

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2621558
BY HENCH NUTRITION LIMITED
TO REGISTER THE TRADE MARK**

hENCH

**IN CLASSES 5, 25, 28, 29, 30 & 32
AND**

**IN THE MATTER OF JOINT OPPOSITION
THERE TO UNDER No. 103923 BY
ADEMOLA ADEYEBA and GET HENCH LTD**

BACKGROUND

1) On 19 May 2012, Hench Nutrition Limited (hereinafter the applicant) applied to register the trade mark shown above in respect of the following goods:

In Class 5: Vitamins, minerals and food supplements; dietetic foods and drinks adapted for medical, sports nutrition and slimming purposes.

In Class 25: Articles of clothing; footwear; headgear; gloves, jackets, trousers, jumpers, vests, t-shirts.

In Class 28: Gymnastic and sporting articles; weightlifting and weight training aids; belts and gloves for sporting activities; sports training aids; sporting supports.

In Class 29: Dietary preparations and nutritional foodstuffs for slimming and sporting purposes all included in this class and not for medical purposes; vitamin, protein and mineral enriched foods and foodstuffs all included in this class and not for medical purposes; protein for food, milk and milk products.


In Class 30: Dietary preparations and nutritional foodstuffs for slimming and sporting purposes all included in this class and not for medical purposes; vitamin, protein and mineral enriched foods and foodstuffs all included in this class and not for medical purposes; preparations made from cereals, carbohydrate and cereal based foodstuffs, snack bars, confectionery.


In Class 32: Isotonic beverages; energy drinks; beverages for meal replacement.

2) The application was examined and accepted, and subsequently published for opposition purposes on 6 July 2012 in Trade Marks Journal No.6947.

3) On 5 October 2012 Ademola Adeyeba filed a notice of opposition. On 16 December 2013 Get Hench Ltd joined as a joint opponent and provided the necessary undertakings. I shall refer to both parties as the opponents. The grounds of opposition are in summary:

a) The opponents are the proprietors of the following trade marks:

Mark	Number	Date of application / registration	Class	Specification relied upon
	2570053	25.01.11 06.05.11	25	Clothing, footwear, headgear.

	2592409	22.08.11 02.12.11	29	milk and milk products; prepared meals;
			32	non-alcoholic drinks; fruit drinks and fruit juices;

b) The opponents contend that the mark in suit is confusingly similar to its registered UK trade mark 2570053. They state that the following goods applied for in the mark in suit are similar or identical to those for which their 2570053 mark is registered: “Articles of clothing, footwear, headgear”. The mark in suit therefore offends against Section 5(2)(b) of the Act. The opponents contend that the mark in suit is confusingly similar to its registered UK trade mark 2592409. They state that the following goods applied for are similar: In Class 29: “protein for food, milk and milk products”. In Class 30 “vitamin, protein and mineral enriched foods and foodstuffs all included in this class and not for medical purposes”. In Class 32: “Isotonic beverages; energy drinks; beverages for meal replacement”. The mark in suit therefore offends against Section 5(2)(b) of the Act.

c) The opponents also contend that the mark applied for is similar to their UK mark 2570053 and that it has a reputation for clothing under this mark. They contend that the mark in suit offends against section 5(3) as the relevant public would believe there to be an economic connection between the marks.

4) On 15 April 2013, the applicant filed a counterstatement denying all the grounds. It put the opponents to strict proof of use of their marks.

5) Only the opponents filed evidence. Both parties seek an award of costs in their favour. Neither side wished to be heard. The opponents filed written submissions as part of their evidence which I shall refer to as and when relevant in my decision.

OPPONENTS’ EVIDENCE

6) The opponents filed a witness statement, dated 14 June 2013, by Ademola Adeyeba. He states that the mark 2570053 was first used on T-shirts in November 2009. He states that he owns the company Get Hench Ltd. Mr Adeyeba states that he appeared on a television programme, promoting his goods, on Sky One but this was shown on 24 July 2012, after the relevant date. He provides the following exhibits:

- AA1: A copy of a website page (www.gethench.co.uk) which shows pictures of individuals wearing T-shirts and hoodies with both of the opponents’ marks upon them.
- AA2: This is a list of three websites which are said to contain images of a promotional drive amongst ten universities where the brand was marketed during a strength/fitness challenge.

- AA3: This consists of a photograph of a body builder wearing the opponents' attire.
- AA4: A list of two websites where images of two mixed martial arts fighters are said to be wearing the opponents' attire. It is stated that these fighters had bouts shown on Sky TV in October and December 2011. It is said that this exposure resulted in an increase in orders despite no link to the opponents' being visible on the attire, merely the trade marks as registered.
- AA5: It is stated that the opponents sponsor the USN Body Makeover Challenge in the UK. USN is stated to be one of the largest protein shake and nutritional supplements providers in the UK, and the annual challenge centres on those who have transformed their body and lifestyle. The exhibit consists of two £20 vouchers to spend at the opponents website but are not addressed or dated.
- AA7: A copy of a page from the opponents' website which states that they will deliver to a number of countries worldwide.

