

O-093-05

TRADE MARKS ACT 1994

**IN THE MATTER OF AN APPLICATION NO. 2318495
IN THE NAME OF ROBERT. G. GREEN**

AND

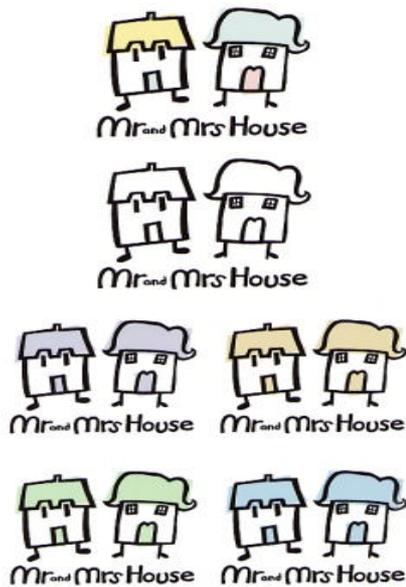
**OPPOSITION THERETO UNDER NO. 91877 BY UPSTARTS LTD AND
DEREK BATEY ENTERPRISES LTD, JOINTLY**

TRADE MARKS ACT 1994

**IN THE MATTER OF an
application No. 2318495
in the name of Robert. G. Green
and opposition thereto under No.
91877 by Upstarts Ltd and
Derek Batey Enterprises Ltd, jointly.**

BACKGROUND

1. Application No. 2318495 was applied for on 14 December 2002 for the following series of six marks.



2. The application is subject to the following claim to colour. “The applicant claims the colours khaki, blue and pink in respect of the first mark and the colours mauve, taupe, green and blue in respect of the third, fourth, fifth and sixth marks respectively”.

3. The application stands in the name of Robert G Green and is in respect of the following specification of goods:

Class 8: Cutlery, bottle openers, salad serving utensils.

Class 14: Costume jewellery, watches, clocks, jewellery.

Class 16: Stationery, greetings cards, gift tags, gift wrap, note books, diaries, photo albums, cheque book holders, stationery racks and trays, pen holders, pen ink pots, paper table linen, letter openers.

Class 18: Hand bags, wallets, purses, clothing for animals, blankets for animals, umbrellas, parasols, key fobs.

Class 20: Garden furniture, furniture, picture frames, wooden goods, mirrors, objects of various materials for decoration, plastic furniture, waste bins, framed mirrors, photograph frames, trays, floor and seat cushions, pillows, cushions, cat and dog baskets and beds, pouffes.

Class 21: Glassware, porcelain, earthenware items, kitchen and household utensils and containers, candle holders, paper plates and cups, tissue box covers.

Class 24: Bedding, bed linen, infants bed linen, cot blankets, blankets, table linen, duvet covers, throws, travellers rugs, bath sheets, bath towels, beach towels, face and hand towels, tea towels, fabric place mats, place mats.

Class 25: Clothing, T shirts, pyjamas, underwear, lounge wear, scarves, gloves, mitts, caps, slippers, beach footwear, bath robes, dressing gowns.

Class 27: Rugs, mats.

4. The application was published for opposition purposes on 9 May 2003. On 8 August 2003 notice of opposition against the registration of the application was filed on behalf of Upstarts Limited (“the first opponent”) and Derek Batey Enterprises Limited (“the second opponent”), jointly.

5. The first opponent is the proprietor of the following trade marks:

Trade Mark No. 2298292 for the mark:

MR AND MRS
MR & MRS (series of two)

For the following goods:

Class 3: Cosmetics, perfume, toothpaste, shampoo, soap, toiletries.

Class 9: Computer software; pre-recorded video tapes, CD-ROM’s, audio tapes.

Class 16: Printed matter; books, booklets, magazines, playing cards, photographs, stationery.

Class 25: Clothing, footwear, headgear, outerwear, underwear, t-shirts, jackets, caps.

Class 28: Toys, games, playthings, board games, sporting equipment.

