

O/0391/23

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3573158

BY GOULIELMOS ALAFOUZOS &

ALEXANDROS SOTIRIADIS

TO REGISTER:



AS A TRADE MARK IN CLASSES 29, 30 & 35

AND

IN THE MATTER OF THE OPPOSITION THERETO

UNDER NO. 424934 BY

SNBC GROUP LTD

BACKGROUND AND PLEADINGS

1. Goulielmos Alafouzos and Alexandros Sotiriadis (“the applicants”) applied to register the trade mark shown on the front cover of this decision in the United Kingdom on 29 December 2020. The application was accepted and published on 16 April 2021 in respect of the following goods and services:

Class 29

Greek Beans & Grains; Greek olive oil.

Class 30

Greek pasta; Greek Herbs & Spices.

Class 35

Retail services in relation to alcoholic beverages (except beer); Retail services in relation to baked goods; Retail services in relation to bakery products; Retail services in relation to beer; Retail services in relation to chocolate; Retail services in relation to cocoa; Retail services in relation to coffee; Retail services in relation to confectionery; Retail services in relation to dairy products; Retail services in relation to desserts; Retail services in relation to dietary supplements; Retail services in relation to dietetic preparations; Retail services in relation to disposable paper products; Retail services in relation to food preparation implements; Retail services in relation to foodstuffs; Retail services in relation to frozen yogurts; Retail services in relation to ice creams; Retail services in relation to meats; Retail services in relation to non-alcoholic beverages; Retail services in relation to preparations for making alcoholic beverages; Retail services in relation to preparations for making beverages; Retail services in relation to seafood; Retail services in relation to sorbets; Retail services in relation to teas; Retail services relating to alcoholic beverages; Retail services relating to bakery products; Retail services relating to candy; Retail services relating to delicatessen products; Retail services relating to food; Retail services relating to food preparation implements; Retail services relating to fruit; Retail services relating to horticultural products; Retail services via catalogues related to alcoholic beverages (except beer); Retail services via catalogues related to beer;

Retail services via catalogues related to foodstuffs; Retail services via catalogues related to non-alcoholic drinks; Retail services via global computer networks related to alcoholic beverages (except beer); Retail services via global computer networks related to beer; Retail services via global computer networks related to foodstuffs; Retail services via global computer networks related to non-alcoholic beverages; Wholesale services in relation to beer; Wholesale services in relation to chocolate; Wholesale services in relation to cocoa; Wholesale services in relation to coffee; Wholesale services in relation to confectionery; Wholesale services in relation to dairy products; Wholesale services in relation to desserts; Wholesale services in relation to foodstuffs; Wholesale services in relation to ice creams; Wholesale services in relation to meats; Wholesale services in relation to non-alcoholic beverages; Wholesale services in relation to seafood; Wholesale services in relation to sorbets; Wholesale services relating to candy.

2. On 14 June 2021, the application was opposed by SNBC Group Ltd (“the opponent”). The opposition is based on sections 5(4)(a), 3(6) and 5(6)(a) of the Trade Marks Act 1994 (“the Act”) and concerns all the goods and services in the application.

3. Under section 5(4)(a), the opponent claims to have used the following sign throughout the UK since 2015 for *Online retail services in connection with a wide variety of products including foods, beverages, healthcare, cosmetics and beauty, baby care, cleaning products, detergents, kitchen utensils and equipment, books and printed matter.*



The opponent claims to have acquired substantial goodwill under the sign. According to the opponent, use of the contested mark, which it asserts is virtually identical to its sign, would constitute a misrepresentation to the public that would result in damage to the opponent’s business reputation or to loss of sales. It also claims that, as the applicants previously had a business relationship with the opponent, they were fully

aware of the opponent's business and sought to imitate the opponent's sign to take advantage of its goodwill. Consequently, use of the contested mark would be contrary to the law of passing off.

4. Under section 3(6), the opponent claims that the applicants have over the past few years been business connections of the opponent and showed an interest in investing in the opponent's business. It asserts that in 2020 it became clear that the applicants had no real interest in investing in the business and the relationship deteriorated. The opponent claims that the applicants have sought to register a mark to which they have no entitlement and have done so in an attempt to block the opponent from securing trade mark rights in their own sign and as an attempt to disrupt the opponent's business. Consequently, in the opponent's view, the application offends against section 3(6) of the Act.

