**O/0403/26**

**CONSOLIDATED PROCEEDINGS**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO. UK00003859511 IN THE NAME OF GALAXY MOBILITY INNOVATIONS TECHNOLOGY CO., LTD FOR THE TRADE MARK:**

# heybike uk

**IN CLASS 12**

**AND AN OPPOSITION THERETO UNDER NO. 440402 BY EASLINK B.V.**

**AND**

**IN THE MATTER OF TRADE MARK APPLICATION NO. UK00003964486 IN THE NAME OF HEYBIKE INC. FOR THE TRADE MARK:**

# HEYBIKE

**IN CLASS 12**

**AND AN OPPOSITION THERETO UNDER NO. 444909 BY EASLINK B.V.**

**AND**

**IN THE MATTER OF REGISTRATION NO. UK00003637118 IN THE NAME OF EASLINK B.V. FOR THE MARK:**

# heybike

**IN CLASS 12**

**AND**

**AN APPLICATION FOR A DECLARATION OF INVALIDITY UNDER NO. 506161 BY HEYBIKE INC.**

## BACKGROUND AND PLEADINGS

1. This decision involves cross-proceedings between the parties Galaxy Mobility Innovations Technology Co., Ltd ("Galaxy") and HEYBIKE INC. ("HEYBIKE"), and Easlink B.V. ("Easlink"). I will summarise the relevant proceedings below.

Easlink's first opposition

2. On 15 December 2022, Galaxy applied to register the first mark shown on the cover page of this decision in the UK ("the first opposed mark"). The first opposed mark was published for opposition purposes on 24 February 2023, and registration is sought for the following goods:

   Class 12: Electric bicycles; Folding electric bicycles; Motorized bicycles; Electrically powered scooters; Mobility scooters; Self-balancing one-wheeled electric scooters; Self balancing unicycles.

3. The first opposed mark was opposed by Easlink on 21 April 2023. The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is reliant upon the following trade mark:

   heybike
   UK registration no. 3637118
   Filing date 5 May 2021; registration date 24 September 2021
   Relying on all goods, namely:

   Class 12: Electrically operated scooters; Electrically powered scooters; Electrically-powered motor scooters; Scooters; Electrically powered scooters [vehicles]; Self balancing electric scooters; Electric one wheel scooters; Scooters [vehicles]; Mobility scooters; Self-balancing two-wheeled electric scooters; Self-balancing one-wheeled electric scooters; Motorized scooters; Dirt

bikes; Mountain bikes; Folding bikes; Road bikes; Motorized dirt bikes for motocross; Bicycles; Electric bicycles.

("Easlink's mark").

4. Easlink claims that the marks are very similar and cover identical or very similar goods. As a result, Easlink's position is that there exists a likelihood of confusion between the marks, including a likelihood of association.

5. Galaxy filed a counterstatement wherein it denied the claims against it, whilst making reference to the fact that Easlink's mark was now subject to an application for a declaration of invalidity.

HEYBIKE's application for invalidity

6. Easlink is the proprietor of a trade mark, the details of which are set out at paragraph 3 above. On 31 May 2023, Easlink's mark was subject to an invalidation application by HEYBIKE. The application is brought under section 47 of the Trade Marks Act 1994 and is based on sections 5(4)(a) and 3(6).

7. Under its 5(4)(a) ground, HEYBIKE relies on the unregistered sign 'heybike', which it claims to have been using throughout the UK since 29 October 2020 in respect of the following goods:

> "Bicycle saddles; folding electric bicycles; motorized bicycles; motorized mobility scooters; self-balancing one-wheeled electric scooters; self-balancing unicycles."

8. By virtue of relying on section 5(4)(a), HEYBIKE's claim is that its business enjoys a protectable level of goodwill stemming from the use made of its sign. Under this ground, HEYBIKE claims that Easlink's mark is identical to the sign relied upon and is registered for identical goods. It is claimed that because of this, use of Easlink's mark will cause a misrepresentation and inevitably damage HEYBIKE's goodwill as well as naturally result in lower sales of HEYBIKE's goods.

9. Under the 3(6) ground, HEYBIKE claims that Easlink applied for its mark in bad faith because it has obviously copied HEYBIKE's own mark for identical goods with an unacceptable dishonest intention to block HEYBIKE from protecting and/or using its own mark within the UK. It is also claimed that Easlink has sought to extort HEYBIKE's goodwill and simply use its reputation for commercial gain without investing time and money in its own brand.

