

O-448-19

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3300621

BY GUANGDONG CAMEL APPAREL CO. LTD.

TO REGISTER THE FOLLOWING TRADE MARK:

CAMEL CROWN

IN CLASSES 18, 20, 22, 24, 25, 27 & 28

AND

OPPOSITION THERETO UNDER NO. 413371

BY WORLDWIDE BRANDS, INC. ZWEIGNLEDERLASSUNG DEUTSCHLAND

BACKGROUND AND PLEADINGS

1. On 29 March 2018, Guangdong Camel Apparel Co. Ltd (“the applicant”) filed trade mark application number UK00003300621 for the mark **CAMEL CROWN**. The application was accepted and published for opposition purposes on 11 May 2018, in respect of the goods listed at Annex A to this decision.

2. Worldwide Brands, Inc. Zweigniederlassung Deutschland (“the opponent”) opposes the application under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), relying upon trade mark number WE00000814414, an International Registration designating the EU (“IR(EU)”), the details of which are as follows:



Representation:

International registration date: 9 September 2003

Date of Designation of the EU: 5 July 2017

Priority date: 28 May 2003

Goods:

Class 9 Eyeglasses, sunglasses, binoculars; cases, chains, cords, lenses and frames for glasses.

Class 14 Precious metals and their alloys and goods in precious metals or coated therewith (included in this class); jewellery, precious stones; horological and chronometric instruments and cases therefor; watch straps; key rings.

Class 18 Leather and leather imitations, as well as products therefrom (included in this class); backpacks, school bags, satchels, shopping bags, book bags, shoulder bags, hand bags, waist bags, travelling bags, wallets, coin purses and purses, key cases, trunks and suitcases; umbrellas,

parasols and walking sticks; animal skins, hides; whips; harness and saddlery.

Class 25 Clothing, footwear, headgear.

3. In its notice of opposition, the opponent directed its case against all goods in the application. The opponent has since limited this, and the opposition is now directed against all goods in classes 18, 24 and 25 of the application, and the following goods in class 28:

Golf bags, with or without wheels; fitted protective covers specially adapted for sports equipment, namely, golf club, tennis racket, skis; gloves for golf; bowling gloves; rugby gloves.

4. By virtue of having a priority date that predates the filing date of the contested mark, the opponent's IR(EU) qualifies, under section 6 of the Act, as an earlier mark for the purpose of these proceedings. As the earlier mark has a designation date of July 2017 and a protection date following that, it is not subject to the proof of use conditions set out under section 6A of the Act. As a result, the opponent may rely upon all of the goods for which its earlier mark is registered.

5. The opponent originally intended to pursue the opposition under sections 5(2)(b) and 5(3) of the Act. The opponent has since notified the tribunal of its decision no longer to pursue its 5(3) ground.

6. Under section 5(2)(b), the opponent argues that the marks at issue are visually, phonetically and conceptually similar to a high degree and that the respective goods are identical or highly similar, resulting in a likelihood of confusion.

7. The applicant filed a counterstatement denying any similarity between the goods or the marks and denying that a likelihood of confusion exists.

8. Neither party filed evidence. Neither party requested a hearing. Both parties filed written submissions in lieu of a hearing. The opponent is represented by Sonder IP Limited. The applicant is represented by J A Kemp.

DECISION

Section 5(2)(b)

9. Section 5(2)(b) of the Act states that:

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

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

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

Relevant law

10. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

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 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

11. In their respective written submissions in lieu of a hearing, the opponent and the applicant provide fairly detailed comparisons of the goods at issue. I will take these into account when I come to make the assessment.

12. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*¹ that even if goods/services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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”.

13. *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer* is also relevant. The Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

“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

¹ Case T-133/05

purpose and their method of use and whether they are in competition with each other or are complementary”.

14. Guidance on this issue has also come from Jacob J. in the *Treat* case², where he identified the factors for assessing similarity as:

(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.

15. In relation to assessing whether the goods may be regarded as “complementary”, I refer to *Boston Scientific Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*³ where it was stated that complementarity means that:

“...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

² [1996] R.P.C 281

³ Case T-325/06. See also *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL 0/255/13.

may think that the responsibility for those goods lies with the same undertaking.”

