

O-327-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2489619
BY IMRAN KARIM, HASSAN KARIM AND YASIN NAZIR KARIM YAKUB TO
REGISTER THE TRADE MARKS**

**CR7
CR 7**

AS A SERIES OF TWO, IN CLASSES 25, 35, 38, and 43

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 98481
BY CHATEAU ROUGE LTD**

TRADE MARKS ACT 1994

IN THE MATTER OF Application No. 2489619

By Imran Karim, Hassan Karim and Yasin Nazir Karim Yakub to register the trade mark

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**IN THE MATTER OF Opposition thereto under No. 98481
by Chateau Rouge Ltd**

BACKGROUND

1. On 10th June 2008, Imran Karim, Hassan Karim and Yasin Nazir Karim Yakub of 44 Station Road, Redhill, Surrey RH1 1PH (hereafter “the applicants”) applied to the register (in standard characters without claim to font, style, size or colour) the following marks:

CR7

CR 7

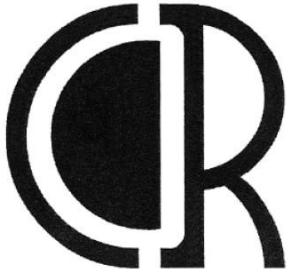
as a series of two, in Classes 25, 35, 38 and 43. It is only the services in Class 43 that concern me as they comprise the subject of the opposition. These services are:

Class 43

Services for providing food and drink; temporary accommodation; restaurant, bar and catering services; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; retirement home services; creche services; hotels; cafes; cafe.

2. The application was published on 19th September 2008 and on 19th December 2008, Chateau Rouge Ltd of 5-7 Vernon Yard, London W11 2DX (hereafter “the opponent”) lodged an opposition against the Class 43 services indicated above.

3. The opponent based its opposition on section 5(2)(b) of The Trade Marks Act 1994 (hereafter the “Act”), citing an earlier UK mark, 2403964, the details of which are as follows:

Mark	Filing and registration dates	Goods and services relied upon in the opposition
	14 th October 2005 and 7 th April 2006	Class 43: Services for providing food and drink.

4. The opponent says their mark comprises the letters “CR”, being an abbreviation of their company name “Chateau Rouge”. They say they sell food and beverages to the public with planned expansion into a wider range to include restaurants, cafes, catering and hotel services. They believe there is a likelihood of confusion with their earlier mark.
5. The applicants filed a counterstatement denying the ground of opposition. They say the opponent makes luxury teas, in respect of which they will not be using the mark the subject of the application. They do not feel the marks are similar as the opponent’s mark is a figurative mark whilst theirs is a word mark with the number ‘7’ as an integral element of the whole mark ‘CR7’. They also say they have a Community Trade Mark, E6992895, which would in any event cover them for the UK. Nonetheless they offer not to produce tea under the CR7 mark as a ‘gesture of goodwill’.
6. On the subject of the earlier Community Trade Mark mentioned by the applicants, I should clarify that, whatever may have been intended by its mention by the applicants, or thought to have been intended by the opponent, for the purposes of these proceedings, it does not feature in my consideration and conclusions. The fact the applicant has a parallel Community Trade Mark (“CTM”) is not relevant in my consideration as to a likelihood of confusion as between the earlier cited UK mark of the opponent and the applicant’s mark under consideration. If the opponent feels they have rights which predate the applicant’s CTM then these matters are properly dealt with before the Community Trade Mark Office and are not issues for me.

7. If, on the other hand, by referring to their CTM mark, the applicant's hoped to 'trump' the opponent's earlier UK mark, 2403964, it is noted, firstly, that the opponent's earlier UK mark has an earlier filing date in any case than the CTM. Secondly, and in any event, as confirmed in Tribunal Practice Notice 4/2009, such a 'defence' has been confirmed as wrong in law (see the Appointed Person's decision in BL O-211-09).
8. In recognising in particular that both parties in this case are unrepresented I should also, and at the outset, clarify that where the opponent's earlier UK mark is not the subject of proof of use requirements, as in this case, the comparison I shall embark on is a 'notional' one. In other words, the comparison is as between the applicant's mark as *filed* and the mark the opponents have *registered*, and not as either party may *actually* use, or intend to use.
9. A further aspect of the notional comparison means that, as with the respective marks, the same rule applies to their specifications of services. That is to say that what matters is the specification as registered or as filed, and not what goods or services either party may *actually* use their mark on, or in respect of.
10. Having made the clarifications as above in paras 6 - 9, I trust that matters raised in letters and evidence by the parties have been clarified. Formal evidence has, in fact, only been supplied by the opponent, but I trust my clarifications address the issues in that evidence and that, accordingly I have no need to present the usual summary of relevant evidence. Neither party has asked to be heard and instead are content that the matter be decided on the papers.

