

O-439-19

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3331103

BY UKBD OUTLET LTD

TO REGISTER THE FOLLOWING TRADE MARK

IN CLASS 25:



AND

OPPOSITION THERETO UNDER NO. 414528

BY G. & G. S.R.L.

Backgrounds and pleadings

1. On 12 August 2018, UKBD OUTLET LTD (“the applicant”) applied to register the mark shown on the cover page of this decision for a range of goods in class 25.
2. The application was accepted and published for opposition purposes on 31 August 2018.
3. The application is opposed by G. & G. S.r.l. (“the opponent”). The opposition, which is directed against all of the goods in the application, was initially based upon grounds under Sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The claim made under Section 5(4)(a) was subsequently struck out because the opponent did not file any evidence to support the opposition based on that ground and the opposition continued under Section 5(2)(b) only. The ground of opposition under Section 5(2)(b) of the Act is based on European Trade Mark registration number 15115926 for the mark:

BD BAGGIES

4. The mark was applied for on 16 February 2016 and registered on 8 July 2016 in respect of a range of goods in classes 3, 9, 16, 18 and 25, all of which the opponent states it is relying on. The opponent claims that the marks are similar and that the goods covered by the applicant’s mark are identical to the class 25 goods covered by the earlier mark, leading to a likelihood of confusion on the part of the public. Therefore, registration of the contested mark should be refused under Section 5(2)(b) of the Act.
5. The trade mark upon which the opponent relies qualifies as earlier trade mark, in accordance with section 6 of the Act. As this mark had not completed its registration process more than 5 years before the publication date for the application in issue in these proceedings, it is not subject to proof of use pursuant to section 6A of the Act.
6. In these proceedings, the opponent is represented by Bromhead Johnson, the applicant represents itself.

7. Only the opponent filed evidence. This will be summarised to the extent that it is considered necessary. Neither party asked to be heard nor did they file written submissions in lieu of attendance at a hearing. This decision is reached following careful consideration of the papers.

DECISION

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

“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,

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

9. 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 goods

10. Although the opponent states that it relies on all of the goods for which the earlier mark is registered, it focuses on the goods in class 25. I shall therefore consider these goods first:

The applied for goods	The opponent's goods
<p>Class 25: <i>Men's Clothes; Baby Clothes; Women's Clothes; Anti-sweat underclothing; Anti-sweat underwear; Après-ski boots; Apres-ski shoes; Aprons; Aprons [clothing]; Aqua shoes; Arm warmers [clothing]; Army boots; Articles of clothing; Articles of clothing for theatrical use; Articles of clothing made of hides; Articles of clothing made of leather; Articles of outer clothing; Articles of sports clothing; Articles of underclothing; Ascots; Ascots (ties); Athletic clothing; Athletic footwear; Athletic shoes; Athletic tights; Athletic uniforms; Athletics footwear; Athletics hose; Athletics shoes; Athletics vests; Babies' clothing; Babies' outerclothing; Babies' pants [clothing]; Babies' pants [underwear]; Babies' undergarments;</i></p>	<p>Class 25: <i>Clothing; Outerwear; Sportswear; Knitwear; Underwear; Nightwear; Beachwear; Ties; Hosiery; Scarves; Gloves; Belts; Pocket squares; Footwear; Headwear.</i></p>

Babushkas; Baby bibs [not of paper]; Baby bodysuits; Baby boots; Baby bottoms; Baby clothes; Baby layettes for clothing; Baby pants; Baby sandals; Baby tops; Balaclavas; Ball gowns; Ballet shoes; Ballet slippers; Ballet suits; Ballroom dancing shoes; Bandanas; Bandanas [neckerchiefs]; Bandannas; Bandeaux [clothing]; Barber smocks; Baseball caps; Baseball caps and hats; Baseball hats; Baseball shoes; Baseball uniforms; Baselayer bottoms; Baselayer tops; Basic upper garment of Korean traditional clothes [Jeogori]; Basketball shoes; Basketball sneakers; Bath robes; Bath sandals; Bath shoes; Bath slippers; Bathing caps; Bathing costumes ;Bathing costumes for women; Bathing drawers; Bathing suit cover-ups; Bathing suits; Bathing suits for men; Bathing trunks; Bathrobes; Bathwraps; Beach clothes; Beach clothing; Beach cover-ups; Beach footwear.

11. In its counterstatement the applicant states (reproduced as written):

“The opponent’s goods and services is very confusing such as “clothing” could not mention anything such as whether it’s men’s; women’s or child.

