

**O-218-18**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3176071  
BY MATTRESS FIRM, INC.  
TO REGISTER THE TRADE MARK**

**SLEEP HAPPY**

**IN CLASS 35**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 408190  
BY DREAMS LIMITED**

**BACKGROUND**

1. On 22 July 2016 Mattress Firm, Inc. (“the applicant”) applied to register the trade mark shown on the cover page of this decision for the following services in class 35:

*Retail store services in relation to beds, mattresses, mattress frames, mattress foundations, box springs, mattress covers, mattress pads, mattress toppers, pillows, pillow covers.*

2. The application was published for opposition purposes on 7 October 2016.

3. The application is opposed in full by Dreams Limited (“the opponent”). The opponent initially pleaded grounds under Sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”), however, as it failed to file any evidence of goodwill, the claim under 5(4)(a) was subsequently struck out. The opposition therefore continued under Section 5(2)(b) only, for the purpose of which the opponent relies on European Union Trade Mark (EUTM) no.12956124 for the following mark:



4. The opponent claims the colours purple, pink and white.

5. The opponent relies upon all the goods and services in classes 20, 24 and 35 for which the mark is registered, including those shown in paragraph 14.

6. The opponent’s mark was filed on 10 June 2014 and registered on 03 November 2014. The significance of these dates is that (1) the opponent’s mark constitutes an earlier mark in accordance with section 6 of the Act, and (2) it is not subject to the proof of use conditions contained in section 6A of the Act, its registration process having been completed less than five years before the publication of the applicant’s mark.

7. The opponent claims that the applied for mark is confusingly similar to the earlier marks and covers services that are identical with and/or similar to those under the earlier mark, such that there would be a likelihood of confusion. It states:

“The subject mark is composed of the words SLEEP HAPPY, which is wholly contained within the opponent’s mark. This therefore results in visual, phonetical and conceptual similarity between the marks”.

8. The applicant filed a counterstatement, denying the claims.

9. Only the applicant filed evidence. This will be summarised to the extent that is considered appropriate. Neither side requested a hearing but they both filed written submissions in lieu. I will refer to these submissions as necessary below. The opponent is represented in these proceedings by Lane IP Limited, the applicant is represented by Kilburn & Strode LLP.

### **The applicant’s evidence**

10. This consists of a witness statement from Cara Naomi Baldwin dated 15 January 2018. Ms Baldwin explains that she is a trade mark attorney and senior associate at Kilburn & Strode LLP, the applicant’s representative in these proceedings. Having provided copies from the EUIPO databases of the registration relied upon by the opponent at Exhibit CNB1, Ms Baldwin then states that there are four trade mark registrations in the UK and EU registers featuring the terms SLEEP HAPPY and HAPPY SLEEP, that these registrations cover goods that are identical or similar to the goods covered by the earlier mark and that the records available on the UKIPO and EUIPO reveal that the opponent did not oppose any of these registrations. Exhibits CNB2 consists of copies from the UKIPO and EUIPO databases showing details of the following registrations: i) UK 3097648 for the mark SLEEP HAPPY registered on 4 December 2015 for goods in classes 20 and 24; ii) UK 3128177 for the mark SLUMBERWON SLEEP HAPPY (figurative) registered on 8 January 2016 for goods in classes 11, 20 and 24; iii) EUTM 14590971 for the mark SLUMBERWON SLEEP HAPPY (figurative) registered on 24 February 2016 for goods in classes 11, 20 and 24 and iv) EUTM 13181623 for the mark HAPPY SLEEP SWITZERLAND

(figurative) registered on 22 December 2014 for goods in classes 6,10, 20, 22 and 24.

## **DECISION**

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

“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.”

### **Section 5(2)(b) - case-law**

12. 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 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### Comparison of services

13. In comparing the respective specifications, all the relevant factors should be taken into account. In the judgment of the Court of Justice of the European Union (CJEU) in *Canon*, Case C-39/97, the Court stated at paragraph 23:

“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”.

