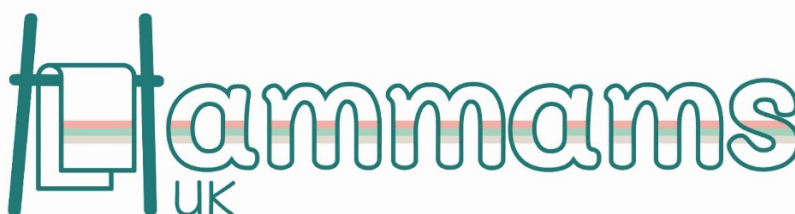


**O/572/20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003407124 BY  
BRIDPORT RESPONSIVE DELIVERY LTD  
TO REGISTER THE FOLLOWING TRADE MARK:**



**AS A TRADE MARK IN CLASS 24**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. 417908**

## **Background and Pleadings**

1. On 16 June 2019, Bridport Responsive Delivery Ltd (“the Applicant”) filed an application to register the trade mark shown on the cover page of this Decision, number 3407124, for *towels* in class 24. The application was published for opposition purposes in the *Trade Marks Journal* on 28 June 2019.
2. On 30 September 2019, EKE TEKSTİL KONFEKSİYON TURİZM SANAYİ VE TİCARET ANONİM ŞİRKETİ (“the Opponent”) filed an opposition based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The Opponent relies on the following earlier trade mark registration for its section 5(2)(b) ground:

UK3194861

hamam

Filing date: 03 November 2016; Date registration completed: 17 February 2017.

Relying on its registered goods and services in the following classes:

Class 24: Textiles and textile goods, not included in other classes; bed covers; table covers; textile linings, namely, linen lining fabric for shoes, textile used as lining for clothing; buckram; filtering materials of textile, namely, chemical fiber fabrics, synthetic fiber fabrics, inorganic fiber mixed fabrics all for use in filtering liquids and powders; quilts of textile, woolen blankets; bath mitts, bath linen, hand towels, face towels of textile, bathing towels; travelling rugs, namely, lap rugs; curtains of textile, shower curtains of textile, shower curtains of plastics; oilcloth for use as table cloths; bed blankets, bed sheets, bedspreads, bed linen, diapered linen, pillowcases, quilt covers; furniture coverings of textile, namely, unfitted fabric furniture covers; upholstery fabrics; table napkins of textile; bed covers of paper.

Class 25: Clothing, namely, trousers, jackets, overcoats, coats, skirts, suits, jerseys, waistcoats, shirts, ready-made leather linings (parts of clothing), T-

shirts, sweatshirts, dresses, bermuda shorts, shorts, pajamas, pullovers, jeans, tracksuits, rainwear, beachwear, bathing suits, swimming suits; clothing for sports (for exclusive use for sports), clothing for babies, namely, shirts, pants, coats, dresses; underclothing, namely, boxer shorts, brassieres, briefs, pants; socks; clothing; footwear, namely shoes excluding orthopedic shoes, sandals, waterproof boots, walking boots, booties, sporting shoes, slippers; shoe parts namely heelpieces, insoles for footwear, footwear uppers; Headgear, namely caps, skull caps, sports caps, hats, berets; gloves (clothing), stockings, belts (clothing), camisoles, sarongs, scarves, neck scarves, shawls, collars, neckties, ties, suspender belts; bathing costumes; bath robes; bathing suits; bath slippers.

Class 27: Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile); bath mats; tapestries of textile.

Class 35: Advertising; business management; business administration; office functions; the bringing together, for the benefit of others of textiles, bed covers, table covers, textile linings, namely, linen lining fabric for shoes, textile used as lining for clothing, buckram, filtering materials of textile, namely, chemical fiber fabrics, synthetic fiber fabrics, inorganic fiber mixed fabrics all for use in filtering liquids and powders, quilts of textile, woolen blankets, bath mitts, bath linen, hand towels, face towels of textile, bathing towels, tapestries of textile, travelling rugs, namely, lap rugs, curtains of textile, shower curtains of textile, shower curtains of plastics, oilcloth for use as table cloths, bed blankets, bed sheets, bedspreads, bed linen, diapered linen, pillowcases, quilt covers, furniture coverings of textile, namely, unfitted fabric furniture covers, upholstery fabrics, table napkins of textile, bed covers of paper, clothing, namely, trousers, jackets, overcoats, coats, skirts, suits, jerseys, waistcoats, shirts, ready-made leather linings (parts of clothing), T-shirts, sweatshirts, dresses, bermuda shorts, shorts, pajamas, pullovers, jeans, tracksuits, rainwear, beachwear, bathing suits, swimming suits, clothing for sports (for exclusive use for sports), clothing for babies, namely, shirts, pants, coats, dresses, underclothing, namely, boxer shorts, brassieres, briefs, pants, socks,

