O/0803/26

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF REGISTRATION NO. UK0004072572
IN THE NAME OF FOSHANSHIJICHENHUISHANGMAOYOUXIANGONGSI
IN CLASS 30

AND AN APPLICATION FOR A DECLARATION OF INVALIDITY
UNDER NO. 507978 BY FONSLIFE TRADING FZCO

AND IN THE MATTER OF APPLICATION NOS. 4080321 AND 4081719
IN THE NAME OF FONSLIFE TRADING FZCO
IN CLASS 30

AND OPPOSITIONS THERETO NOS. 450878 AND 450812
BY BENTSING LIMITED

BACKGROUND AND PLEADINGS

1. Bentsing Limited ("Bentsing") was the original proprietor of a series of two trade marks **LULUTOX** and **LuluTox** (no. 4072572) ("the 572 Mark") which was filed on 6 July 2024 and registered on 4 October 2024. The 572 Mark is protected for the following goods:

Class 30	Detox tea; Oolong tea [Chinese tea]; Oolong tea; Rooibos tea; Chai tea; Iced tea; Tea (Iced -); Chamomile tea; Tieguanyin tea; Peppermint tea; Black tea [English tea]; Ginseng tea; Ginger tea; Jasmine tea; Tea cakes; Tea beverages; Green tea; Tea for infusions; Tea bags for making non-medicated tea; Instant Oolong tea; Tea bags; Rosemary tea; Barley tea; Buckwheat tea; Fermented tea; Tea leaves; Tea extracts; Citron tea; Flavourings of tea; Kelp tea; Tea beverages with milk; Sage tea; Tea pods; Lime tea; White tea; Black tea; Teas; Iced teas; Yellow tea; Mate [tea]; Beverages with tea base; Beverages with a tea base; Red ginseng tea; Instant tea; Tea mixtures; Tea substitutes; Ginseng tea [insamcha]; Tea (Non-medicated -); Herbal tea [other than for medicinal use]; Artificial tea; Japanese green tea; Instant green tea; Beverages made of tea; Non-medicinal herbal tea; Theine-free tea; Iced tea mix powders; Herbal teas; Tea beverages (Non-medicated -); Packaged tea [other than for medicinal use]; Chrysanthemum tea (Gukhwacha); Tisanes made of tea (Non-medicated -); Apple flavoured tea [other than for medicinal use]; Fruit flavoured tea [other than medicinal]; Iced coffee; Tea bags (Non-medicated -); Roasted barley tea [mugicha]; Jasmine tea bags, other than for medicinal purposes; Roasted barley tea; Lime blossom tea; Instant white tea; Fruit teas; Tea extracts (Non-medicated -);Herbal teas [infusions]; Earl grey tea; Tea.

2. On 29 October 2024, FONSLIFE Trading FZCO ("Fonslife") applied to invalidate the 572 Mark pursuant to section 47 of the Trade Marks Act 1994 ("the Act"). Fonslife relies upon sections 5(4)(a) and 3(6) of the Act. For the section 5(4)(a) ground, Fonslife

claims to have used the sign LULUTOX throughout the UK since September 2023 in relation to “tea; fermented tea; tea mixtures; tea substitutes; tea bags; aromatic preparations for making non-medicated infusions”. Fonslife claims that use of the 572 Mark would be contrary to the law of passing off.

3. Under section 3(6), Fonslife states that Bentsing knew, or ought to have known, that Fonslife was the rightful owner of the LULUTOX brand and that the 572 mark was filed with the intention of benefitting from Fonslife’s reputation and to give the impression of a connection with Fonslife, which is not the case. Consequently, Fonslife claims that the 572 Mark was filed in bad faith.

4. Bentsing filed a counterstatement denying the claims made and purporting to be the senior user of the LULUTOX sign.

5. In the meantime, Fonslife had applied for the following trade marks:

> LuluTox
>
> LuluTox
>
> (series of 2)
> UKTM no. 4080321
> Filing date: 26 July 2024
> (“the 321 Mark”)
>
> LULUTOX
> Lulutox
> (series of 2)
> UKTM no. 4081719
> Filing date: 30 July 2024
> (“the 719 Mark”)

6. The 321 Mark and the 719 Mark were both published for opposition purposes on 16 August 2024, and protection is sought in respect of the following identical specification:

Class 30	Tea; Fermented tea; Tea mixtures; Tea substitutes; Tea bags; Aromatic preparations for making non-medicated infusions.

