

O-255-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2548558
BY ABDUL LAWAL
TO REGISTER A TRADE MARK IN CLASSES 16, 21 & 25**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 101012 BY KIKO S.R.L.**

BACKGROUND

1. On 24 May 2010, Abdul Lawal applied to register



as a trade mark for a range of goods in classes 16, 21 and 25. Following examination, the application was accepted and published for opposition purposes on 2 July 2010.

2. On 1 October 2010, Kiko S.r.l ("Kiko") filed a notice of opposition. Following amendment this now consists of a single ground based upon section 5(2)(b) of the Trade Marks Act 1994 (as amended) ("the Act") directed solely at the class 25 element of the application for registration which reads as follows:

Clothing, footwear, headgear.

Kiko relies upon the following trade marks:

Trade Mark	No.	Application date	Registration date	Goods
KIKO	E1479179	27.01.2000	05.06.2003	25 - Clothing, namely, women's wear.
KIKO	E5736351	22.02.2007	Pending	18 – Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery. 25 –Clothing, excluding stockings, tights and socks; headgear. 35 - Retailing and wholesaling of leatherwear, clothing and headgear, excluding all the services with relationship to the business of footwear.

3. In its Notice of Opposition Kiko says inter alia:

“3. The earlier marks are highly distinctive per se because they are composed of the short invented word KIKO, which has no conceptual meaning in respect of class 25 goods and which is characterised by alliteration....

4. The mark applied for begins with the element KIKI, which is separated from the other element that forms the mark and which is highly similar to the earlier mark in that it has the same number of letters, the same first 3 letters, the same sequence K-vowel-K-vowel and the same alliteration.

5. The strong element KIKI in the mark applied for dominates that mark.

6. The average consumer of the class 25 goods, the subject of the application, is the general public who displays only an average degree of attention and who often must rely upon an imperfect recollection of the marks.

7. It is now well established that the public pays more attention to the beginning of marks and there is a risk that the mark applied for will be remembered by the public by the element KIKI, which we submit is confusingly similar to KIKO.

8. The class 25 goods, the subject of the application, are identical and highly similar to the goods covered by the earlier marks.”

4. On 21 October 2010, Mr Lawal filed a counterstatement in which the ground of opposition is denied. In his counterstatement Mr Lawal says inter alia:

“2. KIKI RABBIT consists of two words not one.

3. KIKI RABBIT is phonetically different from KIKO.

5. KIKI RABBIT contains a descriptive word (RABBIT). This is more likely to be remembered by the public than the element KIKI.”

Mr Lawal also points to a number of other trade marks registered in class 25 which he notes have: “the same number of letters, the same first three letters, the same sequence K-vowel-K-vowel and the same alliteration as KIKO” concluding that: “this feature is not exclusive to KIKO”.

5. Kiko filed written submissions in lieu of evidence-in-chief; Mr Lawal filed evidence-in-chief and Kiko filed evidence-in-reply. Both parties filed written submissions in lieu of attendance at a hearing; I will refer to the various submissions as necessary below.

Mr Lawal's evidence

6. This consists of a statutory declaration from Mr Lawal. As this declaration consists primarily of submissions rather than evidence of fact it is not necessary or appropriate for me to summarise it here. I will of course keep its contents in mind and refer to it as necessary below.

Kiko's evidence-in-reply

7. This consists of a witness statement from Grazyna Poplawska who is a trade mark attorney at Stevens Hewlett & Perkins, Kiko's professional representatives in these proceedings. Ms Poplawska's statement consists of a mixture of fact and submission; I will not summarise the submissions here but will refer to them as necessary below. Of the five exhibits provided two consist of copies of decisions; one of the IPO (GKP2) and the other the Court of First Instance (now the General Court) (GKP4); I will, if necessary, refer to these decisions below. The remaining exhibits and the conclusions Ms Poplawska draws from them are as follows:

Exhibit GKP1 – consists of extracts obtained from www.lacoste.co.uk, www.ralphlauren.co.uk, www.fashionbrand.co.uk and www.abercrombie.co.uk on 7 and 23 March 2011. Of these results Ms Poplawska says:

“The internet extracts show that many fashion designers use representations of animals to identify their house marks.”

