# O/1021/24

**TRADE MARKS ACT 1994**

**CONSOLIDATED PROCEEDINGS**

**IN THE MATTER OF APPLICATION NOS:**
**UK3840209, UK3849697, UK3849702 AND UK3849707**
**IN THE NAME OF BLUEPRINT TECHNOLOGIES LTD**
**TO REGISTER THE FOLLOWING TRADE MARKS:**

**RISE OF ANUBIS**

**Legend of Anubis**

**LEGACY OF ANUBIS**

**ANUBIS RISING**

**IN CLASSES 9, 28 AND 41**

**AND**

**IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO UNDER NOS:**
**438871, 439321, 439326, AND 439320**
**BY PLAY'N GO MARKS LTD**

## BACKGROUND AND PLEADINGS

1. These consolidated proceedings involve oppositions against four trade marks that Blueprint Technologies Ltd ("the applicant") seeks to register in the UK. The details for those four trade marks are set out below:

**1. 'RISE OF ANUBIS'**
UK application no. 3840209
Filing date: 18 October 2022
Publication date: 28 October 2022
("the applicant's first mark")

**2. 'Legend of Anubis'**
UK application no. 3849697
Filing date: 15 November 2022
Publication date: 25 November 2022
("the applicant's second mark")

**3. 'LEGACY OF ANUBIS'**
UK application no. 3849702
Filing date: 15 November 2022
Publication date: 25 November 2022
("the applicant's third mark")

**4. 'ANUBIS RISING'**
UK application no. 3849707
Filing date: 15 November 2022
Publication date: 25 November 2022
("the applicant's fourth mark")

2. The above applications are all in respect of goods and services in Classes 9, 28 and 41, as set out in Annex 1 of this decision. The specifications for all four applications are identical to each other.

The related oppositions

3. All of the applicant's marks are subject to oppositions brought by Play'n GO Marks Ltd ("the opponent"). The opposition against the applicant's first mark was brought on 27 January 2023, and the oppositions against the applicant's second, third and fourth marks were brought on 22 February 2023. The oppositions are directed at all the applied-for goods and services.

4. All of the oppositions are based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opponent relies upon the following trade mark for the purpose of its oppositions:

**ANKH OF ANUBIS**

UK registration no. 3442138

Filing date: 6 November 2019, but claims priority from an earlier filing of the same mark in the EU on 8 August 2019[1]

Registration date: 24 January 2020

("the earlier mark")

5. The opponent relies on all goods and services in classes 9, 28 and 41 for which the mark is registered, as set out in Annex 2 of this decision.

6. The opponent submits that the parties' respective goods and services are identical or highly similar and that the marks are highly similar, resulting in a likelihood of confusion on the part of the relevant public.

7. The applicant filed counterstatements to all the oppositions. The applicant states that they see no merit in conducting a word-by-word comparison of the goods and services at issue, on the basis that the parties are competitors engaged in the same field. With regard to the respective marks, the applicant acknowledges that there are similarities but submits that the dominant and distinctive elements of their marks and the earlier mark are different, rendering them visually, phonetically and conceptually different, when considered as a whole.

8. On 8 June 2023, the Tribunal wrote to the parties informing them that the opposition proceedings had been consolidated, pursuant to rule 62(1)(g) of the Trade Marks Rules 2008.

9. The opponent's mark qualifies as an earlier mark under section 6(1) of the Act. As it had not completed its registration procedure more than five years before the application date for the contested marks, it is not subject to the use provisions contained in section 6A of the Act. Consequently, the opponent may rely upon all of the goods and services for which the earlier mark is registered without having to establish genuine use.

[1] European Union Intellectual Property Office (EM) 018105508.

10. The opponent is represented by Appleyard Lees IP LLP and the applicant is represented by Honeycomb Law CIC. A hearing was neither requested nor considered necessary, however, a case management conference ("CMC") did take place on 8 November 2023, regarding a procedural issue which does not impact the substantive issues in these proceedings.

11. Only the applicant filed evidence and submissions, and only the opponent chose to file written submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them below as necessary.

12. 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 that predate the UK's withdrawal from the EU.

**EVIDENCE**

13. During the evidence rounds Jonathan Paul Mayner, the Director of the representative for the applicant, submitted a Form TM9R, dated 5 October 2023, requesting a short extension to the deadline in which to file evidence. Mr Mayner stated that due to ill health he had been unable to finalise the relevant evidence and submissions by the required deadline. However, prior to the Tribunal issuing a decision on the matter, evidence in the form of the witness statement of Mr Mayner, dated 16 October 2023, was submitted on behalf of the applicant, along with eight exhibits (JPM1-JPM8).

