

O-068-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2532991
BY PAUL PHILIP HARTLEY TO REGISTER
A TRADE MARK IN CLASSES 14, 25 & 44**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 100365 BY JEAN A VEQUAUD GMBH & CO KG**

BACKGROUND

1. On 30 November 2009, Paul Philip Hartley applied to register **Tattitude** and **TATTITUDE** as a series of two trade marks for the following goods and services:


Class 14: Jewellery; body-piercing rings; body-piercing studs; parts and fittings for the above.

Class 25: Clothing, footwear and headgear.

Class 44: Body piercing services; tattooing services; cosmetic tattooing services; laser tattoo removal service; providing medical information and news about body art, namely, piercing and tattoos; advice and information relating to the above.

The application was accepted and published for opposition purposes on 1 January 2010 in Trade Marks Journal No.6817.

2. On 31 March 2010, Jean A Vequaud GmbH & Co (“Jean”) filed a notice of opposition. This consisted of a single ground based upon section 5(2)(b) of the Trade Marks Act 1994 (as amended) (the Act). Jean indicates that the opposition is directed against all of the goods and services in the application for registration. Jean rely upon one earlier Community trade mark registration:

Trade Mark	No.	Application date	Registration date	Goods relied upon
	E5893557	27/4/07	22/01/09	Although also registered in class 18, only the following goods are relied upon: 25 - Clothing, including women's outerclothing, belts, kerchiefs and scarves; headgear.

3. In their Statement of Grounds Jean state:

“1. The trade mark applied for is visually and phonetically highly similar to [Jean’s] earlier mark. The word TATTITUDE is easily confused with ATTITUDE and [Mr Hartley’s] mark comprises the word Attitude which is the subject of [Jean’s] prior registration and is the distinctive element of [Jean’s] mark because it appears at the beginning of the mark, and because the other word in the mark is of secondary importance. Therefore the word TATTITUDE would be confused by the public to [Jean’s] earlier mark for identical goods in class 25. Further, the mark applied for covers goods identical or similar to the goods for which the earlier mark is registered. The high degree of similarity between the goods offsets any differences between the respective marks.”

4. On 6 May 2010 Mr Hartley filed a counterstatement which consisted, in essence, of a denial of the ground of opposition. In his counterstatement Mr Hartley states, inter alia:

“3...TATTITUDE is an invented word and therefore highly distinctive in its own right. TATTITUDE is one word and cannot be artificially dissected into separate elements for the purposes of assessing the likelihood of confusion. There are significant visual, aural and conceptual differences between TATTITUDE and “Attitude lifestyle” and the mark, as a whole, is not confusingly similar to that of [Jean].

4. [Mr Hartley] admits that some of the goods covered by [Jean’s] registration are similar but denies that this has any bearing on the likelihood of confusion or association as the trade marks themselves are sufficiently different and distinguishable not to give rise to confusion or association.”

5. Both parties filed evidence. While neither party asked to be heard, both filed written submissions; I will refer to these submissions as necessary below.

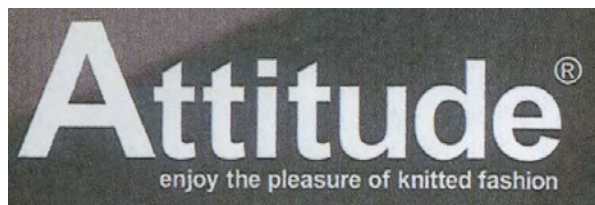
EVIDENCE

Jean’s evidence

6. This consists of a witness statement, dated 15 July 2010, from Sally Schupke who is a trade mark attorney at Chancery Trade Marks, Jean’s professional representatives in these proceedings. Ms Schupke’s witness statement contains a mixture of evidence and submissions. I have only summarised the former but will bear the latter in mind when making a decision. Ms Schupke explains that Jean have used the trade mark the subject of their registration in the United Kingdom since 2006. Exhibit 1 is said to consist of:

“samples of such use of the mark in the UK taken from [Jean’s] website www.attitudefashion.de from which it should be noted is in English and directed at the UK market.”