The extracts provided show that the Lacoste brand uses the device of a crocodile, the Ralph Lauren brand the device of a polo player and the words Pink Pony and Big Pony, the Anglomania brand the device of a snake, the baby phat brand the device of a cat, the Ecko brand the device of a rhinoceros, the Hari brand the device of a lion and the Abercrombie brand what appears to be the device of a moose.

Exhibit GKP3 – consists of extracts obtained www.ralphlauren.co.uk, www.hugoboss.com, www.abercrombie.co.uk and www.armani.com on 7 March 2011. Of these extracts Ms Poplawska says:

“These internet extracts show that it is not unusual for fashion brands to be marketed and remembered by only one of the elements that compose those brands. For example, one of RALPH LAUREN's collections is called LAUREN, the brand HUGO BOSS is often reduced to HUGO, the brand ABERCROMBIE AND FITCH has ABERCROMBIE as well as FITCH lines, the ARMANI family of brands comprises both GIORGIO ARMANI and EMPORIO ARMANI brands along (sic) others that share the ARMANI name. Therefore, to consider that the purchaser of clothing, footwear and headgear would make a separation between the element KIKI and the element RABBIT would not be artificial.”

Exhibit GKP5 – consists of extracts obtained from www.ralphlauren.co.uk, www.hugoboss.com and www.maxmara.com on 7 March 2011. Of these extracts Ms Poplawska says:

“These internet extracts show that manufacturer’s of clothing do not limit the names they give their lines to descriptors such as basis, classic, sport etc. but that they also use more imaginative names, including animal’s names. For example, RALPH LAUREN’s collections include THE RL GANG, PURPLE LABEL, POLO RALPH LAUREN and PINK PONY. HUGO BOSS’s collections include BOSS BLACK, BOSS SELECTION, BOSS ORANGE and BOSS GREEN. MAX MARA’s collections include MAX MARA STUDIO, S BY MAX MARA and WEEKEND BY MAX MARA. Therefore, I believe that it is not unconceivable that the purchaser of clothing, footwear and headgear might believe that the mark KIKI RABBIT is essentially characterised by the word KIKI followed by the line RABBIT.”

8. That concludes my summary of the evidence filed to the extent I consider it necessary.

DECISION

9. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

“5. - (2) A trade mark shall not be registered if because -

(a)....

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, or

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

10. 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 -

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

11. In these proceedings Kiko is relying upon the two trade marks shown in paragraph 2 above, both of which are for the word KIKO presented in upper case and both of which constitute earlier trade marks under the above provisions; trade mark No. E5736351 has not yet achieved registration. However, as No. E1479179 is a registered trade mark, it is this trade mark I shall use to conduct the comparison. Although, in principle, it is subject to proof of use, as per The Trade Marks (Proof of Use, etc) Regulations 2004), I note Mr Lawal has not asked Kiko to provide proof of use (box 5 of his counterstatement refers).

Section 5(2)(b) – case law

12. The leading authorities which guide me are from the CJEU (Court of Justice of the European Union): *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

(e) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a

whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(f) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*.

(g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

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

(i) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(j) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(k) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(l) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*.

The average consumer and the nature of the purchasing process

13. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. The goods in issue in these proceedings are articles of clothing of one sort or another. These are goods which will be bought by the public at large; they then are the average consumer for such goods.

14. As to the manner in which the goods are likely to be selected by the average consumer, this is most likely to consist of a visual act made on the basis of self selection

in either a retail environment, from a catalogue or on-line (see for example the comments of the Appointed Person in *React Trade Mark* [2000] RPC 285).

15. In its Notice of Opposition Kiko characterised the degree of care the average consumer will display when selecting such goods as “average.” In his declaration Mr Lawal said:

“4. [The] average consumer of the class 25 goods...does not display an average degree of attention when buying clothes or headgear. The average consumer is likely to be informed and spend time considering their purchase. Time is spent examining the article of clothing or headgear in detail – be it the size, colour, shape, design or other features. In some cases time is also spent trying on the clothing or headgear to decide whether to proceed with the purchase or not.”

