

O/205/12

IN THE MATTER OF THE TRADE MARKS ACT 1994

-and-

**IN THE MATTER OF APPLICATION NO. 2474062 in the name of FABRIC
FLAVOURS LIMITED**

For the mark 'LOVE AND MONEY'

-and-

**IN THE MATTER OF OPPOSITION NO. 97076 THERETO BY MAGLIFICIO
LOREL MISS S.P.A.**

**APPEAL TO THE APPOINTED PERSON FROM THE DECISION OF MR. MARK
BRYANT ACTING ON BEHALF OF THE REGISTRAR OF TRADE MARKS DATED
11 NOVEMBER 2010**

DECISION

1. This appeal concerns trade mark application 2474062 for a series of two marks:

Love and Money

Love & Money

by Fabric Flavours Limited ('Fabric Flavours') in respect of a series of goods in class 25, namely articles of clothing and footwear.

2. The opponent, Maglificio Lorel Miss S.P.A. ('Maglificio') is the proprietor of the mark

LOVE SEX MONEY

also in class 25, for clothing, footwear and headgear.

3. Opposition was brought under s5(2)(b) and s5(3) of the Trade Marks Act 1994 and the matter was heard by the Hearing Officer Mr Mark Bryant on behalf of the Registrar on 11 November 2010. The Hearing Officer held that the opponent had satisfied the requirements of the Trade Marks (Proof of use. Etc) Regulations 2004 in respect of its marks insofar as they covered 'women's clothing'. He held that the opposition succeeded under s5(2)(b) in respect of all goods save bibs, babies napkins of textile and aprons. The opposition under s5(3) failed because of a lack of sufficient reputation.
4. The applicant has appealed against the refusal of its mark in respect of the remaining goods. It was represented before me by its director Mr Ezekiel Sweiry. The opponent was represented by Ms Tania Clark of Withers & Rogers LLP.
5. Before me, Mr Sweiry accepted that the goods the subject of the appeal are identical or very similar to the goods for which **LOVE SEX MONEY** is registered and has been used (namely women's clothing). His contention was that there was in truth no likelihood of confusion between the two marks **LOVE AND MONEY** and **LOVE SEX MONEY**, even where used on identical goods.

6. He put his case with admirable brevity and clarity. His took as his starting point the approach to comparisons between marks mandated by the decision of the ECJ in Sabel v Puma [1998] RPC 199 namely that one must assess the visual, aural and conceptual similarities of the marks by reference to the overall impressions which they create, bearing in mind their distinctive and dominant components. He noted that mere 'association' in the sense of the later mark bringing the earlier mark to mind was not enough. He also noted that the overall impression conveyed by a composite trade mark may be dominated by one or more of its component parts, as explained in Medion AG v Thomson Multimedia [2006] ETMR 13.
7. With those principles in mind he contended that by far the most distinctive and dominant element of the mark **LOVE SEX MONEY** was the word **SEX**. The absence of that element in the mark **LOVE AND MONEY** means that the marks give a different overall impression and reduce any similarity to a level at which there is no likelihood of one being mistaken for the other.
8. The decision of the Hearing Officer follows the normal pattern of such decisions in s5(2) cases. It sets out the principles which can be derived from a series of ECJ/CJEU decisions on the topic, in standard Registry form. These include the principles mentioned by Mr Sweiry to which I have referred in paragraph 6 above. Having identified the identity/strong similarities between the goods, it proceeds to consider the average consumer and concludes that he/she is a purchaser of clothing which is not limited to expensive, high-end products, and therefore could be expected to exercise a reasonable degree of care in the purchasing process, but not the highest degree of care. This assessment cannot be criticized.
9. Turning to compare the marks, the Hearing Officer considered the similarities from the aural, visual and conceptual perspectives. He

concluded that the similarity is moderately high, as a result of the facts that (i) each consists of 3 words; (ii) two of the words (LOVE, MONEY) are the same and are in the same position in the mark; (iii) the third word (AND in one and SEX in the other) is a three letter word).

10. On the issue of the dominance of the word SEX in the opponent's mark, the Hearing Officer noted that all three words, namely MONEY, SEX and LOVE were features which might be regarded as a desirable aspect of a happy and successful lifestyle, and that this was the message which the mark was seeking to convey. Thus, the concept of the mark was not greatly changed by the removal of one of its elements.
11. Bearing all those matters in mind (and having rejected the opponent's contention that the distinctive character of its mark had been enhanced through use), the Hearing Officer concluded that there was a likelihood of confusion if the marks were to be used in relation to the same or 'reasonably highly similar' goods, namely the articles of clothing for which application was made (which covered women's clothing).
12. It is well-established, following REEF trade mark [2003] RPC 5 that an appeal against a finding of this kind by an experienced Hearing Officer should only normally be sustained where there has been a distinct and material error of principle. The concept of an error of principle obviously includes errors of law, but was explained by Lindsay J in esure Insurance Limited v Direct Line Insurance Plc [008] RPC 6, at para 12 as also including the following:

'the taking into account of that which should not have been, the omission from the account of that which should have been within it, and the case (explicable only as one in which there must have been an error of principle) where it is plain that no tribunal properly instructed could, in the circumstances, have reasonably arrived at the conclusion that it reached.'

13. I have some sympathy for the submission of Mr Sweiry. The word SEX is more distinctive and striking than the other elements in the trade mark relied on, and its absence in the trade mark applied for is therefore more significant than would be the case if (for example) the word LOVE had been omitted instead.
14. However, the Hearing Officer considered this argument and gave a reasoned explanation of why he considered that confusion was nonetheless likely. He cannot be said to have taken account of any irrelevant matters or to have failed to take account of relevant matters. His decision is one which a reasonable tribunal was entitled to reach.
15. In all the circumstances, I uphold the decision of the Hearing Officer.
16. I will award the opponent £100 for the costs of the skeleton argument and £250 for the costs of the short hearing before me, totaling £350.
17. The applicant also seeks to appeal the decision on costs of the Hearing Officer. However, this simply awarded costs on the basis of the published scale, and no reason has been advanced as to why this was not appropriate. I therefore also uphold the decision of the Hearing Officer on costs.

IAIN PURVIS QC
THE APPOINTED PERSON
15 May 2012