O/0212/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3897254
IN THE NAME OF ZAYGHAM ALI HUSSAIN
FOR THE FOLLOWING TRADE MARK:

Brillars

IN CLASSES 10, 17 & 40

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 443078
BY ADNAN SAEED

Background and pleadings

1. On 5 April 2023, Zaygham Ali Hussain ("the applicant") applied to register the trade mark **Brillars** in the UK, under number 3897254 ("the applicant's mark"). Registration is sought for the following goods and services:

Class 10: Air pillows for medical purposes; air cushions for medical purposes; air mattresses for medical purposes; ambulance stretchers; wedge pillows for medical purposes; incline pillows for medical purposes; acid reflux pillows; gerd pillows; bed vibrators; hydrostatic beds for medical purposes; water beds for medical purposes; beds specially made for medical purposes; electric blankets for medical purposes; childbirth mattresses; commode chairs; dentists' armchairs; drawsheets for sick beds; incontinence sheets; incontinence bed pads; patient lifting hoists; operating tables; pads for preventing pressure sores on patient bodies; soporific pillows for insomnia; surgical sterile sheets; stretchers; and surgical drapes.

Class 17: Flexible foam; flexible polyurethane foam; flexible foam materials; cut to size foam; upholstery foam; foam for use in upholstery; shredded foam; foam materials cut to size; foam materials for use in manufacture; foam materials in the form of blocks, sheets, rolls, blanks; shredded polyurethane foams; ether foams; closed cell foams; closed cell polyethylene foams; closed cell cross-linked polyethylene foam; closed cell cross-linked polyethene foam; flower arrangements (foam supports for -) [semi-finished products]; foam for use as heat insulation; foam for use as heat shields; foam for use as motor compartment linings; foam for use in sound absorption; foam for use in sound insulation; foam glass for use as an insulating materials; foam in the form of blocks for use as heat insulation; foam insulation for use in building and construction; foam insulation materials for use in building and construction; foam rubber; foam sheeting for use

as a building insulation; foam supports for floral arrangements; foam supports for flower arrangements [semi-finished products].

Class 40: Foam converting services, cutting and fabricating foam from bulk; processing of goods by cutting, namely converting bulk stock into products of a required shape and size; processing of foam materials by cutting, namely converting bulk stock into products of a required shape and size.

2. Details of the application were published for opposition purposes on 30 June 2023. On 18 September 2023, Adnan Saeed ("the opponent") opposed the registration of the applicant's mark under sections 5(1), 5(2)(a), 5(2)(b), 5(4)(a) and 3(6) of the Trade Marks Act 1994 ("the Act").[1]

3. Under section 5(1), 5(2)(a) and 5(2)(b) of the Act, the opponent relies upon their UK trade mark registration number 3433962, **Brillars** ("the opponent's mark"). The opponent's mark was filed on 4 October 2019 and became registered on 10 January 2020. It stands registered for the following goods, all of which are relied upon for the purposes of the opposition:

Class 20: Kids and baby mattresses, cushions and pillows.

Class 24: Bedding, curtains, textile goods and substitutes for textile goods, bed linen and blankets; duvets, throws, cushion covers, coverings for furniture; adhesive fabric; adhesive fabric for application by heat; adhesive fabrics for application by heat; adhesive labels (textile -); adhesive materials in the form of stickers [textile]; aeronautical balloons (fabric impervious to gases for -); afghans; afghans [knitted covers]; apparel fabrics; artificial silk; baby blankets; baby buntings; badges made of fabric material; bags for

[1] The opposition was originally brought under sections 5(1), 5(2)(a) and 5(2)(b) only. However, the opponent made a request to add the section 5(4)(a) and 3(6) grounds by way of a Form TM7G filed on 16 September 2024. Following a case management conference, these additional grounds were formally added to the opposition for the reasons given in the official letter dated 8 October 2024.

sleeping bags [specifically adapted]; ballistic resistant fabrics; balloons (fabric impervious to gases for aeronautical -); banners; banners of textile; banners of textile or plastic; banners textile; bar cloths; bath linen; bath linen, except clothing; bath mitts; bath sheets; bath sheets (towels); bath towels; bath wrap towels; bathroom towels; beach towels; bean bag covers; bed blankets; bed blankets made of cotton; bed blankets made of man-made fibres; bed canopies; bed clothes; bed clothes and blankets; bed coverings; bed covers; bed covers of paper; bed linen; bed linen and blankets; bed linen and table linen; bed linen made of non-woven textile material; bed linen of paper; bed pads; bed quilts; bed sheets; bed sheets of paper; bed sheets of plastic [not being incontinence sheets]; bed sheets of plastic, not being incontinence sheets; bed skirts; bed spreads; bed throws; bed valances; bed warmer covers; bedroom textile fabrics; bedsheets; bedspreads; billiard cloth; billiard table baize; bivouac sacks being covers for sleeping bags; blackout curtains; blanket throws; blankets (bed -); blankets for household pets; blankets for outdoor use; bolting cloth; borders (textile wall hangings); breathable piece goods made of textile materials bonded with plastics; breathable piece goods made of textile materials bonded with rubber; breathable waterproof fabrics; broad woven industrial fabrics; brocade; brocade flags; brocades; buckram; bunting; bunting flags; bunting of textile or plastic; calico; calico cloth (printed -); canopies (bed linen); canopies [covers for beds]; canopy covers; canvas; canvas for embroidery; canvas for tapestry or embroidery; chair backs [textile articles]; chair covers; cheese cloth; chemical fiber base mixed fabrics; chemical fiber fabrics; chemical fibre loop knit fabrics; chemical fibre mixed fabrics; chenile fabric; chenille fabric; adhesive fabric; adhesive fabric for application by heat; adhesive fabrics for application by heat; adhesive labels (textile -); adhesive materials in the form of stickers [textile]; aeronautical balloons (fabric impervious to gases for -); afghans; afghans [knitted covers]; apparel fabrics; artificial

