

**O-496-20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3449822 BY  
BRADLEY CHURCHILL**

**TO REGISTER:**

**Indigo aura**

**AS A TRADE MARK IN CLASS 25**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 600001359 BY  
Q-STYLE LIMITED**

## Background & pleadings

1. On 7 December 2019, Bradley Churchill (“the applicant”) applied to register the trade mark **Indigo aura** for the goods shown in paragraph 14 below. The application was published for opposition purposes on 13 December 2019.

2. On 12 March 2020, the application was opposed under the fast track opposition procedure by Q-Style Limited (“the opponent”). The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), with the opponent relying upon all the goods (also shown in paragraph 14 below) in United Kingdom trade mark no. 3212740 for the series of two trade marks shown below, which have filing dates of 14 February 2017 and which were registered on 7 July 2017. In its Notice of opposition, the opponent indicates that it is only relying upon the second trade mark shown:



aura



aura

3. The applicant filed a counterstatement in which it denies there is a likelihood of confusion.

4. In these proceedings, the opponent is represented by Barron Warren Redfern and the applicant by Trade Mark Wizards Limited.

5. Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

6. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.

7. In an official letter dated 7 July 2020, the parties were allowed until 4 August 2020 to seek leave to file evidence or request a hearing and until 7 September 2020 to provide written submissions. In a letter dated 4 August 2020, the applicant wrote to the Tribunal seeking leave to both file evidence and attend an oral hearing. The following paragraph explains the basis of the applicant’s request:

“Reasons for filing evidence and attending an oral hearing

Our client believes that his position will be enhanced if he is given permission to file focussed evidence demonstrating the use of the sign ‘AURA’ (the “Sign”) in the market for clothing, the number of trade marks that contain the word “AURA” on the trade mark register and to put forward supporting oral submissions at a hearing. It is his position that there is use of the Sign in the clothing market, both on its own and as part of composite marks, such that the inherent distinctiveness of the Device is low and arises solely from the decorative elements, which are absent from the Mark.”

8. In an email dated 6 August 2020, the opponent indicated that it objected to the applicant’s request. In an official letter dated 25 August 2020, the Tribunal stated:

“Having taken into account the application by the applicant for leave to file evidence and to request an oral hearing, the application is refused. In reaching this decision I take account of TPN 2/2013 and note that the Applicant is not arguing that the marks have existed side by side in the same

part of the UK market for a significant period of time without confusion arising or that it has attained a substantial goodwill in its trade mark. I note that the Opponent's earlier mark is not subject to proof of use and the Applicant has not submitted that it requires to file evidence so that it can challenge the evidence of fact submitted by the Opponent. The goods relied upon in the application and the opposition are straight forward clothing items within class 25 and are not regarded as specialised goods such that evidence of fact regarding the nature of the goods would assist the registrar in its decision.

The opposition is based on section 5(2)(b) and therefore the presence of other trade marks on the register using the word "aura" will not assist the decision in whether confusion exists between the marks at issue. The fact that there are other marks on the market using the word Aura does not necessarily demonstrate that there has (or has not been) confusion between the marks at issue, nor that the distinctive character of the Opponent's trade mark has been weakened in the marketplace because of the frequent use of marks which include the Aura element either on its own or as part of their mark.

In light of para 8 I do not consider that sufficient reasons have been provided by the Applicant such that an oral hearing is necessary or to justify granting leave for it to file evidence. Written arguments would be regarded as being sufficient in order to dispose of the case justly and proportionately."

9. The parties were allowed until 8 September 2020 to request a hearing in relation to the above decisions; no hearing was requested. Both parties filed written submissions which I will refer to, as necessary, later in this decision.

## **DECISION**

10. 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.

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

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

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

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

12. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As this earlier trade mark had not been registered for more than five years at the date the application was filed, it is not subject to the proof of use provisions contained in section 6A of the Act. The opponent is, as a consequence, entitled to rely upon it in relation to all of the goods indicated without having to prove that genuine use has been made of it.

## Section 5(2)(b) – case law

13. 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 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 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**

14. The competing goods are as follows:

<b>The opponent's goods</b>	<b>The applicant's goods</b>
<b>Class 25</b> - Lingerie; brassieres; articles of underclothing; swimwear; dancewear, all being articles of clothing; leotards; articles of thermal clothing; articles of sports clothing.	<b>Class 25</b> - Clothing and accessories.

15. 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”.

