

O/1148/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK3868216

BY EVOKE COUNTRY & EQUESTRIAN LTD

TO REGISTER THE TRADE MARK:

**Polaris**

**POLARIS**

(series of 2)

IN CLASSES 9, 18, 25, 28 & 35

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 440185

BY FLO MAGAZACILIK VE PAZARLAMA ANONIM SIRKETI

## **Background and pleadings**

1. On 13 January 2023, EVOKE COUNTRY & EQUESTRIAN LTD (“the applicant”) applied to register the series of trade marks shown on the cover page of this decision in the UK. The application was published for opposition purposes on 27 January 2023. Registration is sought for the following goods and services:

Class 9: Protective clothing, gloves, riding hats and boots; protective helmets; riding helmets; safety helmets; safety headwear; safety clothing for protection against accident or injury; safety footwear for protection against accident or injury; all of the aforesaid being for equestrian use.

Class 18: Articles of leather and imitation leather all being for equestrian use; saddlery; bridles, stirrup leathers; horse clothing; numnahs, rugs, sheets, blankets; nose bags; horse cloths, collars, covers, blankets; horse leg protectors and boots; whips and crops; all the aforesaid being for equestrian use.

Class 25: Articles of clothing, footwear and headgear; articles of clothing, footwear and headgear all being for wear in connection with equestrian sports, events and activities; riding coats, jackets, hats, boots, gloves; jodhpurs, breeches, chaps, waistcoats, scarves and ties; all of the aforesaid for wear in connection with equestrian sports, events and activities.

Class 28: Sporting articles for equestrian use; body protectors for equestrian use.

Class 35: Advertising, business management, business administration, office functions, provision of information to customers, provision of advice and assistance in the selection of goods, advertising services for others, all of the aforesaid services provided over the Internet, in a department store or over a computer network; all of the aforesaid services relating to equestrian activities.

2. The application was partially opposed by FLO MAGAZACILIK VE PAZARLAMA ANONIM SIRKETI (“the opponent”) on 12 April 2023. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) against all goods in classes 18 and 25 and the following goods in class 9:

Class 9: Protective clothing; riding hats and boots; safety headwear; safety clothing for protection against accident or injury; safety footwear for protection against accident or injury.

3. The opponent relies on the following trade mark:

UK918214756<sup>1</sup>

***Polaris***

Filing date: 26 March 2020

Registration date: 14 July 2020

Relying upon the following goods:

Class 18: Unworked or semi-worked leather and animal skins, imitations of leather, stout leather, leather used for linings; Goods made of leather, imitations of leather or other materials, designed for carrying items, included in this class; bags, wallets, boxes and trunks made of leather or stout leather; keycases, trunks [luggage], suitcases; Umbrellas; parasols; sun umbrellas; walking sticks; Whips; harness; saddlery; stirrups; straps of leather (saddlery).

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<sup>1</sup> 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.

Class 25: Clothing, including underwear and outerclothing, other than special purpose protective clothing; socks, mufflers [clothing], shawls, bandanas, scarves, belts [clothing]; Footwear, shoes, slippers, sandals; Headgear, hats, caps with visors, berets, caps [headwear], skull caps.

4. The opponent claims that the marks are identical or highly similar. The opponent also states that the applicant's goods are identical or highly similar to their own and that these similarities will give rise to a likelihood of confusion.

5. The applicant filed a counterstatement in which it denied that the marks are identical but admitted that they are similar (but not to a very high degree). It admits similarity for some goods but not others, which I will go into further detail on later in this decision.

6. The applicant is represented by Franklins Solicitors LLP and the opponent is represented by Stobbs.

7. The applicant filed evidence. Neither party requested a hearing but the applicant filed submissions in lieu. This decision is therefore taken following careful consideration of the papers.

8. 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**

9. The applicant's evidence consists of a witness statement dated 1 December 2023 by David Lee Mitson who is the Managing Director of Evoke Country & Equestrian Ltd. There were no accompanying exhibits. The main purpose of the evidence is to provide information regarding the goods and services at issue. Whilst I have read and noted the evidence, as there is no proof of use required in these proceedings, the

comparison of goods I will undertake is a notional assessment based on what is contained within the specifications as the average consumer will understand them to mean.

## **DECISION**

10. Section 5(2)(b) is being relied upon and is as follows:

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

11. Section 5A of the Act is as follows:

“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.”

13. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6. (1) In this Act an “earlier trade mark” means –

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;”

14. In these proceedings, the opponent is relying upon the trade mark shown in paragraph 3, which qualifies as an earlier trade mark under the above provisions. As this trade mark had not completed its registration process more than 5 years before the filing date of the application in suit, it is not subject to proof of use, as per section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods and services they have identified.

