

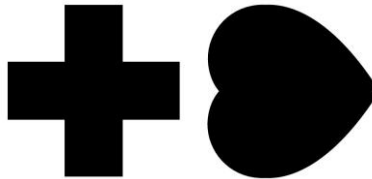
O-379-18

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NOS. 3210544 & & 3216350
BY LUCA PESCI TO REGISTER:**



AND:



AS TRADE MARKS IN CLASS 25

AND

**IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO
UNDER NOS. 409412 & 409413 BY BLUTSGESCHWISTER GMBH**

BACKGROUND & PLEADINGS

1. On 3 February and 3 March 2017 respectively, Luca Pesci (“the applicant”) applied to register the trade marks shown on the cover page of this decision for “Clothing, footwear, headgear” and “Clothing, footwear, headgear, underwear” respectively, in class 25. The applications were published for opposition purposes on 3 and 17 March 2017 respectively.

2. The applications have been opposed by Blutsgeschwister GmbH (“the opponent”). The oppositions are based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), in relation to which the opponent relies upon the goods in class 25 of its European Union Trade Mark (“EUTM”) registration No. 14647606 for the trade mark shown below, which was applied for on 8 October 2015 and registered on 6 June 2016:



3. The applicant filed counterstatements in which the basis of the oppositions is denied.

4. In an official letter dated 14 August 2017, the parties were advised that the proceedings were to be consolidated.

5. In these proceedings, the opponent is represented by Groom Wilkes & Wright LLP; the applicant represents himself. Although only the applicant filed evidence, the opponent filed written submissions during the course of the evidence rounds. Whilst neither party asked to be heard, both filed written submissions in lieu of attendance at a hearing. I shall, as necessary, refer to these submissions later in this decision.

Applicant's evidence

6. This consists of two witness statements. The first is from Mr Pesci and is accompanied by twelve exhibits. The second statement, accompanied by five exhibits, comes from Terry Davy. Mr Davy is a shareholder and director of Cyberdog (UK) Limited which, he explains, has stores in London, Brighton, Manchester, Ibiza and Sharm el Sheikh and who sell "futuristic rave clothing, most of which [he] designs". He adds that his company caters for "the youth and young adult market" and, he claims is "the market leader in forward thinking artistic clothing for today's youth cultures." Mr Davy explains that "Cyberdog intends to stock the applicant's designs, within its flagship Camden Town Store." Although I do not intend to provide any further summary of the applicant's evidence here, for the avoidance of doubt I have read it all, and will, to the extent I consider it appropriate, refer to it later in this decision.

DECISION

7. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

"5 (2) A trade mark shall not be registered if because –

(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."

8. An earlier trade mark is defined in section 6 of the Act, which states:

"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,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

9. In these proceedings, the opponent is relying upon the EUTM registration shown in paragraph 2 above, which qualifies as an earlier trade mark under the above provisions. As this earlier trade mark had not been registered for more than five years at the date the applications were published, it is not subject to the proof of use provisions contained in section 6A of the Act. As a consequence, the opponent is entitled to rely upon it in relation to all the goods it has identified without having to demonstrate genuine use.

Section 5(2)(b) – case law

10. The following principles are gleaned from the decisions of the courts of the European Union in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

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

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

11. The competing goods are as follows:

Opponent's goods in class 25	Applicant's goods in class 25
Clothing; Headgear; Footwear; Waist belts; Neck scarfs [mufflers]; Neckerchieves.	No. 3210544 Clothing, footwear, headgear, No. 3216350 Clothing, footwear, headgear, underwear.

12. In *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P, the Court of Justice of the European Union ("CJEU") stated:

"59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks."

13. In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated:

“78....the court must.... consider a notional and fair use of that mark in relation to all of the goods or services in respect of which it is registered. Of course it may have become more distinctive as a result of the use which has been made of it. If so, that is a matter to be taken into account for, as the Court of Justice reiterated in *Canon* at paragraph [18], the more distinctive the earlier mark, the greater the risk of confusion. But it may not have been used at all, or it may only have been used in relation to some of the goods or services falling within the specification, and such use may have been on a small scale. In such a case the proprietor is still entitled to protection against the use of a similar sign in relation to similar goods if the use is such as to give rise to a likelihood of confusion.”

