

**O/868/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003571815  
BY LUKE O'SHEA TO REGISTER THE FOLLOWING TRADE MARK:**

**Cradle to the Grave (CTTG)**

**IN CLASS 25**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 423846 BY CHRISTOPHER DALTON**

## **Background and Pleadings**

1. On 23 December 2021, Luke O'Shea ('the Applicant') filed an application to register the mark shown on the front page of this decision, number UK00003571815. The application was published for opposition purposes in the *Trade Marks Journal* on 19 February 2021. Registration is sought in respect of the sole class 25 term *clothing*.
2. On 8 April 2021, the application was opposed by Christopher Dalton ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The Opposition is directed against all of the Applicant's goods. The Opponent relies on the following earlier registration for its section 5(2)(b) ground, relying on all of the goods in its specification:

UK00003441363



Filing date: 3 November 2019

Date of entry in register: 24 January 2020

Registered for following goods:

Class 25: *T-Shirts; Beanies; Hoodies; Jumpers; Caps; Jackets; Tank Tops; Belts; Leather clothing; Shorts; Shirts; Vests; Cap peaks; Skirts; Underwear; Shoes; Sandals.*

3. The Opponent claims that the applied-for mark is similar to the earlier mark and for identical or similar goods.
4. The Applicant filed a Defence and Counterstatement in which it denies that the respective marks are similar and therefore argues that there is no likelihood of confusion between the marks.

5. Both parties represent themselves.
6. Evidence has been filed by the Applicant only. A hearing was neither requested nor considered necessary. Neither party has filed written submissions in lieu of a hearing.
7. The following decision has been made after careful consideration of the papers before me.

#### Applicant's evidence

8. The Applicant's evidence comes from the Applicant himself, Luke O'Shea. Mr O'Shea's Witness Statement is dated 7 March 2022. The Witness Statement focuses mainly on the proposed designs of the goods in respect of which registration of the mark is sought, and the Applicant's creative aspirations. While Mr O'Shea's comments are noted, for the reasons provided below at [13] to [15], these matters have no bearing on my assessment of the likelihood of confusion between the parties' marks.

### **Decision**

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

9. 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.”

10. In accordance with section 6 of the Act, the Opponent's mark is an earlier mark by virtue of its earlier filing date (3 November 2019) which falls before the filing date of the applied-for mark on 23 December 2021.

11. Section 6A of the Act provides that where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the application date (or priority date) of the applied-for mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged because the Opponent's mark had been registered for less than 5 years on the date on which the Applicant filed its application.<sup>1</sup> The Opponent is therefore entitled to rely upon all of the goods that it seeks to rely upon.

12. The following principles are derived from the decisions of the Court of Justice of the European Union<sup>2</sup> ("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

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<sup>1</sup> The Applicant's request for 'proof of use' at [7] of the Defence and Counterstatement is therefore deemed an error.

<sup>2</sup> Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

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.

### Preliminary issue

13. Both parties have, in their pleadings,<sup>3</sup> alluded to the use, or otherwise, of the earlier mark on social media platforms, e.g. Instagram. How the Opponent (or Applicant) is currently using its mark is irrelevant to the assessment of whether there is a likelihood of confusion between the respective marks. I must only consider the notional use of the parties' marks.

14. The Court of Justice of the European Union ('CJEU') has stated the following<sup>4</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.

15. In my assessment, I must therefore consider all of the possible circumstances in which the marks *might* be used.

### **Comparison of goods**

16. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the

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<sup>3</sup> Applicant's statement of grounds, at Q5; Opponent's counterstatement, third unnumbered paragraph.

<sup>4</sup> *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06.

ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the ‘Nice Classification’ means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

17. I must also bear in mind the decision of the General Court (‘GC’) in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05

“29. ... 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”.

18. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties’ goods and services must be taken into account:

“[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”.

19. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281<sup>5</sup>, identified the following factors for assessing similarity of the respective goods and services:

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<sup>5</sup> *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found, or likely to be found, in supermarkets and, in particular, whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

20. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.<sup>6</sup>

21. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods [or services]. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

22. Goods (or services) may be grouped together for the purposes of assessment:

*Separode Trade Mark* BL O-399-10 (AP):

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<sup>6</sup> *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.