CLASS 18

16. The goods in class 18 to be compared are:

Opponent's Specification	Applicant's Specification
<p>Leather and leather imitations, as well as products therefrom (included in this class); backpacks, school bags, satchels, shopping bags, book bags, shoulder bags, hand bags, waist bags, travelling bags, wallets, coin purses and purses, key cases, trunks and suitcases; umbrellas, parasols and walking sticks; animal skins, hides; whips; harness and saddlery.</p>	<p>Animal skins; imitation leather; purses; game bags [hunting accessories]; school bags; travelling trunks; backpacks; pocket wallets; bags for climbers; handbags; travelling bags; travelling bags [leatherware]; suitcases; haversacks; garment bags for travel; valises; sports bags; shoulder bags; credit card cases; business card cases; luggage tags; leather trimmings for furniture; leather laces; leather straps; reins for guiding children; garment bags for travel made of leather; briefcases; wrist mounted purses; labels of leather; suitcases with wheels; umbrellas; alpenstocks; mountaineering sticks; canes; walking stick seats; walking stick handles; leather leads; saddlery of leather; whips; covers for animals; harness fittings; dog collars; dog coats; business card cases; reusable shopping bags; attaché cases; bags for campers; suitcase handles; chain mesh purses; luggage and trunks; key cases; slings for carrying infants; pouch baby carriers; parasols.</p>

17. The applicant's 'school bags; backpacks; handbags; travelling bags; travelling bags [leatherware]; suitcases; shoulder bags; suitcases with wheels; umbrellas; saddlery of leather; whips; harness fittings; luggage and trunks; parasols' are clearly identical to the opponent's 'backpacks, school bags, shoulder bags, hand bags, travelling bags, trunks and suitcases; umbrellas, parasols; whips; harness and saddlery' as they are worded identically. I see no reason why the remaining goods of the applicant's specification would not be made of leather or imitation leather. As such I consider the remaining goods to be identical in accordance with *Meric*, either because they fall within a term of the opponent's specification (or vice versa) or because they fall within the opponent's 'leather and leather imitations, as well as products therefrom'.

CLASS 24

18. The goods to be compared are:

Opponent's Specification	Applicant's Specification
<p>Class 18: Leather and leather imitations, as well as products therefrom (included in this class); backpacks, school bags, satchels, shopping bags, book bags, shoulder bags, hand bags, waist bags, travelling bags, wallets, coin purses and purses, key cases, trunks and suitcases; umbrellas, parasols and walking sticks; animal skins, hides; whips; harness and saddlery.</p> <p>Class 25: Clothing, footwear, headgear.</p>	<p>Class 24: Woven fabrics; fabrics for textile use; cotton cloth; lining fabric for footwear; fabric for footwear; linings [textile]; gauze [cloth]; silk fabrics for printing patterns; woollen fabric; fabrics for textile use; spun silk fabrics; gauze fabric; linen [fabric]; furnishing and upholstery fabrics; non-woven textile fabrics; labels of textile; wall hangings of textile; felt; towels of textile; handkerchiefs of textile; face towels of textile; cloths for removing make-up; bath towels; dish towels for drying; household linen; bedspreads; quilts; mattress covers; travelling rugs [lap robes]; sheets [textile]; eiderdowns [down coverlets]; bed linen; ticks [mattress covers]; mosquito nets;</p>

	pillowcases; sleeping bag liners; pillow shams; bed blankets; diaper changing cloths for babies; blankets for household pets; sleeping bags for babies; baby buntings; sleeping bags; table linen, not of paper; coasters of textile; covers for cushions; door curtains; cloth flags; sail cloth.
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19. The opponent submits that all the goods in the applicant's class 24 specification are alternative products to its own goods in class 18, that may be used for the same purpose as leather/leather imitations. It further submits that the class 24 goods are also similar to the opponent's class 25 goods, being the raw materials used to manufacture clothing, footwear, headgear.

20. I bear in mind the GC's finding in *Les Éditions Albert René v OHIM*⁴ that:

“61. The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”

21. I also bear in mind the decision of the EUIPO Board of Appeal in *El Corte Inglés v Gruppo Gf*⁵ that:

“16. The contested goods in Class 24 *textiles and textile goods, not included in other classes, bed and table covers* are for household use. They have a different nature and purpose as compared to that of the opponent's goods and services which mainly include *clothing, footwear, headgear, leather goods and travel goods* and the services of *business management, advertising and office*

⁴ Case T-336/03

⁵ 31/05/2012, R 1699/2011-4

functions. They are not offered by the same undertakings and also target different types of consumers. Therefore the contested goods in Class 24 are dissimilar to the earlier goods and services.”

22. Applying this to the case before me, the relationship suggested by the opponent is not enough to justify a finding of similarity between the goods at issue in classes 24 and 25. The opposition fails in relation to the applicant’s class 24 goods. I note that it is possible for ‘covers for cushions’ to be made from leather or imitation leather. However, I bear in mind *Les Éditions Albert René* and find that the users, purpose and method of use for the raw materials and the applicant’s finished goods will differ, as will the channels of trade. Neither do I find there to be competition between these goods. There is no complementarity in the sense described in the case law (while one is essential for the other, they are unlikely to be considered products of the same undertaking). In addition, the opponent has not drawn my attention to any particular goods in class 18 which might be similar to the applicant’s goods in class 24, not can I identify any which are obviously similar. Overall, I do not find similarity between the goods at issue in classes 24 and 25.

