O/1204/25

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NO. UK3924890
BY ALAN JAMES BLACKWOOD
AND
IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 443445
BY KIDS2, LLC

AND
IN THE MATTER OF UK TRADE MARK REGISTRATION NO. UK917947174
IN THE NAME OF KIDS2, LLC
AND
THE APPLICATION FOR INVALIDATION THEREOF
UNDER NO. 506885
BY ALAN JAMES BLACKWOOD

BACKGROUND AND PLEADINGS

1. These consolidated proceedings consist of one opposition matter and one invalidation matter between the same parties: Alan James Blackwood and Kids2, LLC ("Kids2"). [1]

2. The opposition (443445) is against Mr Blackwood's application for UK3924890 to register the following mark:

Filing date: 20 June 2023
Publication date: 7 July 2023

Registration is sought for the following services:

> Class 35: Retail services connected with the sale of children's clothing; Retail services in relation to children's clothing accessories.

3. The application was opposed by Kids2 on 6 October 2023. The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is against all the applied for services. Kids2 is relying on its following registration:

UK3334011

[1] I note that the opposition (and earlier marks) were previously in the name of Kids2, Inc. However, during the proceedings, an assignment (and subsequent rectification) took place changing the ownership of the marks owned by Kids2, Inc to Kids2, LLC. The relevant undertakings were agreed to by Kids2, LLC for proceedings to continue.

KIDS2

Filing date: 24 August 2018
Registration date: 12 April 2019

Relying upon the following services from their registration:

> Class 35: Online retail services connected with the sale of infant and toddler products.

4. Kids2 claims that the marks are highly similar and the services are identical which will lead to a likelihood of confusion. Mr Blackwood denied the claims made.

5. The invalidation proceedings (506885) were brought by Mr Blackwood against Kids2's UK917947174 registration as follows:

KIDS2

Filing date: 24 August 2018
Registration date: 24 January 2019

6. For the following goods and services:

> Class 20: Play yards; Seats, namely, baby bouncer seats, booster seats, stools; crib mirrors; booster seats with tray; decorative mobiles; mirrors; infants' and children's pillows.
>
> Class 28: Baby multiple exerciser toys; exerciser toys, namely, fabric teething toys, bathtub toys, crib mobiles, play gyms, play mats containing infant toys, plastic character toys, multiple toy mirrors for infants; action skill games; plush toys; building blocks; crib toys; manipulative games; multiple activity toys; musical toys; puppets; swings; infant rattles; squeeze toys; bathtub toys; dolls; stuffed toy animals; toy storage nets for holding bathtub toys; infant bath accessories, namely, pouches for holding toys; card games; electric action toys;

talking toys; toy figures; hand-held electronic games; infant development toys, namely, clutch balls; children's rubber action balls for throwing and catching; children's soft sport balls for throwing, catching, and kicking; and soft sculpture toys, namely, rubbery shapes with holes for grasping and catching.

Class 35: Online retail store services, namely infant and toddler products, and audio visual programming for children stored on video tape, video disc, CD-ROM, and DVD.

Class 41: Providing entertainment information; provision of entertainment, news, and information via communication and computer networks; Entertainment services in the nature of production of television shows and multimedia entertainment content; production of DVDs and television programs featuring animated characters; publishing of books, e-books, audio books, music and illustrations.

7. The application for invalidation was filed on 12 January 2024 and is based on sections 3(1)(b), (c) and (d) of the Act. Mr Blackwood stated in the application for invalidity that the registration lacks any capability to distinguish the goods or services as the average consumer will understand it to mean that those goods and services are also for kids. Further, he stated that the word ‘KIDS’ both alone and with ‘2/TOO’ is in wide use in the marketplace in relation to the goods and services it is registered for and therefore, it is customary in the current language of the relevant sector of trade. Kids2 filed a defence denying the claims.