footwear, namely shoes excluding orthopedic shoes, sandals, waterproof boots, walking boots, booties, sporting shoes, slippers; shoe parts namely heelpieces, insoles for footwear, footwear uppers, Headgear, namely caps, skull caps, sports caps, hats, berets, gloves (clothing), stockings, belts (clothing), camisoles, sarongs, scarves, neck scarves, shawls, collars, neckties, ties, suspender belts, bathing costumes, bath robes, bathing suits, bath slippers, carpets, rugs, mats and matting, linoleum and other materials for covering existing floors, wall hangings (non-textile), bath mats, enabling customers to view and purchase those goods.

3. The Opponent claims that there is a likelihood of confusion under section 5(2)(b) and its opposition is directed against all of the goods and services within the Applicant's mark's specification, i.e. Class 24: Towels.
4. The Applicant filed a defence and counterstatement, denying the grounds.
5. Neither the Applicant nor the Opponent filed evidence or written submissions.
6. The Opponent is represented by HGF Limited; the Applicant represents itself.
7. The only comments from the parties available to me are therefore those within the Opponent's Notice of Opposition and Grounds and the Applicant's Notice of Defence and Counterstatement.

### **Preliminary issue**

8. The Applicant, in its Counterstatement, makes the following comments:

"3) ...Hammam Towels are a flat woven, 100% cotton fabric that has been primaty [sic] used a [sic] traditional coloth [sic] in Turkish Hammams. They are light weight, fluff free towels that are very easy to wash & dry. We only sell hammam towels.

...We have searched their [the Opponent's] online catalogue and cannot find one single item that is the same or similar as our goods. They are selling terry towels and bedding, not flat woven hammam towels.”

9. Section 6A of the Act provides that where the registration date of the earlier mark is less than 5 years prior to the publication date of the application, there is no requirement for the Opponent to prove use of the earlier mark. In these circumstances, the Opponent is entitled to rely upon the full range of goods.
10. It is not relevant to the assessment of whether there is a likelihood of confusion as to how the applicant uses its mark or on what type of towels. Even if the Applicant's goods can, as a matter of fact, be distinguished from those sold by the Opponent in the way in which the Applicant has described in its counterstatement, I must only consider the 'notional' use of the mark for the term 'Towels'.
11. The concept of 'notional use' was addressed in *Compass Publishing BV v Compass Logistics* [2004] R.P.C. 41 per Laddie J.:

“22. It is frequently said by trade mark lawyers that when the proprietor's mark and the defendant's sign have been used in the market-place but no confusion has been caused, then there cannot exist a likelihood of confusion under Art.9.1(b) or the equivalent provision in the Trade Marks Act 1994 (“the 1994 Act”), that is to say s.10(2). So, no confusion in the market-place means no infringement of the registered trade mark. This is, however, no more than a rule of thumb. It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with

the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place.”

12. The Court of Justice of the European Union has stated the following<sup>1</sup>:

“Once a mark has been registered its proprietor has the right to use it as he sees fit so that, for the purposes of assessing whether the application for registration falls within the ground for refusal laid down in that provision, it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier mark in all the circumstances in which the mark applied for might be used if it were to be registered.

13. The Court of Appeal in *Roger Maier and Another v ASOS*<sup>2</sup>, held that:

“the court must.... consider a notional and fair use of that mark in relation to all of the goods or services in respect of which it is registered.”

14. My assessment must therefore only take account of the *conceivable* use of the term in respect of which the Applicant seeks registration of its mark, i.e. ‘Towels’. Any differences between the parties’ actual goods, which cannot be discerned from the specification alone, must be disregarded.

15. The following decision has been made after careful consideration of the papers before me.

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<sup>1</sup> *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06

<sup>2</sup> [2015] EWCA Civ 220, per Kitchen L.J. at [78].

## **Decision**

### **Section 5(2)(b) of the Act and related case law**

16. Section 5(2)(b) of the Act states:

“5(2) 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.”

17. The following principles are derived from the decisions of the Court of Justice of the European Union (“CJEU”) 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 C120/04; *Shake 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.

