o/0256/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003789861

BY RASE LTD

TO REGISTER THE TRADE MARK:

RASE

IN CLASS 25

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 436489

BY RABE MODEN GMBH

BACKGROUND AND PLEADINGS

1. On 19 May 2022, RASE LTD ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 24 June 2022. The applicant seeks registration for the following goods:

Class 25 Articles of clothing, footwear, headwear, underwear and outerwear, all parts and fittings thereof, for men, women, children and infants.

2. The application was opposed by Rabe Moden GmbH ("the opponent") on 26 September 2022 based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). However, the opponent withdrew the section 5(3) and 5(4)(a) grounds in writing on 24 March 2023. Therefore, under section 5(2)(b), the opponent relies upon the following trade mark:

RABE

UK registration no. UK00914289839[1]
Filing date 24 June 2015; Registration date 15 October 2015.
Seniority date 20 March 2007.
Relying upon some of the goods for which the earlier mark is registered, namely:

Class 25 Clothing; Hats; Footwear.

3. The opponent claims that there is a likelihood of confusion because the marks are highly similar, and the goods are identical or highly similar.

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

[1] Following the end of the transition period of the UK's withdrawal from the EU, all EU trade marks ("EUTM") registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (EU)' retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

5. A hearing took place before me on 10 January 2024. The opponent was represented by Lewis Jones of Dummett Copp and the applicant was represented by Randa Gowiely.[2] I make this decision having taken full account of all the papers, referring to them below as necessary.

RELEVANCE OF EU LAW

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

PRELIMINARY ISSUES

7. In the applicant's skeleton argument, reference was made to a survey conducted by the applicant. At the hearing, I explained to Ms Gowiely that this evidence could not be taken into consideration. This is on the basis that the Tribunal Practice Notice 2/2012 ("TPN") states that survey evidence can only be adduced into trade mark proceedings before the Intellectual Property Office ("IPO") with the permission of a Hearing Officer. In this instance, permission was not obtained. Furthermore, I highlighted to Ms Gowiely that the substance of the survey evidence did not conform to the criteria set out in the head note to *Imperial Group plc & Another v. Philip Morris Limited & Another* [1984] RPC 293 which includes the following:

> "If a survey is to have validity (a) the interviewees must be selected so as to represent a relevant cross-section of the public, (b) the size must be statistically significant, (c) it must be conducted fairly, (d) all the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved, (e) the totality of the answers given must be disclosed and made available to the defendant, (f) the questions must not be

[2] At the hearing, Ms Gowiely disclosed that she is the wife of the applicant and not a legal representative.

leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put, (h) the exact answers and not some abbreviated form must be recorded, (i) the instructions to the interviewers as to how to carry out the survey must be disclosed and (j) where the answers are coded for computer input, the coding instructions must be disclosed."

8. The size of the of the sample was 185 people which is significantly small. The sample was selected randomly at the locations of Oxford Street and Bluewater, and I was not provided any details on the interviewees, such as their age, gender etc. The questions and answers were not disclosed, and the only information provided about the survey was "we showed all interviewees a representation of both marks and asked non-leading, open-ended questions" and "each interviewee was asked the same exact question".

9. Ms Gowiely asked me if she could submit her evidence into the proceedings for it to be taken into consideration because she did not know that it should have been submitted during the evidence rounds. However, taking all of the above into consideration, I confirmed that the survey evidence clearly did not adhere to the above criteria, and therefore it would unnecessarily increase the costs to the parties in dealing with the evidence when the Tribunal would reject it for the reasons given above.

10. In response to this, Ms Gowiely asked me if I would be "taking into consideration the case law and precedent of SLEEPRO vs SLEEPIO" that was cited in her skeleton argument. This is on the basis that she believed it mirrored the current case, because both marks have one letter difference, with parallel positioning, and "yet the IPO office clearly ruled that both brands can co-exist".

11. I noted at the hearing that no BL number was provided for this decision and it was not filed as evidence during the proceedings. However, Mr Jones confirmed that the BL number for this decision was O/080/22, that he had sight of this decision before the hearing, and had made submissions in regard to it in his skeleton argument. On this basis, I agreed that for the purposes of this decision, I would take into account the

contents of BL O/080/22, and I will refer to it where necessary below. However, I made it clear that every case is decided on its own facts. I am not bound by previous decisions of this Tribunal.