5. Under section 5(6), the opponent claims that the applicants had once supplied products which the opponent sold under the GREEK MARKET brand and benefited financially from the business arrangements. It asserts that, by acting as suppliers, the applicants were acting in the capacity of agents to the opponent's business and as such had a duty not to encroach on the opponent's trade mark rights. Consequently, in the opponent's view, the application offends against section 5(6) of the Act.

6. The applicants filed a defence and counterstatement denying the claims made and putting the opponent to proof of its claims to substantial goodwill. In defence of the section 5(4)(a) claim, the applicants assert that they entered into an oral agreement with the opponent in autumn 2019 to trade together under the contested mark in relation to the goods and services listed in the specification, and that this agreement entitled them to trade under, and register, the mark. Further, or in the alternative, the applicants deny that the contested mark is virtually identical to the sign relied on by the opponent. They also deny that they were fully aware of the opponent's business.

7. In relation to the opponent's claim under section 3(6), the applicants deny ever having had an interest in purchasing the opponent's business and having been introduced as investors to that business. They claim that in October 2019, they, together with the director of the opponent and his spouse, all acting in their personal

capacity, agreed to create a company “Greek Market Limited” to trade together under the GREEK MARKET brand, and that it was agreed that the applicants would be the majority shareholders. They state that documents were later filed at Companies House without their consent to deprive them of their shareholding and that a Companies House investigation into this matter is currently ongoing.

8. The applicants also deny the opponent’s claim under section 5(6) that they acted as agents of the opponent’s business.

9. In these proceedings, the opponent is represented by Stevens Hewlett & Perkins. The applicants were initially represented by Juris Fisher, who requested a hearing on 5 December 2022 on behalf of the applicants. On 4 January 2023, Juris Fisher informed the Tribunal that they were no longer acting for the applicants. The Tribunal wrote to the applicants three times to ask them to confirm whether they wished to attend the hearing and each time received no response. As the opponent had indicated that it would not attend the hearing, the scheduled hearing was de-listed and I have taken this decision on the basis of the papers that have been filed by both parties.

EVIDENCE AND SUBMISSIONS

10. The opponent’s evidence comes from Stavros Bagizos, the sole director of SNBC Group Ltd, and is dated 21 April 2022. His witness statement is accompanied by 12 exhibits and aims to prove that the opponent has the required goodwill to mount a successful challenge under section 5(4)(a). In addition, it provides evidence of the relationship between the parties and their dealings with each other, which are relevant under sections 3(6) and 5(6). The evidence also contains extracts from the bundle in County Court proceedings between a company associated with Mr Sotiriadis and SNBC.

11. The applicants have filed evidence from three witnesses, namely each of the applicants and Mr Ege Ozmen, the owner of a number of retail stores mainly selling Mediterranean and Turkish food, beverages and tobacco, along with other products.

12. The witness statement of Mr Sotiriadis is dated 30 July 2022 and is accompanied by 11 exhibits. His evidence goes to the relationship between Mr Bazigos and the applicants and an agreement to run a business under the name “Greek Market”, and what he alleges to be the unauthorised removal of the applicants as persons with significant control of the company Greek Market Limited (Registered Company No. 12291263). He also briefly responds to some of the points made by Mr Bazigos and questions the relevance of the evidence from the County Court proceedings.

13. The witness statement of Mr Alafouzou is also dated 30 July 2022 and is accompanied by 4 exhibits. Mr Alafouzou describes himself as the owner of several businesses trading in food, beverages and tobacco, including Hellenic Gourmet and Hellenic Bakery. His evidence goes to his dealings with Mr Bazigos.

14. Mr Ozmen’s evidence is dated 29 July 2022. He states that:

“I can confirm that in 2018 and onwards there was agreement between Messrs. Bazigos, Sotiriadis and Alafouzou to conduct business, including online business, under name ‘Greek Market’. For this purpose, they created Greek Market Ltd. I was present during some of their meetings and conversations, and I witnessed some of the business actions that were preliminarily made as part of that common trade under ‘Greek Market’ between those gentlemen.”¹

15. The applicants also filed written submissions on 1 August 2022. I shall refer to these, as well as relevant details in the evidence, as necessary during the course of my decision.

DECISION

Section 5(4)(a)

16. Section 5(4)(a) of the Act states that:

¹ Paragraph 3.

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented—

(a) by virtue of any rule or law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection 4(A) is met

...”

