

O/0615/24

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NO. UK00003734445
IN THE NAME OF BAKHSH GROUP LTD FOR THE TRADE MARK:

ARTM

IN CLASS 9 AND 36

AND IN THE MATTER OF OPPOSITION THERETO
BY ARTEM AG UNDER NO. 432659

AND IN THE MATTER OF INTERNATIONAL REGISTRATION NO.
WO0000001662643 DESIGNATING THE UK IN THE NAME OF ARTEM AG
FOR THE FOLLOWING TRADE MARK:



AND IN THE MATTER OF OPPOSITION THERETO
BY BAKHSH GROUP LTD UNDER NO. 435858

BACKGROUND AND PLEADINGS

1. On 17 December 2021, Bakhsh Group Ltd (“BGL”) applied to register the trade mark ARTM under application no. 3734445 (“the 445 Mark”) in the UK. The application was published for opposition purposes on 14 January 2022 and registration is sought for the goods and services set out in the Annex to this decision.

2. On 14 April 2022, the application for the 445 Mark was opposed by ARTEM AG (“AAG”) based upon sections 5(4)(a) and 3(6) of the Trade Marks Act 1994 (“the Act”).¹ Under section 5(4)(a) of the Act, AAG relies upon the sign ARTEM which it claims to have used throughout the UK since at least 2 September 2021 in relation to digital cryptocurrency tokens, digital cryptocurrency coins, cryptocurrency services and financial services relating to cryptocurrency. AAG claims that use of the 445 Mark would be contrary to the law of passing off.

3. Under section 3(6) of the Act, AAG claims that the opponent had announced, prior to the filing of the 445 Mark, that it was going to open sales of its ARTEM cryptocurrency to the general public and that this had attracted intense press coverage. AAG claims that BGL was aware of this and sought to register the 445 Mark with the intention of preventing AAG from registering its own ARTEM or ARTM marks or to otherwise disrupt AAG’s business.

4. BGL filed a counterstatement denying the grounds of opposition. There is no express denial in the counterstatement that the parties’ respective fields of activity are similar, other than a blanket denial of all of the claims made by AAG.

5. AAG is the proprietor of international trade mark no. 1662643 (“the 643 Mark”) which was registered on 22 March 2022. Priority is claimed from 2 March 2022. With effect from 22 March 2022, AAG designated the UK as a territory in which it sought to protect the 643 Mark under the terms of the Protocol to the Madrid Agreement. The request

¹ Although the opposition was originally based upon section 5(4)(a) only, the section 3(6) ground was added following the filing of a Form TM7G on 4 August 2022.

to protect the 643 Mark in the UK was published for opposition purposes on 19 August 2022 and protection is sought for the following services:

Class 36 Financial services, namely, issuance and management of non-fungible tokens for the authentication of digital and other art work (excluding asset management, fund management or investment services directed to corporate enterprises or individuals).

6. The request to protect the 643 Mark in the UK was opposed by BGL on 26 August 2022 based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Act. Under section 5(2)(b) and 5(3) of the Act, BGL relies upon the 445 Mark and all of the goods and services for which it is registered. Under section 5(2)(b) of the Act, BGL claims that the marks are similar, and the goods and services are identical or similar, with the result that there is a likelihood of confusion.

7. Under section 5(3) of the Act, BGL claims that use of the 643 Mark would, without due cause, take unfair advantage of, and/or be detrimental to, the distinctive character and/or repute of the 445 Mark.

8. Under section 5(4)(a) of the Act, BGL relies upon the sign ARTM which it claims to have been using throughout the UK since 13 April 2021 in relation to services related to cryptocurrencies, services related to virtual currencies, blockchain technology, NFTs, computer gaming and streaming platforms. BGL claims that use of the 643 Mark would be contrary to the law of passing off.

9. AAG filed a counterstatement denying the grounds of opposition.

10. Neither party requested a hearing, and only AAG filed written submissions in lieu. This decision is taken following a careful consideration of all papers on file.

