

O/0296/25

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003893361
BY SHENZHEN MING XING DIAN ZI KE JI YOU XIAN GONG SI
TO REGISTER:**

FISTAD

AS A TRADE MARK IN CLASS 9

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 441230 BY
SHENZHEN QIAPIN TECHNOLOGY CO., LTD.**

BACKGROUND AND PLEADINGS

1. On 25 March 2023, SHENZHEN MING XING DIAN ZI KE JI YOU XIAN GONG SI (“the applicant”) applied to register the trade mark on the cover page of this decision in the UK (“the applicant’s mark”). The applicant’s mark was published for opposition purposes on 14 April 2023 and registration is sought for the following goods:

Class 9: USB adapters; USB chargers; USB cables; USB sticks; USB flash drives; USB hubs; USB port cards; USB cables for cellphones; Blank USB flash drives; USB card readers; USB flash drives [not pre-recorded]; Credit card-style USB flash drives; Mobile hard drives; Portable hard disk drives for computers; Solid-state hybrid drive [SSHD]; Universal serial bus [USB] drives; Hard disk controllers; USB flash drives with micro USB connectors compatible with mobile phones; Hard disks; Headsets; Headphones; Earbuds; Earphones; Laptop cases; Eyeglass cases; Sunglass cases; Battery cases; Phone cases; Lens cases; Cases for headphones; Cases for sunglasses; Waterproof smartphone cases; Tempered glass screen protectors for smartphones; Mobile phone display screen protectors in the nature of films; Electronic doorbells; Electric doorbells; Electric door bells; Door bells (Electric -).

2. On 7 June 2023, the applicant’s mark was opposed by Shenzhen Qiapin Technology Co., Ltd. (“the opponent”). The opposition is based on section 5(4)(a) of the Trade Marks Act 1994 (“the Act”) and is reliant upon the unregistered trade mark ‘FISTAD’ (“the opponent’s sign”). The opponent claims that it has been using its sign throughout the UK since 19 November 2020 in respect of the following goods:

“USB sticks; USB flash drives; USB hubs; USB port cards; Blank USB flash drives; USB flash drives [not pre-recorded]; Mobile hard drives; Portable hard disk drives for computers; Solid-state hybrid drive [SSHD]; Universal serial bus

[USB] drives; USB flash drives with micro USB connectors compatible with mobile phones; Hard disks.”

3. The opponent claims that it has generated a protectable level of goodwill in the UK in respect of the goods relied upon and that the goodwill generated is associated with its sign. Further, the opponent claims that any use of the applicant’s mark on the goods applied for would misrepresent to the public that those goods are from the opponent. It is claimed that such a misrepresentation would risk causing damage to the opponent’s goodwill as well as a risk of financial damage.
4. The applicant filed a counterstatement wherein it denied the claim against it on the basis that it has been using the sign since as early as September 2015, thereby arguing that the application is not contradictory to section 5(4)(a) of the Act since it is the senior user of the ‘FISTAD’ sign.
5. The applicant is represented by Marcin Ociepka and the opponent is represented by Haoyue Xue. Both parties filed evidence in chief. No hearing was requested and neither party filed any written submissions in lieu of the same. This decision is made following careful consideration of the papers.
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.

EVIDENCE

7. The opponent’s evidence came in the form of the witness statement of Xie Jian Yi dated 15 December 2023. Xie Jian Yi is the president of the opponent, and their statement is accompanied by five exhibits. The purpose of the evidence was to prove the existence of goodwill in the opponent’s sign.