8. Both parties filed evidence in these proceedings. Neither party requested a hearing but both provided submissions in lieu. This decision is made following careful consideration of the papers.

9. Mr Blackwood is represented by Harper Macleod LLP and Kids2 is represented by Marks & Clerk LLP.

10. 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

11. Kids2 filed their evidence in chief in the form of a witness statement dated 18 March 2024 from Robecca Davey, who is a Chartered Trade Mark Attorney from Marks & Clerk LLP. This is accompanied by 5 exhibits and refers to the opponent's business, the similarity of the marks and examples of the goods and services in question.

12. Jamie Watt of Harper Macleod LLP filed a witness statement dated 22 July 2024 on behalf of Mr Blackwood. This is accompanied by 7 exhibits. There are various matters covered within the evidence, including evidence pertaining to other 'KIDS2' marks, website extracts of how both parties use their marks and the meanings of "2" and "too".

13. A further witness statement dated 23 September 2024 was filed by Mr Watt which included one exhibit and referred to the meanings of the terms "children, child, infant, baby and toddler".

14. Robecca Davey filed evidence in reply via a witness statement dated 23 September 2024 with 5 further exhibits. The main purpose of this evidence was to rebut the evidence filed by Mr Blackwood.

15. In terms of the opposition proceedings, the comparisons I must make are based on a notional and fair use of that mark in relation to all of the goods or services in respect of which it is registered[2] and therefore any evidence relating to what mark the parties actually use in the market currently or what products they are currently selling is of no assistance in this matter.

[2] *Roger Maier and Another v ASOS,* [2015] EWCA Civ 220

16. I have read through all the evidence and will refer to it as and where necessary.

Preliminary Issues

17. I note within the first witness statement provided by Ms Davey on behalf of Kids2, that she makes reference to submissions made in Mr Blackwood's Form TM26I as follows:

> "11. This is something that both parties the subject of this matter agree on. Now produced and shown to me marked **Exhibit RD2** is the relevant page of a TM26(i) submitted by the Applicant in the related proceedings (Cancellation No. CA000506885) in which they state at paragraph 3 (and highlighted in yellow) of the submissions: *"the number "2" is functionally, and in the minds of the average consumer, equivalent to the word "too"*. For ease, we have only submitted the relevant page of this form. This admission by the Applicant shows that they too, agree on the similarity between the marks in question here."

18. The submissions contained within the Form TM26I were made separately to the opposition proceedings (i.e. before the two matters had been consolidated) and relate solely to those invalidity proceedings. Therefore, these comments cannot be considered in relation to the opposition proceedings.

Opposition

19. Section 5(2)(b) is being relied upon and 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".

20. Section 5A of the Act is as follows:

> "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."

21. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

> "6. (1) In this Act an "earlier trade mark" means –
>
> (aa)a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;"

22. In these proceedings, the opponent is relying upon the trade mark shown in paragraph 3, which qualifies as an earlier trade mark under the above provisions. As the trade mark had not completed its registration process more than 5 years before the filing date of the application in suit, it is not subject to proof of use, as per section 6A of the Act. The opponent can, as a consequence, rely upon all of the services they have identified.

Case law

23. The following principles are gleaned from the decisions of the EU courts 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 Office for Harmonisation in the Internal Market (Trade Marks and Designs) (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:

(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 Services

24. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "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".

25. 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.

26. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that 'complementary' means:

> "[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking".

