

IN THE MATTER OF THE TRADE MARKS ACT 1994

**IN THE MATTER OF UK TRADE MARK APPLICATION NOS. 2534630 AND 2539350 BY
SLUMBERSOUND IN THE NAME OF SLUMBERSOUND BEDS LTD**

**IN THE MATTER OF OPPOSITION NOS. 100431 AND 100573 BY
MR SHAREZ HUSSAIN**

**AND IN THE CONSOLIDATED MATTER OF APPLICATION NO. 2532070 BY MR SHAREZ
HUSSAIN TO REGISTER THE SERIES OF TWO TRADE MARKS SLUMBERSOUND / SLUMBER
SOUND**

AND IN THE MATTER OF THE OPPOSITION NO. 100199 BY MR TAMOOR SHAZAD

**IN THE MATTER OF THE APPEAL OF THE APPLICANT FROM THE DECISION OF MR GEORGE
SALTHOUSE DATED 2 AUGUST 2012**

DECISION

1. This is an appeal against a decision of Mr. George Salthouse, the Hearing Officer for the Registrar, dated 2nd August 2012, in three consolidated oppositions to three separate trade mark applications.
2. The first application No. 2532070 was made on 18th November 2009 by Mr. Sharez Hussain, for a series of two trade marks, SLUMBERSOUND and SLUMBER SOUND, in respect of goods in Class 20, including furniture, beds, etc., and retail services in Class 35 connected with the sale of furniture, etc. That application was opposed by Mr. Tamoor Shazad,¹ who claimed in effect to have an earlier right to the mark. He relied in particular upon the registration on 11th November 2009 of a company called Slumbersound Beds Limited (“SBL”), of which he is the director, and upon prior use of the Slumbersound name by SBL. Mr. Shazad alleged that he had an earlier right

¹ The handwritten TM55 appears to spell the name as ‘Shahzad’ but the typewritten witness statement filed earlier spells it as ‘Shazad’ and I shall therefore use this spelling.

and goodwill in the name and that Mr. Hussain, who had previously been his employer, deliberately filed the mark to prevent Mr. Shazad from trading in competition with him. That opposition was therefore based upon sections 5(4)(a) and 3(6) of the 1994 Act.

3. The other two trade mark applications which came before Mr. Salthouse were applications made by Mr. Shazad's company, SBL. The first of those was an application made on 17th December 2009 for a device trade mark including the words 'Slumbasound Beds' for goods, including beds, in Class 20. That was application No. 2534630, and there was a second application made by SBL, under No. 2539350, dated 12th February 2010, for the trade mark Slumbersound Beds Ltd. That was also for beds and mattresses in Class 20.
4. Both of SBL's applications were accepted and published for opposition purposes, and Mr. Hussain filed a notice of opposition in relation to each of them. The oppositions broadly mirrored Mr Shazad's opposition to his own trade mark application. Mr. Hussain relied upon his earlier rights in his pending mark No. 2532070, but also claimed to have acquired goodwill in the trade mark 'Slumbersound' prior to the relevant dates, and alleged that Mr Shazad's applications had been made in bad faith, as Mr Shazad – the guiding force behind SBL – was well aware of Mr Hussain's goodwill.
5. Both parties filed evidence in relation to all of the oppositions, but neither wished to be heard and neither provided any written submissions. Mr. Salthouse therefore decided on the three oppositions on the papers before him.
6. Mr. Salthouse dealt first of all with the opposition by Mr. Shazad to Mr. Hussain's trade mark application No. 2532070 (being the earliest of the applications). He held at paragraph 36 that Mr Shazad had failed to prove that he had goodwill in the mark at the date when Mr Hussain applied for it, nor had he shown how Mr Hussain could have been aware of Mr Shazad's

claimed interest in the mark. He therefore concluded that there was no evidence which supported the claim that the application was made in breach of section 3(6). Similar considerations led him to find, in paragraph 41, that Mr Shazad could not oppose the application in reliance on s 5(4)(a).

7. The opposition therefore failed so that Mr. Hussain's mark could proceed to registration. That mark then became a relevant earlier mark in relation to SBL's two trade mark applications and the Hearing Officer upheld Mr. Hussain's opposition to those two applications on the basis of section 5(2)(b) of the Act. He did not feel it necessary to decide those oppositions on the basis of sections 5(4)(a) or 3(6).

Standard of review

8. This appeal is by way of a review; it is not a rehearing. *Reef Trade Mark* [2003] RPC 5 ("*Reef*") and *BUD Trade Mark* [2003] RPC 25 ("*BUD*") show that neither surprise at a Hearing Officer's conclusion, nor a belief that he has reached the wrong decision, suffice to justify interference in this sort of appeal. Instead, if I am to uphold the appeal, I need to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was clearly wrong (*Reef*). As Robert Walker LJ (as he then was) said:

"...an appellate court should in my view show a real reluctance, but not the very highest degree of reluctance to interfere in the absence of a distinct and material error of principle" (*Reef*, para. 28).