### **Case law**

15. In making this decision, I bear in mind the following principles 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**

16. In the judgment of the 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”.

17. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (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.

18. In *Gérard Meric v Office for Harmonisation in the Internal Market* (OHIM) (*‘Meric’*), Case T-133/05, the General Court (“the 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 *Institut für Lernsysteme*

*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”.

19. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that ‘complementary’ means:

“[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

20. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. (as he then was), sitting as the Appointed Person, noted in *Sandra Amalia Mary Elliot v LRC Holdings Limited* BL O/255/13:

“It may well be the case that wine glasses are almost always used with wine and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes”, whilst on the other hand:

“[...] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together”.

21. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

22. The Parties' respective specifications are:

Contested Goods	Opponent's goods
<p>Class 9: Protective clothing; riding hats and boots; safety headwear; safety clothing for protection against accident or injury; safety footwear for protection against accident or injury.</p> <p>Class 18: Articles of leather and imitation leather all being for equestrian use; saddlery; bridles, stirrup leathers; horse clothing; numnahs, rugs, sheets, blankets; nose bags; horse cloths, collars, covers, blankets; horse leg protectors and boots; whips and crops; all the aforesaid being for equestrian use.</p> <p>Class 25: Articles of clothing, footwear and headgear; articles of clothing, footwear and headgear all being for wear in connection with equestrian sports, events and activities; riding coats, jackets, hats, boots, gloves; jodhpurs, breeches, chaps, waistcoats, scarves and ties; all of the aforesaid for wear in</p>	<p>Class 18: Unworked or semi-worked leather and animal skins, imitations of leather, stout leather, leather used for linings; Goods made of leather, imitations of leather or other materials, designed for carrying items, included in this class; bags, wallets, boxes and trunks made of leather or stout leather; keycases, trunks [luggage], suitcases; Umbrellas; parasols; sun umbrellas; walking sticks; Whips; harness; saddlery; stirrups; straps of leather (saddlery).</p> <p>Class 25: Clothing, including underwear and outerclothing, other than special purpose protective clothing; socks, mufflers [clothing], shawls, bandanas, scarves, belts [clothing]; Footwear, shoes, slippers, sandals; Headgear, hats, caps with visors, berets, caps [headwear], skull caps.</p>

connection with equestrian sports, events and activities.	
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### Class 9

*Protective clothing; riding hats and boots; safety headwear; safety clothing for protection against accident or injury; safety footwear for protection against accident or injury.*

23. I note that the opponent has pleaded that the above goods from the applicant's class 9 specification are similar to their own class 25 goods. The applicant has stated within their submissions that this is not so as safety/protective clothing, headwear and footwear is a "discrete market with discrete trade channels to general clothing, headwear and footwear". The Nice Classification explanation note expressly states that class 25 goods (as covered by the opponent's specification) does not include a range of protective clothing or footwear (and this is further supported by the opponent's specification stating 'other than special purpose protective clothing').<sup>2</sup> Having said that, and pursuant to section 60A(1) of the Act, this does not mean that the goods at issue cannot be similar.

24. All of the above terms cover clothing, headwear and footwear for protective/safety purposes and I am of the view that this is a different purpose to that of 'clothing [...]; footwear[...]; headgear[...]' from the opponent's specification. Whilst there might be some undertakings that produce and sell the above protective items as well as ordinary clothing, I do not consider it to be common practice and so I do not consider there to be an overlap in trade channels. I find there to be a limited overlap in nature and method of use on the basis that they cover/dress the body/other clothes in some respect. For users, I consider there would be some overlap, although limited as not all class 25 purchasers will seek to buy class 9 goods. They are not complementary nor are they in competition. I therefore find them to be similar to between a low and medium degree.

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<sup>2</sup>[https://www.wipo.int/classifications/nice/nclpub/en/fr/?basic\\_numbers=show&class\\_number=25&explanatory\\_notes=show&gors=&lang=en&menulang=en&mode=flat&notion=&pagination=no&version=20240101](https://www.wipo.int/classifications/nice/nclpub/en/fr/?basic_numbers=show&class_number=25&explanatory_notes=show&gors=&lang=en&menulang=en&mode=flat&notion=&pagination=no&version=20240101)

## Class 18

25. I note that the applicant has said that their own class 18 goods are explicitly focused on equestrian use (as shown by the limitation on classes 18 and 25) and that the opponent's specification is not; however, as I stated earlier, as there is no need for the opponent to prove use of their goods, they can rely on them as they are listed. I must interpret them as they are noted, and I can see no reason why the opponent's specification on a notional basis would not also cover equestrian use where applicable.

