O/0907/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER 3938022
BY SIT-UP CHANNELS LTD
TO REGISTER THE FOLLOWING TRADE MARK:

IN CLASS 31

AND

AN OPPOSITION THERETO UNDER NUMBER 443675
BY MARS PETCARE UK

BACKGROUND AND PLEADINGS

1. On 25 July 2023, SIT-UP CHANNELS LTD ("the Applicant") applied to register in the UK the trade mark shown on the cover page of this decision ("the contested mark"). The application was accepted and published for opposition purposes on 11 August 2023 and registration is sought for the following goods:

Class 31 *Foodstuffs for animals and pets*.

2. On 18 October 2023, Mars Petcare UK ("the Opponent") opposed the application in full under section 5(2)(b) of the Trade Marks Act 1994 ("the Act").[1] The Opponent relies upon UK trade mark number 918245582,[2] "**LOVEBUG**", ("the earlier mark") which has a filing date of 27 May 2020, a registration date of 11 September 2020 and is registered for the following goods, all of which are relied upon for this opposition:

Class 31 *Animal snacks and foodstuffs with insect protein ingredients; insect protein-based foodstuffs for animals; agricultural, horticultural and forestry products, grains and seeds; live animals, birds and fish; cuttlefish bone; bones for dogs; edible chews for animals; litter for animals; fresh fruits and vegetables; foodstuffs and beverages for animals, birds and fish.*

3. The mark relied upon by the Opponent is considered an earlier mark in accordance with section 6(1)(a) of the Act given it was filed for registration earlier than the date of application for the contested mark. The earlier mark had not been registered for more than five years at the date of application for the contested mark and so, in accordance with section 6A of the Act, it is not subject to proof of use; the Opponent may rely upon all the goods for which the earlier mark is registered.

[1] 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.

[2] The earlier mark is a comparable trade mark. On 1 January 2021 the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable trade marks for all right holders with an existing EU trade mark ("EUTM"). As a result of the Opponent's EUTM being registered before the end of the transition period, a comparable UKTM (the earlier mark) was created. Comparable trade marks are recorded on the UK trade marks register and retain their EU filing date. They are enforceable rights in the UK, consisting of the same sign, for the same goods or services.

4. Under section 5(2)(b), the Opponent claims that there is a likelihood of confusion on the basis that the marks are similar and the goods are identical.

5. The Applicant filed a defence and counterstatement denying a likelihood of confusion on the basis of a lack of similarity between the marks and the goods.

6. The Opponent is represented by Stobbs and the Applicant by Designer IP Limited.

7. Neither party filed evidence in these proceedings and neither party requested to be heard, though both filed written submissions in lieu of a hearing.[3] This decision is therefore made from the papers, which have been carefully considered.

PRELIMINARY ISSUES

8. The Applicant has made two related arguments in its counterstatement and submissions in lieu that I shall address on the basis that they do not assist the Applicant.

9. Whilst the Applicant did not file evidence in these proceedings, its counterstatement suggested it intended filing evidence of use to demonstrate the dissimilarity between the parties' goods.[4] Further, in its written submissions in lieu, the Applicant attached an image of the Opponent's products in order to highlight the difference between the Applicant's mark and the way in which the Opponent uses its mark in the market. Assessing the likelihood of confusion is notional, based on the marks and specifications that have been rendered by the parties for the purpose of application/registration. Therefore, the only similarities/differences that form part of my assessment are those which are evident from the marks and specifications as they appear on the register.

10. I will also briefly address the Opponent's submissions in lieu. The submissions contain what I would consider fairly typical submissions going to the relevant law and

[3] The Applicant's submissions extended to two short paragraphs in an email.
[4] See paragraph 4 of the Applicant's counterstatement.

various assessments usually made in opposition proceedings under section 5(2)(b). However, the Opponent attached a trade mark decision of this Tribunal to its submissions. The Applicant did not have the opportunity to file submissions in reply, going to the relevance of this decision, and so the appropriate time to have filed this decision would have been during the evidence rounds. Even so, I am not bound by the decisions of other Hearing Officers of this Tribunal. Each case is decided on its own facts and so the decision relied upon by the Opponent is of little assistance.

DECISION

Section 5(2)(b)

11. Sections 5(2)(b) and 5A of the Act state:

> "5(2) 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.
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> 5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

Relevant law

12. The following principles are gleaned from the decisions of the Court of Justice of the European Union ("CJEU") in *Sabel BV v Puma AG,* Case C-251/95, *Canon*

Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P.

The principles

(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 he has kept in his 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 be dominated by one or more of its components;

(f) however, it is also 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 great 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;

(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 goods

13. In *Gérard Meric v OHIM,* the General Court confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):[5]

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut fur Lernsysteme v OHIM*- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

[5] Case T-133/05.

