

O/0771/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3979238

BY ALAN MUNRO

TO REGISTER:



AS A TRADE MARK IN CLASS 41

AND

IN THE MATTER OF THE OPPOSITION THERETO

UNDER NO. 446183 BY

SEA-CHANGERS

BACKGROUND AND PLEADINGS

1. On 14 November 2023, Alan Munro (“the applicant”) applied to register the mark shown on the front cover of this decision as a trade mark in the United Kingdom in respect of the following services:

Class 41

Adult education services relating to environmental issues.

2. The application was accepted and published on 1 December 2023

3. On 1 March 2024, the application was opposed by Sea-Changers (“the opponent”). The opposition is based on sections 5(2)(b), 5(4)(a) and 3(6) of the Trade Marks Act 1994 (“the Act”).

4. Under section 5(2)(b), the opponent relies on UKTM No. 3658958, a series of two marks with a filing date of 22 June 2021 and a registration date of 29 October 2021. The marks are shown below:



5. The series qualifies as an earlier mark under section 6(1)(a) of the Act by virtue of its earlier filing date. Nothing turns on the difference between the two marks in the series and so I shall refer to them as “the earlier mark”. The services for which the earlier mark is registered are as follows:

Class 36

Providing monetary grants to charities; Providing project grants for environmental and health awareness projects; Fund raising for charity.

6. The opponent claims that the words “sea-changers” constitute the main distinctive element of the earlier mark. These words are wholly contained in the contested mark and so, the opponent argues, the marks are similar. It also claims that the services are

similar. Consequently, there is a likelihood of confusion on the part of the relevant public.

7. Under section 5(4)(a), the opponent claims to have used the signs shown in paragraph 4 above throughout the UK since 18 August 2011 for the services for which the earlier mark is registered. It argues that it owns “*a considerable amount of goodwill*” as a result of the use made of these signs. Use of the contested mark, which is similar to those signs, would result in a misrepresentation that the services of the applicant are those of the opponent or an entity linked to the opponent. This would cause damage to the opponent, including damage to goodwill, damage to reputation, lost sales and dilution.

8. Under section 3(6), the opponent claims that the applicant was well aware of the opponent’s use of the earlier mark and understood that the contested mark would confuse others operating in the sphere of marine conservation; interfere with the opponent’s rights to the sign **sea-changers** and variants thereof; and benefit from the time, investment and effort the opponent has made in relation to building its trade mark and charity. The opponent claims that the applicant had approached it in relation to the proposed use and registration of the contested mark prior to filing. It argues that the applicant’s actions fall short of acceptable commercial behaviour and that the mark was therefore filed in bad faith.

9. The applicant filed a defence and counterstatement denying the claims made. In particular, under section 5(2)(b) he argues that the marks are distinct, with significant differences in design, typeface, colour scheme and overall presentation and that the services exhibit significant differences. Under sections 5(4)(a) and 3(6), the applicant argues that the opponent has not substantiated its claims and so puts the opponent to proof of them.

10. Both parties filed evidence and this is briefly summarised below.

11. Neither party requested a hearing or filed submissions in lieu of the same.

12. In these proceedings, the opponent has been represented by Trademark Tonic Limited. The applicant has represented himself.

EVIDENCE AND SUBMISSIONS

13. The opponent's evidence in chief comes from Rachel Anne Lopata MBE, Co-Founder of the charity Sea-Changers, which was founded in 2010. Her witness statement is dated 31 July 2024. An amended version was submitted on 9 August 2024. It is accompanied by 28 exhibits. Her evidence goes to the use made of the earlier mark and the claims of bad faith. The opponent also filed written submissions at this stage.

14. The applicant's evidence comes from the applicant himself, Alan Munro, who is the Founder and Director of the Scottish registered charity Young Sea Changers Scotland which was founded in November 2022. His witness statement is dated 21 September 2024 and is accompanied by five exhibits. It goes to the work of Young Sea Changers Scotland and comments on the opponent's evidence relating to the claim of bad faith. In addition, the applicant filed written submissions at this stage.

15. The opponent filed evidence in reply in the form of a second witness statement from Ms Lopata dated 16 December 2024 and accompanied by three exhibits. The evidence goes to actual confusion and the overlap in the parties' fields of activity. The opponent also filed written submissions at this stage.