REPRESENTATION

11. BGL is represented by Cloch Solicitors.

12. AAG was originally represented by Keltie LLP and is now represented by Ladas & Parry LLP.

EVIDENCE AND SUBMISSIONS

13. AAG filed evidence in the form of:

- a) The witness statement of Elio D'Anna dated 20 September 2022, which is accompanied by 34 exhibits (EDA0 to EDA33). Mr D'Anna is one of the founders of AAG.
- b) The witness statement of Emma-Louise O'Neill dated 20 September 2022, which is accompanied by 7 exhibits (ELO1 to ELO7). Ms O'Neil is the founder of ELO BRANDS, which has been providing PR services to HOFA Gallery (see below) for around 10 years. Her company has assisted AAG in its promotional activities.
- c) The witness statement of Jordan French dated 9 January 2022, accompanied by 2 exhibits (JF1 and JF2). Mr French is a journalist who has been covering BitCoin news since 2017.
- d) The witness statement of Galen Law-Kun dated 4 September 2022. Mr Law-Kun is Founding Partner of the Double Peak Group which focuses on digital asset investments, as well as being involved with the Hong Kong Government Cyberport Incubator Program.
- e) The witness statement of Gijs de Viet dated 10 September 2022. Mr de Viet is a commodity trader at Glencore, a position he has held for 15 years.
- f) The witness statement of Stefan Michael Bachmann. Mr Bachmann is an advisor for wealth management companies interested in blockchain ventures and crypto assets. He has been working in this role since 2019, but has been involved in blockchain technology and cryptofinance since April 2015.

14. AAG's evidence was accompanied by written submissions dated 1 November 2022.

15. BGL filed evidence in the form of the witness statement of Philip Hannay dated 12 June 2023, which is accompanied by 6 exhibits (B-PH1-01 to B-PH1-06). Mr Hannay is BGL's representative in these proceedings.

16. AAG did not file evidence in reply.

17. BGL filed evidence in reply in the form of the second witness statement of Mr Hannay dated 14 August 2023, which is accompanied by 6 exhibits (B-PH2-07 to B-PH2-12).

18. AAG filed written submissions dated 11 October 2023.

RELEVANCE OF EU LAW

19. 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.

DECISION

MY APPROACH

20. As the opposition against the 643 Mark is based, at least in part, on the 445 Mark, I will begin by deciding the opposition against the 445 Mark. I will then return to consider the opposition against the 643 Mark once I have determined whether, or to what extent, the 445 Mark may proceed to registration.

THE OPPOSITION AGAINST THE 445 MARK

21. As noted above, AAG opposes the registration of the 445 Mark based upon sections 5(4)(a) and 3(6) of the Act. I will deal with each of these grounds in turn.

Section 5(4)(a)

22. Section 5(4)(a) of the Act states as follows:

“(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, or

(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”.

23. 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.”

24. 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)."

Relevant date

25. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, 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 TMO-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.'

26. Mr Hannay's evidence goes to the activities of BGL. The earliest reference to BGL using the letters ARTM in relation to its cryptocurrency was on 13 April 2021 when it

registered the domain name artmtoken.com.² It subsequently registered the domain name getartm.io on 9 July 2021. However, the latter does not appear to me to be a website that would be aimed at UK consumers (and there is nothing in the evidence to suggest otherwise), as it is not a UK-based domain name.

27. Mr Hannay states that BGL was developing its cryptocurrency during this time and its software was “deposited in GitHub as early as 03 May 2021, with original go live date of 04 June 2021”.³ However, no explanation is provided as to what the significance is of depositing software in “GitHub”, nor is any explanation provided as to whether this is part of a process of preparing for trade in the UK (as opposed to elsewhere). Despite the original ‘go live’ dating being given as 4 June 2021, BGL’s cryptocurrency was not launched until 30 July 2021. A screen shot dated 12 June 2023 shows that there were 913 holders of the ARTM token, but it is not clear to me where these users were located or when they purchased the tokens.⁴ Mr Hannay gives evidence that the “fully diluted market capitalisation (in USD) of the ARTM token is \$75,195,000”, which is supported by the information provided in Exhibit B-PH1-03. However, it is not clear to me what time frame these transactions relate to.