14. The parties’ services are as follows:

<b>Applicant’s services</b>	<b>Opponent’s services include</b>
<p><b>Class 35</b> Retail store services in relation to beds, mattresses, mattress frames, mattress foundations, box springs, mattress covers, mattress pads, mattress toppers, pillows, pillow covers</p>	<p><b>Class 35</b> Retail services relating to the sale of furniture, bedroom furniture, beds, water beds, divans, bedsteads, headboards, bedding, pillows, mattresses, open spring and pocket spring mattresses, memory foam and latex mattresses, futons, air cushions and air pillows, air mattresses, sleeping bags, bed casters not of metal, bed fittings not of metal, chairs, armchairs, cabinets, chests of drawers, desks, footstools, cots and cradles, fabrics and textiles for beds and furniture, bed linen, duvets, bed covers,</p>

	<p>bed blankets, bed clothes, covers for duvets, mattress covers, covers for pillows and pillow cases, covers for cushions, bedspreads, covers for hot water bottles, pyjama cases, furniture coverings of textile, eiderdowns, quilts, parts and fittings for all the aforesaid goods, all provided in a retail furniture and bedding superstore, online via the Internet or other interactive electronic platforms, via mail order or catalogues or by means of telecommunications; information, advisory and consultancy services relating to all of the aforesaid.</p>
--	--

15. 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.

16. In *Gérard Meric v OHIM*, Case T- 133/05, the General Court (GC) stated that:

“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”.

17. The contested *retail store services in relation to beds, mattresses, mattress covers, pillows and pillow covers* are self-evidently identical to the opponent's *retail services relating to the sale of beds, mattresses, mattress covers, pillows and covers for pillows and pillow cases [all provided in a retail furniture and bedding superstore]*.

18. *Mattress frames, mattress foundations and box springs* are all types of platforms for mattresses. As such the opponent's *retail services relating to the sale of beds [all provided in a retail furniture and bedding superstore]* are broad enough to encompass the contested *retail store services in relation to mattress frames, mattress foundations and box springs*. These services are identical on the principle outlined in *Meric*.

19. Finally, the contested *mattress pads and mattress toppers* are essentially mattress covers made of foam. Consequently, I find that the contested *retail store services in relation mattress pads and mattress toppers* are encompassed by the opponent's *retail services relating to the sale of mattress covers [all provided in a retail furniture and bedding superstore]*. These services are also identical on the principle outlined in *Meric*.



## **The average consumer and the nature of the purchasing act**

20. As the case law above indicates, it is necessary for me to determine who the average consumer is for the services at issue; I must then determine the manner in which these services will be selected in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

21. The applicant states:

“The level of attention paid to the Applicant’s retail store services in relation to bed, mattresses, mattress frames, mattress foundations and box springs is likely to be high, as the average consumer will pay attention to the quality, features and substantial costs of these items. The level of attention of the relevant consumer in respect of the Applicant’s mattress covers, mattress pads, mattress toppers, pillow and pillow covers is likely to be reasonable. Again, they will pay attention to the quality, features and price of those items.”

22. The services at issue are retail services for the purchase of beds and bed-related goods. The average consumer is a member of the general public. The applicant’s submissions seem to elide retailing with the goods themselves however, the conflict here relates to the retail services connected with the goods. Whilst I expect more attention to be paid to the selection of the goods as opposed to the retail service provider, the average consumer is likely to be mindful of a range of considerations such as the breadth of goods/brands stocked, customer reviews, delivery

times/costs, opening times and reliability (of the retailer) all of which suggests at least an average degree of attention will be paid to the selection of such services.

23. The service provider will be selected through perusal of websites, brochures, advertisements etc so the visual aspect will be the most important element in the selection although I must also consider aural issues in the form, for example of word of mouth recommendations.

### **Comparison of marks**

24. 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 them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

25. It would be wrong therefore artificially to dissect the 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 created by them. The marks to be compared are:

Application	Earlier mark
SLEEP HAPPY	

### Overall impression

26. The contested mark consists of the words SLEEP HAPPY which will be seen as a single complete phrase. Neither of these two words dominates the other.

