in the series. As a result, the reasoning I have set out at paragraphs 15 through 26 (for section 3(1)(c)) and paragraph 31 (for section 3(1)(b)) applies to the sign 'Teen.' as much as it does to the sign 'Teen'.
19. As far as section 3(1)(b) is concerned, the Hearing Officer set out the legal principles as follows:
  - An objection under section 3(1)(b) operates independently of objections under section 3(1)(c) (*Linde AG (and others) v Deutsches Patent-und Markenamt*, Joined Cases C-53/01 to C-55/01, paragraphs 67 to 68);

## O-618-17

- For a mark to possess a distinctive character it must identify the product (or service) in respect of which registration is applied for as originating from a particular undertaking and thus to distinguish that product (or service) from the products (or services) of other undertakings (*Linde* paragraphs 40-41 and 47);
- A mark may be devoid of distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive (*Postkantoor* paragraph 86);
- A trade mark's distinctiveness is not to be considered in the abstract but rather by reference to the goods or services in respect of which registration is sought and by reference to the relevant public's perception of that mark (*Libertel Group BV v Benelux Merkenbureau*, Case C-104/01 paragraphs 72-77);
- The relevant public must be deemed to be composed of the average consumer who is reasonably well-informed and reasonably observant and circumspect (*Libertel* paragraph 46 referring to Case C-342/97 *Lloyd Schuhfabrik Meyer*).

20. She also cited Ms. Anna Carboni, sitting as the Appointed Person in *COMBI STEAM* (BL O-363-09) at §7 as follows:

"It has been said that lack of distinctive character is the essence of any objection under section 3(1)(b), (c) or (d) of the Act and that, despite its position in the list, section 3(1)(b) performs "a residual or sweeping-up function", backing up the other two provisions, which contain specific and characteristic examples of types of marks that lack distinctive character: Procter & Gamble Ltd's Trade Mark Application [1999] RPC 673 (CA) per Robert Walker LJ at 679. If a trade mark is entirely descriptive of characteristics of goods or services (and thereby prohibited from registration under section 3(1)(c)), it will also be devoid of any distinctive character under section 3(1)(b): Koninklijke KPN Nederland BV v Benelux-Merkenbureau Case C-363/99 (POSTKANTOOR) [2004] ETMR 57 (ECJ) at [86]."

21. She concluded in §31 that the marks both lacked any distinctive character and held:

The marks cannot be said to be said to be fanciful or to have any degree of inventiveness. Neither do they contain stylisation or anything which may imbue them with trade mark character. The average consumer would have to be educated in order to recognise the signs as a badge of origin (on this, Mr Hickey confirmed to me

# O-618-17

that no use has yet been made of the mark, so claiming distinctiveness acquired through use is not an option that is open to him).

## THE APPEAL

### Standard of Review

22. The standard to be applied to appeals of this nature was recently summarised by Daniel Alexander QC sitting as the Appointed Person in *TT Education Ltd v Pie Corbett Consultancy (O/17/17)* with minor revisions as supplied by Phillip Johnson sitting as the Appointed Person in O-173-17:

“52. Drawing these threads together, so far as relevant for the present case, the principles can therefore be summarized as follows.

- (i) Appeals to the Appointed Person are limited to a review of the decision of Registrar (CPR 52.21). The Appointed Person will overturn a decision of the Registrar if, but only if, it is wrong (CPR 52.21).
- (ii) The approach required depends on the nature of decision in question (REEF). There is spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision. At one end of the spectrum are decisions of primary fact reached after an evaluation of oral evidence where credibility is in issue and purely discretionary decisions. Further along the spectrum are multi-factorial decisions often dependent on inferences and an analysis of documentary material (REEF, DuPont).
- (iii) In the case of conclusions on primary facts it is only in a rare case, such as where that conclusion was one for which there was no evidence in support, which was based on a misunderstanding of the evidence, or which no reasonable judge could have reached, that the Appointed Person should interfere with it (Re: B and others).
- (iv) In the case of a multifactorial assessment or evaluation, the Appointed Person should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions. In particular, where an Appointed Person has doubts as to whether the Registrar was right, he or she should consider with particular care whether the decision really was wrong or whether it is just not one which the appellate court would have made in a situation where reasonable people may differ as to the outcome of such a multifactorial evaluation (REEF, BUD, Fine & Country and others).
- (v) Situations where the Registrar's decision will be treated as wrong encompass those in which a decision is (a) unsupportable, (b) simply wrong (c) where the view expressed by the Registrar is one about which the

## O-618-17

Appointed Person is doubtful but, on balance, concludes was wrong. It is not necessary for the degree of error to be “clearly” or “plainly” wrong to warrant appellate interference but mere doubt about the decision will not suffice. However, in the case of a doubtful decision, if and only if, after anxious consideration, the Appointed Person adheres to his or her view that the Registrar's decision was wrong, should the appeal be allowed (Re: B).