14. The goods to be compared are shown in the table below:

The Opponent's goods	**The Applicant's goods**
Class 31: *Animal snacks and foodstuffs with insect protein ingredients; insect protein-based foodstuffs for animals; agricultural, horticultural and forestry products, grains and seeds; live animals, birds and fish; cuttlefish bone; bones for dogs; edible chews for animals; litter for animals; fresh fruits and vegetables; foodstuffs and beverages for animals, birds and fish.*	Class 31: *Foodstuffs for animals and pets*.

15. I acknowledge the Applicant's position, which is that the only similarity between the goods is the class they belong to. However, on the basis that 'pets' are a type of animal, in my view it is self-evident that the Applicant's *foodstuffs for animals and pets* are identical to the Opponent's *foodstuffs and beverages for animals, birds and fish*, either because of their identical wording or because of the principle set out in *Meric*, cited above.

The average consumer and the purchasing act

16. As the case law at paragraph 12 indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited,* [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well

> informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

17. The average consumer for the goods at issue is likely to be a member of the general public, mostly pet (or animal) owners or those working with animals, i.e. on farms. The goods will be subject to self-selection from the shelves of retail establishments such as supermarkets or specialist pet/animal stores. Whilst visual factors are, consequently, likely to dominate the selection process, in my experience, it would not be unusual for sales advisors to provide advice or recommendations orally, so aural considerations cannot be ignored.

18. The goods are generally inexpensive items purchased fairly frequently. That said, consumers will be alive to factors such as ingredients, quality and suitability for the animals' needs. Given the responsibility of pet owners and their affection towards their pets, as well as the responsibility of those working with animals, consumers are likely to apply a medium degree of attention during the purchasing process.

Comparison of trade marks

19. It is clear from *Sabel* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU states at paragraph 34 of its judgment in *Bimbo*, that:

> "…it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relevant 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."

20. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

21. The marks to be compared are as follows:

The earlier mark	**The contested mark**
LOVEBUG	

22. The contested mark consists of the two words 'love' and 'dogs', conjoined. The textual element is presented in lower case and in a fairly standard typeface, with 'love' in black and 'dogs' in red. The difference in colour highlights that the mark is composed of two words. The letter 'o' in each word has a figurative device in its centre: a red heart in the word 'love' and a black paw print in the word 'dogs'.

23. Whilst 'dogs', solus, is allusive of the goods at issue, I find that 'love' and 'dogs' combine to create a unitary meaning in the contested mark; 'love' describes a feeling for 'dogs'. As such, both words contribute to the overall impression of the mark, neither being more dominant than the other. The stylisation of the mark and the figurative devices contribute to the overall impression but play a lesser role than the textual element.

24. The earlier mark consists of the word 'LOVEBUG'. Whilst this word is comprised of two words that are capable of being used separately, 'LOVEBUG' has a definition in its own right as one word; I will discuss this in the conceptual comparison. In my view, the average consumer will see the earlier mark as one word (as it is presented), the overall impression of the mark residing in that word, being the sole dominant and

distinctive component. The Opponent suggests otherwise: that the mark will be seen as two separate words, 'LOVE' being the dominant and distinctive element and 'BUG' being allusive of goods containing insect-based ingredients. Breaking down 'LOVEBUG' in the manner suggested by the Opponent may amount to artificially dissecting the mark. In any case, any consumers that do break down 'LOVEBUG' into two separate words with distinct meanings, would fall into the vast minority and do not represent a significant proportion of the average consumers.

25. Visually, the marks coincide in the word 'LOVE', at the beginning of both marks. The ends of the marks share a letter 'G' but otherwise are visually different. The stylisation and devices in the contested mark create further visual difference. Overall, I consider the marks to be visually similar to a low to medium degree.

26. The earlier mark will be pronounced as 'LOVE-BUG', as two syllables, each syllable being a common dictionary word pronounced in the usual way. The contested mark will be pronounced as the two ordinary words 'LOVE-DOGS' in the usual way. The stylisation and devices in the contested mark will not be articulated. I consider the marks to be aurally similar to at least a medium degree.

27. As I raised in the overall impression, 'LOVEBUG' has a definition in its own right as one word. It is my understanding that 'LOVEBUG' can refer colloquially to a person who is particularly affectionate or loveable. It is also the name of a species of fly,[6,7] though I consider it unlikely that a significant proportion of average consumers will be aware of this.

28. The Opponent submits that the average consumer will recognise 'LOVE' and 'BUG' separately and attribute to each word its individual meaning, with 'LOVE' being afforded origin significance and 'BUG' being descriptive of animal foodstuffs containing insects. When 'LOVE' and 'BUG' are combined, as in the earlier mark, and presented as one word, which has a readily understood meaning, I find it unlikely that consumers would do anything other than associate 'LOVEBUG' with a reference to an affectionate

[6] Collins English Dictionary.
[7] It is open to Hearing Officers to consult dictionaries: BL O/0293/24 and *Ineos Healthcare v OHIM* at [29].

or loveable person, a conceptual message I consider to be capable of immediate grasp.[8]

29. Despite the word 'LOVE' appearing in both marks, the overall concept associated with each mark is different. 'lovedogs' in the contested mark will be seen as a short phrase of 'I love dogs' or a reference to loving dogs. 'LOVEBUG' in the earlier mark will not be seen as 'I love bug(s)' or a reference to loving bugs. As discussed above, neither will it be separated into two words, simply conveying the individual meanings of those words. Rather, 'LOVEBUG' will be seen by a significant proportion of consumers as a reference to a person who is loveable or affectionate.