27. The earlier mark consists of a figurative element composed of a blue rectangular device with a purple wavy line placed above it. The words 'the bed' in white and 'people' in purple appear prominently within the blue device. The device is placed above the words 'Save money. Sleep Happy' which are presented in a grey colour and in a much smaller size. The words 'the bed people' form a complete phrase, however, the word 'bed' is more prominent than the words 'the' and 'people' and stands out, reinforcing the perception of the figurative element as a stylised bed. Due to their size and positioning, the words 'the bed people' and the figurative element are the dominant and distinctive components of the earlier mark and make a roughly equal contribution to its overall impression. Though the words 'Save money. Sleep Happy' are not negligible, they are visually placed in the lower part of the mark and are subordinate to the preceding words 'the bed people'. It follows from my view of the mark that I consider the element 'the bed people' to be likely understood as a reference to the opponent's company name, with the words 'Save money. Sleep Happy' being seen as a strap-line or a slogan.

### Visual similarity

28. Visually, the marks at issue coincide in the words SLEEP HAPPY/Sleep Happy. However, although the words SLEEP HAPPY/ Sleep Happy are present in both marks, the marks are not, as a whole, visually similar. The contested mark is

characterised by its simplicity whilst the earlier mark is visually elaborated. As I have already stated, the dominant and distinctive features of the earlier mark are the words 'the bed people' and the device and the way these components are combined<sup>1</sup>. Though the words 'Sleep Happy' are also part of the earlier mark, they are not prominent. Overall, I find that any visual similarity between the marks must be to a very low degree.

### **Aural similarity**

29. The applicant comments on the aural similarity between the marks in its written submissions. It states:

"The Opponent claims that the respective marks are phonetically similar, as its mark would be read as "THE BED PEOPLE. SAVE MONEY. SLEEP HAPPY" and the additional wording would not detract from the fact that the Applicant's mark is wholly reproduced as a distinctive element of the Opponent's mark.

As discussed above, the "Sleep happy" element of the Opponent's mark lacks any real prominence in the composite mark and appears at the very end of the mark. Following the guidance in the *Trubion* case referred to above, we submit that the average consumer will primarily perceive the dominant words "the bed people" as the commercial origin of the goods/services, rather than the words "Sleep happy". The average consumer is likely to refer only to the Opponent's goods and services as, for example "the bed people furniture/beds/mattresses/shop", rather than reciting every word of the mark. It is highly unlikely that, when recalling the mark from memory, the average consumer would even recollect the verbal elements "Sleep happy" in the Opponent's mark.

---

<sup>1</sup> The opponent claims the colours purple, pink and white as an element of the mark but, for the purpose of this decision, nothing turns on this.

The Applicant's mark will always be pronounced as SLEEP HAPPY and this will be perceived by the average consumer as the commercial origin of the Applicant's services.

Consequently, the marks in question are phonetically highly dissimilar."

30. I agree with the applicant. Given the dominant nature of the words 'the bed people' in the earlier mark, it is by this element that the average consumer is likely to refer to it. Further, since I found that the words 'Save Money. Sleep Happy' are likely to be understood as a strap-line, I consider highly unlikely that a consumer would refer to the opponent's services by this element. Should the earlier mark be identified by the words 'the bed people' alone, it would be aurally different from the contested mark SLEEP HAPPY. Even if the element 'Sleep Happy' in the earlier mark were to be articulated, that element would be overshadowed by the words 'the bed people' and 'Save Money' which are pronounced first and the focus point of the mark would still remain the element 'the bed people', so there would be no more than a low degree of aural similarity.

### **Conceptual similarity**

31. Turning to the conceptual similarity, the applicant states:

"The Opponent claims that the respective marks are conceptually similar and that the additional word elements "the bed people" and "save money" do not detract or take away the "Sleep happy" impression of the mark.