26. The following terms are found identically in both specifications: *saddlery; whips.*

*Articles of leather and imitation leather all being for equestrian use;*

27. I consider that the opponent's 'saddlery' (which I understand to mean saddles, bridles and other horse riding equipment) would fall within the above term and therefore, I find these goods to be identical under the *Meric* principles.

*Bridles, stirrup leathers;*

28. I consider the above items to fall within the term of 'saddlery' within the opponent's specification and therefore, I find them to be identical under the *Meric* principles.

*Horse clothing; numnahs, rugs, sheets, blankets; nose bags; horse cloths, collars, covers, blankets; horse leg protectors and boots*

29. As per the limitation on the applicant's specification, I note that all of the above goods are for equestrian use. Therefore, I consider there to be an overlap in trade channels with the opponent's 'saddlery' as this is also equestrian related. I consider the nature and method of use to be different, the above items are worn or used for the horse's benefit (i.e. to keep them warm, feed them or protect them) whereas saddlery is more for the benefit of the horse rider and is therefore shaped as such. There would be an overlap in user- horse owners and riders would likely use both sets of items.

They are not complementary nor are they in competition. I therefore find them to be similar to between a low and a medium degree.

### *Crops*

30. I consider that a crop used for equestrian purposes could overlap with the opponent's 'whips' as these can also be used in equestrian terms. They overlap in nature, purpose and method of use. There could be an overlap in trade channels. They could be in competition but they are not complementary. I therefore consider them to be similar to a high degree.

### Class 25

31. The applicant admits in paragraph 13 of their counterstatement that their class 25 goods are identical to the opponent's class 25 goods.

### **Average consumer and the purchasing act**

32. 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: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

33. 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 word

“average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

34. For the class 9 and 25 goods, the average consumer will likely consist of members of the general public (including horse owners/riders), not discounting that there may be professional or business consumers also. The goods could be sold through a range of retailers, be that specific or more general. The goods could also be selected online or through a catalogue. In physical premises, the goods will likely be displayed on shelves or racks where they can be viewed and self-selected by the consumer. A similar process will apply to websites and catalogues where the consumer will select the goods having viewed an image displayed on a webpage or catalogue page.

35. The cost of those goods is likely to vary on the basis that some ordinary clothing goods are likely to be relatively inexpensive items whereas protective clothing and safety headwear may be rather more expensive purchases (though I do not consider these extend to being very expensive). I consider the frequency of purchase to be fairly regular, even in the case of the safety items as they will need to be replaced in order to ensure that their safety qualities remain at the highest level.

36. When selecting the ordinary clothing goods, the average consumer is likely to consider fit, style and material used. It is my view that these consumers are likely to pay a medium degree of attention. That being said, I am of the view that for goods such as protective clothing, the average consumer is likely to consider additional factors such as the level of protection offered by the goods, the coverage of the protection and whether they are suitable for the relevant activity/employment environment. In these circumstances, I consider that the average consumer will pay a higher than medium degree of attention (but not the highest) during the selection process.

37. For the class 18 goods, the average consumer is a member of the general public who owns a horse, although I accept there might be some professional consumers (particularly as goods such as whips and crops are likely to be purchased by racehorse trainers). Given the importance of the safety and comfort of both rider and horse when purchasing the riding related goods (i.e. saddlery, bridles and stirrups) I consider that

a higher than medium degree of attention would be paid. For the other goods such as blankets, whips etc I find it to be a medium degree. The goods will likely come from equestrian suppliers, either online or in physical retail outlets. Again, the costs will vary greatly. I consider the visual element to play an important role but do not discount the aural elements from discussions with sales staff.

### **Comparison of the marks**

38. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a 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 marks must be assessed by reference to the overall impressions created by the 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.”

39. 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.

40. I note that the holder accepted within their counterstatement that the marks are similar, however, they did not comment on the level of similarity. Therefore, I am still required to undertake a comparison in order to determine this.

41. The respective trade marks are shown below:

Contested marks (series of two)	Earlier Mark
<p data-bbox="413 333 576 383" style="text-align: center;"><b>Polaris</b></p> <p data-bbox="386 501 603 551" style="text-align: center;"><b>POLARIS</b></p>	<p data-bbox="940 405 1257 472" style="text-align: center;"><b><i>Polaris</i></b></p>

42. The contested marks are singular word marks and therefore, that is where the overall impression lies. The earlier mark contains the singular word 'POLARIS' in a lightly stylised typeface and presented in red. I find, in accordance with settled case law,<sup>3</sup> that the word element will be the dominant and distinctive component with the stylisation playing a much lesser role.