16. In *New Look Ltd v Office for the Harmonization in the Internal Market* (Trade Marks and Designs) Joined cases T-117/03 to T-119/03 and T-171/03 the General Court considered the level of attention taken purchasing goods in the clothing sector:

“43 It should be noted in this regard that the average consumer’s level of attention may vary according to the category of goods or services in question (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trade marks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected.”

17. As the *New Look* case acknowledges, the cost of clothing can vary considerably. However, as neither of the competing specifications in class 25 is limited in this respect, it is goods across the whole price spectrum I must keep in mind. While I agree the average consumer’s level of attention is likely to be heightened when selecting, for example, a bespoke gown or suit, it is also, in my view, likely that the same average consumer’s level of attention will diminish when selecting, for example, an inexpensive pair of socks. While these examples demonstrate that the average consumer’s level of attention is likely to vary considerably given the cost and nature of the article of clothing at issue, I agree with Mr Lawal that when selecting even routine items of clothing the average consumer is likely to be conscious of factors such as the size, colour, material and price of the article concerned. Overall, I think the average consumer is likely to pay at least a reasonable degree of attention to the selection of the goods at issue.

Comparison of goods

18. For the sake of convenience, the goods to be compared are as follows:


Kiko's goods	Mr Lawal's goods
Clothing, namely, women's wear	Clothing, footwear, headgear.

19. Nowhere in his counterstatement, evidence or submissions does Mr Lawal suggest that the competing goods are not (as Kiko argue) identical or highly similar. Although the use of the word "namely" in Kiko's specification means that its specification should be construed as being limited to "women's wear" (the Trade Marks Registry's Classification Practice Guide refers), in view of the following comments of the General Court in *Gérard Meric v OHIM*, Case T-133/05, the competing goods must be regarded as identical:

"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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedial v OHIM – France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42)."

Comparison of trade marks

20. The trade marks to be compared are:

Kiko's trade mark	Mr Lawal's trade mark
KIKO	

21. The average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant components of the respective trade marks and, with that conclusion in mind, I must then go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

Distinctive and dominant components

22. Kiko's trade mark consists of the single word KIKO presented in upper case. As no part of the trade mark is emphasised or highlighted in any way, its distinctiveness must lie in its totality.

23. Turning now to Mr Lawal's trade mark, in its submissions dated 5 January 2011, Kiko said:

"Further we submit that it is unlikely that the general public will remember the mark KIKI RABBIT by the word RABBIT since the memorable and dominant feature of that mark is the word KIKI."

24. And in its submissions dated 20 May 2011, Kiko said:

"The applicant has admitted...that the element RABBIT of the opposed mark is descriptive. The applicant further states...that the word RABBIT is a well known dictionary word used by adults, teenagers and young children. The element RABBIT is also the second word element of the opposed mark. It is therefore submitted that the word element KIKI of the opposed mark is the more distinctive and memorable feature of that mark."

25. By contrast, in his declaration Mr Lawal says, inter alia:

"3. The opponent alleges that the element KIKI dominates the mark and is the memorable feature of the mark. I disagree with this assumption.

The element KIKI does not dominate the mark as it is stylised exactly the same way as the element RABBIT. Both words are stylised with a black stroke and white fill.

The element KIKI is not more memorable than the element RABBIT..."

26. In my view, Mr Lawal's trade mark consists of three elements; the words Kiki and Rabbit and the manner in which these two separate words are presented; the words are, in my view, likely to be known to the average consumer as a female forename and a small mammal respectively.

27. In terms of the distinctiveness of these individual words, there is nothing to suggest that the word Kiki is anything other than distinctive for the goods at issue. Insofar as the word Rabbit is concerned, (although to my knowledge a surname, albeit, I suspect, a rare one), it is likely (given the propensity of traders in the clothing sector to, for example, decorate items of clothing with a multiplicity of images or to trim clothing with fur), to be regarded by the average consumer as a word describing, for example, clothing trimmed with rabbit fur, or adorned with the images of rabbits or even, perhaps, novelty footwear in the form of rabbits. Although the presentation of the words is

somewhat unusual, as both words can still clearly be read, the presentation of Mr Lawal's trade mark does not, in my view, assist him to any significant extent. As to dominance, given its positioning as the first word in Mr Lawal's trade mark, the word Kiki inevitably assumes a degree of positional dominance over the word Rabbit. However, in my view, the two words in Mr Lawal's trade mark "hang together". The average consumer is, I think, likely to construe and remember Mr Lawal's trade mark as a totality; a totality which refers either to a person or (more likely) to a character called Kiki Rabbit; as such, there are, in my view, no dominant or distinctive elements, the distinctiveness of the trade mark lies in the totality it creates; I shall now approach the visual, aural and conceptual comparison with the above conclusions in mind.

