

O/0930/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3928439

IN THE NAME OF REBORN HEALTHCARE LTD  
TO REGISTER THE FOLLOWING TRADE MARK:



IN CLASS 10

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 443564

BY

R82 A/S

## Background and pleadings

1. Reborn Healthcare Ltd (“the applicant”) applied to register the trade mark shown on the cover page of this decision (“the contested mark”) in the UK on 29 June 2023 (application no. UK00003928439). It was accepted and published for opposition purposes on 14 July 2023 in respect of the following goods:

Class 10 - Elastic bandages; Orthopaedic bandages; Compression bandages; Bandages for joints; Hernia bandages; Suspensory bandages; Triangular bandages; Splinting bandages for preparing splints; Conforming bandages; Plaster bandages for orthopedic purposes; Knee bandages, orthopaedic; Splinting bandages for preparing casts; Tubular elastic bandages for supporting joints; Support bandages for medical purposes; Prosthetic socks for limbs; Surgical masks; Stockings (Elastic -) [surgery].

2. On 13 October 2023, R82 A/S (“the opponent”) opposed the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following mark:

UK Trade Mark (“UKTM”) No: UK00902749745 (“the earlier mark”)

FLAMINGO

Filing date 25 June 2002; registration date 27 August 2003. Whilst registered for goods in classes 10 and 12, for the purposes of this opposition it relies upon the following only:

Class 10 - Technical aids for the handicapped, especially seatings, standing frames, bath tubs, toilet and bath chairs and accessories for this purpose; not including mobile and transportable lifters.

3. Under section 5(2)(b) of the Act, the opponent claims that there is a likelihood of confusion on the basis that the marks are similar, and the goods are either identical or highly similar leading to a likelihood of confusion, including a likelihood of association, and that the contested mark should be refused registration.

4. The applicant filed a counterstatement denying the claims made and submitting:

“6. The “Flamingo Logo Mark and Word Mark” vs “Flamingo Word Mark” are dissimilar in a visual and conceptual sense.

7. The Applicant's mark includes a symbol of a flamingo bird in flight, with the word 'flamingo' written in lowercase letters in the font free serif bold italic. The opponent's registered trade mark is for the word 'Flamingo' which does not resemble the applied mark in any of the aforementioned characteristics.

8. In terms of comparing logos for the marks of both parties, the opponent's mark is devoid of a logo. Therefore, no confusion can occur among the consumers on this basis.

.....

14. The Applicant's goods, as detailed in the specification above (No. 12) primarily relate to muscle and joint support aids that alleviate pain and discomfort arising from such related injuries. In contrast, the Opponent's goods (No. 13) encompass a range of special mobility devices and instruments for the disabled.

15. An important distinction between the Applicant's goods and the Opponent's goods is that none of the goods in the Applicant's product range cater to consumers with disabilities and/or special needs.

16. The Opponent's mark is being used for their product which is an adjustable toilet and shower seat. It is important to note here that a product of an identical or even a similar kind does not exist in the Applicant's range of products.”

5. The mark relied upon is deemed an earlier mark in accordance with section 6 of the Act. Given that it has been registered for more than five years from the date of the application, ordinarily it would be subject to the proof of use requirements under section 6A of the Act. However, the applicant did not put the opponent to proof of use of its mark and consequently it may rely upon all of its goods as identified.

## **Representation**

6. The opponent is represented by Patrade A/S. The applicant is not represented. Both sides filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision. Only the applicant filed evidence in support of its claim, which is discussed in further detail below. No hearing was requested and so this decision is taken following a careful perusal of the papers.

## **Relevance of EU Law**

7. 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.

## **Preliminary Issues**

8. It is noted that the applicant has filed a witness statement of Divyesh Patel, the Director of Reborn Healthcare LTD and has held this position since 2012. The witness statement includes evidence of the applicant's use of the contested mark within the UK prior to the date of the application. Mr Patel states that the contested mark has been used within the UK since 2014. I note that within Mr Patel's witness statement he provides details as to the background of the company and some of its activities, as well as evidence on the matter.

9. In this instance, the applicant's evidence is not relevant as the assessment I must undertake under section 5(2)(b) is a notional one; the provisions of the Act are not merely a reflection of what is happening in the market<sup>1</sup>. When assessing the likelihood of confusion in the context of registering a new trade mark, it is necessary to consider all the circumstances in which the mark might be used if it were registered<sup>2</sup> as the use that the applicant has made of its mark prior to the application does not precede the

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<sup>1</sup> *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41

<sup>2</sup> *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06, paragraph 66

opponent's earlier right. In this instance, the earlier mark is a comparable mark but it retains its EU filing and registration date. My assessment must take into account only the contested mark, its specification, and any potential conflict with the earlier marks. Therefore, I will not comment any further upon this evidence.

