

O/0951/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003844663
BY PROGRESSION VENTURES GROUP LTD
TO REGISTER THE FOLLOWING MARK:

LoveHugs

IN CLASSES 24 AND 28

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 439093
BY SAMBRO INTERNATIONAL LIMITED

BACKGROUND AND PLEADINGS

1. On 1 November 2022, Progression Ventures Group Ltd (“the applicant”) applied to register the trade mark on the cover page of this decision in the UK. The application was published for opposition purposes on 9 December 2022. The applicant seeks registration for the following goods:

Class 24 Silk blankets; Children's blankets; Woolen blankets; Sofa blankets; Cotton blankets; Bed blankets; Woollen blankets; Hooded blankets; Blankets (Bed -); Blanket throws; Lap blankets; Yoga blankets; Quilted blankets [bedding]; Blankets with sleeves; Silk bed blankets; Blankets for outdoor use; Bed clothes and blankets; Bed linen and blankets; Bed blankets made of cotton; Textile fabrics for making into blankets; Bed blankets made of man-made fibres.

Class 28 Soft toys; Soft sculpture toys; Soft sculpture plush toys; Soft toys in the form of elks; Soft toys in the form of animals; Children's toys; Infant toys; Fabric toys; Fluffy toys; Cuddly toys; Teddy bears; Toy animals; Stuffed toy animals; Bean bag animals; Stuffed animals [toys].

2. The application was opposed by Sambro International Limited (“the opponent”) on 8 February 2023.

3. The opposition is based upon sections 3(1)(a), 3(1)(b) and 3(1)(c) of the Trade Marks Act 1994 (“the Act”). In its Notice of Opposition, the opponent states:

Section 3(1)(a)

“Section 1(1) of the UK Trade Mark Act 1994 requires a mark to be capable, among other things, (b) of distinguishing goods or services of one undertaking from those of other undertakings.

The mark “LoveHugs” is not so capable because it is read as either;

- i. a statement describing the use or purpose of the relevant goods where a purchaser/user is someone who “loves hugs” and will therefore love hugging the goods to which the sign is being applied, namely soft blankets and/or plush toys. Soft toys are goods which are made for the purpose of hugging. Blankets and particularly baby blankets are also sold for the purpose of providing the recipient with something to cuddle; or
- ii. the sign is read as an abbreviation of the well known and widely used sentimental message, “love and hugs”. This is particularly applicable in the context of plush toys in class 28, which are used to convey sentiment or are adorned with sentimental statements, where use will be seen as a sentimental statement and not as indicating the source of the goods (or any other function of a trade mark). Blankets are also sold as gifts, where the decorative elements consisting of sentimental messages can be the purpose of the goods. In such circumstances the sign will be read as a decoration or a statement of sentiment. Or, it will be read as an indication of the purpose of the goods – to be hugged.”

Section 3(1)(b)

“It is an abbreviation of a widely used sentimental message commonly used as a decoration on goods and in particular on the goods covered by the contested application in class 24 and 28. The goods in class 24 and 28 are blankets and soft toys which children will ‘love’ and ‘hug’ due to the nature of the characteristics of such goods.

The mark should therefore be kept free for other traders to use to convey the sentimental message or the purpose of their goods.

We note that a previous application of the figurative mark “love & hugs” (application number UK00003705616) was rejected in class 28 for cuddly and plush toys, amongst other things, by the UK IPO examination, based on section 3(1)(b).”

Section 3(1)(c)

As set out in section 3(1)(a), the mark “LoveHugs” is a statement describing the use or purpose of the relevant goods where a purchaser/user is someone who “loves hugs” and is buying the relevant goods, namely soft blankets and/or plush toys. Soft toys are goods which are made for the purpose of hugging. Blankets and particularly baby blankets are also sold for the purpose for providing the recipient with something to hug.

In conclusion the opponent submits that the mark is inherently deficient in carrying out its role as a commercial source designator and the grant of an exclusive right would contravene public policy concerns about overbroad monopolies in relation to an expression which should be free for all to use.”

4. The applicant filed a counterstatement denying the claims made.

5. The opponent is represented by Haseltine Lake Kempner LLP and the applicant is represented by Briffa. The opponent filed evidence and the applicant filed written submissions during the evidence rounds. Neither party requested a hearing but the opponent filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

6. 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.