Visual/aural comparison

28. Earlier in this decision I noted that in its Notice of Opposition Kiko said:

4. The mark applied for begins with the element KIKI, which is separated from the other element that forms the mark and which is highly similar to the earlier mark in that it has the same number of letters, the same first 3 letters, the same sequence K-vowel-K-vowel and the same alliteration."

29. In his declaration Mr Lawal said:

"Visually KIKI RABBIT is not similar to KIKO. KIKI RABBIT consists of 10 letters not 4...

Aurally KIKI RABBIT is not similar to KIKO. KIKI RABBIT is phonetically different. It also consists of 4 syllables not 2."

30. I have described the competing trade marks above. It is true that the word KIKO and the first word of Mr Lawal's trade mark i.e. Kiki, consist of the same number of letters, have the same first three letters and share the same K vowel-K-vowel construction. When considered from the visual and aural perspective there is, I accept, quite a high degree of aural similarity between these two competing words and to a somewhat lesser extent visual similarity (given the manner in which Mr Lawal's trade mark is presented). However, the word RABBIT is alien to Kiko's trade mark. When considered as totalities, the degree of visual and aural similarity between the competing trade marks is, I think, relatively low.

Conceptual similarity

31. In its Notice of Opposition Kiko says:

"3. The earlier marks are highly distinctive per se because they are composed of the short invented word KIKO which has no conceptual meaning in respect of class 25 goods..."

32. In his declaration Mr Lawal says:

“Conceptually KIKI RABBIT is not similar to KIKO. KIKI RABBIT is the combination of the girls name KIKI and the dictionary word RABBIT. KIKO is an invented word.”

33. When considering the issue of conceptual similarity, the following explanation from Case T-292/01 *Phillips-Van Heusen v OHIM – Pash Textilvertrieb und Einzelhandel* (BASS) [2003] helpfully sets out the position:

“Next, it must be held that the conceptual differences which distinguish the marks at issue are such as to counteract to a large extent the visual and aural similarities pointed out in paragraphs 49 and 51 above. For there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately. In this case that is the position in relation to the word mark BASS, as has just been pointed out in the previous paragraph. Contrary to the findings of the Board of Appeal in paragraph 25 of the contested decision, that view is not invalidated by the fact that that word mark does not refer to any characteristic of the goods in respect of which the registration of the marks in question has been made. That fact does not prevent the relevant public from immediately grasping the meaning of that word mark. It is also irrelevant that, since the dice game Pasch is not generally known, it is not certain that the word mark PASH has, from the point of view of the relevant public, a clear and specific meaning in the sense referred to above.

The fact that one of the marks at issue has such a meaning is sufficient –where the other mark does not have such a meaning or only a totally different meaning to counteract to a large extent the visual and aural similarities between the two marks.”

34. Both parties agree (and I am not aware of anything to the contrary), that Kiko’s trade mark consists of an invented word; it cannot therefore convey any conceptual message. By contrast, I have concluded that Mr Lawal’s trade mark is likely to create an image in the average consumer’s mind of either a person or (more likely) a character called Kiki Rabbit. In short, Mr Lawal’s trade mark is likely to send a conceptual message whereas Kiko’s trade mark will not.

Distinctive character of Kiko’s earlier trade mark

35. I must now assess the distinctive character of Kiko’s earlier trade mark. The distinctive character of a trade mark must be appraised first by reference to the goods in respect of which it has been registered and, second, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the

greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. As I mentioned above, both parties agree that Kiko's earlier trade mark consists of an invented word. It is neither descriptive of nor non-distinctive for the goods for which it stands registered, and as such, it is a trade mark which, absent use, is possessed of a high degree of inherent distinctive character.