28. Mr Hannay states that the ARTM token has been tracked by CoinMarketCap and CoinGecko (as well as other websites). Examples of the former are provided.⁵ The first is a printout from www.coingecko.com which is dated 12 June 2023. The currency is listed in USD. There is nothing on the webpage that indicates to me when ARTM tokens first became available for purchase, other than that the all time high and all time low of the price for the tokens were in April and March 2022 respectively. The second is a printout from www.coinmarketcap.com dated 12 June 2023. Again, there is nothing on this page which identifies to me when ARTM tokens first became available. There is another printout from a website called www.lbank.info dated 12 June 2023. Again, the currency is listed in USD and there is nothing that identifies to me when these tokens were first made available.

² Exhibit B-PH1-01

³ Exhibit B-PH1-02

⁴ Exhibit B-PH1-03

⁵ Exhibit B-PH1-04

29. A screenshot from BGL’s own website (getartm.io) dated 1 October 2021 is provided, which states “ARTM is an ERC-20 token that will be used to unlock NFTs, video streaming and gaming add-ons” (emphasis added).⁶ The use of the future tense suggests to me that the ARTM token was not fully operational by that date. However, there is a page from the same site which describes the token as having been created and offered for sale in 2021, with a “burn of 100 billion ARTM tokens from team and company-controlled wallets” by 2023. By 13 December 2021, there is evidence that the ARTM token was open for trading on Singapore-based exchange CoinTiger”.

30. The ARTM Twitter account was opened in August 2021, but the only visible post is from 22 December 2021.⁷ I note that the business location is described as Singapore. Although there is evidence of the number of followers for this account (and other social media pages), these are all correct as of 12 June 2023.

31. There is nothing in the evidence filed by BGL to suggest that there has been use of ARTM in, or directed at, the UK. Indeed, there are a number of references to Singapore and currency is listed in USD, which would point towards use being outside of the UK. As noted by Mr Thomas Mitcheson KC, sitting as the Appointed Person in *CASABLANCA*, “use outside the UK would rarely give rise to antecedent rights”.⁸ I believe that to be the case here. Consequently, I do not consider the evidence to be sufficient to establish an earlier relevant date. I have, therefore, only the prima facie relevant date to consider which is 17 December 2021.

Goodwill

32. In *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217 (HOL), goodwill was described in the following terms:

“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

⁶ Exhibit B-PH1-05

⁷ Exhibit B-PH1-06

⁸ BL O/349/16

which distinguishes an old-established business from a new business at its first start.”

33. Mr D’Anna begins his evidence by explaining that he founded the HOFA Gallery in London in 2012, which specialises in contemporary art and emerging international artists. The HOFA Gallery has hosted artists such as Banksy and Damien Hirst and has been referenced in *The Daily Telegraph*.⁹ In 2018, HOFA became the first art gallery in the world to accept only cryptocurrencies as a form of payment. This announcement was covered by publications such as *Forbes* and *The Evening Standard*.¹⁰ It was also covered on *Sky News* in 2019.

34. Mr D’Anna states:

“In September 2021, HOFA Gallery was at the centre of attention of the world’s cryptofinance press because it announced the presentation of the world [sic] most valuable exhibition of art NFTs...”

35. Mr D’Anna incorporated the company Artcels Limited which is AAG’s predecessor in title. All rights were assigned to AAG in April 2021.

