

**O/0493/26**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF REGISTRATION NO. UK00004042111  
BY ELDIDISTRIBUTION LTD  
FOR THE FOLLOWING TRADE MARK:**

**TLBB**

**IN CLASS 20**

**AND**

**AN APPLICATION FOR A DECLARATION OF INVALIDITY  
UNDER NO. 507710  
BY WU SONG**

## Background and pleadings

1. Eldidistribution Ltd (“the proprietor”) is the registered proprietor of the UK trade mark shown on the cover of this decision (“the contested mark”). The contested mark was filed on 22 April 2024 and was granted registration on 12 July 2024. It stands registered for the following goods:

**Class 20:** *High chairs; Foot rests; High chairs for babies; High stools [furniture]; Feet for furniture.*

2. On 19 August 2024, the contested mark was subject to an invalidation application by Wu Song (“the applicant”). The application is based on Section 47 and Section 5(4)(a) of the Trade Marks Act 1994 (“the Act”). For the purpose of his claim, the applicant relies on the sign TLBB which it claims to have used throughout the UK since 31 July 2021 in relation to *highchairs*. Further, the applicant claims that given the identity of the signs and goods at issue, misrepresentation is liable to damage the proprietor’s reputation and goodwill.

3. The proprietor filed a counterstatement denying the claims made.

4. The proprietor is unrepresented; whilst the applicant is represented by IBE Avocat - Isabelle Bertaux.

5. Only the applicant filed evidence in these proceedings. No hearing was requested and so this decision is taken following a careful perusal of the papers.

## Relevance of EU Law

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, Section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

## **EVIDENCE**

7. The applicant's evidence came in the form of a witness statement from Wu Song, the applicant himself (with exhibits Annex 01- Annex 02). Mr Song's witness statement is dated 21 January 2024 (though this might be an error as the witness statement was filed on 21 January 2025 ) and is very brief containing only 6 paragraphs.

8. I do not intend to summarise the evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

### **Section 5(4)(a)**

9. Section 5(4)(a) states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(b) [...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

10. Subsection (4A) of Section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

11. The relevant parts of Section 47 state:

“47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) [...]

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied, unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

### **General principles of Section 5(4)(a)**

12. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt &*

*Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether "*a substantial number*" of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21)."

13. Halsbury's Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

"Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,

- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

#### **The relevant date for Section 5(4)(a)**

14. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC (now KC), as the Appointed Person, endorsed the registrar’s assessment of the relevant date for the purposes of Section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether

the position would have been any different at the later date when the application was made.’ ”

15. In its counterstatement, the proprietor states that it has used the contested mark since its registration. Further, the proprietor did not file any evidence in these proceedings. Hence, the only relevant date I need to consider is the filing date of the contested mark, namely 22 April 2024.

## **Goodwill**

16. The meaning of goodwill was explained in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL) as follows:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

17. As regards the proof of goodwill, in *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

“27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation;

evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

18. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

19. Goodwill must be more than trivial in extent. In *Hart v Relentless Records* [2002] EWHC 1984 (Ch), Jacob J. (as he then was) stated that:

“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole

point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used “but had not acquired any significant reputation” (the trial judge's finding). Again that shows one is looking for more than a minimal reputation.”

20. In *Smart Planet Technologies, Inc. v Rajinda Sharma* (BL O/304/20), Mr Thomas Mitcheson QC (now KC), as the Appointed Person, reviewed the following authorities about the establishment of goodwill for the purposes of passing-off: *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2015] UKSC 31, paragraph 52, *Reckitt & Colman Product v Borden* [1990] RPC 341, HL and *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd* [1980] R.P.C. 31. After reviewing these authorities Mr Mitcheson concluded that:

“... a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon.”

21. After reviewing the evidence relied on to establish the existence of a protectable goodwill Mr Mitcheson found as follows:

“The evidence before the Hearing Officer to support a finding of goodwill for Party A prior to 28 January 2018 amounted to 10 invoices issued by Cup Print in Ireland to two customers in the UK. They were exhibited to Mr Lorenzi's witness statement as exhibit WL-10. The customers were Broderick Group Limited and Vaio Pak.

37. The invoices to Broderick Group Limited dated prior to 28 January 2018 totalled €939 and those to Vaio Pak €2291 for something approaching 40,000 paper cups in total. The invoices referred to the size of “reCUP” ordered in each case. Mr Lorenzi explained that Broderick Group Limited supply coffee vending

machines in the UK. Some of the invoices suggested that the cups were further branded for onward customers e.g. Luca's Kitchen and Bakery.

