

O-053-07

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2367754B IN THE NAME OF
KINGFISHER BLINDS & CURTAINS LIMITED**

AND

**IN THE MATTER OF AN OPPOSITION THERETO UNDER NO. 93272 BY
L. B. PLASTICS LIMITED**

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION
NO. 2367754B in the name of
Kingfisher Blinds & Curtains Limited**

and

**in the matter of an opposition thereto
under No. 93272 by
L. B. Plastics Limited**

Background

1. Application No. 2367754B has an application date of 8 July 2004 and stands in the name of Kingfisher Blinds & Curtains Ltd. The application is for the following series of two marks:

the **future** is sheer.....
the **future** is sheer.....

in respect of:

Class 20:

Plastic vertical louvre blinds; non-textile curtains and blinds

Class 24:

Curtains, blinds; voile; curtains and blinds of voile; voile panels; net curtains; louvre, pleated, conservatory, vertical, venetian and roller blinds; made to measure curtains and blinds.

2. On 16 March 2005, L. B. Plastics Ltd filed a notice of opposition. The grounds of opposition are, in summary:

- Under section 5(1) based on the opponent's earlier trade mark No. 2322782 and in relation to "conservatory blinds";
- In the alternative, under section 5(2)(a) based on the same earlier trade mark and in relation to all goods of the application;
- In the alternative, under section 5(2)(b) based on the same earlier trade mark and in relation to all goods of the application;
- Under section 5(2)(b) based on the opponent's earlier trade marks Nos. 1201657, 2292611, 2198491, 2301638, 2260677 (all UK) and 1740323

(Community Trade Mark) and again in relation to all goods of the application;

- Under section 5(4)(a) based on what the opponent says is the mark “Sheer and marks prefixed Sheer” since the early 1970s. Despite this claim, details for trade mark No. 2322782 alone are provided.

3. Details of the earlier marks relied on by the opponent are as follows:

No: 2322782 (UK) Mark: SHEER

Class 6

Window frames, door frames, doors and door panels, window and door furniture, hinges, handles, fasteners and locks, mounting gear for sliding doors, all made wholly or principally of common metal; metal components for use in building, metal components for use in the construction of window frames and door frames; conservatories; frames for conservatories; parts and fittings for all the aforesaid goods.

Class 17

Plastics material for use in manufacture; composite materials incorporating plastics and wood for use in manufacture; extruded sections of plastics materials or of composite materials incorporating plastics and wood for use in building and in the manufacture of window frames, door frames, building products, fencing, decking, walkways, pontoons, verandahs, handrail assemblies, railings, roof structures, canopies, awnings, rainwater goods, guttering and gutter guards; plastics materials, fibre reinforced composite plastics materials and composite materials incorporating plastics and wood in the form of shaped sections, planks, sheets, slabs, rods, tubes, blocks, bars and films; non-metallic pipes, rods and tubes; articles made of plastics material, composite materials incorporating plastics and wood, rubber or other flexible material included in Class 17; materials for packing, sealing, insulating and weatherproofing; insulating materials for pipes, walls and roofs and for use in building; sound absorbing and sound deadening materials; seals and draft excluders; pre-formed products of plastics materials, composite materials incorporating plastics and wood, rubber or other flexible material for sealing, insulating and weatherproofing purposes; window and door seals; parts and fittings for all the aforesaid goods.

Class 19

Building materials, building components, building panels, non-metallic composite materials for use in building and construction; composite building materials incorporating plastics material and wood; windows, doors, window frames and door frames, secondary glazing assemblies; trim components for use in building, skirtings, architraves, covings, cladding, fascia boards, soffit boards, barge boards and window boards; rainwater goods, guttering and gutter guards; products for use in closing or filling wall cavities in buildings; drainage devices, vents and weepholes for wall structures; wall cavity trays; pipe and vent terminals, masonry fixings; wall, roofing and flooring products and materials; floor boards and floor panels; non-metallic decking, walkways and pontoons, verandah systems, handrail assemblies and railings; roof structures, canopies and awnings; fencing, fence panels, fence posts

and lattice panels; window panes, glass doors, double glazed units for windows and for doors; articles included in Class 19 made of plastics materials; conservatories; frames for conservatories; parts and fittings for all the aforesaid goods.