14. On 24 October 2023, in response to the extension of time request, the Tribunal wrote to the applicant, an extract from which stated as follows:

> "I refer to Party B's TM9R filed on 5th October 2023. I further note Party B's evidence filed on 16th October 2023.

> It is the registry's preliminary view that the request should be refused. In making this view the Registry has considered the given reason whilst also noting TPN2/2011 and 2/2010 in respect of extension of time requests. Little information has been provided by Party B and therefore should be refused.
>
> If you wish to challenge this refusal you have 7 days to request a Case Management Conference (CMC), namely by 27th October 2023.

15. On 8 November 2023, at the request of the applicant, a CMC took place. Having heard the submissions of both parties, the Hearing Officer overturned the preliminary view and a new deadline of 16 October 2023 for filing the evidence was agreed, being the date on which the applicant's evidence had been filed.

16. The witness statement filed by Mr Mayner, alongside eight exhibits (JPM1 – JPM8), has been adduced in order to demonstrate that the opponent's mark is of weak distinctiveness both on the register and in the marketplace, the relevant consumer's knowledge of the relevant marketplace and in particular, the successful coexistence of often closely similar marks and similar themed marks in the relevant marketplace. I will address the claim as to a weaker distinctive character as a preliminary issue below.

**PRELIMINARY ISSUES**

17. Both the applicant and the opponent have raised points in their submissions that I intend to address as preliminary issues. Before going any further into the merits of this opposition it is necessary to explain why, as a matter of law, these points will have no bearing on the outcome of this opposition.

State of the register

18. In its counterstatement, the applicant states the following:

> "The Applicant will adduce evidence that the Opponent's Mark is of weak distinctiveness both on the register and in the marketplace, such that the

differences which are apparent between the Marks are more than sufficient to avoid a likelihood of confusion. While this is a largely evidence-based contention to be addressed more fully at the proper time, the Applicant contends the following:

The UK Trade Mark register contains a reasonable number of marks which are registered in respect of identical goods and services and which adopt the same structure, namely [WORD] OF [ANCIENT EGYPTIAN DEITY]. Most if not all such registrations are similarly owned by the Parties' competitors in the gambling and gaming market.

There are additionally a reasonable number of trade marks on the register owned by third party competitors, which specify identical or similar goods or services, and which contain the word ANUBIS. A number of those registrations contain the string "OF ANUBIS", which is shared by the Marks. Some of these registrations predate the Opponent's Mark and all of these registrations coexist with the Opponent's Mark and the Applicant's Mark."

19. As alluded to above, the applicant did file evidence that it claimed supports its argument on this point. In considering this issue, I refer to the case of *Zero Industry Srl v OHIM*, Case T-400/06, wherein the General Court ("GC") stated that:

"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '… there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR

II-4865, paragraph 68, and Case T-29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II-5309, paragraph 71)."

20. As previously stated, the main purpose of Mr Mayner's witness statement and exhibits, is to demonstrate that the opponent's mark is of weak distinctiveness both on the register and in the marketplace, the relevant consumer's knowledge of the relevant marketplace and in particular, the successful coexistence of often closely similar marks and similar themed marks in the relevant marketplace, and demonstrate the descriptive or non-distinctive nature of the terms 'Anubis' and 'of Anubis' in relation to the goods and services at issue.

21. The evidence includes examples of trade marks on the register that include the word 'ANUBIS', though it is noted that these marks differ to the earlier mark. Furthermore, Google search results and screenshots have also been included in order to demonstrate that 'Egyptian themed' slot games can be found online, as well as games that include the words 'Anubis' or 'of Anubis'. The exhibits are largely undated though I note from the witness statement that they were all retrieved on various dates during October 2023. Whilst the evidence appears to support the statement made by the witness i.e. that 'Egyptian-themed' slot games can be readily found online,[2] it has to be put forward that the opponent's goods and services are not limited to 'Egyptian themed' games and I am not persuaded that the applicant's arguments or their evidence demonstrates that the distinctive character of the earlier mark has been weakened as a result of the popularity of that category of game, nor is the evidence sufficient to make a finding that the opponent's mark is non-distinctive. In any event, by virtue of the earlier mark being registered means that it is assumed to have at least some distinctive character.[3]

22. It is important to recall that the state of the register is not evidence of how many of such trade marks are effectively used in the market, nor does it establish that the distinctive character of the element or elements in question has been weakened because of its frequent use in the field concerned. Accordingly, for the avoidance of doubt, I will say no more about this evidence and, instead, continue to make my

[2] Witness statement of Jonathan Mayner [para 11].
[3] *Formula One Licensing BV v OHIM*, Case C-196/11P

decision based on a fair and notional assessment of the similarity of the marks at issue and the respective goods and services in their specifications, and will draw my own conclusions on the distinctiveness of the earlier mark.