8. The applicant's evidence came in the form of the witness statement of Meirong Ding dated 20 March 2024. Meirong Ding states that they are the owner of the applicant's mark. While noted, this is not correct as the mark for which registration is sought is in the name of a company. That being said, I will proceed as if Meirong Ding is the owner of the applicant company or at least a person with significant control and/or knowledge of the same. Their evidence is accompanied by three exhibits, being those labelled Exhibit A, B and C, and was adduced to prove the applicant's earlier use of its mark.
9. I do not intend to summarise the parties' evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

PRELIMINARY ISSUE

10. In its evidence, the applicant filed what is referred to as a 'Letter of Authorization'.¹ This is dated 27 March 2017 and purports to show that a company called Shenzhen Jinghe Technology Co., Ltd granted the applicant the full authority to handle the registration, operation, management and maintenance of its intellectual property rights in the UK. The applicant has not provided any further explanation in relation to this document either in its evidence or by way of further submission.
11. While such evidence may be construed as that which seeks to prove that the applicant had the rights to use the opponent's intellectual property rights in the UK, it is of no assistance here. I say this because the party referred to as being the grantor of the authorisation (being Shenzhen Jinghe Technology Co., Ltd) is not the opponent. While this company is similarly named to the opponent, it is a third-party company that is not party to these proceedings. Further, I note that there is no evidence filed in respect of any connection between this company and the opponent.² Therefore, any authorisation granted by such a party has no bearing here. Lastly, I note that the opponent was not even established as a company as

¹ Exhibit C

² Further, the evidence does not make any further mention of this company. Therefore, there is nothing to suggest that any goodwill in the 'FISTAD' sign was accrued and owned by this company at any point.

at the date of the agreement (the opponent's evidence confirms that it was established on 30 August 2018). As a result, I find that this evidence is of no relevance to these proceedings and I will say no more about it.

DECISION

Section 5(4)(a)

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

“(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 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).”

15. Halsbury’s Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

“Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant’s use of a name, mark or other indicium which is the same or sufficiently similar that the defendant’s goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

The applicant’s claim to be the first user of the ‘FISTAD’ sign.

16. Before proceeding to consider the crux of the section 5(4)(a) ground, I first consider it necessary to address the applicant’s defence to have been using the ‘FISTAD’ sign since early as September 2015.

17. In doing so, I remind myself of the case of *Smart Planet Technologies, Inc. v Rajinda Sharma*, Case BL O/304/20, wherein Mr Thomas Mitcheson QC, sitting as the Appointed Person, pointed out that “*the start of the behaviour complained about*” is not the same as the date that the user of the applied-for mark acquired the right to protect it under the law of passing off. Rather, it is the date that the user

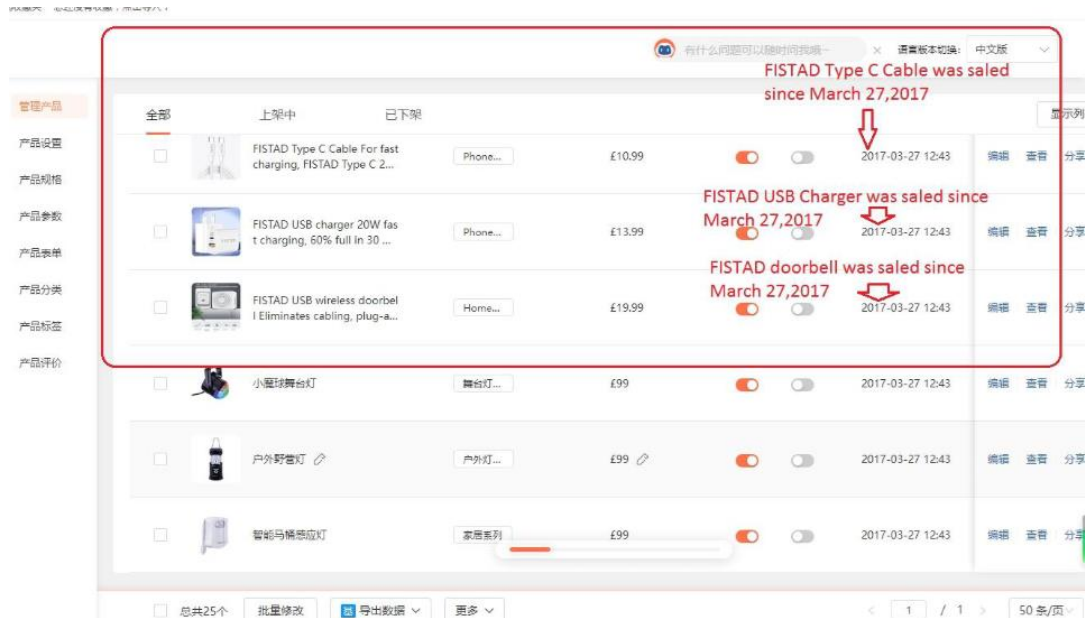
of that mark committed the first external act about which the other party could have complained (if it knew about it) as an act of actual or threatened passing off. Typically, this will be the date when the first offer was made to market relevant goods or services under the mark. However, it could also be the date the first public-facing indication was made that sales were proposed to be made under the mark in future. If the user of the applied-for mark was not passing off at the time such use commenced (usually because no one else had acquired a protectable goodwill under a conflicting mark at that time), they will not normally be passing off by continuing to use the mark. This means that if the applicant started to use the 'FISTAD' mark before the opponent, and continued to use it in the same way, it cannot be found to have been passing off as the opponent, even if the opponent acquired a protectable goodwill under the same or similar mark before the applicant did.

