

O-0949-23

**TRADE MARKS ACT 1994**  
**IN THE MATTER OF**  
**TRADE MARK APPLICATION NO. 3823413**  
**BY MR. SARFRAZ MUNEER**  
**TO REGISTER**

**Ebung**

**AS A TRADE MARK IN CLASS 20**

**AND**

**THE FAST TRACK OPPOSITION THERETO**  
**UNDER NO. 600002627**  
**BY M&A STYLES LTD**

## Background and pleadings

1. On 24 August 2022, Sarfraz Muneer (“the applicant”) applied to register the trade mark shown on the cover page of this decision.
2. The application was published for opposition purposes on 11 November 2022 for the following goods:

Class 20 Cushions (upholstery); Foam mattresses; Foam camping mattresses; Memory foam pillows. Bed Mattresses, Toppers, ; Beds (Hospital -); Feather beds; Dog beds; Wooden beds; Cat beds; Water beds; Hospital beds; Beach beds; Infant beds; Portable beds; Bed slats; Bed mattresses; Chair beds; Bed rails; Sofa beds; Camp beds; Foldaway beds; Bed chairs; Divan beds; Bed heads; Bed-settees; Adjustable beds; Bunk beds; Children's beds; Folding beds; Bed bases; Transportable beds; Bed frames; Bedding for cots [other than bed linen]; Beds, bedding, mattresses, pillows and cushions; Beds of wood; Air bed lounge; Bedding, except linen; Beds for birds; Portable infant beds; Beds for animals; Bean bag beds; Beds for pets; Rods for beds; Furniture incorporating beds; Inflatable pet beds; Beds incorporating divan bases; Bed frames of metal; Bedding for nursery cots [other than bed linen]; Portable beds for pets; Beds made of wood; Beds for household pets; Frames for bed canopies; Non-metal bed fittings; Animal housing and beds; Slatted bases for beds; Bed casters, not of metal; Furniture being convertible into beds; Beach beds incorporating wind shields; Bed fittings, not of metal; Fittings, not of metal (Bed -). Wedge, Pillow, Neck Pillow, Leg Pillow, Leg Elevating Pillow, Foam Wedges.

3. M&A Styles Ltd (“the opponent”) filed an amended notice of opposition under the fast-track opposition procedure on 11 November 2022. The opposition, which is based upon sections 5(1), 5(2)(a) and 5(2)(b) of the Trade Marks Act

1994 (“the Act”), is directed against all of the goods in the application. The opponent relies upon all the goods covered by the following UK trade mark:

Mark: Ebung

UK registration no. 3762393

Filing date: 6 March 2022

Registration date: 27 May 2022

Goods:

Class 24: Upholstery materials; Upholstery fabrics; Materials for upholstery; Textiles for upholstery; Fireproof upholstery fabrics; Tensioning webbing for upholstery; Tensioning fabrics for upholstery; Furnishing and upholstery fabrics.

4. Given its filing date, the above mark constitutes an earlier mark in accordance with section 6 of the Act. As this trade mark had not completed its registration process more than five years before the application date of the opposed application, it is not subject to the proof of use provisions under section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods it has identified.
5. The opponent argues that the marks and the goods are identical or similar.
6. The applicant filed a counterstatement denying the grounds of opposition.
7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008 but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit”.
8. The effect of the above is to require parties to seek permission in order to file evidence (other than the proof of use evidence which is filed with the notice of

opposition) in fast track oppositions. No permission was sought in respect of these proceedings.

9. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary. Additionally, other than filing their respective pleadings neither party filed written submissions.
10. The applicant is unrepresented and the opponent is represented by Mr Mobeen Farooq.
11. 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 upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

## **DECISION**

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

12. The opposition is based upon sections 5(1), 5(2)(a) and 5(2)(b) of the Act, which read as follows:

“5. (1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

(2) A trade mark shall not be registered if because—

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion of the part of the public, which includes the likelihood of association with the earlier trade mark”.

### **Sections 5(1) and 5(2)(a)**

13. In *S.A. Société LTJ Diffusion v Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union (“CJEU”) held, that:

“54 [...] a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer”.