Previous UK IPO and EUIPO opposition decisions

23. In its written submissions in lieu,[4] the opponent has made reference to numerous other opposition decisions insofar as the distinctive elements of the marks and the overall comparisons of the marks are concerned. It has to be put forward that these are decisions on their specific facts and therefore cannot bind me in any way in evaluating the likelihood of confusion in this case where the marks are different. Furthermore, it is well established that previous decisions, including those taken in other trademark jurisdictions, such as the EUIPO, are not binding on the Registrar. Therefore, the decision I make in these proceedings must be stringent and must not consist of the mere repetition of comparable decisions. Accordingly, the previous oppositions referred to are not relevant to these proceedings, and their existence will have no bearing on whether, for instance, there is a likelihood of confusion between the contested marks and the earlier mark.

**DECISION**

**Section 5(2)(b)**

24. Section 5(2)(b) and 5A of the Act states that:

> "5(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,

[4] Dated 28 February 2024 [paras 17-18]

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.

[…]

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

25. I am guided by the following principles which 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 and services**

26. The competing goods and services are set out in Annex 1 and Annex 2 of this decision.

27. With regard to the similarity of the goods and services, in its written submissions,[5] the opponent states the following:

> "19. It is clear from a simple comparison that the goods and services in question are identical, all being gaming and gambling goods and services in classes 9, 28 and 41. In its defence and counterstatements, the Applicant has admitted that its goods and services are in direct competition with the Opponent's, and are of the exact same nature, have the same end users and have identical distribution channels. Furthermore, the Applicant admits that the opposed goods and services are identical to those covered by the Earlier Registration and relied upon for the Opposition, or at the very least highly similar for any goods or services that are not strictly identical."

28. In response, in its written submissions,[6] the applicant states the following:

> "The facts and matters referred to in paragraphs 17-19 of the Opponent's Submissions are agreed. The goods and services in issue are identical."

29. As noted above, the applicant accepts that the parties' goods and services at issue are identical. I do not, therefore, need to consider these goods and services any further and will proceed on that basis.

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

30. It is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and

[5] Dated 1 August 2023 [para 19].
[6] Dated 16 October 2023 [para 4].

services are likely to be selected by the average consumer in the course of trade. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see *Lloyd Schuhfabrik Meyer*, Case C-342/97.

31. 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. (as he then was) 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."

32. With regard to the average consumer of the goods and services at issue, in its written submissions,[7] the applicant states the following:

> "Here, the relevant public is the average consumer of gambling products and services. The Opponent contends that the relevant public is the public at large and that these goods and services are ordinary consumer items which, whilst may not perhaps be everyday purchases, are likely to be bought with some frequency. The Opponent therefore contends that the level of attention paid by the general public when purchasing such goods and services is therefore likely to be average. This is disputed.
>
> The marketplace for these goods and services, the gambling sector, is heavily regulated. Engagement with these goods and services necessarily involves

[7] Dated 16 October 2023 [paras 26-27].

risking monetary loss. The relevant public is not the public at large, but a sub-section of the general public which is conversant in the peculiarities of gambling games, more familiar with the gambling ecosystem that the average consumer, more willing to risk monetary loss than the average consumer and therefore likely to pay a higher level of attention."

33. With regards to the average consumer of the goods and services at issue, in its written submissions in lieu,[8] the opponent states:

> "Here, the average consumer is a member of the public who may play computer games or access games online. These goods and services are ordinary consumer items which, whilst may not perhaps be everyday purchases, are likely to be bought with some frequency. No special skill or knowledge is required to purchase or play these games, which are widely available and easily accessible. The level of attention paid by the general public when purchasing such goods and services is therefore likely to be average.
>
> The average consumer is accustomed to encountering a high number of similar available products when purchasing the relevant goods and services, and the visual aspect of marks will play a role in the purchasing process in addition to the aural aspect as a result or word-by-mouth recommendations. In addition, the average consumer is well aware that game providers often launch sequels and variations of existing games, and this will play a key role in the purchasing process."

