

D YOUNG & CO TRADE MARK NEWSLETTER^{no.50}

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Don't Delay!
When it Comes to Applications for Interim Injunctions "Speedy" is the Word to Remember



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Events



22-26 May 2010

INTA Annual Meeting

Jeremy Pennant, Angela Thornton-Jackson, Helen Cawley and Gemma Williams will be attending the 132nd INTA Annual Meeting in Boston, USA.

www.dyoung.com/event-intamay2010

15-19 June 2010

ECTA Annual Conference

2010 marks the 30th Anniversary of the European Communities Trade Mark Association. Gillian Deas will be attending the 29th ECTA Annual Conference at the Palau de Congressos de Catalunya, Barcelona, Spain.

www.dyoung.com/event-ecta2010

Editorial



Colleagues, clients and regular readers of this newsletter will know that Penny Nicholls recently retired from the firm. Back in November 2001 Penny launched the D Young & Co trade mark newsletter, and in her role as editor over the years steadfastly organised the team in order to bring these regular IP news updates to you. I am sure that Penny would be proud (as we are) to note that this is the 50th edition of this newsletter. We hope that our readers continue to find this publication of interest over the months and years to come.

This edition brings you news of the eagerly awaited ECJ decision on Google AdWords and the first Community Registered Design case decided by the European General Court. We also report on the news that Nominet are now considering lifting the restrictions on previously unregistrable .uk domain names. We will be able to provide further advice on this matter after 8 June when Nominet will be communicating the results of its consultation process.

As usual, we welcome any comments or questions regarding this newsletter. Please do not hesitate to contact our Business Development Manager, Rachel Daniels, by email at rjd@dyoung.co.uk or your usual D Young & Co advisor (see page 8 for office contact details).

Editor:

Angela Thornton-Jackson



Article 01

Don't Delay! When it Comes to Applications for Interim Injunctions "Speedy" is the Word to Remember

Blinxx v Blinkbox & Wasabi Frog v Miss Boo: Interim injunctions need swift action



We are all likely to be familiar with the old fable regarding the hare and the tortoise: slow and steady gets there in the end while the speedy hare misses the finish line. In the case of interim injunctions however, it may be prudent to forget the fairy tales and sprint rather than stroll.

There are occasions when it is not in a brand owner's interest to await full trial before taking out an injunction against an infringer. In those circumstances, the ability to obtain an interim injunction which will bring a speedy halt to the infringer's activity is vital and a swift application to the High Court is necessary. However, the word "speedy" is key here.

There have recently been two applications to the High Court for interim injunctions and the two outcomes were at variants with each other.

Race 1

In the first case, Blinxx had run the blinxx.com website since 2004. In 2008 they became aware that a third party, Blinkbox was operating a similar website under blinkbox.com and, at the same time, had applied to register various Community trade marks which included the word BLINK.

Blinxx wrote to Blinkbox complaining that the

latter was trading on their reputation to Blinxx's disadvantage but did not bring proceedings against Blinkbox for some considerable time after this initial correspondence. At that point, Blinxx filed an application to the High Court for an interim injunction.

Mr Justice Floyd refused to grant an interim injunction on the basis that Blinxx had known of Blinkbox's use of blinkbox.com since 2008 and the balance of convenience lay in favour of Blinkbox.

Race 2

In complete contrast, Wasabi Frog Limited recently applied for an interim injunction to prevent Miss Boo Limited and Gulfray Mohammed (together referred to as "Miss Boo") from trading under or by reference to the mark or domain name "Miss Boo" and "missboo.co.uk". Wasabi Frog did, themselves, trade under the names "boohoo" and "boohoo.com" in relation to women's clothing, shoes and accessories and had done so since November 2006. They also owned Community trade mark registrations for "boo", "boohoo" and "boohoo.com" and the domain names "boohoo.com", "boohoo.co.uk", "missboohoo.com", "missboohoo.co.uk", and "missboohoo.eu" all of which redirect to "boohoo.com".

First Registered Community Design Case Decided by the European General Court

PepsiCo “Rapper” RCD

Miss Boo had launched themselves in the same field of activity in 2009 and their products were in direct competition with Wasabi Frog's.

In order to obtain an interim injunction, Wasabi Frog had to show that there was a triable issue, that an award of damages in the future would not be adequate compensation and that the balance of convenience favoured the granting of an injunction.