silk; baby blankets; baby buntings; badges made of fabric material; bags for sleeping bags [specifically adapted]; ballistic resistant fabrics; balloons (fabric impervious to gases for aeronautical -); banners; banners of textile; banners of textile or plastic; banners textile; bar cloths; bath linen; bath linen, except clothing; bath mitts; bath sheets; bath sheets (towels); bath towels; bath wrap towels; bathroom towels; beach towels; bean bag covers; bed blankets; bed blankets made of cotton; bed blankets made of man-made fibres; bed canopies; bed clothes; bed clothes and blankets; bed coverings; bed covers; bed covers of paper; bed linen; bed linen and blankets; bed linen and table linen; bed linen made of non-woven textile material; bed linen of paper; bed pads; bed quilts; bed sheets; bed sheets of paper; bed sheets of plastic [not being incontinence sheets]; bed sheets of plastic, not being incontinence sheets; bed skirts; bed spreads; bed throws; bed valances; bed warmer covers; bedroom textile fabrics; bedsheets; bedspreads; billiard cloth; billiard cloth [baize]; billiard table baize; bivouac sacks being covers for sleeping bags; blackout curtains; blanket throws; blankets (bed -); blankets for household pets; blankets for outdoor use; bolting cloth; borders (textile wall hangings); breathable piece goods made of textile materials bonded with plastics; breathable piece goods made of textile materials bonded with rubber; breathable waterproof fabrics; broad woven industrial fabrics; brocade; brocade flags; brocades; buckram; bunting; bunting flags; bunting of textile or plastic; calico; calico cloth (printed -); canopies (bed linen); canopies [covers for beds]; canopy covers; canvas; canvas for embroidery; canvas for tapestry; canvas for tapestry or embroidery; chair backs [textile articles]; chair covers; cheese cloth; chemical fiber base mixed fabrics; chemical fiber fabrics; chemical fibre loop knit fabrics; chemical fibre mixed fabrics; chenile fabric; chenille fabric; baby blankets; bath linen, except clothing; bath sheets; bath sheets (towels); bath towels; bath wrap towels; bathroom towels; beach towels; bed blankets; bed

blankets made of cotton; bed clothes and blankets; bed linen; bed linen and blankets; bed sheets; bed spreads; bed throws; bed warmer covers; bedroom textile fabrics; bedsheets; bedspreads; blackout curtains; blanket throws; blankets (bed -); blankets for household pets; blankets for outdoor use; breathable waterproof fabrics; curtain holders of cloth; curtain holders or tiebacks of textile; curtain holders (textile -); curtain material; curtain valences; curtains; curtains and lace curtains of textiles or plastic; curtains for showers; curtains for windows; curtains made from textile materials; baby blankets; bar cloths; bath linen, except clothing; bath mitts; bath sheets; bath sheets (towels); bath towels; bath wrap towels; bathroom towels; bed blankets; bed blankets made of cotton; bed clothes and blankets; bed linen; bed sheets; bed throws; bed valances; bedsheets; bedspreads; blanket throws; blankets (bed -); blankets for household pets.

4. The opponent's mark qualifies as an 'earlier mark' in accordance with section 6 of the Act. It had not been registered for five years or more at the filing date of the applicant's mark and, therefore, it is not subject to the use requirements in section 6A of the Act. Consequently, the opponent may rely upon all the goods listed above without having to demonstrate genuine use.

5. By virtue of making claims under sections 5(1), 5(2)(a) and 5(2)(b), the opponent contends that registration of the applicant's mark should be refused because:

(i) The parties' goods and the competing marks are identical;

(ii) The parties' goods are similar and the competing marks are identical, such that there is a likelihood of confusion; and/or

(iii) The parties' goods are identical or similar and the competing marks are similar, such that there is a likelihood of confusion.

6. Under section 5(4)(a), the opponent claims that they have goodwill in their business in relation to which they have used the sign **BRILLARS** ("the opponent's sign") throughout the UK since January 2020. The opponent's sign is said to have been used in connection with *pillows, medical pillows, orthopaedic pillows, cushions, mattresses* and *retail of pillows, medical pillows, orthopaedic pillows, cushions, mattresses*. The opponent contends that use of the applicant's mark would be contrary to the law of passing off.

7. As for section 3(6), the opponent submits that the application to register the applicant's mark was filed in bad faith. This is on the basis that the applicant was allegedly aware of the opponent's prior use of their sign and registration of their mark when they applied for an identical mark; the opponent argues that the applicant has no bona fide intention to use their mark, instead making the application to block the opponent's use of their mark/sign. The opponent also highlights that the applicant has filed at least 19 trade mark applications in the UK, many of which they claim are for marks belonging to third parties. This, the opponent claims, points to a pattern of dishonest behaviour.

8. The applicant filed a counterstatement, denying the grounds of opposition.[2] The applicant's position in respect of the various grounds is as follows:

> (i) The applicant denies that the parties' goods and the competing marks are identical for the purposes of section 5(1);
>
> (ii) The applicant denies that the parties' goods are similar for the purposes of section 5(2)(a);
>
> (iii) The applicant denies that the competing marks are similar and the parties' goods are identical or similar for the purposes of section 5(2)(b);

[2] An amended Form TM8 and counterstatement was filed after the section 5(4)(a) and 3(6) grounds were added to the opposition.

(iv) The applicant denies that use of their mark would be contrary to the law of passing off due to the absence of a common field of activity; and

(v) The applicant denies that their mark was applied for in bad faith, claiming that they have a bona fide intention to use the mark. The applicant also denies that there is a pattern of dishonest behaviour.

9. The opponent is professionally represented by Wilson Gunn, whereas the applicant represents themselves.[3] No hearing was requested and neither party filed written submissions in lieu. This decision is taken following a careful consideration of all the papers before me.

Relevance of EU law

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 and submissions

11. The opponent filed evidence in the form of a witness statement from Andrew Marsden, dated 27 June 2025, together with five exhibits (AM1-AM5). Mr Marsden is a Trade Mark Attorney with the opponent's representatives. He provides evidence of the opponent's use of their mark/sign and of the applicant's trade marks.

12. The opponent's evidence was accompanied by written submissions.

13. The applicant filed neither evidence nor written submissions.

[3] I note that the opponent was not professionally represented when the proceedings commenced. Wilson Gunn was appointed as the opponent's representative on 28 May 2024 following the filing of a Form TM33P.

14. I have taken all the evidence and submissions into account in reaching my decision and will refer to them below where necessary.

Sections 5(1), 5(2)(a) and 5(2)(b)

Legislation and case law

15. The relevant parts of section 5 of the Act read as follows:

> "5(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.
>
> (2) A trade mark shall not be registered if because—
>
> > (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
> >
> > (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."

16. Section 5A of the Act states that:

> "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."

17. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor* [2025] UKSC 25:

> (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, in certain circumstances, be dominated by one or more of its components;
>
> (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and

(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.

My approach

18. The competing marks both consist of the word 'Brillars' with no other elements. They are self-evidently identical. As such, I will proceed to deal with the opponent's claims under sections 5(1) and 5(2)(a) only.

Comparison of goods and services

19. In *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, the Court of Justice of the European Union ("CJEU") stated, at paragraph 23, that:

"In assessing the similarity of the goods or services concerned, […] 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."

20. The relevant factors identified by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 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.

21. 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 General Court 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."

22. In *Sanco SA v OHIM,* Case T-249/11, the General Court indicated that goods and services may be regarded as 'complementary' and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services

are very different. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for them lies with the same undertaking (or an economically connected) undertaking.

