

O/544/22

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO. 3433290
IN THE NAME OF MEVLANA CEYLON TEA (PVT) LTD
FOR THE FOLLOWING TRADE MARK:**



IN CLASS 30

**AND AN APPLICATION FOR A DECLARATION OF INVALIDITY
UNDER NO. 503761**

BY

GORAN-TEE GROBHANDEL GMBH & CO. KG

Background and Pleadings

1. Mevlana Ceylon Tea (Pvt) Ltd (“the Proprietor”) applied to register the trade mark shown on the front cover page of this decision (“the Contested Mark”) in the UK on 2 October 2019. It was registered on 27 December 2019 for *Tea* in class 30.

2. On 13 April 2021 GORAN-TEE Grobhandel GmbH & Co. KG (“the Applicant”) applied to have the Contested Mark declared invalid under section 47 of the Trade Marks Act 1994 (“the Act”). The application is based upon sections 5(2)(b), 5(4)(a) and 3(6) of the Act.

3. Under section 5(2)(b), the Applicant relies upon the trade marks as set out below. It claims that, in light of the clear similarity between the respective marks and identity between the goods, there exists a likelihood of confusion between them.

(i) UKTM no. 918065872 (“first earlier mark”)

MEVLANA

Filed on 16 May 2019 and registered on 31 August 2019.

Class 30: Tea; Green tea; Black tea; Tea leaves; Tea-based beverages; Tea extracts; Tea mixtures.

(ii) UKTM no. 903083599 (“second earlier mark”)



Colour claimed: Black, white, red, gold.

Filed on 5 March 2003 and registered on 10 August 2004.

Class 30: Tea, in particular high-quality oriental tea mixtures.

4. Under section 5(4)(a), the Applicant claims to have used the following three unregistered signs, throughout the UK, since at least 2002,¹ in relation to “*tea; oriental tea mixtures; black tea; Ceylon tea; dry preparations for making tea, oriental tea mixtures, black tea, Ceylon tea; tea leaves; tea preparations.*”

(i.) MEVLANA

(ii)



(iii)



5. According to the Applicant, use of the Proprietor’s mark would constitute a misrepresentation to the public that would damage the goodwill of its business. Therefore, use of the Proprietor’s mark would be contrary to the law of passing off pursuant to section 5(4)(a) of the Act.

6. Under section 3(6) the Applicant contends that the application to register the Contested Mark was made in bad faith. It contends that the Proprietor was clearly aware of the Applicant’s rights prior to filing its application, applying for a mark that replicates in its entirety the Applicant’s earlier figurative mark and undertaking a clear

¹ Although the Applicant pleads that it has used its mark since 2002, within the body of its statement of grounds, the date relied upon is 2004.

pattern of dishonest behaviour through filing multiple trade mark applications throughout the UK and EU.

7. The Proprietor filed a defence and counterstatement denying all the grounds of invalidation and puts the Applicant to strict proof of each and every claim.

8. The Applicant is represented by Marks & Clerk LLP and the Proprietor is represented by Ladas & Parry LLP. Both parties filed evidence during the evidence rounds. Neither party requested a hearing and both parties filed submissions in lieu of hearing. This decision is taken following a careful perusal of the papers.

9. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. That is why this decision continues to refer to the case law of the EU courts on trade mark matters.

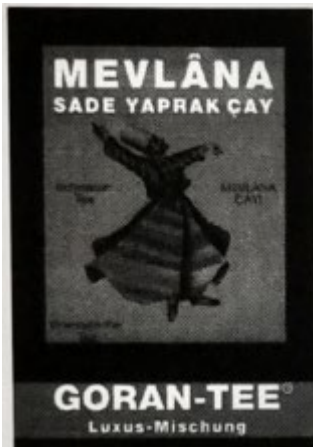
Evidence

10. The Applicant's evidence is in the form of a witness statement from Aram Khisro, dated 18 August 2021, accompanied by 10 exhibits marked AK1-AK10. I shall summarise the main points.

11. Mr Khisro is the managing director of the Applicant company, a position he has held since 2017. He sets out the history of the formation of the business. He explains the Goran Tee business was originally managed by his mother Ingrid Khisro under the name "GORAN-TEE Ingrid Khisro eingetragene Kauffrau (Registered Merchant)" and then as "GORAN-TEE OHG (Partnership)" transferring all assets, to include the intellectual property assets to the Applicant in 2017 upon its incorporation. All registered rights and goodwill were transferred to the Applicant in 2017.

12. Mr Khisro states that the tea leaves are sourced from Sri Lanka and blended at the Applicant's manufacturing facility in Brieselang, Germany. He states that the Applicant has operated in the tea market for 40 years with MEVLANA as its leading brand tea. He states that the final packaged product is sold throughout Europe including the UK. The packaging design of this brand contains the distinctive MEVLANA mark and prominently features a distinctive "dancing man" device, which has been used for 40 years (a copy of which is reproduced below). The print templates

of the design of the packaging drafted by the Applicant between 2015 and 2017, are produced.² He states that the stylisation and design of the packaging illustrated is consistent with later and earlier packaging designs. All products sold under this brand prominently feature the MEVLANA trade mark and the dancing man device.