34. With regards to the goods in Class 9, I consider that the average consumer will include both the general and professional public. For the goods at issue that relate specifically to gambling, the general public will be over the age of 18. For the general public the goods will likely be selected online via websites or app stores on a consumer's device. I am of the view that this consumer will pay no more than a medium level of attention. Conversely, a professional purchaser seeking software for their gaming machines, for example, might pay a slightly higher than medium level of

[8] Dated 28 February 2024 [paras 21-22].

attention as their purchasing decision might include, amongst other things, the compatibility of the software with the gaming equipment, etc. The price and frequency of purchase of the goods will vary. For example, goods such as video games and gaming software for use on mobile phones may be relatively inexpensive or even free and will likely be purchased frequently, whereas software for gaming machines and terminals etc., is likely to be expensive and purchased less frequently.

35. With regards to the goods in Class 28, in my view the goods will almost always be purchased by a professional (other than the applicant's 'lottery scratch cards'), who is in the business of providing gaming, casino or gambling services, etc. The purchasing act will likely be primarily visual with the goods being viewed either in a catalogue or online. There may be an aural aspect to the purchasing process where the purchaser consults the seller before concluding a purchase. The goods are likely to be relatively expensive and I find that the average consumer will likely pay at least a medium degree of attention (though not at the highest level), during the purchasing act as they are likely to consider a number of factors regarding the goods, such as the mathematical algorithms of the gaming machines in order to determine the percentage and frequency of winnings, etc. With regards to 'lottery scratch cards', these goods will be aimed at the general public who will likely purchase these goods on a frequent basis. The goods are relatively inexpensive, and the level of attention paid during the purchasing act is likely to be low.

36. In respect of the services in Class 41, I consider that the average consumer will be predominantly members of the general public, over the age of 18. I consider that the purchasing act will likely be primarily visual on the basis that the purchaser will encounter the service provider either online or upon seeing the physical premises on the street, for example, a betting shop or casino. I find that the relevant member of the general public, engaging in, for example, gambling, betting and wagering services, will include regular gamblers, namely those who gamble frequently with the aim of making money. It is my view that this average consumer will, generally speaking, pay a medium degree of attention when gambling, including those that gamble infrequently, for fun and for low stakes. However, I acknowledge that for some average consumers who are looking to potentially risk a significant amount of their own money when gambling, the attention paid will be higher, although not considerably so.

**Comparison of the marks**

37. It is clear from *Sabel BV v. Puma AG* 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 them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, that:

> "34. […] 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."

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

39. The trade marks to be compared are as follows:

| **The applicant's marks** | | **The opponent's registration** |
|---|---|---|
| The applicant's **first** mark | **RISE OF ANUBIS** | **ANKH OF ANUBIS** |
| The applicant's **second** mark | **Legend of Anubis** | |
| The applicant's **third** mark | **LEGACY OF ANUBIS** | |
| The applicant's **fourth** mark | **ANUBIS RISING** | |

40. Both parties have filed lengthy submissions regarding the similarity of the marks. Whilst I do not propose to reproduce those here, I have taken them all into consideration in reaching my decision.

Overall impression

*The opponent's mark* - **ANKH OF ANUBIS**

41. The opponent's mark is word only. The opponent has stated that the word 'ANKH' has the meaning of 'Life' and the word 'ANUBIS', refers to an ancient Egyptian god of the dead, and as such, when perceived as a whole, the mark will be immediately understood as reference to a traditional story regarding 'Anubis' the Egyptian god of the dead. However, I agree with the applicant in that no evidence has been provided with regards to the relevant consumer's understanding of the word 'ANKH' and its connotations within the ancient Egyptian culture. Even if some consumers do perceive the mark as suggested by the opponent, they do not, in my view, form a significant proportion of consumers. As such, these meanings will not affect my comparison and I will therefore say no more about it. In my view, the average consumer may perceive, for example, that the 'ANKH' element refers to the name of someone, and that the 'ANUBIS' element refers to the location or origin of that person. However, it is more probable that the average consumer will not attribute any particular meaning to the words and simply perceive them as invented. Accordingly, I am of the view that the overall impression of the mark lies in the words themselves.

*The applicant's first mark* - **RISE OF ANUBIS**
*The applicant's second mark* - **Legend of Anubis**
*The applicant's third mark* - **LEGACY OF ANUBIS**
*The applicant's fourth mark* - **ANUBIS RISING**

42. The applicant's marks are all word marks. The applicant submits that the dominant and distinctive element of the marks are the words 'RISE' (in the first mark), 'Legend' (in the second mark), 'LEGACY' (in the third mark), and 'RISING' (in the fourth mark).