### **Comparison of goods**

18. The Applicant seeks registration of its mark solely in respect of 'Towels' in Class 24. The Opponent's mark is also registered in respect of Class 24 and its specification includes the term 'Textiles and textile goods'. It is uncontroversial that towels are textile goods and therefore fall under that term.

19. 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 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".

20. Applying the above principle, the Applicant's goods are identical to the Opponent's goods in Class 24 by virtue of 'Towels', being included in the more general category 'Textiles and textile goods'.

### **Average consumer and the purchasing act**

21. 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.

22. In *Hearst Holdings Inc*<sup>3</sup> Birss J. described the average consumer thus:

"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 word "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

23. The Opponent has included the following comment in its Statement of Grounds of Opposition ('Statement'):

'13. The average consumer would be an everyday consumer of towels. The average consumer would not have any specialist knowledge of the goods in question which have a relatively low pricepoint and therefore the level of attention paid would be low'.

24. The Applicant makes the following comment in its counterstatement:

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<sup>3</sup> *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)

‘...Our marketing is offering customers a different approach to towelling therefore the everyday consumer is NOT the same.’

25. I agree with the Opponent to the extent that the average consumer would not have any specialist knowledge of the goods in question. I consider that the relevant consumer of towels would be, primarily, the general public. I also recognise, however, that a lesser proportion of relevant consumers will be professionals in the hospitality, beauty and leisure trades purchasing towels to equip hotels, beauty salons, health spas and the like.

26. I do not consider that members of the general public would pay a particularly high level of attention when purchasing the goods in question, but, in my view, they will consider factors including quality and durability, as well as the tactile and aesthetic aspects of the goods.

27. For members of the professional public, a slightly more considered purchase would apply due to additional factors such as suitability for the business, and durability, becoming more important.

28. These factors would place the attention level of the average consumer somewhere in the medium range. I therefore disagree with the Opponent’s statement that consumers would pay a low level of attention when purchasing the goods. An often-mentioned example of a casual purchase which typically involves a low level of attention on the part of the average consumer is a bag of sweets.


29. I consider that the goods will, in most cases, be purchased by self-selection based on visual inspection of the goods, either physically from shelves in shops or online. Some purchases may also be made aurally by way of requests to retail staff.

30. In the light of the finding that the Applicant is seeking registration for goods identical to those of the Opponent (at [18] – [20] above), the Applicant’s comment, reproduced above at [24], cannot be accepted.

31. Furthermore, I am unable to take into account the way in which the goods in question are marketed when making my assessment of likelihood of confusion between the Applicant’s and Opponent’s respective marks. The CJEU has set out the rationale as follows<sup>4</sup>:

“As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.”

**Comparison of the marks**

hamam	
Opponent’s mark	Applicant’s mark

32. 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

<sup>4</sup> *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P at [59].

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.”

33. 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.

#### Visual comparison

34. The Opponent has included the following comment in its Statement:

‘The Opponent’s mark is the word mark hamam. All the letters comprising the word hamam are wholly incorporated in the same order within the Opposed Mark and therefore there is a high degree of visual similarity between the marks.’

35. The Applicant has included the following comment in its counterstatement:

‘Our pending trademark logo we [sic] have stylised the word ‘Hammams UK’ to look different from anything else in the market to avoid any confusion from [sic] that of a simple word ‘hamam’ or any other connotation.

[The Opponent] are claiming that we are using the word is [sic] ‘hamam’ we are not. We are using the words Hammams UK.’

36. The Opponent’s mark consists of a single word ‘hamam’ in plain type with all letters in lower case. The overall impression of the mark therefore resides in the mark in its entirety.

37. The Applicant's mark comprises two words, 'Hammams UK', and contains stylisation, a device element and colour. Within the overall impression of the composite mark, the word 'Hammams' is the most dominant element owing to its size. In my view, the way in which the rack and towel image has been designed prevents the device from usurping the word 'Hammams' as the dominant element of the mark. I am persuaded of this by the clear 'H' configuration of the rack/frame and the fact that the coloured banner running through the device and the letters 'ammams' unites both the device and lettering to form a cohesive whole.
38. The first letter of the word, 'H', is in upper case and has been formed with a device representing a towel draped over a rack or frame. It is the rack/frame element of the device that forms the 'H' in 'Hammams'. The 'ammams' portion of the word comprises stylised letters edged in green with a mainly white infill. The letters are bisected horizontally, and through their centres, by a tricolour 'banner' consisting of three stripes. Each stripe is differently coloured, the order of colours from the top to the bottom of the 'banner' being: terracotta orange, sage green and taupe.
39. The colour scheme of 'ammams' extends to the device to the extent that the frame/rack and the edging of the towel are of the same shade of green in which the remaining letters are edged; and the tricolour banner extends to the device to form what would be viewed as a strip of embroidery or other embellishment often included as a decorative feature on towels.
40. The 'UK' element is given less visual prominence by virtue of the text being much smaller in comparison to 'Hammams' and positioned below the first 'a' in 'Hammams'. A much plainer font in the single colour green has been used.
41. Although the Opponent correctly observes that 'all of the letters comprising the word hamam are wholly incorporated in the same order within the Opposed Mark', it does not necessarily follow that there is a high degree of visual similarity between the marks.