13. The Applicant produces a table setting out the significant turnover figures from sales of MEVLANA goods between 2015-2019. The relevant information taken from the table is as follows:

Year	Total sales	Territory breakdown
2015	€13,811,474.16	<u>Germany</u> €12,504,368.16 <u>Other EU Member states</u> €643,896 (including UK)
2016	€15,186,407.22	<u>Germany</u> €13,833,881.62 <u>Other EU Member states</u> €939,456 (including UK)
2017	€16,088,634.32	<u>Germany</u> €14,666,173.72 <u>Other EU Member states</u> €898,686.60 (including UK)
2018	€17,607,536.54	<u>Germany</u>

² Exhibit AK1

		€16,032,230.54 <u>Other EU Member states</u> €1,166,489.20 (including UK)
2019	€19,824,575.02	<u>Germany</u> €17,959,456.50 <u>Other EU Member states</u> €1,371,245.72 (including UK)

14. Mr Khisro produces invoices issued to customers based in Germany, Benelux, France, UK and Switzerland between 2002 and 2019.³ The invoices issued to “customers in the UK” appear to relate to only one customer based in London, England identified by customer number 11303. Invoices to this customer are dated predominantly between 2002 and 2008. Only two invoices are produced within the relevant period/date namely April 2019 and November 2019. The invoices show the supply of a quantity of 1000g and 500g bags of goods described as “Mevlana.”

15. AK3 includes copy screen shots of the Applicant’s websites (www.mevlanacay.de and www.goran-tee.de) retrieved using the internet archive Wayback machine website. The screenshots illustrate the use of both earlier marks in the body of the text and on the product packaging in relation to tea. The screen shots are dated as follows:

- www.mevlanacay.de, webpages dated 10 June 2017; 10 July 2017; 13 October 2018 and 3 February 2019
- www.goran-tee.de, webpages dated 12 August 2003 and 3 May 2016.

16. Mr Khisro states that, since 2015, the Applicant has spent approximately “€218,000-240,000 per annum” on promoting its MEVLANA goods. It is said that the Applicant promotes its goods in numerous ways including on its websites, which are accessible in English, German and Turkish.

17. Mr Khisro produces extracts taken from “Amazon Germany and Amazon UK” showing the MEVLANA goods for sale, the dates of first sale on these platforms and reviews from customers in these territories.⁴

³ AK2

⁴ AK4

18. Mr Khisro states that MEVLANA goods have been available from various retailers as early as 2002 and produces “examples of UK based companies selling MEVLANA goods”.⁵ The screenshots produced are taken from www.korkmazfood.com via the Wayback machine archive website dated 22 August 2018; www.turkishzone.co.uk (undated); www.bonvila.com (undated) and www.anthap.co.uk (undated). The screenshots show use of both earlier marks on images of the product packaging itself (as shown at paragraph 12) and in the text accompanying the images, in relation to tea products, sold in either 500g or 1000g bags, in pounds sterling.

19. The remaining evidence appears to focus on the Applicant’s claim for bad faith. Mr Khisro sets out the timeline of the Proprietor’s knowledge of the Applicant’s mark and the various steps taken by the Applicant to oppose the Proprietor’s applications for trade marks under the name MEVLÂNÂ for tea products in various territories within the EU. I shall return to this evidence later in my decision when assessing the Applicant’s claim under this ground.

20. The Applicant’s evidence also includes witness statements of Mr Robert Johnson and Mr Michael Jackson both dated 16 September 2021. The purpose of both statements is to produce translations to a number of exhibits attached to Mr Khisro’s statement namely exhibits AK2, from German to English and AK3, AK4 and AK10 from Turkish to English. Both Mr Johnson and Mr Jackson verify that the contents of those translations are true and are accurate translated copies of the originals.

The Proprietor’s evidence

21. The Proprietor’s evidence consists of the witness statement of Mr Hamid Yusufov dated 8 December 2021, accompanied by three exhibits marked HY1-3.

22. Mr Yusufov is the Proprietor’s Director and is authorised to complete the statement on its behalf. The Proprietor company was registered by himself and Mr Dinesh Deheragoda as co-directors on 3 February 2017 in Sri Lanka. He produces a certificate of incorporation to this effect, showing the company’s status as a private limited company in Sri Lanka. Only some of the certificate’s details are presented in English. The document is signed on 7th February 2017. ⁶

⁵ AK5

⁶ Exhibit HY1

23. Mr Yusufov states that the company was registered with the main purpose of creating “MEVLANA PURE CEYLON TEA brand with luxurious Ceylon tea leaves - OP1(Orange Pekoe 1-st sort) for the UK market.” He states that “the registration process of the company, including Lion Logo Certificate granted by the Tea Board for UK, and the brand creation was completed in 2019.”

24. A copy of the “Lion Logo” certificate is produced at HY2. The certificate is authorised by the Sri Lanka Tea Board granting “franchise rights” to the Proprietor for the use of the quality certification logo (as reproduced below) in conjunction with its “brand name: MEVLANA”. The certificate includes a reference to the “Destination: United Kingdom”. It is dated 19 August 2020 and has a validity date recorded as 28 November 2022.⁷



25. Mr Yusufov states that “today [they] are genuine manufacturers of Mevlana Pure Ceylon tea, bringing tea from Ceylon fields to UK supermarkets directly.”