38. Mr Rousseau urged me not to dismiss the sales figures as low just because the product was cheap. I have not done so, but I must also bear in mind the size of the market as a whole and the likely impact upon it of selling 40,000 cups. Mr Lorenzi explained elsewhere in his statement that the UK market was some 2.5 billion paper coffee cups per year. That indicates what a tiny proportion of the market the reCUP had achieved by the relevant date.

39. Further, no evidence was adduced from Cup Print to explain how the business in the UK had been won. Mr Rousseau submitted to me that the average consumer in this case was the branded cup supplier company, such as Vaio Pak or Broderick Group. No evidence was adduced from either of those companies or from any other company in their position to explain what goodwill could be attributed to the word reCUP as a result of the activities and sales of Cup Print or Party A prior to 28 January 2018.

40. Various articles from Packaging News in the period 2015-2017 had been exhibited but again no attempt had been made to assess their impact on the average consumer and these all pre-dated the acquisition of the goodwill in the UK. I appreciate that the Registry is meant to be a less formal jurisdiction than, say, the Chancery Division in terms of evidence, but the evidence submitted in this case by Party A as to activities prior to 28 January 2018 fell well short of what I consider would have been necessary to establish sufficient goodwill to maintain a claim of passing off.

41. This conclusion is fortified by the submissions of Party B relating to the distinctiveness of the sign in issue. Recup obviously alludes to a recycled, reusable or recyclable cup, and Party B adduced evidence that other entities around the world had sought to register it for similar goods around the same time. The element of descriptiveness in the sign sought to be used means that it will take longer to carry out sufficient trade with customers to establish sufficient goodwill in that sign so as to make it distinctive of Party A's goods."

22. However, a small business which has more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing off even though its goodwill and reputation may be small. In *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590, the Court of Appeal in England and Wales held that the defendant had passed off its LUMOS nail care products as the claimant's goods. The claimant had been selling LUMOS anti-ageing products since 2007. The goods retailed at prices between £40 and £100 per bottle. The Claimant's sales were small, of the order of £2,000 per quarter from early 2008 to September 2009, rising to £10,000 per quarter by September 2010. The vast majority of these sales were to the trade, including salons, clinics and a market. As at the relevant date (October 2010) the Claimant had sold to 37 outlets and by that date it was still selling to 25 outlets. There was evidence of repeat purchases. Although the number of customers was small, or, as the judge at first instance put it, "*very limited*", the claimant's goodwill was found to be sufficient to entitle it to restrain the defendant's trade under LUMOS.

23. See also: *Stannard v Reay* [1967] FSR 140 (HC); *Teleworks v Telework Group* [2002] RPC 27 (HC); (COA).

24. As I have anticipated, Mr Song's witness statement is very brief. Whist it contains 6 small paragraphs, only two provide evidence of fact. They are as follows (which I reproduce in full):

*"4. My company's device, highchair footrest, has been available in the UK since 2021 via the Amazon's platform. There is now produced and shown as Attachment 01 (AMAZON LINK reference).*

*5. The device that I have been selling constantly, highchair footrest with ASIN: B09BL6P8M4 through Amazon since 31 July 2021 in the UK, which is then earlier than the filing date of the UKTMUK00004042111-TLBB, filed on 22 April 2024 (Amazon selling orders, Attachment 02)."*

25. It is obvious that this evidence comes nowhere near satisfying the test required for passing off. There are no details about the turnover generated by the sale of goods marketed under the earlier sign and there are no marketing figures. There is no

evidence of promotion, and nothing about the applicant's customers. Admittedly, even if the copies of the webpages from Amazon UK exhibited in evidence show a handful number of reviews from customers dated earlier than the relevant date of 22 April 2024, the fact that the goods were offered for sale prior to the relevant date is not sufficient to establish the requirement of goodwill. The test is not if the goods were marketed under the earlier sign prior to the relevant date, but rather, if the applicant has, at that date, developed an actionable goodwill sufficient to sustain an action for passing off.

