

O/0982/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003996909

BY NEXIPATH LTD

TO REGISTER:

KitchenBe1

AS A TRADE MARK IN CLASS 8

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 446783 BY

CAMPERBE PAWEL WASILEWSKI

BACKGROUND AND PLEADINGS

1. On 29 December 2023, NEXIPATH LTD (“the applicant”) applied to register the trade mark on the cover page of this decision in the UK (“the applicant’s mark”). The applicant’s mark was published for opposition purposes on 19 January 2024 and registration is sought for the following goods:

Class 8: Hand-operated choppers; Choppers being knives; Vegetable choppers; Vegetable choppers (Hand-operated -); Vegetable slicers (Hand-operated -); Vegetable slicers, hand-operated.

2. On 10 April 2024, the applicant’s mark was opposed, in its entirety, by CamperBe Pawel Wasilewski (“the opponent”). The opposition is based on section 5(4)(a) of the Trade Marks Act 1994 (“the Act”) and is reliant upon the unregistered right ‘KitchenBe1’ (“the opponent’s sign”). The opponent claims that it has been using its sign throughout the UK since 3 April 2020 in respect of a “grater and peeler set with container”.
3. By virtue of relying on section 5(4)(a) of the Act, the opponent’s claim is that it enjoys a level of goodwill in its business and that the sign relied upon is associated with and/or distinctive of the same. As a result, the opponent claims that use of the applicant’s mark would lead to a misrepresentation which, in turn, would be contrary to the law of passing off as it (1) counterfeits its own product and (2) could deprive the opponent of its own right to sell its product.
4. The applicant filed a counterstatement wherein it denied the claim against it. In addition, the applicant answered ‘yes’ to the question as to whether it wished for the opponent to provide proof of use evidence. While an opponent relying upon section 5(4)(a) of the Act is required to prove that it enjoys a protectable level of goodwill, this is not the same as proving genuine use. This was set out to the parties via correspondence from the Tribunal dated 16 May 2024. In addition, this correspondence set out that the Tribunal would be treating the answer to the proof of use question as ‘no’.

5. The applicant is unrepresented and the opponent is represented by Dariusz Kaczynski. Only the opponent filed evidence. No hearing was requested and neither party filed written submissions in lieu of the same. This decision is taken after careful consideration 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 came in the form of the witness statement of Pawel Wasilewski dated 1 July 2024. Mr Wasilewski is the owner of the opponent, which he founded in 2020. His statement is accompanied by 14 exhibits, being those labelled PW1 to PW14, and was adduced to demonstrate that the opponent enjoys a protectable level of goodwill.
8. I do not intend to summarise the opponent's evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

PRELIMINARY ISSUES

9. In its evidence, the opponent makes an allegation that the applicant is counterfeiting its goods. In making this argument, the opponent's narrative evidence claims that the applicant's product is of very low quality, which spoils opinions about the opponent's own products and would cause its sales to decline, therefore exposing the opponent to financial losses. While evidence of this nature may be of assistance when considering damage under section 5(4)(a) grounds, it will only become relevant in the event that there exists a protectable level of

goodwill and a misrepresentation between the applicant's mark and the opponent's sign.

10. In any event, even if I was to find goodwill and misrepresentation, this evidence is of no assistance. I say this because the only supporting evidence for the claims made comes via a printout of the applicant's product listed for sale on Amazon.co.uk.¹ This printout is dated 10 June 2024 so is from after the relevant date for these proceedings (being 29 December 2023). Further, the product shows just seven reviews, all of which post-date the relevant date and while I appreciate that the goods shown are the same as the opponents' goods, there is nothing to suggest that the goods are of very low quality or that the sale of this product on Amazon has had any impact on the opponent whatsoever.²

11. In light of what I have said above, the claim as to the applicant counterfeiting the opponent's goods is of no relevance to the present case and I will say no more about it.

DECISION

Section 5(4)(a)

12. Section 5(4)(a) of the Act reads as follows:

“(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)

¹ PW14

² I note that some reviews suggest missing parts that would hint at dissatisfaction by the customer. However, this does not, in my view, suggest that the goods are off low quality as claimed by the opponent.

(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.”

13. Subsection (4A) of Section 5 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.”

14. 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).”