EVIDENCE

7. The opponent’s evidence consists of the witness statement of Clare Rix dated 17 October 2023. Ms Rix is the Brand and Licensing Director for the opponent, a position

which she has held since 2023. Ms Rix's statement is accompanied by 4 exhibits (CR1-CR4).

8. Whilst I do not propose to summarise it here, I have taken all of the evidence and the parties' submissions into consideration in reaching my decision and will refer to them where necessary below.

DECISION

Section 3(1)(a)

9. Section 3(1)(a) reads as follows:

“3(1) The following shall not be registered –

(a) signs which do not satisfy the requirements of section 1(1),

[...]”

10. Section 1(1) of the Act states:

“In this Act “trade mark” means any sign which is capable—

(a) of being represented in the register in a manner which enables the registrar and other competent authorities and the public to determine the clear and precise subject matter of the protection afforded to the proprietor, and

(b) of distinguishing goods or services of one undertaking from those of other undertakings.

A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals, colours, sounds or the shape of goods or their packaging.”

11. Mr Geoffrey Hobbs QC, sitting as the Appointed Person in *AD2000 Trade Mark*, said that section 3(1)(a) permits registration provided that the mark is 'capable' to the limited extent of "not being incapable" of distinguishing.¹ Consequently, if I am satisfied that the mark complies with sections 3(1)(b), and (c) of the Act, the 'incapable of distinguishing' objection under section 3(1)(a) is bound to fail. Alternatively, if any of the grounds under section 3(1)(b) or (c) or succeed the outcome under section 3(1)(a) becomes moot. In any event, this ground of opposition fails for the reasons given by Arnold J (as he then was) in *Stichting BDO and others v BDO Unibank, Inc and others* [2013] EWHC 418(Ch):

44. ... As I discussed in *JW Spear & Sons Ltd v Zynga Inc* [2012] EWHC 3345 (Ch) at [10]–[27], the case law of the Court of Justice of the European Union establishes that, in order to comply with art.4 , the subject matter of an application or registration must satisfy three conditions. First, it must be a sign. Secondly, that sign must be capable of being represented graphically. Thirdly, the sign must be capable of distinguishing the goods or services of one undertaking from those of other undertakings.

45. The CJEU explained the third condition in Case C-363/99 *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* [2004] ECR I-1619 as follows:

"80. As a preliminary point, it is appropriate to observe, first, that the purpose of Article 2 of the Directive is to define the types of signs of which a trade mark may consist (Case C-273/00 *Sieckmann* [2002] ECR I-11737, paragraph 43), irrespective of the goods or services for which protection might be sought (see to that effect *Sieckmann*, paragraphs 43 to 55, *Libertel*, paragraphs 22 to 42, and Case C-283/01 *Shield Mark* [2003] ECR I-0000, paragraphs 34 to 41). It provides that a trade mark may consist inter alia of 'words' and 'letters', provided that they are capable of distinguishing the goods or services of one undertaking from those of other undertakings.

¹ [1997] RPC 168.

81. In view of that provision, there is no reason to find that a word like 'Postkantoor' is not, in respect of certain goods or services, capable of fulfilling the essential function of a trade mark, which is to guarantee the identity of the origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin (see, in particular, Case C-39/97 *Canon* [1998] ECR I5507, paragraph 28, *Merz & Krell*, paragraph 22, and *Libertel*, paragraph 62). Accordingly, an interpretation of Article 2 of the Directive appears not to be useful for the purposes of deciding the present case."

46. The Court went on to say that the question whether POSTKANTOOR (Dutch for POST OFFICE) was precluded from registration in respect of particular goods and services (i.e. those provided by a post office) because it was devoid of distinctive character and/or descriptive in relation to those particular goods and services fell to be assessed under Article 3(1)(b) and (c) of the Directive (Article 7(1)(b) and (c) of the Regulation).

47. It follows that "the goods or services" referred to in Article 4 are not the particular goods or services listed in the specification, as counsel for the defendants argued. **Rather, the question under Article 4 is whether the sign is capable of distinguishing any goods or services.**" (My emphasis)

12. The mark is not incapable of distinguishing any goods or services. The section 3(1)(a) ground fails.

Sections 3(1)(b) and 3(1)(c)

13. Section 3(1)(b) and 3(1)(c) read as follows:

"3(1) The following shall not be registered –

(a) [...]

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of product of goods or of rendering of services, or other characteristic of goods or services,

(d) [...]

