BL O/0396/24

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NO. 3567399 IN THE NAME OF SHENZHEN LINKTOP IOT CO., LTD

AND AN APPLICATION FOR INVALIDITY THERETO UNDER NO. 505491 BY KONINKLIJKE PHILIPS N.V.

DECISION

Introduction

1. This is an appeal against the decision of Mrs Karol Thomas, acting on behalf of the Registrar, dated 27 October 2023 (O-1010-23)("***the Decision***") in which the Hearing Officer rejected the application by Koninklijke Philips NV ("***the Applicant***") to invalidate Trade Mark Registration No. 3567399 in the name of Shenzhen Linktop Iot Co., Ltd ("***the Proprietor***").

2. Trade Mark Registration No. 3567399 is registered for the mark:

   PhilzOps

   It was applied for on 14 December 2020 and was entered onto the register on 30 April 2021. The registration covered various goods in class 11.

3. The sole ground of the application for invalidity pursuant to section 47(2) of the Trade Marks Act 1994 ("***the 1994 Act***") was on the basis of section 5(2)(b) of the 1994 Act. For that purpose, the Applicant relied upon UK Trade Mark Registration No. 00900205971 for the following mark:

   PHILIPS

   This trade mark was filed on 1 April 1996 and was registered on 22 October 1999. For the purposes of the application a number of goods in class 11 were relied upon.

4. In its application for invalidity the Applicant maintained that there was a likelihood of confusion between the marks because the respective marks are similar and the goods are identical of highly similar. The Proprietor filed a counterstatement denying the grounds of invalidity. It did not require the Applicant to file proof of use of the trade mark registration relied upon pursuant to section 6A of the 1994 Act.

5. Neither party filed any evidence. No hearing was requested and only the Applicant filed submissions in lieu of attendance. The Hearing Officer therefore made the Decision on the papers.

The Hearing Officer's Decision

6. Having set out the principles to be applied to the assessment under section 5(2)(b) of the 1994 Act in paragraph [10] of the Decision (as to which there is no challenge on this appeal) the Hearing Officer went on to find as follows:

(1) The Proprietor's goods were identical to the Applicant's goods (paragraph [17] of the Decision).

(2) '*[T]he average consumer is likely to pay a medium degree of attention to the purchase process*' (paragraph [20] of the Decision).

(3) The respective marks were visually similar to a high degree (paragraph [26] of the Decision).

(4) The respective marks were aurally similar to a medium degree (paragraph [27] of the Decision).

(5) The respective marks did not convey any conceptual message to the average consumer and the marks were conceptually neutral (paragraph [28] of the Decision).

(6) The Proprietor's mark possessed a medium degree of inherent distinctive character (paragraph [31] of the Decision).

7. With respect to the likelihood of confusion the conclusion was expressed by the Hearing Officer as follows at paragraph [37] of the Decision:

> Although the marks are visually similar to a high degree and aurally similar to a medium degree, an average consumer paying a medium degree of attention to the purchase process is likely to notice the difference between the marks. The visual and aural differences introduced by the letters 'zO' in the proprietor's mark are unlikely to go unnoticed by an average consumer. Moreover, as one mark is a surname and the other is invented, the consumer is likely to remember that in imperfect recollection and would not mistake one mark for the other. I, therefore, find that there is no likelihood of direct confusion. I also find that there is no likelihood of indirect confusion as the difference between the marks is unlikely to be seen as indicating a brand extension. I, therefore, conclude that there is no likelihood of confusion under section 5(2)(b).

8. Having reached this conclusion the Hearing Officer dismissed the application for invalidity and ordered the Applicant to pay the Proprietor a contribution of £300 towards its costs (paragraphs [38] and [39] of the Decision).

The Appeal

9. On 24 November 2023 a Form TM55 P was filed on behalf of the Applicant together with a four page Statement of Grounds.

10. It was not suggested that the Hearing Officer had made any errors in her findings set out in paragraph 6 above save in respect of the finding as to the level of attention of the average consumer as set out in paragraph 6(2) above. On this issue what is maintained on behalf of the Applicant is that the Hearing Officer erred in holding that the average consumer would have paid a medium amount of attention with respect to *all* of the goods in issue.