23. The opponent argues that some goods could be ‘alternatives’ for other goods. However, no specific goods have been identified and I cannot see any to which this would apply.

CLASS 25

24. The class 25 goods to be compared are:

Opponent’s Specification	Applicant’s Specification
Clothing, footwear, headgear.	Underwear; sweaters; shirts; short-sleeve shirts; ready-made linings [parts of clothing]; breeches for wear; trousers; overcoats; knitwear [clothing]; vests; coats; skirts; sports jerseys; sports singlets; pullovers; dresses; topcoats;

jackets [clothing]; parkas; leather coats; Tee-shirts; skorts; leggings [trousers]; waterproof jackets and pants; camisoles; boxer shorts; dressing gowns; tights; sweat-absorbent underwear; waistcoats; slips [underclothing]; bodies [underclothing]; wind coats; down jackets; shirts for infants, babies, toddlers and children; football uniforms; light-reflecting jackets; light-reflecting coats; body suits; warm-up suits; snow suits; singlets; sports jackets; knitted underwear; jerseys [clothing]; babies' pants [underwear]; layettes [clothing]; bibs, not of paper; babies' trousers; shoes for babies; wet suits for water-skiing; cycling shorts; bathing caps; bathing trunks; swimming trunks; swimsuits; clothing for gymnastics; karate uniforms; leotards; raincoats; ponchos; dance costumes; football boots; football shoes; gymnastic shoes; studs for football boots; ski boots; footwear; bath slippers; boots; half-boots; lace boots; goloshes; galoshes; slippers; beach shoes; wooden shoes; sandals; shoes; sports shoes; boots for sport; valenki [felted boots]; ankle boots; non-slip soles for footwear; tips for footwear; boot uppers; inner soles; footwear uppers; spats; gaiters; trouser straps; gaiter straps; heelpieces for footwear; welts for footwear; soles for footwear; heels; running shoes; track and field

	shoes; mountaineering shoes; rain boots; insoles for footwear; climbing shoes; hiking boots; footwear for women; riding shoes; boots for motorcycling; caps [headwear]; hats; ear muffs [clothing]; headbands [clothing]; hosiery; stocking suspenders; pantyhose; socks; gloves [clothing]; muffs [clothing]; ski gloves; shawls; neckties; scarves; veils; mantillas; kerchiefs; pocket squares; mufflers [neck scarves]; turbans; braces for clothing [suspenders]; belts [clothing]; girdles; leather belts [clothing]; albs; shower caps; sleep masks; eyeshades as headwear.
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25. Since the majority of the applicant's goods may fall within the scope of the opponent's 'clothing, footwear, headgear', I find all the parties' class 25 goods to be identical, in accordance with *Meric*, except for the following:

Ready-made linings [parts of clothing]; studs for football boots; non-slip soles for footwear; tips for footwear; boot uppers; inner soles; footwear uppers; insoles for footwear; heelpieces for footwear; welts for footwear; soles for footwear.

26. These goods are not items of clothing, footwear and headgear that are worn alone, rather, they are parts for those items. *Les Éditions Albert René* is also relevant here. The intended nature and purpose of the goods at issue differ. Nor are the goods in competition with one another. However, they are complementary in that parts for goods are important for the goods as wholes, which may lead consumers to believe they are from the same undertaking. The users of the goods may overlap, as may the channels of trade. Overall, I find the applicant's 'ready-made linings [parts of clothing]; studs for football boots; non-slip soles for footwear; tips for footwear; boot uppers; inner soles; footwear uppers; insoles for footwear; heelpieces for footwear; welts for

footwear; soles for footwear' similar to the opponent's 'clothing, footwear, headgear', however, to only a low degree.

CLASS 28

27. The goods to be compared are:

Opponent's Specification	Applicant's Specification
Class 18: Leather and leather imitations, as well as products therefrom (included in this class); backpacks, school bags, satchels, shopping bags, book bags, shoulder bags, hand bags, waist bags, travelling bags, wallets, coin purses and purses, key cases, trunks and suitcases; umbrellas, parasols and walking sticks; animal skins, hides; whips; harness and saddlery.	Class 28: Golf bags, with or without wheels; fitted protective covers specially adapted for sports equipment, namely, golf club, tennis racket, skis; gloves for golf; bowling gloves; rugby gloves.

28. The opponent's submission in relation to the above goods is that 'golf bags' and 'fitted protective covers specially adapted for sports equipment, namely, golf club, tennis racket, skis' are types of bags and therefore highly similar to its own goods within class 18. It further submits that such goods have the same purpose, may be complementary and in competition, may be sold alongside each other, and move through the same trade channels.