14. A good deal of the applicant’s evidence and submissions is devoted to establishing what he considers to be the differences in the actual goods of interest to the parties and the differing target customers for those goods. However, as the above case law makes clear, that is not the correct approach. As I explained earlier, as the opponent’s earlier trade mark is not subject to the proof of use provisions, it is not necessary for the opponent to demonstrate that it has used its trade mark at all, let alone in the United Kingdom. The future intended trading of the applicant is not relevant either. What I must do is compare the words as they appear in the competing specifications on a fair and notional basis, reminding myself that none of the specifications are limited in any way. Considered on that basis, as the applicant’s trade mark no. 3210544 contains terms identical to those contained in the opponent’s specification, the competing goods are literally identical. The same applies to the first three terms in the specification of application no. 3216350. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court (“GC”) stated:

“29. 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 trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

15. In relation to the final term in the specification of application no. 3216350 i.e. “underwear”, as this is a subset of the term “clothing” appearing in the opponent’s specification, it too is to be regarded as identical, albeit on the principle outlined in *Meric*.

The average consumer and the nature of the purchasing act

16. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

17. In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03 the GC stated:

“50. The applicant has not mentioned any particular conditions under which the goods are marketed. 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.”

18. Approached on the notional and fair basis indicated earlier, the average consumer of the goods at issue is any member of the general public. As a member of the general public will, for the most part, self-select the goods from the shelves of a bricks and mortar retail outlet or from the equivalent pages of a website or catalogue, as the above case explains, visual considerations are likely to dominate the selection process. That said, as such goods may also be the subject of, for example, word-of-mouth recommendations or oral requests to sales assistants, aural considerations must not be forgotten.

19. As above, I must adopt the same notional and fair approach when I consider the degree of care the average consumer will display when selecting such goods. The cost of the goods can vary considerably. However, as the average consumer will be alive to factors such as cost, size, colour, material and compatibility with other items of clothing, they will, in my view, pay at least a normal degree of attention to their selection.




Comparison of trade marks

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

created by them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

21. It would be wrong, therefore, artificially to dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The trade marks to be compared are:

Opponent's trade mark	Applicant's trade marks
	 AND: 

22. Although both parties have made detailed submissions on this aspect of the case, I do not consider it necessary to record them (all) here. That does not mean that I have not taken them into account in reaching the conclusions which follow.

23. The opponent's trade mark consists of three symbols in a heavy bold presentation. The opponent describes these symbols as a cross, heart and anchor, a description I am satisfied will accord with how the average consumer will construe these symbols. As all of the symbols are the same size there are no dominant components; all the symbols contribute equally to the overall impression the trade mark conveys and its distinctive character.

24. The applicant's trade marks consists of what it describes as a "plus sign" (and "a Greek cross") accompanied by a heart symbol (the latter presented in both a conventional orientation and on its side); once again, I am satisfied those descriptions are likely to accord with how the average consumer will construe these symbols. The symbols in both trade marks are also in a heavy bold presentation. Like the opponent's trade mark, there are no dominant components, both symbols contributing equally to the overall impression the trade marks convey and their distinctive character.

25. Irrespective of how the average consumer conceptualises the first symbol in the competing trade marks (a point to which I shall return shortly) and the differences in their relative proportions, it is unarguable that they both consist of a vertical stem with a horizontal crossbar and both are in the same heavy bold presentation. Similarly, although the second symbols in the competing trade marks have different relative proportions, they are all in the same heavy bold presentation and will, regardless of their orientations, be viewed as heart symbols. The third symbol in the opponent's trade mark, also in the same heavy bold presentation, will be seen as an anchor; it is, of course, alien to the applicant's trade marks. Balancing the similarities and differences and, in particular, the degree of visual similarity in the first two symbols in the competing trade marks, results, in my view, in an above average degree of visual similarity overall.

26. Turning to the aural comparison, in *Dosenbach-Ochsner AG Schuhe und Sport v OHIM*, T- 424/10, the GC stated:

“46. A figurative mark without word elements cannot, by definition, be pronounced. At the very most, its visual or conceptual content can be described orally. Such a description, however, necessarily coincides with either the visual perception or the conceptual perception of the mark in question. Consequently, it is not necessary to examine separately the phonetic perception of a figurative mark lacking word elements and to compare it with the phonetic perception of other marks.”

27. In view of the above, it is not necessary for me to conduct an aural comparison; I will, however, return to this point when I consider the likelihood of confusion.