36. In January 2020, AAG “minted” its cryptocurrency intended for trading art in the form of NFT on the blockchain. This was accompanied by the launch of a platform for blockchain-based art investments in cryptocurrency. The launch took place in February 2020. Although Mr D’Anna notes that the launch of this platform was covered in the press, much of the evidence provided refers to the sign ARTCELS, not ARTEM/ARTM.¹¹ However, I note that there is some evidence in which the sign ARTEM is used. For example, an article in a publication called *Art Week* dated 25 November 2020 refers to the fact that the coin ARTEM is due to be launched in the first part of 2021.¹² There is also evidence from Mr D’Anna that HOFA Gallery has maintained a link to the ARTEM platform since October 2020, as follows:¹³

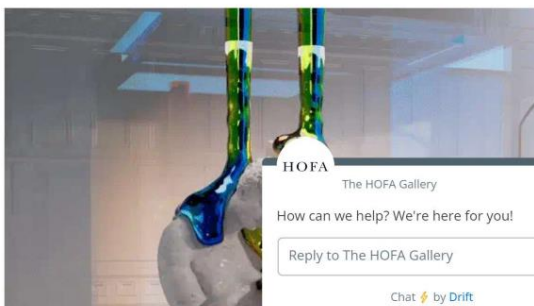
⁹ Exhibit EDA0

¹⁰ Exhibit EDA1

¹¹ See, for example EDA9 and EDA10.

¹² Exhibit EDA11

¹³ Exhibit EDA16



37. Mr D’Anna states that the sign ARTEM was first used in discussions with investors as early as October 2019, but due to the confidentiality of these negotiations he is unable to provide any documentary evidence to support this claim. The earliest documentary evidence that I have been able to identify which refers to the sign ARTEM is an information sheet for potential investors that Mr D’Anna states has been in use since at least August 2020.¹⁴ At this point, there is no evidence to suggest what the nature of the negotiations were with the investors in issue or on what terms the funds were raised. I note that Mr de Viet is UK-based and states that he became an early investor in ARTEM in December 2019. Similarly, Mr Law-Kun states that in the first round of investments approximately £1.6million came from UK-based investors. However, this is before Mr D’Anna states that the ARTEM cryptocurrency was launched to private investors. It, therefore, appears to me that this reference to being an ‘investor’ is in relation to being an investor in the project itself, rather than an ‘investor’ in the context of investing in cryptocurrency sold by AAG.

38. The first evidence of AAG actually trading under the name ARTEM is from April 2021. Mr D’Anna explains that this is when sales of ARTEM cryptocurrency to private investors first started and continued until November 2021; sales were not opened to the general public until 28 December 2021 (after the relevant date). In terms of the

¹⁴ Exhibit EDA10

sales made to private investors, Mr D’Anna explains that AAG “had sold total investments for USD4.75M (approx £3.9M) to third parties and the ARTEM cryptofinance investment platform was valued at USD45M.”¹⁵ By stating that AAG had “sold investments” at this time, I understand Mr D’Anna to mean that private investors provide funds upfront, which AAG then use to develop the platform, on the agreement that (when they are able) AAG will provide the investor with the equivalent amount of cryptocurrency to reflect their investment.

39. This is explained in a supporting agreement between AAG and a private investor as follows:¹⁶

“2. [AAG] aims to generate on a blockchain its own cryptographic ERC-20 token, namely ARTEM COIN (“ARTM” or “Token”).

3. The Purchaser shall provide the funds defined below (FIAT or cryptocurrency) pursuant to this Agreement.

4. In return, the Purchaser receives with this Agreement the right to receive and obtain a specific number of future Tokens yet to be created (“Acquisition Rights”).”

