O/0712/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003699997

BY HELIO LTD

TO REGISTER THE TRADE MARK:

MUTINY

IN CLASSES 9 AND 41

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 432071

BY LADBROKES BETTING & GAMING LIMITED

BACKGROUND AND PLEADINGS

1. On 9 July 2020, HELIO LTD ("the applicant") applied to register the trade mark shown on the cover page of this decision in the European Union. The applicant subsequently applied for the same mark in the UK on 23 September 2021. In accordance with Article 59 of the Withdrawal Agreement between the UK and the European Union, by filing an application for the same mark in the UK within nine months of the end of the transition period, the applicant's mark is deemed to have the same filing date as the EU mark. Therefore, the deemed filing date of the application in these proceedings is considered to be 9 July 2020.

2. Registration is sought for the goods and services in class 9 and 41 as set out in the Annex to this decision.

3. The application was opposed by Ladbrokes Betting & Gaming Limited ("the opponent") on 15 March 2022. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opponent relies upon the following trade mark:

MONEY MUTINY

Comparable UK trade mark (EU) registration no. UK00918061653
Filing date 7 May 2019; Registration date 19 September 2019.

4. The opponent relies upon all of the goods and services for which its earlier mark is registered, as set out in the Annex to this decision.

5. The opposition is based upon the opponent's earlier comparable UK trade mark (EU),[1] claiming that there is a likelihood of confusion because of the identity and/or similarity of the goods and services, and the similarity of the marks.

[1] Following the end of the transition period of the UK's withdrawal from the EU, all EU trade marks ("EUTM") registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (EU)' retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

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

7. The opponent, at the beginning of the proceedings, was represented by Stobbs LLP. However, following the filing of a Form TM33P on 13 July 2023, the representative was changed to Wiggin LLP. The applicant is represented by Osborne Clarke LLP. Neither party requested a hearing, however, the opponent filed submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

RELEVANCE OF EU LAW

8. 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.

DECISION

Section 5(2)(b)

9. Section 5(2)(b) reads as follows:

> "5(2) A trade mark shall not be registered if because –
>
> (a)…
>
> (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."

10. The earlier mark had not completed its registration process more than five years before the relevant date (the filing date of the mark in issue). Accordingly, the use provisions at s.6A of the Act do not apply. The opponent may rely on all of the goods and services it has identified without demonstrating that it has used the mark.

Section 5(2)(b) case law

11. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

12. As noted above, the opponent's and applicant's competing goods and services are contained within the Annex to this decision.

13. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court ("GC") stated that:

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut for Lernsysterne 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."

Class 9

Games software for use with video game consoles, except games software for offline and online casinos, gambling and betting; Computer video game software, except computer video game software for offline and online casinos, gambling and betting; Downloadable video game software, except downloadable video game software for offline and online casinos, gambling and betting; Video games software, except video games software for offline and online casinos, gambling and betting.

14. I consider that the applicant's above goods fall within the broader category of "games software" in the opponent's specification. They are identical on the principle outlined in *Meric.*

Video games on disc [computer software], except video games for offline and online casinos, gambling and betting.

15. I consider that the applicant's above goods fall within the broader categories of "computer software, including downloadable computer software", "computer software for use in playing games" and "games software" in the opponent's specification. They are identical on the principle outlined in *Meric.*

Class 41

Publishing of interactive computer and video game software, except software for offline and online casinos, gambling and betting; video game services, except video game services within offline and online casinos or for gambling and betting; providing

on-line video games, except games for offline and online casinos, gambling and betting.

16. I consider that the applicant's above services fall within the broader category of "electronic game and/or gaming services, interactive games, interactive entertainment and interactive competition services" in the opponent's specification. They are identical on the principle outlined in *Meric.*

Video game entertainment services, except services within offline and online casinos or for gambling and betting.

17. I consider that the applicant's above services fall within the broader category of "gaming, or entertainment provided online via the internet, by telephone, by radio or via a mobile communications network" in the opponent's specification. They are identical on the principle outlined in *Meric.*

The average consumer and the nature of the purchasing act

18. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

19. The opponent submits that the average consumer for the goods and services will be the general public at large, and that "there is no specialist or professional public here". I agree. I also consider that the price of the goods and services is likely to vary. However, I recognise that some of the purchases may be of low (or no) cost, such as downloadable gaming software. However, even in those circumstances, the average consumer is likely to take various factors into consideration, such as the type of software offered, functionality and ease of use. Consequently, I consider that a medium degree of attention is likely to be paid.