Class 10

Air pillows for medical purposes; air cushions for medical purposes; air mattresses for medical purposes; wedge pillows for medical purposes; incline pillows for medical purposes; acid reflux pillows; gerd pillows; childbirth mattresses; soporific pillows for insomnia

23. The above goods all describe types of pillows, cushions and mattresses. There is an overlap in nature, purpose and method of use with the opponent's class 20 goods, namely *kids and baby mattresses, cushions and pillows*. However, the applicant's goods are specifically for medical purposes and will, therefore, possess particular features not typically shared by their ordinary counterparts. There is likely to be an overlap in user insofar as the respective goods will be purchased by members of the general public, though the applicant's goods will be used by a specific group in need of medical cushions, pillows and mattresses. The goods are not complementary since they are not important or indispensable to one another. I accept that there may be a degree of competition between them; for instance, an individual seeking additional support may select a medical pillow over a regular one, or vice versa. The respective goods may reach the market through overlapping trade channels; it is not uncommon for undertakings who sell various types of pillows, cushions and mattresses to also offer those that have been adapted in some way for a medical need. Overall, I find that there is between a low and medium degree of similarity between the respective goods.

Electric blankets for medical purposes

24. It is my understanding that these goods describe coverings which provide therapeutic heat to alleviate pain or which are used to maintain a patient's body temperature. Whilst they are not the same as *bed linen and blankets* in class 24 of the opponent's mark, there is a general overlap in nature, purpose and method of use.

This is because the opponent's goods also consist of coverings which keep the body warm, albeit that they are not specifically for medical purposes and are not heated using electricity. Again, users may overlap to the extent that they may be used by the general public. The applicant's goods will, however, be used by a specific group in need of medical blankets. The respective goods are not complementary in the sense outlined in the authorities, but I do consider there to be a degree of competition between them, whereby an individual could select a medical blanket over a regular one, for instance, to keep themselves warm. There may be an overlap in trade channels, whereby an undertaking offering various types of blankets may also offer the applied-for goods. In light of all this, I find that there is between a low and medium degree of similarity between the respective goods.

Drawsheets for sick beds; incontinence sheets; incontinence bed pads; pads for preventing pressure sores on patient bodies

25. Similarly, in my view there is a general overlap in nature, purpose and method of use between the above goods and the opponent's *bed linen and blankets*. This is because the respective goods both describe coverings for beds which are used whilst sleeping. However, the applied-for goods are used for specific medical purposes, and some may include a protective layer. Users may overlap insofar as they may be purchased by the general public. The respective goods are not in direct competition. Moreover, although the applicant's goods may be used in conjunction with the opponent's goods on the same bed, I do not consider them to be complementary; in my view, consumers are unlikely to believe that responsibility for the applicant's medical goods and the opponent's ordinary bedding products lies with the same undertaking. The respective goods are likely to reach the market through different trade channels. For instance, the applied-for goods are likely to be sold through pharmacies and medical suppliers, whereas the opponent's goods can be found in general retailers and home stores. Taking all of the above into account, I find that there is a low degree of similarity between the respective goods.

Hydrostatic beds for medical purposes; water beds for medical purposes; beds specially made for medical purposes

26. Whilst the nature of the above goods is not the same as the opponent's *kids and baby mattresses*, it is my view that there is a broad overlap in purpose and method of use to the extent that the respective goods are both used to support the body when resting or sleeping. Users may overlap insofar as they may be purchased by the general public. The respective goods may reach the market through overlapping trade channels; although the applied-for goods are likely to be sold by medical stores and specialist suppliers, they may also be sold by more general retailers of bedroom furniture who will also offer mattresses. The respective goods are not in competition. However, there is a degree of complementarity between them; mattresses and beds, including those designed for medical purposes, are important to the use of one another and consumers may believe that responsibility for both lies with the same undertaking. In light of all this, I find that there is a low degree of similarity between the respective goods.

Surgical sterile sheets; surgical drapes

27. The opponent submits that the above goods are highly similar to their class 20 goods, "pillows, cushions and mattresses". They also submit that their class 24 goods, "covers, blankets, duvets, and other textile goods", are complementary to these goods. However, they do not explain why or provide any further detail over and above these broad assertions. At their highest, particularly where the opponent's bedding-related goods are concerned, there may be a broad overlap in nature, method of use and purpose with the applied-for goods to the extent that they consist of sheets which may be placed on a bed or person and used for cover. However, the applicant's goods are for specific surgical purposes, such as maintaining a sterile environment, and will be used during surgical procedures. In my view, the respective goods are likely to have different users; the opponent's goods will be purchased by members of the general public, but the applicant's goods are more likely to be directed at medical professionals. I do not agree that the respective goods are complementary. This is because they are not important or indispensable to one another. Moreover, I do not consider there to be any material competition between the respective goods. It seems

highly unlikely that bedding would be purchased in place of the applicant's goods, or vice versa. In the absence of any evidence to the contrary, it is my view that they are unlikely to reach the market through the same trade channels. The opponent's goods are likely to be purchased in general retailers and home stores, whereas the applicant's goods are likely to be sold through medical stores and specialist suppliers. I acknowledge that I have found broad overlaps in some of the relevant factors. Nevertheless, in *Unicorn Studio Inc v Veronese (Société par Actions Simplifiée)* [2024] EWHC 1098 (Ch), Mr Iain Purvis KC, sitting as a deputy High Court judge, warned against engaging in a 'box-ticking' exercise and stated that "[…] any finding of similarity in the end requires the exercise of common sense and requires the hearing officer to stand back and consider the overall question". In doing so, I do not consider any of the overlaps previously identified to be sufficient, either alone or in combination, to engage any similarity between the respective goods overall. I find that they are dissimilar.

Ambulance stretchers; bed vibrators; commode chairs; dentists' armchairs; patient lifting hoists; operating tables; stretchers

28. The above goods describe various types of medical furniture and specific pieces of medical equipment. I can see no immediate similarity between these goods and any of the opponent's goods. There is no obvious overlap in nature, method of use or purpose. Typically, the respective goods do not reach the market through the same trade channels or share users; the applicant's goods are likely to be sold by specialist medical providers to medical establishments such as hospitals and care homes. None of the opponent's goods appears to be in competition with the above goods. The opponent contends that its "covers, blankets, duvets and other textile goods" are complementary to the applicant's goods. However, the opponent has offered no explanation as to why that is the case. To my mind, since none of the opponent's goods is important or indispensable to the applied-for goods, or vice versa, they are not complementary. Although blankets and the like may be used with some of the applicant's goods, I do not consider this to be sufficient, in and of itself, to engage any

similarity between the respective goods.[4] Taking all of this into account, I find that the respective goods are dissimilar.

Class 17

Upholstery foam; foam for use in upholstery

29. Considering the ordinary and natural meaning of these terms, it is my impression that they refer to foam which is used to add comfort or structure to pieces of furniture. They have a different nature to the opponent's goods, which broadly consist of bedding products, household textile products and fabrics. However, the opponent's *textile goods* include textile fabrics for furniture. Therefore, the respective goods overlap in method of use and purpose as they may both be used in the manufacture of items of furniture. In my view, the respective goods may reach the market through shared trade channels and share users. They may both be sold to furniture manufacturers by suppliers or to members of the general public engaging in furniture repairs or upcycling in household or crafts stores. The respective goods are neither complementary nor in competition. Overall, I find that there is between a low and medium degree of similarity between the respective goods.

