

**BL O/571/18**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION 3238200**

**BY**

**KIDCO TRADING LTD**

**TO REGISTER THE FOLLOWING TRADE MARK IN CLASSES 24 AND 25:**



**AND**

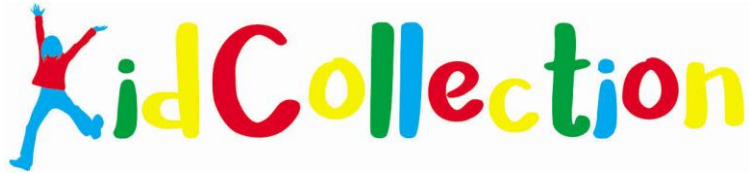
**OPPOSITION THERETO (NO. 410489)**

**BY**

**MAHMOOD, BUSHRA AND YASSER SHAFI**

## **Background and pleadings**

1. Kidco Trading Ltd (the applicant) applied to register the trade mark:



in the UK on 19 June 2017. It was accepted and published in the Trade Marks Journal on 21 July 2017, in respect of:

**Class 24:** Bath towels; Bathroom towels; Beach towels; Bean bag covers; Bed blankets; Bed covers; Bed linen; Bed linen and blankets; Bed sheets; Bed throws; Children's blankets; Children's towels; Covers for cushions; Covers for duvets; Covers for pillows; Curtains; Cushion covers; Duvet covers; Duvets; Hooded towels; Quilt covers; Readymade curtains; Throws; Towels.

**Class 25:** Ankle socks; Articles of clothing; Articles of outer clothing; Athletic clothing; Athletic footwear; Athletic shoes; Baseball caps; Baseball hats; Baselayer tops; Bath robes; Bath slippers; Bathrobes; Beanie hats; Bed socks; Boxer briefs; Boxer shorts; Boys' clothing; Briefs; Briefs [underwear]; Casual clothing; Casual footwear; Casual shirts; Casual trousers; Casualwear; Children's clothing; Childrens clothing; Children's footwear; Children's headwear; Children's outerclothing; Children's wear; Clothing for children; Costumes for use in children's dress up play; Costumes for use in role-playing games; Girls' clothing; Knitwear; Knitwear [clothing]; Pique shirts; Polar fleece jackets; Polo shirts; Ponchos; Pyjamas; Shorts; Shorts [clothing]; Socks; Sports clothing; T-shirts; Underwear.

2. Mahmood, Bushra and Yasser Shafi (the opponents) oppose the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (the Act). This is on the basis of their earlier UK Trade Mark 3195744, for the mark:



3. The following goods are relied upon in this opposition:

**Class 24:** Household textile articles; bed clothes; bed covers, bed spreads, eiderdowns, duvets, duvet covers, quilts, quilt covers, valenced bed sheets and covers, fitted sheets; pillowcases, towels; wall hangings; cushion covers, upholstery fabrics and covers; textile piece goods; blankets, bedspreads, pillow cases and bolster cases; curtains for living room, curtains for dining room, curtains for kitchen and curtains for bedroom; piece goods of textile materials and household textile materials; textiles and textile piece goods not included in other classes; bed and table covers, table clothes and napkins; artificial silk piece goods; bed sheets; pillow cases, bolster cases, pyjama cases and night dress cases; hygienic and anti allergy covers for pillows and mattresses; pillow and mattress protectors; duvet covers and sheets made of silk; woven silk fabrics; silk (cloth).

4. The opposition is directed only against the class 24 element of the application.

5. The opponents argue that the goods at issue are identical or similar and that the marks are similar to the degree that they will be confused by the relevant public, as both contain the words 'KID' and 'COLLECTION'.

6. In its counterstatement the applicant accepts that the goods at issue are identical or similar, but states that the marks are not similar due to the fact that the verbal elements in both are low in distinctive character and descriptive of a collection for kids. The applicant states that the distinctiveness of the marks at issue lies in the stylised and figurative elements in each, which are sufficiently different to set them apart in the mind of the consumer. The applicant also denied that the earlier mark constituted an earlier right for the purposes of the opposition, as the applicant has

unregistered rights to the contested mark which predate the filing date of the earlier mark, and would file evidence to support this claim at a later time.