Class 37

Building construction services; services for the maintenance, repair and restoration of buildings and building components; custom fabrication, installation and replacement of window and door constructions; information services relating to building, to building components and to the construction, fabrication, installation and replacement of windows and doors; fabrication and installation of conservatories; all included in Class 37.

No. 1201657 (UK) Mark: SHEERFRAME

Class 6

Window frames, door frames, doors and door panels, all for building; window and door furniture, hinges, handles, fasteners and locks, all for doors and for windows; mounting gear for sliding doors; all made wholly or principally of common metal; metal elements for use in the construction of window frames and door frames; parts and fittings included in Class 6 for all the aforesaid goods.

Class 17

Extruded plastics sections for use in the manufacture of window and of door frames.

Class 19

Building materials, building elements, double glazed units and double glazed windows and doors, all being wholly or principally non-metallic; window panes and glass doors; all for use in building and all for use with, incorporating, or in the form of, frames; window frames and door frames, all being wholly or principally non-metallic and all for use in building; parts and fittings included in Class 19 for all the aforesaid goods.

Mark No. 2301638 (UK) Mark: SHEERGRIP

Class 17

Plastics materials for use in manufacture; composite materials incorporating plastics and wood for use in manufacture; extruded sections of plastics material or of composite materials incorporating plastics and wood for use in building and in the manufacture of window frames, door frames, building products, fencing, decking, walkways, pontoons, verandahs, handrail assemblies, railings, roof structures, canopies, awnings, rainwater goods, guttering and gutter guards; plastics materials, fibre reinforced composite plastics materials and composite materials incorporating plastics and wood in the form of shaped sections, planks, sheets, slabs, rods, tubes, blocks, bars and films; non-metallic pipes, rods and tubes; articles made of plastics material, composite materials incorporating plastics and wood, rubber or other flexible material included in Class 17; materials for packing, sealing, insulating and weatherproofing; insulating materials for pipes, walls and roofs and for use in building; sound absorbing and sound deadening materials; seals and draught excluders; pre-formed products of plastics materials, composite materials

incorporating plastics and wood, rubber or other flexible material for sealing, insulating and weatherproofing purposes; window and door seals; parts and fittings for all the aforesaid goods.

Class 19

Building materials, building components, building panels, non-metallic composite materials for use in building and construction; composite building materials incorporating plastics material and wood; windows, doors, window frames and door frames, secondary glazing assemblies; trim components for use in building, skirtings, architraves, covings, cladding, fascia boards, soffit boards, barge boards and window boards; rainwater goods, guttering and gutter guards; products for use in closing or filling wall cavities in buildings; drainage devices, vents and weepholes for wall structures; wall cavity trays; pipe and vent terminals, masonry fixings; wall, roofing and flooring products and materials; floor boards and floor panels; non-metallic decking, walkways and pontoons, verandah systems, handrail assemblies and railings; roof structures; canopies and awnings; fencing, fence panels, fence posts and lattice panels; window panes, glass doors, double glazed units for windows and for doors; articles included in Class 19 made of plastics materials; parts and fittings for all the aforesaid goods.

No. 2260677 (UK) Mark: SHEERLOCK

Class 17

Plastics materials for use in manufacture; extruded plastics sections for use in building and in the manufacture of window frames, door frames, building products, fencing, decking, walkways, pontoons, verandahs, handrail assemblies, railings, roof structures, canopies, awnings, rainwater drainage apparatus, guttering and gutter guards; plastics materials and fibre reinforced composite plastics materials in the form of shaped sections, planks, sheets, slabs, rods, tubes, blocks, bars and films; non-metallic pipes, rods and tubes; articles made of plastic material, rubber or other flexible material included in Class 17; materials for packing, sealing, insulating and weatherproofing; insulating materials for pipes, walls and roofs and for use in building; sound absorbing and sound deadening materials; seals and draught excluders; pre-formed products of plastics, rubber or other flexible material for sealing, insulating and weatherproofing purposes; window and door seals; parts and fittings for all the aforesaid goods.