10. Easlink filed a counterstatement wherein it denied the claims against it. It is noted that the counterstatement included a proof of use request but as stated on the form itself, proof of use is only relevant to sections 5(1), 5(2) and 5(3) of the Act. As such, this request is not applicable here. On this point, I will say that it is pre-requisite of section 5(4)(a) of the Act that HEYBIKE proves that its business connected with the sign enjoys a goodwill by demonstrating a sufficient level of trading activities in the UK.

11. Upon the filing of Easlink's counterstatement, the Tribunal consolidated the above proceedings in accordance with the powers vested in it by Rule 62 of the Trade Marks Rules 2008. This was communicated to the parties on 9 November 2023.

Easlink's second opposition

12. On 6 October 2023, HEYBIKE applied to register the second mark shown on the cover page of this decision in the UK ("the second opposed mark"). The second opposed mark was published for opposition purposes on 27 October 2023, and registration is sought for the following goods:

| | |
|---|---|
| Class 12: | Bicycle saddles; Folding electric bicycles; Motorized bicycles; Motorized mobility scooters; Self-balancing one-wheeled electric scooters; Self-balancing unicycles. |

13. The second opposed mark was opposed by Easlink on 27 December 2023. The opposition is based on sections 5(1) and 5(2)(a) of the Trade Marks Act 1994 ("the Act") and is reliant upon the same mark discussed at paragraph 3 above.

14. It is noted that the pleading in question 9 of the notice of opposition sets out that the second opposed mark is identical to Easlink's earlier mark and that the goods at issue are identical or very similar and that, therefore, there is a likelihood of confusion. While I accept this as an adequate pleading, it is slightly misguided on the basis that a likelihood of confusion can only exist under the section 5(2)(a) ground. Under section 5(1) grounds of opposition, there is no requirement to assess a likelihood of confusion but, instead, it is simply a case that if the marks and the goods at issue are identical then the second opposed mark will be refused registration for such goods.

15. Before proceeding, I consider it necessary to set out that in section 1.3 of the statement of grounds accompanying the notice of opposition, Easlink has referred to an incorrect set of goods in relation to the second opposed mark. It appears as though HEYBIKE's goods listed are those that are found under the first opposed mark. Given that the pleading in the form itself is adequate, I will simply disregard this section of the statement of grounds.

16. HEYBIKE filed a counterstatement wherein it denied the claims against it and, much like Galaxy's counterstatement discussed above, made reference to the fact that Easlink's mark was now subject to a declaration of invalidity action.

17. Upon the filing of HEYBIKE's counterstatement, the Tribunal wrote to the parties on 16 May 2024 with a proposal to add the second opposition into the already consolidated first opposition and invalidation application. This was on the basis that while HEYBIKE and Galaxy were not the same legal entity; they do share a legal representative. The fact that the parties are not the same is not a bar to consolidation but, in order to proceed, the Tribunal required confirmation as to the parties' acceptance to be jointly and severally liable for the costs associated with all of these proceedings. This confirmation was received on 30 May 2024 and, on

12 July 2024, the Tribunal confirmed that the second opposition was added into these proceedings. For ease of reference going forward, I will refer to both Galaxy and HEYBIKE collectively, and in the singular, as GHB.

18. GHB is represented by Katarzyna Eliza Binder-Sony. Easlink is represented by IBE Avocat. Both parties filed evidence in chief with GHB also filing written submissions alongside its evidence. No hearing was requested and neither party filed written submissions in lieu of the same. This decision is taken following a careful perusal of the papers.

19. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

**EVIDENCE**

20. Easlink's evidence came in the form of the witness statement of Isabelle Bertaux dated 9 January 2024. Ms Bertaux is the IP lawyer for Easlink and is, therefore, duly authorised to file evidence on its behalf. Ms Bertaux's evidence is accompanied by one exhibit, being Exhibit IBE01, and was adduced to prove use of Easlink's mark, being something that is not at issue.

21. GHB's evidence came via the witness statement of Huimin Fang dated 26 November 2024. Huimin Fang is the director of both HEYBIKE and Galaxy and their statement is accompanied by 7 exhibits (1 to 7). This evidence was adduced in order to demonstrate goodwill in HEYBIKE's sign and that Easlink's mark was filed in bad faith.

