

O-050-14

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2641035
BY RESE (UK) LIMITED TO REGISTER THE TRADE MARK:**



IN CLASSES 24 & 25

AND:

**OPPOSITION THERETO UNDER NO. 104597
BY NORLICENCES SAS**

BACKGROUND

1. On 5 November 2012, Rese (UK) Limited (“the applicant”) applied to register the mark shown on the cover page of this decision. The application was accepted and published for opposition purposes on 7 December 2012 for the following goods:

Class 24 – Baby Towels.

Class 25 – Baby clothing, footwear and headgear.

2. Norlicences SAS (“the opponent”), filed a notice of opposition directed against all of the goods in the application. The opposition was originally based upon grounds under sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”), the latter relying upon the law of passing off. However, as the opponent has not filed any evidence in these proceedings, the grounds based upon section 5(4)(a) of the Act cannot succeed and are dismissed accordingly. For its opposition based upon section 5(2)(b) of the Act, the opponent relies upon the goods and services in the registrations shown below:

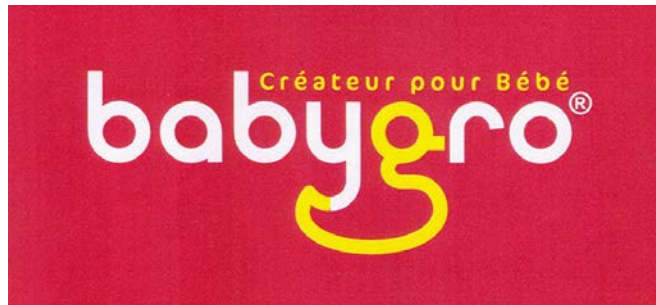
CTM no. 10563245 for the mark: **BABYGRO** applied for on 16 January 2012 and which completed its registration procedure on 24 February 2013.

Class 24 – Fabrics for textile use; Household linen, diapered linen, table runners, coasters, table linen of textile; Tablecloths, placemats, table mats, table napkins of textile; Oilcloth (for use as tablecloths); Bed and table covers; Sheets; Lingerie fabric; Mattress covers; Ticks (mattress covers); Bed linen; Bedclothes; Sleeping bags (sheeting); Quilts, eiderdowns (down coverlets); Quilts; Quilts; Pillow cases and pillow shams; Cushion covers; Towels of textile; Bath linen (except clothing); Beach towels; Handkerchiefs and tissues for removing make-up, of textile; Washing mitts and face towels of textile; Glass cloths; Upholstery fabrics; Curtain holders of textile material; Upholstery fabrics; Loose covers for furniture; Furniture coverings of plastic or of textile; Door curtains; Net curtains; Curtains and blinds of textile or of plastics materials; Shower curtains of textile or of plastic sheets; Textile wall hangings; Banners; Calico; Flags and penants, not of paper; Labels (textile); Travelling rugs; Lap rugs; Canvas for tapestry or embroidery; Traced cloths for embroidery; Gummed cloth, other than for stationery; Non-woven textile fabrics; Knitted fabric; Woollen, linen and jute fabrics; Printed cotton fabrics; Silk fabrics; Crepe (fabric), crepon; Woollen fabric; Textile linings; Moleskin (fabric), flannel (fabric), jersey (fabric), taffeta (fabric); Tulle; Velvet; Damask (fabric); Frieze (cloth); Plastic material (substitute for fabrics); Elastic woven material; Fibreglass fabrics for textile use; Fabric of imitation animal skins.

Class 25 - Outerwear and underwear for men, women and children (except socks, hosiery); Clothing of leather and of imitation leather; Fur clothing; Sportswear (other than for diving); Blousons; Gabardines (clothing); Raincoats; Coats; Mantillas; Mittens; Overcoats; Trench coats; Parkas; Wraps; Fur coats;