7) That concludes my summary of the evidence filed, insofar as I consider it necessary.

DECISION

8) I first turn to the ground of opposition based on section 5(2)(b) which reads:

5.-(2) A trade mark shall not be registered if because -

- (a)
- (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

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

9) An “earlier trade mark” is defined in section 6, the relevant part of which states:

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

- (a) a registered trade mark, international trade mark (UK) or Community trade mark 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.”

10) The opponents are relying upon their marks listed in paragraph 3 above which are clearly earlier trade marks. Given the interplay between the dates the opponents' marks were registered and the publication date of the mark in suit, the proof of use provisions are in not in play.

11) When considering the issues under Section 5(2) and the likelihood of confusion, I take into account the guidance from the settled case law provided by the CJEU 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)*. In the recent case of *La Chemise Lacoste SA v Baker Street Clothing Ltd* [ALLIGATOR O/333/10] Mr Hobbs QC acting as the Appointed Person set out the test shown below which was endorsed by Arnold J. in *Och-Ziff Management Europe Ltd and Oz Management Lp v Och Capital LLP; Union Investment Management Ltd & Ochocki*, [2010] EWCH 2599 (Ch).

(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/ 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; nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;

(e) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 in that mark;

(f) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa;

(g) 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;

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient;

(i) 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;

(j) if the association between the marks causes the public to wrongly believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Distinctive character of the opponents' earlier trade marks

12) The opponents have effectively provided no evidence of use of their marks. They have provided some photographs of garments with the marks upon them but no sales or promotional figures, no evidence of market share or independent witness testimony regarding reputation. The evidence is not sufficient for the opponents to benefit from an enhanced reputation in either trade mark. I believe that the opponents' marks are inherently distinctive for the goods for which they are registered.

The average consumer and the nature of the purchasing process

13) I must now determine the average consumer for the goods of the parties. The products of both parties are such that they would be aimed at both the general public and also at businesses using or retailing the products. Both parties' specifications include clothing, footwear and headgear. Such goods will be sold in, inter alia, traditional retail outlets on the high street, through catalogues and on the Internet. The average consumer of such clothing is a member of the general public who is likely, in my opinion, to select the goods mainly by visual means. I accept that more expensive items may be researched or discussed with a member of staff. In this respect I note that in *New Look Ltd v OHIM Cases- T-117/03 to T-119/03 and T-171/03*, the General Court (GC) said this about the selection of clothing:

"50. Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly, the visual aspect plays a greater role in the global assessment of the likelihood of confusion."

14) In the same case, the Court also commented upon the degree of care the average consumer will take when selecting clothing. It said:

“43. It should be noted in this regard that the average consumer’s level of attention may vary according to the category of goods or services in question (see, by analogy, Case C 342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trade marks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected.”

15) Clearly, the average consumer’s level of attention will vary considerably depending on the cost and nature of the item at issue. However, to my mind even when selecting routine inexpensive items of clothing such as socks, the average consumer will pay attention to considerations such as size, colour, fabric and cost. Overall the average consumer is likely to pay a reasonable degree of attention to the selection of items of clothing, footwear or headgear.

16) Similar views hold true for the goods in Classes 29, 30 and 32, although each has their own issues. Although the implication in the opposition is that these products are primarily aimed at those concerned with bodybuilding, a number of the products listed (energy drinks, milk and milk products) are purchased by members of the public entirely unconcerned with such matters. To my mind, none of the goods involved in this case are likely to be purchased by an individual, retailer or business user without some consideration.

Comparison of goods

17) For ease of reference, I reproduce the specifications of both parties:

Applicant’s specification	Opponent’s specification
In Class 25: Articles of clothing; footwear; headgear;	In Class 25: Clothing, footwear, headgear.
In Class 29: protein for food, milk and milk products.	In Class 29: milk and milk products; prepared meals;
In Class 30: vitamin, protein and mineral enriched foods and foodstuffs all included in this class and not for medical purposes;	
In Class 32: Isotonic beverages; energy drinks; beverages for meal replacement.	In Class 32: non-alcoholic drinks; fruit drinks and fruit juices;



18) The accepted test for comparing goods is that set out by Jacob J. in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 28 TREAT, which was effectively endorsed by the Advocate General in *Canon*; ETMR 1. The factors to be taken into account are:

- a) The respective uses of the respective goods;
- b) The respective users of the respective goods;
- c) The physical nature of the goods;
- d) The respective trade channels through which the goods reach the market;
- e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be found on the same or different shelves;
- f) The extent to which the respective goods are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods in the same or different sectors.