Class 19

Building materials, building components, building panels, non-metallic composite materials for use in building and construction; windows, doors, window frames and door frames, secondary glazing assemblies; trim components for use in building, skirtings, architraves, covings, cladding, fascia boards, soffit boards, barge boards and window boards; rainwater drainage apparatus, guttering and gutter guards; products for use in closing or filling wall cavities in buildings; wall, roofing and flooring products and materials; floor boards and floor panels; non-metallic decking, walkways and pontoons; verandah systems, handrail assemblies and railings; roof structures, canopies and awnings; fencing, fence panels, fence posts and lattice panels; window panes, glass doors, double glazed units for windows and for doors; articles included in Class 19 made of plastics materials; parts and fittings for all the aforesaid goods.

No. 2198491(UK) Mark: SHEERSHADE

Class 17

Plastics materials for use in manufacture; extruded plastics sections for use in building and in the manufacture of window frames, door frames, building products, fencing, decking, walkways, pontoons, roof structures, canopies and awnings; plastics materials and fibre reinforced composite plastics materials in the form of shaped sections, planks, sheets, slabs, rods, tubes, blocks, bars and films; non-metallic pipes, rods and tubes; articles made of plastic material, rubber or other flexible material included in Class 17; materials for packing, sealing, insulating and weatherproofing; insulating materials for pipes, walls and roofs and for use in building; sound absorbing and sound deadening materials; seals and draught excluders; pre-formed products of plastics, rubber or other flexible material for sealing, insulating and weatherproofing purposes; window and door seals; parts and fittings for all the aforesaid goods.

Class 19

Building materials, building components, building panels, non-metallic composite materials for use in building and construction; windows, doors, window frames and door frames, secondary glazing assemblies; trim components for use in building, skirtings, architraves, covings, cladding, fascia boards, soffit boards and window boards; products for use in closing or filling wall cavities in buildings; wall, roofing and flooring products and materials; floor boards and floor panels; non-metallic decking, walkways and pontoons; roof structures, canopies and awnings; fencing, fence panels, fence posts and lattice panels; window panes, glass doors, double glazing units for windows and for doors; articles included in Class 19 made of plastics materials; parts and fittings for all the aforesaid goods.

Class 22

Awnings including awnings for attachment to tents, caravans and other vehicles.

No. 2292611 (UK) Mark: SHEERWOOD

Class 17

Plastics materials for use in manufacture; composite materials incorporating plastics and wood for use in manufacture; extruded sections of plastics material or of composite materials incorporating plastics and wood for use in building and in the manufacture of window frames, door frames, building products, fencing, decking, walkways, pontoons, verandahs, handrail assemblies, railings, roof structures, canopies, awnings, rainwater goods, guttering and gutter guards; plastics materials, fibre reinforced composite plastics materials and composite materials incorporating plastics and wood in the form of shaped sections, planks, sheets, slabs, rods, tubes, blocks, bars and films; non-metallic pipes, rods and tubes; articles made of plastics material, composite materials incorporating plastics and wood, rubber or other flexible material included in Class 17; materials for packing, sealing, insulating and weatherproofing; insulating materials for pipes, walls and roofs and for use in building; sound absorbing and sound deadening materials; seals and draught excluders; pre-formed products of plastics materials, composite materials incorporating plastics and wood, rubber and other flexible material for sealing,

insulating and weatherproofing purposes; window and door seals; parts and fittings for all the aforesaid goods.

Class 19

Building materials, building components, building panels, non-metallic composite materials for use in building and construction; composite building materials incorporating plastics material and wood; windows, doors, window frames and door frames, secondary glazing assemblies; trim components for use in building, skirtings, architraves, covings, cladding, fascia boards, soffit boards, barge boards and window boards; rainwater goods, guttering and gutter guards; products for use in closing or filling wall cavities in buildings; drainage devices, vents and weepholes for wall structures; wall cavity trays; pipe and vent terminals, masonry fixings; wall and roofing products and materials; non-metallic decking, walkways and pontoons, verandah systems, handrail assemblies and railings; roof structures, canopies and awnings; fencing, fence panels, fence posts and lattice panels; window panes, glass doors, double glazed units for windows and for doors; articles included in Class 19 made of plastics materials; parts and fittings for all the aforesaid goods.

No. 1740323 (CTM) MARK: SHEERFLOW

Class 6

Window frames, door frames, doors and door panels, window and door furniture, hinges, handles, fasteners and locks, mounting gear for sliding doors, all made wholly or principally of common metal; metal components for use in building, metal components for use in the construction of window frames and door frames; parts and fittings for all the aforesaid goods.