Flower arrangements (foam supports for -) [semi-finished products]; foam for use as heat insulation; foam for use as heat shields; foam for use as motor compartment linings; foam for use in sound absorption; foam for use in sound insulation; foam glass for use as an insulating materials; foam in the form of blocks for use as heat insulation; foam insulation for use in building and construction; foam insulation materials for use in building and construction; foam sheeting for use as a building insulation; foam supports for floral arrangements; foam supports for flower arrangements [semi-finished products]

30. The above goods comprise a range of foam products with specific uses. There do not appear to be any obvious overlaps in nature, method of use or intended purpose when compared with the opponent's goods. Given the specific uses for the applicant's

[4] See *Everest Food Products Private Limited v Everest Dairies Limited*, BL O/0107/23, paragraph 23

foam products, it is my view that they are unlikely to reach the market through the same trade channels as the opponent's goods. Users may overlap, but only at a very general level. The respective goods are not important or indispensable to one another. As a result, I do not consider them complementary. There is no competition between the respective goods; the applicant's foam products are unlikely to be purchased over the opponent's goods, or vice versa. In light of all the above, I find that there is no similarity between the respective goods.

Flexible foam; flexible polyurethane foam; flexible foam materials; cut to size foam; shredded foam; foam materials cut to size; foam materials for use in manufacture; foam materials in the form of blocks, sheets, rolls, blanks; shredded polyurethane foams; ether foams; closed cell foams; closed cell polyethylene foams; closed cell cross-linked polyethylene foam; closed cell cross-linked polyethene foam; foam rubber

31. These goods are ostensibly more general than those discussed above. However, I have no knowledge of precisely what these goods are or what they are used for, and I have no submissions from the parties on this point. The explanatory note for class 17 of the Nice Classification states that it "includes mainly electrical, thermal and acoustic insulating materials and plastics for use in manufacture in the form of sheets, blocks and rods, as well as certain goods made of rubber, gutta-percha, gum, asbestos, mica or substitutes therefor". In the circumstances, I do not consider there to be any overlap in nature, method of use or intended purpose when compared with any of the opponent's goods. It is possible that the respective goods share users, though this is likely to be at a very general level. There is no evidence of how the respective goods reach the market. In the absence of any evidence to the contrary, I find that they are likely to be sold by different undertakings through distinct trade channels. There is no competition between the respective goods. Furthermore, they do not appear to be important or indispensable to the use of one another and, as such, are not complementary. Overall, I find that there is no similarity between the respective goods.

Class 40

Foam converting services, cutting and fabricating foam from bulk; processing of goods by cutting, namely converting bulk stock into products of a required shape and size; processing of foam materials by cutting, namely converting bulk stock into products of a required shape and size

32. The opponent has not explained how these services are similar to its goods. To my mind, the nature, method of use and intended purpose are clearly different. There is no evidence that these services and the opponent's goods are provided by the same undertakings or otherwise reach the market through the same trade channels. The respective goods and services are not in competition. In addition, I do not consider them to be complementary in the sense outlined in the authorities. I acknowledge the possibility that users will overlap. However, this is likely to be at a level far too general to engage any meaningful similarity between the respective goods and services. In light of all this, I find that the respective goods and services are dissimilar.

Conclusion on goods and services comparison

33. In order for a claim under section 5(1) to succeed, the goods and services are required to be identical. As none of the applicant's goods or services is identical to the opponent's goods, the opponent's claim under that ground must fail.

34. Moreover, some degree of similarity between goods and services is necessary to engage the test for likelihood of confusion; if there is no similarity at all, there is no likelihood of confusion to be considered.[5] My findings above mean that the opponent's claim under section 5(2)(a) must fail in relation to the following goods and services:

Class 10: Ambulance stretchers; bed vibrators; commode chairs; dentists' armchairs; patient lifting hoists; operating tables; surgical sterile sheets; stretchers; and surgical drapes.

[5] *eSure Insurance v Direct Line Insurance* [2008] ETMR 77 CA, paragraph 49

Class 17: Flexible foam; flexible polyurethane foam; flexible foam materials; cut to size foam; shredded foam; foam materials cut to size; foam materials for use in manufacture; foam materials in the form of blocks, sheets, rolls, blanks; shredded polyurethane foams; ether foams; closed cell foams; closed cell polyethylene foams; closed cell cross-linked polyethylene foam; closed cell cross-linked polyethene foam; flower arrangements (foam supports for -) [semi-finished products]; foam for use as heat insulation; foam for use as heat shields; foam for use as motor compartment linings; foam for use in sound absorption; foam for use in sound insulation; foam glass for use as an insulating materials; foam in the form of blocks for use as heat insulation; foam insulation for use in building and construction; foam insulation materials for use in building and construction; foam rubber; foam sheeting for use as a building insulation; foam supports for floral arrangements; foam supports for flower arrangements [semi-finished products].

Class 40: Foam converting services, cutting and fabricating foam from bulk; processing of goods by cutting, namely converting bulk stock into products of a required shape and size; processing of foam materials by cutting, namely converting bulk stock into products of a required shape and size.

Average consumer

35. As the authorities indicate, I must determine who the average consumer is for the parties' goods and how they are likely to be selected. The average consumer is deemed to be reasonably well informed, observant and circumspect.[6]

[6] *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), paragraph 60

36. In *Iconix*, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

> (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
>
> (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
>
> (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
>
> (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;
>
> (e) The average consumer's level of attention varies according to the category of goods or services in question; and
>
> (f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

37. The average consumer of the goods for which I have found there to be at least some similarity may be a member of the general public or a professional user such as a medical professional or a furniture manufacturer. The goods are likely to be

purchased at varying degrees of frequency. For example, soft furnishings may be purchased relatively frequently, whereas mattresses are likely to be purchased less frequently. The cost of the goods will also vary, but none of the goods appears to be extremely expensive. The attentiveness shown in the purchasing process is likely to vary accordingly. However, overall, I find that the average consumer will demonstrate a medium level of attention. This may be slightly higher for professional users, who will be alive to the importance of their decision for their patients (medical professionals) or on their own business (furniture manufacturers). The goods are likely to be purchased in retail outlets, their online equivalents, or from more specialist suppliers, where they will be selected after viewing the products on shelves or displays, or after viewing information on the internet or in brochures. Consequently, I find that the purchasing process will be predominantly visual in nature. However, I do not exclude aural considerations entirely, as the average consumer may receive word-of-mouth recommendations or wish to discuss the products with the provider.

Distinctive character of the earlier mark

38. In *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.*, 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 *Windsurfing Chiemsee 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)."

39. Registered trade marks possess varying degrees of inherent distinctive character. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

40. The opponent's mark is in word-only format and consists of the word 'Brillars'. As there are no other elements, the distinctive character of the mark lies in the word itself. The word does not have any obvious meaning. Rather, it appears to be an invented word. On this basis, I find that the opponent's mark possesses a high level of inherent distinctive character.

