

O-279-11

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 2471691  
BY  
IMRAN SARDAR  
TO REGISTER THE TRADE MARK**

**BAD BYZ**

**IN CLASS 25**

**AND**

**AND IN THE MATTER OF OPPOSITION THERETO  
UNDER NO 96602  
BY  
PLATYPUS WEAR INC.**

**Trade Marks Act 1994**  
**IN THE MATTER OF application 2471691**  
**By Imran Sardar**  
**To register the trade mark**  
**BAD BYZ**  
**In Class 25**  
**AND IN THE MATTER OF opposition thereto**  
**Under no. 96602**  
**By Platypus Wear Inc.**

## **BACKGROUND**

1. On 23 October 2007, Imran Sardar applied to register the above mark for goods in Class 25 of the Nice Classification System.<sup>1</sup> The goods are as follows:

*Clothing; headgear; footwear*

2. The application was published, on 21 December 2007, in the Trade Marks Journal.

3. On 12 March 2008, Platypus Wear Inc. (hereafter 'Platypus') filed a notice of opposition, claiming that registration would be contrary to section 5(2)(b) of the Trade Marks Act 1994 ("the Act").

4. The opposition is directed at all of Mr Sardar's goods. Platypus relies on its earlier UK trade mark detailed below:

<b>Mark details and relevant dates</b>	<b>Goods relied upon</b>
2572396 BAD BOY Date of application: 28 February 2005	Class 25 Articles of clothing; footwear; headgear

5. Platypus's mark was originally applied for, on 28 February 2005, as a Community Trademark (CTM4314845) and is currently subject to a request for conversion to a UK National mark. Since it is pending it does not qualify as an earlier right (as defined by section 6 of the Act) at this stage. Therefore, if I am to find for the

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<sup>1</sup> International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

opponent my decision will be provisional pending the outcome of the procedure relating to the earlier mark's registration.

6. Both sides filed evidence in these proceedings and written submissions in lieu of a hearing. Both are content for a decision to be made from the papers on file.

### **Opponent's evidence**

7. Platypus's evidence consists of a witness statement, dated 24 September 2008, in the name of Imogen Wiseman, a trade mark attorney and partner of FJ Cleveland, acting on its behalf.

8. Exhibited at Annex A, Ms. Wiseman provides a copy of the Registry's practice on text messaging abbreviations from paragraph 26.3 of chapter 3 of the work manual. In particular she highlights the section which states:

*"with the advent of sending text messages via mobile phones, a virtually completely new language has evolved, centred around using abbreviations rather than full words".*

The practice advises that where a trade mark application contains an abbreviation of the type found in a text message it will be open to objection where the equivalent full word/words would be objectionable.

9. Ms Wiseman states that between 1 and 19 September 2008 a number of internet searches were undertaken. In an attempt to demonstrate the use of the letter 'Z' in place of the letter 'S', Platypus's evidence exhibited at Annex B consists of the results of a search for 'BOYZ' on the websites 'www.urbandictionary.com', 'www.odps.org' and 'www.rapdict.org'. All of these websites are user authored. The results include numerous definitions and references to the term 'BOYZ' the first two of which are '*young males*' and '*gay males, usually young gays*'. Results from rapdict.org include a list of rap artists whose name incorporates the term 'BOYZ' in place of 'BOYS', such as 'Markham Boyz' and 'White Boyz'.

10. Exhibit Annex C contains results of internet searches relating to slang languages. Specifically, the searches concentrate on words with vowels omitted and plurals where the letter 'Z' is used in place of the letter 'S'. In her witness statement Ms Wiseman highlights the '*abbreviations which are particularly pertinent*', which include, inter alia, Pls/Plz for 'Please', Gd for 'Good' and Wkd for 'Wicked', all taken from the website [www.urbandictionary.com](http://www.urbandictionary.com).