30. Overall, I consider the marks to be conceptually dissimilar.

Distinctive character of the earlier mark

31. In *Lloyd Schuhfabrik Meyer* the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *WindsurfingChiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
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> 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

[8] As per *Ruiz Picasso v OHIM,* [2006] e.c.r.-I-643; [2006] E.T.M.R. 29.

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)."

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

33. The Opponent attested to an enhanced distinctive character of its earlier mark, thereby increasing the likelihood of confusion.[9] However, the Opponent filed no evidence of use of its earlier mark and so I have only the inherent position to consider. Despite the Opponent's submission that 'BUG' is descriptive of animal foodstuffs containing insects, I find it unlikely that consumers will see 'BUG' in the context of 'LOVEBUG' and notice any reference to the goods for which the mark is registered. 'LOVEBUG' has a clear meaning, which I consider has no relationship to the goods. Overall, I consider the earlier mark to have at least a medium degree of inherent distinctive character.

Likelihood of confusion

34. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned

[9] See paragraph 8 of the Opponent's statement of grounds.

above, it is necessary for me to keep in mind the distinctive character of the Opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

35. I have found the marks to be visually similar to a low to medium degree, aurally similar to at least a medium degree and conceptually dissimilar. I have found the earlier mark to possess at least a medium degree of inherent distinctive character. I have found the goods to be identical. I have identified the average consumer to be a member of the general public who, most likely, owns a pet or works with animals. I found that the average consumer would pay a medium degree of attention to the purchase of the goods and selects them predominantly by visual means, though I do not entirely discount the aural consideration.

36. The Opponent attests to a likelihood of both direct and indirect confusion. I will deal with direct confusion first. The coinciding element in the marks is the word 'LOVE', which appears at the beginning of both marks. I have given thought to the general rule of thumb that consumers pay greater attention to the beginning of marks,[10] but consider that not to be the case here. In my view, the endings of the marks alone ('BUG' versus 'dogs') are sufficient to avoid direct confusion on the basis they simply will not be misremembered as one another. Further, whilst the figurative elements and the stylisation in the contested mark play a lesser role, that does not render them invisible, and I do not consider they will be overlooked. It is also persuasive that the respective marks conjure different concepts in the mind of the average consumer which, in my view, counteracts any visual and aural similarities.[11] Taking everything into account, I find that average consumer will notice the differences between these marks and will not be directly confused between the two. This is so even bearing in mind the interdependency principle and the identicality of the goods. There is no likelihood of direct confusion.

[10] See *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02.
[11] *The Picasso Estate v OHIM,* Case C-361/04 P, EU:C:2006:25.

37. Turning to indirect confusion, I consider the comments of Iain Purvis KC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*:[12]

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

[12] BL O/375/10.

(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)."

38. I remind myself of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, in which Arnold LJ referred to the comments of James Mellor KC, sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

39. The Opponent's position on indirect confusion is that the 'LOVE + [animal]' suggests an economic connection and that consumers will see 'lovedogs' as a variant or sub-brand of 'LOVEBUG' by virtue of the common element 'LOVE'.[13] I disagree. Firstly, I have found that 'LOVEBUG', having a clear meaning as one word, will not be dissected into 'LOVE + BUG' but will be seen as a unit and so the variant/sub-brand argument does not accord with how the average consumer will view the mark. Secondly, and in any case, 'LOVE' is not so distinctive that consumers would assume that no one other than the Opponent would use this word in their trade mark. Neither does replacing 'dogs' for 'BUG', or vice versa, seem logical with a brand extension or a sub-brand. It is far more likely that it will be seen as a coincidence that two entities incorporate the ordinary word 'LOVE' in their respective marks. The differences between the marks are not consistent with a finding of indirect confusion, regardless of the identicality of the goods.

CONCLUSION

40. The opposition under section 5(2)(b) has been unsuccessful. Subject to any successful appeal, the application may proceed to registration in full.

[13] See paragraph 7.6 of the Opponent's submissions in lieu.

COSTS

41. The Applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. As explained earlier in my decision, the Applicant's submissions in lieu were exceptionally short and contained an argument that I found to be irrelevant to the decision I was required to make. On the basis that the submissions were of no use in these proceedings, I make no award relating thereto. In the circumstances, I award the Applicant the sum of £250 for considering the Opponent's statement of grounds and preparing a counterstatement.

42. I therefore order Mars Petcare UK to pay SIT-UP CHANNELS LTD the sum of £250. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the final determination of the appeal proceedings.

Dated this 29th day of September 2025

MRS E FISHER
For the Registrar