Class 17

Plastics materials for use in manufacture; extruded plastics sections for use in building and in the manufacture of window frames, door frames, building products, fencing, decking, walkways, pontoons, rainwater goods, guttering and gutter guards; plastics materials and fibre reinforced composite plastics materials in the form of shaped sections, planks, sheets, slabs, rods, tubes, blocks, bars and films; non-metallic pipes, rods and tubes; articles made of plastic material, rubber or other flexible material included in class 17; materials for packing, sealing, insulating and weatherproofing; insulating materials for pipes, walls and roofs and for use in building; sound absorbing and sound deadening materials; seals and draught excluders; preformed products of plastics, rubber or other flexible material for sealing, insulating and weatherproofing purposes; window and door seals; parts and fittings for all the aforesaid goods.

Class 19

Building materials, building components, building panels, non-metallic composite materials for use in building and construction; windows, doors, window frames and door frames, secondary glazing assemblies; trim components for use in building, skirtings, architraves, covings, cladding, fascia boards, soffit boards, barge boards and window boards; rainwater goods, guttering and gutter guards; products for use in closing or filling wall cavities in buildings; wall, roofing and flooring products and materials; floor boards and floor panels; non-metallic decking; parts and components for the construction of decking, walkways and pontoons; fencing, fence panels, fence

posts and lattice panels, window panes, glass doors, double glazed units for windows and for doors; articles included in class 19 made of plastics materials; parts and fittings for all the aforesaid goods.

4. The applicant filed a counter-statement essentially denying the opponent's claims. It also put the opponent to proof of use of its earlier mark No. 1201657.

5. Both parties filed evidence and requested that a decision be taken from the papers. Both filed written submissions in lieu of attendance at a hearing and requested an award of costs in their favour.

Opponent's evidence

6. The opponent's evidence consists of a witness statement of Terence Hardy dated 30 November 2005.

7. Mr Hardy says he is the Design Director of the opponent company L .B. Plastics Ltd, and has been associated with the company since 1970. He is authorised to make the statement on behalf of the opponent company.

8. Mr Hardy says that the opponent has used the trade mark SHEER and/or marks incorporating the word SHEER since 1971 in relation to a wide range of goods and services covering at least the goods and services of earlier registration No. 2322782 details of which he exhibits at Exhibit TEH1.

9. Mr Hardy says the word SHEER has been used by the opponent in combination with a number of other words. Mr Hardy refers to some 25 marks introduced between 1971 and 2003 which include the word SHEER. Mr Hardy says these trade marks have been used throughout the UK.

10. Mr Hardy gives the following details of total annual sales under trade marks incorporating the word SHEER as follows:

| Year | Annual Sales |
|------|--------------|
| 2000 | £25,354,907 |
| 2001 | £25,337,225 |
| 2002 | £25,674,272 |
| 2003 | £24,784,859 |
| 2004 | £27,105,338 |

11. Mr Hardy breaks down the above sales figures as follows:

| 2004 | 2003 | 2002 | 2001 | 2000 |
|--|------------|------------|------------|------------|
| SHEERFRAME Window extrusions and Reinforcements | | | | |
| 19,552,161 | 17,632,490 | 19,057,846 | 19,675,986 | 19,621,742 |
| SHEERFRAME Fabricated Windows | | | | |
| 4,024,604 | 3,801,405 | 3,912,936 | 3,500,139 | 3,617,616 |
| SHEERFRAME Door extrusions and Reinforcements | | | | |
| 1,189,917 | 654,772 | 387,475 | 317,305 | 296,051 |

| | | | | |
|---|-----------|-----------|---------|---------|
| SHEERLITE Conservatory Systems | | | | |
| 334,320 | 655,701 | 624,181 | 435,423 | 382,283 |
| SHEERLITE Fabricated Conservatory roofs | | | | |
| 176,720 | 99,634 | 0 | 0 | 0 |
| SHEERLINE Decking Systems | | | | |
| 1,312,218 | 1,308,827 | 1,021,621 | 676,774 | 451,467 |
| SHEERGLIDE Drawer systems | | | | |
| 515,398 | 632,030 | 670,213 | 731,598 | 985,748 |

12. Mr Hardy states that the opponent spent around £350,000 promoting what it calls its SHEER trade marks in 2004. He gives no explanation of whether this figure relates to all or some, and if so which, of his company's trade marks and, as with the figure given of sales made in this year, there is no indication of how much refers to a period before the relevant date in these proceedings.