19) Neither side has provided submissions regarding the similarity or otherwise of the goods and so I have to consider the issues as best I can. Clearly the class 25 specification of both parties is identical. In Class 29 the wording “milk and milk products” appears in both specifications and so is identical. With regard to the applicant’s class 29 specification “protein for food”, and its Class 30 specification for “vitamin, protein and mineral enriched foods and foodstuffs all included in this class and not for medical purposes” I can see no reason why these should be regarded as similar to any of the opponents’ goods in class 29 or 32. The users could be the same, i.e. the general public, although these could also be specialised products. The uses, physical nature and respective trade channels are not obviously similar. I therefore find that these aspects of the applicant’s specification are dissimilar to the opponents’ goods. In reaching this conclusion I rely upon *Les Éditions Albert René V Office for Harmonisation in the Internal Market (Trade Marks & Designs) (OHIM) T-336/03* where the following comment was made: “The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.” Lastly I consider the applicant’s Class 32 goods to those of the opponent. To my mind the term “non-alcoholic drinks” in the opponents’ specification is so wide reaching that it would encompass the whole of the applicant’s specification, and the goods must therefore be considered identical.

Comparison of trade marks

20) The trade marks to be compared are as follows:

Applicant's mark	Opponents' marks
	

21) It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

Distinctive and dominant components

22) I am not aware that the term “hENCH” has a meaning and neither side has commented upon the matter. The opponent’s marks would appear to be exhortations to purchase their products, with the term “hENCH” being the distinctive and dominant element in each mark.

Visual / Aural and Conceptual similarity

23) Clearly all marks contain the term HENCH. They differ in that the opponents’ marks also have other matter. The marks of both sides differ in their fonts and the opponents’ marks also have device elements. However, in all three marks the word “hENCH” is clearly visible and dominates the marks. Clearly, there is a significant visual and aural similarity between the marks albeit there are also a number of differences. Neither

would appear to have a conceptual meaning other than the urging of the opponents' marks to "get" their brand. Overall, the respective marks share a high level of similarity.

Likelihood of confusion

24) I must now take all the above into account and consider the matter globally taking into account the interdependency principle- a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods and vice versa. The evidence does not allow me to find the opponents to have a reputation in any of the goods for which their marks are registered. However, given the similarity of the marks, where the goods are identical or similar as set out in paragraph 19 above, even allowing for the concept of imperfect recollection, there is a likelihood of consumers being confused into believing that the goods provided by the applicant are those of the opponent or provided by some undertaking linked to them. **The opposition under Section 5(2) (b) therefore succeeds in relation to the following:**

- In Class 25: Articles of clothing; footwear; headgear.
- In Class 29: milk and milk products.
- In Class 32: Isotonic beverages; energy drinks; beverages for meal replacement.

25) However, despite the similarity of the marks where the goods are not similar there is no likelihood of consumers being confused into believing that the goods provided by the applicant are those of the opponent or provided by some undertaking linked to them. **The opposition under Section 5(2) (b) therefore fails in relation to the following:**

- In Class 29: protein for food;
- In Class 30: vitamin, protein and mineral enriched foods and foodstuffs all included in this class and not for medical purposes;

26) The application can also proceed to registration for those items which were not opposed. This includes a number of items in class 25 which would clearly be encompassed by the specification of "clothing" but were specifically excluded by the opponents in the statement of grounds.

In Class 5: Vitamins, minerals and food supplements; dietetic foods and drinks adapted for medical, sports nutrition and slimming purposes.

In Class 25: gloves, jackets, trousers, jumpers, vests, t-shirts.

In Class 28: Gymnastic and sporting articles; weightlifting and weight training aids; belts and gloves for sporting activities; sports training aids; sporting supports.

In Class 29: Dietary preparations and nutritional foodstuffs for slimming and sporting purposes all included in this class and not for medical purposes;

In Class 30: Dietary preparations and nutritional foodstuffs for slimming and sporting purposes all included in this class and not for medical purposes; preparations made from cereals, carbohydrate and cereal based foodstuffs, snack bars, confectionery.

COSTS

27) As the opponents have enjoyed a measure of success they are entitled to a contribution towards their costs.

Expenses	£200
Preparing a statement and considering the other side's statement	£200
Preparing evidence	£200
TOTAL	£600

28) I order Hench Nutritional Limited to pay Ademola Adeyeba and Get Hench Ltd the sum of £600. This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 6th day of February 2014

**George W Salthouse
For the Registrar,
the Comptroller-General**