11. The results of a further search conducted using *Microsoft's* search engine, *Live Search*, are exhibited at Annex D. The particular search terms used were 'bad' + 'byz' + 'clothing'; 'bad' + 'byz' + 'clothes' and 'bad' + 'byz' + 'brand'. These searches returned the alternate suggestion '*were you looking for: bad boyz clothing.*' Exhibited at Annex E are the results of same search terms using the *Google* search engine with the same replacement suggested in the returned results.

12. Annex F shows the results of searches for the phrase 'BAD BYZ clothing' conducted on *Ebay* which consists of a list of seven items sold by one seller. Each is titled 'BNWT BAD BYZ BIGGIE BIG 2PAC TUPAC LEGACY TSHIRT' followed by the size. However, Ms Wiseman draws attention to the fact that the sizes are listed in abbreviated form following the standard convention of missing out vowels, e.g. LGE for Large.

13. Annex I is the feedback profile of another *Ebay* seller. Included in the list of products sold are items of clothing described as B6 BAD BYZ or BAD BYZ. Annex J is the result of a search of 'www.urbandictionary.com' for the term B6. In her witness statement, Ms. Wiseman summarised these results by stating:

*"...B6 is the slang term for 'Borough Six' and relates to a group of Long Island rappers. BAD BYZ is promoted in this instance as a slang version of the phrase BAD BOYZ, the entire mark meaning Borough Six Bad Boyz."*

### **Applicant's evidence**

14. Mr Sardar's evidence consists of a witness statement in which he states that the brand is not associated with 'boy' or 'boys'. The reason given is that it is also marketed to female customers. Exhibited at Annex A is a series of photographs showing tracksuits which all feature the colours pink, white and light grey and the words 'B6', 'Bad' and 'Byz' either on the chest or the back pocket of the trousers. Annex C consists of the results of an internet search carried out on the user authored site [www.urbandictionary.com](http://www.urbandictionary.com), dated 21 April 2009, using the terms 'bad' + 'byz' and 'byz'. The exhibit shows a print of an internet page, from the aforementioned website, on which the message reads '*bad byz isn't defined yet.*'

15. The Sadar also makes a number of submissions that I will not detail here, but that I will bear in mind.

### **Opponent's evidence in reply**

15. This consists of a further witness statement by Ms Wiseman in which she states that the further evidence is intended to reply to Mr Sardar's assertion that pink, white and light grey are 'ladies' colours' and that "*clothing marketed at the female consumer would not bear the word BOY*". Exhibit IW1A contains numerous internet searches conducted on websites including those of the brands *Thomas Pink*, *Joules* and *Republic* that illustrate numerous items of men's clothing available in the aforementioned colours. Exhibit IW1B is a catalogue produced by *Crew Clothing Co.* which includes further examples of men's clothing available in pink, white and/or light grey.

16. Exhibit IW2 is extracted as a result of a *Google* image search for the term BAD BYZ. It shows a dark grey tracksuit bearing the mark BAD BYZ. It is taken from a website which has a domain name in the Czech Republic. It is not clear whether the model is male or female or if this is a representation of the applicant's goods.

17. Exhibit IW3 is made up of a 'representative sample' of a series of internet searches conducted between 30 April 2009 and 10 June 2009 for women's clothing bearing the word BOY. Searches conducted on [www.littlewoods.direct.com](http://www.littlewoods.direct.com) illustrate numerous items of women's clothing branded with *Playboy*. Search results are also submitted showing *Tomboy* surf and skate clothing for women at [www.podunk-design.com](http://www.podunk-design.com). The word 'Tomboy' is in a prominent position on each item of clothing. Results from [www.zazzle.com](http://www.zazzle.com), a t-shirt company, provide examples of t-shirts where the word 'boy' makes up part of a slogan, such as 'I love Swedish Boys' and 'I love Emo Boys'.