Class 30: Chocolate, confectionery, ices.

Trade Mark No. 2897148 (CTM) for the mark:

MR AND MRS

For the following goods:

Class 3: Cosmetics, perfume, toothpaste, shampoo, soap, toiletries.

Class 9: Computer software; pre-recorded video tapes, CD-ROM's, audio tapes.

Class 16: Printed matter; books, booklets, magazines, photographs, stationery.

Class 25: Clothing, footwear, headgear, outerwear, underwear, t-shirts, jackets, caps.

Class 28: Toys, games, playthings, board games, sporting equipment, playing cards.

Class 30: Chocolate, confectionery, ices.

Class 33: Alcoholic beverages, wine, champagne.

6. The second opponent is the proprietor of the following trade mark:

No. 2008543 for the mark:

MR&MRS
MR AND MRS



(Series of three)

The mark is registered in respect of the following services:

Class 41: Live performances; television programmes; cabarets; theatrical shows; talk shows; after dinner speaking.

7. The grounds of opposition are, briefly,

- under Section 5(2)(b) in that the applicant's mark is confusingly similar to the first opponent's earlier marks; (see also paragraph 36);
- under Section 5(3) in that the application would take unfair advantage of, or be detrimental to, the distinctive character or the repute of both the first and second opponents' earlier trade marks;
- under Section 5(4)(a) by virtue of the law of passing off in respect of both the first and second opponents' earlier trade marks.

8. The applicant filed a counterstatement essentially denying the grounds of opposition.

9. Both parties apply for an award of costs.

10. Following the completion of the filing of evidence by both parties and, in line with usual procedure, the case was reviewed and the parties informed that it was believed a decision could be made without recourse to a hearing. Both parties were advised they retained their right to be heard. Neither party made any such request. I therefore make this decision on the basis of the papers before me, which include written submissions filed on behalf of the applicant.

EVIDENCE

Opponents' evidence

11. The opponents' evidence consists of two documents, one by Derek Batey and dated 20 February 2004 the other by John Mariani and dated 1 March 2004.

12. Mr Batey says that Mr & MRS was a television game show and that he became very closely identified with MR & MRS. The show format, and the name MR & MRS were devised by Roy Ward Dickson from whom Mr Batey obtained the television and stage show rights prior to 1967.

13. Mr Batey explains that he was the presenter of the MR & MRS television show and that it was broadcast between 1967 and 1988. The show was first shown on Border TV between 1967 and 1973 and then on the whole of the ITV network between 1973 and 1988. He goes on to claim that on the full network, where it was mostly shown at off-peak times, the show averaged 3 or 4 million viewers nationwide. Mr Batey does not provide any evidence to support this claim.

14. Mr Batey says that after the show's television run finished, he continued to present the show in different locations. He indicates that the venues included clubs, cabaret, cruise liners and holiday centres but gives no details of the geographical location of these shows nor the dates they took place. Neither does he give any details of how many people might have attended the shows.

15. Mr Batey says that he has written at least 5 quiz books. 2 of these were published by Arrow Books in conjunction with TV Times and sold about 350,000 copies. The

others were self-published and marketed in the places where the shows took place. Again, no details of locations nor dates of these shows are given and neither are any details given of the publication dates of the books.

16. Mr Batey says that the game show has a continued following and has a website. In 2001 he signed an agreement with Upstarts Limited under which they acquired rights to develop and sell a board game and other products under the MR & MRS name and format.

17. In his declaration, Mr Mariani states that he is a director of the first opponent and was one of the founding members of the company in 1988. He confirms that the information he gives is from his own personal knowledge and from the company's records.

18. Mr Mariani explains that along with a Tom White, he formed Upstarts as a partnership in 1988. He goes on to say that the company was unincorporated but Upstarts Limited was formed in 1999 through changing the name of another company they owned at that time.