11. However the gravamen of what is said on behalf of the Applicant on this appeal is that the Hearing Officer made a material error with regards to the finding of a likelihood of confusion as set out in paragraph [37] of the Decision given the unchallenged findings that had been made by the Hearing Officer. That is to say in the light of such findings there was (1) '*no justification*' for a finding of no likelihood of confusion and/or (2) '*the only logical conclusion is that there is a likelihood direct confusion because consumers will mistake the later mark for the earlier mark*'.

12. In that connection it was, in summary, maintained that:

    (1) The Hearing Officer had failed to have regard to the interdependency principle in making the assessment of the likelihood of confusion as set out in Case C-39/97 Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.

    (2) There were certain internal inconsistencies and/or contradictions between the findings in the Hearing Officer's Decision noted in paragraph 6 above and the findings on the likelihood of confusion.

13. No Respondent's Notice was filed.

14. At the hearing of the appeal which took place by video link the Applicant was represented by Mr McLeod of Elkington and Fife LLP. As well as making submissions at the hearing Mr McLeod had also prepared written submissions. The Proprietor was not represented and did not file any submissions in lieu of appearance at the appeal.

The standard of review on appeal

15. Most recently the Court of Appeal has summarised the test to be applied to appeals such as the present in in Lidl Great Britain Ltd v. Tesco Stores Ltd [2024] EWVA Civ 262 at [110] where Arnold LJ stated the position to be as follows:

> The test on appeal
>
> 110. It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable: *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2] (v) (Lewison LJ). Equally, it is common ground that, in so far as the appeals challenge multi-factorial

> evaluations by the judge, this Court is only entitled to intervene if the judge erred in law or principle: compare *Magmatic Ltd v PMS International Group plc* [2016] UKSC 12, [2016] Bus LR 371 at [24] (Lord Neuberger of Abbotsbury) and *Actavis Group PTC EHF v ICOS Corp* [2019] UKSC 15, [2019] Bus LR 1318 at [78]- [81] (Lord Hodge) , and see *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [72]-[78] (McCombe, Leggatt and Rose LJJ) , which was cited with approval by the Supreme Court in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8 at [49] (Lord Briggs and Lord Kitchin).

16. See further the in the Supreme Court in Lifestyle Equities CV. Amazon UK Services Ltd [2024] UKSC 8 referred to by the Court of Appeal which likewise reaffirmed the approach to appeals of the kind at [46] to [50].

17. I have kept these principles in mind when considering the present appeal.

The Decision

18. I turn first to the appeal against the Hearing Officer's finding that the average consumer would pay a medium degree of attention to the purchase of the relevant goods (see paragraph [20] of the Decision). It was said in the Grounds of Appeal that such a finding should not have been applied to *all* the goods. However no distinction between different goods was made either in the Form TM26(I) or in the written submissions filed by the Applicant for the purposes of the determination which the Hearing Officer had to make.

19. Moreover, no explanation given in the Grounds of Appeal or in the submissions made during the hearing of the Appeal as to (1) what the Hearing Officer should have found i.e. what the relevant level of attention should have been found by the Hearing Officer; (2) the specific identity of each of the relevant goods in issue relative to which it was said that the finding was wrong; and/or (3) the error of law or principle that the Hearing Officer was said to have made with respect to such goods.

20. In those circumstances I reject the ground of appeal which challenged the Hearing Officer's findings with respect to the level of attention that the average consumer would possess when purchasing the goods in issue.

21. Turning to the gravamen of the complaint i.e., that the Hearing Officer had erred in the assessment of the likelihood of confusion. It is first to be recognised that this is a multifactorial assessment of the type referred to in paragraph [110] of the judgment in Lidl referred to above.