13. Mr Hardy introduces the following exhibits:

- Exhibits TEH2, TEH3 and TEH4 Brochures, invoices and product charts relating to the trade mark SHEERFRAME
- Exhibit TEH5 Brochure relating to products available under the trade mark SHEERLITE
- Exhibit TEH6 Brochure relating to products available under the trade mark SHEERLINE
- Exhibit TEH7 and TEH9 Technical manual and a brochure relating to products available under the trade mark SHEERGLIDE
- Exhibit TEH8 Brochure relating to products available under the trade mark SHEERBLEND
- Exhibit TEH10 Brochure relating to products available under the trade marks SHEERLINE, SHEERCLAD, SHEERFRAME and SHEERCELL
- Exhibit TEH11 Brochure relating to products available under the trade mark SHEERCLAD
- Exhibit TEH12 An installation leaflet relating to the trade mark SHEERCELL
- Exhibit TEH13 Copy of customer information newspaper SHEERNEWS

- Exhibits TEH14, TEH15 and TEH17 Copies of pages downloaded from the websites of various companies relating to the supply of windows, conservatories and blinds
- Exhibit TEH16 Copy of an advert said to be from the Sunday Times of 17 July 2005
- Exhibit TEH18 Copy of a page from the website of a mobile phone company

Applicant's evidence

14. This takes the form of a witness statement by Joseph M. Letang and is dated 1 March 2006. Mr Letang is a registered Trade Mark Attorney and Associate Partner with Frank B Dehn, the applicant's representatives. He is authorised to make the statement on their behalf.

15. At JML1 and JMLII Mr Letang exhibits copies of correspondence relating to the examination of the application in suit and another (registered) trade mark. Whatever may have occurred during the examination process, this decision is in relation to opposition proceedings and involves a dispute between two parties where the registrar is required to act as an independent tribunal. I have to decide the issues before me on the basis of the application as it stands taking into account the statements of grounds and evidence submitted. For this reason I do not intend to summarise this part of Mr Letang's evidence.

16. At JMLIII Mr Letang exhibits extracts from The Collins English Dictionary and various extracts from the official online Trade Mark Registers of both the UK and European Community Trade Mark Offices. Mr Letang comments on the acceptance of the various registrations. Again, what may or may not have taken place regarding the acceptance or otherwise of other applications for registration is of no relevance to the decision I have to make in the current proceedings.

17. Mr Letang introduces a number of other exhibits:

- JMLIV Copy of a letter from Alain Skelding, Association Secretary of the British Blind and Shutter Association to show that SHEER is a generic terms used in the manufacture and supply of blinds
- JMLV Extracts taken from the official journals of the British Blind and Shutter Association
- JMLVI Documentation relating to a textile company along with a letter from their commercial director

- JMLVII Brochures and extracts from the website of third parties showing use of the word SHEER in the curtain and blind trade

18. No further evidence was filed by either party.

Decision

19. Each of the grounds of opposition are founded on Section 5 of the Act. This reads:

“5.-(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

- (2) A trade mark shall not be registered if because-
- (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
 - (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.

(3)

- (4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-
- (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or
 - (b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.

20. The term “earlier right” is defined in Section 6 of the Act as follows:

6. -(1) In this Act an “earlier trade mark” means –
- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks

21. It is not disputed that each of the trade marks relied on by the opponent are earlier trade marks within the meaning of Section 6 of the Act.

Section 5(1) and 5(2)(a)

22. I consider first the opponent's claim under section 5(1) and, in the alternative, under section 5(2)(a) of the Act. A positive finding under either sections 5(1) or 5(2)(a) requires the respective trade mark to be identical. The question of what constitutes identity was considered by the ECJ in *LTJ Diffusion SA v Sadas Vertbaudet SA*, Case C-291/00 [2003] ETMR 83 as follows:

“50. The criterion of identity of the sign and the trade mark must be interpreted strictly. The very definition of identity implies that the two elements compared should be the same in all respects. Indeed, the absolute protection in the case of a sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered, which is guaranteed by Art. 5(1)(a) of the directive, cannot be extended beyond the situations for which it was envisaged, in particular, to those situations which are more specifically protected by Art 5(1)(b) of the directive.