16. On 19 December 2024, the Registry wrote to the parties to conclude the evidence rounds.

17. On 29 April 2025, the opponent wrote to the Registry to request permission to file additional evidence, which Ms Lopata said contradicted evidence filed by the applicant. She explained that she had become aware that the applicant was now offering grants. The first public call for applications was made in April 2025, so the opponent had been unable to file this evidence earlier. On 9 June 2025, the Registry gave a preliminary view to allow the request. The additional evidence was filed on 16 June 2025 and consists of a third witness statement by Ms Lopata with the same date, accompanied by a single exhibit.

18. The applicant filed written submissions on 30 June 2025, commenting on the opponent's additional evidence.

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

Section 5(2)(b)

20. Section 5(2)(b) of the Act is as follows:

“A trade mark shall not be registered if because—

...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

21. As the earlier mark was registered within the five years before the date on which the application for the contested mark was made, it is not subject to the proof of use provisions in section 6A of the Act and the opponent may rely on all the services for which the mark stands registered.

22. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor* [2025] UKSC 25:

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 they have kept in their mind, and whose attention varies according to the category of goods or services in question;
- c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 the earlier mark to mind, is not sufficient;

j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of services

23. It is settled case law that I must make my comparison of the services on the basis of all relevant factors. These include the nature of the services, their purpose, their users and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary: see *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296]. As the General Court (“GC”) said in *Boston Scientific Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, (goods and) services are complementary when

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

24. In *Extreme Networks Limited v Extreme E Limited* [2024] EWCA Civ 1386, Arnold LJ highlighted two important points about the comparison:

“18. ... The first is that, although the factors discussed above are frequently interrelated, it is also common for the factors to point in different directions, with some suggesting that the goods or services are similar and some suggesting that they are not. Some of the factors tend to be more influential than others, but this depends on the particular sets of goods or services under consideration. The significance of this point is that it confirms that the tribunal’s task is an evaluative one, giving such weight to the various factors as appears appropriate in the specific circumstances of each case.

19. The second point is that it is important to ensure that the ultimate question is kept in view: are these goods or services sufficiently similar to give rise to a likelihood of confusion? A finding that the goods or services are not similar at all implies that there is no possibility of confusion no matter how strongly the other factors in the assessment of likelihood of confusion support the existence of a likelihood of confusion. It is therefore important to guard against the mistake of treating goods or services with a low degree of similarity as dissimilar, just as it is important not to make the opposite mistake of treating highly similar goods or services as identical (which may lead to a relative rights conflict being wrongly treated as a double identity case where the likelihood of confusion is presumed).”

25. The services to be compared are shown in the table below:

Contested services	Earlier services
	<u>Class 36</u> <i>Providing monetary grants to charities; Providing project grants for environmental and health awareness projects; Fund raising for charity.</i>
<u>Class 41</u> <i>Adult education services relating to environmental issues.</i>	

26. Section 60A of the Act states that the services are not to be regarded as dissimilar purely on the basis that they appear in different classes under the Nice Agreement of 15 June 1957 concerning the International Classification of Goods and Services for the Purpose of the Registration of Marks, as revised and amended.

27. The purpose of the earlier services is to generate and/or distribute funds for charitable works or projects or projects that raise awareness of environmental and health issues. The broader terms in the specification (*Providing monetary grants to charities* and *Fund raising for charity*) include services that are focused on environmental issues, as are the contested services. I shall conduct my comparison with this in mind. The nature of the service is monetary. The opponent submits that the

services will be accessed through online websites. I agree that this is likely to be a significant method of use. The users of the earlier services are charities and other organisations that are seeking grant funding, and organisations or individuals who wish to donate money for the purpose of raising awareness of environmental issues.

28. The purpose of the contested service is to educate adults on environmental issues and it would involve the provision of online resources, printed material, audiovisual material or online or in-person training events – all with an educational intent. The services may be accessed through online websites, libraries and other information points, institutions of further and higher education, and in-person events. The users of the services are members of the general public who wish to learn more about environmental issues or organisations, such as councils or other public bodies, purchasing education services for their employees or members of the public.

29. The parties' services have some users in common. The purposes of the services are different, as is their nature. The opponent submits that the method of use is the same, given that both parties' services will be accessed through online websites. In *Unicorn Studio Inc v Veronese (Société par Actions Simplifiée)* [2024] EWHC 1098 (Ch), Mr Iain Purvis KC, sitting as a deputy High Court judge, said:

“23. ... it seems to me the greater the level of generality at which some similarity can be found (i.e. both goods are ‘*sold in large department stores*’ or both goods are ‘*used by ordinary people*’) the less relevant could it be to any question of confusion, and any assessment of similarity of goods should take that into account.”

