

O-086-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION 2526648
BY TEAM 2012 LTD TO REGISTER THE TRADE MARKS**



AS A SERIES OF 2, IN CLASSES 1 - 45

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 100156
BY CANDY TEAM GmbH**

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By Team 2012 Ltd to register the trade marks**



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And

IN THE MATTER OF opposition thereto under No 100156 by Candy Team GmbH

BACKGROUND AND PLEADINGS

1. On 17th September 2009, Team 2012 Ltd of 1 Wandsworth Plain, London, SW18 1EH (hereafter "Team") applied to register the above mark in Classes 1-45. The goods the subject of these proceedings are much narrower in scope, and are as follows:

Class 30:

Cocoa; sauces for food; ice cream and frozen confections; confectionery; bakery products; biscuits; chocolate; snack food products made from flour or cereals; sugar.

2. The application was allocated number 2526648 and was published in the Trade Marks Journal on 13th November 2009, and on 15th February 2010 Candy Team GmbH of Hochestieg 21, 22391 Hamburg, Germany (hereafter "Candy") lodged an opposition against the goods specified above.
3. Candy has opposed on the sole basis of section 5(2)(b), citing the following earlier mark:

Mark. Filing and registration dates	Goods and services relied upon under section 5(2)(b)
<p style="text-align: center;">TEAM</p> <p>International Registration 0592011 designating the EC</p> <p>International Registration date: 30th July 1992</p> <p>International Registration designation date: 18th May 2006</p>	<p>Class 30:</p> <p>Chocolate, chocolate products, in particular chocolate whirls, marzipan, confectionery, in particular sweets, dragees, fruit gum sweets and wine gum sweets, chewing sweets and chewing gums (except for medical purposes).</p>

4. Candy say the two marks of the application should be considered fundamentally the same, however they tend to focus argument upon the black and white version as, they say, this is of potentially 'broader scope' than the colour version. They go on to say the marks are visually, phonetically and conceptually similar to the earlier mark. The dominant element in the opposed marks is the text 'TEAM 2012', and the only difference between that and the earlier mark is the number "2012". This is well understood by the average consumer to be a date and specifically, a year. Although the opposed marks have logos, the stylisation of these is not strong and would not be sufficient to prevent likelihood of confusion. The respective goods are either identical or similar. Taking all factors into account there is a likelihood of confusion.
5. Team filed a counterstatement saying firstly, they are a company that has been established to represent the Great Britain and Northern Ireland Olympic and Paralympic team that will participate in the London Olympics and Paralympics in 2012.
6. They then say it is not right to focus only upon the black and white version of the mark as this has only been filed following registry advice in the Manual of Examination Practice, and *in use* it is the colour version which will primarily be used.

7. As a matter of law, they say the global appreciation test requires that marks be considered as 'wholes' and accordingly it is not correct to isolate (or otherwise focus upon), eg just the textual elements. They also say there are many marks on the register in Class 30 which start with the word 'TEAM' and by implication, this is not a strong mark and the consumer is able to distinguish the fact that different undertakings may be behind goods and services marketed using 'TEAM' marks, even where only small differences exist. They admit there is similarity between the applicant's goods and the opponents, but note the applicant's mark will be applied to such goods under licence and in the context of raising funds for Team 2012, in accordance with the applicant's mission statement. On that basis, the intended purpose of the respective goods bearing the mark will be different, and the applicant's goods will be distributed directly to consumers during the course of the 2012 games as a means of supporting the team.
8. They deny visual, phonetic and conceptual similarity. As regards visual similarity, they say their mark has many features which cannot be considered negligible, including, the numeral '2012', stylisation of the lettering, rectangular background, 'cross/ribbon' device, white circle at the centre, and red white and blue colours. As a consequence they deny that the dominant element is the word element 'TEAM 2012'. Even if it is however, they say the respective marks are conceptually different.
9. On the question of conceptual similarity, they say the numeral '2012' is not simply *any* date or year, but will be acknowledged by consumers to refer to the 2012 Olympic games in London, which has received widespread and consistent media reference, as one would expect from a once-in-a-generation event. Moreover, the colours used in the mark are intended to echo the colours of the Union Jack and this amplifies the connection with the Olympic games.
10. They reiterate that the word 'team' is in fact descriptive, and is usually followed by a 'designation' such as, eg TEAM GB, TEAM TENNIS, TEAM OCTOPUS, and from that, they argue it is the 'designation' after the word 'TEAM' that is the most distinctive and dominant element. Accordingly, from a conceptual point of view the most important element is '2012', and this will be reinforced by the intended purpose of goods sold under the mark.
11. As a matter of law, the applicant notes that conceptual differences can in certain circumstances counteract visual and phonetic similarities.
12. As regards phonetic similarity, the applicant contends that it is unlikely given the nature of the goods that either parties' marks will be used in spoken format (both sets of goods are of the self-selection sort) and it is important to recognise that fact in any overall assessment.

