

**O/968/22**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF  
TRADE MARK APPLICATION NO. 3736629  
BY GURPREET SINGH SIDHU  
TO REGISTER:**

**SACHH**

**AS A TRADE MARK  
IN CLASS 25**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 600002300  
BY NUTRICORP LLC**

## Background and pleadings

1. Gurpreet Singh Sidhu (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK on 24 December 2021. The application was accepted and published in the Trade Marks Journal on 21 January 2022 in respect of the following goods:

*Class 25: clothing; clothes; wristbands [clothing]; tops [clothing]; knitted clothing; oilskins [clothing]; motorcyclists' clothing; hoods [clothing]; leisure clothing; infant clothing; children's clothing; childrens' clothing; sports clothing; leather clothing; gloves [clothing]; waterproof clothing; plush clothing; girls' clothing; swaddling clothes; layettes [clothing]; jackets [clothing]; kerchiefs [clothing]; chaps (clothing); maternity clothing; thermal clothing; belts [clothing]; muffs [clothing]; capes (clothing); motorists' clothing; boas [clothing]; slippers [clothing]; veils [clothing]; wraps [clothing]; athletic clothing; triathlon clothing; windproof clothing; silk clothing; work clothes; woolen clothing; ladies' clothing; latex clothing; knitwear [clothing]; cloth bibs; cyclists' clothing; playsuits [clothing]; slipovers [clothing]; jerseys [clothing]; weatherproof clothing; casual clothing; denims [clothing]; combinations [clothing]; furs [clothing]; shorts [clothing]; collars [clothing]; babies' clothing; ties [clothing]; outer clothing; cashmere clothing; bandeaux [clothing]; women's clothing; bodies [clothing]; embroidered clothing.*

2. On 1 April 2022, Nutricorp LLC (“the opponent”) filed a notice of opposition under the fast track opposition procedure on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed at all of the goods in the application.

3. The opponent relies on the following trade mark:



UK registration no. 917492802

Filing date 19 November 2017; registration date 3 July 2018.

Relying on some of the goods, namely:

*Class 25: Gowns, Clothing, Footwear, headgear; Sportswear, Sportsshoes and Caps [headwear].*

4. The opponent submits that there is a likelihood of confusion because the applicant's mark is similar to its own mark and the respective goods are identical or similar. The applicant filed a defence and counterstatement denying the claims made.

5. Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 No. 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Marks Rules 2008 ("TMR") 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 effect of the above is that parties are required to seek leave in order to file evidence (other than the proof of use evidence which is filed with the notice of opposition) in fast track oppositions. No leave was sought in respect of these proceedings.

7. 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. A hearing was neither requested nor considered necessary. Neither party filed written submissions in lieu of a hearing. The applicant represents itself; the opponent is represented by Lara Grant. This decision is taken following a careful reading of all the papers.

8. 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 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.

### **Section 5(2)(b): legislation and case law**

9. Section 5(2)(b) of the Act reads as follows:

“(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 or association with the earlier trade mark.”

10. Section 5A of the Act states as follows:

“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) or Community 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. Given its filing date, the opponent’s mark qualifies as an earlier mark under the above provision. The opponent’s mark completed its registration less than five years before the application date of the applicant’s mark and, as a result, is not subject to proof of use provisions.

13. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impression 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 to mind the earlier mark, 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 the goods**

14. The applicant's goods can be found in **paragraph 1** of the decision. The opponent's specification for its goods to be compared are set out in **paragraph 2** of the decision.

15. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court (GC) stated:

“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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

16. “*Clothing*” appears in both parties’ specification and, therefore, are self-evidently identical.

17. Although phrased slightly differently, it is my view that “*clothes*” in the applicant’s specification and “*clothing*” in the opponent’s specification are identical.