14. In this instance, both marks are the identical words ‘Ebung’. There are no modifications or additions made to the earlier word mark and I accept that the marks are, therefore, identical for the purposes of sections 5(1) and 5(2)(a) of the Act.

15. Section 5(2)(b) of the Act applies only in cases where the conflicting marks are similar. As I have found that the marks are identical, the opposition under section 5(2)(b) fails. The opposition will now proceed under sections 5(1) and 5(2)(a).

## Comparison of goods

16. I will now proceed to analyse the identity or similarity between the conflicting goods.

17. In *Gérard Meric v OHIM*, the General Court held that 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 - and vice versa.<sup>1</sup>

18. When making the comparison, all relevant factors relating to the goods and services in the specification should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*, the CJEU stated at paragraph 23 of its 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 intended purpose and their method of use and whether they are in competition with each other or are complementary”.

19. The competing goods are as follows:

Opponent's goods	Applicants' goods
Class 24 Upholstery materials; Upholstery fabrics; Materials for upholstery; Textiles for upholstery; Fireproof	Class 20 Cushions (upholstery); Foam mattresses; Foam camping mattresses; Memory foam pillows. Bed Mattresses,

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<sup>1</sup> case T-133/05

<p>upholstery fabrics; Tensioning webbing for upholstery; Tensioning fabrics for upholstery; Furnishing and upholstery fabrics.</p>	<p>Toppers, Beds (Hospital -); Feather beds; Dog beds; Wooden beds; Cat beds ;Water beds; Hospital beds; Beach beds; Infant beds; Portable beds; Bed slats; Bed mattresses; Chair beds; Bed rails; Sofa beds; Camp beds; Foldaway beds; Bed chairs; Divan beds; Bed heads; Bed-settees; Adjustable beds; Bunk beds; Children's beds; Folding beds; Bed bases; Transportable beds; Bed frames; Bedding for cots [other than bed linen]; Beds, bedding, mattresses, pillows and cushions; Beds of wood; Air bed lounge; Bedding, except linen; Beds for birds; Portable infant beds; Beds for animals; Bean bag beds; Beds for pets; Rods for beds; Furniture incorporating beds; Inflatable pet beds; Beds incorporating divan bases; Bed frames of metal; Bedding for nursery cots [other than bed linen]; Portable beds for pets; Beds made of wood; Beds for household pets; Frames for bed canopies; Non-metal bed fittings; Animal housing and beds; Slatted bases for beds; Bed casters, not of metal; Furniture being convertible into beds; Beach beds incorporating wind shields; Bed fittings, not of metal; Fittings, not of metal (Bed -). Wedge, Pillow, Neck Pillow, Leg Pillow, Leg Elevating Pillow, Foam Wedges.</p>
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20. The applicant submits that:

“We disagree with the opponent as we got nothing to do with his trade mark, he registered his trade mark in Class 24, which is mostly for Upholstery products only. Whereas our trade mark is for Class 20, its for the products made of foam, ie., mattresses, pillows, wedges, etc, etc.”<sup>2</sup>

21. While I note that the conflicting goods fall within two different Classes, namely Class 20 and 24, goods within different classes may be found to be similar based on the relevant factors considered in *Canon* case discussed earlier in the decision. Bearing that in mind, I will now compare the applicant’s goods with the opponent’s goods.

#### Cushions (upholstery)

22. The above-mentioned goods cover padded chair cushions used for upholstering. The term ‘upholstery materials’ in the opponent’s specification include fabrics used to cover padded furniture cushions. The conflicting goods are, therefore, likely to coincide in channels of trade and users. Fabrics for cushions are important to protect cushions and the average consumer is likely to think that cushions and their coverings are the responsibility of the same undertaking. The conflicting goods are, therefore, complementary in the sense described by the case law. The goods, however, do not compete. Their nature, purpose and method of use are also different. Considering these factors, I find that the applicant’s cushions (upholstery) are similar to the opponent’s upholstery materials to a medium degree.

Memory foam pillows; pillows and cushions; Wedge, Pillow, Neck Pillow, Leg Pillow, Leg Elevating Pillow, Foam Wedges; Foam mattresses; Foam camping mattresses; Bed Mattresses; mattresses; Bedding for cots [other than bed linen]; Bedding; Bedding, except linen; Bedding for nursery cots [other than bed linen]; Toppers

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<sup>2</sup> The counterstatement.