Stuff jackets (clothing); Suits; Masquerade costumes; Jackets; Smocks; Aprons (clothing); Jumpsuits (clothing and underwear); Crossover tops; Cardigans; Pullovers; Sweaters; Knitwear (clothing); Tank tops; Waistcoats; Skirts; Petticoats; Trousers; Dresses; Shirts; Undershirts; Henleys; Shorts; Bermuda shorts; Short trousers; Overcoats; Ready-made clothing; Paper clothing; Muffs; Pyjamas; Dressing gowns; Peignoirs; Pants, including bathing trunks; Swimwear and beachwear; Jerseys, including swimsuits; Slips; Bodies (teddies); Bustiers; Underpants; Knickers; Briefs; Brassieres; Corsets; Stocking suspenders; Bandannas (neckerchiefs); Scarves; Shawls; Neckerchieves; Mufflers; Fur stoles; Gloves (clothing); Belts (clothing); Braces; Ties; Bow ties; Pocket handkerchiefs (clothing); Collar protectors; Sleepers, Brassiere, Layettes, Sleeping bags, Blanket sleepers; Bibs, not of paper; Slippers; Headwear; Hats; Veiling (clothing); Caps; Visors (hatmaking); Berets; Caps, including swimming caps; Head bands; Turbans; Saris.

CTM no. 5844717 for the mark:



applied for on 19 April 2007 and which completed its registration procedure on 29 January 2010. The registration indicates that the colours red, white and yellow are claimed.

Class 25 – Clothing, underwear and lingerie, tracksuits; hosiery (except socks); clothing for babies and children, except socks and shoes.

Class 35 - Retailing or sale via computer networks of goods of all kinds for babies and children.

3. In its notice of opposition the opponent states:

“Words are visually and phonetically similar. They both contain BABY and GO/GRO look and sound similar. Marks are conceptually similar, as they both relate to babies. The goods are identical and/or similar. The goods are aimed at the same consumer and likely to be sold via the same trade channels. Retail services of baby products are complementary to the baby products themselves. Customers could easily confuse the marks, therefore.”

4. The applicant filed a counterstatement in which the grounds of opposition are denied. As these are the only submissions I have from the applicant, they are reproduced below in full:

“1. The applicant’s trade mark “GO-BABY-GO” is distinct from the opponent’s trade mark “babygro”. Applicant’s trade mark “GO-BABY-GO” is not similar to opponent’s trade mark and there is no likelihood that the use of “GO-BABY-GO” in connection with goods and services under class 24 and 25, would constitute a mis-representation or cause confusion with the opponent’s trade mark “babygro” registered for use in relation to goods and services under class 25 and 35.

2. Applicant disputes the opponent’s claim that its trade mark GO-BABY-GO is identical or similar to the opponent’s mark or that both marks are phonetically similar.

3. Applicant also disputes the opponent’s claim that the goods and services for which registration is sought by the applicant under class 24 and 25 is similar to the goods and services for which the opponent’s trade “babygro” is registered under class 25 and 35.

4. The applicant’s trade mark GO-BABY-GO, will be applied to children’s clothing, children’s towels, children’s dresses and children’s hats.”

5. Whilst neither party filed evidence, the opponent filed submissions during the course of the evidence rounds; I will bear these submissions in mind when reaching a conclusion and refer to them as necessary below. Neither party asked to be heard nor did they file written submissions in lieu of attendance at a hearing;

DECISION

6. Section 5(2)(b) of the Act reads 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, or

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

7. 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.”

8. In these proceedings the opponent is relying upon the trade marks shown in paragraph 2 above, both of which constitute earlier trade marks under the above provisions. Given the interplay between the date on which the application was published and the date on which the earlier trade marks completed their registration procedure, the earlier trade marks are not subject to proof of use, as per section 6A of the Act.

Section 5(2)(b) – case law

9. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the Court of Justice of the European Union (CJEU) cases mentioned) on the basis indicated below:

The CJEU cases

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; Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-6/01; Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH C-120/04; Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P.

