

O-0165-23

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION UK00003720725 BY
HULKMAN LLC TO REGISTER:**

hulkman

**AS A TRADE MARK IN CLASSES
6, 8, 12, 14, 15, 16, 17, 20, 21, 28 AND 35**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 431387
BY DOORINN UG (HAFTUNGSBESCHRÄNKT)**

Background & Pleadings

1. On 12 November 2021, Hulkman LLC (“the applicant”) applied to register the above trade mark in the United Kingdom for a number of goods and services in classes 6, 8, 12, 14, 15, 16, 17, 20, 21, 28 and 35 (laid out at an annex to this decision). The application was published for opposition purposes on 26 November 2021.

2. On 28 February 2022, Doorinn UG (haftungsbeschränkt) (“the opponent”) opposed the application, in part, under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against the goods and services in classes 20 and 35 only, specifically:

Class 20: Head positioning pillows for babies; Air beds, not for medical purposes; Beds, bedding, mattresses, pillows and cushions; Camping mattresses; Chairs; Desks; Folding beds; U-shaped pillows; Dressing tables; Tool boxes, not of metal, empty; Shoe cabinets; Fishing stools; Sofa beds; Office furniture; Outdoor furniture; Pillows; Lockers; Infant beds; Kitchen cabinets; Folding shelves.

Class 35: Provision of an on-line marketplace for buyers and sellers of goods and services; Retail services in relation to hand-operated tools for construction; Retail services in relation to kitchen appliances; Retail services relating to furniture; Retail services in relation to sporting articles; Retail services in relation to bicycle accessories.

3. For the purpose of the opposition, the opponent relies upon the following trade mark and all goods and services for which it is registered, as set out below:

United Kingdom Trade Mark (“UKTM”) 3685514

Hulk

Filing date: 24 August 2021

Registration date: 17 December 2021¹

¹ The mark is filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union and the EU filing date was 29/10/2020

Class 10: *Mattresses for medical use; Anti-pressure sore mattresses.*

Class 20: *Beds, bedding, mattresses, pillows and cushions; Mattresses; Mattress bases; Easy chairs; Recliners [furniture]; Reclining chairs; Lawn furniture; Sun loungers; Sofas; Extendible sofas.*

Class 24: *Bed linen and blankets; Bed pads.*

Class 35: *Wholesale services in relation to beds, Bedding, Mattresses, cushions, Of chaises longues, Sun loungers and pads; Retail services in relation to beds, Bedding, Mattresses, cushions, Of chaises longues, Sun loungers and pads; Postal advertising relating to beds, Bedding, Mattresses, cushions, Of chaises longues, Sun loungers and pads; Providing of information for consumers relating to beds, Bedding, Mattresses, cushions, Of chaises longues, Sun loungers and pads; Providing of information and consultancy for consumers relating to the selection of goods and articles, In particular beds, Bedding, Mattresses, cushions, Of chaises longues, Sun loungers and pads.*

4. In its Notice of Opposition, the opponent contends that the respective marks are visually, aurally and conceptually highly similar. Coupled with the identity or similarity between the parties' goods and services, the opponent submits that there would be a likelihood of confusion on the part of the public, including a likelihood of association.

5. In its counterstatement, the applicant states that the applicant's mark is visually, phonetically and conceptually dissimilar to the opponent's mark and that the goods and services are "largely dissimilar", though it does make some concessions with regards the similarity between the respective specifications. It concludes that there is no likelihood of confusion between the parties' marks.

6. The applicant is represented by Akos Suele, LL.M. and the opponent by Womble Bond Dickinson (UK) LLP. During the evidential rounds, the opponent elected to file written submissions whilst the applicant did not file evidence or submissions. Neither party requested a hearing nor did they file written submissions in lieu. Whilst I do not

propose to summarise the opponent's submissions here, I will keep them in mind throughout and intend to refer to them only where necessary.

7. 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. This is why my decision will continue to make reference to the trade mark case law of EU courts.