15. 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.”

Relevant Date

16. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander Q.C., as the Appointed Person, endorsed the registrar’s assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TMO-212-06* Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’ ”

17. The applicant’s mark does not have a priority date. In addition, there is no evidence before me that is capable of pointing to any earlier use by the applicant that could be considered the start of the behaviour complained about. As such, the relevant date for the present proceedings is the filing date of the applicant’s mark, being 29 December 2023.

Goodwill

18. The first hurdle for the opponent is that it needs to show that it had the necessary goodwill in the sign relied upon as at the relevant date. I remind myself that the

opponent claims that its sign enjoys goodwill owing to its use on the term “grater and peeler set with container”.

19. Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), 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.”

20. 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 off 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 than 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.”

21. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

22. In *Hart v Relentless Records* [2002] EWHC 1984 (Ch), Jacob J. (as he then was) stated that:

“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used “but had not acquired any significant reputation” (the trial judge's finding). Again that shows one is looking for more than a minimal reputation.”

The opponent's evidence

23. Goodwill arises as a result of trading activities. The evidence sets out that the opponent sells its grater and peeler set with a container on Amazon UK. A printout of the opponent's seller profile dated 10 June 2024 is provided.³ In terms of the goods sold, it is confirmed that the opponent began selling its goods via Amazon on 3 April 2020. This is confirmed via a printout of an Amazon UK listing showing this product for sale.⁴ While the printout is taken from after the relevant date (1 July 2024), the narrative evidence confirms that this listing has remained unchanged since first posted in 2020. Having considered the details of this listing, I note that the product is shown as being branded 'KitchenBe1'.

24. An image of the product and packaging is shown in evidence.⁵ In his statement, Mr Wasilewski confirms that he designed the packaging and the branding. On this point, I note that he confirms that this is the design and packaging used between April 2020 and June 2024. The product itself is labelled in the following way:



25. The packaging shows this same branding but also includes the text 'KitchenBe1'. The images and packaging shown here are also shown on the Amazon printout discussed above. Given what Mr Wasilewski sets out in his witness statement, I am content to conclude that this is how the product was branded and packaged from April 2020 onwards.

26. The evidence moves on to discuss the opponent's website, being 'kitchenbe1.com'. The opponent purchased this domain in 2020 and Mr

³ PW1

⁴ PW2

⁵ PW3

Wasilewski designed the website himself. While no printout of the website is provided, the opponent has provided data taken from the 'whois' service database which shows that the website was created on 28 March 2020 and that the opponent is the 'registrant contact'.⁶ Alongside the creation of the website, Mr Wasilewski confirms that he also started a Facebook account, which showed the first presentation of the product on 11 July 2020. A printout showing this post is provided.⁷ While noted, there is nothing to suggest the viewership for this post and there is nothing to indicate its level of engagement amongst the UK consumer base.

27. Whilst on the topic of the opponent's Facebook page, the evidence includes an example of a product advertisement on Facebook.⁸ While this is noted, it is undated and, further, appears to be a preview of a draft advert ready to publish as opposed to the published advertisement itself. Therefore, it is not possible to determine when, if at all, it was published to Facebook. Even if the post was published prior to the relevant date, there is no evidence showing what level of engagement this advert obtained.

28. In 2021, Mr Wasilewski confirms that he expanded the company's operations to other countries and started selling goods via Amazon in Europe and in the USA. A copy of the American listing is provided in evidence.⁹

29. In terms of advertising, the opponent's evidence sets out that it spent a total of £3,225 advertising its goods in 2020, £589 in 2021, £1,914 in 2022 and £3,466 in 2023. Given the placement of the relevant date at the very end of 2023, I consider it reasonable to accept that the entirety of the 2023 turnover is relevant to the present assessment. As such, the total spend equates to £9,194. In support of this, the opponent has provided a sample invoice from July 2020 for advertising on the Amazon platform.¹⁰

⁶ PW5

⁷ PW6

⁸ PW7

⁹ PW8

¹⁰ PW9

30. In respect of the advertising spend, I appreciate that the opponent spent £9,194 advertising its goods over a period of four years but I note that, outside of a draft advert on Facebook, there is nothing before me in terms of actual examples of advertising efforts. Further, it is not confirmed whether this spend relates solely to advertising in the UK or, given the expansion of the business in 2021, if it covers global expenditure from that date onwards.