The principles

“(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

The average consumer and the nature of the purchasing process

10. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services and then to determine the manner in which these goods and services will be selected by the average consumer in the course of trade. The goods and services at issue in these proceedings are (broadly speaking) textile goods, articles of clothing, footwear and

headgear and retail services relating to the sale of goods for babies and children. The average consumer for such goods is, as the opponent, suggests, a member of the general public. 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 (GC) commented upon the manner in which articles of clothing are selected. It stated:

“50. The applicant has not mentioned any particular conditions under which the goods are marketed. Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

11. As the goods in classes 24 and 25 are, in my experience, most likely to be the subject of self selection from traditional retail outlets on the high street, catalogues and websites, visual considerations are likely to dominate the selection process of both, but not to the extent that aural considerations can be ignored. As the selection of a retailer of goods for babies and children will (whether on the high street or on-line), most likely also be selected by the eye, visual considerations will once again dominate the selection of the services in class 35. In *New Look* the GC also considered the level of attention taken purchasing goods in the clothing sector. It stated:

“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.”

12. When selecting the goods in classes 24 and 25, factors such as material, size, colour, cost (which will vary according to the item) and compatibility with other items of textiles/clothing etc. may all come into play. This suggests that the average consumer will pay a reasonable level of attention when making their selection. As to the level of attention paid to the selection of a retailer of, inter alia, textiles and clothing for babies and children, my own experience tells me that factors such as price, range and availability of goods stocked, refund and replacement policy and (particularly in relation to online retail services) shipping costs and ease of use of the website will all be factors

the average consumer will have in mind; once again a reasonable level of attention is likely to be paid to the selection of such services.

Comparison of goods and services

13. In reaching a conclusion, I will keep in mind the decision of the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05 i.e.

“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).”

The goods and services to be compared are shown above.

CTM no. 10563245

14. This mark is registered in, inter alia, classes 24 and 25. As (at least) the phrase: “Towels of textile” appearing in class 24 of the earlier mark would include “baby towels” appearing in class 24 of the application, and as (at least) the terms “Outerwear and underwear for men, women and children (except socks, hosiery)”, “slippers” and “headwear” appearing in class 25 of the earlier mark would include “Baby clothing”, “footwear” and “headgear” appearing in class 25 of the application, the competing goods in classes 24 and 25 are identical on the principles outlined in *Merici*.

CTM no. 5844717

15. This mark is registered in inter alia classes 25 and 35. In relation to the opponent's services in class 35, the decision of the Court of First Instance (now the General Court) in *Oakley, Inc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-116/06 is relevant. In that case the conflict was between an earlier mark which was registered for goods in classes 18 and 25 and a later mark which had been registered for “Retail and wholesale services, including on-line retail store services; retail and wholesale of eyewear, sunglasses, optical goods and accessories, clothing, headwear, footwear, watches, timepieces, jewellery, decals, posters, athletic bags, backpacks and knapsacks and wallets”. The GC upheld OHIM's decision that the goods in classes 18 and 25 were similar to “retail and wholesale of eyewear, sunglasses, optical goods and accessories, clothing, headwear, footwear, watches, timepieces, jewellery, decals, posters, athletic bags, backpacks and



knapsacks, and wallets” as there was a complementary relationship between the retail of the goods and the goods themselves. The Court stated:

“54 Clearly, in the present case, the relationship between the retail services and the goods covered by the earlier trade mark is close in the sense that the goods are indispensable to or at the very least, important for the provision of those services, which are specifically provided when those goods are sold. As the Court held in paragraph 34 of *Praktiker Bau-und Heimwerkermärkte*, paragraph 17 above, the objective of retail trade is the sale of goods to consumers, the Court having also pointed out that that trade includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction. Such services, which are provided with the aim of selling certain specific goods, would make no sense without the goods.”

16. Applying the principles outlined above, I find there is a complementary relationship between all of the goods in the application and the opponent’s “retailing or sale via computer networks of goods of all kinds for babies and children” in class 35; the competing goods and services are, as a consequence, similar. In addition, as both the earlier mark and the application include references to “baby clothing”/“clothing for babies and children” in class 25, these goods are identical. Finally, as the phrase “clothing” appearing in the earlier mark in class 25 is, in my view, broad enough to include “footwear” and “headgear” in the application in class 25, these goods are also identical on the principles outlined in *Meric*. However, even if that view is incorrect, given the similarity in the nature, intended purpose, method of use, users and trade channels through which the goods reach the market, “footwear” and “headgear” must be highly similar to “clothing” in any event.