7. Exhibit 1 consists of four pages. The first page shows a female model wearing items of clothing. At the top of the page appears the word Attitude in the following format:



On the bottom right of the first page appears the word “Invitation”. The second page is of very poor quality but appears to be headed “Spring/Summer 2009” and “Exhibitions”. On the left hand side of the page is a reference to “showrooms” one of which refers to a company called Robert Hellin Ltd of Mill Street, London. As far as I can tell, none of the exhibitions took place in the United Kingdom. The third and fourth pages consist of pages downloaded on 15 July 2010 from the website mentioned above. The fourth page includes, under the heading United Kingdom & Ireland, a reference to Genus Fashions Ltd of Berners Street, London which Ms Schupke explains are Jean’s distributor in the United Kingdom.

8. Sales of “products” bearing the trade mark “Attitude” in the United Kingdom have been as follows:

Year	Sales (£)
2006	90, 100
2007	130, 900
2008	109, 100
2009	132, 730

9. Exhibit 2 appears to be a leaflet produced by an entity called Victoria Lane based in Harrogate. The leaflet is entitled: “Victoria Lane Spring & Summer 2009”. The front page bears the text: “New labels this season are: Attitude, Verse, Weill, Rossler and Hauber” and bears photographs of female models wearing items of Attitude clothing. The final page refers to in-store fashion shows taking place on 25 and 26 March.

10. Exhibit 3 consists of two pages. The first page consists of a Google® search conducted on 15 July 2010 for the word “tattitude”. The second page is taken from the website www.thebestof.co.uk which Ms Schupke says includes a reference to Mr Hartley’s business. Of this extract Ms Schupke says, inter alia:

“...which clearly shows use of the mark “Tattitude” in a stylised form in relation to tattooing services falling in class 44. Therefore we also submit in these observations that [Mr Hartley’s] is a tattooing business and has not used or has no intention to use the mark “Tattitude” in relation to goods in classes 14 and 25 and their website www.tattitude.co.uk does not show use of these products but only in relation to those falling in class 44.”

11. As Jean have not attacked Mr Hartley’s application on the basis of his intention to use his trade marks for the goods in classes 14 and 25, I need say no more about this aspect of Ms Schupke’s submissions.

Mr Hartley’s evidence

12. This consists of a witness statement, dated 16 August 2010, from the applicant Paul Philip Hartley. Like Ms Schupke’s witness statement, much of Mr Hartley’s statement

consists of submissions rather than evidence; I will approach this on the same basis mentioned in paragraph 6.

13. Mr Hartley states that the word “attitude” is commonly used in relation to clothing products and at exhibit PPH1 he provides a list of United Kingdom and/or Community trade marks in class 25 which incorporate the word “Attitude”. At exhibit PPH2 he provides what he describes as:

“copies of websites which clearly show that marks incorporating the word “attitude” are widely used in relation to clothing.”

Commenting on these websites Mr Hartley states:

“In light of this I submit that [Jean’s] trade mark is a very weak mark and is not particularly distinctive. The average reasonable consumer would certainly not associate any mark incorporating the word “attitude” in relation to clothing, with [Jean].”

I will return to this evidence later in this decision

14. That concludes my summary of the evidence filed to the extent that I consider it necessary. However before turning to the decision, during my preparation of this case I noted what appeared to be an inconsistency between the basis of Jean’s opposition (said to be against all of the goods and services in the application) and their evidence and submissions which focused only on the goods in classes 14 and 25. In an official letter dated 2 February 2011 the Case Work Examiner sought clarification on this point. Ms Schupke responded in a letter dated 3 February 2011 in which she said:

“on behalf of [Jean] we can confirm that this opposition is only directed at classes 14 and 25 which is where the potential confusion lies.”

15. In view of that clarification, class 44 of Mr Hartley’s application is free from objection and may proceed to registration. I need only consider the opposition insofar as it relates to classes 14 and 25 of Mr Hartley’s application.

