

O-019-19

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 32556953 BY JAINCO UK LTD
TO REGISTER:**



AS A TRADE MARK IN CLASS 25

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 410892
BY BOI TRADING COMPANY LIMITED**

Background & Pleadings

1. On 15 September 2017, Jainco Uk Ltd (“the applicant”) applied to register the above trade mark for *baby clothes* in Class 25. The application was published for opposition purposes on 29 September 2017.

2. On 27 November 2017, the application was opposed in full by Boi Trading Company Limited (“the opponent”). The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), in relation to which the opponent relies upon the following trade mark:

European Union Trade Mark (“EUTM”) 11886652:

Pride & Honour

Filing date: 10 June 2013

Registration date: 21 October 2013

The opponent indicates that it intends to rely upon all goods in Class 25 for which its mark is registered, namely:

Clothing, footwear, headgear.

3. In its Notice of Opposition, the opponent argues that the phrase HONOUR & PRIDE, which it identifies as the most prominent feature of the applicant’s mark, is simply the phrase of the opponent’s mark in reverse. It claims that the marks are visually and phonetically highly similar and that the respective phrases are conceptually similar on account of their identical word elements and ampersand (‘&’) symbol. With regards to the competing goods, the opponent submits that *baby clothing* is identical to *clothing*.

4. The applicant filed a counterstatement denying the basis of the opposition. Having claimed that the “large ‘stag’ device” in its mark is at least as dominant as its word elements, it submits that the competing marks are visually distinct. It assigns more importance to consumers’ visual perception than the aural and conceptual, given that clothing is primarily selected on a visual basis. The applicant concludes that the overall impressions evoked by the marks are different and that consumers would be able to readily distinguish between the two.

5. The applicant in these proceedings is represented by Downing IP Limited and the opponent by **Novagraaf UK. Whilst the opponent did not file evidence in chief, it did file evidence in reply to the applicant's evidence.** Neither party requested a hearing, nor did they file written submissions. This decision is taken following a careful reading of all the papers which I will refer to, as necessary.

Decision

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

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

(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.”

7. An earlier trade mark is defined in section 6 of the Act, which states:

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

(a) a registered trade mark, international trade mark (UK), 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.”

8. Given its filing date, the opponent's mark qualifies as an earlier trade mark under the provisions outlined above. In accordance with section 6A of the Act, as it had not completed its registration procedure more than five years prior to the publication date of the applicant's mark, it is not subject to the proof of use provisions. Consequently, the opponent is entitled to rely upon all goods identified in its Notice of Opposition (paragraph 2 refers).

Preliminary issues arising from the applicant's evidence

Reliance on an absence of confusion

9. The applicant claims to have been selling baby clothes under the applied for mark since 2014 and states:

"7. In the five years that we have been using the mark, we have not come across any instances of confusion with goods of the Opponent, Boi Trading Company Limited, or with any other trader"¹.

10. In considering the relevance of the applicant's submission, I refer to *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, in which Kitchen L.J. stated that:

"80. ...the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side by side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has

¹ See the witness statement of Ms Donna Page-Stabler

been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur.”

11. In *The European Limited v The Economist Newspaper Ltd*, [1998] FSR 283, Millett L.J. stated that:

“Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff’s registered trade mark.”

12. On the basis of the above case law, the applicant’s reliance on an absence of confusion in the marketplace is of no assistance and can have no bearing on the outcome of the proceedings. Equally, the submissions and exhibits which (I presume) were filed to show the applicant’s pre-existing use of the applied for mark are also of no assistance to me in making this decision.

State of the register evidence

13. By way of the witness statement of Ms Page-Stabler, the applicant argues that both HONOUR and PRIDE are standard English words. As such, it insists that the applicant is not the only trader with an interest in using them. Listed within the statement, and reaffirmed at exhibit DPS4, are a selection of trade marks which the applicant confirms are registered in the UK (or at least have effect in the UK) for class 25 and contain the words HONOUR/HONOR or PRIDE, several of which, it submits, appear to be in use².

14. With only very limited evidence to show that any of these marks have been used in the UK, this must be regarded as “state of the register” evidence. In the *Torreomar* case, BL O/207/02, Mr G Hobbs Q.C. acting as the Appointed Person stated that whether a consumer deems a mark to be origin specific or origin neutral:

² See paragraphs 9-10 of Ms Page-Stabler’s witness statement

“may be supported by evidence directed to the way in which the mode or element of expression has been used by traders and consumers more generally. In neither case can the proposition in contention be substantiated simply by evidence of entries in the register of trade marks; entries in the register do not in themselves affect the way in which marks are perceived and remembered.”

15. In *Zero Industry Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (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).”