41. The distinctive character of a mark may be enhanced as a result of it having been used in the market. Although the opponent has filed evidence, I will proceed on the basis that their mark did not have an enhanced distinctive character at the relevant date of 5 April 2023, not least because it is already highly distinctive inherently.

Likelihood of confusion

42. 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. One such factor is the interdependency principle, i.e. a lesser degree of similarity between the competing marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be mindful 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 they have retained in their mind.

43. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related.

44. Earlier in this decision, I concluded as follows:

- The competing marks are identical;
- The parties' goods are similar to at least a low degree;
- The average consumer may be a member of the general public or a professional user, who will demonstrate a medium level of attention (or slightly higher), overall;
- The purchasing process is predominantly visual in nature, though aural considerations have not been excluded;
- The opponent's mark enjoys a high level of inherent distinctive character.

45. In consideration of all the above factors, I find that there is a likelihood of direct confusion. I acknowledge that there are relatively low levels of similarity between the goods at issue and that the average consumer will exhibit at least a medium level of attention. Nevertheless, taking into account the principles of interdependency and imperfect recollection, it is my view that the identity of the competing marks and the high distinctive character of the opponent's mark will result in the average consumer mistaking one mark for the other.

Conclusion

46. The opponent's claim under section 5(2)(a) is partially successful.

Section 5(4)(a)

47. Section 5(4)(a) of the Act states 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) […]
>
> (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."

48. 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."

49. 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)."

50. There is no evidence that the applicant's mark was used before its filing date or the earliest claimed use of the opponent's sign. Therefore, the relevant date for assessing this ground is the filing date of the applicant's mark, namely 5 April 2023.[7]

Goodwill

51. In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), goodwill was described 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."

52. I note that the applicant's pleaded position in respect of this ground of opposition was as follows:

> "Deny: The claim for passing off is unfounded as there is no common field of activity. Consumers seeking medical or industrial solutions are distinctly different in their purchasing behaviour and needs compared to those buying general consumer textiles, negating any chance of misrepresentation or damage to goodwill."

53. As can be seen from this, the applicant has not specifically denied that there is goodwill in the opponent's business or that the opponent's sign is distinctive of that

[7] *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O/410/11, paragraph 43

goodwill. Consequently, I consider these matters to have been admitted.[8] However, nothing is said about the strength of that goodwill or what goods the opponent's sign has been used in connection with. I, therefore, turn to the evidence.

54. Mr Marsden gives evidence that the opponent sells a range of cushions, pillows, mattresses, "foam products" and "similar goods" under its sign 'BRILLARS'. The opponent is said to sell many of its products on Amazon and eBay. A report has been provided, which details the sales made in the UK through Amazon during February 2023.[9] This shows that the opponent generated a turnover of £99,665.33 through over 4,000 sales. Included in those sales were baby mattresses, mattress toppers, pillows, wedge pillows (for medical purposes, including orthopaedic purposes), wheelchair seat pads, and foam sheets (for replacement seat pads for garden furniture, for instance). Mr Marsden has also provided a range of printouts from Amazon UK, which consist of the following:[10]

> (i) Search results for the word "brillars" which show a wedge pillow, baby mattresses, foam for dog beds, upholstery foam and garden furniture seat pads. The printouts are not dated, and the copyright notice is 1996-2025.
>
> (ii) The product listing for a 'Brillars' baby mattress. The date first available is given as 14 December 2021. The ASIN number matches with products shown in the sales report.
>
> (iii) The product listings for 'Brillars' wedge pillows. The dates first available are given as 23 June 2021, 9 June 2022, 14 September 2022 and 2 December 2022. The listings highlight the claimed medical benefits of the wedge pillows. The ASIN numbers match with products shown in the sales report.

55. I consider the above to be sufficient for the purposes of establishing that the opponent's sign was used in relation to the goods claimed, namely *pillows, medical*

[8] See the comments of Phillip Johnson, sitting as the Appointed Person, in *Delta Air Lines, Inc v Ontro Limited*, BL O/044/21.
[9] Exhibit AM3
[10] Exhibit AM4 and AM5

pillows, orthopaedic pillows, cushions, mattresses. However, I do not consider the evidence sufficient for the purposes of extending the opponent's goodwill to any retail services; there is no evidence of any activities carried out by the opponent for the purposes of encouraging the conclusion of any transactions, over and above the mere selling of its goods through Amazon.

56. I now turn to assess the strength of the opponent's goodwill. Firstly, I note that no turnover figures have been provided and there is no evidence as to how many total orders for the opponent's goods were placed prior to the relevant date. There is also no evidence of, for instance, use of the sign on a website or on social media. The opponent has clearly conducted business under the sign through Amazon, but there is no indication of how many internet users visited the 'BRILLARS' page or the individual product listings. Moreover, there is no evidence of any marketing being conducted in relation to the opponent's sign.

57. Although achieving a turnover of £99,665.33 through over 4,000 sales in a one-month period is certainly not insignificant, the sales report contains numerous other goods which are not relied upon for the purposes of this ground. These include, amongst others, bedding, bathmats and rugs. Moreover, the descriptions suggest that a proportion of the products were sold in connection with other signs, such as, for example, 'Next2Me', 'Pinkfairy', 'Porter and Lambert', 'Gaveno Cavailia' and 'Startextile'. As such, the actual turnover achieved, insofar as it is relevant to my assessment, is likely to be significantly lower.

58. From the sales report it is also not possible to ascertain how geographically widespread in the UK the sales were or whether there was any repeat custom. Further, all the evidenced sales took place two months before the relevant date; there is no evidence of any sales being completed before February 2023. In fact, the earliest date recorded in the opponent's evidence is June 2021 (when one of the wedge pillows was first listed on Amazon), being around two years before the relevant date. The evidence does not suggest that use of the opponent's sign had been very longstanding.

59. On the balance of all the evidence, I find that the goodwill in the opponent's business at the relevant date was more than trivial but very small.

Misrepresentation and damage

60. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt LJ stated that:

> "There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc. [1990] R.P.C. 341* at page 407 the question on the issue of deception or confusion is
>
> > "is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]"
>
> The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd*. (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101."

61. And later in the same judgment:

> "[…] for my part, I think that references, in this context, to "more than *de minimis*" and "above a trivial level" are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993) . It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion."

62. In *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590, Lloyd LJ commented on the paragraph above as follows:

> "64. One point which emerges clearly from what was said in that case, both by Jacob J and by the Court of Appeal, is that the "substantial number" of people who have been or would be misled by the Defendant's use of the mark, if the Claimant is to succeed, is not to be assessed in absolute numbers, nor is it applied to the public in general. It is a substantial number of the Claimant's actual or potential customers. If those customers, actual or potential, are small in number, because of the nature or extent of the Claimant's business, then the substantial number will also be proportionately small."

63. *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".