18. “*Clothing*” in the opponent’s specification is a very broad category that encompasses the all of the applicant’s remaining goods, as the applicant’s goods

cover a range of clothing. On that basis, I find the following goods to be identical on the principle outlined in *Meric*:

*Wristbands [clothing]; tops [clothing]; knitted clothing; oilskins [clothing]; motorcyclists' clothing; hoods [clothing]; leisure clothing; infant clothing; children's clothing; childrens' clothing; sports clothing; leather clothing; gloves [clothing]; waterproof clothing; plush clothing; girls' clothing; swaddling clothes; layettes [clothing]; jackets [clothing]; kerchiefs [clothing]; chaps (clothing); maternity clothing; thermal clothing; belts [clothing]; muffs [clothing]; capes (clothing); motorists' clothing; boas [clothing]; slippers [clothing]; veils [clothing]; wraps [clothing]; athletic clothing; triathlon clothing; windproof clothing; silk clothing; work clothes; woolen clothing; ladies' clothing; latex clothing; knitwear [clothing]; cloth bibs; cyclists' clothing; playsuits [clothing]; slipovers [clothing]; jerseys [clothing]; weatherproof clothing; casual clothing; denims [clothing]; combinations [clothing]; furs [clothing]; shorts [clothing]; collars [clothing]; babies' clothing; ties [clothing]; outer clothing; cashmere clothing; bandeaux [clothing]; women's clothing; bodices [clothing]; embroidered clothing.*

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

19. As the law above indicates, it is necessary for me to determine who the average consumer is for the parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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.”

20. The opponent has submitted that the average consumer is a member of the general public. I agree. In my view, the average consumer for the goods will be members of the general public. The cost of purchase is likely to vary, and the goods will be purchased relatively frequently. Various factors will be taken into consideration during the purchasing process such as materials used, fit, cut, aesthetic appearance and durability.

21. The goods are likely to be obtained by self-selection from the shelves of a retail outlet or after viewing an image online or in a catalogue. This means that the mark will be seen and so the visual element of the mark will be the most significant: see *New Look Limited v OHIM*, Joined cases T-117/03 to T-119/03 and T-171/03, paragraph 50. Visual considerations, therefore, dominate the selection process. However, I do not discount that there will also be an aural component to the purchase, as advice may be sought from a sales assistant or representative. Taking all of the above into account, I consider that a medium degree of attention will be paid by the average consumer when selecting the goods.

### Comparison of the marks

22. The respective trade marks are shown below:

SACHH	 The logo for SASCHA FITNESS. It features a stylized, circular symbol above the word "SASCHA" in a bold, sans-serif font, with the word "FITNESS" in a smaller, spaced-out font below it.
The applicant's mark	The opponent's mark

23. 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 trade marks must be assessed by reference to all the overall impressions created by the trade 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.”

24. 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.

#### Overall impression

25. The applicant's mark is a word-only mark that consists of the text 'SACHH'. There are no other elements that contribute to the overall impression of the mark, which lies solely in the word itself.

26. The opponent's mark is a composite mark that consists of a grey flourish device that sits above the word 'SASCHA' which appears in slightly stylised emboldened black text. Beneath the emboldened text is the word 'FITNESS' in grey; this text is also slightly stylised and appears in slightly smaller text.

27. The opponent states in its notice of opposition that the dominant element of its mark is the word 'SASCHA' as it is placed above the word 'FITNESS' and is emboldened, in larger text and descriptive of some of the goods. Given what I will come to say in my conceptual comparison, I am of the view that the word 'SASCHA' plays the greater role in the overall impression of the mark, with the word 'FITNESS' and the device element playing a lesser role. While the device element is noticeable,

I am of the view that the eye is naturally drawn down to the elements of the mark that can be read. The device will play a lesser role in the overall impression of the mark. The emboldening of the text in the mark, stylisation and greyscale will be overlooked; therefore I find that they are negligible.

#### Visual comparison

28. Visually, the marks share the letters 'S-A-C-H'. The marks differ in the letters 'S-A', 'FITNESS' and the device that are present in the opponent's mark. Further, the marks differ in the additional 'H' that appears in the applicant's mark. Further, I note that the marks differ in the stylisation, greyscale and emboldened text that appears in the opponent's mark. However, I note that I have found those differences play a lesser role in the mark. Taking all the above into account, I find that there is a low to medium degree of visual similarity between the marks.