29. It is permissible to group goods for the purpose of assessment if essentially the same reasons apply: *Separode Trade Mark*.⁶

30. Since protective covers for golf clubs, tennis rackets and skis essentially serve as 'bags', I am satisfied that it is appropriate to consider these items together with golf bags for my assessment.

⁶ BL O/399/10

31. I do not find the goods at issue to have the same purpose – the wording of the specifications is such that the specific purpose of each item is clear, and those purposes differ. Similarly, I do not find the goods to be in competition with one another. However, there may be complementarity on the basis that they may be part of a range with sports bags in class 18, for example. The goods may be sold in the same stores but are unlikely to be on the same shelves. The nature of the goods is similar, and the users may overlap. Overall, I find ‘golf bags, with or without wheels; fitted protective covers specially adapted for sports equipment, namely, golf club, tennis racket, skis’ to be similar to a medium degree to the opponent’s various ‘bags’ in class 18.

32. The opponent makes no submissions regarding the ‘gloves for golf; bowling gloves; rugby gloves’ it opposes. It is possible for these goods to be made from, or contain, leather. However, considering the factors identified in the *Canon* and *Treat* cases (and bearing in mind *El Corte Inglés*), I do not find enough of an overlap between any of those factors to consider these goods similar to the opponent’s class 18 goods. The opposition fails in respect of the applicant’s goods listed in this paragraph.

The average consumer and the nature of the purchasing act

33. 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*.

34. 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*⁷, Birss J. 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

⁷ [2014] EWHC 439 (Ch)

by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

35. The average consumer of the goods at issue will be a member of the general public. Given the range of goods in the specifications, the frequency of the purchase of the goods as well as the cost of such goods is bound to vary. However, on the whole, they will be purchased fairly frequently and are not particularly expensive. The goods will be inspected for different characteristics depending on the item, but there will be such considerations as quality, style, size and colour, for example. I find that, taking all of these factors into account, the level of care and consideration that will be adopted during the purchasing process would be average. The consumer will, for the most part, encounter the marks visually (as submitted by the applicant), by browsing through products in physical stores, in catalogues or using the internet. However, I do not completely discount an aural element to the purchase.

Comparison of marks


36. It is clear from *Sabel BV v Puma AG* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*⁸ 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 relevant 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.”

⁸ Case C-591/12P

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

38. The marks to be compared are as follows:

Earlier mark	Applied for mark
 The logo for 'Camel Active' features the word 'CAMEL' in a bold, black, sans-serif font above the word 'ACTIVE' in a similar font. A thick black line with a curved left-hand corner arches over the text, and a thick yellow line with a curved right-hand corner arches under the text.	CAMEL CROWN

39. The parties have made detailed submissions on the similarities of the marks and I have considered them all in reaching my decision. I will refer below to some of the arguments raised.

Overall impression

40. The opponent's earlier mark consists of the two words CAMEL ACTIVE, written in a fairly standard black font (the second word being presented directly beneath the first), a black line with a curved left-hand corner above the textual components, and a yellow line with a curved right-hand corner below the textual components. As both parties have submitted, the average consumer would likely recognise the word ACTIVE in relation to the goods, making reference to active wear, active people and/or goods intended to be used during activity. Whilst this means that CAMEL plays a greater role in the overall impression of the mark, the word ACTIVE still contributes to the overall look and feel of the mark when it is considered as a whole. The two lines, which, to some extent, create a border around the textual components, will likely be seen as little more than that: a border.

41. The applicant's mark consists of the two words CAMEL CROWN, in a standard black font. There is no stylisation to the words, nor are there any figurative components in the mark. The overall impression of the mark simply rests in the two words CAMEL CROWN, with neither word materially dominating the other.

Visual comparison

42. The similarity lies in the word CAMEL, which is the first word in both marks. The differences are in the second word, ACTIVE versus CROWN, and the stylistic elements in the earlier mark that do not appear in the applied-for mark. Overall, I find the marks to be visually similar to a medium degree.

Aural comparison

43. The earlier mark will be articulated as CAMEL ACTIVE, the applicant's as CAMEL CROWN. The marks differ aurally in their second words, the two-syllable word ACTIVE versus the one-syllable word CROWN. I find that the marks are aurally similar to a medium degree. I do not, though, discount the possibility that the average consumer will shorten CAMEL ACTIVE to CAMEL (given the allusiveness of the word ACTIVE), resulting in a higher degree of similarity.

Conceptual comparison

44. It is highlighted in numerous judgments of the GC and the CJEU, including *Ruiz Picasso v OHIM*⁹, that for a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.

45. The applicant submits that the word CAMEL not only refers to an animal, but is widely used and understood as a colour (like that of camel hair), particularly in relation to clothing, footwear, headgear and accessories.