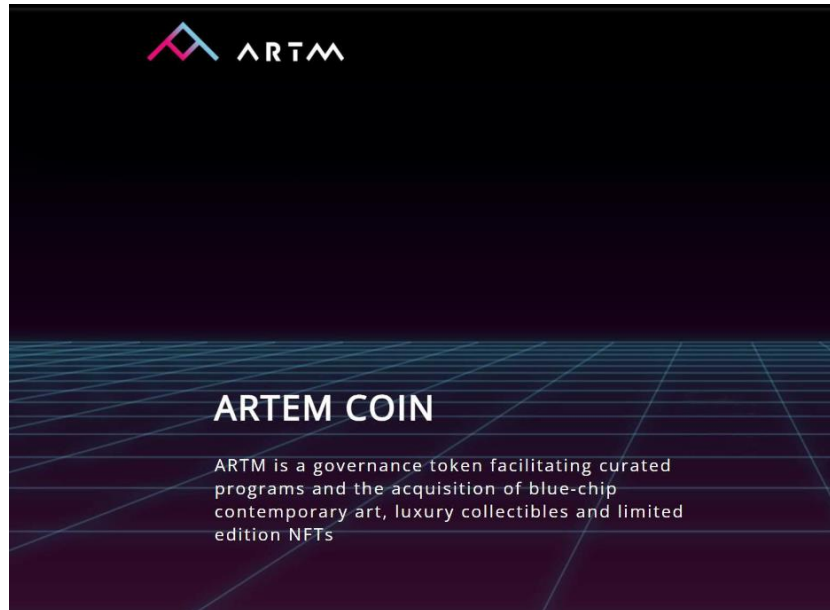
The agreement is for the sum of \$200,000 and the investor is a company located in the British Virgin Islands.

40. By 1 December 2021, AAG’s website appeared as follows:¹⁷

¹⁵ Exhibit EDA27

¹⁶ Exhibit EDA23

¹⁷ Exhibit EDA13



41. An article in the *Financial Times*' supplement dated September 2021 discussed the launch as follows:¹⁸

“Artcels even launched its own Swiss-based cryptocurrency, Artem, last year to facilitate trades on its platform.

An initial 320 shares in the fund – called Millenials – were released in April at a price of £1,000 each in the form of non-fungible tokens, or NFTs. These are lines of code locked into the blockchain, an encrypted record of ownership; each token is unique to the share it represents.”

42. A London-based (and virtual) exhibition was held by HOFA Gallery between 22 April and 2 May 2021 to promote the ARTEM cryptocurrency.¹⁹ A newsletter promoting this was sent to the HOFA Gallery's mailing list, which at the time, consisted of more than 26,000 people.

43. I note that in the lead up to the launch of ARTEM to the general public, there was a flurry of press coverage in early December, with copies of articles provided dated up

¹⁸ Exhibit EDA18

¹⁹ Exhibit EDA20

to 16 December 2021.²⁰ A number of the articles refer to both ARTEM and ARTM. Whilst it is not clear whether all of these websites are aimed at the UK public, I note that some clearly are.²¹

44. Although there is some inconsistency in the evidence about when AAG's cryptocurrency was first launched (in the sense of being able to actually purchase tokens), it seems to me that certainly by April 2021, it had been made available for a section of the relevant public (being private investors). At this time, private investors were able to pay and place orders for the cryptocurrency, even if they were not due to be received until a later date. In my view, this amounts to trading activity. By November 2021, the opponent had effectively received orders amounting to almost £4million. Mr D'Anna states that all of these sales were "procured" through a UK-based company. However, this does not appear to me to be the same as the purchases having been made by UK-based companies. The procurement company would just have acted as a middle man. Indeed, the only evidence that I have of an actual agreement for purchase in this regard relates to a business located in the British Virgin Islands (not the UK). There is also a tension in the evidence between references to 'investors' which appear to relate to actual customers of AAG (who are investors by virtue of the fact that they are investing in cryptocurrency) and 'investors' which appear to be providing financial backing to AAG (who are investors by virtue of the fact that they are investing in AAG or the ARTEM project itself). The latter of these two groups do not, in my view, reflect trade in the goods/services relied upon; this is simply reflective of activities undertaken by AAG as part of their preparations to trade.