Preliminary matter

8. As a preliminary point, I must note the applicant's comments regarding other trade marks on the UK register which are identical or similar to the mark relied upon by the opponent. In its counterstatement, it states:

"It is submitted that there are numerous marks in the Trade Marks register which are identical and/or highly similar to that of the Opponent's 'Hulk' mark and registered and/or applied for in classes of Opponent's interest prior to the date of Opponent's application, as listed below:

Trademark Application/Registration no.	Mark	Class	Application date	Registration date
UK00917981852	HULK	3, 14, 18, 21, 24, 30, 32, 41	07 Nov 2018	22 Mar 2019
UK00914456628	HULK	10, 20	10 Aug 2015	01 Dec 2015
UK00903140324	HULKA	3, 5, 10, 44	22 Apr 2003	26 Jan 2007

Since the Applicant's mark has been peacefully co-existing with these above-mentioned identical and/or highly similar marks, it can be concluded that the average consumer has been able to differentiate the Applicant's mark from the rest of these similar marks."

9. 24. Absent of any evidence or supporting argument, I should make clear that the existence of such marks on the register will not have any bearing on the outcome of these proceedings. In *Zero Industry Srl v OHIM*, Case T-400/06, the General Court (“GC”) stated that:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘...there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T 135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR II 4865, paragraph 68, and Case T 29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II 5309, paragraph 71). “

10. That line of reasoning will therefore play no part in my considerations as to whether there exists a likelihood of confusion.

Decision

11. Section 5(2)(b) of the Act reads as follows:

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

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

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

12. Section 5A reads:

“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.”

13. Under the provisions laid out in section 6 of the Act, the opponent’s trade mark clearly qualifies as an earlier mark. In accordance with section 6A of the Act, as it had not completed its registration procedure more than five years prior to the filing date of the applicant’s mark, it is therefore not subject to the proof of use requirements. Consequently, the opponent can rely upon its mark and all goods and services for which it is registered without providing evidence of use.

Section 5(2)(b) - Case law

14. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect

picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

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

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

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

Comparison of goods and services

15. The goods and services to be compared are laid out at paragraphs 2 and 3 to this decision.

16. Both parties' specifications include the terms *beds*, *bedding*, *mattresses*, *pillows* and *cushions* in class 20. These are self-evidently identical.

17. in addition to goods which are 'literally' identical, the GC set out a further provision as to when goods can be considered identical (though it equally applies to services) in *Gérard Meric v OHIM*, Case T-133/05. It 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 für 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".

18. Applying that principle, I reach the following conclusions:

- The applicant's *head positioning pillows for babies* and *U-shaped pillows* are encompassed by the opponent's *pillows*.
- The applicant's *air beds, not for medical purposes, folding beds* and *infant beds* are encompassed by the opponent's *beds*.
- The applicant's *sofa beds* is encompassed by the opponent's *beds* and/or *sofas*.
- The applicant's *chairs* encompasses the opponent's *easy chairs* and *reclining chairs*.
- The applicant's *camping mattresses* is encompassed by the opponent's *mattresses*.
- The applicant's *outdoor furniture* is encompassing of the opponent's *lawn furniture*.
- The applicant's *retail services relating to furniture* encompasses the opponent's *retail services in relation to beds [...]*.

I find these goods and services identical.

19. In my comparison of the remaining services, I will consider factors including their nature, intended purpose, method of use and whether they are in competition or are complementary.² I shall also keep in mind the following case law.

20. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

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

21. In *Kurt Hesse v OHIM*, Case C-50/15 P, the Court of Justice of the European Union (“CJEU”) stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v*

² *Canon*, Case C-39/97

OHIM (Trade Marks and Designs) (OHIM), Case T-325/06, the GC stated that “complementary” means that:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

22. For the purpose of a comparison, it is appropriate to group related goods or services together, where they are sufficiently comparable to do so³.

Desks; dressing tables; shoe cabinets; folding shelves

23. I consider the above against the opponent’s furniture goods such as *beds* and *easy chairs*. The goods may be used in different ways, for varying purposes, though they are nonetheless general furniture items. Still, I would expect the users of the respective goods to be the same and there would likely be some degree of similarity in the trade channels each occupies. Any opportunity for similarity in physical nature may be limited as the goods’ purpose varies, though some of the same materials may be used. The goods are not competitive and they are not complementary insofar as they are indispensable but an entity offering furniture could feasibly offer both the applicant’s goods and those relied upon by the opponent under a single origin. Weighing all factors, I find a medium degree of similarity between the goods.