## **Decision**

### **Section 5(2)(b)**

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

“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”.

11. Section 5A of the Act states as follows:

“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 C120/04, *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. The competing goods are shown in the table below:

| Earlier trade mark  | Contested trade mark  |
|---|---|
| Class 10 - Technical aids for the handicapped, especially seatings, standing frames, bath tubs, toilet and bath chairs and accessories for this purpose; not including mobile and transportable lifters | Class 10 - Elastic bandages; Orthopaedic bandages; Compression bandages; Bandages for joints; Hernia bandages; Suspensory bandages; Triangular bandages; Splinting bandages for preparing splints; Conforming bandages; Plaster bandages for orthopedic purposes; Knee bandages, orthopaedic; Splinting bandages for preparing casts; Tubular elastic bandages for supporting joints; Support bandages for medical purposes; Prosthetic socks for limbs; Surgical masks; Stockings (Elastic -) [surgery]. |

14. In their counterstatement, the opponent submits “all of the applied for goods and services are either identical or highly similar to the goods and services registered under the opponent’s earlier mark”. In written submissions in lieu, they also state “the nature of the goods is both medical devices designed to support a bodily injury. Considering the significant degree of similarity between the marks, as uncovered in section 4, these two factors are sufficient to constitute a necessary degree of similarity in goods”.

15. The applicant submits:

3.10. The Applicant asserts unequivocally that there exists no overlap or similarity between the products offered by the Applicant and those of the Opponent. The Opponent is involved in the manufacturing of a range of special mobility devices and instruments for the disabled. The Applicant's focus and specialisation lie exclusively in the procurement and distribution of muscle and joint support aids designed to alleviate temporary pain and discomfort associated with related injuries. At no point has the Applicant engaged in the manufacture, sourcing, promotion, or collaboration of products similar to those comprising the Opponent's product range.

3.11. The Applicant's product offerings are distinct in nature, purpose, and target demographic from those of the Opponent. The Applicant's products serve an entirely different market segment from that of the Opponent and cater to distinct consumer needs."

16. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account, as per *Canon*, where the CJEU stated at paragraph 23 of its judgement:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary."

17. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

18. In *YouView Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J stated:

“...Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

Class 10

*Elastic bandages; Orthopaedic bandages; Compression bandages; Bandages for joints; Hernia bandages; Suspensory bandages; Triangular bandages; Splinting bandages for preparing splints; Conforming bandages; Plaster bandages for*

*orthopedic purposes; Knee bandages, orthopaedic; Splinting bandages for preparing casts; Tubular elastic bandages for supporting joints; Support bandages for medical purposes;*

19. The applicant's above goods are all bandages with various different uses. Bandages are typically used for covering or securing a wound, preventing infection, reducing bleeding, promoting healing and managing orthopaedic injury. The opponent's goods are "Technical aids for the handicapped, especially seatings, standing frames, bath tubs, toilet and bath chairs and accessories for this purpose; not including mobile and transportable lifters". I consider the use of "especially" in this context to be indicative of an example, rather than strictly limiting the goods to those listed following the term. These goods are different types of mobility aids which help individuals with mobility impairments to move around more easily and safely and include modifications to the home environment to help individuals perform daily tasks independently. The purpose and use of the goods is clearly different. The methods of use will also differ.

20. Users will also differ as the opponent's goods are for use within the home by people with mobility difficulties, whereas the applicant's goods would be used by medical professionals, as well as members of the general public for first aid treatment and procedures. On a high level of generality there could be an overlap in user, but the opponent's goods are specifically directed at those with mobility difficulties and disabilities whereas bandages are directed at the general public at large. The nature of the goods also differs as the applicant's above goods are typically flexible material in strips, while the opponent's goods are most likely manufactured from plastic and metal. There may be an overlap in trade channels as both can be purchased through pharmacies to the general public and through medical wholesalers to hospitals and medical practices, and health boards more generally but this is insufficient an overlap in itself to find similarity alone on this basis, as given the broad nature of goods sold in pharmacies, it would be the equivalent of finding that goods sold in a supermarket are similar, which is insufficient. There is no competition between the goods given their differing purposes, nor is there complementarity between the goods as they are not important or indispensable for each other. Overall, I find the above goods to be dissimilar.