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

14. The relevant date for determining whether the mark is objectionable under sections 3(1)(b) and 3(1)(c) is the date of the application in issue, i.e. 1 November 2022.

15. I bear in mind that the above grounds are independent and have differing general interests. It is possible, for example, for a mark not to fall foul of section 3(1)(c) but still be objectionable under section 3(1)(b). In *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 P, the Court of Justice of the European Union (“CJEU”) stated that:

“25. Thirdly, it is important to observe that each of the grounds for refusal to register listed in Article 7(1) of the regulation is independent of the others and requires separate examination. Moreover, it is appropriate to interpret those grounds for refusal in the light of the general interest which underlies each of them. The general interest to be taken into consideration when examining each of those grounds for refusal may or even must reflect different considerations according to the ground for refusal in question (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-0000, paragraphs 45 and 46).”

16. The position under the above grounds must be assessed for the perspective of the average consumer, who is deemed to be reasonably observant and circumspect.² In

² *Matratzen Concord AG v Hukla Germany SA*, Case C-421/04

this case, the average consumer will consist of members of the general public, including children. However, given that children are a younger age group, it is more likely that adults would be making the purchase. I consider that a medium degree of attention will be paid to the selection of the goods as the average consumer will consider factors such as aesthetic, durability, safety and suitability for particular age groups.

Section 3(1)(c)

17. I will begin with the opponent's objection under section 3(1)(c). Section 3(1)(c) prevents the registration of marks which are descriptive of the goods, or a characteristic of them. The case law under section 3(1)(c) (corresponding to article 7(1)(c) of the EUTM Regulation, formerly article 7(1)(c) of the CTM Regulation) was set out by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, p. 1), see, by analogy, [2004] ECR I-1699, paragraph 19; as regards Article 7 of Regulation No 40/94, see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18, paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I-1461, paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94 . Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia, *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44, paragraph 45, and *Lego Juris v OHIM* (C-48/09 P), paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley*, paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94, it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie*, paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the

same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland*, paragraph 86, and *Campina Melkunie*, paragraph 19).

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94, the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality,

quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive 89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56)."

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97]."

18. In Ms Rix's witness statement, she states that the words "love" and "hug" are not distinctive words, they are descriptive in nature and they are commonly used on the goods. Whilst Ms Rix states that she has provided the Oxford dictionary definitions of both words in **exhibit CR1**, I note that only the definition of love is provided within this exhibit, that being; "a very strong feeling of liking and caring for somebody/something".

19. In **exhibit CR1**, I have also been provided with an Urban Dictionary definition of a "love hug", being "a hug with lots of love in it". However, Urban Dictionary is a platform that allows entries to be updated by the public. I therefore consider that the information

from this platform should be approached with a certain degree of caution. I also note that the evidence at **exhibit CR1** has a print date of 11 October 2023, falling after the relevant date.

20. Ms Rix has provided evidence of the word “love” being commonly used on or in relation to third party goods at **exhibit CR2**. I note the following from this exhibit:

- a) A screenshot showing a bear holding the letters “L, O, V and E” being sold on sayitwithbears.co.uk for £19.99. The listing name is “Me To You Bear Love Letters M10” and the screenshot is dated 27 April 2021.
- b) A screenshot showing a collection of teddy bears which have a heart that says “love” within it being sold on amazon.co.uk. The date that these goods were first available is 10 September 2020.
- c) A screenshot showing a teddy bear which has a heart that says “love” within it being sold on amazon.co.uk for £29.99. One of the reviews is dated 1 March 2021.
- d) A screenshot showing a teddy bear holding a heart that says “LOVE” being sold on amazon.co.uk for £29.95. The listing name is “HKT Curvaso GIANT TEDDY BEAR LOVE BROWN” and the date that this bear was first available was 29 September 2021.
- e) A screenshot showing a teddy bear holding a heart that says “LOVE” being sold on amazon.co.uk for £23.03. The listing name is “Sweet Toys 3877 Teddy Cuddly Bear Plus Bear Love Super Cute” and a review for it is dated 18 April 2019.
- f) A screenshot showing a heart pattern blanket that says the word “LOVE” on it, being sold on amazon.co.uk for £27.77. The listing name is “LOVE All Season Blanket Super Soft Fluffy Blanket” and the date that this blanket was first available is 11 November 2021.
- g) A screenshot showing a blanket that says “LOVE” on it (with the letter O being a heart) being sold on littlegiraffe.com for \$164. The listing name is “Dolce LOVE Baby Blanket” and the reviews are dated between 2014 to 2017.