DECISION

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

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

(a)....

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

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

17. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade mark” means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

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

18. Jean’s trade mark is an earlier trade mark and is not subject to proof of use, as per The Trade Marks (Proof of Use, etc) Regulations 2004, as it had not been registered for five years at the time of the publication of Mr Hartley’s trade mark application.

Section 5(2)(b) – case law

19. In reaching a decision I must take into account the guidance provided by the European Court of Justice (ECJ) in a number of judgments. The principal cases are: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05),

It is clear from all these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all the relevant factors: *Sabel BV v. Puma AG*, paragraph 22;

(b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27;

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;
- (e) when considering composite marks, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element; *Shaker di L. Laudato & Co. Sas (C-334/05)*, paragraph 42;
- (f) an element of a mark may play an independent distinctive role within it without necessarily constituting the dominant element; *Medion AG V Thomson multimedia Sales Germany & Austria GmbH*, paragraph 30;
- (g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (h) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;
- (i) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;
- (j) further, 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; *Marca Mode CV v. Adidas AG + Adidas Benelux BV*, paragraph 41;
- (k) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

The average consumer and the nature of the purchasing process

20. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. The goods at issue in these proceedings are items of jewellery and articles of clothing. These are the sort of goods which will be bought by the general public; they then are the average consumer for such goods.

21. In his written submissions Mr Hartley said:

“The purchasing act is predominantly a visual and conceptual one...”

22. In my view the selection of jewellery and clothing is most likely to consist primarily of a visual act made on the basis of self selection in either a retail environment, from a catalogue or on-line (see the comments of the Appointed Person in *React Trade Mark* [2000] RPC 285).

23. In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined cases T-117/03 to T-119/03 and T-171/03, the General Court considered the level of attention taken in purchasing goods in the clothing sector:

“43 It should be noted in this regard that the average consumer’s level of attention may vary according to the category of goods or services in question (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trade marks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected.”

24. In my view the comments in *New Look* also apply to the selection of jewellery. As both jewellery and clothing can vary widely in terms of both cost and quality, it is reasonable to assume that the average consumer’s level of attention will also vary depending on the cost of the item under consideration.

Comparison of goods

25. For the sake of convenience the goods to be compared are as follows:

Jean’s goods	Mr Hartley’s goods
Clothing, including women's outerclothing, belts, kerchiefs and scarves; headgear.	14 - Jewellery; body-piercing rings; body-piercing studs; parts and fittings for the above.
	25 - Clothing, footwear and headgear.

26. The leading authorities on how to determine similarity between goods and services are considered to be *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117 and *British Sugar Plc v James Robertson & Sons Ltd (Treat)* [1996] R.P.C. 281. In the first of these cases the ECJ accepted that all relevant factors should be taken into

account including the nature of the goods/services, their intended purpose, their method of use and whether they are in competition with each other or are complementary. The criteria identified in the *Treat* case 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.

Class 14

27. In their “evidence” Jean state:

“The evidence...clearly demonstrates that the earlier mark has been used and has a presence in the UK market...for both identical goods (namely class 25...) and associated fashion accessories (namely class 14) which could be regarded as being similar goods or such that a customer would expect to buy from the same company.”

28. The clash between clothing and jewellery and watches was considered by the Hearing Officer in BL-O-280-09. She said:

“21. Jewellery is for personal adornment; watches are functional but may also be for personal adornment. Their nature, method of use and purpose (other than the fact, at a high level of generality, that they are worn) differ from clothing. Users for both are the general public. The channels of trade may differ or converge; there are specialist outlets for class 14 goods, but equally many clothes shops also sell costume or fashion jewellery side by side. They are not in competition; one would not substitute one for the other. This leaves a question as to whether jewellery and watches are complementary to clothing...”