43. Generally speaking, the word ‘RISE’ when combined with ‘OF’ may be perceived as something or someone, for example, that is in the process of becoming more important, successful or powerful, etc.; ‘Legend’ when combined with ‘OF’ may be perceived as a particular story for example, handed down through generations, which relates to a particular group of people, etc.; ‘LEGACY’ when combined with ‘OF’ may be perceived as relating to a particular event or period in history which has a long lasting impact; and ‘RISING’ may be perceived as an insurrection; rebellion or revolt.

44. With regard to the word ‘ANUBIS’ present in all of the applicant’s marks, as previously stated, despite the opponent’s submissions, I am of the view, that the average consumer is unlikely to attribute any particular meaning to the word and simply perceive it as invented. Overall, I find that the terms ‘RISE OF’, ‘Legend of’, ‘LEGACY OF’ and ‘RISING’, act as qualifiers for the word ‘ANUBIS’, and when considered as a whole, the applicant’s marks will likely be perceived as phrases with unitary meanings.

45. Therefore, whilst the applicant’s marks consist of more than one component, I find that in the context of the marks as a whole, none of the terms ‘RISE OF’, Legend of’, ‘LEGACY OF’ and ‘RISING’, play a dominant or distinctive role within the marks, on the basis that these terms do not have one distinct separate meaning and their meanings could be altered and/or be different depending on the word(s) or name, for example, that are used alongside them. Accordingly, whilst these terms will not be overlooked, I find that they play a lesser role in the overall impression of the applicant’s marks, which in all of the applicant’s marks at issue, will in my view, be dominated by the distinctive element ‘ANUBIS’.

Visual comparison

*The opponent’s mark* **ANKH OF ANUBIS** *and the first, second and third applications* **RISE OF ANUBIS, Legend of Anubis, LEGACY OF ANUBIS**

46. Visually, the marks all consist of three words. The point of similarity is that the second and third words in all the marks, namely ‘OF ANUBIS’ are identical. However, the first word in each mark differs, namely ‘ANKH’ versus ‘RISE’, ‘Legend’, and

'LEGACY'. With regard to the different letter casing used in 'Legend of Anubis', I bear in mind that notional and fair use of the marks would include use in both upper and lower case,[9] so letter case is irrelevant to the comparison. Accordingly, the marks are visually similar to a medium degree.

*The opponent's mark* **ANKH OF ANUBIS** *and the fourth application* **ANUBIS RISING**

47. The earlier mark comprises three words composed of twelve letters, whereas the applicant's mark comprises two words composed of twelve letters. The points of visual similarity is that the word 'ANUBIS' is present in both marks, albeit in different positions, with 'ANUBIS' being the first word in the applicant's mark and the last word in the earlier mark. However, the other words present in the marks are different, namely the word 'RISING' in the applicant's mark, and the words 'ANKH OF' in the earlier mark. Accordingly, the marks are visually similar to between a low to medium degree.

Aural comparison

48. Aurally, 'OF ANUBIS' will be pronounced identically in all the marks, namely as 'AH-NEW-BIS'.

*The opponent's mark* **ANKH OF ANUBIS** *and the first application* **RISE OF ANUBIS**

49. The opponent's mark is likely to be pronounced as 'ANK-OF-AH-NEW-BIS, whereas the applicant's mark is likely to be pronounced as 'RIZE-OF-AH-NEW-BIS. The additional verbal elements 'ANKH' in the opponent's mark and 'RISE in the applicant's mark act as points of aural difference. Overall, I find that the marks are aurally similar to a medium degree.

*The opponent's mark* **ANKH OF ANUBIS** *and the second application* **Legend of Anubis**

[9] *Bentley Motors Limited v Bentley 1962 Limited,* BL O/158/17

50. The opponent's mark is likely to be pronounced as 'ANK-OF-AH-NEW-BIS, whereas the applicant's mark is likely to be pronounced as 'LEJ-UND-OF-AH-NEW-BIS. The additional verbal elements 'ANKH' in the opponent's mark and 'LEGEND' in the applicant's mark act as points of aural difference. Overall, I find that the marks are aurally similar to a medium degree.

*The opponent's mark* **ANKH OF ANUBIS** *and the third application* **LEGACY OF ANUBIS**

51. The opponent's mark is likely to be pronounced as 'ANK-OF-AH-NEW-BIS, whereas the applicant's mark is likely to be pronounced as 'LEG-UH-SEE-OF-AH-NEW-BIS. The additional verbal elements 'ANKH' in the opponent's mark and 'LEGACY' in the applicant's mark act as points of aural difference. Overall, I find that the marks are aurally similar to a medium degree.