When analysing the conceptual similarity between marks containing a figurative element, all concepts have to be assessed, including any images. The concepts of marks consisting of or containing figurative elements and marks consisting of shapes will be what those figurative elements or shapes represent. This has been confirmed in Cases T-5/08 to 7/08 *Golden Eagle/Red Cup* and T-361/08 *THAI SILKI(vogel)*

As indicated above, the average consumer will primarily perceive the dominant words "the bed people" in the Opponent's mark as the commercial origin of the goods/services, rather than the words "Sleep happy". The device that appears as a dominant component of the Opponent's mark reinforces the "the bed people" element of the Opponent's mark, drawing the conceptual link between those words and the device element. The less significant wording "Save money. Sleep happy" is unlikely to attract much, if any, attention to the average consumer and is therefore unlikely to form part of the average consumer's perception of the mark."

32. Again, I find myself in agreement with the applicant's submission. As I have already said in the preceding paragraphs, the dominant nature of the phrase 'the bed people', whose meaning is reinforced by the figurative element, precludes the element 'Save Money. Sleep Happy' from being perceived as a reference to the opponent's company name. The average consumer encountering the earlier mark in a retail furniture and bedding superstore will not fail to understand that he is in a 'the bed people' store, and will perceive the element 'Save Money. Sleep Happy' as a promotional strap-line. In my view, in the context of the services in suit, the relevant public will understand 'the bed people' as the branding indicating the origin of the services and meaning "the people who specialise in bed(s)", with the strap-line 'Save Money. Sleep Happy' being used to indicate that the provider of the services offers value and good quality and will ensure you save money and have a good night sleep. The concepts introduced by the words 'the bed people' and 'Save Money' gives, in my opinion, the words 'Sleep Happy' a specific meaning, i.e. you will sleep happy because you are in the hands of bed(s) specialists and we will ensure you save money and are supplied with the right product.

33. Moving on to the contested mark, given that SLEEP HAPPY is the only component of the mark, consumers will be left in no doubt that SLEEP HAPPY is the identifier of the origin of the services. Conceptually, SLEEP HAPPY is highly allusive in relation to the contested retail services relating to beds, mattresses and bed-related goods since it alludes to the products helping consumers to sleep happily, i.e. have a good night sleep. To the extent that the expression SLEEP HAPPY/Sleep Happy in the respective marks will be understood (in the context of the identical retail

services relating to the sale of bed-related goods) as referring to consumers having a good night sleep, there is a degree of conceptual similarity. However, taking into account that, in the contested mark that expression cannot be perceived other than in a general sense as opposed to the specific way in which it is used in the earlier mark, I find that any conceptual similarity between the marks is of a low degree.

### **Distinctive character of earlier mark**

34. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*<sup>26</sup>, 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).”

35. As no evidence of use has been filed by the opponent, I have only the inherent distinctive character to consider. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of

'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

36. Whilst the earlier mark is a composite mark consisting of a number of elements all of which contribute to various degree to the distinctive character of the mark, it is the distinctiveness of the common element that matters. From an inherent perspective, the words 'Sleep Happy' are not particularly distinctive for retail services relating to beds, mattresses and bed-related goods. The words themselves are ordinary words of the English language and produce an expression which is, in my opinion, an unremarkable one and cannot be said to enjoy anything other than a low degree of distinctiveness.

### **Likelihood of confusion**

37. 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 marks may be offset by a greater degree of similarity between the respective services and vice versa. I must also keep in mind the average consumer for the services, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has retained in his mind.



38. There are two types of relevant confusion to consider: direct confusion (where one mark is mistaken for the other) and indirect confusion (where the respective similarities lead the consumer to believe that the respective goods and services come from the same or a related trade source). This distinction was summed up by Mr Iain Purvis Q.C. sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“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.”