13. Taking account of all relevant factors, they say there is no likelihood of confusion.
14. Neither party filed any evidence, but further (ie, in addition to the statement and counterstatement) submissions were received which I shall take into account. No hearing was requested by either party and so I give my decision based upon a careful reading of the papers.

DECISION

Section 5(2)(b)

15. The opposition is founded upon Section 5(2) (b) of the Act. This reads:

“(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.”

16. The earlier trade mark in this case has an international registration date of 30th July 1992 and a subsequent designation date in the EC of 18th May 2006. It is an earlier mark in accordance with section 6(1) of the Act, being an international trade mark (EC). Moreover, given that its subsequent designation date (which, in accordance with Art 151(1) and (2) of Council Regulation (EC) No 207/2009 constitutes the date of registration) is under five years prior to the date of publication of the application in suit, it is not subject to proof of use requirements under section 6A of the Act.
17. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P* (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma AG*,

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(h) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(i) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(j) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion

within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

The average consumer and nature of the purchase

18. The average consumer for both parties' products will be drawn from the general public, in particular those people of all ages and backgrounds who like sweets and confectionery in particular. The products covered by the respective specification are not in any way specialised.
19. As far as the purchasing process is concerned, both parties' products are relatively inexpensive and everyday purchases, and therefore I agree that not a great degree of attention will be paid by the consumer in the purchasing process. That said, and although the level of attention paid in the process of purchase is at the low end of the spectrum, consumers will nonetheless be nothing other than reasonably circumspect and observant in that purchase and selection process.
20. I would also say that the purchasing process is primarily by way of visual selection.
21. I will of course factor these observations into my overall assessment of likelihood of confusion.

Comparison of marks

22. The case law makes it clear I must undertake a full comparison, from the perspective of the average consumer, of both marks in their totalities and overall impression (see authority (k) above in para 17), taking account of all differences and similarities and also having regard to the distinctive and dominant elements of the respective marks.

23. The first question in this case is, which, of the two marks in the series filed by the applicant should I be comparing with the earlier mark, the mark in colour, or the mark filed in black and white? I may just mention that I think it is mistaken to say that the mark in black and white gives 'broader protection' by virtue of it having effective protection for *all* colours. The true position is that the 'protection' for the mark in black and white is, in effect *without reference* to any colour at all. By contrast, the mark filed in colour has protection with reference to those colours used in the representation, but whose protection is not *limited* to those colours.¹

24. That aside, if there were any suggestion that one or the other mark may give rise to different outcomes, that would, of itself, suggest that the applicant's claim to a 'series' of marks (to paraphrase, marks having the same 'identity') be in doubt. I must consider both marks of the series, and in doing so I do not believe it makes any material difference which marks I compare, as my analysis will seek to show.

Visual comparison.

25. Candy's mark comprises a single five letter word, 'TEAM', in bold but standard type, using thick-set capital letters. Team's colour mark comprises the word 'team' in lower case script, with, directly underneath but slightly offset from, the number '2012'. Both parties accept that the number '2012' would be taken to be a year, although they are at odds as to what significance that year may hold, if any, to the average consumer. Team say the year 2012 will immediately resonate with the average consumer as being the year of the Olympics, whilst Candy, in effect, downplay that significance, reducing its significance to just another year.

26. In purely visual terms, the number '2012' is in script which is roughly the same size as the word 'team'. The textual elements are against a blue rectangular background which is crossed and enveloped by two red diagonal 'swooshes' against white backgrounds. One of these 'swooshes' is ragged at the ends, the other solid. At the point where these swooshes converge, there is more white background, blending into the predominantly blue overall background. The black and white version of Team's mark is exactly the same in terms of textual matter and background configuration, except that it is not in colour. Taking the similarities and dissimilarities into account I find that the respective marks (that is, the black and white version and the earlier mark) share a moderate level of visual similarity. As far as the colour version is concerned, the impact of colour does not vary this finding which is the same, namely that there is a moderate level of visual similarity.