17. Subsection 4(A) is as follows:

“The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

18. In *Reckitt & Colman Products Limited v Borden Inc. & Ors (“Jif Lemon”)* [1990] RPC 341, HL, Lord Oliver of Aylmerton described the ‘classical trinity’ that must be proved in order to reach a finding of passing off:

“First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying ‘get-up’ (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff’s goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff. Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the

defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."²

Relevant Date

19. In *Maier & Anor v ASOS plc & Anor* [2015] EWCA Civ 220, Kitchin LJ said;

"... Under the English law of passing off, the relevant date for determining whether a claimant has established the necessary reputation or goodwill is the date of the commencement of the conduct complained of (see, for example, *Cadbury-Schweppes Pty Ltd v The Pub Squash Co Ltd* [1981] RPC 429). The jurisprudence of the General Court and that of OHIM is not entirely clear as to how this should be taken into consideration under Article 8(4) (compare, for example, T-114/07 and T-115/07 *Last Minute Network Ltd* and Case R 784/2010-2 *Sun Capital Partners Inc*). In my judgment the matter should be addressed in the following way. The party opposing the application or the registration must show that, as at the date of application (or the priority date, if earlier), a normal and fair use of the [contested] trade mark would have amounted to passing off. But if the [contested] trade mark has in fact been used from an earlier date then that is a matter which must be taken into account, for the opponent must show that he had the necessary goodwill and reputation to render that use actionable on the date that it began."³

20. The applicants do not claim to have used the contested mark before the date of application, and so I do not need to consider the position at a date earlier than the application date of 29 December 2020.

² Page 406.

³ Paragraph 165.

Goodwill

21. The opponent must show that it had goodwill in a business at the relevant date and that the sign relied upon is associated with, or distinctive of, that business.

22. The concept of goodwill was considered by the House of Lords in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantages of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has the power of attraction sufficient to bring customers home to the source from which it emanates.”⁴

The opponent's evidence

23. The opponent claims that it has built up substantial goodwill and sales under the earlier sign, on the basis of at least seven years' use before the relevant date.⁵ Mr Bazigos goes on to state that:

“There has been a significant growth in the sale of goods from my Company's online retail store, with annual sales of several hundred thousand pounds worth of goods in 2019 and 2020.”⁶

24. Exhibit SB4 contains order information. There are 24 payment receipts dated from 26 April 2013 to 16 February 2017 from customers with addresses in the UK. Amounts range from £24.40 to £100.20. The total of all these orders comes to £1,102.69 over

⁴ At [224].

⁵ Witness statement of Mr Bazigos, paragraph 7.

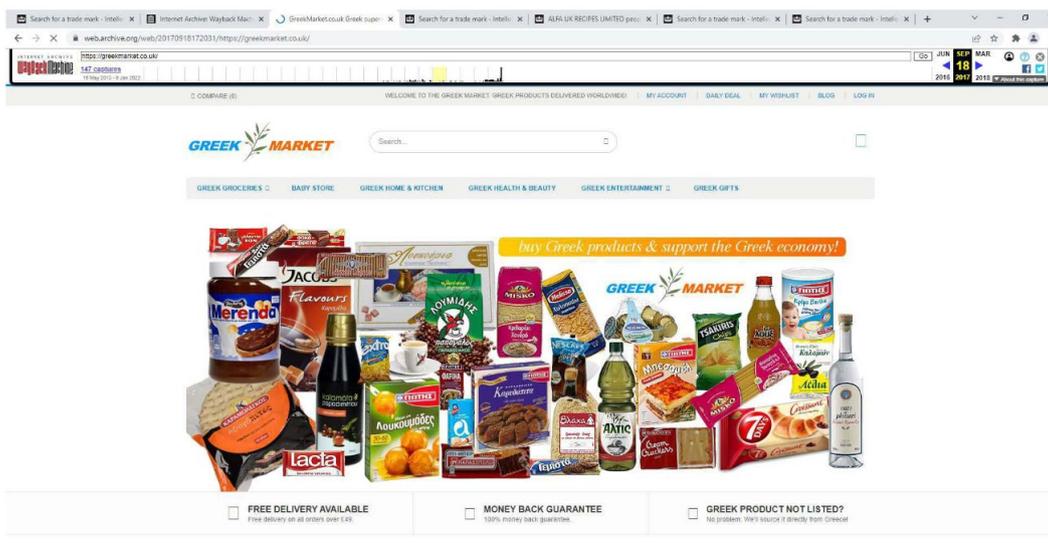
⁶ Paragraph 4.

almost four years. However, it is not clear what goods were being retailed. There are also 18 invoices dated from 24 June 2017 to 27 December 2020 showing sales of what appear to be Greek food and beverage products to customers with addresses in the UK. Amounts range from £15.20 to £75.22 and the total comes to £790.51. All the receipts and invoices state that the purchases were made from the website greekmarket.co.uk. The sign relied on is present on the invoices from 24 September 2018 onwards.