51. There is therefore identity between the sign and the trade mark where the former reproduces, without any modification or addition, all the elements constituting the latter.

52. However, the perception of identity between the sign and the trade mark must be assessed globally with respect to an average consumer who is deemed to be reasonably well informed, reasonably observant and circumspect. The sign produces an overall impression on such a consumer. That consumer only rarely has the chance to make a direct comparison between signs and trade marks and must place his trust in the imperfect picture of them that he has kept in his mind. Moreover, his level of attention is likely to vary according to the category of goods or services in question (see, to that effect, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, para.26).

53. Since the perception of identity between the sign and the trade mark is not the result of a direct comparison of all the characteristics of the elements compared, insignificant differences between the sign and the trade mark may go unnoticed by an average consumer.

54. In those circumstances, the answer to the question referred must be that Art.5(1)(a) of the directive must be interpreted as meaning that a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

23. In its statement of grounds, the opponent claims the earlier mark SHEER is identical to the marks applied for whereas in its written submissions, it claims that

“taking the first part of the opposed mark this is identical to the Opponent’s registered mark SHEER”. This latter claim is plainly incorrect but in any event I have to compare the respective trade marks in their entirety. It is not enough that the trade mark applied reproduces the whole of the earlier trade mark unless it does so in a way that any remaining differences between the marks are so insignificant that they would go unnoticed by the average consumer.

24. In relation to the grounds of opposition under sections 5(1) and, in the alternative 5(2)(a), the opponent relies on its earlier mark No. 2322782 for the trade mark SHEER. The application in suit is for a series of two marks each comprising four words followed by six dots as set out earlier in this decision. The first mark in the series appears in to me to be a pink colour. Whilst each mark in the series contains the word SHEER, it appears after the words “the future is” and before the six dots. The words “the future is” and the dots are not visually negligible elements in the marks. I consider that neither the words “the future is” nor the dots will go unnoticed by the average consumer. I find that the respective marks are not identical and it follows that the grounds of opposition under section 5(1) and 5(2)(a) are not made out and must fail.

Section 5(2)(b)

25. As set out elsewhere in this decision the opponent relies on seven earlier trade marks to support its claims under section 5(2)(b). In respect of one of those earlier trade marks, No. 1201657 for the trade mark SHEERFRAME, the registration procedure was completed on 19 February 1986. This is before the start of the period of five years ending with the date of publication of the application in suit which was 17 December 2004.

26. In its counter-statement, the applicant puts the opponent to proof of its use of this earlier mark in relation to *window frames, door frames, window and door furniture, double glazed units and double glazed windows and doors, window panes and glass doors*. These proceedings are therefore also subject to the Trade Marks (Proof of Use, etc.) Regulations 2004. Section 4 of those Regulations amend section 6 of the Act by the addition of the following:

“6A Raising of relative grounds in opposition proceedings in case of non-use

(1) This section applies where -

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

- (2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.
- (3) The use conditions are met if –
- (a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
 - (b) the earlier trade mark has not been so used, but there are proper reasons for non-use.
- (4) For these purposes –
- (a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and
 - (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.
- (5) In relation to a Community trade mark, any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.
- (6)
- (7)"

27. Section 100 of the Act states:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

28. The question of what constitutes “genuine use” was considered by the ECJ’s in *Ansul BV v AjaxBrandbeveiliging BV (Minimax)*[2003] RPC 40. It said:

“36. “Genuine use” must therefore be understood to denote use that is not merely token, serving solely to preserve the rights conferred by the mark. Such use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the product or services from others which have another origin.

37. It follows that “genuine use” of the mark entails use of the mark on the market for the goods or services protected by that mark and not just internal use by the undertaking concerned. The protection the mark confers and the

consequences of registering it in terms of enforceability *vis-à-vis* third parties cannot continue to operate if the mark loses its commercial *raison d'être*, which is to create or preserve an outlet for the goods or services that bear the sign of which it is composed, as distinct from the goods or services of other undertakings. Use of the mark must therefore relate to goods or services already marketed or about to be marketed and for which preparations by the undertaking to secure customers are under way, particularly in the form of advertising campaigns. Such use may be either by the trade mark proprietor or, as envisaged in Art. 10(3) of the Directive, by a third party with authority to use the mark.