26. Admittedly Annex 2 shows that a handful number of orders were made from Amazon UK, and the first page of annex 2 also shows that between 1 January 2022 and 31 December 2022 (prior to the relevant date) 395 orders were made of a product identified with ASIN number B09BL6P8M4 and described as *"High Chair Footrest, Adjustable Height Natural Bamboo Baby Highchairs Pedal, Suitable for IKEA Antilop High Chair Footstool (A)"*. The same annex also shows that 3367 orders were made of the same product in the last year. Whilst this is the only evidence which provides some details about sales, unfortunately for the applicant, it does not assist. This is because:

- As regards the evidence about the 3367 orders made in the last year, the webpages from Amazon UK which confirm this information are undated. However, even if I were to consider that the webpages from Amazon UK show a date of 24.07.2024 on the right-hand corner, it would mean that that there were 3367 orders made between 24.07.2023 and 24.07.2024 which would include sales made after the relevant date of 22 April 2024 – significantly the screenshot exhibited only shows orders placed on 23 to 24 July 2024 (i.e. after the relevant date).
- As regards the 395 orders made between 1 January 2022 and 31 December 2022 (prior to the relevant date), there are also issues here. First, this inventory appears to include orders which were cancelled as shown below by the word "cancelled" which appears next to an order. This casts doubts on the number of items actually sold as only the number of orders has been provided.



High Chair Footrest, Adjustable Height Natural Bamboo Baby Highchairs Pedal,  
Suitable for IKEA Antilop High Chair Footstool (A)  
ASIN: B09BL6P8M4  
SKU: V7-BWDC-AQB3  
Item subtotal: £16.99

Cancelled

But most importantly, the earlier mark is not visible in the description of the product which is as follows:

<input type="checkbox"/> Order date	Order details
<input type="checkbox"/> <b>2 years ago</b> 31/12/2022 00:00 GMT	<b>202-9612120-4125949</b> Buyer name: sanniah/mohsin Fulfilment method: Seller Sales channel: Amazon.co.uk
<b>High Chair Footrest, Adjustable Height Natural Bamboo Baby Highchairs Pedal</b> Suitable for IKEA Antilop High Chair Footstool (A) ASIN: B09BL6P8M4 SKU: V7-BWDC-AQB3 Quantity: 1 Item subtotal: £16.99	

In this connection, having analysed in detail the webpages exhibited, I have noted that, as can be seen in the image below, the brand TLBB appears in small writing in the Amazon listing details, but it is not possible to determine from this image if it is visible on the goods:



High Chair Footrest, Adjustable Height  
Natural Bamboo Baby Highchairs Pedal,  
Suitable for IKEA Antilop High Chair  
Footstool (A)

Brand: TLBB  
4.2 ★★★★★ 581 ratings | [Search this page](#)  
200+ bought in past month

£16<sup>99</sup>

FREE Returns

<b>Material</b>	Rubber
<b>Colour</b>	Wood
<b>Brand</b>	TLBB
<b>Special feature</b>	Easy to Clean, Adjustable
<b>Frame material</b>	Metal

**About this item**

- Adjustable
- Easy to Clean

[Report an issue with this product](#)

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Consequently, I doubt that the consumer would notice the brand at all, as (a) the brand is not prominently displayed neither on the goods nor on the listing, and (b) the brand is not incorporated in the description of the goods and (c) given the description of the goods is “*High Chair Footrest, Adjustable Height Natural Bamboo Baby Highchairs Pedal, Suitable for IKEA Antilop High Chair Footstool (A)*”, it seems that the goods will be selected by the consumer because of their compatibility with a different brand (i.e. an IKEA highchair) not because of the brand TBLL. In this connection, none of the reviews provided mention the brand TBLL.

27. Bearing in mind all of the above, my conclusion is that even taking a generous approach that the applicant’s evidence establishes that the applicant sold 395 units of goods prior to the relevant date, first that would not be use in relation to the goods claimed in the pleadings, namely highchairs, because the goods sold are merely

footrests for highchairs, not highchairs themselves. Second, even if the applicant had pleaded goodwill in relation to the correct goods, given the minuscule amount of goods sold (i.e. 395) and the way the sign has been used, which is hardly noticeable, it would not be sufficient to establish a more than trivial goodwill.

28. Since the applicant has failed to establish a more than trivial goodwill at the relevant date, his claim for passing off fails at the first hurdle.

## **OUTCOME**

29. The invalidity application has failed, and the proprietor's mark will stay registered.

## **COSTS**

30. The proprietor has been successful and is, therefore, entitled to a contribution towards its costs. The proprietor was given the opportunity to submit the standard costs proforma but since it failed to do so, I make no costs award in respect of the opposition.

**Dated this 10<sup>th</sup> day of June 2026**

**TERESA PINTO**  
**For the Registrar**