19. Mr Mariani states that in 2001 contact was made with Derek Batey to see whether they could work with him to produce a MR & MRS board game. The game was launched in September 2002. Mr Mariani says that in November of that year the game was the sixth best selling family board game and that over the period July to December 2002 it was the eleventh best selling board game, according to NPD figures.

20. Mr Mariani says that "NPD figures [-] are the Toy Trade Sales table representing 68% of retail outlets". I cannot be certain what he means by this but he does not give any indication of who NPD might be or how the results were reached. He does not explain the geographical location of the 68% of retail outlets nor what the position might be in the remaining 32%. He does not explain what the situation is in the relevant market as a whole, he gives no details of where and when any sales took place, nor the number and value of any units sold.

21. Mr Mariani says that a large number of radio, television and press interviews with Mr Batey were arranged by his company and took place in October 2002. Mr Mariani exhibits a copy of an exchange of e-mails detailing part of the interview itinerary.

22. Mr Mariani says that during October and November 2002, a 20 second TV advertisement targeted specifically at housewives was made and broadcast approximately 300 times on satellite channels. He gives no details of which channels were involved, nor their geographical coverage or viewing figures. He does not exhibit a copy of the advertisement.

23. Mr Mariani says that the game had considerable press exposure and exhibits at JM2 a copy of a centre page spread from the Daily Express of 31 October 2002 which promoted the game and made the connection to the Derek Batey show. At JM3 he exhibits a number of other newspaper cuttings taken in the period July to November 2002 from various national and regional publications.

24. Mr Mariani says that negotiations for a new series of the show are well advanced and that it is probable it will be broadcast in the near future. He goes on to say that the intention is to merchandise a range of products under the mark although none have, he says, “been commercialised yet” as the best time to do this would be when the television show is broadcast.

25. Mr Mariani says that the theme of the show and the board game involves the posing of questions to partners primarily about the things that they do in the home and he exhibits at JM5 a number of question cards from the board game. Finally, Mr Mariani exhibits photographs of MR & MRS quiz books published by Arrow Books and which, he says, were referred to by Mr Batey in his evidence. The photocopies do not show any publication dates, however several of the pages show the back cover of books. The words printed on the book cover indicate that the book affords the reader the opportunity to take part in the television show. I therefore assume that the books were published sometime before the show ended its run in 1988.

Applicant’s evidence

26. This takes the form of a witness statement by Robert. G. Green and is dated 20 August 2004. Mr Green says that he first had the idea for Mr and Mrs House in 1987. He wanted to open a home ware shop. At no time, says Mr Green, did he think of the television show and furthermore no-one else he shared his ideas with did either. It was not until around 1997 that he developed his ideas further and by 2001 he started to design some products for Mr and Mrs House.

27. Mr Green explains how he carried out a number of searches at Companies House and the Trade Marks Registry. Finding nothing he thought conflicted, he registered domain names incorporating the words “mrandmrshouse” and he applied for the mark in suit.

28. Mr Green states that the “Mr and Mrs House” website was launched in October 2002. At RGG1 he exhibits printouts of all the “current” pages of the website which, he says, show the way in which the trade mark is used and the products on sale.

29. Mr Green concludes by saying that at no time prior to or since launching his website, has anyone ever confused him with or even mentioned the Mr & Mrs board game or television show.

Opponents’ evidence in reply

30. This takes the form of a second statutory declaration from Mr Mariani and is dated 13 October 2004. Most of this declaration is opinion and I do not therefore intend to summarise it. But Mr Mariani does indicate that “to date” his company has sold MR & MRS products/games to the value of £890,000. He does not explain what products other than games might have been sold but in any event does not say what the value was of sales of specific goods at the relevant date; a date which is almost two years before his statutory declaration was made. He goes on say that this figure does not include sales of the Mr & Mrs products by Derek Batey himself but I note that the opposition is not based on any claim by Mr Batey as an individual, in respect of any products.

DECISION

Section 5(3) and 5(4)(a)

31. The opponents have filed the briefest of evidence about their trade marks. Whilst a reputation in each of the earlier marks is claimed, the evidence does not support these claims.