## DECISION

18. The opposition is based on section 5(2)(b) of the Trade Marks Act 1994, which states:

*"(2) A trade mark shall not be registered if because –*

*....*

*(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."*

19. The leading authorities pertinent to this ground are from the Court of Justice of the European Union (CJEU), namely: *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, *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 for 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.(hereafter Canon)*;

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: *LIMONCELLO*.

## **Comparison of goods**

20. For ease of reference the respective goods are as follows:

<b>Platypus' goods</b>	<b>Mr Sardar's goods</b>
Articles of clothing; footwear; headgear	Clothing; headgear; footwear

21. Mr Sardar submits that the marks “...*have been marketed, represented and sold in completely different ways and targeted at different consumer groups,*” and concludes that the average consumer and goods are different as a result.

22. This point was addressed by the General Court (GC) in *Sadas SA v OHIM*<sup>2</sup> in which the applicant claimed a difference existed between the goods as a result of differing marketing strategies. The court held:

*“...it is important to reiterate that the comparison between the goods in question is to be made on the basis of the description of the goods set out in the registration of the earlier mark. That description in no way limits the methods by which the goods covered by the earlier mark are likely to be marketed.”*

23. Taking account of this guidance, I must consider notional and fair use across the range of goods listed in the parties' specifications and these are not limited to women's or men's clothing. Therefore, when considering the respective specifications, as they both include essentially the same terms, it follows that the respective goods are identical.

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

24. As the respective goods are identical it follows that the average consumer will be the same, namely clothes buying members of the general public. The average consumer is reasonably well informed and reasonably circumspect and observant, but with a level of attention likely to vary according to the category of goods. The attention paid is likely to vary depending on price and, to some extent, the nature of the goods and the frequency of the purchase. There is a wide range of goods covered by the respective specifications from socks, which may be a fairly frequent, inexpensive purchase but also high end designer clothing, which will be a less frequent and more expensive one. I find support for such a finding from the General Court (GC) in *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined cases T-117/03 to T-119/03 and T-171/03, where it commented:

*“43 It should be noted in this regard that the average consumer's level of attention may vary according to the category of goods or services in question*

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<sup>2</sup> T-346/04 at paragraph 67

*(see, by analogy, Case C-342/97 Lloyd Schuhfabrik Meyer [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trade marks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected.”*

25. I am also mindful of the comments of Mr Simon Thorley, sitting as the Appointed Person, in the *React trade mark case* [2000] R.P.C. 285:

*“There is no evidence to support Ms Clark’s submission that, in the absence of any particular reputation, consumers select clothes by eye rather than by placing orders by word of mouth. Nevertheless, my own experience tells me it is true of most casual shopping. I have not overlooked the fact that catalogues and telephone orders play a significant role in this trade, but in my experience the initial selection of goods is still made by eye and subsequent order usually placed primarily by reference to a catalogue number. I am therefore prepared to accept that a majority of the public rely primarily on visual means to identify the trade origin of clothing, although I would not go so far as to say that aural means of identification are not relied upon.”<sup>3</sup>*

26. Taking account of this guidance it is clear that there is a range of purchasing acts relating to clothing and that this is dependent upon the cost. That said, there is no evidence before me that the average consumer of the respective goods is any more than averagely attentive. As Mr Thorley noted, the purchasing process is primarily a visual one but I do not ignore the aural considerations that may be involved in this case.

### **Comparison of marks**

27. The marks to be compared are:

<b>Platypus’s earlier mark</b>	<b>Mr Sardar’s mark</b>
BAD BOY	BAD BYZ

28. In making a comparison between the marks, I must consider the respective marks’ visual, aural and conceptual similarities with reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant

<sup>3</sup> The GC has continued to identify the importance of visual comparison when considering the purchasing act in respect of clothing (see for example Joined Cases T-117/03 to T-119/03 and T-171/03 *New Look Ltd v OHIM (NLSPOET et al)* [2004] ECR II-3471 at [49]-[50] and Case T-414/05 *NHL Enterprises BV v OHIM (LA KINGS)* [2009] ECR II).