The Court found that Wasabi Frog enjoyed a substantial reputation in the marks “boohoo” and “boohoo.com” and that there was a strong likelihood of confusion between these marks and Miss Boo.

Therefore, there was clearly a triable issue. Moreover, the Court found that damages would not be adequate remedy for Wasabi Frog as Miss Boo had no assets and their trading in goods of an inferior quality could do irreparable harm to Wasabi Frog's reputation in their “boohoo” goods.

In addition, Miss Boo's website could be easily changed and therefore the balance of convenience lay in favour of granting the injunction to Wasabi Frog.

Clearly, Wasabi Frog had not wasted any time in bringing this application for an interim injunction to the Court. This is in complete contrast to the situation in the *Blinxx/Blinkbox* application for an interim injunction whereby *Blinxx* had allowed *Blinkbox* time in which to build up their own business under the name so that the whole balance of convenience shifted.

It is advisable, therefore, that an application for an interim injunction is made within a matter of weeks of a brand owner becoming aware of an infringement of their mark if they wish to take advantage of this action and not have to await full trial.

In the case of *Blinxx*, the delay was fatal!

Author:
Gillian Deas



On 18 March 2010, the General Court (previously the Court of First Instance, “CFI”) issued its judgement in a case relating to the invalidity of a Registered Community Design (RCD). This is the first designs case to reach the General Court and as a result the judgement is helpful in providing guidance on various aspects of design protection.

The case concerned a RCD owned by PepsiCo for a promotional item described as a rapper consisting of a disc made of metal which can be moved around or flipped as part of a game. The rappers are promotional items given away with the proprietor's snack foods. An application to invalidate the registration was filed by a Spanish company based upon their earlier design.

Initially the Invalidity Division of OHIM declared that the contested design was invalid as a result of the existence of a prior right. This decision was overturned by OHIM's Board of Appeal which then led to a further appeal to the General Court seeking to have the registration declared invalid.

The applicant challenged the contested decision on the basis that the Board of Appeal had found that the “informed user” could be not only a child in the approximate age range of 5-10 but also a marketing manager. The Court confirmed that the informed user is neither a manufacturer nor a seller of the products in which the designs at issue are intended to be incorporated or to which they are intended to be applied. The informed user is particularly observant and has some awareness of the state of the prior art, that is to say the previous designs relating to the product in question that had been disclosed on the date of filing of the contested design or, as the case may be, on the date of priority claimed. Accordingly, the informed user, so the General Court held, could be either a child or a marketing manager. In any event, a statement that the informed user is “particularly observant” is likely to be construed as having a knowledge of the specific marketplace in question.

To succeed in the appeal it was also necessary for the applicant to challenge the Board's

finding that the designs at issue produced a different overall impression on the informed user. The Court's findings in relation to the question of a “different overall impression” provide useful guidance in an area which has long been open to a broad range of interpretations. Due to the variance of certain languages within the European Union, the Court confirmed that a design is limited to the appearance of the whole or part of a product and thus the impression must be a visual one. The test therefore is whether designs provide a different overall impression is therefore solely a visual comparison and would not take into consideration any other sensory similarities.

The Court also considered the designer's freedom in developing his design in assessing whether a design is in conflict with an earlier right. The Court confirmed that the Board of Appeal was correct to conclude that an RCD is in conflict with a prior design when, taking into consideration the freedom of the designer in developing the community design, that design does not produce on the informed user a different overall impression than that produced by the prior design relied on.

As a side issue, the Court confirmed, as they have done in a number of trade mark cases, that new evidence cannot be introduced at the time of an appeal to the General Court. Therefore, the applicant's attempt to introduce new documents in response to the Board of Appeal's decision were excluded without the Court having to consider their probative value.

The judgement further goes to underline the importance of design protection. It is anticipated that with the increase in awareness of the protection afforded by RCDs that other cases in this area will be progressing to the General Court in future.

Author:
Jeremy Pennant



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www.pepsi.com

Passing Off

CIPRIANI v CIPRIANI LONDON

VODKA v VODKAT

To succeed in a case for Passing Off it is necessary to satisfy the tests set down in the decided cases of JIF LEMON or ADVOCAT. Two recent high profile cases have however caused the Courts to revisit these principles.

CIPRIANI v CIPRIANI LONDON

The JIF LEMON case [Reckitt and Colman Ltd v Borden Inc [1990] 1 All E.R. 873], established a three tier test, holding that to succeed in Passing Off the Claimant must have a goodwill or reputation in the sign on which it is relying; there must be a misrepresentation by the Defendant and there must be damage (real or perceived) to the Claimant's business.

In Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Ltd and others 2010 EWCA Civ 110, the Court examined the question as to whether it is necessary to have a physical presence in the UK in order to own goodwill here.

The Claimant



The background to the dispute was that the Claimants operated a number of hotels under the name CIPRIANI although they did not operate any hotels in the UK under that name.

The Defendant



The Defendant operated a restaurant in London under the name CIPRIANI LONDON, which was often shortened to just CIPRIANI. The Claimants sued for trade mark infringement and Passing Off using its CTM

registration for CIPRIANI as a basis.

The question at issue in relation to the Passing Off claim was whether the Claimant had a sufficient reputation in its CIPRIANI trade mark in the UK when its hotel was based in Venice, Italy.

The Court of Appeal held that the Claimant did in fact have a sufficient goodwill here in the UK which it could rely on in a Passing Off action against the Defendant. The Claimant had demonstrated through the proceedings that it had a substantial customer base in the UK and that a large proportion of bookings at its hotel originated from the UK. On this basis, the Court held that the Claimant's reputation in its hotels was an attractive force that brought in English custom and as such, resulted in the Claimant owning goodwill in the UK.

The claim for Passing Off was therefore upheld.

VODKA v VODKAT

In another high profile case, the principles set down in ADVOCAT relating to extended Passing Off were revisited. The ADVOCAT case [Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd., [1979] AC 731, [1980] R.P.C. 31] held that extended Passing Off could occur where

1. there was a misrepresentation
2. made by a trader in the course of trade
3. to prospective or ultimate consumers
4. which is likely to injure the business or goodwill of another trader, and
5. which causes or is likely to cause damage to the business or goodwill of the trader who brings the action.

In Diageo North America Inc & Anor v Intercontinental Brands [2010] EWCH 17 Ch, the High Court held that the Defendant had passed off their VODKAT product as vodka.

The Defendant



Intercontinental Brands manufactured an alcoholic beverage under the trade mark VODKAT. The product was made from both vodka and a neutral fermented alcohol, with the result that the product only had an overall alcoholic strength of 22%. Vodka products must have a minimum strength of 37.5%.

The Claimant



Diageo brought an action for Passing Off claiming that the VODKAT product was harmful to its SMIRNOFF product.

The Court found that there were 3 main issues in contention. The first was whether the term "vodka" had a reputation and goodwill. Arnold J found that it did. Although consumers may not necessarily know what vodka is, the term is readily used by consumers and is distinguishable from other similar products such as rum or gin for example.

The second issue was whether marketing of VODKAT misrepresented itself as being vodka. It was held that the name VODKAT suggests that the product is either vodka, or at the least, made from vodka. Although the latter was true for VODKAT, Arnold J still found there to be a misrepresentation because Intercontinental Brands had failed to educate consumers that VODKAT only contained vodka and was not actually vodka. This finding was enhanced by the fact that the evidence presented pointed to confusion at every level of the supply chain.

➤ **Related articles**
*Trade Mark
Newsletter No. 41,
January 2009, Article
3: "What's in a
Name? Hotel Cipriani
Sweeps the Board
Against Previous
Business Partners".
[www.dyoung.com/
trademarknewsletter-
jan09](http://www.dyoung.com/trademarknewsletter-jan09)*

Article 04

Google AdWords European Court of Justice Issues Adwords Decision

The final issue was whether Diageo had suffered, or was likely to suffer damage as a result of Intercontinental Brands' misrepresentation. Diageo contended that it had lost some sales under its SMIRNOFF trade mark as a result of confusion with VODKAT. Arnold J held that even if there had been no evidence of lost sales, damage was still likely to occur as the marketing of VODKAT would be likely to erode the distinctiveness of the term "vodka" because its alcoholic strength was much less than the required minimum of 37.5%. If marketing of VODKAT was allowed to continue, it could become viewed as a term applicable to lower strength alcoholic products.