¹ See, eg Able C & C Co Ltd's Application BL O/246/08

Phonetic comparison

27. Candy's mark will be pronounced "TEE-M". Assuming all textual elements of Team's mark will be pronounced, their mark will be pronounced "TEE-M TWEN-TEE TWEL-VE". It is conceivable that in aural use, the mark will be reduced to just 'TEE-M', but against that, the number '2012', is not visually subsidiary or secondary in any way to 'team', and therefore it would be dangerous to assume that an abbreviated or shortened version would be used. On that basis, and taking the similarities and dissimilarities into account, I find that the respective marks share a moderate level of phonetic similarity. Colour of course plays no part in the phonetic comparison.

Conceptual comparison

28. By conceptual similarity, it is meant 'semantic' conceptual similarity. Candy's mark comprises a known, dictionary word, 'team', meaning a group of players. A full definition is as follows:

"team

→ *n.* [treated as sing. or pl.]

1. a group of players forming one side in a competitive game or sport."²

29. That is Candy's mark's sole linguistic point of reference. Although Team's marks also contain the dictionary word "team", there is additional matter which is not negligible, and accordingly capable of contributing to an underlying concept. In particular, and of similar if not entirely equal, visual prominence is the number "2012". I agree this will be taken to be a year, but the average consumer will not see this as *any* year. London's bid for the Olympic Games was successful in 2005, and since that time progress towards the provision of facilities, the budget, the 'legacy' and the competitors have all provided the media with a constant focus. This is something of which I can take judicial notice. There will be few people in this country who are unaware that 2012 is when the Olympic Games come to the UK, with the focus being on East London. Even when this application was filed in September 2009, given the period between 2005 and 2009, most people in this country (and by definition, average consumers) would be aware of the significance of the year 2012. I have no hesitation in finding then that, upon seeing the words, "team 2012", the average consumer in this country will

² "team *n.*" *The Concise Oxford English Dictionary*, Twelfth edition . Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2008. *Oxford Reference Online*. Oxford University Press. Intellectual Property Office. 28 January 2011 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t23.e57570>>

make a conceptual link to a team competing in the Olympic Games planned for 2012 to take place in the UK and predominantly London.

30. This brings me to the question whether anything *else*, apart from the verbal elements in Team's marks may contribute to this conceptual link. To put this question another way, I need also to consider the possible impact of the non-verbal elements in Team's marks and whether these may reinforce, vary or otherwise affect the marks' respective conceptual identities.
31. Team say the colour in the colour mark (as well as the configuration) is/are redolent or reminiscent of the flag, the Union Jack. Whilst it is true that red, white and blue are present in the colour mark, and in roughly equivalent places one would expect to find them in an accurate representation of the Union Jack, I am not convinced the average consumer will instantly and inevitably see reference in the device to the Union Jack. Specifically, of course, the Union Jack has another linear (as well as diagonal) cross in its configuration. That said, it is more plausible that use of those particular colours, even in somewhat abstract configuration, taken with the verbal element of the colour mark, could give rise in the consumer's mind that the 'team' referred to in the words 'team 2012' is in, fact the Great British team.
32. The most I can say about the colour mark is that, when viewed as a whole (including the words), some average consumers may see reference to the Union Jack or that the Olympic 'team 2012' being referred to is the British team. As far as the black and white mark is concerned the same connection with the Olympic Games will be made on the basis of the verbal element alone, but there will, in my view, be no connection with either the Union Jack or the competing British team.
33. Taking all these factors into account, the words (in both Team's marks) convey a very direct concept, that of a team associated with the Olympic Games. This concept is not displaced or otherwise varied by the other elements in either the black and white or the colour version of the mark. Indeed in respect of the colour version it can be said that the Olympic 'concept' will be reinforced or more focussed by possible reference to the Great British team competing in those games.
34. I accept then, Team's submission that these days, it is common to refer to a team as "team x", 'x' being the defining element or characteristic of the team, be it a geographical designation, a person or something else. So for example, we have "team GB", "team Scotland", "team Cameron" and so forth. In this case, the average consumer will, as I have said, see the combination of "team 2012" in both colour and black and white versions, as a plain reference to the Olympic Games.