7. Both sides filed written submissions, which largely mirror the comments provided in the TM7 statement of grounds and TM8 counterstatement. The opponents provided evidence.
8. The opponents evidence is comprised of a witness statement from Mr Mahmood Shafi, one of the opponents, and two exhibits, MS1 and MS2. In his witness statement Mr Shafi provides background information detailing conversations he engaged in with the applicant prior to these proceedings being launched. As this is not pertinent I will say no more about it.
9. Mr Shafi states that exhibit MS1 shows the applicant's goods being duvets sets and MS2 shows the opponents' goods also being duvet sets, however, I note that the exhibits depict only the goods themselves, there are no indications as to origin, i.e. labels, swing tags or other printed material that can be used to determine that the goods pictured in MS1 are the applicant's or that the goods shown in MS2 originate from the opponent. Neither of the marks at issue are displayed in these exhibits.
10. Mr Shafi states in his witness statement, that the goods concerned are identical and that as such, the channels of trade and relevant consumer will also be identical.
11. The applicant's written submissions set out its acceptance that the goods at issue are identical or similar. The applicant disagrees with the opponent's suggestion that the marks are so similar that they will be confused. The applicant states that the verbal elements of both marks are of low distinctive character and that scope of protection in the earlier mark should only extend to the mark as a whole, taking account of the stylisation and figurative aspects in the mark. The applicant notes that the opponent has made no claim that its earlier mark has enhanced distinctive character.
12. The applicant refers to a recent decision of the IPO in which the Hearing Officer focussed on the importance of visual and figurative elements in the mark (BL 0-268-18). The applicant also refers to Mr Justice Arnold's comments *in Whyte and Mackay*

*Ltd v Origin Wine UK Ltd [2015] EWHC 1271 (Ch), [2015] FSR 33, paragraph 44,* where he found that “if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion”.

13. The applicant states that the word ‘KIDZ’ in the earlier mark is the dominant element of that mark but that, when considered in their entirety, the verbal elements found in both marks are descriptive. The applicant claims that their mark would be perceived as KIDCOLLECTION or possibly just COLLECTION, due to the heavily stylised letter ‘K’ in that mark, whereas the earlier mark would be perceived as purely a ‘KID’ mark. The applicant claims that the marks are visually strikingly different, phonetically different and conceptually similar only in respect of non-distinctive elements. As such the marks will not be confused and that ‘mere association’, if it arises at all, would not be sufficient to find in favour of the opponent.

14. No hearing was requested and so this decision is taken following a careful perusal of the papers. The opponent has represented itself throughout the proceedings and the applicant has been professionally represented by Wilson Gunn.

## **Decision**

### **Section 5(2)(b) of the Act**

15.5(2)(b) of the Act states:

“(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.”

16. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“the CJEU”) in *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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### **Comparison of goods**

17. The goods at issue are:

#### **Applied for goods:**

**Class 24:** Bath towels; Bathroom towels; Beach towels; Bean bag covers; Bed blankets; Bed covers; Bed linen; Bed linen and blankets; Bed sheets; Bed throws; Children's blankets; Children's towels; Covers for cushions; Covers for duvets; Covers for pillows; Curtains; Cushion covers; Duvet covers; Duvets; Hooded towels; Quilt covers; Readymade curtains; Throws; Towels.

#### **Earlier goods:**

**Class 24:** Household textile articles; bed clothes; bed covers, bed spreads, eiderdowns, duvets, duvet covers, quilts, quilt covers, valenced bed sheets and

covers, fitted sheets; pillowcases, towels; wall hangings; cushion covers, upholstery fabrics and covers; textile piece goods; blankets, bedspreads, pillow cases and bolster cases; curtains for living room, curtains for dining room, curtains for kitchen and curtains for bedroom; piece goods of textile materials and household textile materials; textiles and textile piece goods not included in other classes; bed and table covers, table clothes and napkins; artificial silk piece goods; bed sheets; pillow cases, bolster cases, pyjama cases and night dress cases; hygienic and anti allergy covers for pillows and mattresses; pillow and mattress protectors; duvet covers and sheets made of silk; woven silk fabrics; silk (cloth).

18. In its counterstatement dated 02 January 2018 and in later submissions dated 14 May 2018, the applicant agrees that the goods at issue, listed above, are either identical or similar. Whilst his acceptance is noted, the degree of similarity is clearly something that contributes to whether there is a likelihood of confusion. For sake of clarity I record here that I consider all of the applied for goods to be identical because they all fall within the ambit of the earlier term 'textile household items'.

#### **Average consumer and the purchasing act**

19. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must 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: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

20. 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.”