12. I also note that at the hearing Ms Gowiely raised the following:

1. Extensive research was carried out and “RASE” was available as an unregistered trade mark in the UK and globally.
2. A Trade Mark Attorney was hired by the applicant to register its mark, and in the first instance, a thorough search was conducted. The Trade Mark Attorney confirmed that the mark RASE was available and that there were no conflicts (potential or otherwise).
3. The UKIPO examiner did not find “RABE” as a potentially conflicting mark, which is confirmed in the IPO’s initial examination report which was filed alongside its Form TM8.
4. The opposition action “undermines the whole point of the Trade Marks Act and the whole process of checking, because checks were made at various stages by the actual IPO office themselves, not to mention the trade mark filing attorneys of course”.

13. I also note that section 38 of the Act reads as follows:

> “(1) When an application for registration has been accepted, the registrar shall cause the application to be published in the prescribed manner.
>
> (2) Any person may, within the prescribed period of time from the date of publication of the application, give notice to the registrar of opposition to the registration.”

14. The “prescribed manner” that section 38(1) refers to is the publication of the application in the Trade Marks Journal. Once it is published, there is an initial 2 month period (the opposition period) in which anyone can make observations on the trade marks acceptance, or oppose its registration. This is also outlined in the Tribunals

letter which is headed “Advertisement of a Trade Mark Application” which includes the following wording:

> *“If you proceed, your application will be published in the online Trade Marks Journal and anyone can oppose it should they consider they have grounds to do so. If such action were to be successful, this would likely result in a costs award against you.”*

15. Therefore the Tribunal makes it clear from the onset that an applied for mark could be opposed, regardless of the checks which may have been done by their attorneys or searches performed by the UKIPO examiners. The above submissions, therefore, do not assist the applicant.

Section 5(2)(b)

16. Section 5(2)(b) reads as follows:

> “5(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.”

17. The opponent’s mark had completed its registration process more than five years before the relevant date (the filing date of the applicant’s mark). Accordingly, the use provisions at section 6A of the Act do apply. However, as the applicant did not request that the opponent prove use of its mark, it is entitled to rely upon all of its goods without demonstrating that it has used its mark.

Section 5(2)(b) case law

18. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, 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, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) 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;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

19. The competing goods are as follows:

Opponent's goods	**Applicant's goods**
Class 25 Clothing; Hats; Footwear.	Class 25 Articles of clothing, footwear, headwear, underwear and outerwear, all parts and fittings thereof, for men, women, children and infants.

20. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "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."

21. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors

22. In *Gérard Meric v OHIM*, Case T- 133/05, the General Court ("GC") stated that:

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institüt für Lemsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

Applicant's submissions

23. The applicant submits that RABE is a German brand that specialises in knitwear for women, and "it has absolutely no market presence in the UK". At the hearing, Ms Gowiely also stated that RASE is a high end, luxury, urban streetwear for men, women and children, and therefore, "these are two completely distinct and separate markets where this is no likelihood of confusion". "Both brands also do not compete as they serve entirely different markets, with highly distinguishable features and completely different trade channels, different manufacturing channels, different marketing channels and different routes to market".

24. However, the applicant's above submissions regarding how the parties goods are used and sold in practice are not relevant to my assessment. I have to carry out a notional assessment based upon the specifications before me (how the goods within the parties' specifications could be used and sold), and all the circumstances in which the mark applied for might be used if it were registered.[3]

Class 25 goods comparison

25. While expressed slightly differently, the opponent's "footwear for men, women, children and infants" is self-evidently identical to the applicant's "footwear".

26. While expressed slightly differently, the opponent's "clothing for men, women, children and infants" is self-evidently identical to the applicant's "articles of clothing".

[3] *O2 Holdings Limited & Anor v Hutchison 3G UK Limited*, Case C-533/06, paragraph 66.

27. The opponent's "hats for men, women, children and infants" falls within the applicant's broader category of "headwear". The goods are identical on the principle outlined in *Meric*.

28. The applicant's "underwear and outerwear" falls within the opponent's broader category of "clothing for men, women, children and infants". The goods are identical on the principle outlined in *Meric*.

29. I consider that the applicant's "all parts and fittings thereof, for men, women, children and infants" is dissimilar to the opponent's "clothing", "hats" and "footwear". As set out in *Les Éditions Albert René v OHIM*,[4] it is clear that just because a particular good is used as a part, element or component of another, it should not result in a finding of identity/similarity between those goods. However, it does not mean that there can never be similarity between such goods where there is overlap in the factors identified in *Treat*.

30. In this instance, I consider that the applicants' parts and fittings for clothing, footwear, and headwear do not overlap with the opponent's clothing, hats or footwear. I do not find that the use, user or nature of the goods overlap. I also consider that there wouldn't be an overlap in trade channels as the applicants' parts of clothing, footwear and headwear would be purchased wholesale to be used in the production of the finished article, which would then go on sale to the general public. I do not consider that the goods are in competition nor complementary. Taking the above into account, I consider that the goods are dissimilar.