My goods and services is very specific as I mentioned above such as “Men’s Clothes, Women’s Clothes.

Therefore my [the Applicant’s] goods and services totally different from the opponent.”

12. The applicant's argument cannot be accepted. Firstly, "Clothing" is a pre-approved term within class 25 and the opponent was not required to specify the sub-categories of clothing in relation to which it wished to use the mark. Secondly, in *Gérard Meric v OHIM*, Case T- 133/05, the General Court (GC) expressly addressed that goods can be considered as identical when the goods designated by the trade mark application are included in a more general category designated by the earlier mark, or vice versa. I approach the comparison on that basis.

13. The contested *Men's Clothes; Baby Clothes; Women's Clothes; Anti-sweat underclothing; Anti-sweat underwear; Aprons; Aprons [clothing]; Arm warmers [clothing]; Articles of clothing; Articles of clothing for theatrical use; Articles of clothing made of hides; Articles of clothing made of leather; Articles of outer clothing; Articles of sports clothing; Articles of underclothing; Athletic clothing; Athletic uniforms; Athletics vests; Babies' clothing; Babies' outerclothing; Babies' pants [clothing]; Babies' pants [underwear]; Babies' undergarments; Baby bibs [not of paper]; Baby bodysuits; Baby bottoms; Baby clothes; Baby layettes for clothing; Baby pants; Baby tops; Ball gowns; Ballet suits; Bandeaux [clothing]; Barber smocks; Baseball uniforms; Baselayer bottoms; Baselayer tops; Basic upper garment of Korean traditional clothes [Jeogori]; Bath robes; Bathing costumes; Bathing costumes for women; Bathing drawers; Bathing suit cover-ups; Bathing suits; Bathing suits for men; Bathing trunks; Bathrobes; Bathwraps; Beach clothes; Beach clothing; Beach cover-ups*; fall within the broad terms *Clothing; Outerwear; Sportswear; Underwear* or *Beachwear* in the opponent's specification. As such, these goods are considered identical on the principle outlined in *Meric*.

14. The opponent's *Footwear* encompasses anything that covers the foot, including socks. Consequently, the contested *Après-ski boots; Apres-ski shoes; Aqua shoes; Army boots; Athletic footwear; Athletic shoes; Athletic tights; Athletics footwear; Athletics hose; Athletics shoes; Baby boots; Ballet shoes; Ballet slippers; Baby sandals; Ballroom dancing shoes; Baseball shoes; Basketball shoes; Basketball sneakers; Bath sandals; Bath shoes; Bath slippers; Beach footwear* overlap with and are identical to the opponent's *Footwear* and *Hosiery* and are also considered identical on an inclusion basis (*Meric*).

15. The contested *Ascots; Ascots (ties)* are encompassed by the term *Ties* in the opponent's specification and are to be regarded as identical (*Meric*).

16. The contested *Babushkas; Balaclavas; Bandanas; Bandanas [neckerchiefs]; Bandannas*; are items worn tied around the head or neck. As such, they fall within the terms *Scarves* and *Headwear* in the opponent's specification and so are identical (*Meric*).

17. The contested *Baseball caps; Baseball caps and hats; Baseball hats; Bathing caps*; are clearly encompassed by the term *Headwear* in the opponent's specification and are also considered identical (*Meric*).

The average consumer and the nature of the purchasing act

18. 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 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.”

19. The goods at issue are broadly speaking clothing, footwear and headwear. The average consumer is a member of the general public. Such goods will typically be offered for sale in retail outlets, in brochures and catalogues as well as on the internet.

20. The initial selection is therefore primarily visual¹. I accept that more expensive items of clothing, footwear and headgear may, for example, be researched or discussed with a member of staff or be made to measure. The latter, along with personal recommendations, bring aural considerations into play.

21. Clearly, the average consumer's level of attention will vary depending on the cost and nature of the item at issue. However, to my mind even when selecting routine inexpensive items for personal use such as socks/slippers/caps the average consumer will pay attention to considerations such as size, colour, fabric and cost, all of which suggest a medium degree of attention.

Distinctive character of earlier mark

22. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*²⁶, 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

¹ *New Look Ltd v OHIM*, Cases T-117/03 to T-119/03 and T-171/03

originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

23. No evidence of use has been filed by the opponent, so I have only the inherent distinctiveness of the mark to consider.