“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

23. The goods to be compared are as follows:

Opponent’s (earlier) mark:	Applicant’s (contested) mark:
Class 25: <i>T-Shirts; Beanies; Hoodies; Jumpers;</i> <i>Caps; Jackets; Tank Tops; Belts;</i> <i>Leather clothing; Shorts; Shirts; Vests;</i> <i>Cap peaks; Skirts; Underwear; Shoes;</i> <i>Sandals.</i>	Class 25: <i>Clothing</i>

24. In my view, the term *clothing* will encompass any garment or item of attire worn on the body to provide coverage and/or protection from the elements<sup>7</sup>. The following of the Opponent’s terms will, to my mind, be encompassed by the Applicant’s broad term *clothing*:

*T-Shirts; Beanies; Hoodies; Jumpers; Caps; Jackets; Tank Tops; Leather clothing; Shorts; Shirts; Vests; Skirts; Underwear.*

I therefore find the parties’ respective goods to be ‘Meric’ identical.

25. I also compare the Applicant’s *clothing* against the Opponent’s *Shoes* and *Sandals*. The parties’ goods share the broad purpose of providing some sort of protection to the wearer; the specific purpose of the Opponent’s goods, i.e. footwear, being the protection of the feet from the elements and terrain. Methods of use will overlap to the extent that both sets of goods will be worn on the person.

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<sup>7</sup> It is acknowledged that clothing can also have a decorative function.

Users will overlap; both sets of goods purchased predominantly by the general public. The physical nature of the respective goods will usually differ: clothing is typically (although not always) fashioned from softer fabrics capable of being draped, whereas footwear is typically crafted from tougher materials with some rigidity such as leather or canvas. Trade channels will often be shared; clothing and footwear are often sold via the same retail outlets, whether physical shops or online stores. Where the goods are sold in physical shops, the Opponent's *shoes* and *sandals* will usually be found in a dedicated 'footwear' section of the premises. There is no competitive relationship between the goods, neither set of goods being substitutable for the other. I do not find complementarity either. Although the average consumer may presume both clothing and footwear to originate from the same undertaking, neither set of goods is necessary for the other. In the light of the foregoing, I find the goods to be similar to a medium degree.

26. I also compare the Applicant's *clothing* against the Opponent's *Belts*. Both sets of goods are worn on the person, albeit *belts* are, in my view, considered to be 'accessories' worn with other pieces of clothing rather than items of clothing themselves. The specific purposes of the respective goods will differ; the function of *belts* being either to hold up garments worn on the lower body (e.g. trousers, skirts) or to 'cinch in' the waistlines of garments such as dresses or shirts. Users of the respective goods will coincide; purchasers of *belts* will necessarily also be purchasers of *clothing*. The physical nature of the respective goods will differ to the extent that belts are thin strips of fabric rather than garments. Trade channels will coincide; clothing shops will typically also sell belts. In physical clothing shops, *belts* will, to my mind, often be found in the 'accessories' section; likewise, online stores typically have an 'accessories' page. I do not find any competition between the goods. However, I do consider the goods to be complementary. *Belts* are, in my view, important for some items of clothing<sup>8</sup> and the average consumer would presume both sets of goods to originate from the same undertaking. I therefore find the parties' goods to have a medium-high level of similarity.

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<sup>8</sup> Many trousers are equipped with belt loops.

27. I also compare the Applicant's *clothing* to the Opponent's *Cap peaks*. The respective goods will have similar purposes to the broad extent that both are intended to protect the wearer in some way; the specific aim of *cap peaks* being to shield or protect the eyes or face from the elements. The methods of use will be very different. Whereas *clothing* is worn on the person, *cap peaks* are component parts of hats used in the manufacture thereof, rather than finished items that are ready to wear. The physical nature of the respective goods will, in many cases, differ; *cap peaks* typically being composed of tougher fabrics than those used to make garments.<sup>9</sup> Users will, in my view, diverge. *Cap peaks* will, in my view, almost always be purchased by professionals, e.g. manufacturers of headwear. Trade channel overlap is unlikely; trade channels for finished garments will likely differ to those for components of garments. There is no competition between the respective goods. I do not find complementarity, either. Although *cap peaks* are necessary for the manufacture of certain hats, the average consumer would unlikely presume both sets of goods to derive from the same undertaking. I bear in mind the case of *In Les Éditions Albert René v OHIM*, Case T-336/03, the General Court found that:

“61... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”

In the light of the foregoing, I find the parties' goods to be dissimilar.

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

28. 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.

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<sup>9</sup> It is recognised that there are some exceptions. For example: waxed cotton hats and jackets can be made from the same materials.

29. In *Hearst Holdings Inc*<sup>10</sup> Birss J. (as he then was) 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.”