32. No evidence of use is provided in respect of any of the goods covered by the first opponent's marks with the exception of board games, the length of that use being, in any event, no more than three months. In respect of both opponents' marks, what evidence is provided does not show, for example, any details of turnover of goods sold or services provided under the marks at the relevant date, nor does it provide any proof of size of the turnover in relation to the relevant markets. There is no indication of the geographical spread of any use, and no details are given of any advertising or marketing costs. There is no evidence from the public nor the trade to support the claim to reputation. In respect of the second opponent's earlier marks, there is no evidence to show that any reputation that might once have existed, continues to exist.

33. Accordingly, I dismiss the grounds of opposition based on Sections 5(3) and 5(4)(a) and the matter falls to be decided on the grounds of Section 5(2)(b) with the opponents having no sustainable claim that the marks forming the basis of the claim have an enhanced degree of distinctive character through use.

Section 5(2)(b)

34. Section 5(2)(b) of the Act states:

- “5.- (1)
- (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.”

35. The term “earlier trade mark” is defined in section 6 of the Act as follows:

- “6.- (1) In this Act an “earlier trade mark” means-
- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where

appropriate) of the priorities claimed in respect of the trade marks,”

36. The applicant’s written submissions appear to assume that the opposition under this ground is based on the earlier registrations of both of the opponents. I do not consider this to be the case. The opponents’ statement of grounds is set out under various headings. There is no heading which indicates that there is a ground of opposition under Section 5(2)(b) based on the second opponent’s registration. In any event, the services covered by the second opponent’s registration are not, and not claimed to be, identical or similar to the goods of the application in suit as would be required to found an objection under this section. I therefore proceed on the basis that the objection under this section is based on the first opponent’s registrations only.

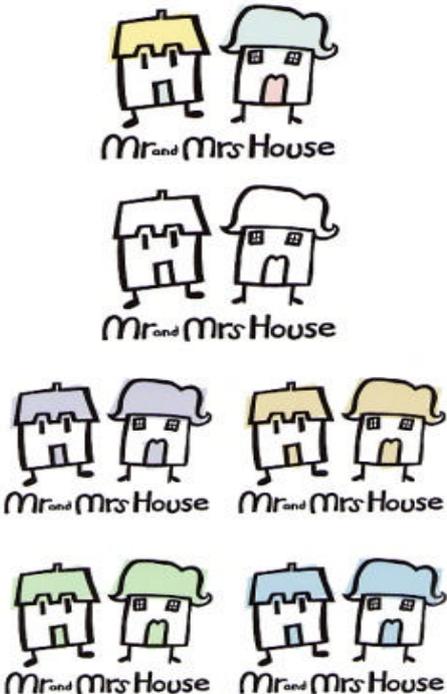
37. Each of the first opponent’s registrations relied on are earlier trade marks within the definition of Section 6 of the Act.

38. In determining the question under Section 5(2), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel v Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R 77 and *Marca Mode CV v Adidas AG* [2000] E.T.M.R.723. 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*, paragraph 22;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question: *Sabel BV v Puma AG*, paragraph 23, 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 he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen B. V.* paragraph 27;
- (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*, paragraph 23;
- (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*, paragraph 23;
- (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 v Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (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*, paragraph 24;

- (g) 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*, paragraph 26;
- (h) 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*, paragraph 41;
- (i) 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*, paragraph 29.

39. For ease of reference I set out the respective marks below:

Applicant's Marks	Opponents' Marks
	<p>First Opponent's marks:</p> <p>MR & MRS MR and MRS (2298292)</p> <p>MR AND MRS (2897148)</p>

Comparison of goods

40. The applicant seeks registration in respect of goods in classes 8, 14, 16, 18, 20, 21, 24, 25 and 27. There is no objection to the registration in respect of goods in classes 8, 20, 21 and 27.