26. Mr Yusufov gives an explanation as to how the name was created. He states “being a person with a Turkish background using the Mevlana name on my product is an honour for me as Mevlana Celaleddin Rumi, called Saint Mevlana, is a part of Turkish culture and every Turkish person wishes to use Mevlana name as a brand of his restaurant, cheese, bread, business centre etc. If I had a chance to create a new butter brand and manufacture it, I would call it again Mevlana”.⁸

27. Mr Yusufov accepts that when he applied for the contested trade mark, he received notification from the registry of the existence of three similar earlier registered trade marks (two of which are the ones relied upon by the Applicant for the purposes of these proceedings). However in that letter, he was informed that the office would not notify the owner of the two EU trade marks recorded, only the UK trade mark holder. He states, therefore, in order to avoid opposition risks he contacted the holder of the

⁷ HY2

⁸ Para 3 witness statement Mr Yusufov

third trade mark namely Eda Quality Foods UK Ltd (“Eda”) and offered them exclusive rights to distribute MEVLANA PURE CEYLON TEA in the UK territory, on condition that they did not oppose the trade mark application. He confirms that they entered into an agreement and the Proprietor has been cooperating with one of Eda’s subsidiary companies until today. Exhibit HY3 consists of three invoices dated 4 March 2020, 23 May 2020 and 14 August 2020 addressed to Njoy Catering Ltd, based in London. The invoices are addressed to NJOY, displaying the mark as follows:



28. The mark is also referred to under the “tea quality” column of the invoice, in word only form as “MEVLANA CEYLON TEA”. Each invoice refers to quantities in the region of “1,500/1,600 cartons” being delivered valued at between 95,500 and 102,000 USD.

29. Mr Yusufov states that as soon as the mark achieved registration [they] put all available resources into implementing [their] UK project. Since January 2020 he states that the Proprietor has invested \$500,000 into the UK, which includes “distributor support in payments and marketing activities”. He states that “MEVLANA PURE CEYLON TEA is a British brand and has gained popularity in a short time”.

30. Mr Yusufov states that he was informed by his UK trade mark attorney of the application for invalidation and as far as he was aware the Applicant’s tea under their mark was for the German market only. The reason he came to this conclusion is because the Applicant’s packaging has no English wording. He states that the Applicant was aware of his brand since 2017 but did not oppose their UK application within the 2 months opposition period, waiting almost two years after it had gained a reputation and certain market share to oppose it.

31. Mr Yusufov queries the invoices produced by the Applicant stating that as the Applicant was not registered nor in possession of the trade marks before 2017 it could not have raised invoices under its name. The earlier invoices therefore produced in the years between 2003 and 2017 have no connection with the Applicant.

Applicant's evidence in reply

32. A second statement is produced by Mr Khisro dated 8 February 2022. The purpose of this second statement is to refute some of the matters raised by Mr Yusufov. Whilst I do not propose to summarise the contents of this statement in full, the salient points are set out as follows:

- proceedings were issued as soon as Mr Khisro became aware of the Proprietor's registration in the UK as he had done for each of the Proprietor's applications in other EU territories.
- He challenges Mr Yusufov's contention as to how the contested mark was chosen. It is contended that it was not mere coincidence that the same name and almost identical stylisation and packaging design as the Applicant's was chosen by the Proprietor.
- He accounts for the inconsistencies regarding the raising of invoices. This he explains was as a result of the company's accounting software which automatically generates copies of historic invoices by reference to the letterhead of the current Applicant company and not the original issuer. He has produced scanned images of original paper copies of a selection of invoices issued to the UK between 2013 and 2015.⁹ Copies of some of the original invoices show that they were raised by the Applicant's predecessor in title.
- The Applicant first became aware of the Proprietor's use of MEVLANA in 2017 and issued a cease and desist letter in March 2017. It subsequently became aware that a number of registrations had been applied for by Black Tea Exports (Pvt) Ltd (a linked company to the Applicant and owned by Mr Yusufov) in a number of territories throughout the EU and took action to challenge them.
- Twenty five invoices are produced dated between 26 June 2012 and 18 October 2016 under the heading GORAN-TEE which Mr Khisro explains was the trading name of the Applicant when his mother was in charge of the business. The invoices refer to Mevlana in 1000g and 500g bags. The price is displayed in Euros. The specific customer details and addresses are redacted other than by reference to the customer number 11303. The products are shown as being shipped to London, England.

⁹ AK1 of second statement which I shall refer to as AK1*

33. Both parties filed submissions in lieu of hearing. Whilst I have read and considered these documents in full I do not propose to summarise their contents, but I have taken them into account in my deliberations and shall refer to the salient points where appropriate.

Decision

34. The application to invalidate the Proprietor's mark is based on three different grounds namely sections 5(2)(b), 5(4)(a) and 3(6) of the Act, which have application pursuant to section 47 of the Act, which states as follows.¹⁰

“47(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

[...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground –

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2ZA) [...]

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

¹⁰ and since the earlier marks are comparable marks by virtue of paragraph 9 of Part 1, Schedule 2A of the Act.

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered –

(i) within the period of 5 years ending with the date of application for the declaration; and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) [...]