Kitchen cabinets

24. In my view, *kitchen cabinets*, as a term, can refer to either freestanding cabinets intended to store crockery, for example, or to cabinets which are installed as part of a fitted kitchen. Applying the former meaning, I would consider it to be a general piece of furniture and I therefore apply much of my previous reasoning and find the goods similar to a medium degree. I would find a lesser degree of similarity were the cabinets to be those which constitute a fitted kitchen as this would likely signify more of a distinction in trade channels and the providers are unlikely to be the same.

³ *Separode Trade Mark* BL O-399-10 (AP)

Tool boxes, not of metal, empty

25. The above goods are used to store tools and I can see little similarity in their use compared to those of the opponent's goods (or services). There may be some similarity in the goods' respective users, though this seems a fairly broad relationship insofar as both can be selected by the general public, and tool boxes may also be purchased by consumers relying on tools for occupational purposes, for example. The physical nature of the goods is likely to be distinct and it seems unlikely that they will reach the market via the same trade channels. The goods do not share a competitive or complementary relationship; they are not indispensable for one another, nor are they, to my knowledge, likely to be offered under a single entity nor sold in any degree of proximity. I find no similarity between the applied for goods and the goods and services relied upon by the opponent.

Office furniture

26. Whilst the opponent relies upon a number of furniture items including beds, sofas and lawn furniture, those are typically used in a domestic setting, whilst the applied for goods are generally used in an office environment. That being said, in my experience, there may be some correlation in the respective users, given that office furniture can also be selected for use in a domestic environment such as the home. The physical makeup of the goods will vary for enabling each to fulfil its specific purpose, though some materials may be shared. I would typically expect the goods to reach the market via different trade channels, though there may be limited opportunity for some crossover. I do not consider the goods competitive and they are not complementary, though there are some circumstances whereby a single entity may produce both respective goods, offering both beds and office furniture such as desks, for example. On balance, I find the goods' similarity of a fairly low degree.

Lockers

27. In my experience, *lockers* are utilised in public spaces to safely store personal belongings so I see little similarity in use when considered against the goods relied

upon by the opponent. There would also likely be some distinction in the goods' respective users and I see little similarity in the goods' physical nature, at least in any tangible terms. I find any opportunity for crossover in the goods' trade channels extremely limited, particularly given the different environments in which the parties' goods are typically used. The goods are not, to my knowledge, generally provided by a single entity, nor would I consider them complementary or competitive. On balance, I do not find any similarity.

Fishing stools

28. The opponent's earlier mark is registered for a number of furniture items including *easy chairs* and *recliner chairs*. The goods share a use insofar as all will be used to sit upon, though the opponent's goods will likely be utilised in a home environment and the applicant's specifically whilst fishing. Similarly, the applicant's goods will likely be purchased by consumers with an interest in fishing whilst the opponent's will generally appeal to the public at large. There is likely to be some similarity in the goods' physical characteristics as both must support the weight of its user, for example, though I accept the degree of comfort offered by the respective goods is likely to differ. I see only limited opportunity for any correlation in the trade channels via which the goods reach the market and they are unlikely to be sold in any immediate vicinity, though may be sold in the same retail establishment, broadly speaking. The goods are unlikely to be competitive; the consumer will generally know which it requires. The goods are not indispensable, though it may not seem unreasonable for the consumer to expect a single entity to offer a wide range of seating or furniture. On balance, I find the goods' similarity of a low degree.

Provision of an on-line marketplace for buyers and sellers of goods and services

29. In contrast to the opponent's wholesale services and retail services in class 35, the aforementioned services applied for in the same class do not specify which goods the marketplace will cater to and instead remains a fairly broad term. Particularly in regards the opponent's retail services, where there is some similarity in the goods being offered, the services will be accessed for a similar purpose; to purchase a certain good. I would expect some significant crossover in the services' respective users and

there could be some similarity in the services' nature, even more so where the retail services are conducted online. The services may be offered by a single origin and there could be a competitive relationship to be found. I find at least a medium degree of similarity between the services.