And:

“Ltd submits that its registrations cover ‘fashion items’ which are identical or similar to the goods of the IR. Although the point is unexpanded, Ltd submits that there is a similarity in nature and purpose between ‘fashion items’, which would include goods in class 14 and classes 3 and 25.”

29. This appears to me to be a very similar argument to that put forward by Jean. I note that in *Oakley, Inc., v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case T-116/06) the GC commented on the clash between the retailing of jewellery and watches and a trade in articles of clothing. The GC said:

“52. Regarding, third, the complementary nature of the services and goods in question, found to exist by the Board of Appeal in paragraph 23 of the contested decision, it should be pointed out that, according to settled case-law, complementary goods are those which are closely connected in the sense that one is indispensable or important for the use of the other, so that consumers may think that the same undertaking is responsible for both (see, to that effect, *SISSI ROSSI*, paragraph 49 above, paragraph 60; *PAM PLUVIAL*, paragraph 49 above, paragraph 94; and *PiraÑAM diseño original Juan Bolaños*, paragraph 49 above, paragraph 48). “

And:

“85 Notwithstanding the fact that, as held in paragraphs 63 to 70 above, the signs are very similar, there is no similarity whatsoever between, in particular, retail services concerning eyewear, on the one hand, and items of clothing and leather goods, on the other hand. The earlier trade mark does not cover, directly or indirectly, goods similar to ‘eyewear, sunglasses, optical goods and accessories, watches, timepieces, jewellery, decals, and posters.

86. The intervener’s argument that eyewear, jewellery and watches could be similar or complementary to items of clothing cannot succeed, since, as correctly pointed out by OHIM, the relationship between those goods is too indirect to be regarded as conclusive. It must be borne in mind that the search for a certain aesthetic harmony in clothing is a common feature in the entire fashion and clothing sector and is too general a factor to justify, by itself, a finding that all the goods concerned are complementary and, thus, similar (*SISSI ROSSI*, paragraph 49 above, paragraph 62).”

30. Having considered the comments of the GC, I have come to the same conclusion as the Hearing Officer in the case mentioned above i.e. there is no similarity between Mr Hartley’s goods in class 14 and the articles of clothing in Jean’s registration.

Class 25

31. In his written submissions Mr Hartley concedes:


“that the class 25 goods covered by [Jean’s] registration are similar.”

32. In view of the following comments of the GC in *Gérard Meric v OHIM*, Case T-133/05, the competing goods in this class must be regarded as identical.

“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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).

Comparison of trade marks

33. For the sake of convenience, the trade marks to be compared are as follows:

Jean’s trade mark	Mr Hartley’s trade marks
	Tattitude TATTITUDE

34. The average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must then go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

Distinctive and dominant components

35. Mr Hartley has applied for a series of two trade marks. Both trade marks consist of the same nine letters presented in the same order; the first trade mark is presented in title case, the second in upper case.

36. I note that in their Notice of Opposition Jean stated:

“and [Mr Hartley’s] mark comprises the word Attitude which is the subject of [Jean’s] prior registration and is the distinctive element of [Jean’s] mark because

it appears at the beginning of the mark, and because the other word in the mark is of secondary importance.”

37. In his written submissions Mr Hartley said:

“The word ATTITUDE is not the dominant or distinctive feature of [his] trade mark. It is not a separate word within the context of [his] trade mark and neither is it emphasised or highlighted in any way. It is merely an integrated component of [the] mark.”

38. As Mr Hartley’s trade marks are presented in a conventional manner, I agree that neither has a distinctive or dominant component; the distinctiveness of each trade mark lies in its totality. As neither party has sought to draw any distinction between the manner in which Mr Hartley’s trade marks are presented, I will refer to his two trade marks by the first trade mark in the series i.e. Tattitude.

39. Turning to Jean’s trade mark, this consists of the word Attitude presented in bold in title case below which appears the word lifestyle presented in lower case in a much smaller font. In Jean’s view it is the word Attitude that is the distinctive element of their trade mark. Given its relative size and positioning, the word Attitude is clearly the dominant element of Jean’s trade mark. In addition, given what I consider to be the non-distinctive nature of the word “lifestyle” in relation to goods in class 25, I agree with Jean that it is the word Attitude which is the distinctive element of their trade mark.