(2D) –(2DA) [Repealed]

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the

purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c).

[...]

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) [...]

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall be deemed never to have been made. Provided that this shall not affect transactions past and closed.”

Section 5(2)(b)

35. Section 5(2)(b) of the Act 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.”

Proof of use

36. Both marks relied upon by the Applicant have filing and registration dates that predate the contested mark's registration and therefore qualify as earlier marks pursuant to section 6 of the Act. In circumstances in which the earlier marks completed their registration process more than five years before the date of the application for invalidity, i.e. 13 April 2021, the use conditions must be met. I note that the first earlier mark has been registered within this five-year period and is therefore not subject to the proof of use provisions contained within section 6A of the Act. Consequently, the Applicant is entitled to rely upon all the goods of this registration without having to establish genuine use. In relation to its second mark, however, it has been registered for more than five years ending on the filing date of the application for invalidation and in order to rely on this mark the proof of use conditions must be met.

My Approach

Section 5(2)(b) invalidation

37. The first earlier mark is for the word only MEVLANA, whereas the second earlier mark is a more complex mark consisting of the same word (albeit stylised) combined with a number of additional elements and a device. There is also a significant overlap between the goods of the respective marks. I note that the Proprietor has requested proof of use for the second earlier mark, but no proof of use is required for the first word only earlier mark. Consequently, for the purposes the assessment under section 5(2)(b) I will proceed initially by assessing the invalidation based on the first earlier mark where proof of use is not required, as this mark is closer in terms of similarity. If reliance on the second earlier mark and for those remaining goods becomes critical to my decision, I will formally consider whether the use conditions are met and undertake a further comparison as between the Applicant's second mark.

38. The following principles are gleaned from the decisions of the EU courts 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:

(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 to mind the earlier mark, 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 the goods

39. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc* Case C-39/97, where the court stated at paragraph 23 of its judgment that:

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

40. The parties’ respective specifications in class 30 are set out below:

Proprietor’s goods	Applicant’s goods first mark
Tea	Tea; Green tea; Black tea; Tea leaves; Tea-based beverages; Tea extracts; Tea mixtures.

41. The Proprietor’s goods cover *Tea* which is self-evidently identical to the Applicant’s *Tea*. It is not necessary, therefore, to undertake a comparison between the Applicant’s remaining goods of its registration, as this will not place it in any stronger position.

Average consumer and the purchasing process

42. When considering the opposing trade marks I must determine, first of all, who the average consumer is for the goods and the method of selecting those goods. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. It must also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question.

43. 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

44. Neither party addressed the assessment as to the relevant public nor the purchasing process. I consider that both parties' goods are directed at the end user namely the member of the general public, who is likely to choose the goods from a physical retail outlet through self-selection, or from an equivalent website. Whilst I accept that the goods may be purchased by business consumers for example tea merchants or those running their own restaurants/businesses, overall, I consider that it is the general member of the public that the goods are mostly directed towards and who form the average relevant consumer group. The purchasing process is likely to be predominantly a visual one, although, there may be occasions where the goods are purchased aurally as a result of a request made to a sales assistant or waiting staff, for example, and therefore this selection process cannot be dismissed entirely.

45. I do not consider that a great degree of attention will be undertaken in the selection process taking account of the nature of the goods as they are consumables, which are relatively inexpensive in nature. Such things as taste, preference and price will be considerations taken into account. Overall, therefore, I consider that the level of attention undertaken in the purchasing process is low to average.


Comparison of the marks

46. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) 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 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.”

47. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to consider the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

48. The marks to be compared are as follows:

Applicant's mark	Proprietor's mark
MEVLANA	 The proprietor's mark consists of the word "MEVLÂNA" in a bold, white, sans-serif font, with a circumflex accent over the "A". Below it, the words "PURE CEYLON TEA" are written in a smaller, white, sans-serif font. The entire text is set against a solid black rectangular background.

49. The Proprietor contends that the respective marks can be distinguished from one another. Furthermore that “the word MEVLANA can be distinguished from the challenged mark as the latter has other distinctive features apart from the word

MEVLANA. No evidence of actual confusion in the market place in the United Kingdom has been given.”

50. The Applicant submits that “.. it is abundantly clear that the mark subject to the Registration is highly similar to the earlier trade marks relied upon by the Cancellation Applicant. On a visual basis the marks are highly similar to one another. The earlier highly distinctive MEVLANA word mark is wholly contained within the [contested] mark and is the dominant element. The average consumer will perceive the remainder of the [contested] mark as descriptive and decorative.”

Overall impressions

51. The Applicant’s mark is a word only mark in capital letters. The overall impression resides in the totality of the word.

52. The Proprietor’s mark consists of the words MEVLÂNA PURE CEYLON TEA presented in a white emboldened unremarkable type face on a black rectangle. The Applicant submits that due to its size and position it is the word MEVLÂNA which is the distinctive and dominant element of the Proprietor’s mark and in which the overall impression resides, especially given that the words PURE CEYLON TEA are descriptive of its goods. I agree. Whilst contributing to the mark, little weight will be given to the words PURE CEYLON TEA as these words will be regarded as descriptive of the nature and quality of the goods on offer. Similarly little weight will be placed on the circumflex above the middle letter A, not only due to its size and function in the word, but also because it is not commonly used in the English language and is likely, therefore, to be overlooked. The black rectangle plays a lesser role in the mark (as does the type face used and stylisation) as it will be purely seen as a background.