27. In *Gérard Meric v Office for Harmonisation in the Internal Market* (OHIM) ('Meric'), Case T-133/05, the GC stated that:

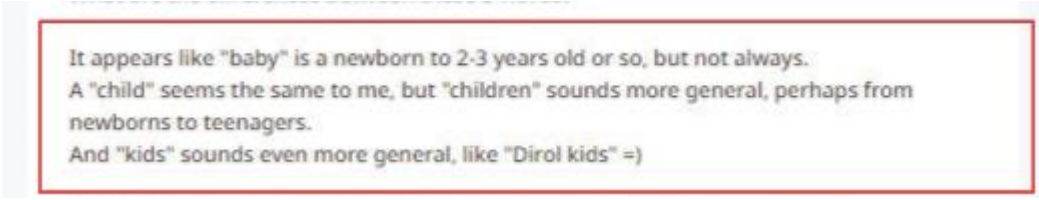
> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM - Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where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

28. For the purposes of considering the issue of similarity of services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

29. The services at issue are as follows:

Mr Blackwood's services	**Kids2's services**
Class 35: Retail services connected with the sale of children's clothing; Retail services in relation to children's clothing accessories.	Class 35: Online retail services connected with the sale of infant and toddler products.

30. Firstly, I note the evidence from Mr Watt in his second witness statement. He states that Exhibit JW8 contains various pieces of information from internet research illustrating that the terms children, child, infant, baby and toddler have different meanings. The exhibit contains screenshots from 'italki.com' which appears to be a forum asking questions where participants can respond. The question posed is "Baby vs child vs kid. What are the differences between these three words?" Mr Watt has highlighted certain sections he believes to be of assistance such as:


It appears like "baby" is a newborn to 2-3 years old or so, but not always.
A "child" seems the same to me, but "children" sounds more general, perhaps from newborns to teenagers.
And "kids" sounds even more general, like "Dirol kids" =)

However, this appears to simply be a forum for people to post opinions on rather than any particular expertise or knowledge of participants.

31. Next, are some screenshots from Quora, which, like the above evidence seems to be a site where people can ask questions and receive responses from others. Again,

there is no indication that this is anything other than opinions of people on the internet. The main theme in the answers is that the terms denote slightly different age ranges.

32. Thirdly, is an article from Parenting First titled ‘How do Newborns, Babies, Infants, Toddlers, Preschoolers and Kids differ from each other”. It goes into detail about what age each of those categories is considered to be. However, I note the article does not give any guidance as to what ‘children’ means and uses the term to denote all of the above on occasion.

33. When making my assessment, I am deciding what the average consumer would view the specification terms to mean. Clearly, online retail is encompassed within retail services more generally. I have not seen anything within the above evidence that sways me into believing that the term ‘children’ does not also include ‘toddlers’ and infants’. The applicant’s services are focused on clothing and clothing accessories whereas the opponent’s services are more generally ‘products’. ‘Product’ is a very wide term which could incorporate clothing and accessories. In light of all this, I find that there will be an overlap in use, user, purpose, trade channel and the services are likely to be in competition. They are not complementary. I therefore find them similar to a high degree.

Average consumer and the purchasing act

34. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

35. 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. (as he then was) 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."

36. For the class 35 services, the average consumer will be the general public. The services are likely to have been chosen by viewing promotional material or visiting retail premises. The choice of all services at issue will largely be influenced by visual considerations but there is the possibility of word-of-mouth recommendations. When selecting the services at issue, the average consumer is likely to consider such things as stock, suitability and age appropriateness, price of goods offered in comparison to other retailers, delivery method (for online retail) and knowledge of the staff. I therefore believe that the average consumer will pay a medium degree of attention during the selection process.

Comparison of the marks

37. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a 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 marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, 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 relative 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."

38. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the 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.

Contested mark	**Earlier mark**
	KIDS2

39. In relation to the earlier mark, it is a word mark that comprises 'KIDS' conjoined with the number 2. I believe the overall impression lies in the mark as a whole.

40. The contested mark comprises the words 'KIDS' and 'TOO' which have a space between them. These are presented in a standard typeface and appear to be grey in colour. There is a turquoise stripe that runs horizontally behind the words. Given 'Kids' is descriptive of the end user of the goods, I also find this plays a lesser role than 'TOO' which is the dominant and distinctive element of the mark. The presentation and stripe also play lesser roles.