In my view, the finding that both parties' services can be delivered via online websites also shows a high level of generality, as many different services can be provided in this way. Consequently, I find that an overlap of this nature will carry little weight in my overall assessment.

30. In my view, there is likely to be an overlap in trade channels. This is confirmed by the opponent's additional evidence which shows that the applicant provides grants as well as educational services. The applicant submits that this is only a limited initiative. Nevertheless, I consider it likely that there will be some undertakings providing both grant funding and educational services.

31. The parties' services are not in competition, but the opponent submits that they are complementary. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as complementary and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different. In this case, the goods and services at issue were *Chickens* and *Transport, storage and distribution of chickens*. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for the goods and services lies with the same undertaking. As Mr Daniel Alexander QC, sitting as the Appointed Person, noted in *Sandra Amalia Mary Elliot v LRC Holdings (LUV/LOVE Trade marks)*, BL O-255-13:

“18. It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.

...

20. ... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

32. The relevant public for the present purposes consists of users likely to use the services of both parties: see *Sanco*, paragraph 25. In my view, these will be organisations and members of the public with an interest in environmental issues. However, I do not consider that they will believe that the opponent's Class 36 services are important or indispensable for the use of the applicant's Class 41 services, or vice versa. I find that they are not complementary. However, on the basis of overlapping users and trade channels, I find that there is a low degree of similarity between the applicant's services and those of the opponent.

Average consumer and the purchasing process

33. The average consumer is deemed to be reasonably well informed and reasonably circumspect: see *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), paragraph 60. For the purposes of assessing the likelihood of confusion, it

must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question: see *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 26.

34. In *Iconix*, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

“16. First, the average consumer is both a legal construct and a normative benchmark. They are a legal construct in that consumers who are ill-informed or careless and consumers with specialised knowledge or who are excessively careful are excluded from consideration. They are a normative benchmark in that they provide a standard which enables the courts to strike a balance between the various competing interests involved, including the interests of trade mark owners, their competitors and customers.

17. Secondly, the average consumer is neither a single hypothetical person nor some form of mathematical average, nor does assessment from the perspective of the average consumer involve a statistical test. They represent consumers who have a spectrum of attributes such as gender, age, ethnicity and social group. ... It follows that assessment from the perspective of the average consumer does not involve the imposition of a single meaning rule akin to that applied in defamation law (but not malicious falsehood). ... if having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, then a finding of infringement may properly be made.

18. Thirdly, assessing from the perspective of the average consumer is designed to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence. ...

19. Fourthly, the average consumer's level of attention varies according to the category of goods or services in question.

20. Fifthly, the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.”

35. The average consumer of both parties’ services is, as I have already found, a member of the public or an organisation interested in environmental issues. The opponent submits that, where the average consumer is a member of the public, they are likely to pay an average degree of attention, while organisations are likely to pay a higher-than-average degree of attention. I agree that a member of the general public will pay an average (or medium) degree of attention, while an organisation is likely to pay an average (medium) degree of attention for services relating to education with a slightly higher degree of attention for grant funding services.

36. Both types of consumer are likely to choose a provider after browsing websites or seeing media coverage or use of the marks on signage or labelling. The visual aspect of the marks will therefore play an important role. The average consumer may also receive word-of-mouth recommendations or discuss options with advisors, so the aural aspect of the marks is also likely to be relevant.

Comparison of marks

37. It is clear from *SABEL BV v Puma AG*, Case C-251/95, that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details: see, in particular, paragraph 23 of that judgment. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“CJEU”) stated in *Bimbo SA v OHIM*, Case C-519/12 P, that:

“34. ... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”

38. Artificial dissection of the marks would therefore be wrong, although it is necessary for me to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