- (vi) The Appointed Person should not treat a decision as containing an error of principle simply because of a belief that the decision could have been better expressed. Appellate courts should not rush to find misdirections warranting reversal simply because they might have reached a different conclusion on the facts or expressed themselves differently. Moreover, in evaluating the evidence the Appointed Person is entitled to assume, absent good reason to the contrary, that the Registrar has taken all of the evidence into account. (REEF, Henderson and others).

Bearing in mind the repeated reminders that different points are likely to be particularly relevant in other cases, this is not intended to be a summary of universal application for other cases where particular aspects of the approach may require different emphasis.”

23. I shall apply this guidance to the present case.

### **Criticisms of the Decision**

24. The Applicant has raised a number of points in his written submissions. They have been helpfully summarised by Mr Abrahams as follows:
- (a) The sign cannot be ‘exclusively’ descriptive pursuant to section 3(1)(c) of the Trade Marks Act 1994 (‘the Act’) because the goods it intends to protect can be purchased and worn by consumers of any age;
  - (b) The sign does not fall within the very limited range of terms which can be deemed ‘exclusively’ descriptive of the goods claimed;
  - (c) Although the sign may identify and/or designate a characteristic of the product’s design, such findings should be disregarded in the context of assessing it as a trade mark;
  - (d) The sign is descriptive of the consumer/end user rather than the goods claimed;
  - (e) The Registrar should (but did not) consider section 11 of the Act when determining the sign’s suitability for acceptance;



## O-618-17

- (f) The Registrar's decision to refuse the mark is inconsistent with decisions apparently taken in other cases where marks appear on the register.
25. The Applicant points out that (d) should properly read "descriptive of *a certain* consumer" and I shall deal with the submission on this basis.
26. Mr Abraham suggests that arguments (c)-(e) were not articulated below and objects to them being raised. The Applicant disagrees and has pointed to various passages on the file as demonstrating that they were argued before the examiner. Rather than engage in a detailed exercise in order to try to decide whether or not the points were all raised in identical terms previously, I shall simply deal with them all below. The major points of principle appear to arise under (a)-(b) (meaning of "exclusively") and (c)-(d) (TEEN does not describe the goods themselves) and I propose to deal with them jointly on this basis.

### **"Exclusively"**

27. The Applicant points to the use of the word "exclusively" in s.3(1)(c) and says that because TEEN would not be descriptive when used for goods for e.g. adults, the Hearing Officer fell into error. He emphasises the extract from COMBI STEAM quoted above which refers to the situation in which a trade mark "*is entirely descriptive of characteristics of goods or services*" (emphasis added).
28. This misunderstands the way the word "exclusively" is used in the legislation as interpreted by the settled case-law. s3(1)(c) refers to "trade **marks which consist exclusively of** signs or indications which **may** serve...to designate..." (emphasis added). "Exclusively" should therefore be understood as referring to the fact that there must be no distinctive elements of the mark which prevent it from being interpreted descriptively, not that the mark must be descriptive in all possible interpretations of its relationship to the goods. See for example *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (Case C-363/99 Postkantoor) at §§54-58 (emphasis added):
54. As the Court has already held (*Windsurfing Chiemsee*, paragraph 25, *Linde*, paragraph 73, and *Libertel*, paragraph 52), Article 3(1)(c) of the Directive pursues an aim which is in the public interest, namely that such signs or indications may be freely used by all. Article 3(1)(c) therefore prevents such signs and indications from being reserved to one undertaking alone because they have been registered as trade marks.