7. On 15 November 2024, Bentsing opposed the applications for the 321 Mark and the 719 Mark on the basis of section 5(4)(a) of the Act. Bentsing claims to have used the sign LULUTOX throughout the UK since 27 March 2017 in relation to “detox tea; tea”. As such, it claims that use of the 321 Mark and the 719 Mark would be contrary to the law of passing off.

8. Fonslife filed counterstatements denying the grounds of opposition.

9. On 6 February 2025, the proceedings were consolidated pursuant to Rule 62(1)(g) of the Trade Marks Rules 2008.

10. Subsequently, there were a number of changes in ownership of the 572 Mark, culminating in its transfer to FoShanShiJiChenHuiShangMaoYouXianGongSi (“FoShan”), who is the current proprietor. There has been no request to substitute the name of the opponent in the oppositions against the 321 Mark and the 719 Mark which continue in the name of Bentsing.

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

REPRESENTATION

12. Fonslife is represented by Groom Wilkes & Wright LLP.

13. Bentsing and FoShan are represented by Fred Guo.

EVIDENCE AND SUBMISSIONS

14. Fonslife filed evidence in chief in the form of the witness statement of Matas Fabijonavicius dated 7 April 2025, which is accompanied by 8 exhibits (GW1 to GW8).

Mr Fabijonavicius is the director of UAB Adlibris Media, which is the business that developed the product sold under the trade mark LULUTOX prior to it being transferred to Fonslife. He is also a director of Fonslife, a position he has held since 22 December 2023.

15. Bentsing filed evidence in chief in the form of the witness statement of Xin Peng Huang dated 7 April 2025, which is accompanied by 4 exhibits (Exhibits A to D). Mr Huang claims to have been the owner of the 572 Mark at the time of filing his evidence, although his name does not appear on the Register as having been a recorded owner at any point. Indeed, his own evidence appears to show that he was in fact the legal representative of the entity recorded as the owner at the time.[1]

16. Fonslife filed written submissions in reply dated 9 June 2025.

17. Bentsing purported to file evidence in reply. However, this was the exact same statement filed as evidence in chief (i.e. the statement of Mr Huang dated 7 April 2025).

18. Fonslife filed written submissions in lieu dated 21 August 2025.

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.

[1] Annex B

DECISION

<u>The oppositions against the 321 Mark and the 719 Mark</u>

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

> "5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -
>
> > a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,
> >
> > aa)…
> >
> > b) …
>
> A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of "an earlier right" in relation to the trade mark."

21. Subsection (4A) of section 5 of the Act 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."

22. 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

23. The prima facie relevant dates are the filing dates of the 321 Mark and the 719 Mark i.e. 26 July 2024 and 30 July 2024 respectively. However, even if Bentsing were able to show goodwill at those prima facie relevant dates, it may also be necessary to consider the position at an earlier relevant date. This arises where the behaviour complained about commenced at an earlier point in time; if use of a sign was not liable to be prevented under the law of passing off when it was commenced, it will not generally become unlawful at a later date. However, for reasons that will become clear, I do not need to consider an earlier relevant date in this particular case.

Goodwill

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

25. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

> “27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent that the enquiry under s.11 of the 1938 Act (see Smith Hayden & Co. Ltd's Application (OVAX) (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.
>
> 28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

26. Mr Huang’s evidence is that he has been using the sign LULUTOX on his website since March 2017. The first problem with this evidence, of course, is that he is not personally the party bringing the claim. Consequently, if he is the one claiming to have put the sign to use then the question arises as to whether he owns the goodwill personally, or whether it vests in Bentsing or FoShan. However, I do not consider that that is material in this case. This is because the evidence in itself does not establish that there has been any use in the UK at all.

27. Mr Huang states that use has been via his website at comwinn.cn, which I understand to be a Chinese domain name. It is true that the website is available in

English.[2] However, his statement that the sign has "been used throughout the UK" is no more than assertion, with no detailed narrative evidence or documentary evidence provided to support this claim. The same is also true of his statement that the LULUTOX sign has "been enjoying substantial sales in the UK for a very long time". No turnover figures or order numbers are provided to support this assertion. There is no evidence that the website in question had an option for delivery to the UK, no information about UK visitors to that website or any information regarding attempts to market the goods sold under the sign in the UK. Taking all of this into account, I am not satisfied that there has been any use in the UK of the LULUTOX sign by either FoShan or Bentsing. The evidence cannot, therefore, support a finding of goodwill and the oppositions brought by Bentsing fall at the first hurdle.