18. In light of the above, if the applicant is able to prove that it was the first user of the 'FISTAD' sign then it will be able to validly defend the opposition against it. To determine whether this is the case or not, I must consider the applicant's evidence of its own use.

19. The applicant's evidence claims that it has been using the mark 'FISTAD' on various class 9 goods since 27 March 2017 on the website 'www.comwinn.cn'. There are screenshots of this website provided in evidence.³ While the products listed show the 'FISTAD' brand and the prices are in pounds, the screenshots are taken from a Chinese facing website ('.cn' is the domain for Chinese websites) which includes text/characters in a Chinese language. As such, and even considering the reference to British pounds, I am of the view that this website is actually aimed at the Chinese consumer, as opposed to the UK consumer. Additionally, the screenshots are all undated and while they show a copyright date of "2016 – 2023", this does not mean that the pages appeared exactly as they are shown in evidence between those dates. On this point, I will say that without further evidence, I am not willing to infer that the screenshots provided reflect the position prior to the relevant date.

³ Exhibit B

20. An additional screenshot is provided from the website 'i.mail.fkw.com' which shows the following image:



21. Again, I appreciate that the prices are shown in pounds and that the goods shown have been listed since 27 March 2017.⁴ However, the website is clearly one targeted at the Chinese consumer and I have nothing to suggest that this website actively targeted users in the UK.

22. Due to the global nature of the internet, I appreciate that both of the websites discussed above may very well have been accessible by UK consumers. However, this does not necessarily mean that the presence of goods on Chinese websites constitute a valid attempt to offer goods to the relevant UK market. Without anything further to precisely demonstrate the offering of goods to UK consumers, I am not willing to infer that the evidence described above is sufficient to prove that the applicant began using its mark in the UK prior to its filing date.

⁴ In respect of the latter point, I note that the suggestion as to when the goods were first available has been added on to the screenshot, presumably by the witness. In the circumstances, I consider that it would be reasonable for me to question whether this column is meant to actually show the date first available (on the basis that it not obvious from the website itself). However, for the purpose of this assessment, I will proceed on the basis that it is correct.

23. In addition to the above screenshots, I note that the narrative evidence of Meirong Ding claims that the applicant has enjoyed sales in the UK ‘for a very long time’ under the FISTAD branding. While noted, I am of the view that the applicant should therefore have records of the same by way of sales confirmations or invoices, for example. No such evidence has been provided in these proceedings. In the circumstances, it is my view that if the applicant was making sales to UK consumers under the ‘FISTAD’ brand, it should have filed sufficiently solid evidence in order to demonstrate the same. Without such evidence, I consider that I am entitled to be sceptical of the applicant’s broad claim.⁵

24. In considering the applicant’s evidence, I am not convinced that it can be said to show that ‘FISTAD’ branded goods were offered to consumers in the UK from 27 March 2017 onwards (or at any other earlier date, for that matter) and, as such, its defence in respect of being the first user of ‘FISTAD’ fails.

