

O/195/20

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3405307

BY

RYAN INNOLES

TO REGISTER THE FOLLOWING TRADE MARK IN CLASS 25

TWENTY2 CLOTHING

AND OPPOSITION THERETO (NO. 417374)

BY

NEW ERA CAP CO., INC

Background and Pleadings

1. Mr Ryan Innoles (“the Applicant”) applied to register the trade mark “TWENTY2 CLOTHING” on 7 June 2019 for goods in class 25, namely *clothing*. It was accepted and published on 21 June 2019.

2. New Era Cap Co., Inc (“the Opponent”) opposes the application under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) relying on its earlier UK and EU registered trade marks as outlined below:



UKTM no. 3143110

Filed: 6 January 2016

Registered: 1 April 2016

Class 25: Headwear; hats, caps, knitted hats, baseball caps.

(“Mark 110”)



UKTM no. 3143117

Filed: 6 January 2016
Registered: 1 April 2016
Class 25: Headwear; hats, caps, knitted hats, baseball caps.
(“Mark 117”)

19TWENTY

EUTM no. 017887821

Filed: 16 April 2018
Registered: 28 July 2018
Class 25: Clothing; headgear; footwear.¹
(“Mark 821”)

3. The Opponent relies on all of its goods for which the marks are registered, claiming that there is a likelihood of confusion under section 5(2)(b) of the Act because the trade marks are similar and the Applicant’s mark is to be registered for goods identical with or similar to the goods for which the earlier marks are protected.


4. Mr Innoles filed a defence and counterstatement denying the claims made. He denies that the marks are similar or that there is any identity or similarity between the goods. I have outlined below the entirety of his submissions as he did not file any additional documents:

“1. My company that I am trying to launch is named (TWENTY2 clothing), the opponent trying to stop this is New Era Cap Co. Inc) they have a branch off company which they previously used called NEW ERA 29TWENTY or NEW

¹ Whilst the Opponent marked in form TM7 that it was only relying on “some” of its goods covered by mark 821 for the purposes of the opposition, it did not subsequently specify which ones. I will therefore consider the specification in its entirety especially in light of the nature and extent of the goods in question.

ERA TWENTY9 or NEW ERA 19 TWENTY as far as I am aware 22 is a completely different number to 29 or 2920 or 1920?

2. I am trying to launch a clothing company which will sale [sic] T-SHIRTS, then potentially JUMPERS, HOODIES, JOGGERS, SHORTS the opponent trying to stop this sales CAPS? Hence the name NEW ERA CAP CO.INC? if you type in google 29TWENTY or TWENTY9 or 19TWENTY or NEW ERA all that comes up is caps.

3. Their logo in there[sic] items is  (NY overlapping)

My twenty2 logo is



.....they are completely different and will no way be misunderstood as the same company.

4. just because they own the trademark 29TWENTY or 19TWENTY or TWENTY9 I do not understand how they can dictate other people using any other number TWENTY2 for example or TWENTY3,4,5,6,7,8. etc...? They do NOT own any other trademark.

All of the above clearly shows that these are two separate companies with two different names selling different items.”

5. Mr Innoles is unrepresented whereas the Opponent is professionally represented by Withers & Rogers LLP. Neither party filed evidence nor requested a hearing and only the Opponent filed submissions in lieu of a hearing. Whilst I do not propose to summarise those submissions in full, I have taken them into account in reaching my

decision and will refer to them where necessary. The decision is taken following a careful perusal of the papers.

Decision

6. The opposition is based on section 5(2)(b) of the Act which states:

“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”.

7. In these proceedings, the Opponent is relying upon its UK and EU trade mark registrations, shown above, which qualify as earlier marks under section 6 of the Act because each was applied for at an earlier date than the Applicant’s contested mark. None of the Opponent’s marks have been registered for more than five years at the date the application was filed and therefore they are not subject to the proof of use provisions contained in section 6A of the Act. Consequently, the Opponent is entitled to rely upon all the goods for which the marks are registered, without having to establish genuine use.

