

O/085/19

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO 3 285 678 BY PURRMAIDS



MOBILE CATTERY LIMITED TO REGISTER: IN CLASSES 43 AND 45

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO 411797 BY DAWN
JARRETT

Background and pleadings

1. PurrMaids Mobile Cattery Limited (the applicant) applied to register the trade



mark No 3 285 678: in the UK on 26th January 2018. It was accepted and published in the Trade Marks Journal on 16th February 2018 in respect of the following services:

Class 43:

Cattery services.

Class 45:

Pet sitting.

2. Dawn Jarrett (the opponent) opposes the trade mark on the basis of Section 5(2)(b)¹ of the Trade Marks Act 1994 (the Act), relying on its earlier UK Trade Mark No 3 284 027: Helping Hands Mobile Cattery Service. The following services in Class 44 are relied upon in this opposition: *mobile pet care services, cat sitting, cat service at home, cat care, cat home visiting service, mobile cat care service.*
3. The opponent argues that the respective services are identical or similar and that the marks are similar. In particular, Ms Jarrett argues that she coined the term “mobile cattery” which she claims is not commonly used in the industry and that it is this which is being copied by the applicant.
4. The applicant filed a counterstatement denying the claims made.

¹ The opposition also originally included a ground based on Section 5(4)(a) of the Act. However, this did not proceed as the opponent failed to offer any evidence in support.

5. Neither side filed evidence, but both sides filed written submissions. These will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.

Section 5(2)(b)

6. Section 5(2)(b) of the Act is 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”.

Comparison of goods and services

7. In the judgment of the Court of Justice of the European Union in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

8. 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.

9. I also take into account the guidance in *In Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court 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”.

10. The Opponent's earlier services are:

Class 44: Mobile pet care services, Cat sitting, Cat care service at home, cat care, cat home visiting service, mobile cat care service.

The Applicant's later services are:

Class 43: *Cattery services*

Class 45: *Pet sitting*

11. The later services in Class 43 are those which provide cat care, usually on a boarding basis. The earlier services include cat care at large which can easily include the later services. In the terms of Meric, these services (albeit classified in different class numbers) are identical.
12. These later services in Class 45 usually involve the service provider staying in (or at least regularly visiting) a customer's home while, for example, they are on holiday and taking care of the family pet(s). The earlier trade mark is registered for cat setting. The later term can easily also include the earlier and so they are also identical (again even though they are classified in respect of different class numbers).


Comparison of marks

13. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union 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.”

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

15. The respective trade marks are shown below:

<p>Helping Hands Mobile Cattery Service</p>	
<p>Earlier trade mark</p>	<p>Contested trade mark</p>

16. The earlier trade mark is a word only trade mark and its distinctiveness resides in the trade mark as a whole. The later trade mark is a complex trade mark, the dominant feature being the apron which appears centrally. The words “Purr-Maids” is clearly a distinctive feature; the words “mobile cattery” underneath the apron device are strongly allusive to the nature of the services and are not particularly distinctive.

17. Visually, the trade marks coincide in respect of the words “Mobile Cattery” but differ in all other respects as shown above. The degree of visual similarity is considered to be very low.

18. Aurally, again the marks coincide in respect of the words “mobile cattery” and differ in all other respects. The level of aural similarity is considered to be low.

19. Conceptually, it is considered that the earlier trade mark conveys the message of a service in respect of caring for cats in a manner which is convenient and helpful. The later trade mark, despite the obvious visual and aural differences, overall, conveys a similar message in that it is clear to the consumer that this is a service providing care for cats. The addition of “purr” (i.e. the noise a cat makes) reinforces this. They are conceptually similar to a low to medium degree.

Average consumer and the purchasing act

20. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

21. 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.”

22. The average consumer for these services will be the general public, notably pet owners. The selection process may involve a period of research and word of mouth recommendations. The selection of a suitable service to care for a

family pet is likely to involve a degree of care as a potential purchaser will want to be assured of the standard of care provided. Some of the services are provided in the home and so again, care will be evident in the selection process as the potential customer will want assurances regarding the good character of the provider. It is considered overall that this will be a considered purchase and so the level of attention expected to be displayed during the purchasing process will be at least medium, and may well be high.

Distinctive character of the earlier trade mark

23. 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).”

24. The opponent has not provided any evidence demonstrating that its mark enjoys an enhanced degree of distinctiveness as a result of any use made of it. As such, I have the prima facie case to consider. It is noted that the opponent claims to have coined the phrase “mobile cattery”, that it is not common in the industry, and that it is distinctive of her business. The words “mobile cattery services”, if not directly descriptive, are at least strongly allusive in relation to the services provided as they convey to the consumer that the service provided is in respect of the care of cats (even if the exact nature of this care is unclear). Whether or not the opponent coined the phrase and used the term first is not sufficient (in the absence of any evidence on the point) to demonstrate that the words “mobile cattery” are distinctive in their own right. The remaining words are “helping hands”, which conveys a convenience to the service provided. The earlier trade mark’s distinctiveness therefore lies in the combination as a whole. As to the degree of distinctiveness and bearing in mind the aforesaid analysis, it is considered that the earlier trade mark is distinctive to a below average degree.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

25. 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.

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 great 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.

26. The services have been found to be identical. The level of attention expected to be displayed by the average consumer will be at least medium and may indeed be high. The marks are visually similar to a very low degree, aurally to a low degree. It is accepted that conceptually there is a low to medium degree of similarity. The earlier trade mark is distinctive to a below average degree. Furthermore, the coincidental element in each of the marks is strongly allusive and conveys the message that the service provided is in respect of the care of cats. The differences between the marks is clear and obvious. Even allowing for imperfect recollection, it is considered that a consumer will not mistake one trade mark for the other. There is no likelihood of direct confusion.

27. However, this is not the end of the matter, since case law also allows for indirect confusion - and in this respect, I take into account the following guidance. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, 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.

28. I also bear in mind the guidance in *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, where Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

29. The marks coincide in respect of “mobile cattery”. As already stated, this is strongly allusive as regards the services on offer. The remaining elements of each of the marks are significantly different. “Purr-Maids” in the later trade mark is particularly memorable and this is complemented by the apron device. In the light of this, it is difficult to see how the later trade mark would be seen as another brand of the earlier trade mark – the differences are too great. At best the application may bring the earlier mark to mind. But as per the guidance above, this is not sufficient. There is also, therefore, no likelihood of indirect confusion. As such, the ground of opposition based upon Section 5(2)(b) fails in its entirety.

Final Remarks

30. In its submissions, the opponent argues that the applicant is new to the pet care industry. This is of concern to the opponent as damage could be caused to its business (with the use of a name containing a coincidental element) should the service provided by the applicant not be of a sufficiently high standard. This argument appears to be akin to a claim under Section 5(3). However, this has not been included in these proceedings and so must be dismissed. Further, it may be that the opponent intended this line of argument to provide support for its claim in respect of Section 5(4)(a). However, as

already stated above, no evidence was filed in respect of this ground and so this will also be dismissed.

COSTS

31. The applicant has been successful and is entitled to a contribution towards its costs. It is noted that the applicant is unrepresented. As such, they were sent a pro forma in which provide details of costs incurred during these proceedings. The applicant submitted a pro forma indicating that a total of 3 hours and 40 minutes time was spent defending these proceedings. Using the agreed rate of £19 per hour, I therefore award to applicant £69 as a contribution towards the cost of the proceedings.

32. I therefore order Dawn Jarrett to pay PurrMaids Mobile Cattery Limited the sum of £69. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated this 13th day of February 2019

Louise White
For the Registrar