20. The goods are likely to be self-selected from the shelves of a retail outlet or their online equivalent. The services are likely to be selected following the perusal of premise frontages, websites or advertisements. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount that there may be an aural component to the purchase, given that advice may be sought from retail assistants or word-of-mouth recommendations.

Comparison of the trade marks

21. It is clear from *Sabel BV 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. 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."

22. 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.

23. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
MONEY MUTINY	**MUTINY**

24. The opponent's mark consists of the words MONEY MUTINY. I consider that the overall impression lies in the combination of these elements.

25. The applicant's mark consists of the word MUTINY. There are no other elements to contribute to the overall impression which lies in the word itself.

26. Visually, the marks coincide in the word MUTINY. This acts as a visual point of similarity. However, the opponent's mark begins with the word MONEY. This acts as a visual point of difference. I also bear in mind that the average consumer tends to pay more attention to the beginning of the marks.[2] Consequently, I consider that the marks are visually similar to no more than a medium degree.

27. Aurally, the opponent's mark begins with the word MONEY, which will be given its ordinary dictionary pronunciation. Therefore, the beginning of the marks differ aurally. However, as highlighted by the opponent, the word MUTINY will be pronounced identically in both marks. Therefore, they are aurally similar to a medium degree.

28. Conceptually, both marks overlap in the concept of MUTINY, which has an ordinary dictionary meaning of a rebellion, or a refusal to obey a person in authority. I consider that this will be known by the average consumer.

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

29. The word money is also an ordinary dictionary word which will be understood by the average consumer. The opponent submits that a money mutiny could be a mutiny over money or caused by money. I consider that this concept is conveyed and would be recognised by the average consumer.

30. Regardless, as the marks overlap in the concept of MUTINY, I consider that the marks are conceptually similar to at least a medium degree.

Distinctive character of the earlier trade mark

31. 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 C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR 1-2779, 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 promotion of 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)."

32. 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 and services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

33. As highlighted above, the opponent's mark is composed of the words MONEY MUTINY. I consider that as a whole, the mark will convey a rebellion over money, or caused by money. The words MONEY MUTINY do not directly describe the goods and services; however, it may be suggestive of a characteristic of the goods and services (that the topic of the gaming goods and services may be a rebellion over money, or caused by money). Consequently, the opponent's mark is inherently distinctive to no more than a medium degree.

Likelihood of confusion

34. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

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

- The marks are visually similar to no more than a medium degree.
- The marks are aurally similar to a medium degree.
- The marks are conceptually similar to at least a medium degree.
- I have found the earlier mark to be inherently distinctive to no more than a medium degree.
- I have identified the average consumer for the goods and services to be members of general who will select the goods and services primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process.
- I have found the parties' goods and services to be identical.

36. Taking all of the factors listed in paragraph 35 into account, bearing in mind the principle of imperfect recollection, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. The beginning of the marks tend to make more of an impact than the ends. I therefore do not consider that the average consumer would overlook the word "MONEY" at the beginning of the opponent's mark. Consequently, I do not consider there to be a likelihood of direct confusion.

37. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C. sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the

earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

38. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

39. In considering indirect confusion, I do not believe that this is a case that can be said to fall within categories (a) and (b) of *L.A. Sugar* (cited above). This is on the basis that the shared element of "MUTINY" is not strikingly distinctive to the point that the

average consumer would think that no-one else but the opponent would use it, especially as it is suggestive of the topic of the parties' gaming goods and services. Further, I do not consider that the addition of the word "MONEY" at the beginning of the opponent's mark can be said to be a non-distinctive addition on the basis that it plays an equal role in the overall impression of the mark. While I remind myself that the categories set out in *L.A. Sugar* are not exhaustive, the opponent has not provided any further argument as to why any other scenario exists where a likelihood of indirect confusion would occur. As a result, this leaves me with considering category (c) of *L.A. Sugar*.

40. In the present case, I must consider whether the addition of the word "MONEY" at the beginning of the opponent's mark would give rise to a finding that the average consumer would view them as being entirely logical and consistent with a brand extension. I consider it reasonable to conclude that the average consumer would notice the differences between the marks and put them down to the opponent's mark being a brand extension of the applicant. The word "MUTINY" by itself suggests that the gaming goods and services are specifically regarding rebellions, and I have found that that the word "MONEY" combined with the word "MUTINY", suggests that the gaming goods and services are specifically regarding rebellions that are over, or started because of, money. Based on this understanding, I find that, upon viewing the marks at issue, the average consumer would consider that MUTINY is the house brand for the gaming goods and services, with MONEY MUTINY being a sub-brand, which is specifically focussed on "money mutiny" gaming goods and services. Taking all of this into account, I consider that there is a likelihood of indirect confusion.

