

O/453/18

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3232190
BY FORCE MANNER COMPANY LIMITED
TO REGISTER AS A TRADE MARK:

AIR MONSTER

FOR GOODS IN CLASS 11

AND

IN THE MATTER OF THE OPPOSITION THERETO UNDER NO. 410107
BY AIRMASTER A/S

BACKGROUND AND PLEADINGS

1. On 18 May 2017, Force Manner Company Limited ("the Applicant") applied to register as a UK trade mark the figurative mark as shown on the front page of this decision, to be registered in respect of goods in Class 11, namely:

Apparatus for heating; electric fans for personal use.

2. The application was published for opposition purposes on 26 May 2017. Registration is opposed by Airmaster A/S ("the Opponent") on the basis of section 5(2)(b) of the Trade Marks Act 1994 ("the Act"), relying on the European Union Trade Mark (EUTM) registrations for the word mark "AIRMASTER", as detailed below (which I describe as Mark A and B).

Mark A	
EUTM No. 15621998	AIRMASTER (Word mark)
Filed: 7 July 2016	Registered: 23 December 2016
Relying only on its goods in classes 9 and 11 below	
Class 9: <i>Control units, sensors, detectors, monitoring units, data loggers, automatic and electric timers, communication networks and communications apparatus, software for use in relation to apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes; Software for controllers and operators for apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes not including air-purifiers</i>	
Class 11: <i>Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes not including air-purifiers. all aforementioned goods with the exception of hairdryers and other apparatus and instruments especially destined to hairdressers' saloons</i>	

Mark B		
EUTM No. 9698986	AIRMASTER	(Word mark)
Filed: 31 January 2011	Registered: 18 May 2012	
<p>Relying only on its goods in Class 11 specified in the same terms as Mark A, except for the absence of the words “<i>not including air-purifiers</i>”, which, although present in the Form TM7, do not appear on the EUIPO register, as shown in the Opponent’s filed evidence.</p>		

3. The Opponent’s claim is that the mark applied for is similar to the Opponent’s earlier trade mark, and is to be registered for goods that are identical and/or similar to those for which the earlier trade mark is registered such that there exists the likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.
4. The Applicant filed a notice of defence and counterstatement, where the Applicant accepted that its “*apparatus for heating*” goods are identical to those of the Opponent, but denied any similarity or identity between its “*electric fans for personal use*” and any of the Opponent’s goods¹. It denies that the marks are similar and that there is a likelihood of confusion. The Applicant requested proof of use in respect of Mark B.

Papers filed and representation

5. The Opponent filed both evidence and submissions during the evidence rounds; the Applicant filed submissions both during the evidence rounds and in lieu of an oral hearing. As I explain in the decision section below, I consider it necessary to summarise the Opponent’s evidence only relatively briefly. I refer to the parties’ submissions so far as I consider appropriate.
6. W P Thompson acts for the Opponent in these proceedings; the Applicant is represented by Bridle Intellectual Property Ltd. Neither party requested an oral hearing and I take this decision based on a careful reading of the papers filed.

¹ The Applicant in later submissions accepted similarity between its goods in Class 11 and goods registered under the registered Opponent’s mark.

EVIDENCE

7. The evidence took the form of a **Witness Statement** dated 22 December 2017 by **Kim Jensen**, CEO of the Opponent company, who states that throughout the relevant period² the Opponent has consistently used Mark B *“in relation to air handling apparatus and systems for offering air conditioning, heating, cooling and ventilation, and their component parts”*.
8. Mr Jensen’s Witness Statement is supported by **Exhibits KJ001 – KJ010**, which include materials such as publicity leaflets and photographs for exhibitions in Denmark and Sweden, advertisements in Swedish publications and various invoices relating to the supply of goods under the AIRMASTER mark, including in the UK (July 2016), Denmark (July 2015 and January 2017) and Austria (October 2016) (**Exhibit KJ008**). **Exhibit KJ009** shows photographs said to be of various sites in six EU member states. The exhibiting pages are undated and appear to be slides from a presentation. The pages bear the AIRMASTER brand, but the trade mark is not visible in the photographs, which tend to show external shots of buildings or internal shots of rooms including large devices on the ceiling that appear to be ‘air handling apparatus’. One of the sets of photos is labelled as being “a college in the UK”, another “Heathrow”.
9. The evidence also included a **Witness Statement** dated 22 December 2017 by **David Alan Gill**, Partner in WP Thompson, representing the Opponent. Mr Gill states that he has *“investigated the use of the terminology ‘electric fans for personal use’ in relation to the field of heating, drying, ventilating and air conditioning apparatus and systems to ascertain whether such apparatus and systems are available on a personal/portable basis for personal use.”* Mr Gill states that his *“findings indicate that electric fans are widely used in, and in some instances can comprise, personal/portable heating, drying, ventilating and air conditioning apparatus.”* **Exhibits DAG001 – DAG004** show Amazon and Google search results for the terms “personal fan heater”, “personal electric drying fan”, “ventilation fans” and “personal air-conditioner”. The exhibits various images of such fan-based items, many with prices given, and which include items clearly for personal use.