components,<sup>4</sup> but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

### **Distinctive and dominant components**

29. Mr Sardar's mark consists of two three-letter words, the first of which is BAD, the second of which is BYZ, with no emphasis added to either part of the mark. Ms Wiseman submits that the second word will be understood to be an alternative spelling of the word 'BOYS' and that consequently the mark as a whole will be perceived by the average consumer as being an alternative spelling of the phrase 'BAD BOYS'. If this is the case, the mark will hang together with no one element dominating. If, as Mr Sardar submits, the second word of the mark will not be considered, by the average consumer, to represent the word 'BOYS' the level of distinctiveness in the BYZ element of the mark will be elevated as a consequence of the first word of the mark having a clear dictionary meaning which is lacking in the second word. Nevertheless, the first word of the mark informs the average consumer's understanding of the second and it is the mark as a whole which I must consider. This point is dealt with in detail below.<sup>5</sup>

30. Platypus's mark also consists of two three-letter words, the first of which is BAD, followed by the second word, BOY. It hangs together as a complete phrase with no one element being dominant and the distinctiveness lies in the totality of the mark.

### **Visual comparison**

32. The respective marks both begin with the word BAD, which is an obvious point of similarity. Platypus's mark also includes the word BOY and Mr Sardar's has the second word BYZ. Both of these second elements begin with B and consist of three letters which provides a further point of similarity. They differ in that the last two letters of Platypus's mark are 'OY' whereas Mr Sardar's mark has the final two letters 'YZ'. Taking all of these factors into account I conclude that the marks share a reasonably high degree of visual similarity.

### **Aural comparison**

33. Aurally, Platypus's mark consists of the two words/syllables BAD BOY. The marks share the first word/syllable BAD. The second words of the respective marks are spelt differently and Mr Sardar submits that, as a result of this, the marks sound different with the letter "Y" in the word BYZ being pronounced as an "I".

34. It is not clear if it is Mr Sardar's view that the pronunciation of 'I' would be hard, resulting in the word BYZ being pronounced 'BIZ', or whether a softer pronunciation would be used, resulting in the pronunciation 'BUYS'. No evidence has been

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<sup>4</sup> *Sabel v Puma AG*, para. 23

<sup>5</sup> See paragraph 35

submitted on this point. Taking this into the word may be pronounced 'BIZ' or 'BUYS', resulting in the overall mark being pronounced 'BAD-BIZ' or 'BAD-BUYS'. As I will detail later, Ms Wiseman argues that 'BYZ' will be understood as an alternative spelling of the plural word 'BOYS'. If this is correct the respective marks will be, aurally, virtually identical with Mr Sardar's mark being pronounced merely as the plural of Platypus's mark. If this is not the pronunciation attributed by the average consumer and the mark is instead pronounced as "BAD-BIZ" or "BAD-BUYS", the marks will still, nevertheless, share a reasonably high degree of aural similarity.

### Conceptual comparison

35. For a conceptual meaning to be relevant it must be one capable of immediate grasp.<sup>6</sup> Such assessment must, of course, be made from the perspective of the average consumer. The term BAD BOY has a clear dictionary meaning, being defined as: '*a man who does not conform to approved standards of behaviour*'.<sup>7</sup> .As the term is made up of very common English words, the meaning of the combination is likely to be easily understood by the average consumer.