Retail services in relation to hand-operated tools for construction; Retail services in relation to kitchen appliances; Retail services in relation to sporting articles; Retail services in relation to bicycle accessories.

30. The opponent relies upon retail services in relation to a number of goods, specifically beds, bedding, mattresses, cushions, of chaises longues, sun loungers and pads. However, other than the respective services both being retail in nature, I see little similarity in the goods each party has elected to operate in. The variation in the goods being retailed creates some distinction in the services' respective uses and any overlap in their users is likely to be only in broad terms. There may be some degree of similarity in the nature of the services insofar as both parties are providing a retail service though, again, the difference in the goods being offered would likely mean a different retail environment, for example, and different considerations being made by the average consumer approaching its purchase. The services are unlikely to occupy competitive roles and I see little opportunity for complementarity; the services are not indispensable for one another and they are not, in my experience, typically provided by a single entity. Applying due weight to each of those factors, I find the services dissimilar.

31. For those goods and services where I have failed to find any similarity, the opposition fails at this juncture. If there is no similarity, there is no likelihood of confusion to be considered⁴.

The average consumer and the nature of the purchasing act

32. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category

⁴ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. 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. (as he then was) 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.”

33. The average consumer of the goods and services at issue here is likely to be a member of the general public. The goods are generally self-selected by the average consumer from a traditional bricks-and-mortar retail establishment or showroom, or an online equivalent or catalogue. The services will likely be accessed online or in a traditional retail or wholesale environment. This suggests that the marks’ visual impressions carry the greatest weight in the purchasing process, though I do not discount the opportunity for orders to be made over the phone, for example, and I therefore do not overlook the relevance of the marks’ aural impact. In approaching its selection of the goods, the average consumer will likely be alive to considerations such as quality and sustainability of materials. In the case of the services, those same considerations will likely apply to the consumer’s selection of the end goods but it will also be alive to the reputational standing of the service provider. The frequency of the purchase, and the cost likely to be incurred, are variable. *Cushions*, for example, will likely cost significantly less than *beds* and will be purchased more frequently. Weighing all factors, I find the average consumer likely to apply between a medium and fairly high degree of attention to its purchase.

Comparison of trade marks

34. 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 in *Bimbo SA v OHIM*, Case C-591/12P, that:

“34. ...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.”

35. It would be wrong, therefore, to artificially 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.

36. The trade marks to be compared are displayed in the table below:

Opponent's mark	Applicant's mark
Hulk	hulkman

37. The opponent's earlier mark comprises a single word of four letters. Its overall impression consequently resides solely in the word itself.

38. The applicant's mark comprises a single word of seven letters, though the average consumer will likely recognise it as a merging of two words; hulk and man. Still, the mark's overall impression resides in the word itself.

39. I attribute little weight to the difference in the marks' casing (one beginning in an upper case 'H' and the other a lower case) as word marks are protected for use in a variety of cases. Visually, the four letters which represent the entirety of the opponent's word mark are replicated at the beginning of the applicant's mark. In the applicant's mark, those letters precede a further three; specifically m-a-n. Keeping in mind that the beginnings of marks typically have more of an impact on the average consumer than their endings⁵, I find the marks' visual similarity of at least a medium degree.

40. Aurally, I find the opponent's mark likely to be articulated in a single syllable; HULK. The applicant's mark would likely comprise two syllables; HULK-MAN. Weighing that against what I have said regarding the beginnings of marks, I find the marks aurally similar to at least a medium degree.

41. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer⁶. The applicant contends that "neither mark has a meaning for the analysed public in the relevant territory" and, consequently, the "conceptual aspects of the opponent's mark, if any, shall not influence the assessment of the similarity of the signs."⁷ In the opponent's submissions, it cites the Oxford Dictionary in providing the following dictionary definitions of 'hulk':

"3.14.1 "the body of an old ship, car or very large piece of equipment that is broken and no longer used"; or

3.14.2 a "large, heavy, awkward person or thing"

It submits that the second definition is "arguably more common to the average consumer", with which I would agree.