24. The earlier mark consists of the words BD BAGGIES. The opponent claimed that the letters BD are distinctive and that the word BAGGIES is descriptive for clothing. In this connection, it adduced evidence relating to the meaning of the word BAGGIES. This consisted of a witness statement by Ross Timothy Manton, a partner in the firm of Bromhead Johnson, the opponent’s representative. Mr Manton exhibited the following material:

- Exhibit RTM1: consists of screenshots from various websites including:
 - (a) an extract from Wikipedia displaying the following text: “Baggies (clothing) - "Baggies" was a name given to a particular type of jean in the early 1980s in the United Kingdom. The jeans were designed to be loose fitting around the leg, with a tight zip or button around the ankle, and had a number of zips with pockets primarily down the front of the jean. Typically, there may have been ten or more pockets on the front of the jeans. They would frequently be worn with another 1980s fashion accessory, the day-glo sock, which was a terry towelling sock typically coloured in bright yellow, pink, or light blue. Before the popular 'baggy clothing' introduced by MC Hammer of the late '80s and early '90s, there was the dress style Baggies. This style of clothing is best symbolized as dress style clothing. The most fashionable representation of these type of outfits was the pants along with a dress shirt, a thin tie, a fancy blazer coat and dress shoes. The best example of this clothing and outfits were worn by the Minneapolis based band known as "The Time" (headed by frontman Morris Day);
 - (b) an extract from dictionary.com giving the following definition: “baggies”: 1. Loose-fitting swimming trunks, often with a drawstring at the waist,

especially as worn by surfers; 2. Loose-fitting slacks, especially women's slacks gathered at the waist and tapering towards the ankles”;

(c) an extract from Oxford Living Dictionaries² giving the following definition: “baggy”: Adjective – 1. (of clothing) loose and hanging in folds ‘*baggy trousers*’; 2. Noun (baggies) *informal* loose, wide-legged trousers or shorts”;

(d) an extract from Merriam-Webster³ giving the following definition: “baggies” plural noun - baggy pants or shorts; baggies - trademark- used for transparent plastic bags”.

25. The applicant did not comment on this evidence.

26. Whilst I think that most UK consumers of clothing will be familiar with the expression 'baggy clothing', I am not sure that the same consumers will be familiar with the expression BAGGIES or that they will readily understand BAGGIES as meaning loose-fitting clothing, trousers or shorts. Dictionary.com and Merriam-Webster are American-based dictionary websites and although the term BAGGIES may be used in American English, there is no evidence that it was commonly used in the UK at the relevant date to denote a particular style of clothing. I should also add that, as the opponent's evidence showed, the first and main result of a search for the term BAGGIES on English Oxford Living Dictionary returned BAGGY as the most recognised word. The same result indicated that BAGGIES has the meaning informal for “loose, wide-legged trousers or shorts”; however, this was the least recognised meaning and no details have been given as to the actual frequency of use of the word BAGGIES in the UK.

27. In my view, it is telling that two of the dictionary definitions exhibited by the opponent are from American-based online dictionaries. It is also telling that the only dictionary definition which could (arguably) relate to the UK⁴, namely the one from English Oxford Living Dictionary, identified BAGGY as the most recognised word.

² The website address is not visible

³ The website address is not visible

⁴ The page says “Home>British & World English>baggy – Definition of baggy in English”

Though the word might be used in current American English, it is not the same as the English spoken in the UK.

28. Finally, as regards the extract from Wikipedia there are two issues. Firstly, Wikipedia is not a reliable source of information as it is freely editable⁵ so it has limited probative value. Secondly, even if I were to give some weight to the evidence that "Baggies" was a name given to a particular type of jean in the early 1980s in the United Kingdom, I am not prepared to take judicial notice of the fact that the average consumer of clothing in the UK would have been aware of this at the relevant date⁶.

29. In conclusion, I dismiss the opponent's argument that the UK average consumer will understand the word BAGGIES in the earlier mark as descriptive for the goods.

30. Likewise, I do not accept (and the opponent made no specific submission on the point) that BAGGIES will be taken as a synonym for 'baggy clothes'. This is particularly true in relation to the earlier *Underwear; Nightwear; Beachwear; Ties; Hosiery; Scarves; Gloves; Belts; Pocket squares; Footwear; Headwear* for which the association with 'baggy clothes' would not even be made. I have also considered that the opponent's mark could be used in relation to loose-fitting articles of clothing. However, my conclusion is that, even in that context, the element BAGGIES could, at most, be said to evoke the concept of 'baggy clothes', but this would not in any way mean that BAGGIES is a usual term for it and the word would still be a distinctive element of the mark.