8. 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 greater 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 to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

9. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc* Case C-39/97, where the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

10. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat*, [1996] R.P.C. 281 namely:

- (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.

11. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM - Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

12. The respective goods are set out as follows:

Applicant's goods	Opponent's goods
Class 25: Clothing	Mark 110 Class 25: Headwear; hats, caps, knitted hats, baseball caps.
	Mark 117 Class 25: Headwear; hats, caps, knitted hats, baseball caps.
	Mark 821 Class 25: Clothing; headgear; footwear

13. The term *clothing* appears in both the Applicant's specification and the Opponent's 821 mark specification, they are self-evidently identical.

14. In relation to the Opponent's remaining goods in respect of its other two marks the Opponent submits that "Headgear, hats, caps, knitted hats, baseball caps can all be categorised as types of headwear....and is similar to clothing to at least a medium degree." ² My own understanding of the term *clothing* and that of the average consumer, is that it would be something that is worn and would therefore include *headwear* and *headgear* and cover such things as *hats, caps, knitted hats* and *baseball caps* and therefore be identical on the principles in *Meric*. Even if they are not regarded as identical they are highly similar, given that the goods share nature, intended purpose, method of use and users and reach the market using the same trade channels. Similarly, footwear would be categorised as something that is worn on the feet and whilst footwear is more likely to be made from different materials and

² Para 14 submissions dated 7 January 2020

thus differ in nature they would again share trade channels as footwear is often sold in the same retail outlets and departments as clothing. The respective goods would overlap in users and purpose, both articles being items of fashion or goods to cover or adorn the body. I consider that *clothing* and *footwear* are similar to a medium to high degree.

Average consumer and the nature of the purchasing act

15. When considering the opposing marks, I must determine first of all who the average consumer is for the goods and the purchasing process. The average consumer is deemed reasonably informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion the average consumer's level of attention is likely to vary according to the category of goods in question.³

16. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

³ *Lloyd Schuhfabrik Meyer*, case c- 342/97.

17. The goods are likely to vary in price from the inexpensive mass-produced items to those designer pieces within a higher price bracket. Nevertheless, I must consider the respective goods across the whole breadth of the registered specification especially since no evidence has been filed by either party. The Opponent considers that the average consumer for the goods in question is a member of the general public. I agree. Overall, I consider that the goods are unlikely to be the most expensive and will be purchased on a fairly frequent basis with considerations such as fashion trends, price, quality and suitability playing important roles. With this in mind I consider that at least an average degree of attention will be undertaken in the purchasing process.

18. In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, the GC stated that:

“49. However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

And

“50..... 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.”

19. Taking into account the nature of the goods I consider that the purchasing process will be primarily visual with the goods selected from retail outlets or their online equivalents. I do not discount aural considerations however in the form of advice sought from sales assistants or queries over the telephone.



Comparison of the marks

20. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

22. The respective trade marks are shown below:

Applicant's Mark	Opponent's Marks
<p>TWENTY2 CLOTHING</p>	<p><u>Mark 110</u></p>  <p><u>Mark 117</u></p>  <p><u>Mark 821</u></p> <p>19TWENTY</p>

Overall Impression

The Applicant's Mark

23. The applied for mark consists of the word TWENTY conjoined with the number 2 and the word CLOTHING. The word CLOTHING will be viewed as descriptive of the nature of the goods provided by the undertaking and therefore little trade mark weight will be attributed to it by the consumer, resulting in it playing a much lesser role in the overall impression of the mark. The dominant and distinctive element of the mark and therefore the overall impression, resides in the word TWENTY followed by the numerical 2 in combination.

The Opponent's 821 Mark

24. The Opponent's mark consists of the number 19 conjoined with the word TWENTY. Since there are no other elements to contribute to the mark the overall impression resides in these two elements in combination.