42. When considering the perception of the average consumer, I am mindful of the comments in *Chorkee Ltd v Cherokee Inc.*⁸, in which Ms Anna Carboni, sitting as the

⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

⁶ *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29

⁷ See 1.3 of the applicant's counterstatement

⁸ Case BL O/048/08

Appointed Person, described the limits to which judicial notice can be used in order to find that the average consumer is aware of particular facts. She said:

“While the Applicant contended in its Counterstatement that the earlier marks would be recognised to refer to the Cherokee tribe and that the tribe was well known to the general public, no evidence was submitted to support this. By accepting this as fact, without evidence, the Hearing Officer was effectively taking judicial notice of the position. Judicial notice may be taken of facts that are too notorious to be the subject of serious dispute. But care has to be taken not to assume that one’s own personal experience, knowledge and assumptions are more widespread than they are.”

In that case she found that although the Hearing Officer was entitled to take judicial knowledge of the fact that CHEROKEE was the name of a tribe of native Americans, he was not entitled to attribute this knowledge to the average UK consumer of clothing.

43. In addition to its above submission, the opponent also contends, when considering the conceptual identity of the applicant’s mark, that:

“3.15 Even if the average consumer does not entirely overlook the ‘man’ element (which is possible due to consumers readiness to exclude non-distinctive elements in a given word), the second element of the Sign, ‘man’, means a male person in English. The ‘hulk’ element alone could be understood to be a large or heavy person (i.e. a man), so addition of ‘man’ merely emphasises the meaning of ‘hulk’ and does not change the concept, meaning the Mark and the Sign remain conceptually identical, or at least highly similar.”

44. Particularly having kept in mind the comments in *Chorkee*, I am not prepared to assign a specific gender to the word ‘hulk’. Although I accept that there may be cultural figures or characters, of which some consumers are aware, known as ‘Hulk’, who are typically portrayed by, or as, males, there is no evidence before me to suggest that this is the understanding of the average consumer. In my view, *hulk* has become synonymous with a large, powerful person, possibly angry or rageful, and this is the message the opponent’s mark will convey to the average consumer. In the applicant’s

mark 'hulk' precedes the word 'man' and the average consumer will likely identify that the word represents a merging of two known or recognised words, despite being presented as a single word. The effect of adding the word 'man', in these circumstances, in my view, is therefore simply to clarify the gender of the 'hulk' the mark references, effectively giving an impression of man who is large and possibly angry. I keep in mind that the gender of the 'hulk' in the earlier mark is unspecified but the characteristics or attributes the term evokes are nonetheless the same regardless of whether or not it refers simply to a person (with an unspecified gender) or a man specifically. With that in mind, I find the marks conceptually similar to at least a high degree.

45. I have considered whether the average consumer would interpret the word 'man' in the applicant's mark as an indication that the goods and services are targeting predominantly male consumers but, in my view, this is an unlikely interpretation. I have no evidence before me to suggest that the relevant goods and services are traditionally marketed in such a way and nor does this marry with my own experience, though I also have no evidence before me to the contrary. However, particularly as the word 'man' is not presented as an independent word, but instead has been added to 'hulk' to create a single word, an association will likely be made with the 'hulk' itself, rather than any of the terms for which the applicant seeks registration.

Distinctive character of the earlier trade mark

46. 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. 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 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).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

47. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods or services for which they are registered, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will typically fall somewhere in the middle. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; generally, the more distinctive the earlier mark, the greater the likelihood of confusion. The distinctive character of a mark may be enhanced as a result of it having been used in the market.

48. Given that the opponent has not made a pleading of enhanced distinctiveness, and in the absence of evidence of use, I have only the inherent distinctiveness of the earlier mark to consider. The earlier mark comprises a single word; HULK. I have already considered the conceptual impression this is likely to leave on the average consumer. To my knowledge, the word has no relationship to the goods or services relied upon. I have considered that the idea of strength conjured by the term (albeit in respect of a person), could be considered a nod toward the quality of some of the furniture goods relied upon, for example, but I do not take the view that the average consumer will dissect the mark so greatly as to make that association. Furthermore, whilst I have found that HULK will be identifiable to the average consumer, it is not

what I would describe as an everyday dictionary word and, as above, I do not consider it to have any descriptive nor suggestive connotations when considered against the relied upon goods and services. I find the earlier mark inherently distinctive to a fairly high degree.