38. Finally, when assessing whether there has been genuine use of the trade mark, regard must be had to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark is real, in particular whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark.”

29. The opponent’s evidence provides figures for the years 2000-2004 relating to sales of goods it says were made under the trade mark SHEERFRAME. Those sales which, given that they range from between some £22m to £24.7m, are not token and were said to have been in relation to window and door extrusions and reinforcements, and fabricated windows. The opponent has provided brochures bearing the mark and product charts along with invoices relating to sales made under the mark. The evidence has not been challenged by the applicant. I am satisfied that the evidence provided enables me to find that there has been genuine use of the trade mark SHEERFRAME in relation to the goods for which the applicant requested proof of use. I therefore go on to consider the objection under section 5(2)(b).

30. In approaching this ground, I take into account the guidance provided by the ECJ in *Sabel v Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R 77 and *Marca Mode CV v Adidas AG and Adidas Benelux* [2000] E.T.M.R.723. It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors: *Sabel BV v Puma AG*, paragraph 22;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question: *Sabel BV v Puma AG*, paragraph 23, 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 he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen B. V.* paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details: *Sabel BV v Puma AG*, paragraph 23;
- (d) the visual, aural and conceptual similarities of the marks must therefore be

assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*, paragraph 23;

- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki v Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v Puma Ag*, paragraph 24;
- (g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*, paragraph 26;
- (h) further, 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; *Marca Mode CV v Adidas AG*, paragraph 41;
- (i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, paragraph 29.

31. In essence the test under Section 5(2)(b) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements and taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed.

32. Mr Hardy refers to 25 marks he says his company has used since 1971. Annual sales in the UK are said to have totalled between approximately £24.7m and £27.1m between 2000 and 2004. Not all of these sales relate to the seven marks relied on under section 5(2)(b) of the Act. Indeed evidence of use has been provided for only one mark relied on under section 5(2)(b), that being SHEERFRAME. The evidence is as outlined at paragraph 11 above and show sales under this mark of between approximately £22m and £24.7m. Given the company's total sales in the UK, it is clear that the vast majority of its sales are made under the SHEERFRAME mark.

33. I have no evidence before me of the value of the relevant UK market, though I expect it to be substantial. Neither do I know what percentage share of that market these sales may reflect. I am however prepared to acknowledge the opponent has some reputation in its SHEERFRAME mark. In respect of the remaining six earlier marks relied on under section 5(2)(b), no details are given of any sales figures or advertising costs under any of the marks nor is any evidence provided of the marks in use. I am unable to say that any of these six marks benefit from any enhanced reputation.

34. Whilst the opponent relies on seven earlier marks, it seems to me that its best case lies in its earlier registration under No. 2322782 for the mark SHEER. I do not see that any of the other earlier marks relied on will place the opponent in any better position.

35. For ease of reference, I set out the respective marks below:

| Applicant's Trade Mark | Opponent's Trade Mark |
|--|---|
| <p>the future is sheer..... the future is sheer.....</p> | <p>SHEER</p> |
| <p>Class 20: Plastic vertical louvre blinds; non-textile curtains and blinds</p> <p>Class 24: Curtains, blinds; voile; curtains and blinds of voile; voile panels; net curtains; louvre, pleated, conservatory, vertical, venetian and roller blinds; made to measure curtains and blinds.</p> | <p>Class 6: <i>Window frames, door frames, doors and door panels, window and door furniture, hinges, handles, fasteners and locks, mounting gear for sliding doors, all made wholly or principally of common metal; metal components for use in building, metal components for use in the construction of window frames and door frames; conservatories; frames for conservatories; parts and fittings for all the aforesaid goods.</i></p> <p>Class 17: <i>Plastics material for use in manufacture; composite materials incorporating plastics and wood for use in manufacture; extruded sections of plastics materials or of composite</i></p> |