<u>The invalidation against the 572 Mark</u>

28. Sections 5(4)(a) and 3(6) have application in invalidation proceedings by virtue of section 47 of the Act, which states:

> "(1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration). Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.
>
> (2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-
>
> > (a) […]
> >
> > (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

[2] Exhibit C

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[…]

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

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

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made.

Provided that this shall not affect transactions past and closed."

<u>Section 5(4)(a)</u>

29. I have set out the legislative provisions and case law applicable to this ground above. I apply the same here.

Relevant date

30. The prima facie relevant date is the filing date of the 572 Mark i.e. 6 July 2024. For the same reasons given above, I do not consider that there is evidence of use by Bentsing/FoShan in the UK prior to the prima facie relevant date and so this is the only applicable relevant date for me to consider.

Goodwill

31. Again, I have set out the case law applicable to this assessment above and I apply the same here.

32. Mr Fabijonavicius has provided the following breakdown of UK revenue:

January 2024	$197,858.33
February 2024	$139,211.00
March 2024	$301,417.18
April 2024	$297,265.18
May 2024	$196,351.41
June 2024	$1,069,361.09

33. He states that this shows the substantial sales enjoyed by Fonslife for its LULUTOX product, which I take to mean that these revenue figures relate to sales made under that brand (and no counter submission is put forward by FoShan/Bentsing).

34. Mr Fabijonavicius states that advertising in the UK has cost $253,603.68 in 2024. However, I bear in mind that this appears to relate to the whole of 2024, and so it is not clear when (within that year) this spend was incurred. There is evidence of payments for LULUTOX products to appear as "sponsored products" on Amazon UK dating back to November 2023.[3] Mr Fabijonavicius has provided a graph which he states records the reach of a UK pre-launch marketing campaign.[4] However, it appears to list the number of "followers", rather than the number of people who have engaged with a marketing campaign specifically, and makes reference to Sydney as one of the "top cities" and so does not appear to be related only to the UK (albeit the UK is listed as one of the "top countries").

[3] Exhibit GW4
[4] Exhibit GW5

35. The documentation that has been filed to support Fonslife's claim is very thin. However, I bear in mind that Mr Fabijonavicius has given detailed narrative evidence regarding the revenue generated under the LULUTOX brand and the advertising spend in 2024 (albeit not broken down to identify how much applied to the period prior to the relevant date). Whilst use is claimed from 2022 onwards, I have no evidence of the scale of the use until 2024, which is the only year for which revenue figures have been provided. Nonetheless, the revenue that has been generated in the 6 months leading up to the relevant date is clearly not insignificant. There is evidence of payments made for LULUTOX products to appear as "sponsored products" on Amazon UK dating back to 2023, which does show some marketing activities, albeit on a very small scale. Whilst it is certainly thin and, in some places lacking in clarity, I am satisfied that the evidence is sufficient to demonstrate a small (but protectable) goodwill in the UK in relation to detox tea at the relevant date and that the sign relied upon was distinctive of that goodwill.

Misrepresentation and damage

36. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

> "There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc. [1990] R.P.C. 341* at page 407 the question on the issue of deception or confusion is
>
> > "is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents'[product]"
>
> The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148 . The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd*. (1941) 58 R.P.C. 147 at page 175 ; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101."

And later in the same judgment:

> ".... for my part, I think that references, in this context, to "more than *de minimis* " and "above a trivial level" are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993) . It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion."

37. In *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590, Lord Justice Lloyd commented on the paragraph above as follows:

> "64. One point which emerges clearly from what was said in that case, both by Jacob J and by the Court of Appeal, is that the "substantial number" of people who have been or would be misled by the Defendant's use of the mark, if the Claimant is to succeed, is not to be assessed in absolute numbers, nor is it applied to the public in general. It is a substantial number of the Claimant's actual or potential customers. If those customers, actual or potential, are small in number, because of the nature or extent of the Claimant's business, then the substantial number will also be proportionately small."