43. Visually, both marks contain the word 'Polaris'. The earlier mark has the addition of the light stylisation which is not replicated within the contested mark. I therefore consider the marks to be visually similar to a high degree.

44. In relation to the aural comparison, I consider that the marks will be articulated identically as 'PO-LAR-ISS'.

45. Conceptually, I understand 'Polaris' to be another name for the North Star and I believe that a significant proportion of consumers will also know or at least understand it to be a reference to a star. I consider that there may be some consumers who view the mark as an invented term as they do not recognise the reference to a star however, I consider this group will likely be a minority and as is it sufficient that a significant proportion of consumers might be confused, I will not consider this further.<sup>4</sup> I therefore find the marks to be conceptually identical.

<sup>3</sup> See for instance: *MigrosGenossenschafts-Bund v EUIPO*, T-68/17; and *Wassen International Ltd v OHIM (SELENIUM-ACE)*, Case T-312/03, paragraph 37.

<sup>4</sup> *Interflora Inc v Marks and Spencer plc* [2013] EWHC 1291 (Ch), paragraph 224.

## **Distinctive Character of the Earlier Mark**

46. 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 Attenberger* [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).”

47. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and/or services, ranging up 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 made of it. However, I have not been provided with any evidence of use and, consequently, I have only the inherent position to consider.

48. For a significant proportion of consumers, the earlier mark is an ordinary dictionary term which has no relation to the goods and services registered. Therefore, I find the mark to be inherently distinctive to a medium degree.

### **Likelihood of confusion**

49. 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 and 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 and services and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier marks, 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.

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

- I have found the word 'POLARIS' to be the dominant and distinctive element of the earlier mark, with the stylisation of the word playing a much smaller role. With the contested marks, the overall impression lies in the word 'POLARIS' as that is the only element.
- I have found the marks to be visually similar to a high degree.
- I have found the marks to be aurally identical and conceptually identical.
- I have found the earlier mark to be inherently distinctive to a medium degree.
- I have identified the average consumer for the goods at issue to be a combination of members of the general public as well as

professionals/businesses. The purchasing process is likely to be predominantly visual.

- I have concluded that either a medium or a higher than medium degree of attention (but not the highest) level of attention will be paid during the purchasing process.
- The remaining goods at issue are either identical or range in similarity between a low and medium degree to a high degree.

51. Given I have found that the marks are highly similar visually and that they are aurally and conceptually identical, I am satisfied that the average consumer is unlikely to recall the marks accurately and may not remember that one of them is stylised by way of imperfect recollection. They are likely to mistake one mark for the other even where the level of similarity between the goods is lower. Consequently, I find there to be a likelihood of direct confusion between the marks.

52. In the event that I am wrong in finding there to be a likelihood of direct confusion, I will now go on to consider whether there could be indirect confusion. Mr Iain Purvis Q.C. (as he then was) said further in *L.A. Sugar Limited v Back Beat Inc*:

“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).”

53. These examples are not exhaustive but provide helpful focus, as was confirmed by Arnold LJ in *Liverpool Gin Distillery Limited & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207:

“This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition.”<sup>5</sup>

54. In the case of indirect confusion, the average consumer has noticed the differences between the marks but still believes them to be linked. The difference that the average consumer might notice in this case is the stylisation of the earlier mark. As previously mentioned, I have found the stylisation to not be a highly distinctive element of the mark. The average consumer, seeing that slight change in the presentation of the word element, will then see the contested marks as simply another way of using the earlier mark. Therefore, I find that indirect confusion is likely to occur.

## **Conclusion**

55. The opposition has been successful and the registration is refused, subject to any appeal.

## **Costs**

56. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023 as these proceedings commenced after 1 February 2023. I find that the applicant’s own evidence was limited in value and not extensive and the opponent provided no

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<sup>5</sup> Paragraph 12

response to it, therefore I am not providing an award in relation to this. I award the opponent the sum of **£350**, calculated as follows:

Official fee	£100
Preparing the Notice of opposition and considering the counterstatement	£250
<b>Total</b>	<b>£350</b>

57. I therefore order EVOKE COUNTRY & EQUESTRIAN LTD to pay FLO MAGAZACILIK VE PAZARLAMA ANONIM SIRKETI the sum of £350. This 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 the 29<sup>th</sup> day of November 2024**

**L Nicholas**  
**For the Registrar**