Visual comparison

53. Both marks include the identical word MEVLANA which is the dominant and distinctive element of the contested mark and the entirety of the earlier mark. The contested mark differs in that it also includes the words PURE CEYLON TEA, is presented on a black rectangle in a slightly stylised type face and includes a circumflex above the middle letter A. In light of my assessment regarding the overall impression of the contested mark, and the relative weight of the additional elements I consider that visually it is dominated by the word MEVLANA. Weighing up the differences and

similarities, therefore, overall I consider that the marks are similar to a medium to high degree.

Aural comparison

54. The competing marks are aurally similar to the extent that the dominant and distinctive element of the Proprietor's mark shares commonality with the entirety of the Applicant's mark. Notwithstanding that there may be a number of ways in which the respective marks are pronounced, I consider that, to a substantial proportion of the relevant public, it is more likely that the common aural element MEVLANA will be pronounced identically, as MEV-LAH-NAH, regardless of the presence of the circumflex above the middle letter A. The Proprietor's mark consists of further verbal elements namely PURE CEYLON TEA which may or may not be articulated at all or articulated in their entirety given their descriptive role in the mark. Accepting that "descriptiveness does not of itself render an element negligible or aurally invisible",¹¹ and that I should be careful not to disregard these words completely from the aural assessment, nevertheless, these additional verbal elements are not particularly distinctive and consequently less weight will be attributed to them in a trade mark sense. In this scenario, therefore, the marks are aurally almost identical or at least highly similar as a result of the shared common word MEVLANA, given that a circumflex is not ordinarily used in the English language, which means that UK consumers are unlikely to alter the pronunciation of the word by reference to it. The degree of aural similarity will be reduced to a medium degree if the words PURE CEYLON TEA are also pronounced.

Conceptual comparison

55. The Proprietor submits that the name MEVLANA is a saint's name in Turkey, however, to the general member of the English speaking public in the UK, I do not consider that this will be a fact known to a significant enough number. For a conceptual meaning to be relevant it must be capable of immediate grasp¹² and therefore if some within the Turkish community within the UK recognises it as the name of a saint this will not be widespread amongst a significant enough number. I recognise that some

¹¹ *Purity Wellness Group Ltd v Stockroom (Kent) Ltd* - BLO/115/22 Mr Philip Harris, sitting as the Appointed Person.

¹² *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29.

consumers may see it as the name of an individual or a place name of foreign origin, but given that it is not a common name or place in the UK, I do not consider that again this meaning will be known amongst a large proportion of the relevant public. In any event even if these were the meanings attributed to the word MEVLANA, this does not assist the Proprietor as these meanings would apply equally to both marks, irrespective of the presence of the circumflex above the letter A.

56. When considering the meaning attributed to the word MEVLANA/MELVÂNA I agree with the Applicant that to the majority of UK consumers the word is more likely to have no meaning and be regarded as invented. If considered to be an invented word, therefore, then conceptually since no conceptual comparison is possible they will be regarded as conceptually neutral.

57. The remainder of the Proprietor's mark will simply describe the product on offer namely the type and quality of tea (highlighted by the word Pure which shows that it is not a blended tea) which is a point of conceptual difference, however, the concept introduced by this element is not a distinctive concept in the context of the goods at issue.

Distinctive character of the earlier mark

58. Registered trade marks possess varying degrees of inherent distinctive character. Those marks that are regarded as descriptive of the goods will possess a low degree of distinctiveness. Conversely invented words with no association to the goods are highly distinctive. The more distinctive the earlier mark (either per se or by the use that has been made of it) the greater the likelihood of confusion.¹³

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

¹³ *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)

undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

60. I shall consider the inherent distinctive character position first. As outlined earlier in my decision the word MEVLANA to a greater proportion of the public will not give rise to any meaning beyond an invented word. On this basis I consider that the distinctive character of the Applicant's mark is therefore at its highest.

61. Whilst the Applicant has filed evidence and claimed an enhanced degree of distinctive character, I note that the focus of its evidence is directed towards use in the EU and particularly Germany. The position regarding the level of enhanced distinctive character can only be considered from the viewpoint of the UK public and how well the UK consumer identifies with the mark.

62. Assessing the evidence filed by Mr Khisro, I note that the turnover figures produced for the UK are incorporated in the figures of "other EU member states" without being broken down further or particularised specifically for the UK. Whilst the total figure is in the region of 1 million euros I am unable to assess how much of this is only attributed to the UK market. The copy screenshots of retailers' websites offering the Applicant's goods are all undated bar one in 2018 and I am not told how many items were sold via these outlets, how many customers viewed the websites, nor the volume of goods purchased as a result. The Applicant's own domain names, whilst I am told are accessible in English, end in a ".de" IP address which suggests that they are German websites directed at the German market. No evidence is produced as to how many UK consumers have accessed these websites. Whilst the goods are offered for sale on Amazon UK I note that the reviews from UK customers are limited to no more than 11 individuals between January 2018 to December 2020 and no categorical evidence is produced as to the total number of products that were sold via this forum. The invoices produced do not assist either, as only two invoices are provided for 2019, (the remainder being over 10 years old) issued to one customer based in London and therefore I cannot assess the geographical extent of the use. I have no breakdown of the advertising expenditure incurred solely for the UK or in fact any examples of how it promoted its mark/goods in the UK, for example via printed advertisements or social

media. On this basis I do not find that the Applicant has demonstrated that it has enhanced the distinctive character of its mark to the UK consumer through use.