Likelihood of confusion

36. In determining whether there is a likelihood of confusion, I need to bear a number of factors in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. It is also necessary for me to consider the distinctive character of Kiko's earlier trade mark, as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and 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 he has retained in his mind. Earlier in this decision I concluded, inter alia, that: (i) the average consumer was the public at large, (ii) the goods at issue were identical, (iii) Kiko's earlier trade mark was possessed of a high degree of inherent distinctive character, (iv) there was a relatively low degree of visual and aural similarity, and (v) while Mr Lawal's trade mark was likely to create an image in the mind of the average consumer, Kiko's trade mark was not.

37. In reaching a conclusion of the likelihood of confusion, I must also bear in mind Kiko's evidence which has been filed to show that traders in clothing; (i) use representations of animals to identify their house marks, (exhibit GKP1), (ii) use trade marks which are marketed and are remembered by only one of the elements that compose the trade mark (exhibit GKP3), (iii) use imaginative names to identify their lines (exhibit GKP5) and, (iv) by reference to comments of the GC in the case mentioned at paragraph 16 above (exhibit GKP4) that it is common in the clothing sector for the same trade mark to be configured in various ways according to the type of product it is designating and for a single clothing manufacture to use sub-brands to distinguish its various lines from one another. Although all of Kiko's evidence emanates from March 2011 which is after the material date in these proceedings, nowhere in his evidence or submissions does Mr Lawal take issue with Kiko's evidence in this respect, and I doubt the position would have been materially different at or before the material date of May 2010.

38. However, in his submissions Mr Lawal does take issue with a number of the conclusions reached by Kiko in its evidence-in-reply. These submissions contained some additional evidence which ought to have been filed in the course of proceedings

and to which, I note, Kiko objected. For the record, Mr Lawal's additional evidence and Kiko's response to it have played no part in my decision.

39. I agree with Kiko that the evidence establishes that a range of traders in clothing also use device of animals to identify their goods, that trade marks in the clothing sector are often marketed by reference to only one element of, for example, a word trade mark, that imaginative names are used to identify particular lines and that it is common for clothing manufacturers to use sub-brands and to configure their trade marks in differing ways according to the type of product being designated. In his submissions Mr Lawal says:

“6. In reply to the opponent's statements...KIKI RABBIT is configured exactly the same way for clothing, footwear and headgear. There are no sub brands.

7. [T]he average consumer normally perceives a mark as a whole. There is no reason for the purchaser of clothing, footwear and headgear to believe the mark KIKI RABBIT is essentially characterised by the word KIKI followed by the line RABBIT...”

40. Keeping all of the factors identified in paragraphs 36 and 37 in mind, I have come to the conclusion there is no likelihood of direct confusion. In my view there will be no direct confusion i.e. where one trade mark is mistaken for the other, because the competing trade marks are simply too different when compared from the visual and aural perspectives, and particularly when considered from the conceptual perspective (which as the case law explains is likely to counteract to a large extent any visual and aural similarities). I have also concluded there will be no likelihood of indirect confusion i.e. where the average consumer will assume that the goods come from undertakings which are economically linked (and which in my view probably offered Kiko the best prospect of success in these proceedings). I come to that conclusion because, in my view, the average consumer will (as Mr Lawal suggests) perceive his trade mark as a whole; a whole which will, in turn, evoke the conceptual image in their mind which I have mentioned above. This image, in my view, is likely to negate the likelihood of the average consumer seeing Mr Lawal's trade mark as a Kiki trade mark or in which the word Rabbit operates as, for example, a sub-brand. The consequence of those conclusions is that Kiko's opposition based upon section 5(2)(b) of the Act fails.

Costs

41. As Mr Lawal has been successful, he is entitled to a contribution towards his costs. Awards of costs are governed by Annex A of Tribunal Practice Notice 4 of 2007. Using that TPN as a guide (and making no allowance for Mr Lawal's statutory declaration which consisted only of submissions), but bearing in mind the registrar's practice to award costs at half the rate that would have been awarded where a party had legal representation, I award costs to Mr Lawal on the following basis:

Preparing a statement and considering
Kiko's statement: £100

Written submissions: £100

Total: £200

42. I order Kiko S.r.l to pay to Abdul Lawal the sum of **£200**. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of July 2011

C J BOWEN
For the Registrar
The Comptroller-General