DECISION

11. The opposition is founded solely upon Section 5(2) (b) of the Act. This reads:

“(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.”

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

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

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

13. With a filing date of 14th October 2005 and a registration date of 7th April 2006, it is clear that under Section 6(1) of the Act, the opponent’s mark is an earlier trade mark. Further, having a registration date of 7th April 2006, less than five years before the publication of the contested mark (19th September 2008), it is, therefore, not (as I have already said) subject to the proof of use requirement set out in section 6A of the Act.

14. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (“ECJ”) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P* (LIMONCELLO). It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

Comparison of services

15. In assessing the similarity of goods and services, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the ECJ stated at paragraph 23 of the Judgment:

‘In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their end users and their method of use and whether they are in competition with each other or are complementary.’

16. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.
17. Two further cases on the way that specifications ought to be interpreted (particularly in respect of services) should be borne in mind. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd (“Thomson”)* [2003] RPC 32, at para 31, Aldous LJ, says

“In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use.”

Although this was in the context of arriving at a fair specification consequent to an attack of revocation on the grounds of non-use, the principle that it is the public and circumstances of the relevant trade that should underpin consideration as to the terms used in a specification nonetheless holds good. Secondly, there is the case of *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd (“Beautimatic”)* [2000] FSR 267, in which the principle of giving words their ordinary (rather than an unnaturally narrow) meaning was enshrined. In summary, the *Beautimatic* case urges an approach that is not unnaturally narrow, whilst the *Thomson* case stresses that the exercise is not one of lexical analysis in a vacuum, but by reference to how the average consumer may perceive matters in the relevant trade.

18. It is important to recognise that even though there is no evidence on similarity, I nevertheless have the statements of case and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the Appointed Person said in *Raleigh International trade mark* [2001] R.P.C. 11 at paragraph 20, that such evidence will be required if the goods or

services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items, evidence may not be necessary. He also stated that the tribunal may, in an appropriate case, consider the question of similarity from the viewpoint of the notional member of the relevant purchasing public.

19. I should also mention a further case in terms of the application of legal principles, and that is the European Court of First Instance (“CFI”) in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) (“Meric”)* Case T-133/05, where, at para 29, it is stated:

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

16. Finally, there is the case of *Avnet Incorporated v Isoact Ltd (“Avnet”)* [1998] FSR 16, where Jacob J (as he then was) says:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

17. With my introductory comments out of the way, I turn to the services to be compared, which are as follows:

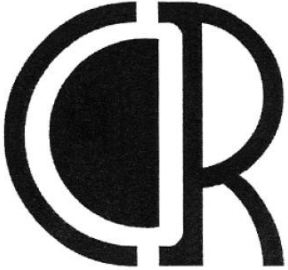
The opponent's services	The applicants' services
<p>Class 43:</p> <p>Services for providing food and drink.</p>	<p>Class 43</p> <p>Services for providing food and drink; temporary accommodation; restaurant, bar and catering services; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; retirement home services; creche services; hotels; cafes; cafe.</p>

18. It is clear that “Services for providing food and drink” in the applicants’ specification is identical to the same term in the opponent’s specification. By the same token, the term “restaurant, bar and catering services” amount to the same thing, and are identical to, “services for providing food and drink”. Similarly, “cafes” and “café” are also identical to “services for providing food and drink”. That is to say that “restaurant, bar and catering services” and “cafes” and “café” all have, as their primary purpose and raison d’etre, the provision of food and drink. That describes the service on offer. That then leaves the following: “temporary accommodation; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; retirement home services; creche services; hotels”.
19. Plainly, “temporary accommodation”, “provision of holiday accommodation”, “retirement home services”, “crèche services” and “hotels” may (or may not) all involve the provision of food and drink as part of and ancillary to the overall service. This is not, however, their primary intended purpose. In trade, a hotel would be classed as a “hotel”, a crèche as a “crèche”, a retirement home as a “retirement home”. That said, I cannot ignore that clear boundaries do not always exist as between, eg hotels and restaurants. The distinctions are sometimes blurred by the fact that a hotel or other temporary accommodation may gain a reputation for its restaurant services, quite apart and distinct from the accommodation side of things. It is common practice for hotels to open their restaurants for non-residents for example, whereas a retirement home or crèche would not.