39. The respective marks are shown below:

Contested mark	Earlier mark
	

40. The contested mark is a figurative mark, showing a round logo on a black background. The words “YOUNG SEA CHANGERS” are presented in blue-grey capital letters and form the top part of a circle, with the word “SCOTLAND” presented in green capital letters forming the bottom part. These two groups of words are separated by dots in the same shade of green. In the centre are two swirling devices, one in light blue, the other in green. In my view, these will be perceived as representing waves. Above these is a stylised blue bird shape. As a general rule, the word elements of a mark are regarded as more distinctive than figurative elements, because the relevant public will use the words to identify the mark: see *Migros-Genossenschafts-Bund v European Union Intellectual Property Office (EUIPO)*, Case T-68/17, paragraph 52. I consider that to be the case here, notwithstanding the large size of the figurative element and the greater degree of contrast between the device and the background when compared with the blue-grey letters used for “YOUNG SEA CHANGERS”. The applicant submits that “YOUNG” and “SCOTLAND” are descriptive elements indicating respectively the demographic to which the services are targeted and the geographical focus of those services. I agree. Consequently, the words “SEA CHANGERS”, which will be understood as a unit, make the greatest contribution to the overall impression of the mark. The figurative elements and use of colour make a smaller contribution.

41. The earlier mark consists of the words “sea” and “changers” in lower case and separated by a hyphen. The word “sea” is in black, while the hyphen and “changers” are in orange. Either above or to the left of the words is an orange silhouette of a dolphin. I find that “sea-changers” will be perceived as a unit and is the dominant and distinctive element of the mark. The visual element serves to reinforce the connection with the sea. The colour used for the mark makes only a very limited contribution to its overall impression.

Visual comparison

42. The dominant and distinctive element of the earlier mark is present in the contested mark, minus the hyphen. The contested mark does, as I have already noted, contain two additional words, one at the beginning and the other at the end of the verbal element. However, I found that these are descriptive. That does not mean that I can ignore them for the purposes of the visual comparison. In addition, both marks contain figurative elements, with that of the contested mark taking up a considerable proportion of the mark as a whole. In my view, there is a low degree of visual similarity between the marks.

Aural comparison

43. The words in both marks would be pronounced in the usual way. The earlier mark has three syllables, while the contested mark has six, assuming that all the words are articulated. Of these six, the words of the earlier mark comprise the second, third and fourth syllables. In my view, there are some consumers who would say “YOUNG SEA CHANGERS SCOTLAND”, but there will also be a group who say “YOUNG SEA CHANGERS”. In my view, this will be a significant proportion of consumers. For these consumers, the only difference is the addition of a syllable at the beginning of the contested mark. I find that the marks are aurally similar to a medium to high degree. If all the words in the contested mark are spoken, I consider that the marks are aurally similar to a low to medium degree.

Conceptual comparison

44. The phrase “sea changers” will bring to the mind of the average consumer the idea of people or organisations who work towards changing the marine environment. The

marine focus of activity is reinforced by the imagery used in the figurative elements: a dolphin in the case of the earlier mark and a bird and waves in the case of the contested mark. The contested mark conveys the additional messages that the services are targeted towards young people and are focused on the marine environment in Scotland. I find that the marks are conceptually similar to a medium to high degree.

Distinctive character of the earlier mark

45. Distinctive character is a measure of how strongly a mark distinguishes the goods or services of one undertaking from those of others. The factors that I must take into account in assessing the level of distinctive character were set out by the CJEU in *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV*, Case C-39/97:

“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).”

46. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of the mark can be enhanced by the use that has been made of it.

47. I shall begin by considering the inherent distinctive character of the earlier mark. The opponent submits that “sea-changers” is not a term that would be found in an English dictionary and Ms Lopata states that she and her co-founder came up with the

name in 2010.¹ The applicant submits that “sea change” is a well-known expression referring to a significant transformation and that the term “sea changers” is a natural extension of that expression. He argues that “*sea changers’ functions as a descriptive term for those who enable transformations in the marine environment, rather than a unique brand identifier.*”² I agree that “sea change” is a term that would be widely recognised and understood in the way submitted by the applicant. However, I do not see that “sea changers” is a natural extension, but rather a play on the known meaning of “sea change” and the marine focus of the opponent’s activities. It is therefore somewhat fanciful. While there is a degree of allusion to some of the services (and these include the ones that are relevant to this opposition), the playfulness leads me to find that the earlier mark has a medium degree of inherent distinctive character. I do not consider that the dolphin device or use of colour increase this inherent distinctiveness. I shall now consider whether it has been enhanced through the use made of the mark.

48. The opponent became a registered charity in England and Wales in May 2011 and registered with the Office of the Scottish Charity Regulator (“OSCR”) from 9 April 2013.³ Ms Lopata states that the opponent’s charitable purpose is “*to promote, for the benefit of the public, the conservation, protection and improvement of the physical and natural marine environment and promote marine diversity*”.⁴ It does this by establishing fundraising partnerships with partners across the UK, collecting funds and providing grants to marine charities and non-profit organisations.