30. The average consumer of the Applicant’s goods will be predominantly the general public. The goods will be sold from physical shops, catalogues or online. The goods will, in most cases, be self-selected: in retail premises, they will be selected from shelves or rails; online, they will be ‘added to the shopping basket’ after visual inspection of the product listing. The purchasing act will, in most cases, be primarily visual; in instances where a member of staff is consulted, there will be an aural aspect. In my view, the average consumer will consider factors including: size of the garment/item of footwear/belt; colour; the composition of the material; care instructions; comfort/how the material feels; durability and how the item looks when tried on. In my view, the average consumer will display at least a medium level of attention when purchasing these goods.

### Comparison of the marks

Opponent’s (earlier) mark: 	Applicant’s (contested) mark: <b>Cradle to the Grave (CTTG)</b>
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31. 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

<sup>10</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).

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 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.”

32. 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.

33. The Opponent’s mark comprises three words ‘Cradle to Grave’, rendered in a cursive script. The word elements ‘to’ and ‘Grave’ are set below the word ‘Cradle’ and staggered to the right. A device depicting a cradle is positioned above the centre of the word ‘Cradle’ and a device depicting a headstone is positioned above the centre of the word ‘Grave’. These devices will not, in my view, go unnoticed by the average consumer. The overall impression of the mark resides in the mark in its entirety, with the text ‘Cradle to Grave’ playing the most dominant role by virtue of the fact that it can be read or articulated, whereas the devices cannot.

34. The Applicant’s mark is a word mark<sup>11</sup> consisting of the words ‘Cradle to the Grave’ followed by the initials in brackets ‘(CTTG)’, all on one line. The overall impression

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<sup>11</sup> In *LA Superquimica v EUIPO*, Case T-24/17, at paragraph [39] it was held that:

‘ [...] it should be noted that a word mark is a mark consisting entirely of letters, words or groups of words, without any specific figurative element. The protection which results from registration of a word mark thus relates to the word mentioned in the application for registration and not the specific figurative or stylistic aspects which that mark might have. As a result, the font in which the word sign might be presented must not be taken into account. It follows that a word mark may be used in any form, in any colour or font type (see judgment of 28 June 2017, *Josel v EUIPO — Nationale-*

resides in the mark in its entirety, with the text 'Cradle to the Grave' the dominant element. The initials placed in brackets play a subordinate role as they simply provide an initialism of the dominant wording.

### 35. Visual comparison

In finding this, I have borne in mind the case of *Dreamersclub Ltd v KTS Group Ltd*<sup>12</sup> in which Mr Philip Johnson, as the Appointed Person, found that the use of the mark shown below qualified as use of the registered word-only mark DREAMS. This was because the stylisation of the word did not alter the distinctive character of the word mark. Rather, it constituted an expression of the registered word mark in normal and fair use.

The word 'dreams' is written in a black, cursive, handwritten-style font. The letters are connected and have a fluid, flowing appearance.

36. The points of visual difference are:

- the presence of the word 'the' in the Applicant's mark, which is absent from the Opponent's mark;
- the presence of the cradle and headstone devices in the Opponent's mark, which are absent from the Applicant's mark;
- the presence of the element '(CTTG)' in the Applicant's mark, which is absent from the Opponent's mark;
- the fact that the 'To Grave' element in the Opponent's mark is staggered to the right.

I find the marks to have a medium to high level of visual similarity.

### 37. Aural comparison

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*Nederlanden Nederland (NN)*, T-333/15, not published, EU:T:2017:444, paragraphs 37 and 38 and the case-law cited).

<sup>12</sup> BL O/091/19.

The Opponent's mark will be articulated as 'CRAY-DUL-TO-GRAVE'. The Applicant's mark will be articulated as 'CRAY-DUL-TO-THE-GRAVE'. I consider it unlikely that the average consumer would articulate the '(CTTG)' element of the Applicant's mark because it would, in my view, be seen simply as the initials of the words preceding it, particularly given the presence of the brackets. The only aural difference is the presence of 'the' in the Applicant's mark which is absent from the Opponent's mark. I find the marks to be highly aurally similar. If the average consumer *does* articulate the '(CTTG)' element, the level of aural similarity will be medium.

### 38. Conceptual comparison

I first consider the Opponent's mark. The phrase 'cradle to grave' will, in my view, be a phrase with which the average UK consumer will be familiar. The average consumer will understand it as an expression referring to the life course of a human being. The cradle and headstone devices reinforce the meanings of the words 'cradle' and 'grave' and do not, to my mind, add any further concept to the mark.

39. I consider that the Applicant's mark 'Cradle to the Grave' will be understood in the same way. The presence of 'the' does not, in my view, elicit any change in the conceptual message conveyed by the earlier mark. The element '(CTTG)' will be perceived simply as an abbreviation of 'Cradle to the Grave' and will not, therefore, add any further concept to the mark. I find the marks to be conceptually identical.