Likelihood of confusion

49. 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.

50. 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.

51. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where he 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.””

52. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of my earlier conclusions. I also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind.

53. With regards the relevance of the marks’ conceptual impressions, I keep in mind *The Picasso Estate v OHIM*, Case C-361/04 P, in which the CJEU found that:

“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.”

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

“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).”

55. I will begin by considering a likelihood of direct confusion. I have found the parties’ marks visually similar to at least a medium degree, aurally similar to at least a medium degree and conceptually similar to at least a high degree. I have also attributed a fairly high degree of inherent distinctiveness to the earlier mark. With regard to the competing specifications, I have found a number of the parties’ goods identical, some similar to a medium degree, some similar to a low or fairly low degree and some not similar at all. The average consumer is likely to apply between a medium and fairly high degree of attention to its selection of the relevant goods or services. Even where

that attention is at the lower end, i.e. of a medium degree, it nonetheless seems likely that the average consumer would readily identify that the marks differ, with one having almost twice the number of letters than the other (or vice versa). Generally, I find that likely to apply to all goods and services, including those which are identical, and therefore dismiss a likelihood of direct confusion. That being said, I would not overlook the opportunity for the consumer to directly confuse the marks were there to be sufficient time between purchases, given the closeness of the conceptual messages likely to resonate with the average consumer.

56. I turn now to consider a likelihood of indirect confusion. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

57. As I’ve said, I find the marks’ conceptual similarity of at least a high degree and I have further found the marks’ common element ‘hulk’ to have no meaningful relationship to any of the goods and services at play (having considered but dismissed the possibility of it alluding to the strength of the goods). I am confident that the average consumer will readily identify the common element in the marks. Where the marks differ is the word ‘man’, which is adjoined to ‘hulk’ in the later mark to create a single word. I have found that difference to create little distinction in the marks’ respective conceptual impressions. Weighing that against the distinctiveness of the earlier mark, without meaning to suggest that the word ‘man’ is non—distinctive, it seems likely that the average consumer, having identified the shared element, would conclude that the marks originate from a shared or at least related entity, considering the chances of two distinct entities operating in similar goods or services electing to use the same word within their respective marks fairly low, particularly as the word is distinctive in relation to, and has no relationship with, the relevant goods and services.

I find this the likely outcome wherever the goods and services are similar to any degree. In other words, I find a likelihood of indirect confusion.

Conclusion

58. The opposition has failed in respect of the following goods and services and, subject to any successful appeal, the application will proceed to registration in regard to:

Tool boxes, not of metal, empty; lockers (class 20)

Retail services in relation to hand-operated tools for construction; Retail services in relation to kitchen appliances; Retail services in relation to sporting articles; Retail services in relation to bicycle accessories. (class 35)

The application will also proceed to registration in regard to all of the goods which were not opposed.

59. The opposition has succeeded in respect of the following goods and services and, subject to any successful appeal, the application will be refused in regard to:

Beds, bedding, mattresses, pillows and cushions; head positioning pillows for babies; U-shaped pillows; air beds, not for medical purposes; folding beds; infant beds; sofa beds; chairs; camping mattresses; outdoor furniture; desks; dressing tables; shoe cabinets; folding shelves; kitchen cabinets; office furniture; fishing stools (class 20)

Provision of an on-line marketplace for buyers and sellers of goods and services; retail services relating to furniture (class 35)

Costs

60. The opponent has achieved a greater measure of success and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal

Practice Notice (“TPN”) 2/2016. In accordance with that TPN, I award costs as follows (reduced accordingly):

Filing a Notice of Opposition (official fee): £100

Preparing a Notice of Opposition and preparing a counterstatement: £150

Preparing written submissions: £200

Total: £450

61. I order HULKMAN LLC to pay Doorinn Ug (haftungsbeschränkt) the sum of £450. This sum is to be paid within twenty-one days 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 15th day of February 2023

**Laura Stephens
For the Registrar**

Annex

All goods and services applied for

Class 6: Crampons for climbing; Bicycle locks of metal; Safety cashboxes; Locks of metal for bags; Metal clothesline wire; Metal fence stays; Metal folding doors; Metal hooks; Metal shelf brackets; Metal tool boxes; Metal garden stakes; Casements of metal.