25. I will now proceed to consider the section 5(4)(a) ground in the ordinary way.

Relevant Date

26. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander Q.C., as the Appointed Person, endorsed the registrar’s assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

“43. In *SWORDERS TMO-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

⁵ In making this point, I refer to paragraph 22 of *Awareness Limited v Plymouth City Council*, Case BL O/236/13. While a case about the filing of evidence in respect of genuine use, I consider that the principle (that a tribunal is entitled to be sceptical of use if inconclusive evidence is filed) is equally applicable here.

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.’ ”

27. The applicant’s mark does not have a priority date. Additionally, and as set out above, the applicant’s evidence is not capable of determining with any degree of certainty that the applicant began offering goods to the UK public under the ‘FISTAD’ mark prior to the filing date of its mark. Therefore, there is no evidence before me that is capable of pointing to an earlier date of the behavior complained about. As such, the relevant date for the present proceedings is the filing date of the applicant’s mark, being 25 March 2023.

Goodwill

28. The first hurdle for the opponent is that it needs to show that it had the necessary goodwill in the sign relied upon as at the relevant date. I remind myself that the opponent claims that its sign enjoys goodwill thanks to its use on the following goods:

“USB sticks; USB flash drives; USB hubs; USB port cards; Blank USB flash drives; USB flash drives [not pre-recorded]; Mobile hard drives; Portable hard disk drives for computers; Solid-state hybrid drive [SSHD]; Universal serial bus [USB] drives; USB flash drives with micro USB connectors compatible with mobile phones; Hard disks.”

29. Goodwill was described in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217 (HOL), 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.”

30. 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 off 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 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.”

31. 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.”

32. In *Hart v Relentless Records* [2002] EWHC 1984 (Ch), Jacob J. (as he then was) stated that:

“62. In my view the law of passing off does not protect a goodwill of trivial extent. Before trade mark registration was introduced in 1875 there was a right of property created merely by putting a mark into use for a short while. It was an unregistered trade mark right. But the action for its infringement is now barred by s.2(2) of the Trade Marks Act 1994. The provision goes back to the very first registration Act of 1875, s.1. Prior to then you had a property right on which you could sue, once you had put the mark into use. Even then a little time was needed, see per Upjohn L.J. in BALI Trade Mark [1969] R.P.C. 472. The whole point of that case turned on the difference between what was needed to establish a common law trade mark and passing off claim. If a trivial goodwill is enough for the latter, then the difference between the two is vanishingly small. That cannot be the case. It is also noteworthy that before the relevant date of registration of the BALI mark (1938) the BALI mark had been used “but had not acquired any significant reputation” (the trial judge's finding). Again that shows one is looking for more than a minimal reputation.”

The opponent's evidence.

33. Goodwill arises as a result of trading activities. The opponent claims that it has been selling ‘FISTAD’ branded USB drives in the UK since 19 November 2020, mainly through third-party retail platforms such as Amazon.co.uk. A screenshot of the opponent's Amazon storefront is provided in evidence that shows that in the last twelve months, it had 689 positive ratings stemming from sales of its products.⁶ While noted, the screenshot is dated 22 December 2023, being some nine months after the relevant date meaning that only three months' worth of ratings are relevant. As such, it follows that a significant proportion of these ratings will have

⁶ Exhibit 1

inevitably come from sales made after the relevant date. Further, while the screenshot is taken from Amazon.co.uk and shows the British flag, it appears to have been accessed from Poland.⁷ On this point, it is my understanding that the nature of Amazon retail services is such that purchases can be made from different countries, so it is entirely plausible to suggest that a proportion the ratings also come from sales made to consumers outside of the UK.