41. Turning now to the visual comparison, both marks share the word 'KIDS' at the beginning. The marks differ with their endings being "TOO" and "2" respectively. The contested mark also includes the turquoise stripe that has no equivalent in the earlier mark. I therefore consider the marks to be visually similar to a medium degree.

42. Aurally, all word elements of both marks will have their ordinary everyday pronunciations. As both "TOO" and "2" have the same pronunciation, the marks are aurally identical.

43. Both parties have provided detailed submissions regarding the concept of the marks. In summary, KIDS2 claim that "2" and "TOO" essentially have the same meaning in terms of branding whereas Mr Blackwood claims that they have different meanings and impressions (as evidenced by a BBC bitesize page in Exhibit JW7). Ms Davey provided evidence in Exhibit RD5 (to her second witness statement) of a list of registered trademarks that contain either a number in place of a word or where words have been abbreviated to a single letter. I am discounting the second type of mark as that is not what we are dealing with in this case. Regarding the marks that also contain the number '2', I note that for the most part the number features somewhere in the middle of the mark. For example, from the list she has provided: 'START 2 RUN', 'CLOSE 2 YOU' and 'DIRECT 2 PEOPLE'. In my mind, the positioning is key to the understanding of the number '2' replacing the word 'TO' and the position of 2 being at the end of the earlier mark actually makes it less likely to be seen as meaning the same as 'TOO'. Further, I consider that most of the examples provided are where the word 'TO' is replaced as opposed to this matter where the word in question is 'TOO'.

44. Taking the above into account, I consider that a significant proportion of consumers who will view "2" as meaning the number. Therefore, the '2' versus 'TOO' elements create a conceptual point of difference however, insofar as the marks share the element 'KIDS' this concept is identical.

Distinctive Character of the Earlier Mark

45. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 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).

> 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 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)."

46. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and/or services, ranging up 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 made of it however, I have not been provided with any evidence of use. I have however, been provided with evidence from Mr Blackwood of other registrations and screenshots of marks on social media and websites which include the words 'KIDS 2'. I agree with KIDS2's criticisms of this evidence, that most of the marks have further elements with them (for example, Kidz2play) and also, they are not all for the same goods as the earlier mark (i.e. one is for a soft play, one relates to a breakfast club and another is in relation to sports for children). I therefore only have the inherent position to consider here.

47. The earlier mark comprises of two ordinary everyday terms' 'KIDS' and '2', in addition, the mark is registered for goods and services that are for children and therefore, the mark is descriptive/allusive of that although the '2' provides some further conceptual content. I therefore find the mark to be inherently distinctive to a low degree.

Likelihood of confusion

48. 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 and services 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 services and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier 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.

49. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks being compared visually similar to a medium degree and aurally identical.
- In relation to the concept of the marks, I have found that the 'KIDS' elements are conceptually identical but that the '2'/'TOO' element provides a point of conceptual difference.
- I have found the earlier mark to be inherently distinctive to a low degree.
- I have identified the average consumer as being the public. The purchasing process is likely to be predominantly visual.
- I have concluded that a medium level of attention will be paid during the purchasing process.
- The services are similar to a high degree.

50. In *Face2FaceHR Partners Limited v Peninsula Business Services Limited*, O/0368/23, Emma Himsworth K.C., as the Appointed Person, reviewed the case law in *Whyte and Mackay v Origin* [2015] EWHC 1271 (Ch) and *Nicoventures Holdings Limited v The London Vape Co Ltd* [2017] EHWC 3303 (Ch), as well as guidance in the Common Communication on the Common Practice of Relative Grounds of Refusal - Likelihood of Confusion (impact of non-distinctive/weak components) dated 2 October 2014, which is referred to in the case law. Miss Himsworth summarised the correct approach when assessing the likelihood of confusion where the only common element between the marks in issue has no or low distinctiveness as follows, at paragraph 44:

> "(1) The distinctiveness of the mark as a whole must be assessed, taking into account that a minimum degree of distinctiveness must be acknowledged.
>
> (2) The distinctiveness of each of the components of both marks must be assessed with priority being given to the coinciding elements.
>
> (3) The focus of the assessment of the likelihood of confusion should be on the impact of the non-coinciding components on the overall impression of the mark.
>
> (4) Account must be taken of the similarities/differences in the non-coinciding elements of the marks.
> (5) A coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.
>
> (6) There may be a finding of a likelihood of confusion if (a) the non-coinciding elements of the mark are of lower (or equally low) degree of distinctiveness or are of insignificant visual impact and the overall impression is similar; or (b) the overall impression of the marks is highly similar or identical."

51. As discussed above, I have noted that the earlier mark is distinctive to a low degree, with 'KIDS' being descriptive of the end user but the '2' element providing further conceptual content. With the contested mark, the same reasoning applies ('KIDS' is descriptive whilst 'TOO' provides more conceptual content and the stripe

plays a small role in the overall impression). It is clear that the main coinciding part of the marks, is the 'KIDS' element which is entirely descriptive. The '2' vs 'TOO' are conceptually and visually different (for what are primarily visual purchases) and there are differences in the overall impressions of the marks. I do not find that these marks fall within the examples set out in subparagraph (6) the case above. Therefore, I consider there to be no likelihood of direct confusion.

52. I will now go on to consider indirect confusion, which was described in the following terms by Iain Purvis Q.C. sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

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

(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)."

53. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), 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.

54. As discussed above, I do not view '2' and 'TOO' as interchangeable in the context of the marks before me. Therefore, I do not believe the marks will be viewed as a brand extension or differing version of the same undertaking's marks. Neither mark is so distinctive, nor features any element that is so distinctive that the average consumer would assume that they come from the same undertaking and there is no additional element which suggests that one mark might be the sub-brand of the other. I do not believe there is any proper basis for a finding of indirect confusion.

The opposition fails under section 5(2)(b).

Invalidation

Section 3

55. Section 3(1)(b), 3(1)(c) and 3(1)(d) 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) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade:

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."

56. Section 47(1) states:

"47. (1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration). Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

[…]

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

[…]

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made.
Provided that this shall not affect transactions past and closed."

57. I bear in mind that sections 3(1)(b) and 3(1)(c) are independent and have different 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 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)."

58. 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.[3] In 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 as the average consumer will consider factors such as aesthetics, fit, durability, safety and suitability for particular age groups.

[3] *Matratzen Concord AG v Hukla Germany SA*, Case C-421/049

Section 3(1)(c)

59. 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 and services, 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 I-2779, 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]."

60. In *Campina Melkunie BV and Benelux-Merkenbureau,* Case C-265/00, the CJEU stated that:

> "39. As a general rule, the mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics within the meaning of Article 3(1)(c) of the Directive even if the combination creates a neologism. Merely bringing those elements together without introducing any unusual variations, in particular as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

40. However, such a combination may not be descriptive within the meaning of Art.3(1)(c) of the Directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition will have to be satisfied as regards both the aural and the visual impression produced by the mark.

41. Thus, a mark consisting of a neologism composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of those characteristics within the meaning of Art.3(1)(c) of the Directive, unless there is a perceptible difference between the neologism and the mere sum of its parts: that assumes that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts."

61. Within their Form TM26(I) and statement, Mr Blackwood claimed that the 174 registration is "contrary to section 3(1)(c) in that it is indicative solely of the kind and intended purposes of the goods and services set out in the Registration, in that they are also for kids."[4] Within their submissions they also state:

"25. Given that word element of the mark (kids) would convey a clear descriptive meaning in relation to the relevant public, the impact of that element of mark on the relevant public will be simply and solely descriptive in nature, eclipsing any impression that said element could indicate a trade origin, and any risk that the reuse of such sign by a third party could cause confusion."