## O-618-17

55. That public interest requires that all signs or indications which **may** serve to designate characteristics of the goods or services in respect of which registration is sought remain freely available to all undertakings in order that they may use them when describing the same characteristics of their own goods. Therefore, marks consisting exclusively of such signs or indications are not eligible for registration unless Article 3(3) of the Directive applies.
56. In those circumstances, the competent authority must, under Article 3(1)(c) of the Directive, determine whether a trade mark for which registration is sought currently represents, in the mind of the relevant class of persons, a description of the characteristics of the goods or services concerned **or whether it is reasonable to assume that that might be the case in the future (see to that effect *Windsurfing Chiemsee*, paragraph 31)**. If, at the end of that assessment, the competent authority reaches the conclusion that that is the case, **it must refuse, on the basis of that provision, to register the mark.**
57. **It is irrelevant whether there are other, more usual, signs or indications for designating the same characteristics of the goods or services referred to in the application for registration than those of which the mark concerned consists.** Although Article 3(1)(c) of the Directive provides that, if the ground for refusal set out there is to apply, the mark must consist exclusively of signs or indications which may serve to designate characteristics of the goods or services concerned, it does not require that those signs or indications should be the only way of designating such characteristics.
58. Similarly, whether the number of competitors who may have an interest in using the signs or indications of which the mark consists is large or small is not decisive. **Any operator at present offering, as well as any operator who might in the future offer, goods or services which compete with those in respect of which registration is sought must be able freely to use the signs or indications which may serve to describe characteristics of its goods or services.**
29. See also §97 (emphasis added):
97. It is not necessary that the signs and indications composing the mark that are referred to in Article 3(1)(c) of the Directive actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that those signs and indications could be used for such purposes. A word must therefore be refused registration under that provision **if at least one of its possible meanings designates a characteristic** of the goods or services concerned (see to that effect,

## O-618-17

in relation to the identical provisions of Article 7(1)(c) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1), Case C-191/01 P *OHIM v Wrigley* [2003] ECR I-0000, paragraph 32).

30. Accordingly it is clear that “exclusively” in s.3(1)(c) does not mean that the mark must only have one meaning which is characteristic of the goods. Instead, if one of its possible meanings is capable of describing some of the characteristics of the goods, then the mark should not be registered. It is irrelevant if there are other possible meanings, whether as a result of a different understanding of the mark or of the goods it refers to.
31. In the present case it is correct that a clothing article designed with a teenager in mind - in terms of its size, fit and/or design - may be purchased or worn by anyone. However, that does not take it outside the provisions of s.3(1)(c) on the basis that any descriptive term is not used “exclusively”. When it is perceived as referring to a size, fit or design suitable for teenagers, the entirety of the mark is descriptive and there are no distinctive elements. Further, non-teenager purchasers will still see one of the meanings of the sign as descriptive of goods for teenagers. It is therefore irrelevant that the goods are not restricted to offer for sale or purchase by or for non-teenagers.
32. I therefore conclude that the Hearing Officer correctly held that at least one of the possible meanings of the mark has the potential to designate a characteristic of the goods applied for. That is sufficient to satisfy the “exclusively” provisions of s.3(1)(c). I now turn to the second set of arguments put forward by the Applicant, namely whether the Hearing Officer was correct to conclude that at least one of the possible meanings of the mark actually designates a characteristic of the goods applied for.

### **Teen Not Descriptive of Goods Themselves**

33. The Applicant submitted that TEEN cannot be descriptive for clothing, footwear, headgear when the goods are merely pieces of fabric cut and sewn for the purposes of warmth and modesty. In other words he makes the point that TEEN does not describe the goods themselves. He says the mark is characteristic of a certain type of customer and not the product, and so there can be no proper objection under s.3(1)(b) or (c).
34. However, the phrase ‘characteristics of (the) goods or services’ is not limited to those terms which describe only the most fundamental aspects of a product (in the Applicant’s submission, words such as ‘Footwear’, ‘Shoe’ and ‘Shirt’). This would limit section 3(1)(c) to preventing registration of only those signs which designate

## O-618-17

the kind of the product, but nothing else. The provision also applies to those terms which designate inter alia the quality, quantity, intended purpose and 'other' characteristics of the goods.