The Opponent's 117 Mark

25. This mark is a composite arrangement presented in monochrome of a circular device with a black outline intersected by a thick bold blocked line, upon which the numeral 29 is displayed followed by the word TWENTY in white. Above this are two conjoined squares, one presented in black, the other in white. Within the squares in corresponding black and white colours are the letters NE presented to depict a flag and the words NEW ERA one on top of the other. I agree with the Opponent that the words NEW ERA may be seen by the average consumer as a house mark due to their relative size and position within the mark and therefore play a lesser role in the overall impression, as do the additional figurative elements. The eye is naturally drawn to the conjoined numerical 29 and word TWENTY at the centre of the circular device and it is these elements in combination which form the dominant and distinctive components of the mark and in which the overall impression resides.

The Opponent's 110 Mark

26. As with Mark 117, this mark includes similar elements, save that the circular device and intersected bold line are presented as a reverse negative in white on a black squared background. The two conjoined squares above the intersecting line are identical to the ones as described in mark 117 above and include the same elements. At the centre of the mark the conjoined word TWENTY is displayed in black, followed by the number 9. As with mark 117, the overall impression of the mark resides with the conjoined word TWENTY and number 9 due to their position and size at the centre of the device. The circular device, black background and monochrome effect make a limited contribution to the mark as a whole as do the letters NE and words NEW ERA due to their size and position and how they will be perceived by the average consumer.

Visual Comparison

27. Visually the marks coincide with the presence of the word TWENTY which is common to all marks. This word precedes the number 2 in the Applicant's mark whereas in the Opponent's 110 mark it precedes the number 9 and in the Opponent's 117 and 821 marks it follows the numbers 29 and 19 respectively. There are clear points of visual difference; the circular devices, stylisation and the additional letters and words present in the Opponent's 110 and 117 marks, there being no counterpart in the Applicant's mark and the Applicant's mark includes the word CLOTHING, there being no counterpart in any of the Opponent's marks. There are also clear visual differences with not only the actual numbers but their positions preceding and following the word TWENTY. I accept these differences are not overly significant due to their size and relative weight within the overall impressions of the marks and therefore weighing them up each against the other I consider that the visual similarity between the Applicant's mark and the Opponent's 110 and 117 marks is low to medium and in relation the Opponent's 821 mark is medium.

Aural Comparison

28. It is well established that when a trade mark consists of a combination of words and figurative components it is by the word component that it is most likely to be referred. The presence of the circular devices and the other decorative elements present in the Opponent's 110 and 117 marks are therefore not relevant factors in the aural comparison. Also taking into account my previous conclusions regarding the overall impressions of the marks I do not consider that the initials NE presented as a banner or the words NEW ERA are likely to be articulated. Further the additional verbal element CLOTHING present in the Applicant's mark is unlikely to be articulated as it will be regarded as descriptive of the goods. The only common element between all four marks is the word TWENTY which is identical in each and will be given its normal pronunciation. Similarly, the numbers present in each mark will be given their ordinary pronunciations.

Applicant's Mark

29. In light of the above, the Applicant's mark is therefore likely to be pronounced as either TWE-NTY-TOO or TWE-NTY-TOO-CLOW-TH-ING dependent on whether the clothing element is pronounced.

The Opponent's 821 Mark and the Applicant's Mark

30. The mark will be pronounced as NINE-TEEN-TWE-NTY as both the number 19 and word TWENTY will be given their ordinary pronunciation. I do not discount that some consumers will articulate each number in turn pronouncing the mark as ONE-NINE-TWE-NTY, however since the numbers appear together in two digit form I consider that this is unlikely. The aural similarity only coincides with the element TWENTY which is the first two syllables of the Applicant's mark and the last two syllables of the Opponent's mark. If only the numbers are articulated the marks share a medium degree of aural similarity or low in any other case.