Class 8: Air pumps, hand-operated; Garden tools, hand-operated; Adjustable spanners; Bread slicers [hand-operated]; can openers, non-electric; Socket spanner; Folding knives; mallets being hand tools; Hand drills, hand-operated; Clamps [hand tools]; Nippers; Wire cutters; Wire strippers [hand tools]; Torque wrenches; Rotary tools [hand-operated tools]; Abrading tools [hand operated]; Hand jacks; Hand-operated riveting tools.

Class 12: All-terrain vehicles; Anti-skid chains for vehicle tires; Electric bicycles; Camera drones; Canoe paddles; Driverless cars; Electrically-powered motor scooters; Folding bicycles; Hovercraft; Hybrid cars; Motor scooters; Saddle covers for bicycles; Self-balancing one-wheeled electric scooters; Sun visors for automobiles; Automobile roof racks; Luggage carriers for automobiles; Air pumps for automobiles; Steering wheel locks; Self balancing unicycles; Pushchairs for pets.

Class 14: Apparatus for timing sports events; Chronometric apparatus and instruments; Clocks and watches, electric; Commemorative coins; Key chains; Sports watches; Atomic clocks; Automobile clocks; Boxes of precious metal; Crucifixes as jewellery; Jewellery boxes; Watch bracelets; presentation boxes for watches; Stopwatches; Tie bars; Watch bands; Watch movements; Prayer beads.

Class 15: Tuning hammers; Bass drums; Accordions; Bagpipes; Saxophones; Conductors' batons; Cornets; Drums; Guitars; Harps; Lutes; Morin khuur [mongolian bowed stringed instrument]; Musical instrument stands; Oboes; Pianos; Trombones; Violins; Ukuleles.

Class 16: Baking paper; Binders; Boxes of paper; Cardboard packaging boxes in made-up form; duplicators; Duplicating paper; Gift boxes; Paper cutters [office requisites]; Pencil sharpeners, electric or non-electric; Staple removers; Writing instruments; Collapsible cardboard boxes; Color pencils; Blackboards; drawing boards; Writing board erasers.

Class 17: Acoustical insulation barrier panels; Insulating gloves; Sound dampening blankets; Strapping tape; Acrylic rubber; Electrical tape; Flexible tubes of plastic; Glass fibers for insulation; Insulating blankets for hot water heaters; Insulating tapes; Insulating tiles; Packing [cushioning, stuffing] materials of rubber or plastics; Rubber stoppers for bottles; Window stops of rubber; weatherstripping sealants in the nature of caulk; Watering hoses.

Class 20: Head positioning pillows for babies; Air beds, not for medical purposes; Beds, bedding, mattresses, pillows and cushions; Camping mattresses; Chairs; Desks; Folding beds; U-shaped pillows; Dressing tables; Tool boxes, not of metal, empty; Shoe cabinets; Fishing stools; Sofa beds; Office furniture; Outdoor furniture; Pillows; Lockers; Infant beds; Kitchen cabinets; Folding shelves.

Class 21: Dishes; Ovenware; Disposable table plates; Candle holders; Cooking pot sets; cups; Tooth brushes; Lunch-boxes; Apparatus for cleaning teeth and gums using high pressure water for home use; Electrical toothbrushes; Laundry sorters for household use; Pans (Frying -); Gardening gloves; Portable pots and pans for camping; Wine bottle cradles; Brooms; Food steamers, non-electric; Electric hair combs; Crumb-sweepers.

Class 28: Aerobic step machines; Ball pitching machines; Gaming keypads; Fishing tackle; Knee guards for athletic use; Skateboards.

Class 35: Provision of an on-line marketplace for buyers and sellers of goods and services; Retail services in relation to hand-operated tools for construction; Retail services in relation to kitchen appliances; Retail services relating to furniture; Retail services in relation to sporting articles; Retail services in relation to bicycle accessories.