35. Based on that conclusion, although there is a degree of conceptual similarity between the respective marks (as they have the word 'team' in common), this is the extent of the similarity. Candy's mark will not convey any (or the same) direct reference to the Olympic Games or to anything else. On that basis I find that the degree of conceptual similarity is only at a low level.

Overall similarity

36. At this point I need to make a finding in respect to 'overall impression' of the respective marks, having regard to any distinctive, dominant elements. Candy's mark is not a complex mark of course, but as far as Team's marks are concerned, the distinctive dominant elements will be the word and number, in combination, "team 2012" (neither one, nor the other assuming dominance). I have not overlooked of course the other elements in Team's marks but on my assessment, these will not contribute equally to the overall impact of those marks. The device, either in black and white or colour, provides only background against which the verbal element stands out.

37. Taking the visual, aural and conceptual assessments *overall*, I find the respective marks share a low degree of similarity. I should stress that in this finding I have also factored in the nature of the goods concerned, which are everyday foodstuffs, and therefore prone more to visual selection from a supermarket shelf, rather than aural or phonetic selection.

Comparison of the goods

38. In assessing the similarity of the goods, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at para 23 of the Judgment:

'In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their end users and their method of use and whether they are in competition with each other or are complementary.'

39. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.

40. It is important to recognise that even though there is no factual evidence on similarity, I nevertheless have the statements of case, submissions and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the appointed person said in *Raleigh International trade mark* [2001] R.P.C. 11, at

para 20, that such evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items (which these are), evidence may not be necessary. He also stated that the tribunal may, in an appropriate case, consider the question of similarity from the viewpoint of the notional member of the relevant purchasing public.

41. I should also mention a further case in terms of the application of legal principle, and that is the European Court of First Instance (“CFI”) in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) (“Merica”)* Case T-133/05³, where, at para 29, it is stated:

“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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

42. With my introductory comments out of the way, the respective goods to be compared are as follows:

Team’s goods	Candy’s goods
<p>Class 30:</p> <p>Cocoa; sauces for food; ice cream and frozen confections; confectionery; bakery products; biscuits; chocolate; snack food products made from flour or cereals; sugar.</p>	<p>Class 30</p> <p>Chocolate, chocolate products, in particular chocolate whirls, marzipan, confectionery, in particular sweets, dragees, fruit gum sweets and wine gum sweets, chewing sweets and chewing gums (except for medical purposes).</p>

43. In view of Team’s concession that their goods are ‘similar’ to those of Candy, nothing much is going to hang on the analysis of goods. For the sake of good order and completeness however, it may be as well to record that certain of

³ See also the Appointed Person’s decision in *Galileo* BL O-269-04 paras 13ff

Team's goods are not just similar, but identical. So, the term 'chocolate' in Team's specification is identical to 'chocolate' in Candy's.

44. Cocoa, in Team's specification is an ingredient in chocolate but this does not thereby make it identical or even similar to chocolate, taking account of all relevant factors. That said, the channels of trade are likely to be the same and the manufacturers of one are likely to supply the other, a pattern of trade which would be recognised by the average consumer. On that basis I consider cocoa to be similar to chocolate.

45. Candy has the broad term 'confectionery'. This will be identical to 'confectionery' and 'frozen confections' and 'ice cream' (being a frozen confection) in Team's specification.

46. The terms of Team's specification:- "bakery products"; "biscuits"; snack food products made from flour or cereals"; these are all in my opinion highly similar to 'confectionery'. Even if one takes the view that the term 'confectionery' is confined to sweets and chocolate, it is likely that 'confectionery' and the products listed in Team's specification will be housed, for example, in close proximity on the shelves of larger supermarkets. Moreover, all are by their nature, snack foods, and (larger) manufacturers of sweets and chocolate can also be expected to produce, eg biscuits, bakery products and snack foods. On that basis, I find that the products listed are all highly similar to Candy's 'confectionery'.

47. That leaves: "sauces for food" and "sugar". Sauces for food can include a very large range of products, from tomato sauce to chocolate sauce and so on. These (as accompaniments) would not normally be understood to be 'confectionery', and neither would it be housed in an area of the supermarket necessarily close to confectionery. Similarly 'sugar', whilst being a product used in the manufacture of confectionery, is likely to be sold on its own, apart from confectionery products. Although Team has conceded their products are at least 'similar' to Candy's, I am not convinced and must conduct my own analysis. Taking all factors into account I find that "sauces for food" and "sugar" are not similar to 'confectionery' or any of the other terms in Candy's specification.