22. I will refer to points from the evidence or submissions where necessary.

## MY APPROACH

23. I will begin my decision by assessing GHB's invalidation application. I do so because any success of the same would have a direct impact on Easlink's oppositions. On this point, if GHB's application succeeds in full then Easlink's mark will be declared invalid and deemed to have never been protected in the UK. This would mean that it would not qualify as an earlier mark for the purpose of Easlink's oppositions resulting in said oppositions falling away. Further, if the application is only partially successful then the oppositions will proceed but only based upon those goods that remain. Lastly, in the event that the application fails outright, then both oppositions will proceed in full. If necessary, I will discuss the position with Easlink's oppositions at the conclusion of GHB's application.

## DECISION

## THE INVALIDATION APPLICATION

24. Section 5(4)(a) and 3(6) of the Act have application in invalidation proceedings by virtue of section 47 of the Act, which states as follows:

> "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).
>
> […]
>
> (2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-
>
> (a) […]

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[…]

(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.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(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."

**Section 5(4)(a)**

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

"(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) …..

(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."

26. 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."

27. 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)."

28. 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[1] among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

(a) the nature and extent of the reputation relied upon,

(b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;

(c) the similarity of the mark, name etc used by the defendant to that of the claimant;

(d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

Relevant Date

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

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

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

30. Easlink's mark does not have a priority date. While Easlink has provided evidence regarding the use of its mark, this comes via one printout of an Amazon product listing covering a hoverboard (being a good that is not at issue) that is shown as being first available on 22 December 2023. As such, there is no evidence to suggest any use of Easlink's mark prior to it being filed. Therefore, the relevant date for the section 5(4)(a) assessment falls on the filing date of the contested mark, being 5 May 2021.

**Goodwill**

31. Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), in the following terms:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."

32. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J. stated:

> "27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent that the enquiry under s.11 of the 1938 Act (see Smith Hayden & Co. Ltd's Application (OVAX) (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.
>
> 28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing

officer that it is not shown on the balance of probabilities that passing off will occur."

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

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

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

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

35. The first hurdle for GHB under this ground is that it needs to show that, at the relevant date, it had the necessary goodwill in its business and that the sign relied upon was distinctive and/or associated with that goodwill. In the present case, I remind myself that the earlier sign relied upon is 'heybike' and it is claimed to have been used throughout the UK since 29 October 2020 in respect of the following goods:

> "Bicycle saddles; folding electric bicycles; motorized bicycles; motorized mobility scooters; self-balancing one-wheeled electric scooters; self-balancing unicycles."

36. Goodwill stems from trading activities. GHB claims that it has been present on the British market in more than just an incidental manner. The first evidence presented in this regard is a screenshot showing analytical statistics to visits to GHB's website for the 'HEYBIKE' brand over time.[1] In reviewing this screenshot, I note that it covers visits from January to September 2021. The only figures that are relevant are those prior to May 2021, totalling just 51 sessions by 37 visitors.

37. GHB has provided evidence of an itemised list of sales to British clients.[2] The list does not confirm what goods were actually sold under each transaction and, further, only covers sales from 9 August 2023 onwards. Such sales are of no assistance here because they fall after the relevant date for the present assessment. A further printout regarding sales is provided, being that taken from GHB's Shopify account.[3] The narrative evidence confirms that these cover sales of 'HEYBIKE' branded goods but there is no confirmation as to what actual goods they cover. Further, I appreciate that the price of such goods is shown but all of the sales appear to be from 2023, again being after the relevant date.

[1] Exhibit 1
[2] Exhibit 2
[3] Exhibit 4

38. A screenshot is provided that is stated as being a summary of GHB's advertisement spending for the period between 1 January 2021 and 30 April 2021.[4] The amount of the spend is merely $27.74 and while the advertising (whatever it may have been) reached 22,267 people and gained 41,981 impressions, the territory covered by this is shown as being 'US, IT, GB, FR a…'. To me, this appears to cover the USA, Italy, Great Britain and France, amongst others. Given that the present assessment relates to UK customers, the fact that this evidence is applicable to many territories is such that I am entitled to treat it as being vague and imprecise.