25. It appears from the opponent's evidence that the earlier sign was used from 30 April 2016 for an online retailer of Greek products, with the following sign used in 2015:⁷



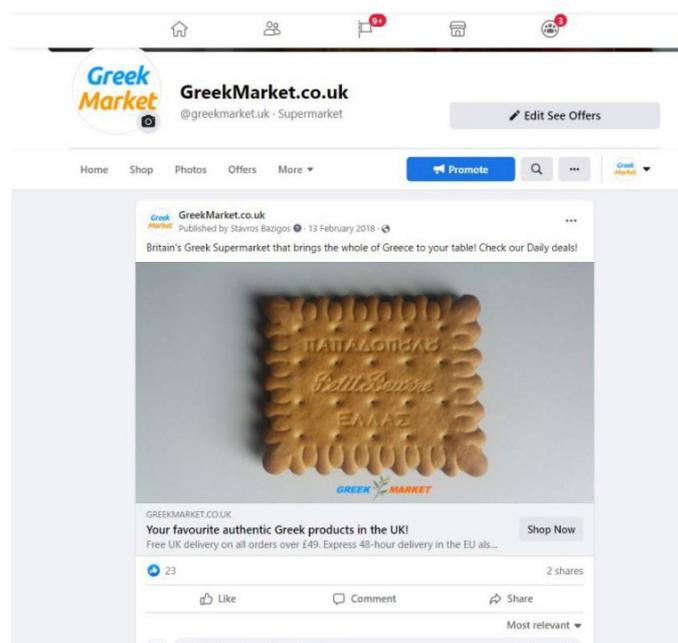
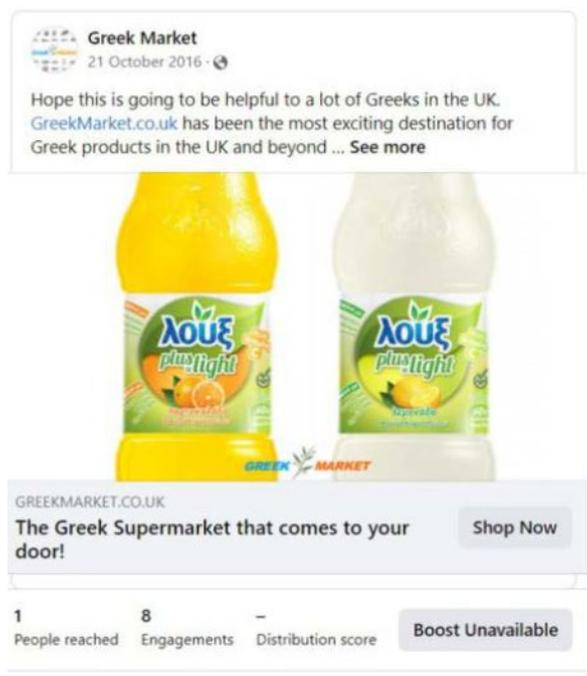
The website screenshots show a range of goods on sale, namely Greek pasta, Greek beans and grains, Greek herbs and spices, Greek cakes and biscuits, Greek olives and olive oil, and Greek coffee and tea. A single screenshot dated 16 November 2020 shows baby laundry liquid detergent, snacks, fruit juice, a hand blender, flour and bakery goods. The following screenshot dated 18 September 2017 portrays the website as a source of Greek food and drink from what appear to be a number of different brands.⁸



⁷ Exhibit SB3.

⁸ Exhibit SB3, page 13.

26. The opponent's website has been promoted through Facebook advertising, two examples of which are shown below.⁹ Further posts dating from 25 February 2014 to 16 November 2019 can be found in the same exhibit, along with 30 pages of billing reports showing regular payments for Facebook adverts between 20 June 2017 and 31 December 2020.



⁹ Exhibit SB5, pages 5 and 7.

27. The sign also appears on the packaging of the boxes and, although it is only shown partially in a photograph dated April 2020, on vans (albeit in a different colour).¹⁰

Has the opponent shown that it has sufficient goodwill?

