

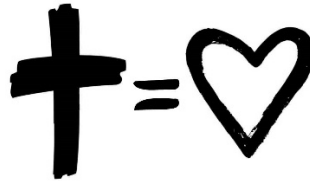
O-336-20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION 3417088

BY LOUIS BOLLARD

TO REGISTER:



AS A TRADE MARK IN CLASS 25

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 418132 BY

BLUTSGESCHWISTER GMBH

BACKGROUND & PLEADINGS

1. On 28 July 2019, Louis Bollard (“the applicant”) applied to register the trade mark shown on the cover page of this decision for the goods in class 25 shown in paragraph 10 below. The application was published for opposition purposes on 9 August 2019.

2. On 18 October 2019, the application was opposed in full by Blutsgeschwister GmbH (“the opponent”). The opposition is 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 (shown in paragraph 10 below) in the following European Union Trade Mark (“EUTM”) registration:

No. 14647606 for the trade mark shown below, which was applied for on 8 October 2015 and entered in the register on 6 June 2016:



3. The applicant filed a counterstatement, in which the basis of the opposition is denied.

4. In these proceedings, the opponent is represented by Groom Wilkes & Wright LLP; the applicant represents himself. Although only the applicant filed evidence, both parties filed written submission during the evidence rounds. Although neither party requested a hearing, the applicant elected to file written submissions in lieu.

The applicant’s evidence

5. This consists of a witness statement, dated 24 March 2020, from Mr Bollard, exhibit LB1 to which consists of screenshots obtained from the opponent’s website on 24 March 2020. I shall return to this evidence later in this decision.

DECISION

6. 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 –

(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.

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

7. The trade mark upon which the opponent is relying qualifies as an earlier trade mark under the provisions of section 6 of the Act. Given the interplay between the dates on which the opponent’s trade mark was entered in the register and the application date of the trade mark being opposed, the earlier trade mark is not subject to the proof of use provisions contained in section 6A of the Act. As a consequence, the opponent can rely upon all the goods claimed without having to demonstrate it has made genuine use of them.

Case law

8. 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.

Opening remarks

9. In its submissions, the opponent has pointed to, inter alia, a previous decision of this tribunal (BL-O-379-18) in which it was successful in consolidated oppositions against two applications filed in the name of Luca Pesci. Coincidentally, I was also the Hearing Officer in the earlier proceedings. In his submissions, Mr Bollard has replied to those

submissions concluding that: “The above cases all relate to later marks which are conceptually very similar to the earlier marks.” For the avoidance of doubt, my previous decision will play no part in the conclusions that I have to reach in these proceedings. To the extent that this decision may rely upon the same case law and reach similar conclusions in relation to, for example, the comparison of goods, the average consumer and the opponent’s trade mark, that is simply because the goods at issue are substantially the same as in the previous proceedings, as is the earlier trade mark being relied upon, and because many unrepresented parties adopt a similar (misconceived) approach to issues such as the comparison of goods and the identification of the average consumer.

Comparison of goods

10. The competing goods are as follows:

Opponent’s goods	Applicant’s goods
Class 25 - Clothing; Headgear; Footwear; Waist belts; Neck scarfs [mufflers]; Neckerchieves.	Class 25 - Clothing for men, women and children; Articles of outer clothing; Casual clothing; Jogging bottoms [clothing]; Leisure clothing; Shorts [clothing]; Tops [clothing]; Clothing.

11. In his written submissions, Mr Bollard states:

“1.2.2. The application is intended to be used on T-shirts, which the applicant plans to market and sell to Christian persons via very limited distribution channels in the United Kingdom; i.e., family and friends and at small Christian festivals. Such T-shirts with the application are intended to be used by Christian persons as a subtle profession of their faith.”

12. By reference to exhibit LB1 to his statement, he concludes:

“It is evident that the opponent’s mark is used on products marketed and sold:

via the opponent’s retail outlets, which according to [the opponent’s website] are all located in Germany with no retail outlets in the United Kingdom; and

online via the opponent’s website which operates under a German domain and targeted at the German-speaking consumer market.

Moreover, it seems the opponent’s mark is used for goods solely for females (womens’ clothing).

...the applicant submits that the goods and intended markets for the two marks are identifiably different even though both being within class 25; and that the respective users of the goods for the two marks are of different categories and geographies.”

13. 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.”

14. 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.”