#### Aural comparison

29. Aurally, the applicant's mark will either be pronounced as 'SACK' or 'SATC'H'. It is my view that the majority of consumers will pronounce the mark as 'SACK'. The opponent's mark consists of four syllables that will be pronounced as 'SASH-UH-FIT-NESS'. Whilst the marks share the pronunciation of the letters 'SA' at the beginning of the marks, I note that the applicant's mark is a single syllable which begins with 'SA' and the remainder of both marks differ in pronunciation. I do not consider that the device in the opponent's mark will be pronounced. Taking all the above into account, I find the marks to be similar to a low degree. Even if I am mistaken, and the average consumers pronounce the marks as SA-CH, it is my view that the degree of aural similarity between the marks will still be low.

#### Conceptual comparison

30. Conceptually, it is my view that 'SACHH' in the applicant's mark will have no particular meaning to the average consumer. In my view, the text will be viewed by the average consumer as words that will be perceived as a made up or invented word that will not convey any obvious conceptual meaning. In relation to the opponent's mark, the word 'SASCHA' will be viewed as a name and the word 'FITNESS' in the

opponent's mark will convey a concept of being physically fit and healthy. Together, it is my view that the words 'SASCHA FITNESS' will create the impression that an individual named 'SASCHA' is behind a fitness brand. It is my view that 'FITNESS' in the opponent's mark will be seen as having descriptive qualities, particularly when displayed on goods used for sporting and fitness purposes. However, in relation to the goods not related to fitness, I do not consider that the mark will have descriptive qualities but it is my view that the words 'SASCHA FITNESS' will still create the impression that an individual named 'SASCHA' is behind a fitness brand. The flourish device will not add to the concept of the opponent's mark, as it does not convey a conceptual message. Taking this into account, on the basis that the opponent's mark conveys a concept and the applicant's mark does not, I find the marks to be conceptually dissimilar.

### **The distinctive character of the opponent's mark**

31. 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).”

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

33. The opponent has not pleaded enhanced distinctive character through use and has not filed evidence to support such a claim, therefore, I have only the inherent position to consider.

34. The opponent’s mark consists of the words ‘SASCHA FITNESS’ that sits below a flourish device. The name ‘SASCHA’ is not a widely used name, to my understanding, in the UK. However, I note that I have no evidence or submissions to assist me on this matter. Although the name is usually spelt as ‘SASHA’ in the UK, it is my view that the difference in spelling will not alter the average consumer identifying the mark as the same name with an alternative spelling. The name ‘SASCHA’ does not allude to the goods at issue. I also note the case of *Becker v Harman International Industries*, Case C-51/09 P, the distinctive character of a surname was considered and the CJEU stated as follows:

“Although it is possible that, in part of the European Union, surnames have, as a general rule, a more distinctive character than forenames, it is appropriate to take account of factors specific to the case and, in particular, to the fact that the surname concerned is unusual or, on the contrary, very common, which is likely to have an effect on that distinctive character.”

35. Although this case concerns surnames, the same reasoning can be applied to forenames; that is, the less common the forename the higher the distinctive character of the mark. It is my view that the word ‘FITNESS’ is descriptive of the goods that are used in relation to fitness. I do not consider that the flourish device and use of greyscale, the stylisation or emboldening of the text has an impact on the inherent distinctiveness of the mark. Therefore, bearing all of the above in mind, I find the mark to be inherently distinctive to a medium degree. For the goods that do not relate

specifically to 'FITNESS', I do not consider the mark to have any allusive or descriptive qualities. For those goods, I also find the mark to be inherently distinctive to a medium degree.

### **Likelihood of confusion**

36. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer of the goods and the nature of the purchasing process. In doing so, I must be alive to 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 that he has retained in his mind.

37. I have found the marks to be aurally similar to a low degree, visually similar to a low to medium degree and conceptually dissimilar. I have found the opponent's mark to have a medium degree of inherent distinctiveness. I have found the goods to be identical. I have found the average consumer to be a member of the general public who will select the goods at issue predominantly via visual means, however, I do not discount that there will also be an aural component to the selection of the goods. I have concluded that the average consumer's degree of attention will be medium when purchasing the goods.