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

40. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those

goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

41. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

42. The phrase ‘Cradle to Grave’ comprises words found in the English dictionary and is an expression to refer to the life course of a human being. The earlier mark neither describes nor alludes to the goods in respect of which it is registered. I find the Opponent’s mark to have an average level of inherent distinctive character.

43. The Opponent has not adduced any evidence. There is therefore no basis upon which to make a finding that the earlier mark enjoys an enhanced level of distinctive character.

### **Likelihood of confusion**

44. Confusion can be direct or indirect. Mr Iain Purvis K. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v Back*



*Beat Inc*<sup>13</sup>. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*<sup>14</sup>, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly matches it to the imperfect image of the earlier mark in their ‘mind’s eye’. Indirect confusion occurs when the average consumer recognises that the competing marks are not the same in some respect, but the similarities between them, combined with the goods/services at issue, leads them to conclude that the goods/services are the responsibility of the same or economically linked undertaking.

45. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [12]. When considering all relevant factors ‘in the round’, I must bear in mind that a greater degree of similarity between goods/services *may* be offset by a lesser degree of similarity between the marks, and vice versa.

46. In my view, the identity and similarity of the parties’ goods, together with the medium to high visual similarity, high aural similarity and conceptual identity between the parties’ marks, will result in a significant proportion of average consumers confusing the marks. In my view, the word elements of the Opponent’s mark will have visual primacy over the ‘cradle’ and ‘headstone’ device elements because, generally speaking, the average consumer tends to notice words more readily than images.<sup>15</sup> The purchasing act will, in the case of all of the goods, be

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<sup>13</sup> Case BL O/375/10 at [16].

<sup>14</sup> *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

<sup>15</sup> “According to well-established case-law, in the case of a mark consisting of both word and figurative elements, the word elements must generally be regarded as more distinctive than the figurative elements, or even as dominant, since the relevant public will keep in mind the word elements to identify the mark concerned, the figurative

primarily visual. In my view, the differences that I have identified between the marks will be easily overlooked. The cradle and headstone devices present in the Opponent's mark add nothing over and above the concept conveyed by the words 'Cradle to Grave' and will, therefore, be easily forgotten. The '(CTTG)' in the Applicant's mark does not add anything further conceptually, either; because it will be perceived merely as an abbreviation of 'Cradle to the Grave'. It is my view that when the average consumer encounters the Opponent's mark, they may mistake it for the Applicant's mark (or vice versa) because the mind's eye has failed to register the visual differences described. There is a likelihood of direct confusion. I find this to be the case even though the average consumer will pay at least a medium level of attention when purchasing the goods.

47. In case I am wrong about the visual differences between the parties' marks being overlooked by the average consumer, I now consider whether there is a likelihood of indirect confusion. Mr Purvis Q. C., (as he then was) as the Appointed Person, identified the following categories in *L.A. Sugar Limited v Back Beat Inc*<sup>16</sup> where a finding of indirect confusion might be made:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

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elements being perceived more as decorative elements" – see *Migros-Genossenschafts-Bund v EUIPO – Luigi Lavazza (CReMESPRESSO)*, Case T-189/16, paragraph 52.

<sup>16</sup> Case BL O/375/10

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

48. I note that these categories were not intended to be exhaustive. Although the instant case does not, in my view, strictly speaking, fall squarely within any of the categories identified by Mr Purvis K. C.<sup>17</sup>, I consider that a significant proportion of average consumers would presume the marks to be brand variations originating from the same or economically-linked undertakings. I have found the marks to be conceptually identical. The presence of the word 'the' in the Applicant's mark, which is absent from the Opponent's mark, is, to my mind, a difference that would easily be overlooked by the average consumer. The cradle and headstone devices in the Opponent's mark, and the '(CTTG)' element at the end of the Applicant's mark, to my mind, could be perceived simply as variations of marks relating to the overarching brand. I therefore find that there is a likelihood of indirect confusion.

### **Conclusion**

49. The Opposition has succeeded in respect of all of the Applicant's goods. The Application, subject to a successful appeal, is refused.

### **COSTS**

50. Neither party has filed a costs pro forma. There is therefore no order as to costs.

**Dated this 10<sup>th</sup> day of October 2022**

**Mx N. R. Morris**  
**For the Registrar,**  
**the Comptroller-General**

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<sup>17</sup> Since King Charles III has assumed the throne, counsel who previously held the status of 'Q. C.' are 'K. C'.