39. Earlier in my decision I found that the respective services are identical. The services will be selected primarily by visual means with at least an average degree of care and attention. The marks are visually, aurally and conceptually similar to a low degree and the common element SLEEP HAPPY/Sleep Happy is possessed of only a low degree of distinctive character. The opponent did not contend that there is a likelihood of direct confusion between the marks. Instead, it relies on the decision of the CJEU in *Medion v Thomson*, Case C-120/04, that there is a likelihood of (indirect) confusion because the element ‘Sleep Happy’ has an independent distinctive role in the earlier mark. It states:

“Whilst the Opponent's mark does contain additional features, this does not detract from the fact that the Subject Mark is wholly contained within the mark.

In Case C-120/04 (Medion AG v Thomson) (LIFE v THOMSON LIFE) it was held in paragraph 30 that *"an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element."* This is comparable to the current proceedings as SLEEP HAPPY which has an independent distinctive role in the Opponent's Mark, regardless as to whether it is the dominant element, is wholly reproduced by the Subject Mark. Given that LIFE and THOMSON LIFE were found to be visually similar the same reasoning must be applied to 'SLEEP HAPPY and 'THE BED PEOPLE. SAVE MONEY. SLEEP HAPPY'".

40. It also relies on use by famous brands such as Adidas, Toyota and KFC of "different elements" as an indication of trade origin. It states:

"Furthermore, even though there are additional elements to the Opponent's Mark, consumers are used to seeing device marks which contain devices and various word elements and associate the different elements of the mark individually to the owner. For example, consumers would view the below marks as a whole, but still be able to attribute each element of the mark individually to the brand owner [...]



The above examples are directly applicable to SLEEP HAPPY, as consumers would appreciate this element of the Opponent's Mark and even though it has been reproduced on its own in the Subject Mark, consumers would still attribute it as an indicator of origin for the Opponent. Ultimately, consumers are used to seeing marks which have more than one element and being able to appreciate each distinctive element and attribute it back to the owner of the mark.”

41. Though the opponent carefully uses the words “additional elements” the examples to which it refers are clearly examples of slogans. This confirms my own impression of the component ‘Save Money. Sleep Happy’ as a strap-line (or slogan). In any event, the way in which the various components of the earlier mark are combined does not support the analysis of the mark as a combination of a house mark ‘the bed people’ and a secondary mark ‘Sleep Happy’. In this connection, I have already found that, in the context in which it appears in the earlier mark, the element ‘Sleep Happy’ is unlikely to be taken to denote trade mark origin and there is no evidence that it has become associated, in the mind of the average consumer, with the opponent. Further, whilst I do not consider the evidence filed on behalf of the applicant to be material, I concur with its conclusion that the words “Sleep Happy” are not particularly striking in relation to retails services connected with the sale of beds and bed related goods. Finally, I note that the common element between the marks is only ‘Sleep Happy’ which is the last part of the strip-line ‘Save Money. Sleep Happy’; one could better understand the opponent’s argument if the contested mark was (say) ‘Save Money. Sleep Happy’ on its own. However, in this case, the fact that the contested mark only reproduces two of the four words comprising the strap-line ‘Save Money. Sleep Happy’ makes the opponent’s argument untenable. **There is no likelihood of confusion, either direct or indirect.**

## **CONCLUSIONS**

42. The opposition fails.

## **COSTS**

43. As the applicant has been successful, it is entitled to a contribution towards its costs. Awards of costs in opposition proceedings are governed by Tribunal Practice Notice (TPN) 2/2016. Whilst the applicant has filed some evidence, it was very light so I will award only £300 in relation to it. Using TPN 2/2016 as a guide, I award costs to the applicant on the following basis:

Preparing a statement and considering the other side's statement:	£200
Filing of evidence:	£300
Written submissions:	£300
Total:	£800

44. I order Dreams Limited to pay Mattress Firm, Inc. the sum of £800 as a contribution towards its costs. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case, if any appeal against this decision is unsuccessful.

**Dated this day 5<sup>th</sup> April 2018**

**Teresa Perks  
For the Registrar  
The Comptroller – General**