20. A retirement home and a creche are both “self standing” services, recognisable in their own right, and in respect of which the provision of food and drink, whilst essential, at least in the case of retirement homes, would be both ‘closed’, in the sense of being offered to residents only, but more importantly would not be recognised as the primary intended purpose of the service. For these reasons I believe a distinction can be drawn between certain of the remaining services. Because of the sometimes blurred distinction referred to, “temporary accommodation; provision of holiday accommodation and hotels” can be classed as “similar to a low degree” to “services for providing food and drink”. In my finding, I am also mindful in my finding of the principle expressed in *Avnet* that services ought not to be given a “wide construction”.
21. By contrast, “retirement home services” and “crèche services ” are not similar to “services for providing food and drink” for the reasons given.
22. This then leaves me with the term, “booking and reservation services for restaurants and holiday accommodation”. Of course, it is true that customers can book directly with restaurants and accommodation of their choice and so, to some extent, many eating and hotel establishments will include “booking” as part and parcel of their service. That said, I believe I must construe the term as if used in relation to “booking services” provided to *others (ie other businesses, rather than internal or ancillary use)*, consistent with the essential function of a trade mark. Seen in this context, the types of booking service covered by the term would include “travel agency” type booking services, whereby a wide selection of accommodation is on offer to the end consumer. On that basis, plainly such services are not similar to “services for the provision of food and drink”. Their respective intended purposes are very different and their channels of trade also very different.

Comparison of marks

23. The respective marks are as below:

The opponent's mark	The applicants' mark
	<p data-bbox="804 353 874 389">CR7</p> <p data-bbox="804 439 884 474">CR 7</p>

24. The case law makes it clear that I must undertake a full comparison of both marks in their totalities, taking account of all differences and similarities. The comparison needs to take account of the visual, aural and conceptual similarities and differences between the marks.
25. In terms of visual appearance, the opponent's mark presents as a stylised letter and logo mark. The stylisation is reminiscent (whether intended or not) of 'art deco' type design, being simple in line, but given the rounded elements and infilling especially, having decorative property, over and above mere lettering. The second letter is clearly discernible as an upper case 'R', being formed as such. On balance, the first letter will be seen as a 'C'. At this point I should acknowledge that there is room for some visual ambiguity as regards the letter 'C', and this is caused by the stylisation, involving the infilling of the letter 'C' by a black half circle, coupled with the blending of the two letters together. That said, whilst I acknowledge the visual ambiguity, I am of the view that on balance the first letter will be seen as 'C' on the basis that the average consumer will definitely see that a letter is intended and that letter is intended to accompany and precede the 'R'. Secondly, that the 'C' has no 'tail' or 'stalk' of any description (which may create a 'g' or 'd' for example) and thirdly, despite its infilling, the letter formation is seen to be a semicircle and accordingly a 'C'. The applicant's marks, on the other hand will be seen as combined letter and number marks; the letters plainly being 'C' and 'R' in that order, followed by the number '7'. In one version the number '7' is joined to the letters without space and in the second version there is a space between the letters and the number. Taking account of the visual similarities (the letters 'C' and 'R' in that order) and the dissimilarities (the stylisation of the opponent's mark and the inclusion of the number '7' in the applicant's marks, I find that the respective marks are visually similar to a moderately high degree.
26. Aurally, the opponent's mark will be pronounced by enunciation of each of the letters separately, as in "C" (pronounced "see"), and then "R"

(pronounced “ar”). There is no other way of enunciating the mark. The applicants’ marks will be enunciated in the same way but of course with the additional number ‘7’ added, pronounced “sev-en”. Taking into account the similarities and dissimilarities, I find that the respective marks are aurally similar to a high degree.

27. Conceptually, I cannot see that any clear underlying semantic ‘concept’ attaches to either mark. The fact that the opponent’s mark is intended to be an abbreviation of “Chateau Rouge” is not apparent in the mark itself. The average consumer will simply see two letters ‘C’ and ‘R’ without necessarily knowing what exactly they mean. Similarly, the applicant’s marks will have no obvious derivation. The presence of the number ‘7’ sheds no clear light on or imbues any overall meaning to the mark in relation to the services. The respective marks may only be said to be conceptually ‘similar’, to the extent only that they share the same letters of the alphabet in the same order, but such a finding does not address underlying *semantic* conceptual similarity, of which there is none. In conclusion I find that conceptually the marks are neutral; it is neither possible to find semantic conceptual similarity nor dissimilarity.
28. Overall, I conclude that the respective marks share a moderately high level of similarity.