15. Although I understand Mr Bollard’s comments and the evidence he has filed in support, as I mentioned earlier, his approach is misconceived. As the above case law makes clear and as I explained, as the opponent’s earlier trade mark is not subject to the proof of use provisions, it is not necessary for it to demonstrate that it has used its trade mark at all, let alone in the United Kingdom. Mr Bollard’s trading intentions are also not relevant. Rather, 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.

16. In *Gérard Meric v Office for Harmonisation in the Internal Market*, 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”.

17. The term “clothing” appears in both parties’ specifications and is literally identical. However, as all of the remaining goods which appear in the applicant’s specification would be encompassed by the term “clothing” in the opponent’s specification, the competing goods are to be regarded as identical on the inclusion principle outlined in *Meric*.

The average consumer and the nature of the purchasing act

18. 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.”

19. Approached on the notional and fair basis mentioned above, the average consumer of the goods at issue is a member of the general public, and not just the “Christian persons” Mr Bollard intends to target. As a member of the general public will, for the most part, self-select such goods from the shelves of bricks-and-mortar retail outlets or

from the equivalent pages of a website or catalogue, visual considerations are likely to dominate the selection process. However, as such goods are also likely to be the subject of oral requests to sales assistants and word-of-mouth recommendations, aural considerations must not be ignored.

20. As to the degree of care such a consumer will deploy, the cost of such goods can vary considerably. However, as the average consumer will have in mind factors such as cost, size, colour, material and compatibility with other items, the average consumer can, in my view, be expected to pay at least a medium degree of attention to their selection.


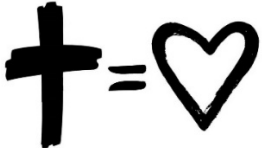
Comparison of trade marks

21. 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.”

22. 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 as follows:

Opponent's trade mark	Applicant's trade mark
	

23. While it is fair to say that a good deal of the competing submissions were directed at this aspect of the case, I do not intend to record them all here. I have, of course, taken them all into account in reaching the conclusions which follow.

24. The opponent's trade mark consists of three symbols in a heavy bold presentation. The opponent describes the first two symbols as a cross and a heart; the third symbol is clearly a device of an anchor. I am satisfied that is 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.

25. As to the applicant's trade mark, in his submissions, Mr Bollard describes the symbols as a cross, equals sign and a heart. I agree that is how the average consumer will interpret the three symbols. In his submissions, Mr Bollard states:

“The application is designed in a distinctive “rough” “sketched” style consistent in all icon elements...The heart icon in the application is designed as an outline with a sketch brush stroke...”

26. The cross symbol in the applicant's trade mark is presented in a heavy bold font and, I agree, in a "rough" manner as is the equals symbol and the outline of the heart symbol, the inner portion of which is presented in white. Although the cross symbol is somewhat larger than the heart symbol and although both are much larger than the equals symbol which appears between them, given the size and positioning of the equals symbol, it will not go unnoticed. Despite their differing sizes and positions, all of the symbols in the applicant's trade mark will contribute to the overall impression it conveys and its distinctiveness. However, given their size, the cross and heart symbols are likely to have a higher relative weight.

Visual comparison

27. The competing trade marks coincide insofar as they both contain devices of a cross and a heart. They differ in: (i) the manner in which those devices are presented, (ii) the applicant's trade mark contains an equals symbol, and (iii) the opponent's trade mark contains a device of an anchor. However, notwithstanding the various differences, given the size of the devices of a cross and heart in the applicant's trade mark and bearing in mind that a cross and heart are the first two devices in the opponent's trade mark, it results in what I regard as a medium degree of visual similarity between the competing trade marks.

Aural similarity

28. 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.”

29. In view of the above, it is not necessary for me to conduct an aural comparison.

Conceptual similarity

30. In his submissions, Mr Bollard states:

“1.4 The applicant submits that the EQUALS sign has a major significance in the application due to the fact that it serves to explain that CROSS EQUALS HEART; or rather that “Christianity is Love.” Such meaning cannot be found in the opponent’s trade mark. Indeed, it is explained on the opponent’s website that the conceptual meaning of the opponent’s sign “stems from seafaring” and represents “Faith in the individual”, “Love for creativity” and a “Down to earth attitude” respectively.”

And:

“3.5...The applicant submits that the meaning of the application is clear and well-established, not only within the Christian community who is the perceived target consumer group for goods bearing the application, but indeed for consumers in the UK market as a whole. This conceptual meaning derives from a religious message, in particular Christianity, conceptually different to the opponent’s trade mark which is derived from seafaring.”