16. In *Gérard Meric v Office for Harmonisation in the Internal Market*, 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. As the term “clothing” in the applicant’s trade mark is broad enough to include all the goods in the opponent’s specification, the competing goods are to be regarded as identical on the principles outlined in *Meric*. Insofar as the term “accessories” in the applicant’s specification is concerned, as the opponent points out, these are accessories for clothing which are proper to class 25. Considered on that basis, if not identical, when one considers the overlap in, inter alia, the nature, intended purpose, method of use, trade channels and complementary relationship that is likely to exist, the applicant’s “accessories” are to be regarded as similar to the opponent’s goods to a high degree.

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

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 such 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.”

19. The average consumer of clothing is a member of the general public. As a member of the general public will, for the most part, self-select such goods from the shelves of a bricks-and-mortar retail outlet or from the equivalent pages of a website or catalogue, visual considerations are likely to dominate the selection process. That said, as such goods may also be the subject of, for example, word-of-mouth recommendations or oral requests to sales assistants (both in person and by telephone), aural considerations must not be forgotten.

20. As to the degree of care the average consumer will display when selecting the goods at issue, in its Notice of opposition, the opponent states that:

“7...The purchase of such goods will be made with a higher degree of care to ensure the right purchase is made to meet the consumer’s likes and needs.”

21. However, in its written submissions, it characterises the level of attention as “average at best.” In its submissions, the applicant concludes the level of attention paid by the average consumer to the selection of the goods at issue would be “average.” While I agree the cost of such goods can vary considerably, as the average consumer will be alive to factors such as cost, size, colour, material and compatibility with other items, the average consumer can, in my view, be expected to pay at least an average degree of attention to their selection. As the cost and/or


importance of the item increases, so too is likely to be the degree of care paid to its selection

### Comparison of trade marks

22. 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 CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*:

“.....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.”

23. It would be wrong, therefore, artificially to 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. The competing trade marks are as follows:

The opponent's trade mark	The applicant's trade mark
	Indigo aura

24. Although presented in a stylised font, the opponent's trade mark will, I am satisfied, be understood by the average consumer as the word "aura" (meaning "a quality or feeling that seems to surround a person or place or to come from them" -

collinsdictionary.com). I am further satisfied that the average consumer will be very familiar with that meaning. Although the stylisation will contribute to the overall impression conveyed as, to a much lesser extent, will the device which appears on the tail of the final letter “a”, it is the word “aura” which has by far the highest relative weight in the overall impression the trade mark conveys and it is in this word the vast majority of the distinctiveness lies.

25. The applicant’s trade mark consists of the word “Indigo” presented in title case accompanied by the word “aura” presented in lower case. In its written submissions, the opponent states:

“10...The word INDIGO serves only as a qualifying adjective for the word AURA, especially given the known association and meaning of INDIGO within the range of shades of the colour BLUE. Clearly, colour is a key descriptive indicator for the goods in question.”

26. In its written submissions, the applicant states:

“10. In this case, the average consumer will pay greater attention to the dominant and inherently distinctive word “Indigo” with the word “aura” holding much less significance as it appears at the end of the sign.”

27. Collinsdictionary.com defines “indigo” as “something that is indigo is dark purplish-blue in colour.” Once again that is a definition with which the average consumer will be very familiar. Although the word “Indigo” will contribute to the overall impression the applicant’s trade mark conveys, given the goods at issue in which colour is a key consideration, I agree with the opponent that it is most likely to be viewed by the average consumer as descriptive in nature. As a consequence, it will have, at best, a low relative weight in the overall impression conveyed. In those circumstances, it is the word “aura” which has the highest relative weight in the overall impression conveyed and it is in that word the distinctiveness lies.

### **Visual similarity**

28. Given my comments above regarding the word “Indigo” and despite the stylisation present in the opponent’s trade mark, it results in what I regard as a medium degree of visual similarity between the trade marks at issue.

### **Aural similarity**

29. Despite its stylisation, the opponent’s trade mark will be articulated as the word “aura”. As the word “aura” and its meaning will be well known to the average consumer, how it will be articulated is predictable. As the same word in the applicant’s trade mark will be articulated in an identical fashion, those elements are aurally identical. Given its descriptive significance, it is, in my view, arguable as to whether the word “Indigo” will be articulated by the average consumer. If the average consumer does not articulate the word “Indigo”, the trade marks at issue would be aurally identical. However, if the word “Indigo” is articulated, the competing trade marks would be aurally similar to a medium degree.