⁹ [2006] e.c.r.-I-643; [2006] E.T.M.R. 29

46. Whilst I agree that CAMEL can be used to describe a yellow-brown colour, it is more likely that the immediate concept recognised by the average consumer, in the context of the marks as wholes, would be that of the animal of the same name. The same concept will be grasped for both marks. The addition of the word ACTIVE in the earlier mark creates an additional concept, but, given the allusiveness of the word, it has less impact than the concept of CAMEL. The addition of the word CROWN in the applied-for mark also creates a separate concept (the traditional form of headwear worn by a monarch) from that of CAMEL, since the two words are unrelated. The words do not combine to create a clear concept, rather, they are likely to conjure two separate concepts in the mind of the consumer. Overall, I find the marks to be conceptually similar to a medium degree.

Distinctive character of the earlier mark

47. Having compared the marks, it is necessary to determine the distinctive character of the earlier mark, in order to make an assessment of the likelihood of confusion. This is because the more distinctive the earlier mark, the greater the likelihood of confusion (see *Sabel BV v Puma AG*, paragraph 24). In *Lloyd Schuhfabrik* 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).”

48. As no evidence has been filed by the opponent, I have only the inherent distinctiveness of the earlier mark to consider. The earlier mark is made up of two ordinary dictionary words, CAMEL and ACTIVE, the latter of which is allusive for the goods at issue. The word CAMEL is the dominant element of the mark, which has no relation to the goods of the registration. Overall, I consider the earlier mark is entitled to a medium degree of inherent distinctiveness.

Likelihood of confusion

49. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

50. Confusion can be direct (which occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/goods down to the responsible undertaking being the same or related).

51. Due to the clear visual and aural differences between the marks at issue, I am satisfied that direct confusion will not occur. The average consumer will not mistake one mark for the other.

52. In terms of indirect confusion, this was dealt with by Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*¹⁰:

¹⁰ BL 0/375/10

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

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

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

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

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

53. These examples are not exhaustive. Rather, they were intended to be illustrative of the general approach¹¹.

54. I go on now to consider whether the average consumer, having recognised that the marks are different, considers the common elements of both marks and determines, through an instinctive mental process, that the marks are related and originate from the same, or an economically linked undertaking.

55. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It

¹¹ See *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17 at paragraphs [81] to [82]

does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

56. Applying this case law to the matter before me, I find that the word CAMEL plays an independent distinctive role in the later mark.

57. I acknowledge that confusion is not an automatic result of the identical element having an independent distinctive role, and I have borne in mind the guidance of Mr James Mellor Q.C.¹² that a finding of indirect confusion should not be made merely because the two marks share a common element. However, the common element has sufficient distinctiveness (and dominance in the earlier mark) that when considered alongside the other factors, the consumer will consider that the marks are different marks used by the same undertaking and will be confused. I find this to be the case even for goods with a low degree of similarity. There is a likelihood of indirect confusion.

CONCLUSION

58. The opposition under section 5(2)(b) has been partially successful.

59. The following goods **will proceed** to registration:

¹² Sitting as the Appointed Person in *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

Class 20 Stools; cribs for babies; sideboards; writing desks; office furniture; furniture; seats; deck chairs; desks; mattresses; beds; hat racks; bookshelves; sofas; bed frames; dressers; plate racks; high chairs for babies; rocking chairs; wardrobes; containers, not of metal, for liquid fuel; containers, not of metal [storage, transport]; boxes of wood or plastic; toy boxes; tool boxes, not of metal; clips, not of metal, for cables and pipes; ladders of wood or plastics; steps [ladders], not of metal; tent pegs, not of metal; step stools, not of metal; split rings, not of metal, for keys; non-metal cable clips; angle valves of plastics, other than parts of machines; clips of plastic for sealing bags; looking glasses; hand-held mirrors [toilet mirrors]; non-electric fans for personal use; bamboo baskets for industrial purposes; stuffed animals; display boards; decorations of plastic for foodstuffs; pet cushions; identification bracelets, not of metal; furniture partitions of wood; table tops; doors for furniture; cushions; pillows; air pillows, not for medical purposes; straw mattresses; bolsters; air cushions, not for medical purposes; mats for infant playpens; baby changing mats; camping mattresses; chair cushions; indoor window shades [furniture]; pegs [pins], not of metal; shoe dowels, not of metal; venetian blinds.

Class 22 Ropes, not of metal; ropes; rope ladders; nets for camouflage; fishing nets; twine for nets; snare nets; mesh bags for washing laundry; purse seines; net pens for fish farming; animal feeding nets; sails; sails for ski sailing; tarpaulins; hammocks; awnings of textile; tents; awnings of synthetic materials; bags [envelopes, pouches] of textile, for packaging; straw wrappers for bottles; cloth bags for storage; down feathers; raw silk; raw fibrous textile; silk flock; fleece wool.