63. In any event this makes little difference to the distinctive character assessment since I have already found that the first earlier mark possesses the highest degree of inherent distinctive character.

Likelihood of confusion

64. When considering whether there is a likelihood of confusion between the marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods and services originate from the same or a related source.

65. A number of factors must also be borne in mind when undertaking the assessment of confusion. 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 a global assessment of all relevant factors when undertaking the comparison and that the purpose of a trade mark is to distinguish the goods and services of one undertaking from another. In doing so, I must consider 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 that he has retained in his mind. Mr James Mellor, as the Appointed Person, directed that a common sense approach should be undertaken in any assessment where “every comparison must be conducted according to the approach laid down in the CJEU case law and every comparison will depend on its own facts” applying “the well-established propositions for assessing the visual, aural and conceptual similarities.”¹⁴

66. The Proprietor argues that the Applicant has failed to provide any evidence of actual confusion in the UK. It submits that “there are only references to issues with customers in Germany and it is not clear that they are confused in any way.”¹⁵ Caselaw

¹⁴ *Robert Bosch GmbH v Bosco Brands UK Limited*, BL O/301/20

¹⁵ Submission dated 31 March 2022

suggests, however, that whether there is or is not actual confusion is of little or no significance as it does not necessarily reflect the actual position regarding whether the average consumer would be aware of the respective marks on the market, nor whether the consumer has been consistently exposed to them side by side in comparable market environments.¹⁶ The absence of confusion is unlikely to be a determinative factor therefore, as it may be as a result of differences extraneous to the earlier mark.¹⁷ It is not necessary therefore for the Applicant to provide evidence of actual confusion as the assessment must be based on an objective test of all the relevant factors.

67. Earlier in my decision I found the respective goods are self-evidently identical. The goods will be selected predominantly via visual means (but not discounting aural considerations) using a low to average level of attention in the selection process. The earlier mark is inherently distinctive to a high degree. The marks are visually similar to a medium to high degree and aurally from a medium to high/almost identical degree depending on what elements of the contested mark are pronounced. Conceptually I found that a greater proportion of the relevant public would regard the marks as invented rendering them conceptually neutral. A point of conceptual difference was created by the words PURE CEYLON TEA, however, the concept introduced by this element is not a distinctive concept in the context of the goods at issue.

68. Taking account of these conclusions, I remind myself that I must assess the matter as to how the marks are perceived on first impressions and from the perspective of the consumer's immediate and instinctive reaction to the marks on first encounter.¹⁸

69. Bearing in mind the principle of imperfect recollection, in my view, average consumers are unlikely to recall the difference created as a result of the circumflex present above the letter A in the middle of the word MEVLANA in the contested mark which renders this element nigh on identical to the earlier mark. The remaining aspects of the contested mark are descriptive of the nature and quality of the goods and therefore as I have already explained play a much lesser role in the mark as a whole and are likely to be ignored or overlooked.

¹⁶ *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41

¹⁷ *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283

¹⁸ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

70. In *Diramode S.A. v Richard and Linda Turnham (Pinkies)*,¹⁹ Mr Geoffrey Hobbs, QC, sitting as the Appointed Person, concluded that there is a greater likelihood of confusion where the earlier mark has a highly distinctive character.

71. Consumers who search for an entity providing tea will do so by reference to the word MEVLANA absent the circumflex given that this character it is not a common symbol on a conventional keyboard. The circumflex itself therefore fails to be sufficient to distinguish between the marks as do the additional descriptive elements identified in the contested mark. Taking account of the principle of imperfect recollection and the fact that consumers rarely have a chance to compare marks side by side, I conclude that there is a strong likelihood that the marks will be mistaken one for the other leading to a likelihood of direct confusion.

72. Furthermore, direct confusion is even more likely where the marks are spoken since the emphasis will be on the word MEVLANA and not on the descriptive words PURE CEYLON TEA. It is the word MEVLANA which is the prominent element in the contested mark, and which acts as a badge of origin for the goods.

73. Even if I am wrong in this regard and the words PURE CEYLON TEA and the stylisation/black rectangle are noticed by consumers, indirect confusion would still arise. I consider that the figurative elements and the inclusion of the words PURE CEYLON TEA will, rather than creating a brand extension in the minds of consumers, be regarded as a different form of the same mark from the same or related undertaking. The differences will be regarded as the one used on labels or packaging for example as opposed to an abbreviated word only version used in text. This is in fact how the Proprietor refers to its mark. Mr Yusufov has produced a number of documents²⁰ where the contested mark is referred to as MEVLANA solus, absent the circumflex, the words PURE CEYLON TEA and the other elements. I consider that the way in which the Proprietor refers to its mark in reality, is illustrative of how it would be perceived and referred to by consumers. Consequently consumers will believe that the same or related undertaking was responsible for the respective goods, leading to a likelihood of indirect confusion.