42. The fact that in the Applicant's mark, the word 'Hammams' contains a double 'm', as well as an 's' on the end of the word, cannot be overlooked. These differences, although not vast, nevertheless have a visual impact to the extent that the word 'Hammams' is greater in length than 'hamam'.
43. In the light of the foregoing, I find that the stylisation, device and tricolour 'banner'/stripes, together with the differences in spelling of hamam/Hammams, would result in a low-medium level of visual similarity between the marks.
44. Notional and fair use of the earlier mark would cover use of the word in the same colour as the Applicant's word. The Court of Appeal has stated on two occasions following the CJEU's judgment in *Specsavers*, that registration of a trade mark in black and white covers use of the mark in colour.<sup>5</sup> This is because colour is an implicit component of a trade mark registered in black and white (as opposed to extraneous matter). Thus, a black and white version of a mark should normally be considered on the basis that it could be used in any colour. Notional and fair use of the Opponent's mark would include use in the same colour as the word represented in the Applicant's mark. This would not extend to the stripes because it is not appropriate to apply complex colour arrangements notionally to a mark registered in black and white. The reason why this is so is because it is necessary to evaluate the likelihood of confusion on the basis of normal (notional) and fair use of the marks, and applying complex colour arrangements to a mark registered without colour would not represent normal and fair use of the mark.

#### Aural comparison

45. The Opponent has included the following comment in its Statement:

'The Opposed Mark is almost aurally identical to the Opponent's Mark aside from the letter S found at the end of the mark. The single m in the Opponent's Mark and the double mm in the Opposed Mark does not create

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<sup>5</sup> Paragraph 5 of the judgment of the Court of Appeal in *Specsavers* [2014] EWCA Civ 1294 and *J.W. Spear & Sons Ltd v Zynga, Inc.* [2015] EWCA Civ 290, at paragraph 47.

any aural difference between the marks. Overall there is a high degree of similarity between the marks.'

46. The Applicant has countered that:

'[The Opponent] claim that our mark is almost aurally identical to that that [sic] of Eke Tekstil. Our mark is Hammams UK not 'hamam' so when said aurally there is not a high degree of similarity.'

47. I find that the first syllable of each mark will be pronounced identically as 'ham'.

The second syllable of each mark will be pronounced almost identically, the only difference being the pronunciation of the 's' in 'ams' in the Applicant's mark. I consider that the 'UK' element of the Applicant's mark would unlikely be articulated. I conclude that if 'UK' is not articulated, the marks have a high degree of aural similarity; if 'UK' is articulated, the marks have a medium degree of aural similarity.

#### Conceptual comparison

48. Neither party has addressed the matter of conceptual similarity in their Statement or counterstatement.

49. I bear in mind, however, that the Applicant, in its counterstatement, refers to its products as 'hammams', for example:

"Our hammams are more versatile than a standard Terry Towel..."

50. Dealing with the Opponent's mark first, it is my view that a large proportion of average consumers would not readily ascribe a conceptual meaning to the word 'hamam'. It would be perceived as either an invented word or, at most, simply a non-English-sounding word.

51. The Applicant refers, in its counterstatement, to "Turkish hammams". I appreciate, therefore, that some consumers might recognise 'hamam' as the



Turkish word for the English word ‘hammam’ meaning Turkish bath or bath house<sup>6</sup>.

52. I must also be mindful, however, of the extent to which certain knowledge may be ascribed to the average consumer. Ms Anna Carboni, as the Appointed Person in *Chorkee Ltd v Cherokee Inc*<sup>7</sup> urged caution ‘not to assume that one’s personal experience, knowledge and assumptions are more widespread than they are.’ Despite it being a fact that the word Cherokee denotes the name of a tribe indigenous to North America, the Hearing Officer was not entitled to attribute this knowledge to the relevant average consumer.