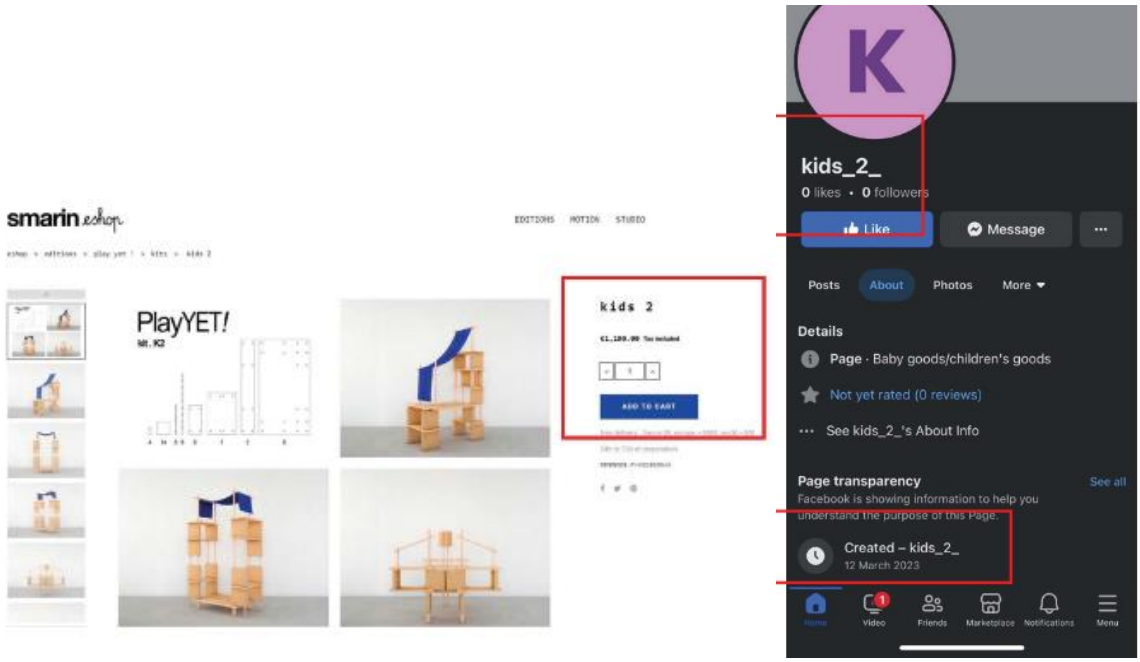
62. They have also referenced the judgement of the Court of First Instance (Fourth Chamber) EUIPO Case T-348/02 (*Quick Restaurants SA*) paragraphs 32 to 37. I note this case relates to the mark 'QUICK' in relation to classes 29, 30, 31, 32 and 42. The

[4] Paragraph 8

court noted in the aforementioned paragraphs that the word ‘QUICK’ consists exclusively of an indication which may serve, in trade, to designate an important quality of the relevant products, that is the speed which they can be prepared and served.

63. Within the first witness statement of Jamie Watt, he states at paragraph 5 that Exhibit JW2 included examples of the sign ‘Kids Too’ in relation to goods and services in a descriptive and generic capacity. However, the mark in question here is ‘KIDS2’ and so this evidence is not entirely relevant. As I have discussed earlier in this decision, I do not believe that, in these circumstances, ‘2’ and ‘TOO’ are interchangeable. Therefore, I do not see how this evidence is of assistance here.

64. Turning to Exhibit JW1 which is a selection of screenshots from various websites using ‘KIDS2’, I have reviewed the same and note that for the most part there are further elements at the end of the marks which, as I have stated previously, prevents the ‘2’ and ‘TOO’ elements being used interchangeably. For example, ‘Kids Back 2 Sport’ has a meaning when all read together. There are 2 examples where ‘KIDS2’ are used without further elements as follows:



65. On their own, this evidence does not provide much context for the argument that the term ‘KIDS2’ is descriptive. One shows a product referred to as ‘kids 2’ and the

other is a social media page using kids_2_ as a handle/username, i.e. being a unique identifier for a page related to baby/children's goods.