34. In addition to the above, screenshots taken from Amazon.co.uk showing the opponent's actual product listings are provided.⁸ These show the offering for sale of three different types of USB drives. All of the screenshots are dated 22 December 2023, being after the relevant date. Saying that, the products listed do show information regarding the date they were first available. I note that these dates are 11 November 2020, 4 March 2022 and 6 March 2022, all of which are prior to the relevant date so I am content to conclude that these goods were available to consumers in the UK during that time. In addition, each of the listings show separate 'ratings' information and, respectively, I note that these show total ratings of 3,413, 1332 and 3,414. That being said, the screenshots are all from after the relevant date and (like the screenshot discussed above) were accessed from Poland. Further, the screenshots confirm that the goods shown are deliverable to Poland. All of these points mean that these ratings provided will inevitably cover those given after the relevant date and by customers outside of the UK, and it is therefore not clear how many are relevant to my assessment.

35. In terms of sales figures for the opponent's goods, I note that the opponent has provided evidence by way of four screenshots and one invoice.⁹ The screenshots are all taken from the 'Amazon Seller Central – Europe' portal which shows information regarding the opponent's UK storefront. The first screenshot provided shows just seven purchases,¹⁰ seemingly from November 2022. The second screenshot appears to show orders from one week in May 2022 and confirms the sale of 26 'FISTAD' products.¹¹ This information includes a column for repeat

⁷ This is on the basis that the words 'Deliver to Poland' are shown top left-hand corner of the page.

⁸ Exhibit 2 to 4

⁹ Exhibit 5

¹⁰ Page 18 of Exhibit 5

¹¹ Page 19 of Exhibit 5

customers, of which there are confirmed to be none. The third screenshot appears to show orders for the month of May 2022, of which I note that there are 73 sales with one of them being from a repeat customer.¹² Given that the second screenshot refers to one week in May 2022, it is likely that the 26 sales referred to form part of the 73 sales shown in the third screenshot. Having calculated these screenshots, I note that they demonstrate 80 sales in May and November 2022.

36. The last screenshot is one taken from the 'disbursement page' of the opponent's account on the 'Amazon Seller Central – Europe' website.¹³ There are three disbursements shown, all dated between 12 September 2022 and 10 October 2022. They are for different amounts, one being £1,728.84 and the other being £1,593.99. The last disbursement shown in this list (for 12 September 2022) is horizontally cut off, so I am unable to confirm the exact amount. However, based on the number of characters, it appears to me to be a figure less than £1,000. While the information on this screenshot is noted, I have nothing to suggest what these 'disbursements' cover in the context of an Amazon seller account. As far as I am aware, disbursements are payments made to third parties on behalf of a client which are then charged to said client. Further, it is not confirmed whether this disbursement is a payment made by the opponent or to the opponent. Without any explicit confirmation of what these disbursements relate to, I am unwilling to infer that they cover sales achieved by the opponent's brand. As a result, I do not consider that this evidence is of any assistance to the present assessment.

37. Lastly, the one invoice provided is to an individual consumer in the UK and shows the sale of one USB drive on 20 June 2022 for a total amount (including shipping costs of £1.04) of £6.03.¹⁴ This brings the total sales figures shown in the evidence to 81 goods shipped in May, June and November 2022.

¹² Page 20 of Exhibit 5

¹³ Page 22 of Exhibit 5

¹⁴ Page 21 of Exhibit 5

Assessment of the evidence

38. In considering the evidence provided by the opponent, I am of the view that it presents a number of problems. The first is in relation to the user ratings shown on the opponent's storefront and the individual product listings. It is my understanding that such ratings are global and, therefore, can include ratings from customers outside of the UK. On this point, I have set out above that the goods shown in evidence are available for delivery in Poland which further emphasises this point. In respect of this issue, it is necessary to set out here that an assessment of goodwill is to be based on the awareness of UK customers.¹⁵ Further, the information regarding these ratings is taken from a range of printouts dated 22 December 2023 and, as set out above, this is likely to include ratings given after the relevant date. Lastly, it is my understanding that ratings on Amazon do not necessarily always stem from what Amazon commonly refers to as 'verified purchases'. As a result, I am unable to precisely determine how many of these ratings are from verified purchases by UK customers prior to the relevant date. I, therefore, consider that this evidence is of no real assistance to my assessment of actual trading activities undertaken by the opponent in the UK prior to the relevant date.