The Opponent's 110 mark and the Applicant's Mark

31. In light of my earlier assessment I consider that only the numbers will be articulated in the Opponent's mark in which case it will be pronounced as TWE-NTY-NINE. The marks coincide in the first two syllables there being no similarity in sound between the third syllable TWO as opposed to the third syllable NINE in the respective parties' marks. Consequently, the marks are aurally similar to a medium degree since two out of the three syllables are identical.

The Opponent's 117 mark and the Applicant's Mark

32. The Opponent's mark will be pronounced as TWE-NTY-NINE-TWE-NTY discounting the other verbal elements for the same reasons as outlined above. In this scenario weighing up the similarities and the differences together with the identical first two syllables I consider that the marks are aurally similar to a medium degree.

33. I have considered various alternatives to the pronunciation of the Opponent's marks where the numbers are pronounced as single digits and where all the verbal elements of the Opponent's marks are pronounced in various combinations but discount this as I believe it would result in an artificial dissection of the marks which would not be undertaken by the average consumer. If, however, I am wrong and all the verbal elements of each mark is pronounced then the aural similarity between those marks are low.

Conceptual Comparison

34. In *Lacoste v Chanel Ltd*, Case BL 0/469/17, Mr Daniel Alexander Q.C., sitting as the Appointed Person, upheld the hearing officer's assessment that the marks "11.12" and "L.12.12" were conceptually similar to a moderate degree explaining that:

"it is often difficult to express precisely why two marks share conceptual similarity where such similarity as there is may exist at a rather abstract level.

That is partly because such marks do not denote any particular thing or have a particular informational content. Such marks may be, in some sense, nonsensical, but may nonetheless be nonsensical in a similar way.”

35. Given my findings regarding the overall impressions of the marks the word TWENTY in combination with the numbers in each mark will be immediately recognised either as two separate numbers or as a unit to make a new number. The word CLOTHING in the Applicant’s mark will be given its ordinary meaning but be regarded as descriptive of the goods provided. The marks overlap conceptually therefore to the extent that all four marks will bring to mind the identical notion of the number TWENTY. The marks differ in so far as the total number achieved in combination for example the number twenty two in the Applicant’s mark as opposed to twenty nine in the Opponent’s 110 mark. Whilst there is a clear conceptual similarity as a result of the number TWENTY, the difference regarding the different single digits creates a difference in concept in so far as they are different numbers. The marks overall may be considered as conceptually similar to a medium degree.

Distinctiveness of the earlier marks

36. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU provided guidance on assessing a mark’s distinctive character, stating 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).”

37. Registered trademarks possess varying degrees of inherent distinctive character; descriptive words tend to have a low level of inherent distinctiveness, whereas invented words are regarded as possessing a high level of distinctive character. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion. The distinctive character of a trade mark can only be assessed by reference to the goods and by reference to the way it is perceived by the relevant public and can be enhanced by virtue of the use made of it.⁴

38. The Opponent did not file evidence claiming that the distinctive character of its marks have been enhanced through use, I therefore only have the inherent position to consider. The distinctive character of all of the Opponent’s marks are dominated by the word TWENTY conjoined with a numerical. The Opponent submits that the different numbers accompanying the word TWENTY denote a different style number within its range however I do not consider that the average consumer will automatically come to this conclusion as there is no evidence put forward to specifically associate the numbers with the goods. Numbers generally are not uncommon for clothing, headgear and footwear and will therefore be regarded as fairly low in distinctive character, however, the distinctiveness of a mark must be considered as a whole. The

⁴ *Rewe Zentral AG v OHIM* (LITE) [2002] ETMR 585

totality of the number TWENTY written as a word conjoined with a numeral will provide an unusual presentation. On this basis I consider that the level of inherent distinctiveness of the Opponent's 821 mark is average. The device and additional verbal/decorative elements present in the Opponent's 110 and 117 marks are unremarkable and will therefore contribute less to their distinctive qualities which I also consider will be average.