28. In *Smart Planet Technologies, Inc. v Rajinda Sharma (Recup Trade Mark)*, BL O/304/20, Mr Thomas Mitcheson QC, sitting as the Appointed Person, reviewed the following authorities on the establishment of goodwill for the purposes of passing off: *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2015] UKSC 31, paragraph 52, *Jif Lemon*, and *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd* [1980] R.P.C. 31. After doing so, he concluded that:

“.. a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon.”¹¹

29. The applicants submit that the opponent has not shown that it has demonstrated sufficient goodwill for a successful claim under this ground. They have adduced evidence from the records of Companies House that shows that, although the opponent was incorporated on 24 June 2015, it was exempt from filing accounts under section 480 of the Companies Act 2006 relating to dormant companies for each year up to and including the financial year ending 30 June 2018. For the year ending 30 June 2019, turnover was £60,210 and profit £1,081.¹² The applicants contend that any trade was carried out by Mr Bazigos personally, as a sole trader, rather than by the opponent.¹³

30. The opponent has not explained the apparent discrepancy between a claim to goodwill, which requires trading, and the dormant status of the opponent until the

¹⁰ Exhibit SB5, page 10.

¹¹ Paragraph 34.

¹² Exhibit AS9.

¹³ Written submissions, paragraph 14.

financial year ending 30 June 2018. Even if a persuasive explanation had been provided, the level of sales is low. The only turnover figures come from the year ending 30 June 2019, and I note that the opponent itself had only given a very general indication, as quoted in paragraph 23 above. Prior to 24 June 2017, I have no information on which goods were actually sold to UK consumers by the online retailer. After that date, the only goods shown on the invoices are food and beverages and the Facebook advertising that has been adduced in evidence also highlights these products. Consequently, I find that the opponent has not shown that it has a protectable goodwill in relation to *Online retail services in connection with a wide variety of products including ... healthcare, cosmetics and beauty, baby care, cleaning products, detergents, kitchen utensils and equipment, books and printed matter.*

31. Even if I were to take the most generous view of the opponent's evidence, that all the sales are food and beverages purchased by UK consumers, I have evidence of sales of £1,325.59 before 1 July 2018, £60,210 between 1 July 2018 and 30 June 2019, and £198.81 after 1 July 2019 until the relevant date. I do not have any evidence of the size of the food and beverage online retail market but I consider it reasonable to believe it to be large. In my view, under £62,000 worth of sales over a period of seven years would be insufficient to create a protectable goodwill in relation to *Online retail services in connection with ... foods, beverages.*

32. Might the level of trading be sufficient to generate a protectable goodwill in relation to *Online retail services in connection with ... Greek foods, beverages?* The market here will naturally be smaller than the market for online retail of food and beverages as a whole. However, I remind myself of what Lord Oliver said in *Jif Lemon* (with my emphasis), that

“... he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying ‘get-up’ (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the

public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services."¹⁴

33. The sign in question consists of the two words "GREEK" and "MARKET" separated by what I believe to be a depiction of an olive branch. The verbal element of the sign essentially describes the services that are provided: in the second advert shown in paragraph 26 above, the website is described as "Britain's Greek supermarket". In addition, the figurative element is smaller and, to my mind, less memorable.

34. In *Office Cleaning Services Limited v Westminster Window & General Cleaners Limited* [1946] 63 RPC 39, Lord Simonds stated that:

"Where a trader adopts words in common use for his trade name, some risk of confusion is inevitable. But that risk must be run unless the first user is allowed unfairly to monopolise the words. The court will accept comparatively small differences as sufficient to avert confusion. A greater degree of discrimination may fairly be expected from the public where a trade name consists wholly or in part of words descriptive of the articles to be sold or the services to be rendered."

35. In paragraph 41 of his decision in *Recup*, the Appointed Person noted that in that case and bearing in mind the comments of Lord Oliver that I have quoted above, the element of descriptiveness in the sign meant that it would take longer for sufficient trade to have been carried out in order for protectable goodwill to have been established. Here, I have been given only one year's turnover figures, some fairly general narrative commentary and orders and invoices showing relatively low sales. Given the descriptive element of the sign, I do not consider that the trade shown is enough for the sign to have become recognised by the public as distinctive specifically of the opponent's services. I find that there is no protectable goodwill, and the section 5(4)(a) ground fails.

¹⁴ Page 406.