21. Ms Rix has also provided evidence of the word “hug” being commonly used on or in relation to third party goods at **exhibit CR3**. I note the following from this exhibit:

- a) A screenshot showing a teddy bear with the word hugs stitched onto its foot being sold on cardfactory.co.uk for £5.99. The listing name is “Hugs Bear & Cupcake Soft Toy” and the screenshot is dated 15 June 2021.
- b) An article from PG Buzz dated 14 October 2022 titled “IC&G’s Barley plush heads to High Streets”. I note that the content of the article is cut off, but the narrative evidence states that the article shows that Barley “Hugs” teddy bear was launched on the 14 October 2022. I note that a teddy bear holding a red heart which says “Hugs x” within it is shown within the pictures in this article.
- h) A screenshot showing a teddy bear wearing a t-shirt that says “BIG HUGS” sold on amazon.co.uk for £6.99. The date that this teddy was first available is 24 March 2020.
- c) A screenshot showing a search for “Hugs Bear Gifts” on cardfactory.co.uk dated 28 March 2016. The result shows two bears called “Hugs Bears”, one with a purple jumper with a pink heart and the other wearing a pink jumper with 3 pink hearts, both priced at £5.99.

22. Lastly, **exhibit CR4** contains evidence to demonstrate that the words “Love & Hugs” and “I Love Hugs” are commonly used on or in relation to third-party goods. I note the following from this exhibit:

- d) A screenshot showing a teddy bear holding 2 hearts, with a star in between them, which say “Love & Hugs”, being sold on amazon.co.uk for £10.99. The listing name is “Me To You Bear M7 Love and Hugs” and it was first available from 30 May 2022.
- e) A screenshot showing a bear with the words “Love & Hugs” embroidered onto its foot being sold on amazon.co.uk for £11.38. The listing name is “Official Plush Liverpool Football Love & Hugs Teddy Bear”, and the reviews are dated between 18 February 2020 and 16 June 2022.
- f) A screenshot of a teddy bear with a red heart that says “Love & Hugs” for sale on cardfactory.co.uk for £1.99. The listing name is “Hugs Bear & Love Heart Soft Toy”. Underneath is an eBay listing showing that this bear was put up for resale on 11 October 2022.
- g) A screenshot of a teddy rattle comforter with the words “Love and Hugs” embroidered onto it being sold on eBay.com. The listing name is “Card Factory

Blue Love and Hugs Teddy Bear Rattle Comforter Blanket Soother” and the listing was last updated on 1 July 2022.

- h) A screenshot of a teddy bear rattle being sold on eBay.com. The listing name is “Everton FC Official Love and Hugs Bear Rattle Baby Infant EFC Gift” and it was listed for sale on 19 August 2021.
- i) A screenshot of a teddy bear blanket currently unavailable for sale on amazon.co.uk. The listing name is “Chelsea Love and Hugs Comfort Blanket and the reviews are dated 8 August 2018 and 11 March 2019.
- j) A screenshot of a blanket with the words “I (heart) hugs” on it, for sale on amazon.co.uk. The listing name is “Personalised Luxury Pink ‘I Love Hugs’ Baby Blanket” and the listing was first available on 22 November 2014.

23. The words “love” and “hugs” are ordinary dictionary words which would be known to the UK average consumer. The definition of love is provided by the opponent in paragraph 18 above, and as noted by the applicant, a hug is to “squeeze tightly in one’s arms, typically to express affection”.

24. I note that Ms Rix considers that the applicant’s mark is a shorthand for “Love & Hugs” and “I Love Hugs”. However, without any evidence before me to support this assertion, I do not consider that these phrases are known to be shortened to “LoveHugs” by the UK average consumer.

25. Whilst the evidence also shows some use of the words “love” and “hug” together, I note that they are typically connected using the word “and” or an ampersand. However, in the applicant’s case, the words are presented without a space between them creating a sufficiently unexpected, newly coined term. I therefore consider that, based on the definitions above, the UK average consumer will understand the applicant’s “LoveHugs” mark as conveying the idea of loving hugs (in the sense of enjoying hugs).