### **Conceptual similarity**

30. As I mentioned above, the word “aura” and its meaning will be well known to the average consumer. Also as mentioned above, the average consumer will be familiar with the meaning of the word “Indigo”. I agree with the applicant that when taken as a whole the words “Indigo aura” do not “have any discernible meaning in the English language” (paragraph 14 of its written submissions refer). However, as the word “aura” in both trade marks will evoke an identical concept and as the word “Indigo” in the applicant’s trade mark will be perceived by the average consumer as a colour, the competing trade marks are conceptually similar to a fairly high degree.

### **Distinctive character of the earlier trade mark**

31. 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 – *Rewe Zentral AG v*

*OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

32. As the applicant was refused leave to, inter alia, file evidence going to the issues mentioned in paragraph 7 above, those arguments will play no part in my decision. As the opponent has filed no evidence of any use it may have made of the trade mark upon which it relies, I have only its inherent characteristics to consider.

33. Having stated in its Notice of opposition that its trade mark is: “distinctive of the goods to at least a medium degree if not a high degree” (paragraph 5), in its written submissions, the opponent states:

“20. The opponent asserts that the word AURA, having no meaning whatsoever relative to clothing, is highly distinctive per se...”

34. Although a dictionary word, as the word “aura” is neither descriptive of nor non-distinctive for the goods at issue, it enjoys a fairly high degree of inherent distinctive character. Although the stylisation present in the trade mark improves the position further, it does not do so to any material extent.

### **Likelihood of confusion**

35. 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. 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 trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

36. 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. Earlier in this decision I concluded:

- Where not identical, the competing goods are similar to a high degree;
- The average consumer is a member of the general public who, whilst not forgetting aural considerations, will select the goods at issue by predominantly visual means whilst paying at least an average degree of attention during that process;
- The competing trade marks are visually similar to a medium degree, aurally similar to at least a medium degree and conceptually similar to a fairly high degree;
- The earlier trade mark is possessed of a fairly high degree of inherent distinctive character.

37. 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.”

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

39. In reaching a conclusion, I begin by reminding myself of my conclusions in paragraph 36 above. Having done so, the presence of the word “Indigo” in the applicant’s trade mark and the degree of stylisation present in the opponent’s trade mark, is, I think, unlikely to lead an average consumer paying at least an average degree of attention during the selection process (who is, as a consequence, less prone to the effects of imperfect recollection) to directly confuse the competing trade marks.

40. Much more likely, in my view, is that an average consumer who has noticed the competing trade marks are different, will simply assume that, for example, the applicant’s trade mark is a variant brand being used by the opponent or a related undertaking to promote a specific range of its “aura” goods which are indigo in colour. As that will result in a likelihood of indirect confusion, the opposition succeeds.

### **Concluding remarks**

41. In reaching the above conclusions, I have not overlooked the decision of the Opposition Division of the EUIPO in proceedings no. B281313 which the applicant brought to my attention in its written submissions. In that decision, the Opposition Division concluded that there was no likelihood of confusion between the trade marks “AURA” (figurative) and “AVON DOLCE AURA” in relation to goods in class 3.

While the above decision is, of course, not binding upon me, given my conclusion in relation to the word “Indigo”, it does not assist the applicant in these proceedings in any case.

## **Conclusion**

**42. The opposition has succeeded and, subject to any successful appeal, the application will be refused.**

## **Costs**

43. As the opponent has been successful, it is entitled to an award of costs. Awards of costs in fast track opposition proceedings are governed by Tribunal Practice Notice (“TPN”) 2 of 2015. In its written submissions, the opponent stated:

“23. In addition to refusal, the Opponent asks for an award of costs taking account the additional time and effort caused by the request to seek leave to file evidence and attend a hearing, especially if the Applicant seeks a hearing to argue against the Registrar’s refusal of such leave to file.”

44. As the applicant did not request a hearing to challenge the Tribunal’s decision to refuse leave, the second part of the above paragraph does not apply. Although refused by the Tribunal, the applicant was entitled to make the request it did. Although the opponent elected to object to that request, given the nature of its objections, I think it highly unlikely that it would have resulted in any significant extra expenditure on the opponent’s part. As a consequence, I shall make no additional award in this regard.

45. Applying the guidance in that TPN and bearing in mind the degree of overlap in the opponent’s Notice of opposition and written submissions, I award the opponent costs on the following basis:

Filing a Notice of opposition and reviewing      £200  
the counterstatement:



Official fee:	£100
Written submissions:	£100
<b>Total:</b>	<b>£400</b>

46. I order Bradley Churchill to pay to Q-Style Limited the sum of **£400**. This sum is to be paid within twenty one days of the expiry of the appeal period or within twenty one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 6th day of October 2020

**C J BOWEN**  
**For the Registrar**