35. In relation to the goods applied for, a term which describes a characteristic of the end user can also designate a characteristic of the article itself – most notably style or size. The Hearing Officer gave examples of terms such as MEN and WOMEN which describe the gender of those most likely to purchase/wear the clothes, but also function as descriptions of the products per se. As Mr Abraham points out, in the context of clothing articles, descriptive terms are commonly used in reference to size (e.g. 'small'; 'XL'), suitability for a particular age range (e.g. '13-14 years') and style (e.g. 'Tailored Fit', 'Unisex'). In the same way the word 'Teen' may refer to both the intended/most suitable age of the wearer and/or the style of the item. This is supported by the internet references reproduced above.
36. Applying such logic to the sign under appeal, I agree with the Hearing Officer that the word 'Teen' is descriptive of clothing produced for teenagers as a matter of size or style, notwithstanding the fact that it also describes the approximate age of the intended wearer.
37. Moreover, the fact that the mark may only describe a certain type of customer or style (and not all customers or styles) is neither here nor there if the average consumer would perceive the goods as describing that type of customer or style. The mark does not have to be descriptive of all consumers to fall foul of the objection under Article 3(1)(c). The fact that it is descriptive of some is sufficient – as the use of "may" in the legislation emphasises.
38. I therefore conclude that the Hearing Officer correctly took into account the fact that clothing is commonly classified and described by words which refer to the size, age and/or other characteristics of the intended wearer, and correctly concluded that the word 'Teen' is one such word. It therefore falls squarely within s.3(1)(c).

### **S.11 Defences**

39. Mr Hickey relies on the defences under section 11 of the Act as providing a reason why there could be no harm if the marks were registered – those third parties using the word "teen" descriptively would not be liable for infringement.
40. It is well established that the existence of a potential defence is insufficient reason to allow an otherwise unregistrable mark onto the register. The existence of the registered mark at all could have a chilling effect on competitors and for public policy

## O-618-17

reasons it is far better that the mark is never registered in the first place. See *Libertel Groep BV v Benelux-Merkenbureau* (Case C-104/01 *Libertel* paragraphs 58 and 59) where, in relation to Article 6 of Directive 2008/95/EC (equivalent to section 11 of the Act), the Court explained:

58. Article 6 of the Directive concerns the limits on the effects of a trade mark once it has been registered. The Commission's argument amounts to proposing that there should be a minimal review of the grounds for refusal in Article 3 of the Directive at the time when the application for registration is considered, on the basis that the risk that operators might appropriate certain signs which ought to remain available is neutralised by the limits which Article 6 imposes at the stage when advantage is taken of the effects of the registered mark. That approach is, essentially, tantamount to withdrawing the assessment of the grounds of refusal in Article 3 of the Directive from the competent authority at the time when the mark is registered, in order to transfer it to the courts with responsibility for ensuring that the rights conferred by the trade mark can actually be exercised.

59. That approach is incompatible with the scheme of the Directive, which is founded on review prior to registration, not an *a posteriori* review. There is nothing in the Directive to suggest that Article 6 leads to such a conclusion. On the contrary, the large number and detailed nature of the obstacles to registration set out in Articles 2 and 3 of the Directive, and the wide range of remedies available in the event of refusal, indicate that the examination carried out at the time of the application for registration must not be a minimal one. It must be a stringent and full examination, in order to prevent trade marks from being improperly registered. As the Court has already held, for reasons of legal certainty and good administration, it is necessary to ensure that trade marks whose use could successfully be challenged before the courts are not registered (Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 21).

41. The Court could not have been clearer. The existence of a potential defence is no reason to allow an otherwise unregistrable mark onto the register.

### **State of the Register**

42. Finally the Applicant relies on the state of the register for the fact that the mark GOURMET has been registered for a variety of food related goods and services.

43. There is nothing in this last point and the GOURMET example is no better than the BOY example relied on before the Hearing Officer. The Hearing Officer correctly referenced the *TREAT* case cited above for the proposition that the state of the register cannot assist in assessing registrability, not least because these may have been cases where there was evidence of acquired distinctiveness. In any event, the

## O-618-17

circumstances referred to by the Applicant do not support his case. Two of the five examples he cites are no longer registered, and of the other three, the registrations for napkins in classes 16 & 24, machines in class 7 and petfood in class 31 are all distinguishable on the facts from the present registration of TEEN for clothes.

### **Conclusion**

44. For the reasons I have given I am unable to identify any error in the analysis carried out by the Hearing Officer. Nor, standing back, can I conclude that she was wrong to hold that the mark does not describe exclusively the kind, quality and purpose of the goods for which registration is sought. Accordingly I dismiss the appeal under s.3(1)(c). Mr Hickey did not make separate representations in relation to s.3(1)(b) and in the light of my conclusions that the mark should be refused under s.3(1)(c), I need say no more about it. For the same reasons the Hearing Officer was correct to determine that the application also failed to satisfy the requirements of s.3(1)(b).

### **Costs**

45. As is normal for ex parte appeals, each party should bear its own costs.

Thomas Mitcheson QC  
The Appointed Person  
4 December 2017

The Applicant represented himself.

The Registrar was represented by Mr Abraham.