

O/0989/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003738858

BY RAW CULTURE APS

FOR THE FOLLOWING TRADE MARK:

RAW CULTURE

IN CLASSES 29, 30, 31, 32 AND 33

AND IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 432311

BY RAW CULTURE LIMITED

BACKGROUND AND PLEADINGS

1. On 3 January 2022, Raw Culture ApS (“the applicant”) applied to register the trade mark shown on the cover page of this decision, in the UK. The trade mark was published for opposition purposes on 4 March 2022 and registration is sought for the goods set out in the Annex to this decision.

2. On 30 March 2022, the application was opposed by Raw Culture Limited (“the opponent”) based upon section 5(4)(a) of the Trade Marks Act 1994 (“the Act”). The opponent claims to have used the sign **Raw Culture** throughout the UK since February 2020 in relation to “kombucha, fermented tea, soft drinks”. The opponent claims that use of the applicant’s mark would be contrary to the law of passing off.

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

4. The opponent is unrepresented, and the applicant is represented by Patrade Legal.

5. Only the opponent filed evidence during the evidence rounds. Neither party requested a hearing, and neither filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

EVIDENCE

6. The opponent filed evidence in the form of the witness statement of Christopher James Geary dated 3 January 2023, which is accompanied by 27 exhibits. Mr Geary is the Managing Director and owner of the opponent. His evidence addresses the opponent’s trade under the sign relied upon.

7. I note that the applicant’s counterstatement was accompanied by 9 documents (Appendixes 1 – 9). Although not provided under cover of a witness statement, as these documents were filed with the counterstatement, which is itself accompanied by

a statement of truth, I will also consider these documents as evidence in the proceedings.

8. I have taken the evidence into consideration in reaching my decision and will refer to it below, where necessary.

RELEVANCE OF EU LAW

9. 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. This is why this decision continues to make reference to the trade mark case-law of EU courts.

PRELIMINARY ISSUE

10. In his evidence, Mr Geary states as follows:

“18. With regard to the Raw Culture Ltd trademark – in the early days my company was a small, self-funded start up business. We had very limited cash flow and the focus was on building demand and production to get money in the bank to allow the business to grow. We had checked and therefore knew the trademark for Raw Culture was available as this was a high priority for us. I attempted to register Raw Culture Ltd on the 20th of January 2022 to find that a newly started company in Denmark had filed for it just 17 days before on the 03rd of January.

19. I have researched Raw Culture Aps (Denmark) and have established that their company is not as well developed as Raw Culture Ltd. [...]”

11. Mr Geary then goes on to give more detail about the developmental stages of the two parties. Whilst I sympathise with the circumstances in which the opponent finds itself, priority for trade marks is based upon their filing date. Consequently, as the applicant filed its trade mark before the opponent attempted to file a trade mark, even

if only a short time before, it is the applicant's mark which takes priority (notwithstanding the fact that the opponent's business in the UK might be more advanced than the applicant's). Of course, if the opponent is able to establish an earlier right upon which it can successfully base an opposition, then the application will be refused. However, if the opponent is unable to do so, then the developmental stage of the parties' respective businesses will not be of assistance to it in these proceedings.

DECISION

12. Section 5(4)(a) of the Act states as follows:

“5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

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

aa)...

b) ...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark”.

13. Subsection (4A) of section 5 of the Act states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

14. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a Deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

Relevant date

15. Whether there has been passing off must be judged at a particular point (or points) in time. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander Q.C., sitting as the Appointed Person, considered the relevant date for the purposes of s.5(4)(a) of the Act and stated as follows:

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

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

the position would have been any different at the later date when the application was made.”

16. The applicant has filed evidence to demonstrate that it started using its mark prior to the application date.¹ However, these documents relate to a website with the domain name rawculture.dk. This is not a UK domain name. Consequently, the applicant has not demonstrated any use of its mark in the UK prior to the application date. As the UK is the relevant jurisdiction, there is no evidence before me to establish an earlier relevant date. I have only the prima facie relevant date to consider, which is the date of the application for the contested mark i.e. 3 January 2022.

Goodwill

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

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

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

“27. There is one major problem in assessing a passing of claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the

¹ Appendix 8-9

enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX) (1946) 63 R.P.C. 97* as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

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

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

20. Mr Geary gives evidence that activities were taking place during 2020 relating to the commencement of the business. For example, the opponent was registered at Companies House in Scotland on 26 February 2020, a domain name was purchased on 27 February 2020 and the product recipe was finalised on 19 March 2020.² The

² Exhibits CG_01 and CG_03

launch was delayed due to the Covid pandemic, but social media activity was taking place (for example, the first social media post was made on 2 April 2020).³

21. Mr Geary confirms that the first commercial production batch of the opponent's kombucha product was bottled ready for sale on 22 August 2020.⁴ By October 2020, the opponent had built its own micro-brewery due to the increased popularity of its product, but subsequently outgrew that facility and had to move into a commercial property, which it did in April 2021. No information is provided about the output capacity of either of these premises, to enable me to assess the extent of the trade that might have been taking place at this time. The first online sales were made on 25 March 2021 and, due to the easing of Covid restrictions, the opponent began promoting its products at various markets in the Northeast of Scotland. I note that in September 2021, an article in *The Press and Journal* referred to the launch of Raw Culture.⁵ However, the other articles referred to by the opponent are dated after the relevant date.