CONCLUSION

41. The opposition is successful in its entirety and the application is refused.

COSTS

42. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the

circumstances, I award the opponent the sum of **£650** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Filing a Notice of opposition and considering the applicant's counterstatement	£200
Filing written submissions	£350
Official Fee	£100
Total	**£650**

43. I therefore order HELIO LTD to pay Ladbrokes Betting & Gaming Limited the sum of £650. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 25th day of July 2023

L FAYTER
For the Registrar

ANNEX

The applicant's mark

Class 9

Games software for use with video game consoles, except games software for offline and online casinos, gambling and betting; Video games on disc [computer software], except video games for offline and online casinos, gambling and betting; Computer video game software, except computer video game software for offline and online casinos, gambling and betting; Downloadable video game software, except downloadable video game software for offline and online casinos, gambling and betting; Video games software, except video games software for offline and online casinos, gambling and betting.

Class 41

Publishing of interactive computer and video game software, except software for offline and online casinos, gambling and betting; Video game services, except video game services within offline and online casinos or for gambling and betting; Video game entertainment services, except services within offline and online casinos or for gambling and betting; Providing on-line video games, except games for offline and online casinos, gambling and betting.

The opponent's mark

Class 9

Downloadable games (software); interactive electronic games (software); computer software, including downloadable computer software; computer software for use in playing games; games software; gaming software, including interactive gaming; downloadable games applications; interactive electronic games applications; downloadable publications; betting terminals; coin-operated mechanisms for vending machines; CDs, DVDs, CDRoms; parts and fittings for all of the aforesaid goods.

Class 28

Games and playthings; printed game cards; lottery scratch cards; scratch cards for playing lottery games; electronic games; interactive electronic games; apparatus for games adapted for use with television receivers; apparatus for playing electronic

games; gaming machines for gambling; arcade game machines; games involving gambling; parts and fittings for all of the aforesaid goods.

Class 38

Broadcasting; communications and telecommunications; fibre optic, cable and satellite, television transmission services; data transmission services, including transmission of data featuring encryption and decryption; subscription data transmission services; subscription television broadcasting services; interactive broadcasting and communications services; communications for access to databases and computer networks; communications by and/or between computers and computer terminals; computer aided transmission of information, messages, text, sound, images, data and radio and television programmes; broadcasting and transmission of interactive television, interactive entertainment and interactive competitions; receiving and exchange of information, messages, text, sound, images and data; provision of access to information, text, sound, images and data via communications and computer networks; electronic mail services; teletext services; inter-active video text services; rental of digital, cable or satellite, video and audio-visual image transmitters for use in the transmission of television programming and informational data; provision of access to content of a website or TV channel allowing a user to bet, gamble and play games, including poker and bingo among others; providing access to gambling and gaming websites on the internet; providing access to websites on the internet to play games; provision of information services and advice in relation to all the aforesaid; consultancy, advisory and information services relating to the foregoing services.

Class 41

Entertainment services and provision of leisure facilities; organisation and presentation of gambling or gaming events, poker games, betting, pool betting, tote betting, playing games, bingo games; gambling or gaming services, betting, pool betting, tote betting, book-making and casino services; electronic game and/or gaming services, interactive games, interactive entertainment and interactive competition services; education, teaching and training relating to playing games, gambling, gaming, poker, bingo, betting, book making; gaming, or entertainment provided online via the internet, by telephone, by radio or via a mobile communications network; provision of betting, gambling and gaming services through physical and electronic

sites; provision of a website allowing a user to bet, gamble and play games, including poker and bingo among others; all the aforesaid services also provided on-line from a computer database, by telephony or the Internet; providing information in the field of betting and gaming via a website; provision of information services and advice in relation to all the aforesaid; consultancy, advisory and information services relating to the foregoing services.

Class 42

Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software; design and development of video game software; design and development of computer game software; computer software design; computer software consultancy; computer system analysis; computer system design; computer programming; programming of betting and gaming software; creating and maintaining websites; hosting websites; computer software design services relating to betting and gaming; providing online, non-downloadable software; consultancy, advisory and information services relating to the foregoing services.