53. I also bear in mind the decision in *Wunderkind Trade Mark*<sup>8</sup> where the Registrar refused to attribute knowledge of the German meaning of the word ‘wunderkind’ to the average consumer even though some evidence had been adduced to demonstrate its use in UK press articles.

54. I conclude that a significant proportion of the average consumer would perceive the word as an invented word; while a smaller proportion would recognise it as a non-English word, but without knowing its meaning.

55. I now turn to the Applicant’s mark. In my view, a notable proportion of average consumers would not readily attach a conceptual meaning to the word ‘Hammams’, but would perceive it as an invented word or, at best, a non-English sounding word.

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<sup>6</sup> <https://dictionary.cambridge.org/translate/> accessed 30 October 2020 at 12.20,

(insert ‘hammam’ and translate into Turkish – hamam;  
insert ‘hammam’ and translate into English – hammam);

<https://dictionary.cambridge.org/dictionary/english/hammam> accessed 30 October 2020 at 12.21,  
hammam (also Turkish bath)

A health treatment in which you sit in a room full of steam and are then usually massaged and washed, or a building in which this treatment is available.

<sup>7</sup> Case BL O/048/08

<sup>8</sup> [2002] R.P.C. 45.

56. As noted above at [51], ‘hammam’ is the English word for Turkish bath or an establishment in which one may experience a Turkish bath. The Applicant, in its counterstatement, treats ‘hammam’ as a noun denoting the particular type of towel that it sells. While I appreciate that a number of consumers will be familiar with ‘hammam towels’ as an alternative to ‘Terry’ towels by virtue of their flat weave, I consider hammam towels to be a rather niche product with which most consumers would be unfamiliar. For the proportion of consumers familiar with hammam towels, the ‘s’ in ‘Hammams’ functions simply to pluralise ‘hammam’. For this group, the ‘Hammams’ element of the mark would therefore be taken to indicate that the owner of the mark is a purveyor of hammam towels.

57. I find that, irrespective of whether the average consumer is familiar with ‘hammam towels’, the device would be perceived as a towel rack and towel.

58. The conclusion of my conceptual analysis is as follows:

For the group of average consumers that perceive both the Opponent’s mark ‘hamam’ and the ‘Hammams’ element of the Applicant’s mark as invented words, there will be no conceptual similarity. This is not, however, the same as saying that the marks are conceptually *dissimilar*. This is because, in order to make a finding of either conceptual similarity or dissimilarity, there must be *some conceptual content* found in each mark. In the instant case, the finding is that neither mark has any conceptual content.

For the group of average consumers familiar with the words ‘hamam’ and ‘hammam’ as referring to a Turkish bath, the marks will be conceptually similar to a high degree. They are not identical because of the additional concept provided by the device in the Applicant’s mark.

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

59. *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).”

60. It follows from my finding that there are two groups of average consumers, that I must consider the distinctiveness of the earlier mark from the perspective of each of those groups.

61. I consider that for the group of average consumers unfamiliar with the meaning of hamam/hammams, the earlier mark will be perceived as an invented word which neither describes nor alludes to the relevant goods. For this group, the earlier mark is inherently distinctive to a high degree.

62. On the other hand, for the group of average consumers with the knowledge that ‘hamam’ refers to a Turkish bath, the earlier mark will be seen as at least moderately allusive to the relevant goods. In these circumstances, despite the

allusion to Turkish bath houses and a certain style of bathing, the distinctive character derives from 'hamam' being a fairly unusual word to identify a purveyor of towels directed at the UK market.

63. I therefore find that, for this latter group of average consumers, the earlier mark would be inherently distinctive to a medium degree.

### **Likelihood of confusion**

64. Confusion can be direct or indirect. Mr Ian Purvis Q. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*<sup>9</sup>. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*<sup>10</sup> in 1999, the Court of Justice of the European Union recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that he has in his mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark before him but mistakenly matches it to the imperfect image of the earlier mark in his 'mind's eye'. Indirect confusion occurs when the average consumer recognises that the later mark is indeed different from the earlier mark, but concludes that the later mark is economically linked to the earlier mark by way of being a 'sub brand', for instance.

65. Before arriving at my decision, I must make a global assessment taking into account all of the relevant factors, including the principles a) – k) set out above at [17].

66. My finding that the respective goods are identical is uncontroversial.

67. When considering all relevant factors 'in the round', I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

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<sup>9</sup> Case BL O/375/10 at [16].