22. I note that the opponent's goods have been distributed by wholesalers, but this was after the relevant date (February, March and April 2022, respectively).⁶ Mr Geary also confirms that various events have been attended to promote the product such as the Speciality Fine Food Fayre in London.⁷ However, he confirms that these took place "[o]ver the last 12 months" i.e. the 12 months prior to his witness statement which was dated 3 January 2023. This dates these events as after the relevant date. The opponent has also won awards; those dated 2023 are clearly after the relevant date. However, even those dated 2022 are most likely to have been awarded after the relevant date (given how early in the year the relevant date falls). Nonetheless, I recognise that some trade must have taken place up to these awards being made in order for the business to have received recognition in this way. Similarly, I note Mr Geary's evidence that the opponent "currently supply 73 retail and hospitality outlets directly". That information was given as at the date of Mr Geary's statement (one year after the relevant date). Again, whilst undoubtedly there would have been a build up

³ Exhibit CG_06

⁴ Exhibit CG_08

⁵ Exhibit CG_019

⁶ Exhibits CG_011 to CG_013

⁷ Exhibit CG_14

of such a supply over time, no information is given as to when these businesses began placing orders with the opponent or on what scale.

23. The burden of proving a protectable goodwill is on the opponent. Clearly, the opponent had been trading by the relevant date. However, I have very limited evidence before me to enable me to assess the extent of the use in the UK at the relevant date. Presumably the opponent's business has built up over the period of time between 22 August 2020 (when the first batch of product was ready for sale) and 3 January 2023 (when Mr Geary gave his evidence). However, how much of that trade was built up by the relevant date? I simply do not know based upon the evidence I have before me. I also bear in mind that I have no information regarding overall advertising and marketing expenditure.

24. I bear in mind that small businesses may still be protected by the law of passing off. However, the law of passing off does not protect a goodwill of trivial extent.⁸ As Mr Thomas Mitcheson Q.C., sitting as the Appointed Person, concluded in *Smart Planet Technologies, Inc. v Rajinda Sharma*:⁹

“...a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon.”

25. This is all the more so in a case, such as this one, where the sign relied upon is of below average distinctiveness. In this regard, the applicant submits as follows:

“First, as for kombucha, the sign “Raw Culture” is balancing on the line of descriptiveness. According to Wikipedia, kombucha is produced using a “symbiotic culture of bacteria and yeast” [...]. In essence, the one ingredient necessary for making kombucha, is the bacteria or yeast culture. Together with the fact that this culture is not prepared in any fashion, it can reasonably be

⁸ *Hart v Relentless Records* [2002] EWHC 1984 (Ch)

⁹ BL O/304/20

described as “raw”. Therefore, the distinctiveness of “Raw Culture” is below average, only making it “across the distinctiveness line” due to the wordplay resulting from the combination of the two words.”

26. This accords with my own understanding of the opponent’s product, kombucha, and the definitions that I have found in Collins Dictionary.¹⁰ The sign relied upon is allusive, at best, resulting in below average distinctiveness. Bearing this in mind, as well as the deficiencies in the opponent’s evidence, I am unable to find, on the balance of probabilities, that the opponent had established a more-than-trivial level of goodwill under the Raw Culture sign in the UK at the relevant date.

CONCLUSION

27. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

28. As the applicant has been successful it 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 applicant the sum of **£650**, calculated as follows:

Considering the Notice of opposition and preparing a counterstatement	£300
Considering the opponent’s evidence	£350
Total	£650

¹⁰ <https://www.collinsdictionary.com/dictionary/english/kombucha> and <https://www.collinsdictionary.com/dictionary/english/culture>

29. I therefore order Raw Culture Limited to pay Raw Culture ApS the sum of £650. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 24th day of October 2023

S WILSON

For the Registrar

ANNEX

Class 29

Meat, fish, not live, poultry and game, not live; Meat extracts; Preserved, frozen, fried and prepared fruits and vegetables; Jellies, jams, compotes; Eggs; Milk, cheese, butter, yoghurt and other milk products; Edible oils and fats.

Class 30

Coffee, teas, cocoa and coffee substitutes; Rice, pasta and noodles; Flour and cereal preparations; Bread, cakes and confectionery; Chocolate; Ice cream, Sherbets [ices] and other edible ices; Sugar, honey, treacle; Yeast, Baking powder; Salts, seasonings, dried and preserved herbs; Vinegar, Sauces [condiments]; Kombucha.

Class 31

Raw and unprocessed grains, seeds and agricultural seeds; Fresh fruits and vegetables, fresh herbs; Onions, cereal seeds and seeds for planting; Animal foodstuffs and beverages for pets; Malt.

Class 32

Beer; Non-alcoholic beverages; Mineral and aerated waters; Fruit juice beverages; Syrups and other non-alcoholic preparations for making beverages.

Class 33

Alcoholic beverages (except beer); Alcoholic preparations for making beverages.