16. In *British Sugar Plc v James Robertson & Sons Ltd* [1996], RPC 281, Mr Justice Jacob said:

“Both sides invite me to have regard to the state of the register. Some traders have registered marks consisting of or incorporating the word “treat”. I do not think this assists the factual inquiry one way or the other, save perhaps to confirm that this is the sort of word in which traders would like a monopoly. 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 the Registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is on principle

irrelevant when considering a particular mark tendered for registration, see eg *Madam Trade Mark* and the same must be true under the 1994 Act. I disregard the state of the register evidence.”

17. In summary, when assessing the likelihood of confusion under Section 5(2), it is necessary to consider the potential for conflict between the applied for mark and the earlier trade mark in light of all relevant circumstances. The existence of other trade marks on the register is not pertinent to the matter before me.

Evidence summary

Applicant's evidence

18. The applicant's evidence comprises a witness statement from its Operations Manager, Ms Donna Page-Stabler, which is dated 21 August 2018 and supported by exhibits DPS1 to DPS9. In light of my earlier findings, I do not consider it necessary to summarise the applicant's evidence but will refer to any relevant submissions, as required, throughout the course of this decision.

Opponent's evidence in reply

19. The opponent's evidence in reply comprises a witness statement from Mr Alastair Rawlence of Marks & Clerk LLP, dated 22 October 2018, and supporting exhibit AR. The exhibit comprises a copy of a judgment from the European Court of First Instance in Case T-67/08, *Hedgfund Intelligence Ltd v OHIM*. I do not propose to reproduce the content of that decision here, nor do I find it necessary to summarise Mr Rawlence's submissions, but will refer to any relevant case law or submissions, as required.

Section 5(2)(b) - Case law

20. 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*

Klijnsen Handel B.V. Case C-342/97, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, Matratzen Concord GmbH v OHIM, Case C-3/03, Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, Shaker di L. Laudato & C. Sas v OHIM, Case C-334/05P and Bimbo SA v OHIM, Case C-591/12P.

The principles:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

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

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

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

Comparison of goods

21. The competing goods, all proper to class 25, are as follows:

Opponent's goods	Applicant's goods
Clothing, footwear, headgear	Baby clothes

22. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the 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 fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

23. The applicant's *baby clothes* are clearly encompassed by the general term *clothing*, for which the opponent's earlier trade mark is registered. On the basis of *Meric*, the competing goods are, therefore, identical.

The average consumer and the nature of the purchasing act

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

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

25. 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 GC said in relation to the selection of clothing:

“50. The applicant has not mentioned any particular conditions under which the goods are marketed. Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

26. The average consumer for the goods at issue in these proceedings is a member of the general public, with the goods most likely to be the subject of self-selection from traditional high street retail outlets, catalogues and websites. For this reason, and as the case law above indicates, visual considerations are likely to play a larger role in the selection process. I do not discount aural considerations as, in my experience, it would not be unusual for orders to be made via telephone or for sales assistants to provide oral recommendations, for example.

27. The goods in dispute are available in a relatively broad range of prices, from very expensive designer goods to those sold by budget brands. Irrespective of cost, when selecting articles of clothing, be it for themselves or in an intermediary capacity (when purchasing baby clothes, for example), consumers are likely to consider factors including size, material, durability and so on. This suggests that the average consumer will pay at least an average degree of attention when making their selection.

Comparison of trade marks


28. 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 Court of Justice of the European Union (“CJEU”) stated in its judgment 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.”

29. 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.

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

Opponent's trade mark	Applicant's trade mark
PRIDE & HONOUR	

31. The overall impression of the opponent's mark lies in the unit formed by the combination of the three word elements it comprises, having no additional components to rely upon. The ampersand will be readily seen as 'and'; a linking word which simply joins PRIDE with HONOUR.

32. The applicant's mark is a figurative one. The words in the mark are 'HONOUR & PRIDE', presented in capital letters and in a mottled bold, black font. Behind the words rests a fairly large silhouette reminiscent of a stag (at least its neck and head), its antlers extending to a significantly greater height than the words themselves. The silhouette is composed of a selection of geometric shapes in various shades of grey. Both the word and device elements of the applicant's trade mark are independently distinctive. Despite the discrepancy in their respective sizes, I find it likely that each will make a fairly even contribution to the mark's overall impression.

Visual comparison

33. Given that the opponent's mark is absent of any figurative elements, any visual similarity between the respective trade marks extends to their shared word elements, namely PRIDE and HONOUR, and the ampersand symbol which binds them, albeit in an inverted sequence. I keep in mind that, whilst fair and notional use is not likely to include the 'mottled' effect applied to the text in the applicant's mark, it will permit

presentation of the opponent's mark in a variety of colours and standard fonts. Clearly, the presence (or absence) of the stag device creates a striking visual difference between the respective marks. I agree with the opponent insofar as it states that "the mere inversion of the elements (words) of a mark cannot allow the conclusion to be drawn that there is no visual similarity."³ Given the differences, however, on balance, I can find no more than a medium degree of visual similarity between the marks.