<sup>10</sup> *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

68. My comparison of the marks has determined that:

- There is a low-medium level of visual similarity between the marks;
- There is a high level of aural similarity if the 'UK' element of the Applicant's mark is not articulated; if the 'UK' element is articulated, there is a medium degree of aural similarity;
- The extent to which the marks are conceptually similar differs according to each of the two groups of average consumers identified above at [49] – [58]:

For the group of average consumer unfamiliar with the meaning of the words 'hamam' and 'hammams', both the earlier mark and the applied-for mark would be perceived as invented (or, at best, simply non-English sounding) words. There would therefore be no conceptual similarity between the marks.

For the group of average consumers aware of the meanings of hamam/hammam, the level of conceptual similarity is high.

- For the reasons set out above at [49]-[58], I have found that the group of average consumers to whom knowledge of the meanings of 'hamam' and 'hammams' will be attributed will be very small. I therefore conclude that an assessment of the likelihood of confusion between the two marks is to be considered from the standpoint of the average consumer who is not furnished with such knowledge but perceives both 'hamam' and 'hammams' to be invented words.

69. In *New Look Limited v OHIM*<sup>11</sup> the General Court stated that:

"49. ...it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do

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<sup>11</sup> Joined cases T-117/03 to T-119/03 and T-171/03

not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market...”

70. I consider that the low-medium level of visual similarity between the marks somewhat mitigates the high level of aural similarity between them. Furthermore, the weight to be accorded to aural similarity is diminished further in this case given the importance of the visual perception of a mark where the goods concerned are purchased by self-selection from a shelf in a store. In *Quelle AG v OHIM*<sup>12</sup>, the General Court held that:

“68..... If the goods covered by the marks in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs.”

71. I have found that, for the larger of the two groups of average consumers, the Opponent’s mark is inherently distinctive to a high degree.

72. The Court of Justice of the European Union held in *Sabel*<sup>13</sup> that:

“24. The more distinctive the earlier mark, the greater will be the likelihood of confusion.”

73. This principle was given an important qualification by Mr Iain Purvis Q.C, as the Appointed Person, in the decision of *Kurt Geiger v A-List Corporate Limited*<sup>14</sup>:

“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

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<sup>12</sup> Case T-88/05.

<sup>13</sup> *Sabel BV v Puma AG* (C-251/95), [1998] E. T. M. R. 1 (1997) at [24].

<sup>14</sup> BL O-075-13.

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.”

74. The distinctive character of the Opponent’s mark derives from the fact that ‘hamam’ will be perceived, by the larger group of the average consumer, as an invented word to which no meaning will attach.

75. The distinctive character of the Applicant’s mark derives from the fact that ‘Hammams’ will be perceived by the larger group of the average consumer as an invented word. There is no conceptual nexus between the Opponent’s and Applicant’s marks.

76. I conclude that, despite the respective goods being identical, the visual differences between the marks are sufficient for me to find that there is no likelihood of direct confusion.

77. However, the following observations lead me to conclude that there is a likelihood of *indirect* confusion:

- The absence of conceptual content in either mark means that there is no semantic aspect for the mind to fix upon when recalling the marks from memory. In these circumstances, perception of the marks’ visual and aural similarities is heightened.
- Although I have found that there is a low-medium visual similarity between the marks, the *dominant components within those marks*, i.e. the words ‘hamam’ and ‘Hammams’, respectively, are similar. Perception of the difference in spelling would, in my view, be diminished due to the absence of conceptual content, leading to imperfect recollection.
- The larger group of the average consumer will perceive a visual difference between the marks by virtue of the integration of the towel and rack device

into the word 'Hammams', and the presence of 'UK' in the Applicant's mark.

- The marks have a high degree of aural similarity, if the 'UK' element of the Applicant's mark is not articulated.
- In my view, the culmination of these factors will result in the larger group of the average consumer concluding that the marks relate to economically-linked undertakings.

### Final Remarks

78. The Opposition has succeeded and the application is refused.

### COSTS

79. I award the Opponent the sum of **£300** as contribution towards its costs, calculated as follows<sup>15</sup>:

Preparation of statement and consideration of the Applicant's statement:	£200
Official fee for 5(2)(b) only:	£100
<b>Total:</b>	<b>£300</b>

80. I therefore order Bridport Responsive Delivery Ltd to pay the sum of £300 to Eke Tekstil Konfeksiyon Turizm Sanayi Ve Ticaret Anonim Şirketi. 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.

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<sup>15</sup> Based upon the scale published in Tribunal Practice Notice 2/2016.



**Dated this 16th day of November 2020**

**N. R. MORRIS  
For the Registrar**