31. The evidence turns to discuss the opponent's turnover from 2020 to 2024. This is broken down as follows:

Year	Turnover (£)
2020/2021	5,146
2021/2022	3,021
2022/2023	12,007
2023/2024	21,522
Total	41,696

32. In support of the above turnover, the opponent has provided four invoices showing sales of goods to customers in the UK.¹¹ Of the four invoices, one is from after the relevant date so is of no assistance here. I also note that the invoices are addressed to different customers in the UK and each of them relates to the sale of one product only.¹² I appreciate that the invoices relate to sales in the UK, however, as was the case with the advertising spend above, it is not expressly confirmed that the above figures are solely UK related. Again, since the opponent expanded its operations in 2021, it could reasonably be inferred that the post-2021 turnover covers international sales.

33. While on the topic of the turnover figures, I remind myself that the relevant date for these proceedings is 29 December 2023. There is no breakdown as to what dates are covered by the year entries set out in the above table. This is an issue because figures are provided for 2024 and any turnover accrued during that time

¹¹ See PW10 to PS13

¹² All invoices describe the product as a 'Cheese Grater with Container and Lid & Peeler Set'.

is to be disregarded as it falls after the relevant date. Given that the figures are not broken down, it is not possible for me to determine how much of the '2023/2024' sales are attributable to 2023 and how much are attributable to 2024. This renders it somewhat difficult for me to determine an accurate turnover up to 29 December 2023.

34. When discussing its level of sales, I note that the opponent refers to its high ranking on Amazon and the fact that it has achieved many good customer reviews. In respect of this claim, the opponent refers to the Amazon UK listing I have discussed at paragraph 23 above. Having considered the ratings/reviews on this listing, I note that the product is shown as being ranked at number 39,843 in the category of 'Home and Kitchen' and number 43 in the 'Peelers' category. While being ranked at number 43 may be considered relatively high on a platform such as Amazon, I consider it likely that the 'Peeler' category is a very specific sub-category of goods and there is nothing to suggest how many other goods fall within this category.¹³ As such, it is not possible for me to determine how impactful such a ranking is. Even so, the printout is from 1 July 2024 so it is unclear what these rankings would have been as at the relevant date. As a result, the evidence as to the opponent's rankings is of no real assistance here.

35. While on the topic of the Amazon printout, I do appreciate that the listing shows that the product has achieved 929 global ratings, 66% of which are 5-star ratings with a further 25% being 4-star ratings. While these may be high ratings, 929 ratings between April 2020 and July 2024 are not particularly reflective of a widespread level of use. On this point, I note that the printout showing these ratings is from 1 July 2024 meaning it is likely that a number of the ratings were awarded after the relevant date. Such ratings are of no assistance here and there is nothing before me to assist in determining how many ratings were in place as at the relevant date. In addition, the ratings are expressly referred to as being *global*. Given the international nature of Amazon and the fact that the opponent's product has been listed for sale via other countries' Amazon websites since 2021, it is likely that some of these ratings will have been given by non-UK customers.

¹³ I note that there is no evidence demonstrating the size of the sub-category.

This is an issue here because the assessment of goodwill is based on UK customers.

36. As for the claim to having achieved 'many good customer reviews', I do not consider that it is particularly clear from the evidence. I say this because the Amazon listing only shows four verified reviews from UK customers prior to the relevant date. While they may be positive reviews, they are hardly reflective of 'many' reviews. On this point, I note that the listing shows a number of verified reviews from countries such as Italy, Netherlands and Spain which are of no assistance here. Further, the international reviews add further weight to what I have said in the preceding paragraph regarding the international nature of the global ratings.

Assessment of the evidence

37. In terms of turnover, the above evidence demonstrates that the opponent's turnover between 2020 and 2024 was £41,696 and that, between 2020 and 2023, it spent a total of £9,194 advertising its business. While noted, I have discussed above that it is not confirmed whether this is UK specific turnover or spend. In the present case, the opponent began selling goods in other countries in 2021 and obtained a number of non-UK reviews on its Amazon listings. In my view, it is therefore reasonable to infer that the turnover/advertising spend does not solely relate to the UK. This is problematic for the opponent because, as set out above, the assessment I must make here is to be based on the perception of UK consumers.