31. Mr Bollard has, however, filed no evidence to support his assertion that the average consumer (as defined in paragraph 19 above) will conceptualise his trade mark in the manner he suggests. Similarly, while it is true that the opponent’s website indicates that its symbols are intended to be construed in the manner he suggests (exhibit LB1

refers), there is no evidence to indicate that is how the average consumer will actually construe them. Mr Bollard's trade mark will, however, evoke the concepts of a cross, equals symbol and heart. Notwithstanding that the opponent's trade mark will also evoke the concept of an anchor, the fact that it will also evoke the concepts of a cross and heart in the same order, results in what I consider to be a medium degree of conceptual similarity overall.

Distinctive character of the earlier trade mark

32. 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.

33. As the opponent has filed no evidence, I have only the inherent characteristics of its trade mark to consider. In its submissions, the opponent states that its trade mark:

“23...has an inherently high degree of distinctive character because it does not describe or even allude to the goods for which it is registered.”

34. While I agree with that submission and shall proceed on that basis, I shall return to this point when I consider the likelihood of confusion.

Likelihood of confusion

35. 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.

36. 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.

37. Earlier in this decision, I concluded that:

- the competing goods are identical;
- the average consumer is a member of the general public who, whilst not ignoring aural considerations, will select the goods at issue by predominantly visual means whilst paying at least a medium degree of attention during that process;
- the competing trade marks are visually and conceptually similar to a medium degree;

- the opponent's trade mark is possessed of a high degree of inherent distinctive character.

38. 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.”

39. 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).”

40. I begin by reminding myself of my conclusions in paragraph 37 above. In reaching a conclusion, I shall, however, proceed on the basis most favourable to the applicant i.e. that an average consumer will pay a high degree of attention during the selection process (thus making him/her less prone to the effects of imperfect recollection) and the opponent's earlier trade mark enjoys only a medium degree of inherent distinctive character.

41. However, even in those circumstances, the medium degree of visual similarity, combined with the medium degree of conceptual similarity arising from the fact that both trade marks contain devices (appearing in the same order) which will be conceptualised

as a cross and heart and the absence of evidence indicating that the average consumer will conceptualise the trade marks in the very specific manner Mr Bollard suggests, is, in my view, likely to result in direct confusion and the opposition succeeds accordingly.

42. In the event I am wrong in that regard, I will go on to consider the likelihood of indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

43. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two trade marks share a common element. In this connection, he pointed out that it is not sufficient that a trade mark merely calls to mind another trade mark. This is mere association not indirect confusion.

44. An average consumer who has noticed that the competing trade marks are different will, however, note that they both contain, inter alia, the devices of a cross and heart in the same order, albeit, I accept, presented in differing ways. However, when considered

in relation to the identical goods at issue, such a consumer is, given the degree of visual and conceptual similarity between the competing trade marks and the at least medium degree of inherent distinctiveness the opponent's trade mark enjoys, likely to conclude that Mr Bollard's trade mark is, for example, a variant brand being used by the opponent or by an undertaking linked to it. That results in a likelihood of indirect confusion and, once again, the opposition succeeds accordingly.

Concluding remarks

45. In its written submissions, the opponent draws the tribunal's attention to two decisions of this tribunal (one of which is my own) and one from the GC, which it regards as persuasive. In his submissions, Mr Bollard points to two EUTMs and one International Registration designating the United Kingdom in the names of unrelated undertakings which are registered for goods in class 25 and which include the devices of a heart and cross. As it is well established that the existence of other trade marks on the register is rarely of assistance and as the decisions to which the opponent refers are not binding upon me, these arguments have not assisted either party.

Overall conclusion

46. The opposition has succeeded and, subject to any successful appeal, the application will be refused.

Costs

47. As the opponent has been successful, it is entitled to a contribution towards its costs. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice ("TPN") 2 of 2016. Having applied the guidance in the TPN, I award costs to the opponent on the following basis:

Preparing the Notice of Opposition and reviewing the counterstatement:	£200
Official fee:	£100
Considering the other side's evidence:	£100
Written submissions (x2):	£300
Total:	£700

48. I order Louis Bollard to pay to Blutsgeschwister GmbH the sum of **£700**. This sum is to be paid within two months of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 23rd day of June 2020

C J BOWEN
For the Registrar