48. My conclusions on similarity of goods can therefore be summarised as follows:

Team's goods	Identical to	Highly similar to	Similar to	Not similar
Chocolate	Chocolate			
Cocoa			Chocolate	
Confectionery and frozen	Confectionery			

confections				
Sauces for food				Confectionery
Ice cream	Confectionery			
Bakery products		Confectionery		
Biscuits		Confectionery		
Snack food products made from flour or cereals		Confectionery		
Sugar				Confectionery

Likelihood of confusion

49. Before proceeding to bring all my findings together in an overall global assessment, I need to make an assessment of the distinctive character of the earlier mark. An invented word having no derivation from known words is, in its inherent characteristics, very high on the scale of distinctiveness, KODAK of course being the prime example.

50. The earlier mark is the dictionary word ‘team’, which will be understood by the average consumer, but which nonetheless bears no obvious allusion or direct connection with the goods of the specification. On that basis, the earlier mark can be said to be inherently distinctive on a moderate level. There is no evidence that this level of distinctiveness has been enhanced through use in the UK.

51. I also need to deal with Team’s argument that likelihood of confusion will be all the more unlikely in this case given their plans for use of the mark. Team say they intend to use the mark in support of its publicly stated mission, to support athletes taking part in the London Olympics and Paralympics. In other words, the mark will be used under licence and in the context of raising funds for Team 2012. This means it is unlikely to be used as a primary mark. According to Team, this changes the ‘intended purpose’ of the goods, relevant to the analysis under similarity of goods and services, as well as being a factor in the overall assessment of likelihood of confusion. In support of their argument, Team cite *Kerly’s Law of Trade Marks and Trade Names* (14th Ed) where it says:

“If in fact it is known what use an applicant intends to make of his mark then that use cannot be excluded.”

They also rely on three cases from the 1960's: "*Grundig*", "*Players*" and "*Woodies*" (no other references are provided).

52. The European Courts have developed a line of authority resistant to arguments about 'marketing activities'. In the case of *C-171/06P T.I.M.E Art v OHIM and Devinlec Developpement Innovation Leclerc*, the CJEU says:

"59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks."

53. Whether one is talking about 'marketing activities' or 'mission statements', both invoke external circumstances which may well change in time. Who is to say Team's usage of their mark would not at some point be 'under licence'. On that basis, I prefer the more recent authorities established by the European Courts on this question and find that Team's particular usage of the mark cannot be a factor in my assessment, but it is nonetheless an *example* of one particular notional and fair use. I may just say for the avoidance of any doubt on this question, my overall assessment would have been no different if I were to be wrong on this particular question.

54. At this point I need to remind myself of my various findings and bring them together in a global assessment taking, of course, into account, the doctrine of imperfect recollection. I have found that the respective goods range from identical through to not similar. I have found the earlier mark to be inherently distinctive to a moderate degree. I have made observations on the respective average consumers, namely that they have identity and commonality and I have found the purchasing process to involve a level of attention at the low end of the spectrum. Finally, I have found the respective marks to share a low degree of similarity. Needless to say that in making a global assessment, it is not a 'tick box' exercise, whereby if I find more factors in Team's favour, it wins. All factors must be weighed in the evaluation of likelihood of confusion.

55. In all the circumstances, I find there is no likelihood of confusion in this case and the oppositions fail in their entirety.

56. In particular I find in this case that, conceptually, the marks only share a low level of similarity and in particular, I believe the media saturation of the Olympic and Paralympic Games in London 2012 will immediately invoke that particular connection in the mind of the average consumer. The same cannot be said of Candy's earlier mark.

Costs

57. Team 2012 Ltd has been totally successful in defending against the opposition. Accordingly, it is entitled to a contribution towards its costs and neither party sought costs off the normal scale. In the circumstances I award Team 2012 Ltd the sum of £800 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

1. Preparing counterstatement and considering statement - £400
2. Preparing submissions - £400

Total £800

58. I order Candy Team GmbH to pay Team 2012 Ltd the sum of £800. The sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 01 day of March 2011

**Edward Smith
For the Registrar,
the Comptroller-General**