Class 24 Woven fabrics; fabrics for textile use; cotton cloth; lining fabric for footwear; fabric for footwear; linings [textile]; gauze [cloth]; silk fabrics for printing patterns; woollen fabric; fabrics for textile use; spun silk fabrics; gauze fabric; linen [fabric]; furnishing and upholstery fabrics; non-woven textile fabrics; labels of textile; wall hangings of textile; felt; towels of textile; handkerchiefs of textile; face towels of textile; cloths for

removing make-up; bath towels; dish towels for drying; household linen; bedspreads; quilts; mattress covers; travelling rugs [lap robes]; sheets [textile]; eiderdowns [down coverlets]; bed linen; ticks [mattress covers]; mosquito nets; pillowcases; sleeping bag liners; pillow shams; bed blankets; diaper changing cloths for babies; blankets for household pets; sleeping bags for babies; baby buntings; sleeping bags; table linen, not of paper; coasters of textile; covers for cushions; door curtains; cloth flags; sail cloth.

Class 27 Carpets; rugs; reed mats; bath mats; floor coverings; artificial turf; gymnasium exercise mats; gymnastic mats; door mats; floor mats for vehicles; non-slip mats; vinyl floor coverings; mats of woven rope for ski slopes; textile bath mats; anti-slip floor coverings for use on staircases; floor mats, fire-resistant, for fireplaces and barbecues; yoga mats; wallpaper; decorative wall hangings, not of textile; textile wallpaper.

Class 28 Games; apparatus for games; handheld game consoles; protective films adapted for screens for portable games; ring games; marbles for games; kites; counters [discs] for games; slides [playthings]; dolls; toy masks; gyroscopes and flight stabilizers for model aircraft; scooters [toys]; flying discs [toys]; toy vehicles; remote-controlled toy vehicles; scale model vehicles; toy furniture; shoes for dolls; musical toys; toy robots; tricycles for infants [toys]; checkers [games]; bingo cards; playing cards; balls for games; billiard table cushions; billiard balls; bowling apparatus and machinery; hockey sticks; rackets; badminton shuttlecocks; billiard cues; stationary exercise bicycles; body-building apparatus; body-training apparatus; chest expanders [exercisers]; rollers for stationary exercise bicycles; dumb-bells; hang gliders; spring bars for exercising; bows for archery; archery implements; archery targets; baseball bats; baseball bat cases; golf balls; nets for sports; soft tennis balls; rubber baseballs; sleds [sports articles]; edges of skis; machines for physical exercises; bindings for alpine skis; darts; barbells; surfboards; ski edges; sole coverings for skis; skis; climbers' harness; toy gliders; skateboards; surfboard leashes; trampolines; yoga straps; water skis; ski sticks; ski

poles; kendo bamboo swords; relay batons; boards used in the practice of water sports; yoga blocks; play swimming pools; inflatable pool toys; boxing gloves; shin guards [sports articles]; fencing gloves; baseball gloves; elbow guards for athletic use; knee guards for athletic use; protective paddings [parts of sports suits]; gloves for golf; swimming jackets; skating boots with skates attached; roller skates; ice skates; in-line roller skates; snowshoes; bowling gloves; ice skate blades; rugby gloves; protective supports for shoulders and elbows [sports articles]; kendo plastrons; catchers' masks; toy Christmas trees; artificial fishing bait; rods for fishing; landing nets for anglers; floats for fishing; fish hooks; lures for hunting or fishing; fishing tackle; fishing lines; reels for fishing; creels [fishing traps]; gut for fishing; bite indicators [fishing tackle]; bite sensors [fishing tackle]; scent lures for hunting or fishing; fish cages for use in recreational fishing; fishing rod holders; fishing sinkers; camouflage screens used in hunting; nets for sports.

COSTS

60. The applicant makes the following submissions in relation to costs:

“We refer to the submissions made in defence of the opposition in our letter of 11 April 2019. We have also now seen the Opponent’s submissions, also filed on the afternoon of 11 April 2019 (the deadline), which appears to limit (at paragraph 14) the opposition to the goods applied for in Classes 18, 24 and 25, and some of the goods applied for in Class 28.

Given that the Opponent has limited the scope of the opposition at the last possible opportunity without proper notification to the Applicant in advance of the deadline for final submissions, which meant that the Applicant was forced to make submissions in relation to the other goods applied for (in Classes 20, 22 and 27, and some of the goods remaining in Class 28), the Registrar is asked to take this into account when a decision is made on costs in these proceedings.”