39. Printouts taken from GHB's UK Facebook account are provided, seemingly to show that there is a level of awareness of GHB's 'HEYBIKE' brand in the UK.[5] The first printout shows a post dated July 2023 so is of no assistance here. The second printout is of the account generally and is undated. While it does show that the account has 3,000 likes and 3,100 followers, the lack of a date means that I am unable to determine whether these figures represent the position as at the relevant date. Even if they did, they are very low.

40. Lastly, GHB has provided a screenshot regarding a GoogleAds campaign that was run between 6 January 2023 and 31 December 2023. I note that the impressions are almost 3 million and there were over 82,000 interactions stemming from this campaign. However, the evidence is from after the relevant date so is of no assistance here.

41. This represents the entirety of GHB's evidence in respect of its claim to enjoy a protectable level of goodwill in its business in the UK. Put simply, it falls far short of the threshold for proving the existence of protectable goodwill. I say this because the majority of the evidence comes from after the relevant date. For example, all evidence of sales stem from 2023 so are not capable of showing the position as at the relevant date. Even considering the evidence that is actually from prior to the relevant date, it is of no real value. Firstly, it shows an extremely low level of visits

[4] Exhibit 3
[5] Exhibits 5 and 6

to GHB's website. Secondly, the advertising spend for the period January to April 2021 amounts to just a $27 spend and covers a number of different jurisdictions so is (1) very low and (2) is not even capable of being attributed to the UK. As a result, I find that GHB's application under the section 5(4)(a) ground fails in its entirety. I will now proceed to consider the section 3(6) ground.

**Section 3(6)**

42. 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."

43. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin summarised the general principles applicable to bad faith at [240] 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)."

44. 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: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch).

45. It is necessary to ascertain what the proprietor knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *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).

46. GHB's claim under the present ground is that Easlink applied for its mark in bad faith because it has obviously copied HEYBIKE's own mark for identical goods with an unacceptable dishonest intention to block HEYBIKE from protecting and/or using its own mark within the UK. It is also claimed that Easlink has sought to extort HEYBIKE's goodwill and simply use its reputation for commercial gain without investing time and money in its own brand.

47. The entirety of GHB's evidence in respect of the present ground is set out in paragraphs 6 to 12 of Huimin Fang's witness statement. While I would not ordinarily reproduce such evidence in full, I do so here because this narrative evidence is all I have before me in support of the bad faith claim. It states as follows:

> "6. First of all, I would like to emphasize that [Easlink's mark] is nothing more than an illegitimate copy of the trademark filed in the United States by [GHB] on November 10, 2020. What is more, both trademarks in question have been filed for basically the same set of goods in class 12.
>
> 7. Consequently, the specification of the goods of the trademark filed by [Easlink] clearly indicates that the intention of [Easlink] has always been to duplicate the [GHB's] trademark not only in relation to the name but also in relation to the scope of goods and the double identity exists in this case.
>
> 8. [Easlink] is a company incorporated in the Netherlands. Throughout its existence it has filed only 2 trademark applications, both in the United Kingdom.
>
> 9. The other one was an application for the figurative mark UK00003683507 which also has been nothing more than just a copy of [GHB's] trademark filed earlier in the United States, namely, US Sr. 90812236.
>
> 10. [GHB] filed applications for the declaration of invalidity against both trademark registered in the United Kingdom by Easlink B.V.
>
> 11. Probably unsurprisingly, [Easlink] did not even try to defend the registration UK00003683507 as it is obvious that this trademark is a plain copy of [GHB's] earlier trademark and [Easlink] has been unable to prove that is possess any copyrights to this particular image.
>
> 12. The mere fact that [Easlink] filed just 2 trademark applications and both were illegal copies of [GHB's] earlier trademarks should constitute adequate

evidence that [Easlink] is not a normal business entity aimed at just competition and honest commercial practices. On the contrary, its goal was to steal a brand created by someone else and prevent this entity from entering the British market. This is a practice commonly known as trademark trolling and is a clear example of bad faith."