64. I have found that the opponent benefits from goodwill in relation to *pillows, medical pillows, orthopaedic pillows, cushions, mattresses*. This field of activity is the same as, or significantly overlaps with, *air pillows for medical purposes; air cushions for medical purposes; air mattresses for medical purposes; wedge pillows for medical purposes; incline pillows for medical purposes; acid reflux pillows; gerd pillows; childbirth mattresses; soporific pillows for insomnia* in class 10 of the applicant's mark. The fields of activity are slightly more distant insofar as the applicant's *hydrostatic beds for medical purposes; water beds for medical purposes; beds specially made for medical purposes; electric blankets for medical purposes; drawsheets for sick beds; incontinence sheets; incontinence bed pads; pads for preventing pressure sores on patient bodies* are concerned. However, in my view, there remains a reasonable degree of overlap due to both parties being concerned with soft furnishings and bedding for medical purposes and sleeping equipment. Notwithstanding the very small level of goodwill, I find that a substantial number of the opponent's actual or potential

customers would be deceived into believing that the goods provided under the applicant's mark and the opponent's sign are offered by the same or economically linked undertakings. This is particularly the case considering the applicant's mark is identical to the opponent's sign. In such circumstances, I consider that damage though diversion of sales is entirely foreseeable.

65. The remaining goods in class 10 of the applicant's mark can broadly be described as medical and surgical equipment and furniture. Whilst they are medical in nature, I consider them much further away from the goods for which the opponent's sign has been used. To my mind, the overlap between the respective fields of activity is tenuous and solely rests on the fact that the goods have medical purposes. As for the applied-for goods and services in classes 17 and 40, there is a significant distance between the fields of activity. There does not appear to be any overlap. Whilst there is no requirement for the parties to be operating in a common field of activity, it is still a highly relevant consideration; proving a likelihood of confusion and any resulting damage where there is no common field of activity is a heavy burden.[11] No evidence going to misrepresentation has been filed. I find that the very small level of goodwill in the opponent's business is not sufficient to overcome the distance between the parties' goods and services, notwithstanding the identity between the applicant's mark and the opponent's sign. I do not consider that a substantial number of the opponent's actual or potential customers would be deceived in relation to these goods and services. As there would be no misrepresentation, there is no risk of damage.

66. In making this finding, I acknowledge that I found there to be a likelihood of confusion under section 5(2)(a) in respect of *upholstery foam; foam for use in upholstery* and that the different legal tests often produce the same outcome.[12] However, the opponent's goodwill does not extend to the goods which formed the basis of the earlier finding of similarity with these applied-for goods.

[11] *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA)
[12] See *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41. Although this was an infringement case, the principles are equally applicable to section 5(2) of the Act: *Soulcycle Inc v Matalan Ltd* [2017] EWHC 496 (Ch).

Conclusion

67. The opponent's claim under section 5(4)(a) is partially successful.

Section 3(6)

68. Section 3(6) of the Act states:

> "(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith."

69. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin SCJ considered the question of what amounts to bad faith. He underlined that the categories of bad faith and the circumstances which may constitute bad faith are not closed, and continued:

> "152. In seeking to identify the relevant principles, it is necessary to have in mind two fundamental aspects of trade mark law to which I have already referred: first, it is concerned with the use of marks in trade to denote the origin of goods and services. Secondly, the aim of the trade mark regime is to contribute to a system of undistorted competition in which businesses are able to attract and retain customers by the quality of their goods and services, and for that purpose are able to have registered signs which enable consumers to distinguish the goods and services of one undertaking from those of another. Such a system must also provide an incentive and protection for the investment by a brand owner in the quality and other beneficial aspects of its goods and services, and so allow it to develop a goodwill in its business relating to their sale and supply.
>
> 153. Against this background, the essence of the objection that an application to register a mark was made in bad faith may be understood: it is that the motive or intention of the applicant was to engage in conduct that departed from accepted principles of ethical behaviour or honest commercial practices having regard to the purposes of the trade mark system which I have described.

Whether the conduct was undertaken with that motive or intention and did indeed depart from such ethical behaviour or honest commercial practices must be assessed having regard to all the objective circumstances of the case: see, for example, *Koton Mağazacilik Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 ("*Koton*"), paras 46 and 47 […]."

70. Later in his judgement (at paragraph 240), Lord Kitchin summarised the general principles applicable to bad faith as follows:

"(i) […]

(ii) The date for assessing whether an application to register [a] trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).

(iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation […], and must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 ([*Malaysia Dairy Industries Pte Ltd v Ankenaevnet for Patenter og Varemaerker* (C-320/12) EU:C:2013:435 ("*Malaysia Dairy*")], para 29; [*Sky plc v SkyKick UK Ltd* (C-371/18) EU:C:2020:45 ("*Sky CJEU*"), para 73).

(iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law, which involves the use of marks in the course of trade. Further, it must have regard to the objectives of the […] law of trade marks, namely the establishment and functioning of […] a system of undistorted competition in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45;

[*Koton Mağazacilik Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 ("*Koton*")], para 45).

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case ([*Hasbro Inc v EUIPO, Kreativni Dogaaji d.o.o. (intervening)* (Case T-663/19) EU:T:2021:211 ("*Hasbro*")], paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; [*AS v Deutsches Patent-und Markenamt* (C-541/18) EU:C:2019:725], para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the application in the light of the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that constitutes making the application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to

the goods or services in relation to which it is sought to register the mark, or that the applicant has a bona fide intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87)."

71. An allegation of bad faith is a serious one which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies, i.e. balance of probability. This means that it is not enough to establish facts which are as consistent with good faith as bad faith.[13] It is necessary to ascertain what the applicant knew at the relevant date, that being 5 April 2023. Evidence about subsequent events may be relevant if it casts light backwards on the position at the relevant date.[14]

72. According to *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are:

(i) What, in concrete terms, was the objective that the applicant has been accused of pursuing?

(ii) Was that an objective for the purposes of which the contested application could not be properly filed?

(iii) Was it established that the contested application was filed in pursuit of that objective?

73. The opponent's pleaded case on bad faith is as follows:

"The Applicant was fully aware of the Opponent's use of the sign and earlier trade mark registration for the identical mark when he filed the opposed application. The Applicant is therefore aware that he is not the true proprietor

[13] *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch)
[14] *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16)

of the mark. The Applicant has filed the application to block the Opponent's use of its mark/sign, in particular to interfere with the Opponent's use on Amazon. The Applicant has filed at least 19 UK trade mark applications, many of which are for marks belonging to third parties, at least 8 of the applications have been opposed. The Applicant is therefore engaged in a pattern of dishonest behaviour by seeking to register marks that he is aware belong to third parties. The Applicant's intention is to block the true owners use and otherwise interfere with such use. The Applicant has no bona fide intention to use the applied mark for the applied goods/services. We will file evidence to support these claims in the proceedings."