31. As regards the distinctiveness of the element BD, I propose to approach the matter from the point of view of the Registry's practice in relation to abbreviations, acronyms or initials as set out in the Work Manual (version published at the time of writing). This indicates that:

⁵ Case T -344/07 O2 (*Germany*) GmbH & Co. OHG v OHIM, at § 46: "Furthermore, the finding made by the examiner on the basis of information from Wikipedia must also be disregarded since, as it is based on an article from a collective encyclopaedia established on the internet, whose content may be amended at any time and, in certain cases, by any visitor, even anonymously, such a finding is based on information lacking certainty."

⁶ *Chorkee Ltd v Cherokee Inc.*, Case BL O-048-08

“Trade marks consisting of abbreviations, acronyms or initials will be accepted unless research indicates that the letters represent descriptive words used in trade to denote the goods and/or services intended for protection.”


32. There is nothing to suggest that the letters BD are, or would be regarded as, descriptive or otherwise non-distinctive in relation to the registered goods in class 25. That said, the element BD is a two-letter combination and whilst I do not consider it appropriate to pitch its distinctiveness at only a very low level, I do not think that it would strike the average consumer as particularly distinctive. The mark I have to consider is, in any case, not simply BD but BD BAGGIES. I come to the view that the combination BD BAGGIES as a whole is distinctive to a medium degree.

Comparison of marks

33. 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.”

34. 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 impression created by the marks. The marks to be compared are:

Earlier mark	Application
BD BAGGIES	

35. The opponent's mark consists of the words BD BAGGIES, written in capital letters. The overall impression of the marks lies in the combination of these two elements, with neither element dominating.

36. The applied for mark is made up of the letters UKBD written in upper case and the getup (including the colour contrast) applied to those components. The letters UK and BD are stylised differently: the detailing in the letters UK is the Union Jack, that in the letters BD is a colour pattern consisting of a green background with a red semi-circle in each letter. Due to the colour contrast, the mark breaks down fairly naturally into its component elements, i.e. UK and BD. The letters UKBD have the greatest relative weight in the overall impression because this is how the mark will be memorised and referred to. Nevertheless, since the get-up reinforces how the mark is made up and gives the mark a particular visual impact, it will still play a role.

37. The opponent argued that the letters BD is the most distinctive element. It states:

“10. Accordingly, the distinctiveness of the Applicant's mark relies very heavily on the letters BD. Those letters are represented in a very different colour scheme in the mark applied for, whereby they are clearly presented to the relevant public as a separable distinctive element of the mark. Some members of the relevant purchasing public might understand that the letters BD constitute the ISO standard two-letter abbreviation for Bangladesh and that the green and red colouration of those letters in the mark applied for could be seen to evoke the Bangladeshi flag. In the Opponent's submission, however, a substantial proportion of the relevant public would not make such a connection and would, rather, understand the "BD" element of the Applicant's mark as having no meaning, save as an indicator of trade origin.

11. The Applicant alleges that it is "unreasonable and unrealistic" to regard the mark applied for as being comprised of two separable elements - UK and BD. However, the Applicant contradicts its own assertion in this regard by also stating: "The point of conceptual similarity with my mark 'UKBO' is that our goods [are] imported from BD (Bangladesh to United Kingdom), so that the relevant purchaser can recognise[d] without any confutation". As noted in paragraph 10 above, the average consumer of the goods in question will not necessarily grasp the intended significance of the "BD" element of the Applicant's mark but will undoubtedly understand the significance of the "UK" element. In spite of the Applicant's assertions to the contrary, therefore, the "BD" element does indeed constitute a readily recognisable and separable distinctive element of the mark applied for."

38. I agree with the opponent that whilst some UK consumers may recognise that the letters BD in the applicant's mark are used to signify Bangladesh (a reference that is reinforced by the colours of the letters BD, which evoke those of the flag of Bangladesh), a substantial proportion of the general public will not. For those consumers who will perceive the element BD as a reference to Bangladesh, the overall impression of the mark will be that of a combination of four letters, UKBD, which stands for UNITED KINGDOM – BANGLADESH. For the other group of consumers, i.e. those who will not perceive the existence of a link between BD and Bangladesh, the overall impression of the mark will still be that of an combination of four letters, however, whilst consumers will still recognise UK as an abbreviation for United Kingdom, they will not attribute any meaning to the letter BD beyond that of being a combination of two letters. Either way, the verbal element of the mark will be memorised as UKBD. As regards the opponent's argument that BD is the most distinctive element and UK has the least relative weight, I do not accept it. This is because (a) the letters UK blend in the mark as a whole and are not placed in a subsidiary position so the average consumers will concentrate of the combination UKBD as a whole and (b) the element BD is not visually dominant, and whatever is the significance that will be attributed to it, it does not have an autonomous function.