*The opponent's mark* **ANKH OF ANUBIS** *and the fourth application* **ANUBIS RISING**

52. The opponent's mark is likely to be pronounced as 'AN-KH-OF-AH-NEW-BIS, whereas the applicant's mark is likely to be pronounced as 'AH-NEW-BIS-RI-ZING'. The additional verbal elements 'ANKH OF' at the start of the opponent's mark and 'RISING' at the end of the applicant's mark act as points of aural difference. Overall, I find that the marks are aurally similar to between a low to medium degree.

Conceptual comparison

53. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. 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. The assessment must, therefore, be made from the point of view of the average consumer.

*The opponent's mark* **ANKH OF ANUBIS**

54. As previously stated, with regards to the opponent's submissions that the word 'ANKH' has the meaning of life, and 'ANUBIS' refers to an ancient Egyptian god of the

dead, I am of the view that it is unlikely that a significant proportion of average UK consumers will make this connection, but will instead, simply perceive these elements as invented with no immediate concept.

*The applications*

55. As stated above, I am of the view that 'ANUBIS', present in all of the marks, will be perceived as an invented word with no immediate concept.

56. The words 'RISE OF' in the first application will likely be understood as reference to something or someone that has become important/successful, etc.

57. The words 'Legend of', in the second application will likely be understood as a reference to a particular story, i.e. one that has been handed down through generations.

58. The words 'LEGACY OF' in the third application will likely be understood as a reference to a particular event or period in history, which has a long-lasting impact.

59. The word 'RISING' in the fourth mark will likely be understood as a reference to an insurrection or rebellion, etc.

60. Overall, in comparing the marks, I find that the shared dominant element 'ANUBIS' is conceptually neutral because, as discussed above, 'ANUBIS' will likely be perceived as an invented word with no obvious meaning (the same applies to 'ANKH', for that matter). As for the additional words in applicant's four marks, e.g. 'RISE OF', etc., these act as points of conceptual difference. Accordingly, I am of the view that the marks at issue are conceptually dissimilar.

**Distinctive character of the earlier mark**

61. 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 C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Alternberger* [1999] ECR I-0000, 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 promoting 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).”

62. Registered trade marks possess varying degree 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 distinctive character of a mark can be enhanced by virtue of the use that has been made of it.

63. The degree of distinctiveness of the earlier mark is one of the factors that must be taken into account when assessing whether there is a likelihood of confusion, this includes considering whether the distinctive character of the earlier mark has been enhanced through the use that has been made of it. If a mark has an inherently high level of distinctiveness, the greater the likelihood of confusion may be, although it is

the distinctive character of a component that is similar between the marks that is particularly relevant.[10]

64. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use in relation to the earlier mark. Consequently, I have only the inherent position to consider.

65. In its written submissions[11] the opponent submits that the word 'ANUBIS' refers to an ancient Egyptian god of the dead and that the word 'ANKH' has the meaning of 'life'. Furthermore, the opponent states that as the earlier mark 'ANKH OF ANUBIS' has no meaning in relation to the goods and services at hand, it is therefore distinctive to at least a medium degree. However, as previously discussed in this decision, it is noted that the applicant is of the opinion that the opponent's mark is of weak distinctiveness, both on the register and in the marketplace, due to the coexistence of closely similar marks and the relevant consumer's knowledge of the marketplace. In this regard, I remind myself that the state of the register is not evidence of how many of such trade marks are effectively used in the market, nor does it establish that the distinctive character of the element or elements in question has been weakened because of its frequent use in the field concerned.[12]

66. As previously stated, I am of the view that the average consumer is unlikely to know the names of the Egyptian gods, or that 'ANKH' is intended to mean 'life', but rather, will perceive the words as invented with no meaning. Accordingly, when considered as a whole, in combination with the goods and services at issue, I do not find the earlier mark 'ANKH OF ANUBIS' to be descriptive. As such, I find the earlier mark to be inherently distinctive to a high degree.

**Likelihood of confusion**

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

[10] *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, paragraphs 38 and 39.
[11] Written submissions in lieu, dated 28 February 2024 [para 16].
[12] *Zero Industry Srl v OHIM,* Case T-400/06

average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods or services 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 or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services 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.