49. Ms Lopata states that total gross income for the opponent was £19.85k in 2018, £63.02k in 2019, £14.52k in 2020, £79.37k in 2021, £158.70k in 2022 and £171,495 in 2023.⁵ With the exception of 2020, the figures increased year-on-year. As of 25 July 2024, the opponent was the 17th largest marine conservation charity in Scotland. This ranking has been calculated on the basis of latest income for charities registered with the OSCR. It is not clear whether the figures for all the charities in the list cover a

¹ First witness statement of Rachel Lopata, paragraph 10.

² First written submissions of the applicant, section F.

³ First witness statement of Rachel Lopata, paragraph 3.

⁴ Ibid, paragraph 4.

⁵ First witness statement of Rachel Lopata, paragraph 12.

period before the relevant date. Furthermore, I note that the opponent is an organisation covering the whole UK.

50. Exhibit RL4 contains extracts from the opponent's website showing examples of the recipients of the grants. The pages are dated 23 July 2024 (i.e. after the relevant date), but further information is provided on a project connecting the threat of marine pollution and the impact of the ocean on mental wellbeing. The grant for this project was given in 2022.⁶

51. Exhibit RL5 contains an excerpt from the opponent's website listing existing partners. These pages are also dated 23 July 2024. However, they do say that some of the partnerships began before this date: Bunzl plc (from 2020), River Island (in 2018), Hebridean Island Cruises (from 2012), H&V, a supplier and distributor of electrical and other goods (in 2023), Mike's Dive Stores (from 2015), Actisense, a manufacturer of marine electronic equipment (in 2023), LIGA, a producer of sustainable homeware and lifestyle products (in 2022); the William Grant Foundation (in 2022); and IUMI, an organisation of national marine insurance associations (in 2023).

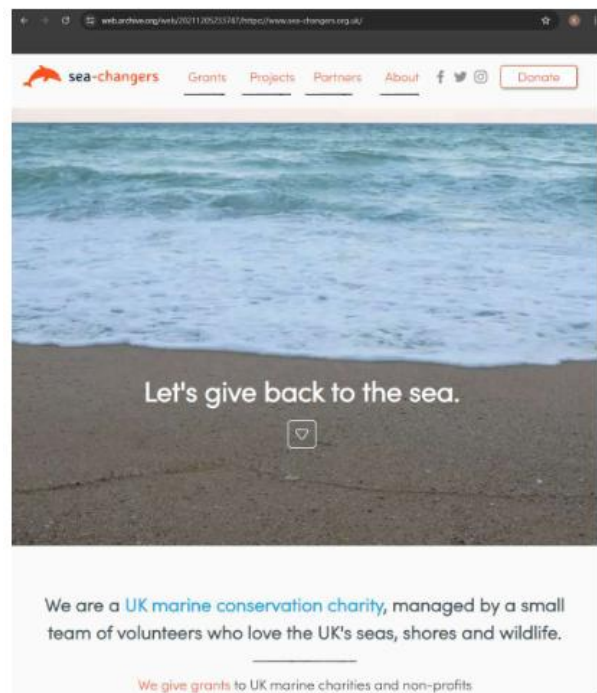
52. Initially, a slightly different sign was used, as can be seen in this screenshot from the opponent's website, dated 31 August 2014:⁷



⁶ Exhibit RL4, page 2.

⁷ Exhibit RL8, page 10.

53. The logo used in the earlier mark was adopted in 2021. This is shown on the following website screenshot, dated 5 December 2021:⁸



54. It continued to be used in this form up to and beyond the relevant date for this ground, which is the date of application for the contested mark (14 November 2023).

55. The first grant was allocated in September 2012.⁹ It was featured in an article in *Sport Diver Magazine* in 2012. As well as this article, Exhibit RL8 includes pieces from *Diver Magazine* (dated November 2012, December 2012, 2013, 2014, March 2015), *Women and Home* (dated August 2013), *Coast Magazine* (dated April 2017). None of these articles shows a logo. Instead, they all refer to “Sea-Changers”.

56. Exhibit RL8 also contains some photographs, two of which were taken before the relevant date, and show the mark in use. The first shows a water fountain at Swanage Beach and appeared in the local newspaper in June 2022:¹⁰

⁸ Exhibit RL9, page 4.