26. The applicant submits that it would not be usual to describe the contested goods, such as soft toys for example, as “LoveHugs” or for the purpose of “LoveHugs”. I agree. Whilst soft toy goods can be hugged, or the user might love to hug those goods (although their primary purpose is that they are to be played with), the use or intended

purpose of these goods is not “loving hugs”. Whilst it could be argued that blankets can also be hugged, or the user might love to hug those goods (albeit I consider they are more likely used to provide warmth and comfort), again, the use and intended purpose of these goods is not “loving hugs”.

27. Loving hugs is a feeling, or a personality trait of the user, not a purpose or characteristic of the goods.

28. For the sake of completeness, I also note that in the opponent’s notice of opposition, they state that the applicant’s mark refers to the user as “someone who loves hugs”. If this was to be conveyed by the applicant’s mark, I consider that the same rationale applies as above. A user who loves hugs is also not a purpose or characteristic of the goods. On this basis, I do not find the applicant’s mark to be descriptive of the goods at issue or any characteristics thereof.

29. I find that the applicant’s mark is not objectionable under section 3(1)(c) of the Act, and therefore I do not consider that the general interest of keeping signs free so that they may be used by all traders offering such goods applies to the present circumstances.

30. The opposition based upon section 3(1)(c) of the Act fails.

Section 3(1)(b)

31. Section 3(1)(b) prevents registration of marks which are devoid of distinctive character. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by the CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

“29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or

service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37)."

32. I have found that the applicant's mark is not descriptive under section 3(1)(c). I accept that this does not, of itself, mean that the applicant's mark cannot be objectionable under section 3(1)(b).

33. Under this ground, the opponent argues that:

1. That "children will 'love and hug' due to the nature of the characteristics of such goods".
2. "LoveHugs" is an abbreviation of a widely used sentimental message commonly used as a decoration on blankets and soft toys.
3. "In conclusion the opponent submits that the mark is inherently deficient in carrying out its role as a commercial source designator".

34. I consider that the opponent's first argument, which mentions the "nature of the characteristics of such goods", is referring to the section 3(1)(c) wording. This section prevents the registration of marks that are descriptive of the goods. However, given my findings above whereby the opposition based upon section 3(1)(c) has failed, it follows that the opponent's reliance upon a descriptiveness argument under the section 3(1)(b) ground must also fail.

35. Secondly, as noted in paragraph 24 above, without any evidence before me to establish that the applicant's mark is shorthand for "Love & Hugs" and "I Love Hugs", I do not consider that these phrases are known to be shortened to "LoveHugs" by the UK average consumer. I also note that none of the evidence provided by the opponent shows use of the term "LoveHugs" as a decoration on soft toys and blankets. On this basis, I find that the opponent's second argument fails.

36. Lastly, it is not entirely clear whether the opponent's third argument stems from its second argument (being that a sentimental message used as a decoration makes it inherently deficient), or whether it is an independent argument that the mark is non-distinctive. If it stems from its second argument, which I find has failed, then of course its third argument must also fail. For the sake of completeness, if it is an independent argument, I consider that the applicant's mark, "LoveHugs", is a sufficiently unexpected, newly coined term, which is distinctive enough to function as a trade

mark. However, I acknowledge that the mark is lower in distinctiveness, because whilst the mark conveys the meaning of loving hugs, which as noted above is a feeling, or a personality trait of the user, (not a purpose or characteristic of the goods), it is still being used on goods which can be hugged, or that users might love to hug (as acknowledged in paragraph 26 above).

37. It is clear from the case law that for a mark to possess distinctive character, it must serve to identify the goods as originating from a particular undertaking. I can see no reason why the mark as a whole, not being descriptive of the goods in issue, would be incapable of identifying those goods as originating from a particular undertaking. I consider that the use of the words “Love” and “Hug” presented as a sufficiently unexpected, newly coined term, “LoveHugs”, would indicate a particular organisation.

38. The opposition under section 3(1)(b) also fails.

Other considerations

39. For the sake of completeness, under the section 3(1)(b) ground, I note that the opponent has referred to a previous application (“love & hugs”) which was rejected for class 28 goods. Every case is decided on its own facts, the marks clearly differ, and I am not bound by previous decisions of the UK IPO. This submission, therefore, does not assist the opponent.

CONCLUSION

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

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. In the circumstances, I award the applicant the sum of **£600** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£250
Preparing and filing written submissions	£350
Total	£600

42. I therefore order Sambro International Limited to pay Progression Ventures Group Ltd the sum of £600. 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 October 2024

L FAYTER
For the Registrar