68. In respect of indirect confusion, I am guided by the case of *L.A. Sugar Limited v By Back Beat Inc,* BL O/375/10, wherein Mr Iain Purvis Q.C. (as he then was), as the Appointed Person, explained that:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark'.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

69. The examples given under paragraphs 17(a) to 17(c) of *L.A. Sugar* are not exhaustive but simply offer helpful guidance as to examples where one may find indirect confusion. Further, on the point of indirect confusion, generally, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at paragraph 16 that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

70. The applicant admits that the goods and services are identical.[13] I have found the average consumer for the goods and services to be both members of the public (be that members of the public at large or those over the age of 18 for gambling related goods and services) and professional users. The consumers will select the goods and services by primarily visual means, although I do not discount an aural component. I have concluded that the average consumer will generally pay a medium degree of

[13] Written submissions filed on 16 October 2023 [para 4].

attention but that this may be lower or higher depending on the goods and services at issue. I have found the earlier mark to have a high degree of inherent distinctiveness.

71. With regards to the similarity of the marks, I have found that the applicant's first, second and third marks and the opponent's earlier mark are all visually and aurally similar to a medium degree, and conceptually dissimilar. The applicant's fourth mark and the opponent's earlier mark are visually and aurally similar to between a low to medium degree, and conceptually dissimilar.

72. I bear in mind that the applicant's marks and the opponent's mark begin with different words and that the beginnings of marks tend to have more visual and aural impact than the ends,[14] though I accept that this is not always the case. Furthermore, I do not consider it likely that consumers would entirely forget the unusual element 'ANKH' at the beginning of the opponent's mark. Accordingly, taking all of the above factors and the principle of imperfect recollection into account, I consider that the visual, aural and conceptual differences between the marks are sufficient to ensure that they will not be misremembered or mistakenly recalled as each other. Therefore, I do not consider there to be a likelihood of direct confusion, I say this even when factoring in that the goods and services are identical.

73. Taking into account the previously outlined guidance of Mr Iain Purvis Q.C. (as he then was) in *L.A. Sugar,* I will now consider whether there might be a likelihood of indirect confusion which involves recognition by the average consumer of the differences between the marks.

74. I am guided by the case of *Interflora Inc v Marks and Spencer plc* [2014] EWCA Civ 1403 wherein LJ Kitchin stated that a court must have regard to the impact of the opponent's mark on the proportion of consumers to whom the trade mark is particularly distinctive. I am also guided by the case of *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, wherein Kitchin LJ concluded that if 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. While these cases

[14] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02.

were infringement cases, the principles apply equally to oppositions under section 5(2) of the Act.

75. As a result of the cases cited above, I will focus my assessment of a likelihood of indirect confusion on the significant proportion of consumers who are not aware of the meaning of the word 'ANUBIS' on the basis that it is to that group of consumers that the opponent's marks have a higher degree of distinctive character. It follows that if there is a likelihood of indirect confusion amongst this significant proportion of consumers, it is sufficient for the opposition against the applicant's marks to succeed.

76. In the present case, the applicant's first, second and third marks and the opponent's mark all share the common elements 'OF ANUBIS'. With regard to the applicant's fourth mark and the opponent's mark, the common element 'ANUBIS' is shared (albeit positioned differently in the parties' marks). Whilst I note that the applicant's marks contain different words at the start of the marks (in the case of the first second and third marks), and an additional word at the end (in the case of the fourth mark), I am of the view that these words merely qualify the word 'ANUBIS' in each mark, and therefore, I find that the common element 'ANUBIS' is the dominant and distinctive element in the applicant's marks and will have no obvious meaning to the average consumer. While I acknowledge that the common element sits at the end of the opponent's mark and the applicant's first, second and third marks, rather than at the beginning, I am reminded that elements at the end of marks may still be sufficient to create a likelihood of confusion.[15]

77. Accordingly, I am of the view that the differences between the marks will be seen by the average consumer as alternative marks from the same or economically linked undertakings. Consequently, even taking into account the comments of Mr Mellor QC (as he then was) and Arnold LJ at paragraph 76 above, I consider there to be a likelihood of indirect confusion between the opponent's mark and all of the applicant's marks, even on goods and services that are selected with a higher degree of attention.

[15] *Bristol Global Co Ltd v EUIPO*, T-194/14.

## OUTCOME

78. The oppositions under section 5(2)(b) of the Act succeed against all the applicant's marks, namely application nos. UK3840209 ('RISE OF ANUBIS'), UK3849697 ('Legend of Anubis'), UK3849702 ('LEGACY OF ANUBIS') and UK3849707 ('ANUBIS RISING'). Subject to any successful appeal against my decision, the applications will be refused in their entirety.