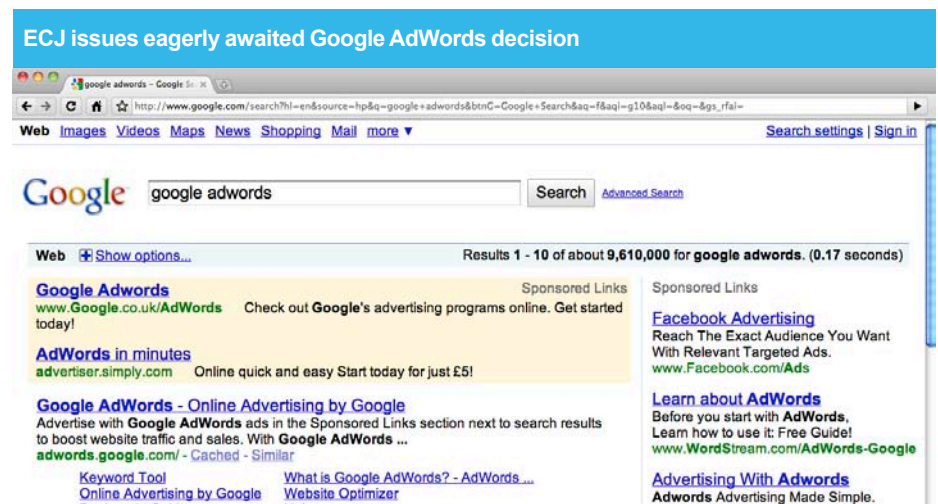
As Intercontinental Brands had misrepresented VODKAT as vodka to consumers, and as Diageo had suffered and as other vodka traders were likely to suffer by the continued marketing of VODKAT at a lower alcoholic strength than other vodka products, Intercontinental Brands were guilty of Passing Off.

COMMENT

These two cases provide some useful guidance for claimants considering bringing Passing Off actions in the UK. The CIPRIANI case has opened the way for claimants who do not operate physical businesses in the UK to be able to bring actions for Passing Off if they are able to show that they have goodwill in their businesses here, such as by demonstrating a large UK consumer base. However, the Court have issued a word of caution with regard to the reliability of direct online bookings as a test for goodwill given that an increasing number of companies now offer online bookings worldwide. No doubt, this issue will be tested in the months and years to come.

The VODKAT case offers hope to manufacturers of groups of products that have defined qualities who wish to prevent others from eroding the uniqueness of that group of products. However, the Court has granted the Defendant with leave to appeal and it remains to be seen whether the Court of Appeal would find in favour of the Claimant.

Author:
Gemma Williams



The ECJ has now issued its eagerly anticipated decision in the Google AdWords case.

Readers will be aware that Google operates an AdWords system which allows advertisers to purchase competitors trade marks as key words in order to trigger sponsored links in internet search results.

The ECJ has found that Google's AdWord system does not infringe the trade mark rights of a brand owner when the brand owner's marks are used by another to trigger the sponsored adverts. The Court found that Google's role was only as an information service provider and Google did not itself violate any trade mark rights. The Court held "the fact of creating the technical conditions necessary for the use of a sign and being paid for that service does not mean that the party offering the service itself uses the sign" as would be necessary to constitute trade mark infringement. Accordingly, "a referencing service provider is not involved in the use in the course of trade within the meaning of the above mentioned provisions [of the directive and regulation]".

This is clearly good news for Google. A finding that they helped infringe third party trade mark rights by offering ad words for sale would have been a significant blow to their business.

However, there was some comfort for brand owners in that the ECJ found that owners would have the right to prevent use of their trade

marks in AdWords where that use did result in some kind of customer confusion. The Court found that "in the case where third parties ads suggest that there is an economic link between that third party and the proprietor of the trade mark, the conclusion must be that there is an adverse effect on the function of indicating origin.

In the case where the ad, while not suggesting the existence of an economic link, is vague to such an extent that the origin of the goods or services at issue that normally informed and reasonably attentive internet users are unable to determine on the basis of the advertising link and the commercial message attached thereto, whether the advertiser is a third party vis-à-vis the proprietor of the trade mark or, on the contrary, economically linked to that proprietor, the conclusion must also be that there is an adverse effect on that function of the trade mark".

Accordingly, if an advertiser does want to make use of a third party trade mark as a purchased AdWord, it would be important to make clear that there is no link between that third party and the brand owner whose trade mark is used. Advertisers who are already using third party trade marks in their advertising campaigns would be well-advised to take legal advice following this decision.

Author:
Angela Thornton-Jackson



Appealing a Win

Maslyukov v Diageo Distilling Ltd & Another



The Chancery Division of the High Court recently ruled on the subject of whether an appeal can be lodged against an opposition decision where the Appellant has won on one ground but not on others.