21. The average consumer of household textile articles such as bed clothes, covers for cushions, curtains or bath towels, will predominantly be the general public but could also be a professional public, buying on behalf of others.
22. The selection of such goods is generally a visual process, as the average consumer (general public) will wish to physically handle the goods to ensure a correct fit or match, whilst simultaneously appraising the overall aesthetic impact. These goods are also purchased online using websites, however this will also be very much a visual process, albeit a remote one.
23. The professional consumer will take greater care over the visual assessment of these goods, as it is essential that any items they select, precisely match the requirements of their customers.
24. I do not, however, ignore the potential for the marks to be spoken, for example, by sales assistants in a retail establishment or when making a purchase from a catalogue, over the telephone. However, in those circumstances, the consumer will have had an opportunity to view the goods, perhaps electronically via an online catalogue or website, or on paper in the traditional sense of catalogue shopping. Therefore, when considering the aural impact of the marks, the visual impression of these goods will already have played a part in the consumer’s mind.
25. In the selection and purchase of such day to day goods, the average consumer will pay no more than a medium level of attention.

### **Comparison of marks**


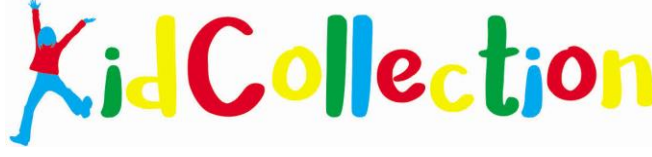
26. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference 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.”

27. It would be wrong, therefore, to artificially dissect the trade 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.

28. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
	

29. The opponents’ mark is made up of the letter combinations ‘KIDZ’ and ‘OLLECTION’ although it is clear that the letter ‘K’ in ‘KIDZ’ is also intended to act as the first letter in the word ‘(K)OLLECTION’. The letters are individually presented in a heavily stylised manner. Due to its greater size, the KIDZ element strikes the eye more in the overall impression, but the word (K)OLLECTION still plays an important role given that it combines with KIDZ to send an overall message. The stylisation also makes a reasonable contribution to the overall impression.

30. The applicant’s mark consists of the combination of letters ‘idCollection’, along with a figure of a person jumping, arms and legs outstretched, at the beginning of the mark

and intended to form a letter 'K'. The letters are brightly coloured in a random mix of red, blue, yellow and green. The overall impression in the mark lies in the perception of the expression 'KidCollection' as a whole, but the stylisation and graphic element also plays a strong role given its quite striking nature.

### **Visual similarity**

31. Visually, the respective marks are similar in that both share the letters 'id' and 'ollection'. The earlier mark begins with a stylised letter 'K' whilst the later mark incorporates the use of a jumping figure to represent a letter 'K' as the first element of that mark, although clearly the letter 'K' and the figure representing a 'K' look very different. The earlier mark also contains a letter 'Z' used to represent the letter 'S' in a misspelling of the word 'KIDS', which has no counterpart in the applied for mark. The later mark contains a letter 'C' which is not shared by the earlier mark. Both marks are heavily stylised and eye catching in their overall get-up. Whilst the marks share several letters, as outlined above, the stylisation and presentation of the lettering sets the marks apart visually, leading me to find that the marks are visually similar to only a low degree.

### **Aural similarity**

32. Aurally, the opponents' mark will be articulated either as *KIDZ/OL/EK/SHUN* or, where the letter 'K' is perceived to act as the initial letter in respect of the string 'OLLECTION', *KIDZ/KOL/EK/SHUN*. The applicant's mark will be articulated as *KID/KOL/EK/SHUN*. The marks are considered to be aurally similar to a high degree.

### **Conceptual similarity**

33. The marks at issue both convey the message that the goods provided under those marks are intended to be used for or by children, and that they comprise a range of goods which are intended to be complementary and form a collection of items that can be used together. The marks are found to be conceptually identical.

34. In conclusion, the marks are found to be visually similar to a low degree, aurally highly similar and conceptually identical.

**Distinctive character of the earlier trade mark**

35. 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).”

36. The opponent has made no claim that its earlier mark has acquired an enhanced degree of distinctive character. I must therefore assess the mark purely on its inherent distinctive character. The mark is comprised of the stylised words ‘KIDZ (K)OLLECTION’. Those words are clearly based upon the expression ‘Kids Collection’ which have either no distinctive character *per se*, or very little. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C., sitting as the

Appointed Person, observed that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

37. In this instance, the common elements are found to be of little or no distinctive character. The distinctiveness of the earlier mark is based predominantly on the misspelling of the words, together with the stylisation and graphic components. As a consequence, I find the earlier mark when taken as a whole, to have an average degree of inherent distinctive character.