² 27 May 2012 – 26 May 2017

My approach in this decision

10. The actual trade marks under Mark A and Mark B are exactly the same word - "AIRMASTER" - and the Opponent relies under both Mark A and Mark B on goods in Class 11 that are in terms almost identical³ to one another, to oppose the Applicant's goods only in so far as the latter are *electric fans for personal use*. In these circumstances I find it procedurally efficient to make my decision only on the basis of Mark A.

DECISION

11. Section 5(2)(b) of the Act states:

"... 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."

12. Since Mark A was filed before the Applicant's mark, it is an earlier mark under section 6(1) of the Act. Since Mark A had not completed its registration procedure more than five years before the Applicant's mark was published for opposition purposes, the earlier mark is not subject to the proof of use provisions under section 6A of the Act. Therefore, the Opponent is able to rely for this opposition on all its claimed goods under Mark A without having to show that it has used its mark in relation to those goods. (Mark B is clearly also an earlier mark, which, being registered for more than five years at publication of the Applicant's mark is subject to the proof of use provisions. However, since I make my decision only on the basis of Mark A, it is unnecessary for me to determine whether the evidence filed satisfies the burden of proving genuine use. Even assuming that I were satisfied as to genuine use of Mark B, the Opponent could be in no better position than my proceeding only on the basis of Mark A.)

³ The absence of the words "*not including air-purifiers*" does not materially affect relevant comparisons.

13. I bear in mind the relevant principles from decisions⁴ of the EU courts and I will refer to those principles as appropriate.

Comparison of the goods

14. The Applicant admits in its defence that its “*apparatus for heating*” goods in Class 11 are identical to those same goods of the Opponent that appear in the same class under Mark A. It only remains therefore to assess identity or similarity of goods in relation to the Applicant’s “*electric fans for personal use*” in Class 11 - and even in that respect the Applicant accepts, in its submissions during the evidence rounds, that its goods are “*similar to goods in connection with which the earlier mark is registered.*”
15. The Opponent submits that there is identity between the Applicant’s “*electric fans for personal use*” in Class 11 and its own goods in the same class that are “*apparatus for .. heating ... drying, ventilating*”.⁵ It is clear from case law such as *Meric*⁶ that 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 or vice versa. I find that electric fans for personal use may fall for example within the scope of the term *apparatus for .. heating* and I therefore find those goods to be identical. In the alternative, there is at least a high degree of similarity between the Opponent’s “*apparatus for .. heating ... drying, ventilating*” and the Applicant’s “*electric fans for personal use*” as they are both machines that tend to involve fans for moving air around and therefore share the same physical nature; an electric fan may be used to blow hot air at oneself or to dry or ventilate one’s immediate personal surroundings – the goods therefore also share common purpose, uses, users and methods of use.⁷

⁴ *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; *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P; and *Bimbo SA v OHIM*, Case C-591/12P.

⁵ The exclusion of air-purifiers, hairdryers and other apparatus and instruments especially destined to hairdressers’ saloons has no material impact in the circumstances of the present comparison.

⁶ See paragraph 29 of the judgment of the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, Case T- 133/05

⁷ See relevant factors for assessing similarity per Jacob J in *British Sugar PLC v James Robertson & Sons Ltd* [1996] R.P.C. 281

The average consumer and the purchasing process

16. It is necessary to determine who is the average consumer for the respective goods and how the consumer is likely to select the goods. It must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question⁸. In *Hearst Holdings Inc*,⁹ 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 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 word “average” denotes that the person is typical... .”

17. The average consumer for the goods at issue will be the general public at large - which may include businesses, notwithstanding that the Applicant specifies some of its goods to be for personal use. The average consumer will see the marks used on the goods as labelling or branding or in advertising, where a consumer will browse shelves in shops, search the internet or peruse a catalogue to select the goods. Therefore, I consider the purchase to be a primarily visual one, but aural considerations may also play a part, such as on the basis of word of mouth recommendations, so I also take into account the aural impact of the marks in the assessment.
18. I find that a medium or ordinary level of care will be taken by the average consumer in buying the goods specified in this case.

Comparison of the marks


19. It is clear from *Sabel*¹⁰ that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant

⁸ *Lloyd Schuhfabrik Meyer*, Case C-342/97

⁹ *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),

¹⁰ *Sabel BV v Puma AG*, Case C-251/95

components. It would therefore be wrong to dissect the trade marks artificially, but it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features that are not negligible and therefore contribute to the overall impressions created by the marks. The marks to be compared are shown below:

Opponent’s earlier trade mark:	AIRMASTER
Applicant’s contested trade mark:	

20. The overall impression of the Opponent’s mark, despite its being presented as one word, is that it is made up of the two ordinary English words, “air” and “master”. Each of those elements contributes equally to the overall impression (although the “air” component in particular is low in distinctiveness in the context of the goods at issue).