Section 3(6)

36. Section 3(6) of the Act is as follows:

“A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

37. In *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121, the Court of Appeal considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, *Hasbro, Inc. v European Union Intellectual Property Office (EUIPO)*, Case T-663/19, *pelicantravel.com s.r.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-136/11, and *Psytech International Ltd v OHIM*, Case T-507/08.¹⁵ Floyd LJ summarised the law as follows:

“The following points of relevance to this case can be gleaned from these CJEU authorities:

1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can be relied on before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].
2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].
3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of

¹⁵ Section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts, although the UK has left the EU.

trade mark law, i.e. the course of trade and having regard to the objectives of the law namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin: *Lindt* at [45]; *Koton Mağazacılık* at [45].

4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacılık* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54]¹⁶.

38. According to Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are:

“(1) what, in concrete terms, was the objective that CKL had been accused of pursuing? (2) was that an objective for the purposes of which the contested application could not properly be filed? (3) was it established that the contested application was filed in pursuit of that objective? The first question serves to ensure procedural fairness and clarity of analysis. The second question requires the decision taker to apply a moral standard which, in the absence of any direct ruling on the point from the CJEU, is taken to condemn not only dishonesty but also ‘some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined’: see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd*

¹⁶ Paragraph 67.

[1999] RPC 367 at 379 (Lindsay J). The third question requires the decision taker to give effect to the principle that innocence must be presumed in the absence of evidence sufficient to show that the applicant has acted improperly as alleged.”¹⁷

39. It is necessary to ascertain what the applicant knew at the relevant date: see *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: see *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

40. The opponent claims that the applicants’ objective was to block the opponent from securing rights in a trade mark to which it is rightfully entitled, or to try to use the contested mark as leverage against the opponent’s business and to disrupt that business.

41. The purpose of the trade mark system is to enable the consumer to distinguish the goods and services of one undertaking from those of another. The courts have found that the filing of a trade mark for the purposes of blocking applications by a third party, without an intention to use the mark, was an act of bad faith: see *Copernicus-Trademarks v EUIPO (LUCEO)*, Case T-82/14. An application to register a mark is likely to have been filed in bad faith where the applicant knew that a third party used the mark in the UK, or had reason to believe that it may wish to do so in future, and intended to use the trade mark registration to extract payment or other consideration from the third party, e.g. to lever a UK licence from an overseas trader: *Daawat Trade Mark*, [2003] RPC 11. An intention to use the mark to disrupt another trader’s business would also not be an objective for the purposes of which the application could properly be filed.

¹⁷ Paragraph 8.

Has the opponent established a prima facie case that the contested application was filed in bad faith?

42. It is undisputed that the applicants had a business relationship with the opponent prior to the application for the contested mark. The opponent's Exhibit SB12 contains a collection of text messages and invoices indicating that Mr Sotiriadis (or his companies) was supplying Mr Bazigos/SNBC with goods from a Greek supplier of frozen pastries under the brand "Alfa" between 11 September 2018 and some point in May 2020. On 8 May 2020, Mr Bazigos on behalf of SNBC wrote to the supplier, Athanassios D Koukoutaris SA, seeking to trade directly with the company, stating that their local suppliers had been unable to cope with increasing demand for the products and "*legal requirements for clarity and transparency*".¹⁸

43. It is also agreed that on 31 October 2019 a company with the name "Greek Market Limited" was incorporated. While Mr Bazigos states that this company was a vehicle to enable the applicants to invest in Mr Bazigos's business,¹⁹ Mr Sotiriadis says:

"... in about summer 2018, we started discussing common business under 'Greek Market' name and expanding it together, and agreed to run it. Mr Alafouzou, the second Applicant, joined this agreement later."²⁰

44. Neither party has filed any contemporaneous evidence as to the nature of the agreement between the parties. Indeed, Mr Sotiriadis states that this was an oral agreement.²¹

45. Greek Market Limited had one director, namely Mr Bazigos's wife, who from 1 January 2020 held 33% of the share capital of the company. The applicants each held another 33% and Mr Bazigos 1%.²² The applicants were recorded as "persons with significant control".²³ On 6 May 2020, electronic forms were filed at Companies

¹⁸ Exhibit SB9, page 10.

¹⁹ Witness statement of Mr Bazigos, paragraph 9.

²⁰ Witness statement of Mr Sotiriadis, paragraph 5.

²¹ *Ibid*, paragraph 9.

²² Exhibit AS6.

²³ Exhibit SB7.