36. Ms Wiseman submits:

*"Platypus has submitted considerable evidence to show that BYZ would be perceived as the word BOYS. We would in particular, point to the following evidence...there is an increased prevalence of abbreviations and shortened misspellings in the English language, which includes the use of "Z" in the place of "S" to denote a plural...words are abbreviated by the omission of vowels, which is clearly the case here in that BYZ is an abbreviation for BOYS..."*

*...Because the contested mark would be perceived by the average consumer as BAD BOYS, Platypus would submit that it is merely the plural version of their mark, and that the respective marks are therefore conceptually highly similar if not identical."*

37. In support of this view Ms Wiseman provides, at the exhibit marked Annex B, examples from several user authored websites of the word 'BOYS' where the 'S' is replaced by a 'Z' resulting in the spelling 'BOYZ'. In his submissions on this point Mr Sardar states:

*"The use of 'Z' is used to denote plural and the Applicant accepts this..."*

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<sup>6</sup> This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r. –I-643; [2006] E.T.M.R. 29.

<sup>7</sup> "bad boy *noun*" *Oxford Dictionary of English*. Edited by Angus Stevenson. Oxford University Press, 2010. *Oxford Reference Online*. Oxford University Press. Intellectual Property Office.

18 July

2011 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t140.e0993508>>

38. In light of this evidence and Mr Sardar's concession, I accept that the letter 'Z' is used interchangeably with the letter 'S' to indicate a plural form.

39. On the matter of abbreviations where vowels are omitted, in further support of her view, Ms Wiseman submitted (at the exhibit marked Annex C) examples from several online dictionaries of words which are commonly abbreviated by omitting vowels. These include, inter alia, 'Plz' for 'Please', 'Thx' for 'Thanks' and 'Gd' for 'Good'. The Registry's practice, exhibited by Ms Wiseman at Annex A, regarding abbreviations suggests that where a mark contains an abbreviation of the type found in a text message, it should be treated in the same way as the ordinary spelling of the word.

41. In order to demonstrate that the word 'BYZ' will be understood to an alternative to "BOYS" or 'BOYZ', Ms Wiseman commented in her witness statement (detailed at paragraph 11 of this decision) that when internet searches for BAD BYZ were carried out, the results included the phrase *'did you mean bad boyz clothing?'*. In an attempt to illustrate the opposite, Mr Sardar points out that the phrase *'bad byz' isn't defined yet'* appears when searches for the term are conducted on one particular website. He argues that this is evidence that the word BYZ does not exist. I do not find the evidence presented on behalf of either party to be particularly persuasive. Search engines of the type evidenced by Ms Wiseman are designed to suggest alternatives, especially where the search term is not a common dictionary word (and there is no evidence before me that BYZ is a common dictionary word). Mr Sardar's comment is in relation to a search carried out using [www.urbandictionary.com](http://www.urbandictionary.com) which is a user authored site, such that the content is entirely dependent on the entries which have been made by the users of the website. Therefore, the mere absence of a definition for BAD BYZ on the website cannot be taken as an indication that it would not be understood by the average consumer.

42. Neither do I find Ms Wiseman's evidence, that BYZ will be perceived as the word BOYS, to be particularly persuasive. I have already commented on the value, to this case, of Internet search engine providing the message "were you looking for bad byz clothing". Other examples presented by Ms Wiseman, such as the items for sale on *Ebay* appear to refer to trade mark use and, as such, fail to support an argument that BAD BYZ or BYZ alone are terms used or understood by the average consumer. Nevertheless, it is fair to say that the average consumer is conditioned to see misspellings and abbreviations, as evidenced by the Registry's practice in respect of text message language. On seeing the mark 'BAD BYZ', the average consumer will be looking for a conceptual hook and it is likely that the mark will be seen as an alternative means of presenting the words 'BAD BOYS'. I therefore concur with Ms Wiseman's conclusions despite the evidence obtained from the internet being unpersuasive. Having concluded this, the conceptual message of both marks is substantially the same, that is, of an individual or group whose behaviour does not conform to approved standards. Taking all of these factors into account, the marks are conceptually virtually identical.

43. In light of finding the marks virtually conceptually identical and that the BYZ element of Mr Sardar's mark will be perceived as being equivalent to the plural of the dictionary word 'BOY', it follows that the marks will also be virtually aurally identical,

being pronounced BAD BOY and BAD BOYS respectively. Taking all of this into account, I find that, when also acknowledging a reasonably high level of visual similarity, that when considering the marks overall, they share a high level of similarity.