Likelihood of Confusion

39. When considering whether there is a likelihood of confusion between the two marks I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion where the similarities between the marks lead the consumer to believe that the respective goods originate from the same or related source.

40. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“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, I conclude that it is another brand of the owner of the earlier mark.”

41. A number of factors must also be borne in mind when undertaking the assessment of confusion. 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 or services and vice versa. As I mentioned above, it is also necessary for me to keep in mind a global assessment of all relevant factors when undertaking the comparison and that the purpose of a trade mark is to distinguish the goods and services of one undertaking from another. In doing so, I must consider that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

42. I remind myself that I have found the average consumer to be a member of the general public selecting the goods primarily by visual means but not discounting aural considerations. I have found the level of attention in the purchasing process to be average taking into account the nature of the goods. I consider the marks to be visually similar to between a low to medium degree and the marks aurally similar to a medium degree if only the numbers are articulated and low otherwise. Conceptually the marks share a medium degree of similarity. I consider the Opponent's marks have an average degree of inherent distinctive characteristics and I have found the respective goods to be identical or highly similar other than footwear which I found to be similar to clothing to a medium to high degree.

43. The Opponent concedes that in light of the moderate degree of visual, aural and conceptual similarity between the marks that direct confusion is unlikely. I agree. Taking into account these conclusions, in terms of direct confusion, I have considered whether the marks would be mistaken one for the other. However, due to the number of additional elements present in the Opponent's 110 and 117 marks, in particular the device, I do not believe this would be the case. There are sufficient differences between the visual characteristics of the marks to ensure that the average consumer will easily distinguish between them. In relation to the Opponent's 821 mark I also consider that it is unlikely that the average consumer would misremember the number

attached to the word TWENTY and imperfectly recall the marks, particularly as the goods are chosen primarily through visual means.

44. However, I must also consider the possibility of indirect confusion and whether the relevant public believes that there is an economic connection between them or that they are variant marks from the same undertaking as a result of the shared dominant common structure, namely the word TWENTY in combination with a number. The Opponent submits that consumers will conclude that the differing numerals merely indicate a brand extension or a new clothing line, style or version. The Applicant however submits that the logos are completely different and that consumers will not consider that they are same company and the Opponent shouldn't be able to monopolise the number TWENTY. Whilst a shared common element alone does not necessarily lead to a likelihood of confusion⁵ it is important for me to note the aspects of the other elements within the respective marks and the part they play. I bear in mind not only the level of distinctiveness of the earlier mark as a whole but also the distinctiveness of the common element.

45. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be

⁵ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

46. The Applicant’s and the Opponent’s 110 and 117 marks all include additional elements which are either descriptive of the type of goods provided or are decorative elements of lesser weight within the marks. I have already acknowledged that numbers are not particularly distinctive especially for clothing and the like, however, the combination of the number TWENTY written as a word together with a number as a digit is still the distinctive element of the earlier marks and the most distinctive component of the application. Bearing in mind my assessment of the overall impression and the role each element plays, when coming across the respective marks, I find that the average consumer will consider that the same provider is responsible for the goods and that the application is a sub brand or another model within the same range or a rebrand. On this basis, I consider that consumers will conclude that they are provided by the same or economically linked undertaking leading to a likelihood of indirect confusion.

Outcome

47. The opposition under section 5(2)(b) of the Act succeeds in full. Subject to any successful appeal the application is refused.

Costs

48. As the Opponent has been successful it is entitled to a contribution towards its costs. Award of costs in proceedings are based upon the scale as set out in Tribunal Practice Note 2 of 2016. Applying that guidance, I award costs to the Opponent on the following basis:

Preparing a notice of opposition and reviewing the counterstatement:	£200
Drafting submissions in lieu of hearing	£300
Official fee:	£100
Total:	£600

49. I order Ryan Innoles to pay New Era Co., Ltd the sum of £600 as a contribution towards its costs. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated this 27th day of March 2020

Leisa Davies
For the Registrar