⁹ Exhibit RL8, page 1.

¹⁰ Page 16.



57. The second shows packaging produced as part of a project to raise awareness of reusable period products. It involved 77 schools in the Argyll and Bute area of Scotland. The photograph was taken in May 2023.¹¹



58. The opponent uses social media channels to communicate with the public. Exhibit RL11 contains examples of posts on Instagram, Facebook, X (Twitter) and LinkedIn. All the screenshots were taken on 29 July 2024 and so do not tell me what the position was at the relevant date.

59. Ms Lopata states that the distinctiveness of “Sea-changers” is demonstrated by the results of a Google search, the first page of which shows links to the opponent’s website.¹² The search dated 30 July 2024 provides a full page of results, which show results referring to the opponent and a single link to the applicant’s website. However, the algorithm used in a Google search is designed to produce results that should be more relevant to each individual user. Therefore, if another party made the same

¹¹ Page 20.

¹² Exhibit RL13.

search, they could receive a different set of results. I am unable to give this evidence any weight.

60. I accept that it has been used throughout the United Kingdom and note that, while the mark as registered has been in use since 2021, the dominant and distinctive element has been in use since 2011 for fund raising and grant giving activities. I have already referred to the problems with the evidence showing the ranking of the opponent among marine conservation charities in Scotland. There is no other evidence that could tell me the opponent's share of the UK market for the services for which the earlier mark is registered. There is a 2017 report from the Environmental Funders Network on grants for environmental work in Scotland which says that 81 grants amounting to £2.48 million were given to coastal and marine ecosystems projects between 2012 and 2016.¹³ A screenshot from the opponent's website dated 16 June 2024 states that 324 projects were funded and £398,000 given in grants between 2012 and 2024.¹⁴ I understand that these figures cover the whole of the UK. Clearly, different time periods are involved and there may be differences in categorisation of projects.¹⁵ However, even if the bulk of the opponent's grants had been given in the period covered by the report, this would be a small proportion when it is considered that, as the report shows, Scotland received considerably less in grant funding than England and Wales. I have no financial information from the opponent for this period so, in my view, the evidential picture as a whole does contain enough detail to draw any firm conclusions on market share.

61. Turning now to publicity and promotion, there is no information on the number of visits to the website. The screenshots from the social media channels were captured after the relevant date. I see that the Twitter (X) account was set up in March 2009, but this must have been under another name as the opponent's own evidence is that the name "sea-changers" was conceived in 2010. These therefore tell me little about how the opponent has communicated with the relevant section of the public.

¹³ Exhibit RL18, page 26.

¹⁴ Exhibit RL3, page 1.

¹⁵ The 2017 report includes other categories such as *Toxics and pollution* and *Biodiversity and species preservation*. The Methodology section states that "a grant is placed in the category that we feel is the main purpose of the work", even if it could arguably be included in another.

62. I have been given no circulation figures for the publications in which the media articles appeared. Even if I had been provided with that information, the most recent article is dated April 2017, and the date on which I must assess whether the distinctiveness of the mark has been enhanced is 14 November 2023. This is a gap of six and a half years.

63. Having reviewed all the opponent's evidence of use and weighed the different factors set out in the case law, I find that the evidence is not sufficient to show that the inherent distinctive character of the earlier mark has been enhanced through use.

Conclusions on likelihood of confusion

64. Making an assessment of the likelihood of confusion is a matter of considering the relevant factors from the viewpoint of the average consumer of the services at issue and determining whether they are likely to be confused. When doing this, I am required to bear in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely on the imperfect picture of them that they have in their mind. This means that the global assessment emulates what happens in the mind of the average consumer on encountering the later mark with an imperfect recollection of the earlier mark. The courts have not said what weight should be attached to each of the factors or provided a formula that can be applied to any set of circumstances. Because this is a global assessment, there is some interdependence between the factors and so a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services or vice versa.

65. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore

requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but analysed in formal terms, is something along the following lines: 'The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

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

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

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

66. In *Liverpool Gin Distillery Limited & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ commented that:

"12. This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition.