40. In his evidence Mr Hartley argues that the word Attitude in Jean’s trade mark is “not particularly distinctive”, and he provides evidence which he feels supports that conclusion. In their written submissions Jean state:

“We deny that the word “Attitude” is commonly used in relation to clothing products since it is recognised that website references are misleading and have little value. We also deny that [Jean’s] mark is weak because it has been properly registered and has acquired reputation and goodwill through [Jean’s] use.”

41. Turning first to exhibit PPH1, the comments of Jacob J in *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281 are relevant:

“In particular the state of the register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led to the Registrar to put the marks concerned on the Register. It has long been held that under the old Act that comparison with other marks on the Register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. *MADAME Trade Mark* (1966 RPC 541) and the same must be true of the 1994 Act. I disregard the state of the register evidence.”

42. Also, in *GfK AG v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-135/04 the General Court (GC) stated:

“68. As regards the search of the Cedelex database, the mere fact that a number of trade marks relating to Class 35 contain the word ‘bus’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned. Firstly, the search in question does not provide any information on the trade marks actually used in relation to the services concerned. Secondly, it includes a number of trade marks in which the word ‘bus’ is used descriptively by public transport businesses.”

43. However, at exhibit PPH2 Mr Hartley provides what he considers to be evidence of the word Attitude being used in relation to clothing. In this regard I note the comments of Floyd J in *Nude Brands Limited v Stella McCartney Limited and others* [2009] EWHC 2154 (Ch):

“29. Whilst the use by other traders of the brand name NUDE in relation to perfume may give those traders relative rights to invalidate the mark, it does not give those rights to any defendant. I am not at this stage persuaded that this evidence has a bearing on any absolute ground of invalidity. It certainly does not go as far as establishing ground 7(1)(d) - customary indication in trade. Ground 7(1)(b) is concerned with the inherent character of the mark, not with what other traders have done with it. The traders in question are plainly using the mark as a brand name: so I do not see how this use can help to establish that the mark consists exclusively of signs or indications which may serve to indicate the kind or quality or other characteristics of the goods, and thus support an attack under 7(1)(c).”

44. I am, of course, also aware of the judgment of Mr Daniel Alexander QC, sitting as a deputy judge of the High Court, in *Digipos Store Solutions Group Ltd v Digi International Inc* [2008] RPC 24 (“*Digipos*”) where he stated:

“Mr Tibber’s evidence shows that it is not possible to draw firm conclusions as to whether the marks revealed by the search are in use, are in use in the United Kingdom or were in use at any relevant date, but there is, nonetheless, a significant number of undertakings which are either using or at least appear to wish to use the prefix DIGI- to denote digital in a number of contexts.”

45. It is to be noted that in that case Mr Alexander was not referred to the judgment of the GC in *GfK AG* and his judgment preceded the judgment of Mr Floyd in *Nude Brands Limited*. *Digipos* also turns very much upon its own facts. In his judgment Mr Alexander referred to the *Madame* case being an absolute grounds case and appeared to consider this of significance. The case from the GC referred to above is a relative grounds case, so clearly the GC considered that the principle of not giving weight to state of the register evidence applies in relative grounds cases.

46. Mr Hartley’s evidence consists of copies of eighteen screen prints taken from a range of websites. A number of these screen prints appear to relate to the same

company while others appear to relate to websites not of United Kingdom origin. That said, some of the screen prints clearly relate to undertakings from the United Kingdom e.g. attitude Clothing Co, Cool Green Attitude, nippaz with attitude, Miss Attitude, Girls with Attitude and Horses with Attitude; all of these undertakings are, in my view, using these names in a trade mark sense. However, the vast majority of the screen prints provided suffer from a more fundamental defect i.e. as far as I can tell they are either undated or are dated after the material date in these proceedings. In those circumstances they are of little assistance to Mr Hartley, and when considered in the light of my comments above, do not support the proposition for which he argues.