23. The term 'furnishing fabrics' in the opponent's specification is a broad term and to my understanding, it encompasses a large variety of furnishing textile items such as pillow and mattress covers that are used to protect and/or beautify furnishings such as cushions, pillows, and mattresses in the applicant's specification. The conflicting goods are likely to be sold through the same distribution channels and coincide in users. The goods, however, differ in nature, purpose and method of use. The goods are complementary in the sense described by the case law. The goods, however, do not compete. Considering these factors, I find that the goods are similar to a medium degree.

Beds (Hospital -); Feather beds; Wooden beds; Water beds; Hospital beds; Beach beds; Portable beds; Chair beds; Sofa beds; Camp beds; Bed-settees; Foldaway beds; Divan beds; Adjustable beds; Bunk beds; Children's beds; Folding beds; Transportable beds; Portable infant beds; Bean bag beds; Furniture incorporating beds; Beds incorporating divan bases; Beds made of wood; Beach beds incorporating wind shields; Beds of wood; Bed chairs; Furniture being convertible into beds; Air bed lounge

24. The applicant's goods mentioned above are various types of beds. The opponent's furnishing fabrics, could include things such as mattress covers, cushion covers and fabrics for bed chairs, consequently they would share channels of trade and users with the applicant's goods. The goods are neither competitive nor complementary. The nature, purpose and method of use of the conflicting goods also differ from each other. Considering these factors, I find that the goods are similar to a low degree.

Bed heads; Bed frames; Bed frames of metal; Frames for bed canopies; Non-metal bed fittings; Slatted bases for beds; Bed casters, not of metal; Bed fittings, not of metal; Fittings, not of metal (Bed -); Bed slats; Bed frames; Bed bases; Bed rails; Rods for beds

25. The goods listed above are parts and fittings of beds. The nature, purpose and method of use of the above-mentioned goods differ from the opponent's furnishing and upholstery fabrics. However, both categories of goods are likely

to be sold through the same distribution channels and coincide with users. Considering these factors, I find that the conflicting goods are similar to a low degree.

Dog beds; Cat beds; Beds for birds; Beds for animals; Beds for pets; Inflatable pet beds; Portable beds for pets; Beds for household pets; Animal housing and beds

26. The above-mentioned goods are specifically aimed at pets, and are also sold alongside beds and furniture in retail shops. The goods are generally made of same materials and have the same purpose although one is aimed at humans while the other at pets. The goods are neither complementary nor do they compete. Considering these factors, I find that the applicant's goods are similar to a low degree to the opponent's goods.

27. In order to succeed in a claim based on section 5(1), the conflicting goods must be identical. As I have not found identity between the conflicting goods, the opposition under section 5(1) fails. The opposition only proceeds under section 5(2)(a).

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

28. It is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which these goods are likely to be selected by the average consumer.

29. 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”.

30. I consider that the average consumer of the competing goods is a member of the general public and professionals. When selecting the goods, the average consumer in both categories is likely to pay attention to customer reviews, delivery times, reliability of the retailer and the specialised nature of the goods, such as hospital beds and their price. The degree of attention paid by the general public is likely to be medium, while those of the professionals is likely to be between medium and high. The providers will be selected through perusal of websites, brochures, advertisements or visiting traditional outlets. So, the visual aspect will be the most important element in the selection, although I must also consider aural aspects in the form, for example of word-of-mouth recommendations.

### **Distinctiveness of the earlier mark**

31. The distinctive character of the earlier mark must be considered. The more distinctive it is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). 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).”

32. As the opponent filed no evidence, I have only the inherent position to consider. The earlier mark is a word-only mark for ‘Ebung’. The word appears to be inventive and is not suggestive of any characteristics of the opponent’s goods. I, therefore, conclude that the earlier mark has a high degree of inherent distinctive character.