House that gave notice that the applicants had ceased to be persons with significant control as of 1 January 2020.²⁴ Mr Sotiriadis states that it was only in October 2020 that he and Mr Alafouzos discovered that this had happened and that they then instructed a lawyer to write to Mr Bazigos's wife demanding an explanation. She did not respond to this, or a follow-up, letter.²⁵ Mr Sotiriadis states that:

“For the avoidance of any doubt, despite tensions, no discussion to terminate our oral agreement to trade under ‘Greek Market’ ever took place. Neither myself nor Mr. Alafouzos departed from the agreement to run separate business under ‘Greek Market’.”²⁶

46. Mr Bazigos gives a different account. He states that the applicants were removed as persons with significant control “*when it was clear that they had no interest in investing in the business*”.²⁷ He states that this lack of interest was confirmed verbally and then in writing. The only written evidence he adduces is the following text message from Mr Alafouzos sent on 26 May 2020:

Good morning Stavros.
Please take down Hellenic gourmet from Greek Market today
I do not want to fall out with you again
And take me off the company
Let me know what to sign to leave
don't want to be in
I have also informed Alexandros
Tomorrow I will go in to have a look and hope not to see my shop in your
page
Regards to your wife
Thank you”²⁸

²⁴ Exhibit AS2.

²⁵ Witness statement of Mr Sotiriadis, paragraphs 10-12.

²⁶ *Ibid*, paragraph 9.

²⁷ Witness statement of Mr Bazigos, paragraph 10.

²⁸ Exhibit SB6.

47. Mr Bazigos says that this message is a request that the applicants' names be removed from Greek Market Limited. There are a number of issues with this interpretation, though. First, Mr Alafouzos does not specify which company he means. Secondly, I cannot see how it can be seen as a request for Mr Sotiriadis to be removed from any company: Mr Alafouzos simply says that he has informed someone called Alexandros (presumably Mr Sotiriadis). Thirdly, the date of the text is 26 May 2020, when the notices of the removal of the applicants from the company were filed earlier, on 6 May 2020.

48. In his own witness statement, Mr Alafouzos says that Mr Bazigos has misinterpreted the message. He notes that it begins with a request to remove one of his companies, Hellenic Gourmet, from Mr Bazigos's website. According to the witness statement, in September 2019, Mr Bazigos had bought the domains hellenicgourmet.co.uk and hellenicbakery.co.uk for Mr Alafouzos, promising that he would pass them on to him. This was not done, and Mr Alafouzos discovered later that the domains directed a potential customer to Mr Bazigos's greekmarket.co.uk.²⁹ He denies ever having requested his name to be removed from Greek Market Ltd or signing any documents to transfer his shareholding, and states that he is expecting to trade under the name "Greek Market" when this matter has been resolved.³⁰

49. I shall make some brief remarks on the remainder of the opponent's evidence going to the section 3(6) claim. This consists of extracts from the bundle of documents filed in legal proceedings in the County Court between the opponent and Alfa UK Recipes Ltd, a company associated with Mr Sotiriadis.³¹ The matter is unrelated to the present proceedings and from what I can tell appears to concern an allegation by Alfa that it is owed money by SNBC. The evidence is incomplete and the opponent has not explained the relevance of this material to the issues that I have to decide. I do not consider that it sheds any light on whether the contested application was made in bad faith and so I shall say no more about it.

²⁹ Exhibits GA3 and GA4.

³⁰ Witness statement of Mr Alafouzos, paragraphs 7-11.

³¹ Exhibit SB10.

50. I take the same line on the opponent's Exhibit SB11, which contains an order from Mr Sotiriadis's wife from greekmarket.co.uk dated 24 February 2020 and an extract from the Companies House website showing that she was until 1 February 2021 a secretary of Alfa UK Recipes Ltd. I cannot see how a single order, placed when Mr Sotiriadis was supplying Mr Bazigos with goods and before relations appear to have soured, has any bearing on an assessment of bad faith.

51. Bad faith is a serious allegation that must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies. It is not enough to establish facts which are as consistent with good faith as bad faith: see *Red Bull*, paragraph 133. The evidence filed by the opponent does not, in my view, produce a *prima facie* case that the application for the contested mark was made in order to block the opponent from registering the earlier sign as a trade mark. In fact, the opponent's application to register that mark was unopposed, although the applicants did file a Form TM7A (Notice of threatened opposition).³² Nor do I consider that the evidence shows that the applicants were motivated by a desire to exercise leverage over the opponent through the contested mark or disrupt its trade. It is equally plausible from the evidence that they wished to carry on with plans to trade as "Greek Market Limited". I can accept that they knew that the opponent also had a website with this name, but I have already found that the words are descriptive of the retailing of Greek products.