28. Finally, the conceptual comparison. In its counterstatement, the applicant states:

“The opponent’s mark consists of a crucifix [roman cross], heart and anchor used together. These three symbols have been used together for hundreds of years. Used together, they were an early Christian symbol, signifying the “theological” virtues of faith hope and love (or faith hope and charity, depending on translation)...We are used to seeing them together, and they have particular connotations, used together...My mark signifies “plus heart”. It is a modern expression, and unlike the opponent’s mark, carries no historical, traditional, faith or religious connotations....”

29. In relation to its trade mark with the heart symbol on its side, the applicant states:

“The use of the rotated heart, on its side, has particular significance – in the world of social media an emoji, used on its side, indicates something quirky or unusual...The use of a heart on its side is likely to be understood by our target market in this way (quirky or unusual)...”

30. In its submissions filed in lieu of a hearing, the opponent states:

“31. [The applicant submits] that the average consumer would describe the opponent’s trade mark [in the manner indicated above] and [his trade marks in the manner indicated above]. The opponent submits that this is far-fetched and wishful thinking and the average consumer would need educating to arrive at these descriptions. The opponent submits that it is far more likely that the average consumer would simply say what they see, namely cross, heart and anchor and cross heart...”

31. In support of his submissions regarding how the opponent’s trade mark will be interpreted, the applicant has filed undated photographs showing the three symbols (presented in differing orders) being used as jewellery and tattoos (exhibit LP2) and on T-shirts (again with the symbols in differing orders); one of the photographs (from cafepress.co.uk), appears to date from June 2014. In his witness statement, Mr Pesci states:

“7...the average consumer, including the consumer of products in class 25, would have at least general awareness of this trio of symbols as having a traditional religious or Christian significance.”

32. Although the majority of the applicant’s evidence on this point is either undated or relates to different areas of trade, it suggests that some average consumers may conceptualise the opponent’s trade mark as meaning, inter alia, “faith, love, hope.” It is also possible that some average consumers may conceptualise the applicant’s trade marks in the manner he suggests i.e. as “plus heart” or, insofar as the trade mark with the heart symbol on its side is concerned, as a quirky presentation of that concept. However, it is, in my view, equally likely that a significant number of average consumers will not be familiar with either of these concepts. Whilst for those consumers in the first group the competing trade marks may, when considered as a whole, send different conceptual messages, beyond the concepts conveyed by the individual symbols of

which they are composed i.e. a cross/plus, heart and anchor, when considered as a whole, for those in the second group the conceptual position is likely to be neutral.

Distinctive character of the earlier trade mark

33. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

34. In its submissions filed in lieu of a hearing, the opponent states:

“18...the opponent’s trade mark has a high degree of distinctive character because it does not describe or even allude to the goods for which it is registered.”

35. In his statement, Mr Pesci states:

“29. I do not accept that the opponent’s mark is distinctive. As stated above, I can’t find any indication that the opponent is known in the UK, and furthermore, the marks is used by others, with use preceding the opponent’s registration in at least one instance.”

36. As the opponent has filed no evidence of any use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. In his submissions and evidence, the applicant makes various comments on the prevalence of the use of plus

and heart symbols (exhibits LP9-LP11 refer). While that may be true, what I must consider is the distinctiveness of the opponent's trade mark as a whole, as opposed to the individual symbols of which it is composed.

37. Although the applicant has filed some examples of the three devices of which the opponent's trade mark is composed (in varying orders) on t-shirts, only one example appears to be dated prior to the filing date of the opponent's earlier trade mark. That falls a long way short of establishing that when considered in relation to the goods at issue, the opponent's earlier trade mark lacks distinctive character. Considered in that context and absent use, it is, in my view, possessed of a normal degree of inherent distinctive character; I shall, however, return to this point below.

Likelihood of confusion

38. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

39. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

40. In his submissions filed in lieu of a hearing, the applicant draws attention to the trade mark shown below, which was applied for on 7 June 2011 and registered on 30 November 2011 (i.e. prior to the filing date of the opponent's trade mark) in the name of a third party for, inter alia, goods in class 25.



41. He states:

“The inevitable conclusion is that the European trade mark office regarded the opponent's mark to be distinctive and notwithstanding the earlier plus sign and heart. It follows that we should not assume that our use of a plus sign and heart is confusing simply on the basis that the applicant and the opponent incorporate a heart and what the opponent sees as a cross in our marks.”

42. Whilst I understand the applicant's submission, the presence of, inter alia, the above trade mark and that of the opponent on the register of the European Intellectual Property Office (“EUIPO”) in relation to identical goods is not relevant. Rather, what I must do, is reach a conclusion on the basis of the pleadings, evidence and submissions filed in these proceedings.