61. As the opponent has been successful (at least in part) I consider that it is entitled to an award of costs in its favour. Awards of costs are governed by Annex A of Tribunal Practice Notice (“TPN”) 2/2016. I take into account both the applicant’s comments and the fact that the applicant has enjoyed some success in defending the opposition and I award costs to the opponent on the following basis:

Official fee:	£100 ¹³
Preparing a statement and considering the other side’s statement:	£200
Preparing written submissions and considering the other side’s written submissions:	£100
Total	£400

62. I order Guangdong Camel Apparel Co. Ltd to pay Worldwide Brands, Inc. Zweigniederlassung Deutschland the sum of **£400**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated 2 August 2019

Emily Venables
For the Registrar,
The Comptroller-General

Annex A

¹³ The official fee paid was £200 as it was based on grounds other than 5(1) or 5(2). However, the opponent decided to only pursue its 5(2) ground, so I amend the award accordingly.

Class 18 Animal skins; imitation leather; purses; game bags [hunting accessories]; school bags; travelling trunks; backpacks; pocket wallets; bags for climbers; handbags; travelling bags; travelling bags [leatherware]; suitcases; haversacks; garment bags for travel; valises; sports bags; shoulder bags; credit card cases; business card cases; luggage tags; leather trimmings for furniture; leather laces; leather straps; reins for guiding children; garment bags for travel made of leather; briefcases; wrist mounted purses; labels of leather; suitcases with wheels; umbrellas; alpenstocks; mountaineering sticks; canes; walking stick seats; walking stick handles; leather leads; saddlery of leather; whips; covers for animals; harness fittings; dog collars; dog coats; business card cases; reusable shopping bags; attaché cases; bags for campers; suitcase handles; chain mesh purses; luggage and trunks; key cases; slings for carrying infants; pouch baby carriers; parasols.

Class 20 Stools; cribs for babies; sideboards; writing desks; office furniture; furniture; seats; deck chairs; desks; mattresses; beds; hat racks; bookshelves; sofas; bed frames; dressers; plate racks; high chairs for babies; rocking chairs; wardrobes; containers, not of metal, for liquid fuel; containers, not of metal [storage, transport]; boxes of wood or plastic; toy boxes; tool boxes, not of metal; clips, not of metal, for cables and pipes; ladders of wood or plastics; steps [ladders], not of metal; tent pegs, not of metal; step stools, not of metal; split rings, not of metal, for keys; non-metal cable clips; angle valves of plastics, other than parts of machines; clips of plastic for sealing bags; looking glasses; hand-held mirrors [toilet mirrors]; non-electric fans for personal use; bamboo baskets for industrial purposes; stuffed animals; display boards; decorations of plastic for foodstuffs; pet cushions; identification bracelets, not of metal; furniture partitions of wood; table tops; doors for furniture; cushions; pillows; air pillows, not for medical purposes; straw mattresses; bolsters; air cushions, not for medical purposes; mats for infant playpens; baby changing mats; camping mattresses; chair

cushions; indoor window shades [furniture]; pegs [pins], not of metal; shoe dowels, not of metal; venetian blinds.

Class 22 Ropes, not of metal; ropes; rope ladders; nets for camouflage; fishing nets; twine for nets; snare nets; mesh bags for washing laundry; purse seines; net pens for fish farming; animal feeding nets; sails; sails for ski sailing; tarpaulins; hammocks; awnings of textile; tents; awnings of synthetic materials; bags [envelopes, pouches] of textile, for packaging; straw wrappers for bottles; cloth bags for storage; down feathers; raw silk; raw fibrous textile; silk flock; fleece wool.

Class 24 Woven fabrics; fabrics for textile use; cotton cloth; lining fabric for footwear; fabric for footwear; linings [textile]; gauze [cloth]; silk fabrics for printing patterns; woollen fabric; fabrics for textile use; spun silk fabrics; gauze fabric; linen [fabric]; furnishing and upholstery fabrics; non-woven textile fabrics; labels of textile; wall hangings of textile; felt; towels of textile; handkerchiefs of textile; face towels of textile; cloths for removing make-up; bath towels; dish towels for drying; household linen; bedspreads; quilts; mattress covers; travelling rugs [lap robes]; sheets [textile]; eiderdowns [down coverlets]; bed linen; ticks [mattress covers]; mosquito nets; pillowcases; sleeping bag liners; pillow shams; bed blankets; diaper changing cloths for babies; blankets for household pets; sleeping bags for babies; baby buntings; sleeping bags; table linen, not of paper; coasters of textile; covers for cushions; door curtains; cloth flags; sail cloth.