## COSTS

79. In these consolidated proceedings, the opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice (TPN) 2/2016, (insofar as opposition No. 438871 is concerned, which was brought before 1 February 2023), and the scale published in TPN 1/2023 (for the remaining oppositions which were brought after 1 February 2023). I also bear in mind that the four cases were consolidated. In addition, the opponent, in its written submissions,[16] has requested the Tribunal award costs in relation to the CMC, that took place on 8 November 2023. The associated submissions read as follows:

> "We refer to the CMC that took place on 8 November 2023 and the attached letter confirming that the Applicant's request for an extension of time to file its evidence is allowed.
>
> This is despite the Applicant's Representatives not following the correct procedure in requesting an extension of time and the reasons provided as to why further time was needed being (1) long-term health conditions (which allowed for a request to be submitted in good time before the deadline) and (2) being a sole practitioner. As expressed at the hearing, we are extremely disappointed with the decision taken, which is not in line with the established criteria the office usually requires to exercise its discretion in allowing an extension of time.

[16] Dated 21 November 2023.

> We understand that we have the right to argue the decision taken at the CMC at the final hearing, and expressly reserve our right to do so. In addition, we would like it to be on record that these circumstances should be taken into account when it comes to assessing costs in the matter."

80. It is noted that the applicant's evidence and submissions were not filed by the original deadline and that their subsequent request for a retrospective extension to the time limit in order to submit the evidence was initially refused by the Tribunal. However, following a CMC the applicant was permitted to file its submissions and evidence. I note from the opponent's comments above, how disappointed they are with the decision taken, and in the circumstances request that the matter is taken into account when it comes to assessing costs in the matter.

81. Accordingly, I confirm that I will bear in mind the opponent's attendance at the CMC, (in addition to making an award for considering the applicant's evidence), in order to reflect the additional costs incurred as a result of attending the CMC. Consequently, I award costs to the opponent on the following basis:

| | |
|---|---|
| Official fee (Form TM7) (£100 x 4) | £400 |
| Preparing notices of opposition and considering the applicant's counterstatements | £600 |
| Preparing written submissions | £300 |
| Considering the applicant's evidence and Written submissions | £400 |
| Preparing for and attendance at the CMC | £300 |
| Preparing submissions in lieu of a hearing | £300 |
| **Total** | **£2300** |

82. I therefore order Blueprint Technologies Ltd to pay Play'n GO Marks Ltd the sum of £2,300. The 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 25th day of October 2024**

**Sam Congreve**
**For the Registrar**

## Annex 1

Applications: UK3840209, UK3849697, UK3849702 and UK3849707

Class 9 Computer software being gambling games, games of chance and skill; computer software downloadable from or distributed via the Internet relating to gaming, casino games and services, gambling and gambling services; computer software downloadable from or distributed via the Internet relating to gaming, casino games and services, poker games, card games, poker tournaments, gambling and gambling services and betting and betting services; gambling software; interactive computer systems relating to gaming, casino games and services, gambling and gambling services and betting and betting services.

Class 28 Gaming machines for gambling; automatic gaming machines; bill operated gaming machines; lottery scratch cards; Electric, electronic or electromechanical apparatus for bingo games, lotteries or video lottery games and for betting offices, networked or unnetworked; Electropneumatic and electric pulling machines being gaming machines; parts and fittings for all the aforesaid goods.

Class 41 Gaming, gambling, betting and casino services including such services provided on a website over computer networks; gambling games, games of chance and skill not downloadable provided on the internet; credit betting, lottery or bookmaking services; provision of electronic information relating to gaming, casino games, gambling services and betting, interactive games and gaming services via a global communications network; interactive games and gaming services via a global communications network; information and advice relating to the aforementioned services; online gambling services; providing casino services; casino, gaming and gambling services.

## Annex 2

Earlier mark: UK3442138

Class 9 Computer games and video games (software), hereunder software for slot machine games, betting and wagering games, video slot games and casino games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers, handheld devices and mobile phones; software for slot machine games, betting and wagering games, video slot games and casino games provided online and via computer networks and playable on any type of computing device including arcade games, personal computers and handheld devices.

Class 28 Videogaming apparatus, hereunder slot machines for gambling, gaming machines, poker machines and other video based casino gaming machines; arcade games; gaming machines, namely, devices that accept a wager; reconfigurable casino and lottery gaming equipment, hereunder gaming machines including computer games and software therefor sold as a unit.

Class 41 Games services provided online (via computer networks), hereunder providing slot machine games, betting and wagering games, video slot games and casino games, playable via local or global computer networks; online gaming services; entertainment services, namely, conducting a game of chance simultaneously at multiple, independent gaming establishments; entertainment services, hereunder providing online computer games; prize draws [lotteries]; organising and conducting lotteries.