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

> "Establishing a likelihood of deception generally requires the presence of two factual elements:
>
> (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

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

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

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

(b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;

(c) the similarity of the mark, name etc used by the defendant to that of the claimant;

(d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

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

39. I have found that Fonslife benefits from a small (but protectable) goodwill at the relevant date in relation to detox tea. The 572 Mark is identical to the sign LULUTOX

which was distinctive of that goodwill. The parties are plainly in the same field of activity i.e. tea. In my view, the fact that the marks are identical, combined with the parties' operation within the same field of activity, will result in a substantial number of Fonslife's customers being misled. Damage through diversion of sales will follow, given the identical fields of activity.

40. The application for invalidation based upon section 5(4)(a) of the Act is successful.

Section 3(6)

41. Section 3(6) of the Act states as follows:

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

42. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin summarised the general principles applicable to bad faith at [240] as follows:

> "(i) […]
>
> (ii) The date for assessing whether an application to register [a] 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 […], 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 Industries Pte Ltd v Ankenaevnet for Patenter og Varemaerker* (C-320/12) EU:C:2013:435 ("*Malaysia Dairy*")], para 29; [*Sky plc v SkyKick UK Ltd* (C-371/18) EU:C:2020:45 ("*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 […] law of trade marks, namely the establishment and functioning of […] 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 Mağazacilik Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 ("*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 Inc* v *EUIPO, Kreativni Dogaaji d.o.o. (intervening)* (Case T-663/19) EU:T:2021:211 ("*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).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; [*AS v Deutsches Patent-und Markenamt* (C-541/18) EU:C:2019:725], para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the application in the light of the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that constitutes making the application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to the goods or services in relation to which it is sought to register the mark, or that the applicant has a *bona fide* intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87)."

43. 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?

44. 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).

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

45. In its Form TM26(I), Fonslife states as follows:

> "7. We submit that at the time the Registered Proprietor filed their UK Trade Mark registration, they knew, or at least ought to have known, that the Applicant for Invalidity was the true and rightful holder of the brand LULUTOX.
>
> 8. Furthermore, we contend that the subject Registration was designed specifically to incorporate the Applicant for Invalidity's mark LULUTOX and benefit from its reputation and long standing use, as well as to give the impression to the UK consumer that it is part of the established business of the Applicant for Invalidity, when this is clearly not the case.
>
> 9. It is therefore clear that the Registered Proprietor has sought registration of the mark in order to fraudulently represent themselves as a provider of LULUTOX branded products in Class 30, in order to directly benefit from the repute and status of the Applicant for Invalidity."

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

46. It is well established that mere knowledge of another party's business activities does not establish bad faith (see *Lindt, Koton*). However, to do so with the intention to take advantage of the reputation of an existing business may be grounds for a finding of bad faith. Consequently, if proven, this is an objective for which the 572 Mark could not be properly filed.

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

47. I accept that it is unusual that two parties have, independently, chosen the same invented word to use as their trade mark. However, Fonslife has filed no evidence to demonstrate that Bentsing/FoShan would have come across their business prior to

the relevant date; indeed, the evidence suggests that Fonslife were operating on a fairly small scale and so this is not a mark that it can be said is so famous that they <u>must</u> have known of them.

48. Even if Bentsing/FoShan had knowledge of Fonslife's operation, that is not enough on its own to make a finding of bad faith. As noted above, mere knowledge of another party's business is not enough; something more is required for bad faith. There is no evidence before me to suggest that there was any motivation on the part of Bentsing/FoShan to enable me to conclude that there is a prima facie case of bad faith. Whilst I accept that there is no rebuttal evidence filed by Bentsing/FoShan, that only becomes relevant if a prima facie case is made out which, in my view, it is not.

49. The application for invalidation based upon section 3(6) of the Act is dismissed.

CONCLUSION

50. The application for invalidation against UKTM no. 4072572 is successful and, subject to appeal, the registration is deemed never to have been made.

51. The oppositions against UKTM nos. 4080321 and 4081719 are unsuccessful and, subject to appeal, the applications may proceed to registration.

COSTS

52. Fonslife has been successful in relation to both the invalidation and in defending the oppositions. As such, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award Fonslife the sum of **£2,000**, calculated as follows:

Preparing forms and considering the other side's forms	£600
Preparing evidence and considering the other side's evidence	£800

Written submissions in lieu	£400
Official fee for invalidation	£200
Total	**£2,000**

53. I therefore order Bentsing Limited and FoShanShiJiChenHuiShangMaoYouXian GongSi (jointly and severally) to pay FONSLIFE Trading FZCO the sum of **£2,000**. 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.

Dated this 3rd day of September 2026

S WILSON
For the Registrar