The case of *Maslyukov v Diageo Distilling Ltd & Another* concerned Scotch Whisky. Diageo were concerned with and sought to oppose various applications by a Russian businessman, Mr Maslyukov, for the names of famous distilleries, including Dallas Dhu. The Hearing Officer at the Trade Mark Registry decided in Diageo's favour that the opposition should succeed under Section 3(6) of the Trade Marks Act on bad faith. However, Diageo was unable to persuade the Hearing Officer that the opposition should succeed on the other grounds, namely Section 5(4)(a) on passing off, Section 3(1)(c) for being descriptive and Section 3(3)(a) and (b) for being deceptive and contrary to public policy. Therefore, Diageo decided to appeal on all of these grounds. They did so on the basis that the decision would set an influential precedent for the other opposition

proceedings that had arisen at OHIM regarding an application by Mr Maslyukov to register DALLAS DHU as a Community Trade Mark. They were also of the opinion that a decision on the above grounds would have a wider significance and affect other manufacturers who faced the same problems.

Mr Justice Arnold ruled that, *prima facie*, Diageo's attempt to appeal the Hearing Officer's decision, even though it was the successful party was contrary to the principle set out in *Lake v Lake* in which the Court of Appeal was unwilling to entertain such an appeal. Diageo's attempt to rely on a later 2007 Court of Appeal decision which was decided the other way was however unsuccessful. The wording of Section 76(1) of the Act which provides that an appeal lies from "any decision" of the Registrar was interpreted by Mr Justice Arnold as relating to the decision to uphold or reject the opposition, not the conclusion regarding the individual grounds of opposition. He said that it was immaterial whether the decision was upheld on one ground or multiple grounds, concluding that he

had no jurisdiction to entertain the appeal, regardless of whether the decision might be taken to have persuasive value.

This finding seems to be consistent with the position at OHIM regarding Community Trade Mark proceedings. The General Court in a cancellation action involving Hoo Hing Holdings Ltd referred to the Regulation which states that an appeal is open to any party to the proceedings which is "adversely affected" by the decision. It followed that the party did not have standing to bring an action before the Court and the appeal was dismissed. In reality the question in the Diageo case and in other cases involving more than one ground of appeal is whether the Courts are willing to assess all grounds on the basis that the Appellant could be adversely affected at a later date even if they are successful on another ground. The current interpretation of the law appears to suggest that they are not.

Author:
Richard Burton



Registration no Guarantee of Distinctiveness

Lancôme's COLOR EDITION

Registration Invalidated

Lancôme registered the Community Trade Mark (CTM) COLOR EDITION in respect of cosmetic and make-up preparations on 11 February 2004. However, on 12 May 2004 an action was brought to invalidate the registration on the grounds that it was descriptive and devoid of distinctive character. This action was brought by a law firm in its own name.

In defending the action, as well as denying that the trade mark was devoid of distinctive character or descriptive, whether a law firm should be entitled to apply for a declaration that the CTM was invalid was also questioned. Lancôme alleged two parts to this appeal. Firstly that the General Court has misinterpreted who is entitled to bring such proceedings and secondly that such an action is incompatible with the role of the legal profession.

In their decision, the Court referred to the CTM Regulation which states that

"A declaration of invalidity based on an absolute ground for invalidity may be submitted by any natural or legal person and any group or body set up for the purpose of representing the interests of manufacturers, producers, suppliers of services, traders or consumers, which has the capacity in its own name to sue and be sued."

In contrast, where a declaration of invalidity is based on relative grounds, it is reserved to specific persons, companies or groups who have an interest in the proceedings. The Court found that the wording of the Regulation (above) made clear that the Legislature had intended to restrict the group of persons able to apply for a declaration of invalidity in the latter case (relative grounds), but not the former (absolute grounds).

Secondly, Lancôme had argued that the "role of the legal profession is incompatible with the right of a law firm to apply to OHIM for a declaration of invalidity of a mark, on its own account and in its own name."

This was found to be based not on any interpretation of the CTM Regulation but other matters of law independent of that provision. However, as this latter plea was not properly

raised before the General Court, the appeal was inadmissible on this matter.

In connection with the registrability issue, the Court referred to settled case law and in particular POSTKANTOOR (Koninklijke KPN Nederland, para. 100) and BIOMILD (Campina Melkunie para. 41) stating that

"A mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of those characteristics, unless there is a perceptible difference between the word and the mere sum of its parts; that assumes that, because of the unusual nature of the combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the results that the word is more than the sum of its parts."