66. For section 3(1)(c) to bite, I must be satisfied that the average consumer would, at the relevant date, have immediately perceived, without thought or explanation, that the mark designated characteristics of the goods and services at issue.

67. I consider that 'Kids' is fairly obviously a common colloquial term for children and, as discussed above, that includes toddlers and babies. I consider that it is possible that the end user of all of the goods and services within the registration could be children, although the actual purchase will likely be carried out by an adult on their behalf. However, the mark in question is not 'KIDS' solus but rather, 'KIDS2'. Mr Blackwood asserts that 'KIDS2' has the same meaning as 'Kids Too' whereby the 'too' means 'additionally' or 'as well as' (ergo the mark would mean that the goods and services are also available for children). I discussed in paragraphs 44-45 that I did not believe this meaning would be seen by the average consumer who sees 'KIDS2' . My previous finding applies here.

68. The number '2' does not have a natural or automatic link to the goods and services in question. It is not a purpose or characteristic. Although one element of 'KIDS2' mark is indeed descriptive of the potential intended audience, the addition of the '2' takes it away from being wholly descriptive and adds a conceptual element that is not descriptive in nature and, as per *Campina Melkunie* above, the combination of the two elements creates a perceptible difference from the mere sum of its parts.

69. 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.

70. The invalidation based upon section 3(1)(c) of the Act fails.

Section 3(1)(b)

71. 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)."

72. I have found 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).

73. In the Form TM26(I) Mr Blackwood argued that the mark lacks any capability to distinguish the goods or services of one undertaking from another and that the average consumer will "understand the mark to mean that the goods and services provided are also for kids".[5] Further, in submissions, Mr Blackwood stated that 'the fact that a sign is composed of a generic word which informs the public of a characteristic or goods or services is relevant to conclude that the sign is devoid of distinctive character.

74. 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.

75. I have already discussed the distinctiveness of 'KIDS2' in paragraph 47, and therefore, do not propose to go through it again here. I note that the mark is lower in distinctiveness because the word 'KIDS' is descriptive but the addition of the '2' element, although in itself is not highly distinctive, does provide a further distinctive aspect to the mark

[5] Paragraph 6

76. The claim under section 3(1)(b) also fails.

Section 3(1)(d)

77. In *Telefon & Buch Verlagsgesellschaft GmbH v OHIM,* Case T-322/03, the General Court summarised the case law of the Court of Justice under the equivalent of s.3(1)(d) of the Act, as follows:

> "49. Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 31, and Case T-237/01 *Alcon v OHIM – Dr. Robert Winzer Pharma* (BSS) [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public's perception of the mark (*BSS*, paragraph 37).
>
> 50. With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (*BSS*, paragraph 38).
>
> 51. Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and Article 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the marks are sought to be registered (see, by analogy, *Merz & Krell*, paragraph 35, and *BSS*, paragraph 39).

> 52. Finally, signs or indications constituting a trade mark which have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services covered by that mark are not capable of distinguishing the goods or services of one undertaking from those of other undertakings and do not therefore fulfil the essential function of a trade mark (see, by analogy, *Merz & Krell*, paragraph 37, and *BSS,* paragraph 40)."