Comparison of marks

17. The competing marks are as follows:

The opponent’s marks	The applicant’s mark
<p data-bbox="188 1436 354 1470">BABYGRO</p> 	

18. It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives marks as a whole and does not pause to analyse their various details. In addition, he/she rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he/she has kept in his or her mind. In reaching a conclusion on similarity I must compare the respective trade marks from the visual, aural and conceptual perspectives identifying, where appropriate, what I consider to be the distinctive and dominant elements of the respective marks.

19. The opponent relies upon the two marks shown above. However, notwithstanding that the opponent's second earlier mark claims, inter alia, the colour red (and the application is also presented in red), the presence in the second mark of the additional words "Créateur pour Bébé" and (more importantly) the high degree of stylisation of the letter "g" (which the opponent describes "as duck shaped"), means that it is the word only registration of "BABYGRO" which, in my view, offers the opponent the best prospect of success. If it does not succeed on the basis of the word only version of its mark, it will, in my view, be in no better position in relation to the stylised version of its mark. Proceeding on that basis, the opponent's mark consists of the word BABYGRO presented in upper case. As no part of the word is highlighted or emphasised in any way, there are no dominant elements, the distinctiveness lying in the mark as a whole.

20. The applicant's mark consists of two elements. The first is a slightly stylised cartoon like image of a crawling baby wearing a red romper suit. Whilst, given its size and positioning, this device is a dominant element of the applicant's mark, my own experience tells me the propensity of those in the same area of trade as the applicant to use similar images to promote their goods, means that it is not likely to be considered a highly distinctive element of the applicant's mark. The second element in the applicant's mark is the hyphenated words "Go-baby-go" presented in red in a cursive script and in which the letter "G" in the first occurrence of the word "Go" is capitalised. Although the phrase "Go-baby-go" is smaller than, and presented below, the device which accompanies it, it is, as far as I am aware, a distinctive element of the applicant's mark, and, in my view, it makes a significant contribution to the distinctiveness of the mark as a whole.

21. Although the applicant's mark contains the letters "baby-g" and "o" which appear in the same order as the opponent's mark, the presence in the applicant's mark of the device element together with the additional letters "Go" at the beginning of the mark (and to a much lesser extent the presence in the opponent's mark of the letter "R" before the letter O), means that when considered from a visual perspective there is, in my view, only a low degree of visual similarity between the competing marks.

22. The opponent's mark consists of three syllables. Considered from an aural perspective, it will be pronounced as "BAY-BE-GROW". Insofar as the applicant's mark is concerned, it is well established that when referring to a mark which includes device and word elements, it is by the words that the average consumer will most likely refer to the mark. The pronunciation of the applicant's four syllable mark is easy to predict i.e.

“GO-BAY-BE-GO”. In my view, the presence in the applicant’s mark of the additional first syllable makes a significant impact on the manner in which the competing words will be spoken and heard resulting in (at best) a moderate degree of aural similarity.

23. Whilst I agree with the opponent that in relation to the conceptual comparison the word BABY appearing in the competing marks leads to a degree of conceptual similarity between them, this is hardly surprising given the goods and services of interest to the parties. More importantly, in my view, the opponent’s mark is likely to evoke in the mind of the average consumer the concept of a baby’s development or growth, whereas the applicant’s mark is likely to be construed as an incitement to a baby to do something. Considered as totalities, the relevant conceptual messages conveyed by the competing marks are, in my view, quite different.

Distinctive character of the earlier mark

24. I must now assess the distinctive character of the earlier mark. The distinctive character of a mark can be appraised only, first, by reference to the goods for which it is registered and, secondly, 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 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 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.

25. As the opponent has not filed any evidence in these proceedings, I have only the inherent characteristics of its mark to consider. Although the word BABYGRO is neither directly descriptive of or non-distinctive for the goods for which it is registered, it clearly alludes to the development (growth) of a baby. As a consequence, it is, in my view, possessed of a no higher than normal degree of inherent distinctive character.