In this case the Court held that because the sign 'COLOR EDITION' was composed exclusively of indications which may serve to designate certain characteristics of the goods in question, the combination was not unusual and employed a normal construction in light of the lexical rules of the English language. The mark in respect of which registration had been sought did not therefore create, for the target public, an impression sufficiently far removed from that produced by the simple juxtaposition of the verbal elements of which it was composed to alter its meaning or scope.

Even if registration has been secured you cannot take it for granted as it can be challenged from any number of directions. If your registration is a borderline case, the more use you have to support acquired distinctiveness, the stronger your position will be. A CTM which has been registered in breach of registration requirements will not be declared invalid if, after registration, it has acquired a distinctive character as a result of the use made of it.

Author:
Helen Cawley



Stop Press

Nominet Consults on .uk Domain Names

Nominet, the national registry for .uk domain names, has commenced a consultation period regarding the release of two letter, one character and other reserved domain names. Registration of these domain names is not currently possible due to the rules governing the .uk domain space. The registry has now proposed to lift this restriction and permit the registrations.

Nominet's Policy Advisory Body (PAB) has recommended that two letter domain names should be available for registration and agreed on the principles of how two letter domain names should be released. Around 2,300 are likely to become available. In addition the PAB also suggested the release of one character domains (i.e. "0" to "9") and some other short names which are identical to existing generic Top Level Domains (i.e. biz.org.uk).

A two-phase sunrise process has been proposed. The first round would allow applications from holders of UK registered trade marks that are identical to the two letter combination applied for. The second round would be for domain names not taken up in the first round and open to holders of unregistered rights. Where there are two or more qualifying right holders, Nominet is likely to stage a sealed bid auction.

End of Consultation is 8 June 2010



The consultation closes on 8th June 2010 when Nominet will publish a summary of all responses on its website and develop a series of recommendations. At this point, we will be able to advise readers on the likely availability of any domain names of interest. If you have any questions in the meantime, please contact your usual D Young & Co advisor.

For more information on the consultation process and a list of the .uk domain names which could be made available for registration see: www.nominet.org.uk/about/consultations/reservedshortdomains

Author:
Richard Burton



Useful links:

www.nominet.org.uk

www.dyoung.com/primer-domains

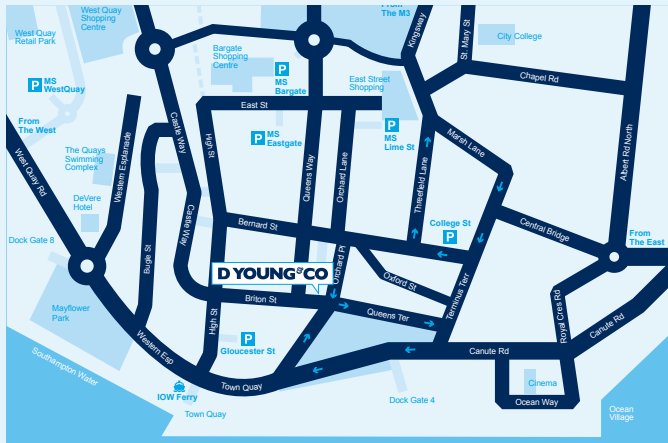
www.dyoung.com/article-ukdomains

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Contact Information

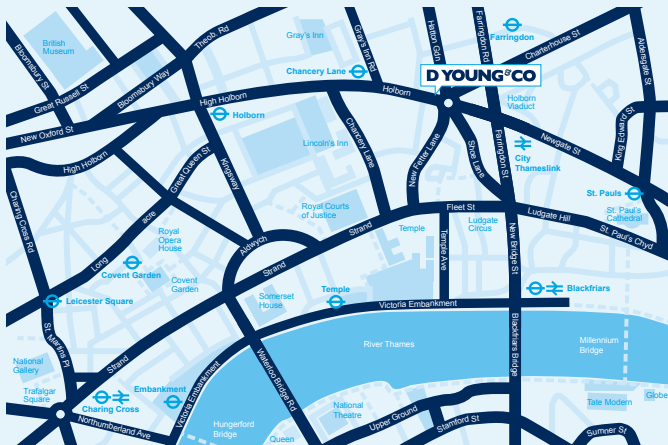
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