45. I am, therefore, in a position where I have no concrete evidence of sales made to customers in the UK. Whilst I am satisfied that there has been trade prior to the relevant date, there is nothing before me to confirm that there were UK-based customers.

46. Whilst I bear in mind that there is evidence of promotional activities by AAG (at least some of which appears to have been aimed at the UK market), the law is not

²⁰ Exhibit EDA29

²¹ See, for example, page 21 of Exhibit EDA29 which refers to a .co.uk email address.

clear as to whether an advertising campaign featuring a mark can create a protectable goodwill without any actual sales to UK customers.²² There have been some cases where pre-launch publicity has been accepted as sufficient to create an actionable goodwill, but they relate to long-established businesses with goodwill in the UK and the question really under consideration was whether their new marks had become distinctive of that goodwill.²³ However, I do not consider that to be the case here. Whilst HOFA Gallery might, itself, have a reputation, it is not claimed that the ARTEM sign was distinctive of that business; it is AAG that claims to own the goodwill. Consequently, until the law is clarified, it is doubtful whether a business with no sales to UK customers (or no proven sales) can establish a passing off right based solely on advertising. Consequently, I am unable to conclude that AAG has satisfied the requirement to show a protectable goodwill in the UK at the relevant date.

47. The opposition based upon section 5(4)(a) of the Act is dismissed.

Section 3(6)

48. Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

49. In *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121 the Court of Appeal considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07 EU:C:2009:361, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, EU:C:2013:435, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, EU:C:2019:724, *Hasbro, Inc. v EUIPO, Kreativni Dogaaji d.o.o. intervening*, Case T-663/19, EU:2021:211, *pelicantravel.com s.r.o. v OHIM, Pelikan Vertriebsgesellschaft mbH & Co KG (intervening)*, Case T-136/11, EU:T:2012:689, and *Psytech International Ltd v*

²² *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*, [2015] UKSC 31

²³ See, for example *BBC v Talbot* [1981] FSR 228

OHIM, Institute for Personality & Ability Testing, Inc (intervening), Case T-507/08, EU:T:2011:46. It summarised the law as follows:

“68. The following points of relevance to this case can be gleaned from these CJEU authorities:

1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can be relied on before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].

2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].

3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of trade mark law, i.e. the course of trade and having regard to the objectives of the law namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin: *Lindt* at [45]; *Koton Mağazacılık* at [45].

4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacılık* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54].”

50. According to *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are:

(a) What, in concrete terms, was the objective that the applicant has been accused of pursuing?

(b) Was that an objective for the purposes of which the contested application could not be properly filed? and

(c) Was it established that the contested application was filed in pursuit of that objective?

51. It is necessary to ascertain what the applicant knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

52. I note that in his evidence Mr Hannay states that he has found BGL to be wholly trustworthy. Whilst that might be the case, his opinion is not relevant to the assessment that I must make as to whether BGL has applied for its mark in bad faith. Consequently, I do not consider that this assists BGL in defending its application.

What, in concrete terms, was the objective that the applicant has been accused of pursuing?

53. AAG's section 3(6) claim is pleaded as follows:

"Prior to the filing date of the opposed application (17 December 2021), the Opponent had announced the opening of sales to the general public of its ARTEM cryptocurrency (also referred to in the press as ARTM) planned for 21 December 2021 (later shifted to a few days later).

Evidence will be adduced that the Opponent's mark ARTEM (also referred to in the press as ARTM) has been the subject of intense press coverage in relation to a cryptocurrency and connected investment scheme for several months prior to the filing of the Opposed Application.

The Opponent claims that the Applicant was aware of the Opponent's marks ARTEM and ARTM at the time of filing the Opposed Application and filed the Opposed Application to register the mark ARTM with an intention to prevent the Opponent from registering its own ARTEM or ARTM marks, or with an intention to disrupt the Opponent's business, or in any case without a bona fide intention to use the mark applied for."