38. Taking all the above into account and even bearing in mind the principle of imperfect recollection, I am of the view that the differences between the parties' marks are sufficient to overcome a likelihood of direct confusion. The low degree of aural

similarity and low to medium degree of visual similarity between the marks will, in my view, enable the average consumer to completely recall and/or remember which parties' marks are which. While the 'SACHH' and 'SASCHA' elements are similar to a degree, the additional elements in the parties' marks will not be overlooked or forgotten. I make this finding even taking into account the fact that 'SASCHA' plays a greater role in the opponent's mark and also the fact that some of the different elements play lesser roles in their respective marks. In support this finding, I remind myself of the case of *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03 which sets out that where the visual component dominates the selection process of the goods at issue, it will be given more weight. Even when the average consumer encounters the marks aurally, the aural differences between the marks are fairly significant and I see no reason why the consumer would misremember or inaccurately recall the marks aurally. Further, I note that the conceptual dissimilarity between the marks that would lead the consumer to mistakenly recall or misremember the marks. Consequently, I find that there is no likelihood of direct confusion, even in circumstances where the marks at issue are displayed on identical goods.

39. It now falls to me to consider whether there is a likelihood of indirect confusion. Indirect confusion involves the recognition by the average consumer of the differences between the marks. Mr Purvis KC in the *L.A Sugar Limited* case sets out that there are three main categories of indirect confusion and that indirect confusion 'tends' to fall in one of them.<sup>1</sup> Whilst I note that the examples set out by Mr Purvis are not exhaustive, I note the recent case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*,<sup>2</sup> wherein Arnold LJ referred to the comments of James Mellor KC sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he stated that a finding of a likelihood of indirect confusion is not a consolidation prize and that there needs to be a reasonably special set of circumstances in order to get indirect confusion where there is no likelihood of direct confusion. Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

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<sup>1</sup> Paragraphs 16 & 17 of *L.A Sugar Limited v By Black Beat Inc*, Case BL-O/375/10

<sup>2</sup> [2021] EWCA Civ 1207

40. As above, indirect confusion exists where the differences between the marks are noticed and those differences point to the existence of an economic relationship between the marks at issue (be that being owned by the same undertaking or an economically connected one). While this may be the case, it is still possible for indirect confusion to exist where some differences are overlooked but some are not. In the present case, I have found that the differences between the marks would not be overlooked and, therefore, do not consider that it is possible for the marks to be imperfectly recalled or misremembered for one another on the basis that there is no plausible rationale for the average consumer to think that the marks belong so the same or economically linked undertakings. Even if the other differences may be seen as those types of differences that fall within the categories set out by Mr Purvis K.C. in *L.A Sugar*, the elements that will be seen as the reference to the undertaking providing the goods at issue (being 'SACHH' and 'SASCHA') will in my view, indicate the existence of two separate and unconnected undertakings. Consequently, I do not consider that there is any likelihood of indirect confusion between the marks are issue, even on goods that are identical.

## **CONCLUSION**

41. The opposition fails in its entirety. The applicant's mark will, therefore, proceed to registration in respect of all goods.

## **COSTS**

42. The applicant has been successful in the proceedings and is entitled to an award of costs. The award of costs in fast track proceedings are governed by Tribunal Practice Notice 2/2015. However, the applicant is unrepresented and at the conclusion of the evidence rounds, the tribunal wrote to the applicant and invited him to indicate whether he intended to make a request for an award of costs. The applicant was informed that, if he intended to make a request, he should complete a costs pro-forma providing details of his actual costs and accurate estimates of the amount of time spent on various activities in the opposition proceedings. He was informed that "if the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time) may not be awarded".



43. The applicant did not file a completed pro-forma. That being the case and in light of the fact that the applicant has not incurred official fees during the court of these proceedings, I make no cost awards to the applicant.

**Dated this 7<sup>th</sup> day of November 2022**

**A Klass  
For the Registrar**