Visual/aural similarity

47. I have described the competing trade marks above and identified what I consider to be their distinctive and dominant components. While the competing trade marks share the same letters in the same order and differ in length by only one letter (being eight and nine letters respectively), the importance of the initial letter T in Mr Hartley's trade marks is unlikely, in my view, to be ignored or overlooked. However, the presence of the common characters still results, in my view, in a reasonable degree of both visual and aural similarity.

Conceptual similarity

48. Attitude is a well known dictionary word with a range of meanings (the Oxford Dictionary of English 2010 includes references to: a settled way of thinking or feeling about something, a position of the body indicating a particular mental state, truculent or uncooperative behaviour, individuality and self-confidence); all of these meanings will, in my view, be known to the average consumer. Tattitude is an invented word with no meaning. Whereas Jean's trade mark will create a conceptual picture in the mind of the average consumer, Mr Hartley's trade mark will not.

Distinctive character of Jean's earlier trade mark

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

50. I have commented on the inherent distinctiveness of the word Attitude earlier in this decision. At the date of Mr Hartley's application, Jean would have a little less than four years use of their trade mark to call upon. However, even if all of the sales figures

shown in paragraph 8 above were attributable only to those goods in class 25 upon which Jean rely in these proceedings, and Ms Schupke's witness statement suggests that is not the case (the figures also appear to relate to sales of goods proper to class 18), and even if the use had been of Jean's trade mark in the form in which it is registered (as far as I can tell none of the exhibits show use of the words Attitude and lifestyle), it would not, given the size of the clothing market in the United Kingdom, be sufficient for Jean's trade mark to benefit from an enhanced reputation resulting from the use that had been made of it. Nonetheless, Jean's trade mark is, in my view, possessed of a reasonable degree of inherent distinctive character.

Conclusion in relation to class 14

51. Earlier in this decision I concluded that there was no similarity between Mr Hartley's goods in class 14 and Jean's goods in class 25. As there must be at least a minimum degree of similarity to engage the test for likelihood of confusion, that effectively disposes of Jean's opposition in this regard and it is dismissed accordingly.

Likelihood of confusion in relation to class 25

52. 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. It is also necessary for me consider the distinctive character of Jean's trade mark, as the more distinctive this trade mark is the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

53. I have concluded that the goods are identical and that there is a reasonable degree of both visual and aural similarity between the competing trade marks. However, I have also found that while Jean's trade mark will create a conceptual picture in the average consumer's mind, Mr Hartley's trade mark will not. In his written submissions Mr Hartley drew my attention to, inter alia, the comments of the Court of First Instance (now the General Court) in *Phillips-Van Heusen Corp., v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case T-292/01):

“Next, it must be held that the conceptual differences which distinguish the marks at issue are such as to counteract to a large extent the visual and aural similarities pointed out in paragraphs 49 and 51 above. For there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately.”

54. The clear and specific conceptual meanings conveyed by the word Attitude (meanings which will, in my view, be immediately grasped by the average consumer),

are (notwithstanding the identity in the goods) sufficient to counteract the reasonable degree of visual and aural similarity between the competing trade marks. This counteraction will, in my view, avoid the likelihood of the competing trade marks being confused either directly or indirectly. The opposition against the class 25 element of Mr Hartley's application is dismissed accordingly.

Costs

55. As Mr Hartley has been successful he is entitled to a contribution towards his costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Using that TPN as a guide, I award costs to Mr Hartley on the following basis:

Preparing a statement and considering the other side's statement:	£200
Preparing evidence and considering and commenting on the other side's evidence:	£500
Written submissions:	£300
Total:	£1000

56. I order Jean A Vequaud Gmbh & Co to pay to Paul Philip Hartley the sum of £1000. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 23 day of February 2011

C J BOWEN
For the Registrar
The Comptroller-General