48. The basis of GHB's claim is that Easlink knew of GHB's mark in the USA and subsequently applied for an identical mark in the UK. Firstly, there is no evidence before me to demonstrate the Easlink was aware of GHB's mark and neither is there anything to suggest that it ought to have known of GHB's mark. Secondly, even if there was, I refer to the case of *Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemærker* Case C-320/12, wherein the Court of Justice of the European Union ("CJEU") set out that although it may be a relevant factor, the mere fact that an applicant knew that another party was using the trade mark in another territory does not establish bad faith. In addition to this case, I note the decision of *HOGS AND HEFFERS* (BL O/580/16) wherein Professor Ruth Annand, sitting as the Appointed Person, set out that given the territorial nature of IP rights, the mere appropriation of a name registered/used abroad (in that case the USA) was not enough under UK law: there must be something else involved before this can justify a finding of bad faith

49. I accept that it may be the case that such knowledge, if used to register a mark for the purpose of extracting consideration from another party or to gain an unfair advantage by exploiting the reputation of a well-known name may be sufficient to find bad faith.[6] However, there is no evidence of such actions before me in the present proceedings and while the bald assertions made in GHB's witness statement are noted, they are, by themselves, insufficient to satisfy me that Easlink sought to 'steal' GHB's brand and prevent it from entering the British market. In addition, as I have set out above, there is no evidence of an existence of goodwill in the 'HEYBIKE' sign so the claim that Easlink sought to exploit GHB's goodwill for commercial is not supportable in any event.

[6] See the cases of *Daawat* Trade Mark, [2003] RPC 11 and *Trump International Limited v DDTM Operations LLC*, [2019] EWHC 769 (Ch), respectively.

50. Looking at GHB's claim more generally, I note that it has provided absolutely no documentary evidence in support of the claims made. Essentially, the present ground is based on a series of mere suppositions. As set out above, a claim of bad faith is a serious allegation and, in order to provide such as claim, it needs to be distinctly proved. That is just not the case here and, as a result, I have no hesitation in concluding that GHB has fallen far short of giving rise to a *prima facie* case that Easlink was acting in bad faith. The present ground, therefore, fails in its entirety.

Conclusion of the application for invalidation

51. GHB's evidence is insufficient to support either of the grounds relied upon in its application. Therefore, Easlink's mark may remain registered for all goods. As such, Easlink is permitted to rely on the same for the purpose of its oppositions, which I will now proceed to consider. On this point, I see no reason why I cannot deal with the oppositions of the first and second opposed marks (collectively, "the opposed marks") together so will proceed on that basis.

**THE OPPOSITIONS**

**Sections 5(1), 5(2)(a) and 5(2)(b): legislation and case law**

52. Section 5(1) of the Act reads as follows:

> "(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."

53. Section 5(2) of the Act reads as follows:

> "(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 or association with the earlier trade mark."

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

"Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

55. 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 –

[…]

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B 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.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if

registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

56. Given its filing date, Easlink's mark qualifies as an earlier trade mark in accordance with the above provisions. As this mark did not complete its registration process more than five years prior to the filing date of either of the opposed marks, the use provisions set out in section 6A of the Act do not apply. The consequence of this is that Easlink may rely on all of the goods identified in its notice of opposition.

57. The following standard summary of the principles applicable to the assessment of the likelihood of confusion (under section 5(2) of the Act) 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.

**Identity of the marks**

58. It is a prerequisite of sections 5(1) and 5(2)(a) of the Act that the marks at issue be identical. These grounds are relied upon in respect of the second opposed mark only. The second opposed mark is ‘HEYBIKE’ and Easlink’s mark is ‘heybike’. Both are word only marks and, on this point, I remind myself that fair and notional use

of such marks covers their use in upper case, lower case or any customary combination of the two. As such, the use of case is not a point of difference between the marks and given that they consist of the same word, they are plainly identical. The second opposition may, therefore, proceed.

**Comparison of goods**

59. The competing goods are as follows:

| The opposed goods | Easlink's goods |
|---|---|
| *The first opposed mark*<br><br><u>Class 12</u><br>Electric bicycles; Folding electric bicycles; Motorized bicycles; Electrically powered scooters; Mobility scooters; Self-balancing one-wheeled electric scooters; Self balancing unicycles.<br><br>*The second opposed mark*<br><br><u>Class 12</u><br>Bicycle saddles; Folding electric bicycles; Motorized bicycles; Motorized mobility scooters; Self-balancing one-wheeled electric scooters; Self-balancing unicycles. | <u>Class 12</u><br>Electrically operated scooters; Electrically powered scooters; Electrically-powered motor scooters; Scooters; Electrically powered scooters [vehicles]; Self balancing electric scooters; Electric one wheel scooters; Scooters [vehicles];Mobility scooters; Self-balancing two-wheeled electric scooters; Self-balancing one-wheeled electric scooters; Motorized scooters; Dirt bikes; Mountain bikes; Folding bikes; Road bikes; Motorized dirt bikes for motocross; Bicycles; Electric bicycles. |

60. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

"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".