74. In concrete terms, the applicant has been accused of applying for their mark with no intention to use the mark but, instead, using it to block the opponent's use of their mark/sign. If so proven, that is an objective for which the application to register applicant's mark could not be properly filed.[15]

75. The opponent's evidential case on bad faith rests on reports from MQ Professional Trademark Search System,[16] which Mr Marsden says in his statement show trade mark applications and registrations in the name of the applicant and third parties.

76. The first report shows a list of 19 trade marks which were applied for by the applicant between 13 April 2020 and 4 May 2023. I note that 11 are listed as registered, five are listed as advertised, and three are listed as abandoned. The trade marks are varied: 'THE FOAM WORKS', 'GAX', 'Brillars', 'BUY IT ALL HERE', 'AllSett Health', 'Abco Tech', 'Night Comfort', 'MASTER FOAM', 'FoamRush', 'MUSA', 'Linenspa', 'Moon Night', 'House of Threads', 'Cloe' Louis', 'Mybecca', 'Foamma', 'ADAM ICON', 'Direct Sales' and 'Sleepavo'. All of the applications/registrations were made in one or more of classes 10, 17, 20, 24 and 40.

[15] See *Copernicus-Trademarks v EUIPO (LUCEO)* Case T-82/14, where the General Court found that the filing of EU trade marks for the purposes of blocking applications by third parties, and without an intention to use the mark, was an act of bad faith.
[16] Exhibits AM1 and AM2

77. The second report contains details of the following UK trade marks:

- Registration nos. 3111930, 3333194, 3903615 and 4215480 in the name of E Home Basics Ltd, ‘cloe’ louis’, ‘Cloe’ Louis’ and ‘CLOE’ LOUIS’ (figurative and word-only). The applications were filed on 5 June 2015, 21 August 2018, 21 April 2023 and 7 June 2025, respectively. The registrations cover goods and services in classes 9, 17, 20, 21, 24, 25 and 40.

- Registration no. 3893991 in the name of Zaygham Hussain (the applicant), ‘Cloe’ Louis’. The application was filed on 28 March 2023 in classes 17, 20 and 40. It was opposed on 19 June 2023 by E Home Basics Ltd. The opposition was partly based on an allegation of bad faith, but the opposition was closed at pleadings stage.

- Registration no. 3793214 in the name of M&A Styles Ltd, ‘Abco Tech’. The application was filed on 27 May 2022 in class 20.

- Application no. 3907675 in the name of Zaygham Hussain (the applicant), ‘Abco Tech’. The application was filed on 4 May 2023 in classes 10 and 24. It was opposed by M&A Styles Ltd on 12 September 2023. The opposition was abandoned at the point at which a defence could be filed.

- Registration no. 3910664 in the name of Mobeen Farooq, ‘Abco Tech’. The application was filed on 12 May 2023 in classes 10 and 24. Information from Companies House provided by Mr Marsden shows that Mobeen Farooq is the sole Director of M&A Styles Ltd.

- Registration no 3866784 in the name of M&A Styles Ltd, ‘AllSett Health’. The application was filed on 11 January 2023 in class 20.

- Application no. 3907679 in the name of Zaygham Hussain (the applicant), ‘AllSett Health’. The application was filed on 4 May 2023 in classes 10 and 24. An opposition was filed by M&A Styles Ltd on 12 September 2023.

- Registration no. 3910667 in the name of Mobeen Farooq, ‘AllSett Health’. The application was filed on 12 May 2023 in classes 10 and 24.

- Registration no. 3650959 in the name of Hassan Mohammed, ‘Moon Night’. The application was filed on 3 June 2021 in class 24.

- Registration no. 3884015 in the name of Zaygham Hussain (the applicant), ‘Moon Night’. The application was filed on 2 March 2023 in classes 17, 20 and 40. It was opposed by Hassan Mohammed on 26 June 2023.

- Registration no. 3905959 in the name of Moon Night Ltd, ‘Moon Night’. The application was filed on 28 April 2023 in classes 17, 20 and 40.

- Registration nos. 3245843, 3256288, 3900629 and 3903665 and in the name of Ayesha Mohsin, ‘House of Threads’ (figurative and word-only). The applications were filed on 24 July 2017, 12 September 2017, 14 April 2023 and 21 April 2023, respectively. The registrations cover goods and services in classes 17, 20, 24, 25 and 40.

- Registration no. 3893990 in the name of Zaygham Hussain (the applicant), ‘House of Threads’. The application was filed on 28 March 2023 in classes 17, 20 and 40. It was opposed by Ayesha Mohsin on 13 June 2023. The opposition was based upon an allegation of bad faith, but it was withdrawn in the evidence rounds.

- Registration no. 3849278 in the name of Amjad Parvez Begum, ‘Foamma’. The application was filed on 14 November 2022 in classes 20 and 24.

- Application no. 3896036 in the name of Zaygham Hussain (the applicant), ‘Foamma’. The application was filed on 31 March 2023 in classes 17 and 40. It was opposed by Amjad Parvez Begum on 24 April 2023.

- Application no. 3912328 in the name of Amjad Parvez Begum, ‘Foamma’. The application was filed on 16 May 2023 in classes 17 and 40. It was opposed by Zaygham Hussain (the applicant) on 23 October 2023.

- Registration no. 3662998 in the name of by M&A Styles Ltd, ‘Adam Icon’. The application was filed on 1 July 2021 in classes 20 and 24.

- Application no. 3897252 in the name of Zaygham Hussain (the applicant), ‘ADAM ICON’. The application was filed on 5 April 2023 in classes 17 and 40. It was opposed by M&A Styles Ltd on 12 September 2023.

- Application no. 3905468 in the name of M&A Styles Ltd, ‘ADAM ICON’. The application was filed on 26 April 2023 in classes 17 and 40. It was opposed by Zaygham Hussain (the applicant) on 15 August 2023.

- Application no. 3911359 in the name of Mobeen Farooq, ‘ADAM ICON Upholstery Foam’. The application was filed on 14 May 2023 in classes 17 and 40. It was opposed by Zaygham Hussain (the applicant) on 29 August 2023.

78. In their submissions, the opponent contends that the above demonstrates a pattern of dishonest behaviour and a history of bad faith on the part of the applicant, filing

applications for identical marks in related classes to existing registrations. The opponent argues that the applicant's intention in making these applications was to interfere with sales by the "true proprietor" of each mark. Pointing to their own goodwill as at the relevant date and the applied-for goods and services, the opponent submits that the applicant's mark was filed as a continuation of this pattern of behaviour.