22. The first submission that was made on this point was that the Hearing Officer had failed to consider or indeed refer to the interdependency principle as set out in Case C-39/97 Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc. This is not correct. In paragraph [32] of the Decision the Hearing Officer stated as follows (emphasis added):

> 32.In determining whether there is a likelihood of confusion, I need to bear in mind several factors. **The first is the**

> **interdependency principle, i.e., a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the goods, and vice versa (*Canon* at [17]).** As I mentioned above, it is also necessary for me to bear in mind the distinctive character of the applicant's trade mark, as the more distinctive the trade mark is, the greater the likelihood of confusion (*Sabel* at [24]). I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks, relying instead upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

23. Therefore to the extent that it is suggested that the Hearing Officer did not have Case C-39/97 Canon and the interdependency principle firmly in mind when making the required assessment for conflict under section 5(2)(b) of the 1994 Act I reject it.

24. Turning to the inconsistencies in the Decision relied upon by the Applicant. The first is said to be a contradiction between the finding in paragraph [37] that '*[t]he visual and aural differences introduced by the letters "zO" in the proprietor's mark are unlikely to go unnoticed by an average consumer*' and the conclusion in paragraph [20] of the Decision that '*[v]isual considerations are, therefore, likely to dominate the selection process*' (paragraph [20] of the Decision and see also paragraph [36] of the Decision). Having considered these findings it does not seem to me that there is any contradiction between the two. It seems to me that the fact that visual considerations dominate the selection process by the average consumer does not preclude them from noticing the visual difference from the marks in issue.

25. The second is an inconsistency between the finding in paragraph [20] of the Decision in which the Hearing Office found that '*[T]he average consumer is likely to pay a medium degree of attention to the purchase process*'; and the statement in paragraph [36] of the Decision that '*I also concluded that the purchasing process will be dominated by visual considerations, and the consumer will pay a low to medium degree of attention to the selection of goods*'. The Applicant is entirely correct that this reveals an inconsistency in the Decision. However given that the required assessment is a multi-factorial one and given the other findings in the Decision this does not in my view amount to a material error.

26. This is particularly the case given that in the context of the present appeal, if the points raised by the Applicant on this appeal were to be considered afresh by me then as stated by Geoffrey Hobbs KC sitting as the Appointed Person in NICO LONDON Trade Mark (O-338-20) at paragraph [36]:

> . . . the Decision would end up being re-taken by this Tribunal under the guise of reviewing it for error. However, it is necessary in order to maintain the required distance between the role of decision taker at first instance and the role of decision taker on appeal for this Tribunal to proceed on the basis that the Decision below should stand unless the matters

on which the Opponent relies are by force of what they reveal sufficient to establish that the Decision is vitiated by error.

27. I have reviewed the Decision in the light of all of the alternatives put forward by the Applicant. Having done so I am satisfied that none of the points relied upon reveal any errors on the part of the Hearing Officer which taken either individually or together establish that the conclusion she reached is one that is vitiated by error. Rather, the conclusion that the Hearing Officer reached is one, that it seems to me, was open to her.

28. Moreover, I am reinforced in my view given the unchallenged findings made by the Hearing Officer in paragraphs [28] and [37] of the Decision that so far as the average consumer is concerned the Proprietor's mark would be perceived as an invented word (as the Applicant itself contended) and the Applicant's mark as a surname.

Conclusion

29. For the reasons set out above it does not seem to me that the Applicant has identified any error of principle or material error in the Hearing Officer's Decision. Moreover, it is not in my view appropriate to interfere with the evaluations that the Hearing Officer made in reaching the decision that she did. In the result the appeal fails and is dismissed.

30. Since the appeal has been dismissed the Proprietor is entitled to a contribution towards its costs of the appeal. However, the Proprietor has taken no part whatsoever in this appeal and therefore in the exercise of my discretion it seems to me that the appropriate order is to make no order as to costs on the appeal.

31. However, the Hearing Officer made an order *inter alia* that Koninklijke Philips N.V. pay to ShenZhen Linktop Iot Co., Ltd the sum of £300 within 21 days of the conclusion of the appeal proceedings. That order therefore comes into effect 21 days from the date of this Decision.

EMMA HIMSWORTH KC

Appointed Person

1 May 2024