Class 25 Underwear; sweaters; shirts; short-sleeve shirts; ready-made linings [parts of clothing]; breeches for wear; trousers; overcoats; knitwear [clothing]; vests; coats; skirts; sports jerseys; sports singlets; pullovers; dresses; topcoats; jackets [clothing]; parkas; leather coats; Tee-shirts; skorts; leggings [trousers]; waterproof jackets and pants; camisoles; boxer shorts; dressing gowns; tights; sweat-absorbent underwear; waistcoats; slippers [underclothing]; bodies [underclothing]; wind coats; down jackets; shirts for infants, babies, toddlers and children; football

uniforms; light-reflecting jackets; light-reflecting coats; body suits; warm-up suits; snow suits; singlets; sports jackets; knitted underwear; jerseys [clothing]; babies' pants [underwear]; layettes [clothing]; bibs, not of paper; babies' trousers; shoes for babies; wet suits for water-skiing; cycling shorts; bathing caps; bathing trunks; swimming trunks; swimsuits; clothing for gymnastics; karate uniforms; leotards; raincoats; ponchos; dance costumes; football boots; football shoes; gymnastic shoes; studs for football boots; ski boots; footwear; bath slippers; boots; half-boots; lace boots; goloshes; galoshes; slippers; beach shoes; wooden shoes; sandals; shoes; sports shoes; boots for sport; valenki [felted boots]; ankle boots; non-slip soles for footwear; tips for footwear; boot uppers; inner soles; footwear uppers; spats; gaiters; trouser straps; gaiter straps; heelpieces for footwear; welts for footwear; soles for footwear; heels; running shoes; track and field shoes; mountaineering shoes; rain boots; insoles for footwear; climbing shoes; hiking boots; footwear for women; riding shoes; boots for motorcycling; caps [headwear]; hats; ear muffs [clothing]; headbands [clothing]; hosiery; stocking suspenders; pantyhose; socks; gloves [clothing]; muffs [clothing]; ski gloves; shawls; neckties; scarves; veils; mantillas; kerchiefs; pocket squares; mufflers [neck scarves]; turbans; braces for clothing [suspenders]; belts [clothing]; girdles; leather belts [clothing]; albs; shower caps; sleep masks; eyeshades as headwear.

Class 27 Carpets; rugs; reed mats; bath mats; floor coverings; artificial turf; gymnasium exercise mats; gymnastic mats; door mats; floor mats for vehicles; non-slip mats; vinyl floor coverings; mats of woven rope for ski slopes; textile bath mats; anti-slip floor coverings for use on staircases; floor mats, fire-resistant, for fireplaces and barbecues; yoga mats; wallpaper; decorative wall hangings, not of textile; textile wallpaper.

Class 28 Games; apparatus for games; handheld game consoles; protective films adapted for screens for portable games; ring games; marbles for games; kites; counters [discs] for games; slides [playthings]; dolls; toy masks; gyroscopes and flight stabilizers for model aircraft; scooters [toys]; flying

discs [toys]; toy vehicles; remote-controlled toy vehicles; scale model vehicles; toy furniture; shoes for dolls; musical toys; toy robots; tricycles for infants [toys]; checkers [games]; bingo cards; playing cards; balls for games; billiard table cushions; billiard balls; bowling apparatus and machinery; hockey sticks; golf bags, with or without wheels; rackets; badminton shuttlecocks; billiard cues; stationary exercise bicycles; body-building apparatus; body-training apparatus; chest expanders [exercisers]; rollers for stationary exercise bicycles; dumb-bells; hang gliders; spring bars for exercising; bows for archery; archery implements; archery targets; baseball bats; baseball bat cases; golf balls; nets for sports; fitted protective covers specially adapted for sports equipment, namely, golf club, tennis racket, skis; soft tennis balls; rubber baseballs; sleds [sports articles]; edges of skis; machines for physical exercises; bindings for alpine skis; darts; barbells; surfboards; ski edges; sole coverings for skis; skis; climbers' harness; toy gliders; skateboards; surfboard leashes; trampolines; yoga straps; water skis; ski sticks; ski poles; kendo bamboo swords; relay batons; boards used in the practice of water sports; yoga blocks; play swimming pools; inflatable pool toys; boxing gloves; shin guards [sports articles]; fencing gloves; baseball gloves; elbow guards for athletic use; knee guards for athletic use; protective paddings [parts of sports suits]; gloves for golf; swimming jackets; skating boots with skates attached; roller skates; ice skates; in-line roller skates; snowshoes; bowling gloves; ice skate blades; rugby gloves; protective supports for shoulders and elbows [sports articles]; kendo plastrons; catchers' masks; toy Christmas trees; artificial fishing bait; rods for fishing; landing nets for anglers; floats for fishing; fish hooks; lures for hunting or fishing; fishing tackle; fishing lines; reels for fishing; creels [fishing traps]; gut for fishing; bite indicators [fishing tackle]; bite sensors [fishing tackle]; scent lures for hunting or fishing; fish cages for use in recreational fishing; fishing rod holders; fishing sinkers; camouflage screens used in hunting; nets for sports.