61. 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.

62. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court 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 fur 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."

63. There is a degree of overlap in GHB's specifications and, as such, I will assess the comparison of the goods together. All goods in both of the opposed specifications are italicised below. For ease of reference, I confirm that those goods that overlap have no additional stylisation but the goods that appear in the first opposed mark only are in bold whereas the goods that appear in the second opposed mark only are underlined.

Class 12

***Electric bicycles**; Folding electric bicycles; Motorized bicycles.*

64. The above terms are either self-evidently identical or identical under the principle outlined in *Meric* with Easlink's terms of "bicycles" and "electric bicycles". Either way, these goods are identical.

***Electrically powered scooters**; Motorized mobility scooters; **Mobility scooters**; Self-balancing one-wheeled electric scooters.*

65. Easlink's mark is protected for the broad term "scooters [vehicles]". This is sufficiently broad so as to encompass all of the above terms meaning that they are identical under the principle outlined in *Meric*.

*Self balancing unicycles.*

66. Easlink's specification includes the term "electric one wheel scooters". While I appreciate that these terms are categorised differently, I am of the view that they both describe the same goods, being an electric, single wheeled vehicle that is controlled by the user leaning in certain directions. As a result, I find that these goods are identical.

*Bicycle saddles.*

67. While Easlink's specification does not include the above term, it is protected for the term "bicycles". The above term covers a part of a bicycle and I remind myself that one good being a part or component of another, by itself, does not automatically mean that they are similar.[7] As such, it is necessary to consider the remaining factors. The nature and method of use of these goods differ. I appreciate that there is some degree of overlap in end purpose in that, ultimately, both goods will be used to cycle. However, I am of the view that any overlap in purpose is somewhat fleeting. As for trade channels and user, there is a clear overlap. This is on the basis that the producer of bicycles will also produce and sell saddles for their bicycles and, further, such goods will be selected by the same consumer. In terms of complementarity, these goods are clearly important to one another and I consider that this relationship is such that would lead consumers to believe that they originate from the same undertakings.[8] As a result, I find that the goods are similar to a medium degree.

Conclusion of the goods comparison

68. As Easlink relied on section 5(1) of the Act in its opposition against the second opposed mark, the outcomes of identity reached above mean that the second opposition succeeds against the following goods, being those that I found identical above:

| | |
|---|---|
| Class 12: | Folding electric bicycles; Motorized bicycles; Motorized mobility scooters; Self-balancing one-wheeled electric scooters; Self-balancing unicycles. |

69. While section 5(1) ground fails in respect of the term "bicycle saddles", Easlink also relied on section 5(2)(a) of the Act meaning that the opposition against this term

[7] *Les Éditions Albert René v OHIM*, Case T-336/03
[8] *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

may proceed in the ordinary way. The same goes for the entirety of the first opposition which is brought under section 5(2)(b) only.

**The average consumer and the nature of the purchasing act**

70. 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.

71. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25, 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.

72. The average consumer for the goods at issue is likely to be a member of general public at large which includes a specific sub-set of cycling enthusiasts. The goods will be available via physical retailers (be that specialist stores or more general ones) and online. They are likely to be selected after the consumer views them on display stands in stores or, if selected online, after having viewed an image of them on a webpage. Therefore, the selection process will primarily be visual but I do not discount the aural component which may involve advice from sales assistants or word of mouth recommendations.

73. The frequency of selection and cost of the goods at issue will vary. I say this because mobility scooters are likely to be selected infrequently and be expensive whereas two wheel scooters will include those bought for children so will be somewhat more frequent in their selection and moderate in their costs. In respect of the level of attention paid, I find that this will be either medium or relatively high (but not outright high). Using the goods discussed above as examples, scooters for children will be relatively ordinary selections with consideration given to style, materials used and durability whereas mobility scooters will attract consideration of similar factors as well as comfort, longevity of battery life, any advertised weight limits and reviews from previous users. Additionally, I appreciate that the term "bicycles" also covers road bikes used for racing that, when purchased by an enthusiast, will likely also attract a higher degree of attention.