Was that an objective for the purposes of which the application could not be properly filed?

54. I am satisfied that, if proven, the objective set out above is a purpose for which the application could not be properly filed.

Was it established that the application was filed in pursuit of that objective?

55. As explained above, there are issues with AAG's evidence in terms of establishing a protectable goodwill at the relevant date. However, what the evidence does show is that prior to the relevant date there was press coverage of the ongoing ARTEM project and the imminent launch to the general public shortly after the relevant date. I bear in mind that the services in question are fairly specialist and so I would expect to see more coverage in specialist publications rather than national ones (which is the case here). However, there is also evidence of coverage in national publication, the *Financial Times*, and the promotional activities undertaken by HOFA Gallery, which already had a following itself, would all have contributed towards a significant part of the relevant public being aware of the imminent launch of ARTEM to the general public. The 445 Mark is for the word ARTM. However, as noted above in the evidence, there were interchangeable references between ARTEM and ARTM within the press coverage. All of the goods and services to which the application relates are identical,

similar or connected to those offered (or due to be offered) by AAG. It is notable that all of BGL's activities in relation to the 445 Mark started taking place at the same time that AAG launched its cryptocurrency for purchase by private investors (i.e. April 2021) and the application was made just shortly prior to the imminent release to the general public. Taking all of this into account, I am satisfied that there is a prima facie case of bad faith.

56. The only evidence that I have from BGL is given by their representative; despite being subject to the serious allegation of bad faith, BGL has elected not to provide any evidence itself. The only explanation offered by Mr Hannay as to how the name "ARTM" was coined by BGL is set out in his evidence in reply as follows:

"8. [...] There is now produced and shown to me marked exhibit B-PH2-12 Wikipedia printouts for the term "Artemis" and the NASA Space "Artemis program" together with the Google results showing articles supporting the popular and pedestrian expression "To The Moon" in the crypto market participant vernacular. It is based on these facts, and not the unsupported belief peddled by Elio D'Anna, that the distinctive mark ARTM was designed, adopted and used by [BGL]."

57. The exhibit referred to includes print outs from Wikipedia which discuss (as set out by Mr Hannay) details of Artemis, being a Greek God, and details of the NASA Space program called Artemis. It also includes the results of a Google search which suggests that those involved in cryptocurrency use the phrase "to the moon" to refer to their hopes of soaring valuations.

58. Mr Hannay does not provide any detail as to how he came to know the basis of BGL's decision to adopt the applied-for mark; it appears to me to be hearsay evidence at best. In any event, the mark adopted is not ARTEMIS, it is ARTM, and no explanation has been given as to how BGL came up with that name. I do not consider that the evidence filed by BGL is sufficient to rebut the prima facie case put forward by AAG.

59. The opposition based upon section 3(6) of the Act is successful in its entirety.

THE OPPOSITION AGAINST THE 643 MARK

Section 5(2)(b) and 5(3)

60. The only earlier right relied upon under these grounds was the 445 Mark. As I have found the opposition against that mark to be successful in its entirety, it cannot be relied upon by BGL. Consequently, the oppositions under these grounds must be dismissed.

61. The opposition based upon sections 5(2)(b) and 5(3) are dismissed.

Section 5(4)(a)

62. The law relating to section 5(4)(a) is set out above. As I have already noted, AAG's first use of the sign ARTEM in the UK (publicly) was in April 2021. Whilst I have found the use to be insufficient to give rise to a protectable goodwill, this still amounts to the commencement of the behaviour complained about for the purposes of establishing the relevant date. Given that BGL's cryptocurrency was not launched until July 2021, it cannot possibly establish an earlier protectable goodwill. Consequently, this ground of opposition must fall at the first hurdle.

63. The opposition based upon section 5(4)(a) of the Act is dismissed.

CONCLUSION

64. The opposition against UKTM no. 3734445 is successful and, subject to any successful appeal, the application is refused.