13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/291/16) at [16] 'a finding of likelihood of

indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

67. I have found that:

- a) The parties' respective services are similar to a low degree;
- b) The average consumer is either a member of the public or an organisation. The former is likely to pay a medium degree of attention, while the latter will pay a medium degree of attention for services relating to education and a slightly higher degree of attention for the Class 36 services;
- c) The visual aspect of the mark will play an important role in the purchasing process, but the aural aspect is also relevant;
- d) The dominant and distinctive element of the earlier mark is "sea-changers", while the words "SEA CHANGERS" make the greatest contribution to the overall impression of the contested mark;
- e) The marks are visually similar to a low degree, aurally similar to a medium to high degree or a low to medium degree depending on how much of the contested mark is articulated, and conceptually similar to a medium to high degree; and
- f) The earlier mark has a medium degree of inherent distinctive character which has not been enhanced through use.

68. Having said all that, I must keep in mind the principle of imperfect recollection. Seen side-by-side, the average consumer would clearly be able to identify that they are different marks. However, this is not generally how the average consumer encounters marks. I also take account of the overall impressions of the marks and the elements that the average consumer is likely to remember. The distinctive and dominant element of the earlier mark appears almost identically in the contested mark:

sea-changers v SEA CHANGERS. I consider that the average consumer will not remember whether there is a hyphen between the words, or whether they appear in upper or lower case. I have found that they are more likely to remember the verbal elements of the contested mark than the figurative elements. I also found that the words “YOUNG” and “SCOTLAND” that form the rest of the verbal part of the contested mark are descriptive. Taking these factors into account and weighing them with my earlier findings summarised above, I find that there is a likelihood of direct confusion, even though there is only a low degree of similarity between the services. In my view, this will be the case where the average consumer is a member of the public, but also where the average consumer is a business or other organisation.

69. In the event that I am wrong in finding a likelihood of direct confusion, I shall consider whether there is a likelihood of indirect confusion. Assuming that the average consumer identifies that the marks are different, it is my view that they will believe that the contested mark is a branch of the opponent, specifically focused on young people in Scotland. These are descriptive words that one might expect to see in a sub-brand. I must also consider the role of the figurative elements. In my view, it is not likely that the average consumer will recall the dolphin device in the earlier mark, but even if they do, I consider that they will believe that this is a brand refresh, given the appearance of a nearly identical version of the dominant and distinctive element of the earlier mark within the contested mark. I find a likelihood of indirect confusion.

70. The opposition is successful under section 5(2)(b).

Section 5(4)(a)

71. Section 5(4)(a) of the Act states that:

“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 or 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 4(A) is met

...”

72. Subsection 4(A) is as follows:

“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.”

73. The opponent says in its first written submissions that the signs relied on under this ground are the signs that are registered as the earlier mark and “*the sea-changers/Sea-Changers brand name*”.¹⁶ However, the Statement of Grounds only refers to the figurative signs that are the same as the earlier mark. If the opponent had wanted to rely on a word sign, this should have been included in the pleadings. There has been no request to amend those pleadings and so I consider that the claim under this ground is that set out in the Statement of Grounds and summarised in paragraph 7 above. This ground does not take the opponent any further than section 5(2)(b) and so I shall not address it here.

Section 3(6)

74. Section 3(6) of the Act is as follows:

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

75. In *Skykick UK Ltd & Anor v Sky Ltd & Ors (Rev1)*, [2024] UKSC 36, the Supreme Court considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07, *Sky plc & Ors v Skykick UK Limited & Anor*, Case C-371/18, *AS v Deutsches Patent- und Markenamt*, Case C-541/18, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, *Hasbro, Inc. v EUIPO*, Case T-663/19, *pelicantravel.com s.r.o. v OHIM*, Case T-136/11, and *Psytech International Ltd v OHIM*, Case T-507/08. Lord Kitchin////////// said:

“152. In seeking to identify the relevant principles, it is necessary to have in mind two fundamental aspects of trade mark law to which I have already

¹⁶ Paragraph 30.1.

referred: first, it is concerned with the use of marks in trade to denote the origin of goods and services. Secondly, the aim of the trade mark regime is to contribute to a system of undistorted competition in which businesses are able to attract and retain customers by the quality of their goods and services, and for that purpose are able to have registered signs which enable consumers to distinguish the goods and services of one undertaking from those of another. Such a system must also provide an incentive and protection for the investment by a brand owner in the quality and other beneficial aspects of its goods and services, and so allow it to develop a goodwill in its business relating to their sale and supply.