31. It is a prerequisite of section 5(2)(b) that the goods be identical or at least similar. The opposition will, therefore, fail in respect of the goods that I have found to be dissimilar.[5] The opposition under section 5(2)(b) fails for the following goods:

Class 25 All parts and fittings of articles of clothing, footwear, headwear, underwear and outerwear for men, women, children and infants.

[4] Case T-336/03
[5] *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

The average consumer and the nature of the purchasing act

32. As the case law above indicates, 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 the goods are likely to be selected by the average consumer. 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."

33. The average consumer for the goods will be members of the general public. The cost of purchase is likely to vary, and the goods will be purchased relatively frequently. However, various factors are still likely to be taken into consideration during the purchasing process, such as materials used, cut, aesthetic appearance and durability. Consequently, I consider that a medium degree of attention will be paid by the average consumer when selecting the goods.

34. The goods are likely to be obtained by self-selection from the shelves of a clothing retail outlet, online or catalogue equivalent. This means that visual considerations will be the most significant.[6] Visual considerations are, therefore, likely to dominate the selection process.

35. However, I do not discount that there will also be an aural component to the purchase, as advice may be sought from a sales assistant or representative.

[6] *New Look Limited v OHIM*, Joined cases T-117/03 to T-119/03 and T-171/03, paragraph 50.

Comparison of the marks

36. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated, at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> "… it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

37. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

38. The respective trade marks are shown below:

Opponent's mark	Applicant's mark
RABE	**RASE**

39. The opponent's mark consists of the word "RABE". There are no other elements to contribute to the overall impression which lies in the word itself.

40. The opponent's mark consists of the word "RASE". There are no other elements to contribute to the overall impression which lies in the word itself.

41. Visually, the marks overlap in the letters R, A and E, which appear in the same order and positioning within the marks. These act as visual points of similarity. However, the third letter of the opponent's mark is the letter "B" and the third letter of the applicant's mark is the letter "S". This acts as a visual point of difference. I also note that the marks are short in length. There is no special test which applies to the comparison of short marks, the visual similarities must be assessed in the normal way.[7] Nevertheless, it is clear that the change of one letter to a mark which is only four letters long is clearly more significant than the change of one letter to a longer mark. However, in the opponent's submissions, they state that the letters "B" and "S" are "relatively similar in themselves, given that both arguably incorporate two curved elements". I note that both of the parties marks are word marks, and their registration covers use in any standard typeface, including presenting the mark in upper and lower-case, or title-case. Therefore, I agree with the opponent's above submission that the letters "B" and "S" are visually similar when they are presented in upper-case. However, when they are presented in lower-case (b vs s), whilst the letters share the bottom curved element, they are less visually similar. Therefore, taking all of the above into account, I consider that the marks are visually similar to a high degree.

42. Aurally, at the hearing, Ms Gowiely stated that the applicant's mark is "pronounced [as] race". Whilst this may be the intention of the applicant, my assessment must be made from the perspective of the UK average consumer, and how they would pronounce the mark. In this case, I consider that whilst some consumers may pronounce the applicant's mark as RACE, a significant proportion of average consumers would pronounce the mark as RAYZ.

43. Ms Gowiely also made submissions on the pronunciation of the opponent's mark, stating that as it is a German brand, it is pronounced as "RAABEH". As noted in paragraph 41 above, my assessment of the marks is made from the perspective of the UK average consumer. There is no reason, there being no evidence of use of the

[7] *Bosco Brands UK Limited v Robert Bosch GmbH*, Case BL- O/301/20, paragraph 44

earlier mark, that the UK consumer would see RABE as a German brand. The UK average consumer would give the mark its ordinary pronunciation in English. On this basis, I consider that the opponent's mark is likely to be pronounced as RAYB.

44. Therefore as the beginning of the marks overlap aurally, sharing the "RAY" element of their syllables, and only differing in the aural sound of the last element (Z vs B), I consider that the marks are aurally similar to between a medium and high.

45. Conceptually, the opponent submits that "neither mark has [an] obvious conceptual meaning". In its skeleton argument, the applicant submits that "RASE produces imagery of sharpness, a razor, razing, a race" and that its dictionary definition is "to tear down, raze, completely destroy". The applicant also submits that "RABE in the Merriam Webster dictionary is under Broccoli Rabe" and the translation of RABE from German to English is "listed as a raven, a large black bird of the crow family".