The average consumer and nature of purchase

29. As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23), it is important that I assess who the average consumer is for the goods at issue, and whether there is anything about the nature of transactions under the respective marks that may lead me to conclude that the average consumer is other than someone “deemed to be reasonably well informed and reasonably circumspect and observant” (see authority (b) in para 14 above).
30. The average consumer for the services covered by the opponent’s specification will be a broad spectrum of people, comprising in the main the general public. The average consumer for the applicants’ services will likewise comprise the general public.
31. The services concerned are not specialised or engaging a particularly high level of circumspection in their selection. It is true nevertheless that both parties’ services are often chosen on the basis of recommendation, but I cannot dismiss the possibility that food and drink services are often accessed in a completely random and purely opportunistic manner.

Use and distinctive character of the earlier trade mark

32. Before I bring my findings together in an overall assessment, I have to consider whether the opponent's mark has a particularly distinctive character, either arising from the inherent characteristics of the trade mark or because of the use made of it. In terms of its inherent distinctiveness I consider the opponent's mark to have a moderate level of inherent distinctiveness. Although the mark is 'minimalist' in the sense it comprises just two stylised letters of the alphabet, these letters are random and have no obvious meaning in relation to the services specified.

Likelihood of confusion

33. The various findings I have arrived at above need now to be factored into an overall assessment of likelihood of confusion. I need to adopt a global approach, which takes into account 'imperfect recollection' on the part of the consumer, as advocated by the ECJ in *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* The doctrine of 'imperfect recollection' means that it would not be right for me to have engaged solely in a 'spot the difference' exercise with the respective marks side by side on a bit of paper, as this would not properly reflect the actual conditions of the market place where side by side comparison does not always, if ever, occur. I must factor in that consumers sometimes have but a vague recollection of a particular mark or sign.

34. It is also the case that the authorities, to which I have referred above in para 14 above, recognise two forms of confusion, direct and indirect. By direct confusion, it is meant that the average consumer is likely to mistake one mark for another, assuming imperfect recollection of course. By indirect, it is meant that although the average consumer will not necessarily mistake the respective marks directly, he or she may well nevertheless assume an association, in that goods sold under the mark the subject of the application derive from the same economic undertaking as the goods sold under the earlier mark. I think indirect confusion plays a significant part in my overall assessment in this case. In other words, the marks CR7 or CR 7 may, given the commonality of the letters 'CR' with the earlier mark, signify to the average consumer that they are in some way variants derived from the same economic undertaking that uses 'CR'.

35. I have found the respective marks to share a moderately high level of similarity and some of the services to be identical. Whilst it is true to say that where marks are 'minimalist' in nature, such as two letter marks, then any difference, such as the addition of the number '7', can make a disproportionate amount of difference in the assessment. However, this particular doctrine does not undermine the fact that a random two letter mark can nonetheless in principle be moderately distinctive as I have found in this case. Moreover as with all doctrines, it is always subject to

the specific circumstances of the case in suit. In this case, the respective marks start with the same letters in the same order; the number '7' in the applicants' marks may, for many consumers, prove to be subsidiary to, and accordingly less 'recollectable', in real trade than the letters. I would stress this is not necessarily inevitably the case, but a factor capable of being taken into account.

36. In all the circumstances, including imperfect recollection and, in particular the fact that whilst consumers may not be direct confusion between the marks but instead consumers may assume that services under the marks may be provided by the same economic undertaking, I find that the opposition succeeds in respect of the services I have found to be identical, namely:

“Services for providing food and drink; restaurant, bar and catering services; cafes; cafe.”

37. But in respect of the remaining services, namely:

“Temporary accommodation; provision of holiday accommodation; booking and reservation services for restaurants and holiday accommodation; retirement home services; creche services; hotels.”

the opposition fails.

Costs

38. It is usual for both parties to expressly seek an award of costs in the event they should win. As far as I am aware they have not done so explicitly in this case. That said, it is plain from the forms that both have completed and the explanatory information provided by the registry that an award of costs is within my powers and would normally be made. However, in my view the honours are even in this case in terms of the overall outcome; both parties have achieved success in what I regard as equal measure. On that basis I do not make any award of costs.

Dated this 22 Day of September 2010

**Edward Smith
For the Registrar,
the Comptroller-General**