39. Another issue presented by the opponent's evidence is the limited nature of its sales figures. I accept that the opponent has listed 'FISTAD' goods on Amazon.co.uk since November 2020. However, the evidence only shows the total sale of 81 products in May, June and November of 2022. Further, only one of the sales covered by the evidence appears to be from a repeat customer.¹⁶ Lastly in respect of this evidence, I note that it was provided by way of printouts from the opponent's account on 'Amazon Seller Central – Europe'. While it is likely the case that the screenshots cover a proportion of sales made by the UK store, I have set out above that the nature of Amazon retail services is such that the figures provided may also reasonably include sales made by European consumers. In support of this conclusion, I again remind myself that the screenshots of the Amazon.co.uk

¹⁵ See paragraphs 47 and 52 of *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*, [2015] UKSC 31

¹⁶ On this point, I accept that repeat custom is an indicator of the existence of goodwill amongst the UK consumer base. However, evidence of just one repeat customer is in no way sufficient to point to a finding of goodwill.

listings confirm that the goods are shippable to Poland. The problem for the opponent here is that I have no way to determine with any degree of accuracy how many of the 81 sales the opponent made to UK consumers. As such, I consider the opponent's evidence of trading activities to be vague and imprecise and incapable of leading to a finding that the opponent enjoys any protectable goodwill in its business in the UK.

40. Even if I was to take the opponent at its best case in that the sales covered by the evidence were all to UK consumers, I am of the view that in the context of the USB drive market (which I suspect is a large one that involves a high level of sales),¹⁷ 81 sales to UK consumers represents a vanishingly low level of sales. While I remind myself that small businesses which have more than a trivial goodwill can protect signs which are distinctive of those businesses under the law of passing off even though their goodwill and reputation may be small,¹⁸ I do not consider that to be the case here. In short, 81 total sales over the course of 3 months in 2022 is not sufficient to give rise to a finding that, at the relevant date, the opponent enjoyed a protectable level of goodwill in its sign.

41. For the avoidance of doubt, even if I was wrong to discount the 26 sales made over the course of one week in May 2022 (as I did at paragraph 35 above), it would have no effect on the outcome reached above. If those weekly figures were meant to be included *in addition* to the figures for May 2022 as a whole, it would result in a total of 107 sales prior to the relevant date. In the context of the market as a whole, this figure remains vanishingly small and, as such, falls short of demonstrating that the opponent enjoyed a protectable level of goodwill as at the relevant date.

42. Given that the opponent has failed to prove that it enjoys a protectable level of goodwill in its sign, there can be no misrepresentation and because the section 5(4)(a) ground is the only one relied upon, the opposition hereby fails in its entirety.

¹⁷ On this point, I have no evidence as to the size of the market but I consider that it is reasonable to conclude that it is a high-volume market attracting many sales at relatively low costs.

¹⁸ See, for example, *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590

CONCLUSION

43. The opposition has failed and, subject to any successful appeal against my decision, the applicant's mark may proceed to registration for all of the goods applied for.

COSTS

44. As the applicant has succeeded, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicant the sum of £900 as a contribution towards its costs. The sum is calculated as follows:

Considering the notice of opposition and preparing a counterstatement:	£300
Considering evidence filed by the opponent and preparing own evidence:	£600
Total:	£900

45. I hereby order Shenzhen Qiapin Technology Co., Ltd. To pay SHENZHEN MING XING DIAN ZI KE JI YOU XIAN GONG SI the sum of £800. The above 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 28th day of March 2025

A COOPER
For the Registrar