**Distinctive character of Easlink's mark**

74. 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 *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)."

75. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of marks can be enhanced through use, and I note that while Easlink has filed evidence that it claims to be of use of its earlier mark, I have explained above that it covers just one printout from Amazon. It is not accompanied by any evidence that points to actual use of the mark and, as such, it is insufficient

to demonstrate an enhanced degree of distinctive character. Therefore, I only have the inherent position to consider.

76. Easlink's mark is a word only mark consisting solely of the word 'heybike'. Consumers will readily identify this as being the conjoining of the separate words 'hey' and 'bike'. Individually, the word 'hey' will immediately be recognised as an informal greeting and 'bike' will be viewed as a reference to a bicycle or a motorbike. When the mark is viewed as a whole, I consider that the two words combine to form a slightly unique and unusual phrase. I say this because 'heybike' is a somewhat non-sensical informal greeting to a bike, being an inanimate object. Consumers will understand the connection to bikes but given the unusual nature of the phrase, I do not consider that they would view the mark as being outright descriptive. That being said, its distinctiveness still sits on the lower end of the scale, just not outright low. Instead, I consider that Easlink's mark enjoys a low to medium degree of distinctive character.

**Comparison of the marks**

77. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

78. 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."

79. 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.

80. The respective trade marks are shown below:[9]

| Easlink's mark | The first opposed mark |
|---|---|
| heybike | heybike uk |

Overall Impression

81. Easlink's mark is a word only mark consisting of the word 'heybike'. This will readily be viewed as the conjoining of the two words 'hey' and 'bike'. However, for the same reasons as discussed when considering the distinctive character of this mark, I find that its overall impression lies in the conjoined word itself. As for the first opposed mark, this is also a word only mark consisting of the words 'heybike uk'. 'heybike' will be seen in the same way as described above. As for 'uk', this will be clearly understood as a reference to the United Kingdom and its sole role in the mark is as a geographical identifier, meaning that it carries very little value from a trade mark perspective. As such, I find that 'uk' will play a lesser role in the overall impression of this mark, with 'heybike' playing the greater role.

[9] For the avoidance of doubt, a comparison in respect of the second opposed mark is not necessary because, as above, it is identical to Easlink's mark.

Visual Comparison

82. Visually, the marks coincide with their shared use of the word ‘heybike’. This is the sole element of Easlink’s mark and the stronger element of the first opposed mark. Further, it is the beginning element of the first opposed mark and, generally speaking, consumers tend to focus on the beginnings of marks as opposed to their ends.[10] The marks differ in the presence of the ‘uk’ element in the first opposed mark. This will not be ignored but its visual impact is limited because (1) it sits at the end of the first opposed mark and (2) plays a lesser role. As a result, I find that these marks are visually similar to a high degree.

Aural Comparison

83. The first opposed mark will be pronounced in full and in the ordinary way. It consists of four syllables. Easlink’s mark consists of two syllables that will also be pronounced in the ordinary way. Clearly, the shared pronunciation of two syllables stemming from ‘heybike’ is a point of aural identity between the marks. The two syllables stemming from ‘uk’, however, are a point of aural difference. While the marks share two syllables but differ in another two, I cannot ignore the role of the ‘heybike’ element in both parties’ marks and its placement at the beginning of the first opposed mark. Overall, I find that these marks are aurally similar to a high degree.

Conceptual Comparison

84. The concept of Easlink’s mark lies solely in the conjoined word ‘heybike’. As I have discussed above, ‘heybike’ will be viewed as an informal greeting to a bike, being an inanimate object. This same concept will apply to the ‘heybike’ element of the first opposed mark. The only point of difference between the concepts of the marks comes in the ‘uk’ element in the first opposed mark. This plays a lesser role in the overall impression of the mark because despite ‘heybike’ being connected to the

[10] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

goods at issue, ‘uk’ serves the sole purpose of being a geographical indicator, confirming that the goods originate from or are available in the UK. As such, its impact on the conceptual comparison is only slight. Taking all of this into account and bearing in mind the identical and dominant concept of ‘heybike’, I find that the marks are conceptually similar to a very high degree.

**Likelihood of confusion**

85. 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. 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 vice versa. As I mentioned above, 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 they have retained in their mind.