65. The opposition against protection of IR no. 1662643 in the UK is unsuccessful and, subject to any successful appeal, the protection is granted.

COSTS

66. AAG has been successful in both consolidated cases and is, therefore, entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award AAG the sum of **£2,100**, calculated as follows:

Preparing a Notice of opposition, preparing a counterstatement and considering BGL's forms	£450
Preparing evidence and considering BGL's evidence	£1,000
Written submissions in lieu	£450
Official fee	£200
Total	£2,100

67. I therefore order Bakhsh Group Ltd to pay ARTEM AG the sum of **£2,100**. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the expiry of the appeal period.

Dated this 28th day of June 2024

S WILSON

For the Registrar

ANNEX

Class 9

Digital asset (such as cryptocurrency, digital tokens, virtual currency and digital currency) software; cryptocurrency software; digital currency software; virtual currency software; virtual currency apparatus and instruments; digital asset apparatus and instruments; digitised asset devices; scientific, surveying, measuring, signalling, checking [supervision] and teaching apparatus and instruments; software provided from a computer network; computer application software for digitised assets via the internet; digital recorded media; electronic publications; downloadable electronic publications and documentation; music, sound, images, text, signals, software, information, data and code provided by telecommunications networks, by online delivery and by way of the Internet and the worldwide web; digital recordings or publications in electronic form supplied on-line or from facilities provided on the Internet; digital assets provided from the Internet; multi-media recordings; digital recordings, computer software and firmware, computer multimedia products; magnetic and optical programme bearing media; interactive computer software; computer software; computer programmes; application software; broadcast software; data analytics software; computer databases; software provided from a computer network; computer software supplied from the Internet; interactive games; parts and fittings for all the aforesaid goods.

Class 36

Financial services; provision of digitised assets (such as cryptocurrency, digital tokens, virtual currency and digital currency); virtual currency services; electronic financial trading, namely trading in the field of digitised assets such as cryptocurrency, digital tokens, virtual currency and digital currency; trading in digitised assets (such as cryptocurrency, digital tokens, virtual currency and digital currency), including over a global computer network or the Internet ; financial services, namely, providing a decentralised and open source cryptocurrency on a global computer network utilising a blockchain currency exchange service; financial, banking, monetary and payment services related to cryptocurrency, virtual and digital money; property insurance; consultancy services relating to cryptocurrency and digital tokens; provision of

information and advisory services relating to monetary affairs, including the provision of information from a computer database, the Internet or other electronic network; provision of information and advice for the prospective purchasers of commodities and goods; financial information services provided by access to a computer database; money services for mobile telephones; telephone banking services; administration of funds and investments; stock, brokerage, shares and bond trading information and brokerage services; financial and monetary services in relation to charitable services including charitable fundraising and support services; charitable collections; investment of funds for charitable purposes; distribution and allocation of charitable funds; insurance for digitised assets (such as cryptocurrency, digital tokens, virtual currency and digital currency); insurance for digital asset apparatus and instruments; insurance for computer software and hardware; financial leasing; hire purchase financing; lease-purchase financing; lease-purchase of digitised assets (such as cryptocurrency, digital tokens, virtual currency and digital currency); banking services including home, mobile, Internet and remote banking; financial sponsorship; insurance and finance services, including such services provided over the Internet or any other electronic network; electronic wallet services (payment services); payment services provided via wireless telecommunication apparatus and devices; electronic payment services including electronic fund transfer services and online transaction facilities; issue, collection and redemption of tokens, vouchers, points and cash back; credit card services; charge card services; electronic currency transfer services; insurance, financing and financial guarantee services relating to digitised assets (such as cryptocurrency, digital tokens, virtual currency and digital currency); financial guarantee services relating to digitised assets (such as cryptocurrency, digital tokens, virtual currency and digital currency); provision of investment and fund management information; financial affairs; monetary affairs; real estate affairs.