41. The first opponent contends that the goods for which registration is sought in classes 14, 18 and 24 are similar to those covered by its earlier marks. I can see no justification for this contention. The test laid down in the *Canon* case requires consideration of the nature of the goods, their end users, their methods of use and whether they are in competition or are complementary. With this test in mind I consider the goods in these classes to be markedly dissimilar to anything covered by the first opponent's registrations.

42. Finally, the first opponent contends that the goods for which registration is sought in classes 16 and 25 are identical to those covered by its earlier marks. All of the goods covered by the application in class 16 are included within the terms printed matter and stationery which are themselves included in the opponent's registration. Similarly, all of the goods covered by the application in class 25 are included within the terms specified in the opponent's registration in this class. I therefore find that identical goods are involved in respect of the goods in classes 16 and 25.

Comparison of marks

43. Each of the first opponent's marks consist of the same words Mr and Mrs, each presented in a slightly different way. The difference is in the use of upper and lower case letters within the mark and, in one case, the replacement of the word "and" by an ampersand. Despite these very minor differences, each of the first opponent's marks are for the words "Mr and Mrs".

44. The applicant's marks contain the words "Mr and Mrs". However, the applicant's marks are not merely the words "Mr and Mrs". The marks consist of the words "Mr and Mrs House", these words being placed under a device of two somewhat fanciful houses. Each of the houses are standing on what appear to be legs and each right hand house in each mark has a somewhat unusual roof shape which resembles a hair style having flicked-up ends. Five of the marks in the series also claim colour as applied to the door and roof of the houses. Although there is some similarity in that the words "Mr and Mrs" appear in both the applicant's and opponent's marks, the additional elements within the applicant's marks make the respective marks visually very different.

45. Aurally, similar considerations apply. Whilst each of the respective marks contain the words "Mr and Mrs", the applicant's marks have the additional word "House". Whilst the titles "Mr and Mrs" are in everyday use, the addition of the word "House", which is a distinctive element, makes the applicant's mark aurally different.

46. Conceptually, the opponent's marks bring to mind an unnamed, married, man and wife couple. The applicant's mark brings to mind a cartoon couple known as Mr and Mrs House. This conceptual interpretation is emphasised by the presence of the stylised device of the two houses.

47. It is, of course, possible to overanalyse marks and in doing so shift away from the real test which is how marks would be perceived by customers in the normal course of trade. I also have to take account of the fact that the public rarely compares trade marks side by side.

48. The relevant date for the purposes of this decision under Section 5(2)(b) is 14 December 2002, the date the application in suit was filed. As I determined in paragraphs 31 and 32 above, I am unable to say that at the relevant date the first opponent's marks had any enhanced distinctiveness because of the use made of them. The words Mr and Mrs are everyday words in common use but, that said, it seems to me that the marks possess a degree of distinctiveness in respect of the goods for which they are registered.

49. The goods for which registration is sought are varied but they are all items bought by the public at large. Whilst some of the goods are everyday items, e.g. greetings cards, others are items that a particular purchaser would not buy that often e.g. garden furniture. That said, it seems to me that all of the goods covered by the application are such as would be selected and purchased only after some degree of deliberation.

50. On a global appreciation and taking all relevant factors into account, I find that whilst there is some similarity between the respective marks, in that each consist of or contain the words Mr and Mrs, there are significant differences between them. These differences outweigh the similarities with the result that the respective marks are not sufficiently similar to give rise to a likelihood of confusion even taking into account imperfect recollection and the identity of some of the respective goods. Consequently, I find that there is no likelihood of confusion in relation to any of the goods against which opposition was filed. The opposition under section 5(2)(b) of the Act therefore fails.

51. It follows that the opposition has failed on all grounds.

Costs

52. The applicant having been successful is entitled to an award of costs in his favour. I take into account that this decision was made without a hearing taking place. I order the opponents to pay the applicant the sum of £1200. This sum is to 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 8th day of April 2004

A CORBETT

**For the Registrar
The Comptroller-General**