21. The overall impression of the Applicant’s mark is that it is made up of the two ordinary English words, “air” and “monster”. The figurative addition centred around the “O” in “monster”, but extending to the first three letters of that word, is not negligible and suggests a swirling air motion. Both words contribute to the overall impression, but the word MONSTER, being longer word and featuring figurative embellishments is a little more striking than the word “AIR”.

Visual similarity

22. The marks share the common initial element “AIR” and although their second textual components differ in the number of their letters – six as against seven –both begin with the letter M and end with the letters S-T-E-R. The marks differ in that the earlier mark is a single word, the Applicant’s is two, and the Applicant’s mark is figurative and features the swirl device, but the greatest difference results from the Opponent’s mark involving the letter A, while the Applicant’s mark involves the letters O-N. The positioning of the swirl device

visually emphasises those two letters, particularly the letter “O”. The marks are visually similar to a medium degree at most.

Aural similarity

23. The marks differ aurally between the “MAR” sound of the Opponent’s mark and the “MON” sound of the Applicant’s mark, leading to the readily distinguishable word sounds “MASTER” and “MONSTER” respectively. The marks are aurally similar to low degree.

Conceptual similarity

24. The marks share the concept of air, which in itself is of low distinctiveness for the goods at issue. The average consumer would understand the word component “MASTER” to carry the meaning of “one with exceptional skill at a certain thing”, and would understand the word “MONSTER” to involve the concept of “large, ugly, and frightening imaginary creature” or “a thing of extraordinary or daunting size.” The conceptual similarity is only for the shared element AIR – the marks as a whole have a clear conceptual difference and are conceptually similar only to a very low degree.

Distinctive character of earlier trade mark

25. The distinctive character of the earlier mark must be considered. The more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion (*Sabel*). In *Lloyd Schuhfabrik*¹¹ the Court of Justice of the European Union (“CJEU”) stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element

¹¹ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97

descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51).”

26. The Opponent’s trade mark is a single made-up coinage, but combining two ordinary English words. On the face of the specification of the goods under Mark A, there is a relationship to various regulatory effects on air, and in that regard the featured element “AIR” in the trade mark is of low distinctiveness. At my highest estimation, the earlier mark has an ordinary degree of inherent distinctiveness.
27. The level of inherent distinctiveness of a trade mark may be enhanced through use in the UK. The Opponent filed evidence in relation to the same trade mark under Mark B, which involves substantially the same relevant goods in Class 11. That evidence is extremely thin in relation to use of the AIRMASTER trade mark in the UK and does not show an enhanced level of distinctiveness of the earlier mark in the perception of the UK consumer.

Conclusion as to likelihood of confusion

28. I now turn to reach a conclusion as to the likelihood of confusion between the parties’ marks if they were used in relation to the registered goods I have considered. I make a global assessment of the likelihood of confusion, taking account of all relevant factors.
29. I take due account of some interdependence¹² between the relevant factors, including that a lesser degree of similarity between the marks may be offset by a great degree of similarity between the goods. The goods at issue are identical or highly similar and the purchasing process will involve primarily visual considerations of the marks, which I have assessed to be visually similar to a medium degree (at most). However, I have also found differences between the marks which make them aurally similar only to low degree and conceptually

¹² See paragraph 17 of the judgment in Canon Case C-39/97.

similar to a very low degree. Despite the level of visual similarity that arises from the extent of shared letters, the term MONSTER - which is especially striking in the overall impression of the Applicant's mark- is readily distinguished from the term MASTER. They will be recognised and understood as quite different concepts in the mind of the average consumer. Whilst the average consumer may hold in mind an imperfect picture of the marks, s/he is deemed reasonably well informed and reasonably circumspect and observant, and in this case would pay a medium or ordinary average level of attention when buying the goods at issue. The Opponent's AIRMASTER mark does not have high degree of distinctiveness and I find that there will be no association between the marks and no risk that the public might believe that the respective goods come from the same or economically-linked undertakings. There is no likelihood of confusion and consequently, **the opposition fails.**

Costs

30. The opposition has failed and the Applicant is entitled to a contribution towards its costs. My assessment of a contribution towards the cost of the proceedings is based on the guidance in Tribunal Practice Notice 2/2016 and I award the Opponent the sum of £550. The sum is calculated as follows:

Considering Opponent's statement of grounds and preparing a counterstatement:	£200
Considering the Opponent's evidence and submissions during evidence rounds and preparing own submissions	£350
Total:	£550

31. I therefore order Airmaster A/S to pay Force Manner Company Limited the sum of £550 (five hundred and fifty pounds) 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 24th day of July 2018

Matthew Williams
For the Registrar