Likelihood of confusion

26. In determining whether there is a likelihood of confusion, 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 vice versa. As I mentioned above, it is also necessary for me to factor in the distinctive character of the 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 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.

27. Earlier in this decision I concluded that:

- (i) the average consumer of the goods and services at issue is a member of the general public who will select the goods by primarily visual means and who will pay a reasonable degree of care when doing so;
- (ii) mark no. 10563245 represents the opponent's strongest case;
- (iii) this mark has no dominant element, the distinctiveness lying in the totality;
- (iv) the device element present in the applicant's mark is a dominant but not highly distinctive element of its mark;
- (v) the words present in the applicant's mark make a significant contribution to the mark's overall distinctiveness;
- (vi) the competing goods are identical;
- (vii) the competing marks share a low degree of visual similarity, a moderate degree of aural similarity and, insofar as it is relevant, are conceptually distinct, and
- (viii) the earlier mark is possessed of a no higher than normal degree of inherent distinctive character.

28. In its submissions, the opponent refers to the decision in *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04 in which the CJEU stated:

"29. In the context of consideration of the likelihood of confusion, 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. On the contrary, 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 (see *Matratzen Concord*, paragraph 32).

30. However, beyond the usual case where the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case an earlier mark used by a third party in a composite sign including the name of the company of the third party still has an independent distinctive role in the composite sign, without necessarily constituting the dominant element.

31. In such a case the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.

32. The finding that there is a likelihood of confusion should not be subject to the condition that the overall impression produced by the composite sign be dominated by the part of it which is represented by the earlier mark.

33. If such a condition were imposed, the owner of the earlier mark would be deprived of the exclusive right conferred by Article 5(1) of the directive even where the mark retained an independent distinctive role in the composite sign but that role was not dominant.

34. This would be the case where, for example, the owner of a widely-known mark makes use of a composite sign juxtaposing this mark and an earlier mark which is not itself widely known. It would also be the case if the composite sign was made up of the earlier mark and a widely-known commercial name. In fact, the overall impression would be, most often, dominated by the widely-known mark or commercial name included in the composite sign.

35. Thus, contrary to the intention of the Community legislator expressed in the 10th recital in the preamble to the directive, the guarantee of the earlier mark as an indication of origin would not be assured, even though it still had an independent distinctive role in the composite sign.

36. It must therefore be accepted that, in order to establish the likelihood of confusion, it suffices that, because the earlier mark still has an independent distinctive role, the origin of the goods or services covered by the composite sign is attributed by the public also to the owner of that mark.”

29. In reaching a conclusion on the likelihood of confusion, I remind myself that the competing goods are identical and record here that, in my view, the words “Go-baby-go” plays an independent distinctive role in the applicant’s mark. However, the inclusion in the applicant’s mark of a device element (which, although not highly distinctive, is alien to the opponent’s mark) and the addition of the word “Go” at the beginning of the word element of its mark is, bearing in mind the very different conceptual messages the competing marks are likely to convey to the average consumer, more than sufficient to further off set the low degree of visual and moderate degree of aural similarity between the competing marks. As a consequence, there is, in my view, no likelihood that the average consumer will either confuse the competing marks directly (i.e. mistake one for the other) or assume the goods come from undertakings which are economically linked i.e. there will be no indirect confusion.

Decisions in other jurisdictions

30. In its submissions, the opponent states:

“In 2011, the opponent won a case in the French Trade Mark Office (INPI) against an application for BABYGO for identical/similar goods. The opponent based its case on a French registration identical to the device mark which is the basis for the present opposition...”

31. As decisions from other jurisdictions are neither determinative nor persuasive of proceedings before this tribunal, the decision mentioned has played no part in my considerations.

Overall conclusion

32. The opposition fails and subject to any successful appeal the application may proceed to registration.

Costs

33. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Using the TPN mentioned as a guide but keeping in mind that the applicant has not been professionally represented, I award costs to the applicant on the following basis:

Preparing a statement and considering the opponent's statement:	£100
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Total:	£100
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34. I order Norlicences SAS to pay Rese (UK) Limited the sum of **£100**. 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 29th day of January 2014

C J BOWEN
For the Registrar
The Comptroller-General