38. In the present case, the vague nature of the turnover/advertising spend evidence is such that it proves fatal for any claim by the opponent to enjoy goodwill in the UK. This is because it is not possible for me to accurately calculate how much of the turnover or advertising spend actually relates to the UK. Without confirmation on this point and given the lack of any breakdown, I am unable to determine the level of trading activities in the UK. As a result, any claim by the opponent to enjoy goodwill in its business must fail. On this point, I will say that even if I were wrong

on this point and the turnover and advertising spend did solely cover UK activity, the opponent's claim would still fail. My reasons follow.

39. When assessing the level of use shown by the opponent, I must consider it in light of the market in which the opponent operates. I appreciate that I have no evidence on this point, however, it is clear to me that the market for graters, peelers and containers (being, essentially, the kitchen utensil market) is a relatively large one. While the goods are unlikely to be expensive, their nature is such that they are goods that attract high volumes of sales and will be selected at a relatively high frequency. In light of this, I am of the view that the total turnover provided by the opponent is very low.¹⁴ Further, I consider that the marketing spend of £9,194 is also very low.

40. The low level of use alone is not necessarily fatal to the opponent because a small business which has more than a trivial goodwill can still protect signs which are distinctive of that business under the law of passing off even though its goodwill and reputation may be small.¹⁵ However, in the present case, I am of the view that the overall evidential picture is not compelling enough to overcome the low level of use. For example, the opponent's use stems from approximately three and a half years of use (being April 2020 to the relevant period of December 2023). Therefore, it cannot be said that the opponent's evidence is reflective of a longstanding period of use. While I accept that use over a short period of time may be sufficient, this is ordinarily a result of an intensive level of use. Plainly, this is not the case here.

41. In addition to the above, I note that the opponent has not provided any evidence demonstrating repeat custom, which is commonly a factor that can be said to assist in a finding that there exists a protectable level of goodwill in a business. Lastly, I am of the view that the lack of advertising evidence and examples of marketing efforts, even in light of confirmation of an advertising spend, makes it difficult for me to determine the actual level of exposure of the opponent's

¹⁴ On this point, I remind myself that some of the total turnover will have been accrued after the relevant date. I cannot, therefore, take the entirety of the turnover (£41,696) into account. While the relevant turnover will be lower than this amount, I do not consider that it will be considerably so.

¹⁵ See, for example, *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590

business across the UK. In respect of this point, I remind myself again that the level of expenditure is very low so it cannot reasonably be inferred that this inevitably led to a sufficient level of exposure.

42. Taking all of the evidence into account, I am of the view that while a small business may sustain a claim for passing off, the evidence before me is simply not sufficient enough to warrant a finding that, as at the relevant date, the opponent's business enjoyed a protectable level of goodwill amongst UK customers. Not only is the turnover at a very low level, but there is also just not enough supporting evidence to justify the existence of goodwill in the opponent's business. Without the existence of a protectable level of goodwill in the opponent's business, there can be no misrepresentation or damage. As such, the opponent's claim under section 5(4)(a) of the Act fails at the first hurdle. Given that this was the only ground of opposition, I find that the opposition fails in its entirety.

CONCLUSION

43. The opposition has failed and, subject to any successful appeal against my decision, the applicant's mark is hereby permitted to registration for all goods applied for.

COSTS

44. The applicant has succeeded in defending the opposition in its entirety. The applicant would, therefore, in the ordinary course of these proceedings, be entitled to a contribution towards its costs. However, the applicant is unrepresented meaning that, in order to claim its costs, it was required to file a completed costs pro-forma. It did not do so. On this point, I note that a blank costs pro-forma was provided to the opponent under the cover of a letter from the Tribunal dated 27 September 2024. This letter set out that:

“If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded.”

45. As no costs pro-forma was filed and the applicant incurred no official fees arising from this action, I make no order as to costs. Therefore, both parties are to bear their own costs of these proceedings.

Dated this 21st day of October 2025

A COOPER

For the Registrar