43. Earlier in this decision, I concluded that the competing goods are identical and the average consumer is a member of the general public who, whilst not discounting aural considerations, is most likely to select the goods at issue by predominantly visual means, paying at least a normal degree of attention during that process. Having assessed the competing trade marks, I found they were visually similar to an above average degree. Whilst I was prepared to accept that for some average consumers they may, when considered as a whole, evoke different concepts, I concluded that for a significant number of average consumers, beyond the concepts conveyed by the

individual symbols of which they are composed, when considered as a whole, they are likely to be conceptually neutral. Finally, I concluded that the opponent's earlier trade mark is inherently distinctive to a normal degree.

44. In *Formula One Licensing BV v OHIM*, Case C-196/11P, the CJEU found:

“41.it is not possible to find, with regard to a sign identical to a trade mark protected in a Member State, an absolute ground for refusal, such as the lack of distinctive character, provided by Article 7(1)(b) of Regulation No 40/94 and Article 3(1)(b) of Directives 89/104 and 2008/95. In this respect, it should be noted that the characterisation of a sign as descriptive or generic is equivalent to denying its distinctive character.

42. It is true that, as is clear from paragraph 48 of the judgment under appeal, where an opposition, based on the existence of an earlier national trade mark, is filed against the registration of a Community trade mark, OHIM and, consequently, the General Court, must verify the way in which the relevant public perceives the sign which is identical to the national trade mark in the mark applied for and evaluate, if necessary, the degree of distinctiveness of that sign.

43. However, as the appellant rightly points out, their verification has limits.

44. Their verification may not culminate in a finding of the lack of distinctive character of a sign identical to a registered and protected national trade mark, since such a finding would not be compatible with the coexistence of Community trade marks and national trade marks or with Article 8(1)(b) of Regulation No 40/94, read in conjunction with Article 8(2)(a)(ii).”

45. In *L'Oréal SA v OHIM*, Case C-235/05 P, the CJEU found:

“45. The applicant's approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of

confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

46. As I mentioned earlier, the applicant’s evidence falls a long way short of establishing that the opponent’s trade mark lacks distinctive character. However, even if I was of that view (which I am not), as the above cases make clear: (i) I am not entitled to reach that finding in any case and, (ii) even if I had assessed the opponent’s trade mark as only having a weak distinctive character, that does not preclude a likelihood of confusion.

47. In *The Picasso Estate v OHIM*, Case C-361/04 P, the CJEU found:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

48. In *Nokia Oyj v OHIM*, Case T-460/07, the GC stated:

“Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98).”

49. Even if, as the applicant submits, the competing trade marks do send differing conceptual messages to the average consumer, as the comments in *Nokia* make clear, that is not always sufficient to neutralise, inter alia, the visual similarities between the competing trade marks.

50. In reaching a conclusion, I shall consider the matter on the basis most favourable to the applicant i.e. from the perspective of an average consumer paying a high degree of attention during the selection process (thus making them much less prone to the effects of imperfect recollection). I remind myself there is identity in the goods, an above average degree of visual similarity between the competing trade marks (i.e. the most important factor given the manner in which the goods at issue will most often be selected) and, beyond the concepts conveyed by the individual symbols of which the competing trade marks are composed, the neutral conceptual message the competing trade marks as a whole are likely to convey to a significant number of average consumers. Balancing those considerations, I am satisfied that an average consumer paying even a high degree of attention (but who is still prone to the effects of imperfect recollection), is likely to mistake one trade mark for the other i.e. there is a likelihood of direct confusion. That conclusion is even more pronounced when considered from the perspective of an average consumer paying a lower degree of attention during the selection process.

Overall conclusion

51. The oppositions have succeeded and, subject to any successful appeal, the applications will be refused.

Costs

52. As the opponent has been successful, it is entitled to a contribution towards its costs, albeit reduced to reflect the large measure of overlap between the consolidated proceedings. Awards of costs in proceedings commenced after 1 July 2016 are

governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. Applying the guidance in that TPN, I award costs to the opponent on the following basis:

Preparing Notices of opposition and reviewing the counterstatements:	£300
Considering the applicant’s evidence:	£500
Written submissions:	£300
Official fees i.e. 2 x £100	£200
Total:	£1300

53. I order Luca Pesci to pay to Blutsgeschwister GmbH the sum of **£1300**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of June 2018

C J BOWEN
For the Registrar