46. Firstly, I do not consider that the UK average consumer for clothing goods would know that RABE is a type of broccoli. Secondly, as my assessment is from the perspective of the UK average consumer, the translation of RABE from German to English is redundant. Thirdly, I consider that the other conceptual meanings which have been proposed by the applicant, such as to tear down and a razor, would not be assigned to the conceptual meaning of RASE, especially because of the spelling of this word (using the letter S instead of Z). For those average consumers that pronounce the applicant's mark as RACE, the concept of a race may be assigned to the mark. However, I consider that a significant proportion of average consumers will see the applicant's mark, RASE, as an invented word with no conceptual meaning. On this basis, both marks evoke no meaning and thus the marks are conceptually neutral.

Distinctive character of the earlier mark

47. 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 C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR 1-2779, 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 promotion of 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)."

48. Registered marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

49. As the opponent has not filed any evidence to show that the distinctiveness of its mark has been enhanced through use, I only have the inherent position to consider. As noted above, a significant proportion of UK average consumers will see the opponent's mark, RABE, as an invented word with no conceptual meaning. On this basis, the opponent's mark is inherently distinctive to a high degree.

Likelihood of confusion

50. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the

average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

51. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually similar to a high degree.
- I have found the marks to be aurally similar to a between a medium and high degree.
- I have found the marks to be conceptually neutral.
- I have found the opponent's mark to be inherently distinctive to a high degree.
- I have identified the average consumer to be members of the general public who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process for the goods.
- I have found the parties' goods to be identical.

52. In *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, Kitchin LJ stated that:

> "if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely

to be confused such as to warrant the intervention of the court then it may properly find infringement."

53. The above case is an infringement action pursued under section 10 of the Act. However, the same approach is also appropriate under section 5(2).[8] It is not necessary for me to find that the majority of average consumers will be confused. I have to determine whether there is a likelihood of confusion amongst a significant proportion of them.

54. Taking all of the above factors into account, bearing in mind that the average consumer rarely has a chance to make direct comparisons between trade marks and, instead, will encounter them in different settings at different times, and therefore must rely upon the imperfect picture of them retained in its mind, I consider that the marks are likely to be mistakenly recalled or misremembered as each other. This is particularly the case given that the parties' goods are identical and the high degree of visual similarity between the marks and the predominantly visual purchasing process. Even where aural considerations play a greater role, the between a medium to high degree of aural similarity between the marks will have the same result.

55. I consider that because the marks share the first, second and fourth letters (R, A and E), with the differences being the third letter of the marks, (S vs B), these will be easily overlooked or misremembered as each other. This is especially the case because the third letters share some visual similarity; when in upper-case, "B" and "S" share two curved elements, and when in lower-case, the marks share the bottom curved element.

56. Furthermore, and as noted above, the average consumer would see RABE as an invented word with no meaning, and a significant proportion of consumers would also see RASE as an invented word with no conceptual meaning. This results in the opponent's mark being inherently distinctive to a high degree, and, in the absence of any conceptual hook in either of the marks, a significant proportion of average

[8] *Soulcycle Inc v Matalan Ltd* [2017] EWHC 496 (Ch), Mann J.

consumers will not have a strong conceptual message to assist them in differentiating between them. This results in a likelihood of direct confusion.

Concluding comments

57. As noted in paragraph 11 above, for the purposes of this decision, I have read the contents of BL O/080/22 SLEEPRO vs SLEEPIO. In this case, the Hearing Officer concluded that the marks were visually similar to "an average degree", aurally similar "to below an average degree" and conceptually similar "to a low degree". The Hearing Officer also concluded that there was no likelihood of confusion, "particularly given the low level of distinctive character of the earlier mark".

58. In the applicant's case, I have found that the opponent's earlier mark is inherently distinctive to a high degree, I have found the marks to be visually similar to a high degree, aurally similar to a between a medium and high degree, and conceptually neutral to a significant proportion of consumers. These factors are therefore completely different from those concluded in BL O/080/22, and as rightly noted by the Hearing Officer in SLEEPRO vs SLEEPIO, "*in approaching the question on likelihood of confusion, consideration has to be given to the cumulative effect of all of the aforesaid findings*".

59. Therefore, the finding of no likelihood of confusion in the decision BL O/080/22 SLEEPRO vs SLEEPIO has no weight or impact on my above findings.

CONCLUSION

60. The opposition is partially successful in respect of the following goods for which the application is refused:

Class 25 Articles of clothing, footwear, headwear, underwear and outerwear for men, women, children and infants.

61. The application can proceed to registration in respect of the following goods for which the opposition has been unsuccessful:

Class 25 All parts and fittings of articles of clothing, footwear, headwear, underwear and outerwear for men, women, children and infants.

COSTS

62. As both parties have achieved what I regard as a roughly equal measure of success, I direct that both parties should bear their own costs.

Dated this 26th day of March 2024

L FAYTER

For the Registrar