52. The section 3(6) ground has failed.

53. This means that I do not need to address the submissions made by the applicants in relation to the filing of email correspondence between Mr Bazigos and his legal advisors. The applicants invited me to consider that the opponent had, either intentionally or inadvertently, waived the privileged status of that correspondence by producing it with the evidence. For the record, I shall say that I believe the filing of that correspondence is likely to have been made in error. As I find that the section 3(6) ground fails, I need consider it no further.

³² Witness statement of Mr Sotiriadis, paragraph 28; Exhibit AS11.

Section 5(6)

54. Section 5(6) of the Act is as follows:

“Where an agent or representative (‘R’) of the proprietor of a trade mark applies, without the proprietor’s consent, for the registration of the trade mark in R’s own name, the application is to be refused unless R justifies that action.”

55. In *Safariland LLC v OHIM – DEF-TEC Defense Technology GmbH (FIRST DEFENCE AEROSOL PEPPER PROJECTOR)*, Case T-262/09, the General Court (“GC”) said that:

“60. ... under Article 8(3) of Regulation No. 207/2009, a trade mark must not be registered where an agent or representative of the proprietor of the trade mark applies for registration thereof in his own name without the proprietor’s consent, unless the agent or representative justifies his action.

61. It is apparent from the wording of that provision that, for an opposition to succeed on that basis, it is necessary, first, for the opposing party to be the proprietor of the earlier mark; secondly, for the applicant for the mark to be or to have been the agent or representative of the proprietor of the mark; thirdly, for the application to have been filed in the name of the agent or representative without the proprietor’s consent and without there being legitimate reason to justify the agent’s or representative’s action; and fourthly, for the application to relate in essence to identical or similar signs and goods. Those conditions are cumulative.”

56. Even though I found that the opponent did not have protectable goodwill, it was using the earlier sign. However, at the date of application, this earlier sign was not a trade mark and so the ground should, in my view, fail at this first hurdle. However, in case I am wrong in this, I shall move on to consider the second condition, where I am guided by the comments the GC made later in the same judgment:

“64. As regards the terms ‘agent’ and ‘representative’ as used in Article 8(3) of Regulation No. 207/2009, it must be found that – as is stated in the OHIM Opposition Guidelines – in cases where agents of the trade mark proprietor have filed an application without consent, those terms must be interpreted broadly, so as to cover all kinds of relationships based on a contractual arrangement under which one party is representing the interests of the other, regardless of how the contractual relationship between the proprietor or principal, on the one hand, and the applicant for the Community trade mark, on the other, is categorised. According to those guidelines, it is sufficient for the purposes of Article 8(3) of Regulation No 207/2009 that there be some agreement of commercial co-operation between the parties of a kind that gives rise to a fiduciary relationship by imposing on the trade mark applicant – whether expressly or implicitly – a general duty of trust and loyalty as regards the interests of the trade mark proprietor. Nevertheless, some kind of agreement has to exist between the parties. If the applicant acts completely independently, without having entered into any kind of relationship with the proprietor, he cannot be treated as an agent for the purposes of Article 8(3) of Regulation No 207/2009. Thus, a mere purchaser or client of the proprietor cannot be regarded as an ‘agent’ or as a ‘representative’ for the purposes of that provision, since such persons are under no special obligation of trust to the trade mark proprietor.

As regards the cessation of the contractual relationship at the time when the application for the trade mark is filed, it must be found that – as is also apparent from the abovementioned guidelines – it is not necessary for the agreement between the parties still to be in force at the time when the application for the trade mark is filed and that Article 8(3) of Regulation No 207/2009 is intended to protect the trade mark proprietor even after the cessation of the contractual relationship from which an obligation of trust derived.”

57. The relationship between the applicants and the opponent was that of supplier and customer. This is not the type of relationship in which one party represents the interests of another, and there is no special obligation of trust.

58. The section 5(6) ground fails.

OUTCOME

59. The opposition has failed and Trade Mark Application No. 424934 will proceed to registration.

COSTS

60. The applicants have been successful and are entitled to a contribution to their costs, in line with the scale set out in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicants the sum of £1350, which is calculated as follows:

Preparing a statement and considering the other side's statement: £350

Preparing evidence and commenting on the other side's evidence: £1000

TOTAL: £1350

61. I therefore order SNBC Group Ltd to pay Goulielmos Alafouzou and Alexandros Sotiriadis the sum of £1350. This sum should be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 26th day of April 2023

Clare Boucher
For the Registrar,
Comptroller-General