¹⁹ BL O/566/19

²⁰ Invoices and in the franchise certificate Exh HY2 and HY3

Conclusion

74. The opposition succeeds under section 5(2)(b) of the Act. Having reached this conclusion based on the first earlier mark, I consider that it is unnecessary to undertake an assessment against the Applicant's second earlier mark as it will not place it in any better position, and I decline to do so.

Other grounds of opposition

Section 5(4)(a)

75. Whilst the Applicant also relies on a claim under section 5(4)(a), on a question of proportionality, its position is not improved beyond that which I have already found under section 5(2)(b).

76. However dealing with the claim briefly in order for the Applicant to succeed under this ground it must demonstrate goodwill, misrepresentation and damage. Since goodwill is territorial, the Applicant must establish that it had the requisite goodwill with UK consumers as at the relevant date namely 2 October 2019. Goodwill arises out of trading activities which must be considered in the context of its revenue figures. The evidence produced said to be directed at the UK market is very limited. There is no evidence of turnover or advertising figures relating only to the UK. Only two invoices are produced in 2019 of sales to a customer, who is based in London which does not show a wide geographical catchment. It is unclear to me whether this customer is a distributor or a retailer as no details are provided. I place little weight on this evidence, therefore. The screenshots of third party websites offering the Applicant's goods are all undated bar one and therefore are of little value in establishing goodwill particularly as they are not supported by evidence of sales or a customer base. The extracts taken from Amazon UK only demonstrate a handful of reviews which by themselves and given their dates are insufficient.

77. Following the decision in *Starbucks*²¹ if the Applicant is unable to demonstrate that it has actual customers in the UK or if the evidence points to a customer base that is too small, then it would be unable to succeed in demonstrating the requisite goodwill.

²¹ *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*, [2015] UKSC 31

It is not enough to show that, at the relevant date, the Applicant's signs had a reputation of some sort in the UK. Rather, it is necessary to show that it had customers in the UK for whom MEVLANA (in its word only form or as part of a composite figurative/device mark) distinguishes its goods.

78. The Applicant has not filed evidence of sufficient substance to demonstrate that it has goodwill with UK consumers as at the relevant date. I am unable to place much weight on the turnover figures as they represent figures for the number of EU countries and there is no way of telling what proportion relates only to the UK. Without being able to establish goodwill, no misrepresentation or damage could follow.

79. The Applicant's claim under section 5(4)(a) fails.

Section 3(6)

80. Section 3(6) of the Act states:

“3(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

81. In *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121 the Court of Appeal considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07 EU:C:2009:361, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, EU:C:2013:435, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, EU:C:2019:724, *Hasbro, Inc. v EUIPO, Kreativni Dogaaji d.o.o. intervening*, Case T-663/19, EU:2021:211, *pelicantravel.com s.r.o. v OHIM, Pelikan Vertriebsgesellschaft mbH & Co KG (intervening)*, Case T-136/11, EU:T:2012:689, and *Psytech International Ltd v OHIM, Institute for Personality & Ability Testing, Inc (intervening)*, Case T-507/08, EU:T:2011:46. It summarised the law as follows:

“68. The following points of relevance to this case can be gleaned from these CJEU authorities:

1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can be relied on

before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].

2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].

3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of trade mark law, i.e. the course of trade and having regard to the objectives of the law namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin: *Lindt* at [45]; *Koton Mağazacılık* at [45].

4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacılık* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54]".

82. The correct approach to assessing bad faith was considered in *Alexander Trade Mark*²² which outlined the following key questions which needed to be asked in that determination:

(a) What, in concrete terms, was the objective that the applicant has been accused of pursuing?

²² BL O/036/18

(b) Was that an objective for the purposes of which the contested application could not be properly filed? and

(c) Was it established that the contested application was filed in pursuit of that objective?

83. It is necessary to ascertain what the Proprietor knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

84. Although it may be a relevant factor, the mere fact that the Proprietor knew that another party was using the trade mark in another territory does not establish bad faith: *Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemærker* Case C-320/12. Given the territorial nature of IP rights, the mere appropriation of a name registered/used abroad (in that case the USA) was not enough under UK law: there must be something else involved before this can justify a finding of bad faith.²³

85. However, an application to register a mark is likely to have been filed in bad faith where the Proprietor knew that a third party used the mark in the UK, or had reason to believe that it may wish to do so in future, and intended to use the trade mark registration to extract payment/consideration from the third party, e.g. to lever a UK licence from an overseas trader: *Daawat Trade Mark*, [2003] RPC 11, or to gain an unfair advantage by exploiting the reputation of a well-known name: *Trump International Limited v DDTM Operations LLC*, [2019] EWHC 769 (Ch).

86. Whilst the exact facts of this case are not on all fours with the facts as outlined in the caselaw it is still incumbent on me to determine whether the filing of the contested mark constituted an act of bad faith. An allegation of bad faith is a serious allegation which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies (i.e. balance of probability). This means that it is not enough to establish facts which are as consistent with good faith as bad faith: *Red Bull*

²³ *Wright v Dell Enterprises Inc.* (HOGS AND HEFFERS), BL O/580/16

GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited [2012] EWHC 1929 (Ch).