153. Against this background, the essence of the objection that an application to register a mark was made in bad faith may be understood: it is that the motive or intention of the applicant was to engage in conduct that departed from accepted principles of ethical behaviour or honest commercial practices having regard to the purposes of the trade mark system which I have described. Whether the conduct was undertaken with that motive or intention and did indeed depart from such ethical behaviour or honest commercial practices must be assessed having regard to all the objective circumstances of the case: see, for example, *Koton Mağazacılık Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 (“*Koton*”), paras 46 and 47 [...].”

76. He then went on to set out a number of principles. I have reproduced the ones that are relevant to this particular claim:

“240. The general principles are these:

...

(ii) The date for assessing whether an application to register an EU trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).

(iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation in the European Union, and

must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 (*Malaysia Dairy*, para 29; *Sky CJEU*, para 73).

(iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law, which involves the use of marks in the course of trade. Further, it must have regard to the objectives of the EU law of trade marks, namely the establishment and functioning of the internal market, and a system of undistorted competition 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 consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45; *Koton*, para 45).

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case (*Hasbro*, paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the

presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

...”

77. I also note that an allegation of bad faith is a serious one and it must be distinctly proved. Arnold J (as he then was) said that “*cogent evidence is required due to the seriousness of the allegation*”. This means that it is not enough to establish facts which are as consistent with good faith as bad faith: see *Red Bull GmbH v Sun Mark Limited & Anor* [2012] EWHC 1929 (Ch), paragraph 133.

78. According to Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are as follows:

- (a) What, in concrete terms, was the objective that the party alleged to have acted in bad faith has been accused of pursuing?
- (b) Was that an objective for the purposes of which the contested application could not properly be filed?
- (c) Has it been established that the contested application was filed in pursuit of that objective?¹⁷

79. The opponent alleges that the applicant knew of the earlier mark and the opponent’s use of the sign **sea-changers** and applied to register a confusingly similar mark. It claims that the applicant understood that use of the contested mark would confuse others, interfere with the opponent’s rights and benefit from the time, investment and effort made by the opponent. It characterises the applicant’s behaviour

¹⁷ Paragraph 8.

as “*disrespectful*” of the value of the earlier mark and so claims that the application was made in bad faith. I note that the opponent submits that it does not consider that the applicant’s behaviour was dishonest “*in the sense of being deceitful or underhand*”.¹⁸ I do not understand the opponent to be claiming that the applicant had the intention of undermining its interests, but that this would occur as a consequence of the applicant’s actions, and that the applicant did not pay sufficient heed to this risk.

80. The applicant submits that bad faith should not be found simply because the applicant knew about the other party’s mark. I agree. The intention of the applicant is a critical part of the factual matrix: see paragraph 153 of the Supreme Court’s judgment in *Skykick*, quoted in paragraph 75 above. In my view, the claim made by the opponent falls outside the scope of the situations that are covered by the bad faith objection.

81. In case I am wrong on this, I shall make some brief comments on the correspondence between the parties that the opponent has adduced to support its claim.¹⁹ The first contact took place on 3 February 2023 when one of the trustees of Young Sea Changers Scotland got in touch with Ms Lopata to make her aware of the applicant’s charity “*in case of any confusion from others*”, although she stressed her view that the remit of the two charities differed.²⁰ From my reading of this correspondence, I find that the applicant did not believe that there was anything more than an insignificant potential for confusion. He stated on 14 November 2023 that he consulted a lawyer who told him that the grounds for any legal action were weak.²¹ I find that the opponent has not established a *prima facie* case that the applicant had a dishonest intention when he filed the application, and so the section 3(6) claim fails.

OUTCOME

82. The opposition is successful. Subject to the outcome of any appeal against this decision, Application No. 3979238 is refused registration.

¹⁸ First written submissions, paragraph 44.3.

¹⁹ Exhibits RL20-RL28.

²⁰ Exhibit RL20.

²¹ Exhibit RL24.

COSTS

83. The opponent has been successful and is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Notice No. 1/2023. I have calculated the award as follows:

£350 for preparing a statement and considering the other side's statement;

£1000 for preparing evidence and considering and commenting on the other side's evidence;

£200 for official fees for filing the notice of opposition.

£1550 in total

84. I therefore order Alan Munro to pay Sea-Changers the sum of £1550. 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 conclusion of the appeal proceedings if the appeal is unsuccessful.

Dated this 25th day of August 2026

**Clare Boucher,
For the Registrar**