This appeal

9. Mr. Shazad filed a notice of appeal in Form TM55 by fax on 28th August 2012. The grounds of appeal are set out in the form. They are handwritten and it is extremely difficult to read them on the faxed copy on the file. Upon receiving the papers in the appeal, efforts were made to contact both Mr. Shazad and Mr. Hussain, to arrange a hearing date for the appeal.

Neither of them responded to those attempts and after some time I thought it right to set a date for the appeal, of which both parties were given ample notice by letter. In the event, neither of them attended the appeal hearing, but rather than reject the appeal out of hand, given that Mr. Shazad is a litigant in person, it seems to me right to deal, at least briefly, with the merits of the appeal.

The merits of this appeal

10. Much of Mr Shazad's appeal is based on the repeated claim that he or his company, SBL, owned the goodwill in the Slumbersound mark at the date when Mr Hussain made his trade mark application (hence his reliance on s 5(4)(a). He put that point in a variety of ways in his TM55. For instance, he stated that he "has greater goodwill in the marketplace for Slumber Sound Beds Ltd than Mr. Hussain." I do not know whether the use of the present tense in that statement means that Mr Shazad wished to indicate that he or SBL had built up goodwill in the name Slumber Sound Beds since the relevant date (i.e. the date when Mr Hussain made his trade mark application). If that is so, later goodwill would not have constituted a ground to oppose the application. If he meant to refer only to the position at the relevant date, the position is no stronger. The Hearing Officer, having considered both parties' evidence with care, concluded in paragraph 36 of his decision that Mr Shazad had failed to show "that he had, at the relevant date, any goodwill in the mark applied for. There is virtually no activity prior to the relevant date other than speaking to a business advisor, which would not generate goodwill in the mark." Mr. Salthouse therefore concluded at paragraph 41:

"41) Mr Shazad must show that at the relevant date he had goodwill in his mark. However, as I have already found above Mr Shazad has not shown that he had goodwill in the mark at the relevant date. He has provided invoices for the purchase of raw materials which all post-date the relevant date. These appear to have been delivered to a private address. It would appear that industrial premises were not secured until

after the relevant date. The fact that Mr Shazad had sought business advice and had registered the company name prior to the relevant date does not mean that he had used the trade mark let alone acquired goodwill in it. Mr Shazad has not provided any evidence that he had held discussions regarding the supply of goods to third parties nor even that he had provided such parties with an indication of prices and delivery schedules. As such I find that he had no goodwill in the mark in suit at the relevant date and the opposition under section 5(4)(a) fails.”

11. Mr Shazad has not identified in his TM55 any specific basis upon which he challenges the Hearing Officer’s findings or decision in this respect. There is no error of principle or material error on the facts evident to me, and in the circumstances I reject this ground of appeal.
12. Mr Shazad similarly repeated in the Grounds of Appeal the allegation that Mr Hussain had made the application in bad faith, deliberately to close down SBL’s business. Again, he identified no error in the Hearing Officer’s decision and none is evident to me. I reject this ground of appeal also.
13. Mr Shazad also sought to rely in the appeal upon the fact that Mr Hussain had challenged the registration of SBL’s company name pursuant to s 69(1)(a) and (b) of the Companies Act 2006, but the complaint was rejected by the Company Names Tribunal by a decision dated 4 April 2012. He did not explain on what basis he suggests that his success in that Tribunal would cast doubt on the Hearing Officer’s decision as to the trade mark applications.
14. It is clear to me on reading the Tribunal’s decision No. BL O/141/12 that the factors which it had to consider were not the same as those relevant to the Hearing Officer’s decision. The Tribunal found that SBL had a defence to Mr Hussain’s application under section 69(4)(b)(i), as SBL established that at the relevant date for those proceedings, 26 March 2010, it was operating under the company name and the Tribunal found no reason why Mr Shazad should have known that Mr Hussain intended to make use of this sign, nor that he

intended to incorporate a company under this name, which is the requirement for the section 69(4)(b)(i) defence to be countered. The Tribunal noted that SBL would have had such a defence even if Mr Hussain had proved that he had goodwill by the relevant date. For these reasons, the Company Names Tribunal decision is irrelevant to the appeal against the decision of Mr Salthouse.

15. For all these reasons, the appeal is dismissed. As Mr Hussain took no part in the appeal proceedings, I will make no order as to the costs of the appeal.

Amanda Michaels
The Appointed Person
2 December 2013

Neither party appeared or was represented.