87. It is necessary for me therefore to consider the actions of the Proprietor at the relevant date namely the date it applied for the contested mark namely 2 October 2019.

88. The Proprietor's defence to the bad faith claim is a pure denial that it acted in bad faith. Mr Yusufov's statement sets out a chronology as to the timing of the company's incorporation, what the inspiration was behind choosing the name, and what actions have been taken since trying to establish itself as the "real MEVLANA Pure Ceylon Tea brand".²⁴ Of particular note is that Mr Yusufov does not deny receiving the cease and desist letter which was sent by the Applicant's predecessor in March 2017 prior to the Proprietor applying to register the contested mark in the UK and in various EU countries. The Applicant claims that the Proprietor approached its customers to promote its own goods under the mark in direct competition to the Applicant which again has not been denied by Mr Yusufov and is therefore unchallenged evidence. I note that this allegation was raised in both cease and desist letters sent from the Applicant's lawyers in both 2017 and 2020.

89. The Applicant alleges that it cannot be mere coincidence that the packaging used by the Proprietor is almost identical in terms of stylisation, colour combination, design and lettering to the Applicant's own packaging design (reproduced below). This it is said is an attempt to deceive the Applicant's customers as to the origin of the products under the MEVLANA sign. No explanation beyond the use of the name MEVLANA has been provided by Mr Yusufov in this regard.

²⁴ Taken from the Proprietor's website exhibit AK9

Applicant's packaging	Proprietor's packaging
	

90. Whilst the Proprietor states that he believed that the Applicant “was predominantly based in Germany” it is clear from the 2017 cease and desist letter that this is not the case which outlines that protection for the IP rights held by GORAN-TEE extended not only in Germany but throughout the “EU member states”. Even if this was the case it still demonstrates that the Proprietor was aware of the Applicant’s trade marks and business prior to applying for the contested mark. I also note the Registry’s letter sent at the examination stage²⁵ notified the Proprietor of the Applicant’s ownership of EU trade marks which were similar to the application and likely to cause confusion, but confirmed that it would not notify them. The Proprietor confirmed that it only contacted the UK based company flagged in this letter which it has now entered into a distribution agreement with. Whilst this letter was sent some 8 days after the application it sheds light backwards as to the Proprietor’s intentions during this period especially since no explanation has been given as to why the Proprietor filed a number of applications across different EU territories under different names (under Mr Yusufov’s personal name and under Black Tea Exports (Pvt) Ltd). The inference raised by the Applicant is that the applications were filed under different names in order to evade discovery by the Applicant.

91. I find that I cannot come to any other plausible explanation for the Proprietor’s actions other than it was attempting to saturate the trade mark registration process

²⁵ Dated 10 October 2019

with a number of trade mark applications under the names of different entities associated with the Proprietor in the hope that one would slip through the net as has happened with its UK application.

92. In assessing whether the Proprietor has acted in bad faith I take into account all the individual incidents/factors which paint a picture that the Proprietor and its agents were aware of the Applicant's business and trade marks prior to filing its application. By its own admission, the Proprietor was aware that the Applicant predominantly traded in Germany, it was therefore not unreasonable for it to have also concluded that it may wish to enter the UK market in the future especially as a result of Brexit. I consider that the Proprietor's actions demonstrate that it wanted to gain a foothold and establish itself as the real suppliers of MEVLANA tea in the UK before the Applicant was able to do so. I consider that it took unfair advantage and exploited the Applicant's reputation by contacting their customers and copying a near identical packaging design in order to deceive the Applicant's customers or potential customers.

93. In looking at the picture as a whole I consider that the Proprietor was involved in conduct which departed from the accepted standards of ethical behaviour or honest commercial and business practices. It provided no plausible explanation of its objectives or commercial logic behind its application. The Applicant has sufficiently raised a prima facie case that the Proprietor has acted in bad faith which it has not rebutted. A number of allegations remain unchallenged and this in my view is sufficient to demonstrate that its motives were not honest and legitimate.

94. I accept that it was not mere coincidence that the Proprietor chose the same name, design and device to promote its tea. The timings of the Proprietor's actions lead me to believe that they undertook a pattern of behaviour which fell below the standards of commercial practice.

Conclusion

95. The Applicant's claim under section 3(6) of the Act succeeds.

Outcome

96. The application for a declaration of invalidity based on sections 5(2)(b) and 3(6) have succeeded, the result of which is that the Proprietor's mark is deemed never to have been made.

Costs

97. The Applicant has been successful and is entitled to a contribution towards its costs, based on the scale published in Tribunal Practice Notice 2/2016. I note that it failed in relation to one ground of invalidation, and I take this into account when making the award for costs. Applying this guidance, I award costs on the following basis:

Preparing a statement and considering the Proprietor's counterstatement:	£300
Preparing evidence and considering the Proprietor's evidence:	£1000
Preparing written submissions in lieu of hearing and considering the Proprietor's submissions:	£400
Official Fee:	£200
Total	£1,900

98. I order Mevlana Ceylon Tea (Pvt) Ltd to pay GORAN-TEE Grobhandel GmbH & Co. KG the sum of £1,900 as a contribution towards its costs. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated this 22nd day of June 2022

Leisa Davies

For the Registrar