### **Likelihood of confusion**

33. A likelihood of confusion is made on a global assessment of all factors relevant to the circumstances of the case (*Sabel* at [22]). It is necessary for me to factor in the distinctive character of the earlier trade mark, as the more distinctive this trade mark is the greater the likelihood of confusion (*Sabel* at [24]). I must also have regard to the interdependency principle i.e. a higher degree of similarity between the respective trade marks may be offset by a lesser degree of similarity between the respective goods and vice versa (*Canon* at [17]). I must also keep in mind the average consumer for the goods, the nature of the purchasing process and that the average consumer rarely has an opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

34. Confusion can be direct (which occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/goods down to the responsible undertaking being the same or related).

35. Earlier in this decision, I concluded:

- That the contested goods are similar to varying degrees;
- That the goods will be selected primarily by visual means, with a varying degree of attention;
- That the marks are identical;
- That the opponent's mark is inherently distinctive to a high degree.

36. I am of the view that the identity between the marks and the similarity between the goods is likely to lead to direct confusion. The average consumer who pays a medium degree of attention is likely to mistake the opponent's mark for the applicant's mark and /or vice versa and think that the goods originate from a single or related undertaking. Even where the goods are similar only to a low degree, when factoring in the identity between the marks, I am satisfied that the consumer is likely to mistake one mark for the other. Confusion is still likely where the consumer pays a degree of attention that is between medium and high. In the absence of any difference to distinguish between the marks, the consumer is likely to think that goods are the responsibility of the same undertaking.

## **Conclusion**

37. The opposition has succeeded.

38. The application will be refused in its entirety, namely:

Cushions (upholstery); memory foam pillows; pillows and cushions; wedge, pillow, neck pillow, leg pillow, leg elevating pillow, foam wedges; foam mattresses; foam camping mattresses; bed mattresses; mattresses; bedding

for cots [other than bed linen]; bedding; bedding, except linen; bedding for nursery cots [other than bed linen]; toppers; beds (hospital -); feather beds; wooden beds; water beds; hospital beds; beach beds; portable beds; chair beds; sofa beds; camp beds; foldaway beds; divan beds; adjustable beds; bunk beds; children's beds; folding beds; transportable beds; portable infant beds; bean bag beds; furniture incorporating beds; beds incorporating divan bases; beds made of wood; beach beds incorporating wind shields; beds of wood; bed chairs; furniture being convertible into beds; air bed lounge; bed heads; bed-settees; bed frames; bed frames of metal; frames for bed canopies; non-metal bed fittings; slatted bases for beds; bed casters, not of metal; bed fittings, not of metal; fittings, not of metal (bed -); bed slats; bed frames; bed bases; bed rails; rods for bed; dog beds; cat beds; beds for birds; beds for animals; beds for pets; inflatable pet beds; portable beds for pets; beds for household pets; animal housing and beds

## Costs

39. The opponent has been successful and is entitled to an award of costs. Under cover of a letter dated 26 May 2023, the opponent was sent a costs proforma which the opponent was directed to complete and return by 26 June 2023 if the opponent intended to request an award of costs.<sup>3</sup> The opponent was advised that The Litigants in Person (Costs and Expenses) Act 1975 (as amended) sets the minimum level of compensation for litigants in person in Court proceedings at £19.00 an hour. The opponent returned the cost proforma on 8 June 2023 in which it claims that the opponent incurred £100 in costs. Although no breakdown of the time spent in these proceedings has been provided, I think £100 is reasonable when considering the likely amount of time spent on filing a

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<sup>3</sup> On Form TM7, Mr Farooq claims to be the opponent's representative. From Form TM7, it appears that the opponent company and Mr Farooq share the same address. In the cost proforma filed on 8 June 2023, Mr Farooq claims to be the opponent. Although it is not clear the exact relationship between Mr Farooq and the opponent company, if Mr Farooq claims to be the opponent, I think it might be a case that Mr Farooq could be running the opponent company and hence would have filed the opposition on behalf of the company. I am prepared to give the opponent the benefit of the doubt and consider the opponent as a litigant in person for the purpose of these proceedings.

notice of opposition and considering the counterstatement. I also note that the official fee for filing a notice of fast-track opposition is £100. I, therefore, award the opponent £200 as a contribution towards the cost of the proceedings.

40. I order Mr. Sarfraz Muneer to pay M&A Styles Ltd the sum of £200. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 4<sup>th</sup> day of October 2023**

**Karol Thomas  
For the Registrar  
The Comptroller-General**