79. I reflect here that there is no evidence that the applicant actually used any of the previous applications/registrations or the 'Brillars' mark to block any commercial activities. The opponent has also filed no evidence as to the actual motivations of the applicant in filing the application. However, it is wrong to expect the party bringing the claim to give direct evidence of the motivation of someone else, in this case the applicant.[17]

80. Similar fact evidence was considered in *Trump International Limited v DDTM Operations LLC*, [2019] EWHC 769 (Ch). The controlling mind behind the applicant in that case was shown to have a history of applying for trade marks without any intention to use them, and of being involved in numerous trade mark proceedings in the UK and elsewhere. The application for the trade mark 'TRUMP TV' was found to have been made in bad faith. Carr J said:

> 42. […] In relation to allegations of copyright infringement, it is necessary to decide, as a matter of fact, whether copying has occurred. As with claims of bad faith, direct evidence of copying is rarely available. In this context, it is well established that similar fact evidence may be admissible. The case law is considered in *Copinger and Skone James on Copyright*, Vol 1, 17th Edition at [21-393]:
>
> > "…where the issue in a copyright case is whether the similarity between the claimant's work and the defendant's work is due to copying or is a coincidence, it is relevant to know that the defendant has produced works which bear a close resemblance to works other than the work in question which are the subject of copyright. Whereas similarity between

[17] *Maya Appliances Pvt. Ltd v Prapaharan Sivaratnam*, BL O/0052/25, paragraph 27

two works might be mere coincidence in one case, it is unlikely that there could be coincidental similarity in, say, four cases. The probative force of several resemblances together is much better than one alone."

This reasoning may well apply, depending on the facts, to an allegation that a third-party trade mark has been applied for in bad faith. The probative force of several instances of such applications, by the same or a connected party who has applied to register a third-party trade mark, is obvious. Such instances, if based on solid grounds, are likely to require evidence from the applicant to refute the inference of bad faith that may otherwise be drawn from them."

81. The opponent's evidence shows that the applicant has made seven other applications for marks which are identical to pre-existing marks. Five of those were made before, or on, the relevant date: 'Moon Night' (2 March 2023), 'Cloe' Louis' (28 March 2023), 'House of Threads' (28 March 2023), 'Foamma' (31 March 2023) and 'ADAM ICON' (5 April 2023).

82. I do not place any weight on the fact that some of these marks were opposed on the basis of bad faith. This is because the evidence does not show that there have been any findings of bad faith, only that there were allegations thereof. In fact, the two proceedings in which these allegations were made were closed before a decision was made.

83. Nevertheless, as I have said, the applications were for varied, distinctive marks identical to prior registrations of third parties. The marks at issue in these proceedings are also identical and the opponent's mark is a highly distinctive invented word. Whilst one of these applications could, perhaps, be attributed to coincidence, it seems very unlikely that making multiple applications to register the marks of third parties, in the same or related classes, in the space of one month or so, was a coincidence. Although two further applications were made after the relevant date, namely those for 'Abco Tech' and 'AllSett Health', these were filed just short of a month after the relevant date (4 May 2023) and are, again, identical to pre-existing marks. In the circumstances, it is my view that these applications cast light back on the position at the relevant date insofar as they appear to be a continuation of the same filing practice. Whilst the

evidence presented in support of their case is somewhat limited, I find that the opponent has raised a rebuttable presumption of a lack of good faith.

84. The burden now shifts to the applicant to explain their intentions at the time of making the application. Despite being best placed to do so, the applicant has elected not to lead their own evidential case or to provide any explanation of their objectives in making the application to register their mark. There is no rebuttal of the circumstances as put forward by the opponent. There are multiple authorities which highlight the importance of doing so.[18] For instance, in *Rui Qu (Shanghai) Enterprise Management Consulting Company Limited v Accessible Labs Ltd*, BL O/0534/25, Mr Daniel Alexander KC, sitting as the Appointed Person, explained that:

> "47. […] the case law from the Court of Appeal prior to *SkyKick* suggests that where, in principle, evidence from those with knowledge of intention is available, it is reasonable to expect it to be adduced to rebut a prima facie case of bad faith. That proposition is supported by *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where Arnold LJ said at [180] of one of the grounds of appeal (namely that it was not realistic for the judge to expect that either witness testimony or documentary evidence would be available to explain Lidl's intentions) that despite the passage of time, the applicants for registration were best placed to explain their intentions. The court expected a proper explanation.
>
> 48. In the light of these authorities, where there is evidence from which it is proper to infer that an application for registration has been made in bad faith (on the basis that it was not applied for to protect one or more of the legitimate functions of a trade mark) an applicant can reasonably be expected to provide a sufficiently coherent explanation for the application specifically in the UK including as to its scope. An applicant may be able to justify the application (including its scope) on the basis of credible evidence as to its purposes in

[18] See, for example, *Metro-Goldwyn-Mayer Studios Inc v Meteoric Games Ltd*, BL O/791/21, *Maya Appliances Pvt. Ltd v Prapaharan Sivaratnam*, BL O/0052/25, *Rui Qu (Shanghai) Enterprise Management Consulting Company Limited v Accessible Labs Ltd*, BL O/0534/25, *SkyKick* (cited above), and *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262.

making it, for example by reference to the width of the underlying business, actual or reasonably contemplated, which the trade mark is intended to protect. If no adequate or sufficiently credible explanation is provided or one which justifies the UK application, there may be a proper basis for a finding of bad faith in whole or in part."

85. The applicant's counterstatement contained, essentially, a bare denial and generalised assertions that the application was filed with a genuine intention to use the mark and that each application is aligned with the applicant's objectives:

> "Deny: This allegation is completely unjustified. The application for "Brillars" was made with a bona fide intention to use in the medical and industrial sectors. There is absolutely no pattern of dishonest behaviour; each trademark application I have filed is strategically aligned with specific and legitimate business objectives, wholly separate and independent from the opponent's commercial activities."

86. There is no evidence from the applicant that there was a real commercial justification for applying for the previous marks or the mark at issue in these proceedings. There is nothing before me which points to a genuine intention to establish a business under the 'Brillars' mark. In the absence of any counternarrative or evidence from the applicant which could rebut the allegations against them, I accept that the opponent's case is likely to reflect the correct position. Consequently, I find that the applicant made their application, with no intention to use the mark, to block the opponent's use of their mark/sign in the UK. The application was made in bad faith.

87. The opponent's claim under section 3(6) is successful.

Conclusion

88. The opposition has succeeded in its entirety. Subject to any appeal against this decision, registration of the applicant's mark will be refused.

Costs

89. The opponent has been successful and is entitled to a contribution towards their costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the opponent the sum of £1,100, which is calculated as follows:

Preparing a statement and considering the applicant's counterstatement[19]	£200
Preparing evidence and written submissions	£700
Official fees[20]	£200

90. I order Zaygham Ali Hussain to pay Adnan Saeed the sum of £1,100. This sum is to be paid within 21 days of the expiry of the appeal period, or within 21 days of the final determination of the proceedings if any appeal against this decision is unsuccessful.

Dated this 12th day of March 2026

James Hopkins
For the Registrar

[19] I have made an award slightly below the scale minimum for these activities. This is to account for the fact that the opponent was not professionally represented until after the initial pleadings stage, although later amendments to the Form TM7 were required.
[20] This consists of £100 for the filing of Form TM7 and £100 for the filing of Form TM7G.