Aural comparison

34. In my opinion, the above approach can also be applied to the aural comparison of the marks; simply because the words are presented in reverse order does not give rise to an absence of aural similarity. Despite the sequential inconsistency, each of the marks is likely to be articulated in a total of four syllables which are identical; the opponent's 'PRIDE-AND-HON-OUR' and the applicant's 'HON-OUR-AND-PRIDE'. The stag device in the applicant's mark is unlikely to be articulated at all. I find, therefore, that the marks' aural similarity is of a fairly high degree.

Conceptual comparison

35. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

36. The applicant provided dictionary definitions of the words *honour* and *pride* in its evidence⁴, both of which, it explains, are taken from <https://en.oxforddictionaries.com/>. The top listed definition for each is provided below:

Honour: High respect; great esteem (NOUN)

Pride: A feeling or deep pleasure or satisfaction derived from one's own achievements, the achievements of those with whom one is closely associated, or from qualities or possessions that are widely admired (NOUN)

³ See paragraph 14 of the witness statement of Mr Rawlence

⁴ Exhibits DPS2 and DPS3

Though I am by no means bound by the definitions provided, I am satisfied that they generally marry with my existing understanding of the terms and, more importantly, what I believe would be the understanding of the average consumer. As the order in which the words are presented has no bearing on their conceptual significance, I find each mark's word elements to evoke an identical concept. In the applicant's mark, the inclusion of a stag device provides an additional conceptual insight, of which there is no counterpart in the opponent's mark. In my view, the stag may serve to introduce an additional concept of strength and stature. Given that such qualities are not significantly far removed from those explicitly presented by the marks' word elements, I find the conceptual similarity between the marks to remain at a high degree.

Distinctive character of the earlier trade mark

37. 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).”

38. In the absence of any evidence of use, I have only the inherent distinctiveness of the opponent’s mark to consider. It is widely accepted, though only a guideline, that words which are invented often possess the highest degree of distinctive character, whilst words which are suggestive or allusive of the goods and/or services relied upon generally possess the lowest. The opponent’s mark is comprised of standard English dictionary words with definitions which will be easily recognised and understood by the average consumer. The words have no immediate relationship with the goods for which they are registered, nor are they likely to be seen as descriptive or allusive. On the whole, I find the opponent’s mark to possess an average degree of inherent distinctiveness.

Likelihood of confusion

39. 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.

40. 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.”

In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

41. 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.

42. Earlier in this decision I reached the following conclusions:

- The competing goods are identical;
- The average consumer is a member of the general public. Visual considerations are likely to play a key role in the selection process, though aural considerations are also relevant;
- An average degree of attention is likely to be paid to the selection of goods;
- There is a medium degree of visual similarity between the marks and a fairly high degree of aural and conceptual similarity;
- The opponent’s trade mark possesses an average degree of inherent distinctive character.

43. 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.””

44. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of each of the above 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.

45. Given that the goods at issue in these proceedings are identical, the interdependency principle demands a certain level of difference between the parties' marks if a likelihood of confusion is to be avoided. In my evaluation of the marks' similarity, whilst I have certainly identified differences, I have by no means found what I would consider to be a significant disparity between the two. The words from the opponent's mark are wholly reproduced within the applicant's mark and are presented either side of an ampersand, albeit in a different order. Whilst I find it likely that consumers paying an average degree of attention will easily recall the presence of 'HONOUR' and 'PRIDE', I find it unlikely that consumers will necessarily recall, at least with any degree of certainty, the order in which they are presented. Consequently, those familiar with the earlier mark will, in my view, be susceptible to confusion upon encountering the later mark. Though likely to recognise the inclusion of a stag device, consumers familiar with the earlier mark may attribute the visual development in the later mark to a brand or marketing strategy, or simply consider the stag device to serve

as a decorative background over which the words are presented. In conclusion, although the average consumer will acknowledge the visual differences between the marks, it will observe the identity in the respective marks' word elements and erroneously conclude that both originate from the same undertaking, giving rise to a likelihood of indirect confusion.

Conclusion

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

Costs

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

Official fee (form TM7):	£100
Preparing a Notice of Opposition:	£150
Considering the other side's evidence and preparing evidence in reply:	£250
Total:	£500

48. I order Jainco Uk Ltd to pay Boi Trading Company Limited the sum of £500. 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 11th day of January 2019

**Laura Stephens
For the Registrar**