86. I have found the goods at issue under the first opposed mark to be identical to Easlink’s goods. As for the goods that remain in the second opposed mark, these were found to be similar to a medium degree. The average consumer base is formed of members of the general public (including bike enthusiasts) who will select the goods via primarily visual means (though not discounting an aural component) whilst paying either a medium or higher (but not outright high) degree of attention. I concluded that Easlink’s mark benefits from between a low and

medium degree of distinctive character.[11] In respect of the similarity of the marks, I found that Easlink's mark is visually and aurally similar to a high degree and conceptually similar to a very high degree with the first opposed mark. Easlink's mark is identical to the second opposed mark.

87. On the basis that it is identical with Easlink's mark, I will deal with the second opposed mark first. Taking all of the above factors into account, I am satisfied that the average consumer would likely mistake these marks for each other. This applies even though the earlier mark is only distinctive to between a low and medium degree and in circumstances where the consumer pays a higher degree of attention. I find that this is particularly the case given the identity of the marks at issue and on the basis that the goods at issue relate to bicycles, even if those goods are only similar to a medium degree. I am, therefore, satisfied that there will be a likelihood of direct confusion between Easlink's mark and the second opposed mark.

88. Turning to the first opposed mark, I am of the view that despite the addition of the 'uk' element, there exists a likelihood of direct confusion with Easlink's mark. This is on the basis that 'uk' acts solely as a geographical indicator so is unlikely to remain in the mind of the consumers seeking to recall the marks, especially when factoring in the principle of imperfect recollection and the fact that the marks will be viewed on identical goods. In short, consumers will seek to affix their recollection of the marks on the word 'heybike', regardless of the case it is presented in. Consequently, I find that there exists a likelihood of direct confusion in respect of these marks. Given the identity of this element, I do not consider that the lower degree of inherent distinctive character that lies in Easlink's mark will impact upon this finding. Further, for this same reason I do not consider that the higher degree of attention paid will offset the finding of there being direct confusion.

89. For the sake of completeness in respect of the first opposed mark, I will now proceed to consider indirect confusion. In doing so, I remind myself of the case of

[11] In respect of this point, I remind myself that a weak distinctive character does not preclude a likelihood of confusion. See *L'Oréal SA v OHIM*, Case C-235/05 P

*L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

> "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)".

90. While the above examples in *L.A. Sugar* are noted, they are not intended to be treated as an exhaustive list of the only instances whereby indirect confusion occurs.

91. In considering the issue of indirect confusion in respect of the first opposed mark, I note that the only point of difference is the presence of the 'uk' element. Given this element's sole purpose as a geographical indicator, I find that consumers will identify this additional element as one that is consistent with a sub-brand or brand extension of the 'heybike' brand, namely one that indicates goods that originate from the UK as opposed to the global nature of the overall 'heybike' brand covered by Easlink's mark. Consequently, I find that there exists a likelihood of indirect confusion in respect of these marks, even in circumstances where the marks are viewed in circumstances where the consumer pays a higher degree of attention. Again, I find this to be the case given the identity of the 'heybike' element, regardless of its lower degree of inherent distinctive character.

92. The oppositions both succeed in their entirety.

**CONCLUSION**

93. GHB's application for invalidity has failed in its entirety meaning that, subject to any successful appeal of my decision, Easlink's mark is to remain registered for all goods. As for Easlink's oppositions, these have both succeeded in full meaning that both of the opposed marks are, subject to any successful appeal of my decision, refused registration for all goods applied for.

**COSTS**

94. Easlink has succeeded in all proceedings meaning that it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the present case, I note that Easlink did file evidence but this was of no assistance here. That being said, I will provide an allowance for the costs associated with having to review GHB's evidence.

95. In the circumstances, I award Easlink the sum of £1,450 as a contribution towards its costs. The sum is calculated as follows:

| | |
|---|---|
| Preparing notices of opposition and considering counterstatements: | £400 |
| Considering the invalidation application and preparing a counterstatement: | £250 |
| Considering the opponent's evidence: | £600 |
| Official fees for both oppositions (£100 each)*:* | £200 |
| **Total:** | **£1,450** |

96. I hereby order Galaxy Mobility Innovations Technology Co., Ltd and HEYBIKE INC. to pay, jointly and severally, the sum of £1,450 to Easlink B.V. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 11th day of May 2026**

**A COOPER**
**For the Registrar**