### **Likelihood of Confusion**

38. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

39. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises

the marks are not the same, but puts the similarity that exists between the marks/services down to the responsible undertakings being the same or related).

40. In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, the General Court stated that:

“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.”

41. In *Quelle AG v OHIM*, Case T-88/05, the General Court found that visual similarity (and difference) is most important in the case of goods that are self-selected or where the consumer sees the mark when purchasing the goods. The Court stated:

“69. Likewise, the degree of phonetic similarity between two marks is of less importance in the case of goods which are marketed in such a way that, when making a purchase, the relevant public usually perceives visually the mark designating those goods (*BASS*, paragraph 56 supra, paragraph 55, and Case T-301/03 *Canali Ireland v OHIM – Canal Jean (CANAL JEAN CO. NEW YORK)* [2005] ECR II-2479, paragraph 55). That is the case with respect to the goods at issue here. Although the applicant states that it is a mail order company, it does not submit that its goods are sold outside normal distribution channels for clothing and shoes (shops) or without a visual assessment of

them by the relevant consumer. Moreover, while oral communication in respect of the product and the trade mark is not excluded, the choice of an item of clothing or a pair of shoes 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 (*NLSPORT, NLJEANS, NLACTIVE and NLCollection*, paragraph 53 supra, paragraph 50). The same is true of catalogue selling, which involves as much as does shop selling a visual assessment of the item purchased by the consumer, whether clothing or shoes, and does not generally allow him to obtain the help of a sales assistant. Where a sales discussion by telephone is possible, it takes place usually only after the consumer has consulted the catalogue and seen the goods. The fact that those products may, in some circumstances, be the subject of discussion between consumers is therefore irrelevant, since, at the time of purchase, the goods in question and, therefore, the marks which are affixed to them are visually perceived by consumers.”

42. Due to the nature of the goods at issue, namely household textile items, the visual impact of the marks will carry the most weight in the mind of the average consumer, during the selection and purchasing process.

43. The marks have been found to be visually similar only to a low degree. Notwithstanding the aural and conceptual similarities that have been identified earlier, the visual differences between the marks at issue are striking and obvious. Therefore, in terms of direct confusion, I do not consider it likely that the average consumer will mistake the applicant's marks for the opponents, even having found that the goods are identical, and even taking into account imperfect recollection.

44. Having found that there is no direct confusion between the marks, I must consider the possibility of indirect confusion.

45. Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 noted that:

“16. ...Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

46. These examples are not exhaustive, but provide helpful focus.

47. In the present case, the commonalities between the marks at issue are the non-distinctive and descriptive words ‘KIDCOLLECTION’ and what will be perceived as ‘KIDZ KOLLECTION’. It is in the figurative and stylised elements of each mark (and the misspelling of the earlier mark) that the distinctive character is predominantly found.



48. The applicant's mark does not simply add a non-distinctive element to the opponent's mark which would suggest to the average consumer that it was merely a sub-brand or extension of the earlier known brand. Indeed, the differences are what contribute to the distinctive character of the marks. The differences in the applicant's mark are not likely to be considered a logical or consistent extension of the opponent's mark.

49. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

50. Whilst the marks at issue have been found to be aurally highly similar and conceptually identical, as these findings are based on non-distinctive and descriptive matter, I find there to be no likelihood of indirect confusion.

51. Finally, for the purposes of completeness, I refer back to the claim from the applicant in its counterstatement, to an earlier unregistered right. The applicant did not provide any evidence in support of this claim and accordingly the matter has not been expanded on any further in this decision. In any event, owning an earlier right would not have constituted any form of defence, as referenced to in TPN 4/2009.

### **Conclusion**

52. The opposition fails. Subject to appeal, the application may proceed to registration in respect of all of the applied for goods.

### **Costs**

53. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £800 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing the statement of case and

considering the counterstatement	£300
Considering evidence	£500
Total	£800

54.I therefore order Mahmood, Bushra and Yasser Shafi, being jointly liable, to pay Kidco Trading Ltd the sum of £800. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

**Dated this 12th day of September 2018**

**Andrew Feldon**

**For the Registrar**

**The Comptroller-General**