78. Proving this ground requires the filing of evidence of fact supporting the claim that the mark was customary for other traders to use the word 'KIDS2" at the relevant date but not in a trade mark sense.[6] There is a relatively high evidential bar: in *Affinity Leasing Limited v Total Motion Limited*, Mr Daniel Alexander QC (as he then was), sitting as the Appointed Person reviewed the authorities and concluded the overall message was that section 3(1)(d) "requires specific evidence that it is specifically customary".[7]

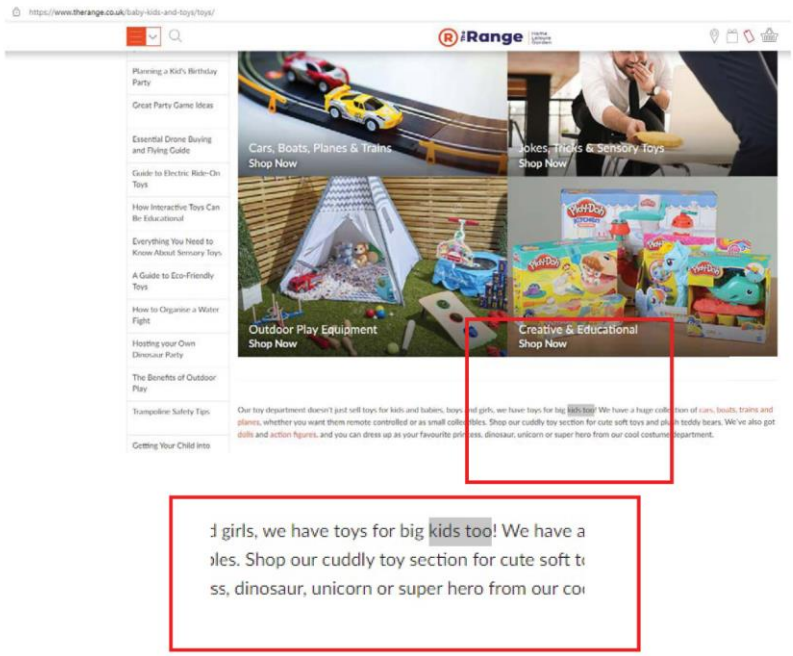
79. I need to make the assessment taking into account the expectations of relevant average consumers in deciding whether at the date of the application a mark had become 'customary in the current language or in the bona fide and established practices of the trade'. Although where intermediaries influence decisions to purchase goods or services their views should also be taken into account, as I have already set out above, in the present case the average consumer for the contested goods and services is the general public, and it is their views which are likely to be of decisive importance.[8]

80. The evidence provided to me in support of the section 3 claims is made up of screenshots of other websites/companies using 'KIDS2' or 'KIDS TOO' within their marks. As discussed above, the majority of these include other elements which alter the meaning and conceptual content. The only evidence of showing 'KIDS TOO' in a

[6] *Nude Brands Ltd v Stella McCartney Ltd,* [2009] EWHC 2154 Ch.
[7] Case BL O/522/20 at [22]
[8] 21 CJEU, Case C-371/02 *Björnekulla Fruktindustrier AB v Procordia Food AB*, paragraphs 24 and 25

non- trade mark manner is in Exhibit JW2 and I replicate the relevant part below for ease:

www.thereange.co.uk



81. I do not find this example to be of any assistance to the invalidation as 'kids too' forms part of a sentence in a piece of prose. It is not being used in isolation. The mark under attack is 'KIDS2' and, as discussed above, I believe this mark to have differing conceptual content to 'Kids Too'

82. I therefore find that simply providing evidence of other marks including the same terms and some examples without context as to what goods and services the marks are applied to, is not enough to find that the mark 'KIDS2' is customary in the trade or established practices.

83. As a consequence, the claim under section 3(1)(d) is also unsuccessful.

Conclusion

84. The opposition against UK3924890 is unsuccessful in its entirety and, subject to any successful appeal, the application may proceed to registration.

85. The invalidity proceedings against UK917947174 are also unsuccessful in their entirety, subject to any successful appeal.

Costs

86. The guidance for awards of costs are set out in TPN 2/2023.

87. On reviewing the matters at hand, I consider that as both the opposition and the invalidation have failed, the fairest basis to deal with costs is for each party to bear their own in this matter.

88. I therefore make no award of costs in this matter.

Dated this 22nd day of December 2025
L Nicholas
For the Registrar