*Prosthetic socks for limbs; Stockings (Elastic -) [surgery].*

21. I understand that both prosthetic socks and surgical stockings are types of medical garment. Prosthetic socks are worn under a prosthetic limb in order to protect the skin and to minimise the friction to a stump when wearing a prosthetic limb. Surgical stockings provide compression to the legs to improve blood circulation, reduce swelling and aching and can be used to prevent varicose veins getting worse. They also reduce the risk of thrombosis and leg ulcers. Both garments have a very specific purpose and are designed to be worn on the legs. The opponent's goods are used as described in paragraph 19. The purpose and use of the goods therefore differs. Users also differ as the opponent's goods are for use within the home and will be used by people with a range of medical issues, although I accept that there may be some overlap as an amputee may require a bath chair, but this is at a basic level. Prosthetic socks would be used by amputees. Surgical stockings may be used by medical professionals, as well as members of the general public for treatment and medical procedures. The nature of the goods also differs as the applicant's above goods are typically flexible opaque material, while the opponent's goods are most likely manufactured from plastic and metal. There may be an overlap in trade channels as both can be purchased through pharmacies to the general public and through medical wholesalers to hospitals and medical practices but for the reasons, I stated earlier this is insufficient by itself for a finding of similarity. There is unlikely to be competition or complementarity between the goods. Overall, I find the above goods to be dissimilar.

*Surgical masks;*

22. A surgical mask is most commonly used by medical professionals and is designed to protect the face and minimise the spread of infection. Surgical masks were also widely used by the general population during the Covid-19 pandemic and remain in use by the general public on occasion to prevent the spread of infection. The purpose and use of the goods is clearly different to that of the opponent's "*technical aids for the handicapped*" which are described as above. The methods of use will also differ as the opponent's goods are aids to sit on or to help individuals to stand / support their mobility whereas the applicant's *surgical masks* are designed to be worn on the face.

23. Users will also differ as the opponent's goods are for use within the home by people with mobility difficulties, whereas the applicant's goods would predominantly be used by medical professionals, as well as some members of the general public. The nature of the goods also differs as the applicant's above goods are typically made of woven fabric with two elastic loops to secure the mask around your ears, while the opponent's goods are most likely manufactured from plastic and metal. There may be an overlap in trade channels as both can be purchased through pharmacies to the general public and through medical wholesalers to hospitals and medical practices, and health boards more generally. There is not competition between the goods given their differing purposes, nor is there complementarity between the goods as they are not important or indispensable for each other. Overall, I find the above goods to be dissimilar.

24. As some degree of similarity between goods is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition aimed against those goods I have found to be dissimilar will fail<sup>3</sup>. As I have found all of the goods to be dissimilar, the opposition fails in its entirety.

## **CONCLUSION**

25. The opposition is unsuccessful, and the application may proceed to registration.

## **COSTS**

26. The applicant being successful is entitled to a contribution towards their costs. Reborn Healthcare Ltd were invited to complete a pro forma regarding the hours spent on a range of given activities and the costs incurred during these proceedings. The following claims are made:

|  |            |
|--|------------|
| Notice of Defence                              | 10 hours   |
| Considering forms filed by the other party     | 4 hours    |
| Reviewing opponent's evidence & submissions    | 9:30 hours |
| Collecting, organising, labelling & formatting |            |

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<sup>3</sup> *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden

|  |             |
|--|-------------|
| supporting documents for the evidence round  | 22:50 hours |
| Drafting witness statement detailing factual background and arguments supporting my case               | 20:20 hours |
| Organising documents, case file management, researching similar trade mark cases & procedural guidance | 30 hours    |

**Total** **82:40 hours**

27. I acknowledge that some time would have been spent considering the opponent's case and preparing the Tribunal forms, however, I consider the time that has been claimed to be excessive. I note that applicant has claimed in excess of 20 hours for drafting their witness statement and preparing their evidence in support of their case, however, the evidence did not ultimately play a part in my decision, as per my comments in paragraph 9. However, the witness statement and accompanying evidence consisted of 81 pages, and I will therefore allow a reduced amount of time for this. The applicant has also claimed 30 hours for organising documents, case file management, researching similar trade mark cases & procedural guidance. I am unclear as to what this relates to and note that costs arising from Tribunal proceedings are contributory, not compensatory, and therefore I will disallow this. In my view, the following amounts reflect those costs which I consider have been reasonably incurred:

|  |                |
|--|----------------|
| • Considering TM7 form filed by opponent (1.5 hours):                            | £28.50         |
| • Preparing a TM8 (3 hours):   | £57.00         |
| • Preparing a witness statement and supporting evidence (4 hours)                | £76.00         |
| • Considering and commenting on Proprietor's evidence and submissions (6 hours): | £114.00        |
| <b>Total</b>   | <b>£275.50</b> |

28. Any claim for costs for an unrepresented party is awarded in accordance with The Litigants in Person (Costs and Expenses) Act 1975 which sets payment at a rate of £19.00 per hour. I therefore order the applicant the sum of £275.50.

29. I therefore order R82 A/S to pay Reborn Healthcare Ltd the sum of £275.50. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 1<sup>st</sup> day of October 2025**

**LA Bailey**

**For the Registrar**