### **Distinctive character of the earlier mark**

44. In order to make an overall global assessment of the likelihood of confusion, I must also assess the distinctive character of Platypus's mark. The distinctive character of a mark can be appraised only, first, by reference to the goods in respect of which it has been registered and, secondly, by reference to the way it is perceived by the relevant public.<sup>8</sup> In determining the distinctive character of a trade mark, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings.<sup>9</sup> No evidence of use has been filed by Platypus, so I have only to consider the inherent level of distinctiveness.

43. 'BAD BOY' has a clear dictionary meaning and comprises two commonly understood English words. As such, the mark is not endowed with the highest level of distinctive character. Nevertheless, its meaning neither describes nor alludes to any characteristics of the relevant goods. As a consequence, the mark enjoys a moderate level of inherent distinctive character.

### **Likelihood of confusion**

45. In assessing the likelihood of confusion I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has in kept in his mind.<sup>10</sup> I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods and vice versa.

46. I have found the respective marks to share a reasonably high degree of visual similarity, that aurally and conceptually they are virtually identical. I concluded that this resulted in a high level of similarity overall. I have also identified a moderate level of distinctive character in Platypus's earlier mark. In respect of the goods I have concluded that Mr Sardar's *Clothing; headgear; footwear* are identical to Platypus's goods. I have identified the average consumer, in respect of clothing, as being the public at large and have concluded that the level of attention paid during the purchasing act will vary according to the cost of such goods. I have concluded that the purchasing act will be primarily visual but I do not ignore aural considerations.

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<sup>8</sup> Rewe Zentral AG v OHIM (LITE) [2002] ETMR 91

<sup>9</sup> Windsurfing Chiemsee v Huber and Attenberger Joined Cases C-108/97 and C-109/97 [1999] ETMR 585

<sup>10</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

47. Taking all the above factors into account, and considering the marks as a whole, I conclude that the similarities between the marks are such that if used on goods which are identical, there is a likelihood that consumers will be confused into believing that the respective goods are provided by the same or linked undertaking. Taking account that marks are rarely recalled perfectly, the average consumer is likely to assume that the respective marks are the same. Even if I am wrong in this and the average consumer makes a distinction between the marks this does not necessarily negate a finding of there being a likelihood of confusion. In *Jose Alejhandro SL v OHIM (Budman)*<sup>11</sup> the GC said:

*“It must be observed that it is common in the clothing sector for the same mark to be configured in various different ways according to the type of product which it designates. It is also common for a single clothing manufacturer to use sub-brands (signs that derive from a principal mark and which share with it a common dominant element) in order to distinguish his various lines from one another (women’s, men’s, youth). In such circumstances it is conceivable that the relevant public may regard the clothing designated by the conflicting marks as belonging, admittedly, to two distinct ranges or products but as coming, none the less, from the same undertaking.”*

48. As such, I find that even where the consumer may notice the visual differences between the marks; it is very likely that they will still assume that the goods provided in respect of the two marks will have originated from the same or linked undertaking.

**49. Accordingly, I find that there is a likelihood of confusion and the opposition would succeed in respect of all the goods applied for.**

50. However, as noted in paragraph 5 above, Platypus’s earlier mark was converted from a CTM and is currently pending registration; it does not therefore qualify as an earlier mark within the provisions of s.6 of the Act. However, if it proceeds to registration it will provide the necessary earlier right in these proceedings. As a consequence, this decision is a provisional one and I will issue a further supplementary decision when the outcome of the earlier mark’s registration procedure is finally determined. I will consider the issue of an award of costs at that time and also set the date from which any appeal period will run.

**Dated this 10 day of August 2011**

**Ms AI Skilton  
For the Registrar**

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<sup>11</sup> [2004] E.T.M.R. 15, paragraph 57