Visual similarity

39. Visually, the marks at issue coincide in the two-letter combination BD. They differ in that the element BD (a) is situated at the end of the applied for mark and at the beginning of the earlier mark respectively; (b) is presented as ornamented in the applied for mark and as plain letters in the earlier mark and (c) both marks contain additional elements, namely the (stylised) letter UK in the applied for mark and the word BAGGIES in the earlier mark. In my view the marks are visually similar to a low degree.

Aural similarity

40. Aurally, the applied for mark will be pronounced as four separate letters U-K-B-D without any significant pause between each letter. The earlier mark will be pronounced as B-D – B-GHIES with a longer pause between the two elements. The marks are similar to a low degree.

Conceptual similarity

41. I have already touched upon the significance of the marks. As regards the applied for mark, for some consumers the letters UKBD will be understood as an abbreviation for United Kingdom/Bangladesh. For others, the letters UK will still be seen as an abbreviation for United Kingdom, but the letters BD will have no meaning in the absence of any verbal reference in the mark to what the letters stand for.

42. Moving to the earlier BD BAGGIES mark, it will be understood as BAGGIES from BD, though neither of these elements will convey a clear concept, the word BAGGIES not being an ordinary English word and the abbreviation BD having no meaning.

43. For those consumers who will understand the letters UKBD as an abbreviation for United Kingdom/Bangladesh, the marks are conceptually different. For the other group of consumers who will see BD as a random combination of two letters with no meaning, to the extent that the same combination is incorporated in both marks and might be said to convey the concept of the same two letter combination (if that can be said to be a concept), the marks are similar, at best, to a very low degree.

Likelihood of confusion

44. 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 goods and vice versa. I must also keep in mind the average consumer for the goods, 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.

45. 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.”

46. Earlier in my decision I found that the parties' goods are identical. The goods will be selected visually with an average degree of attention. The marks are visually and

aurally similar to a low degree. Conceptually, the marks are either different or similar to, at best, a very low degree. The earlier mark is distinctive to an average degree.

47. Whilst I acknowledge that consumers rarely have the opportunity to compare marks side by side and must instead rely on the imperfect picture that they have kept in mind, even applying this principle, it seems unlikely that the opponent's mark would be recalled so imperfectly for it to be directly mistaken for applied for mark. **There is no direct confusion.** This seems to be impliedly accepted by the opponent, who based its argument on confusion on the proposition that given the presence of the letters BD in the applied for mark there is a risk of indirect confusion, because, it said, consumers are likely to assume that the applicant's mark is a UK version of, or an authorised UK outlet for, the opponent's goods. Reference is made to a decision involving the marks TREK and ALLTREK, however, the reference given refers to a different case and, in any event, the proceedings at issue involve different marks.

48. In my view, the applicant's argument that, since the BD element of the earlier mark is reproduced in its entirety in the applied for mark, there is likelihood of confusion cannot be accepted. This is true in relation to those consumers who will see in the applied for mark a reference to Bangladesh, because that reference has no counterpart in the earlier mark. But, equally, even in relation to the other group of consumers who will perceive the letters BD in the earlier mark just as letters, there will be no likelihood of indirect confusion. This is because (1) the overall impression created by the marks, taking into account the dominant and distinctive components, is different (2) the average consumer will not ascribe any specific meaning to the letters 'BD' in 'UKBD' or in 'BD BAGGIES' and even if (s)he were to be aware of the existence of the earlier 'BD BAGGIES' mark, (s)he would put the presence of the letters 'BD' in both marks down to coincidence rather than associate it with the same commercial origin. **There is no likelihood of indirect confusion**⁷.

CONCLUSION

49. The opposition fails.

⁷ For the sake of completeness, I should say that the applicant has provided 'state of the registry evidence', however, this is irrelevant in principle and I have disregarded it.

COSTS

50. The applicant has been successful and is entitled to an award of costs. As the applicant is not professionally represented he was contacted at the conclusion of the evidence rounds asking him to complete a costs pro-forma if he wished to claim costs. The applicant did not respond to the invitation. Consequently, I make no award of costs.

Dated 26 July 2019

Teresa Perks

For the Registrar

The Comptroller – General