| | |
|--|--|
| | <p><i>materials incorporating plastics and wood for use in building and in the manufacture of window frames, door frames, building products, fencing, decking, walkways, pontoons, verandahs, handrail assemblies, railings, roof structures, canopies, awnings, rainwater goods, guttering and gutter guards; plastics materials, fibre reinforced composite plastics materials and composite materials incorporating plastics and wood in the form of shaped sections, planks, sheets, slabs, rods, tubes, blocks, bars and films; non-metallic pipes, rods and tubes; articles made of plastics material, composite materials incorporating plastics and wood, rubber or other flexible material included in Class 17; materials for packing, sealing, insulating and weatherproofing; insulating materials for pipes, walls and roofs and for use in building; sound absorbing and sound deadening materials; seals and draft excluders; pre-formed products of plastics materials, composite materials incorporating plastics and wood, rubber or other flexible material for sealing, insulating and weatherproofing purposes; window and door seals; parts and fittings for all the aforesaid goods.</i></p> <p>Class 19: <i>Building materials,</i></p> |
|--|--|

| | |
|--|---|
| | <p><i>building components, building panels, non-metallic composite materials for use in building and construction; composite building materials incorporating plastics material and wood; windows, doors, window frames and door frames, secondary glazing assemblies; trim components for use in building, skirtings, architraves, covings, cladding, fascia boards, soffit boards, barge boards and window boards; rainwater goods, guttering and gutter guards; products for use in closing or filling wall cavities in buildings; drainage devices, vents and weepholes for wall structures; wall cavity trays; pipe and vent terminals, masonry fixings; wall, roofing and flooring products and materials; floor boards and floor panels; non-metallic decking, walkways and pontoons, verandah systems, handrail assemblies and railings; roof structures, canopies and awnings; fencing, fence panels, fence posts and lattice panels; window panes, glass doors, double glazed units for windows and for doors; articles included in Class 19 made of plastics materials; conservatories; frames for conservatories; parts and fittings for all the aforesaid goods.</i></p> |
|--|---|

| | |
|--|---|
| | <p>Class 37: <i>Building construction services; services for the maintenance, repair and restoration of buildings and building components; custom fabrication, installation and replacement of window and door constructions; information services relating to building, to building components and to the construction, fabrication, installation and replacement of windows and doors; fabrication and installation of conservatories; all included in Class 37.</i></p> |
|--|---|

Comparison of goods and services

36. The principles to be applied in considering the similarity of goods and services are to be found in the *Canon* case where the ECJ stated at paragraph 23:

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

37. In *British Sugar Plc v James Robertson & Sons* (TREAT) [1996] RPC 281 it was considered that channels of trade should also be brought into the reckoning.

38. I bear in mind the now well established principle that the class in which the goods and services are placed is relevant in determining the nature of the goods and services (see *Altecnic Ltd's Trade Mark Application* [2002] RPC 34). In relation to the comparison with services I bear in mind the comments of Jacob J in *Avnet Incorporated v Isoact Ltd* [1998] FSR 16:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

39. Additionally, although resulting from a non-use issue, I take into account the words of Aldous LJ in *Thomson Holidays Ltd v Norwegian Cruise Line Ltd* [2003] RPC 32 where he said:

“In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under section 10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use.”

40. Finally, it is well established that words appearing in specifications should be given no more than their natural meaning with reference to their context (see *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267).

41. Registration is sought for goods in classes 20 and 24 of the Nice Agreement concerning the International Classification of Goods and Services. The earlier mark is registered for goods and services in classes 6, 17, 19 and 37. Being in different classes, the respective goods and services cannot be the same. I therefore go on to determine whether the respective goods and services are similar. In doing so, I have to consider normal and fair use in respect of all of the goods and services of the respective marks; I cannot be restricted to the actual use the opponent may have made of its mark.

42. I am unable to see how, and the opponent has provided no evidence to show that *non-textile curtains* appearing in Class 20 and *voile, voile panels, curtains, curtains of voile, net curtains* and *made to measure curtains* appearing in Class 24 of the application coincide with or bear any correlation to any of the goods and services of the earlier mark taking into account the criteria set out in the *Canon* and *Treat* cases. Consequently, I find that these goods are not similar to any of the goods and services of the earlier mark.

43. That leaves me to consider *plastic vertical louvre blinds* and *blinds* in Class 20 and *blinds, blinds of voile, louvre, pleated, conservatory, vertical, venetian and roller blinds* and *made to measure blinds* in Class 24. All of these are blinds. The opponent objects on the basis of each of the goods and services of its earlier mark but a straight comparison makes clear that this is not the case. The opponent has not explained in any way the basis for this broad claim. For this reason I do not intend to undertake a forensic analysis of each of the goods and services. It seems to me that the opponent's strongest position lies with the following goods and services of its earlier mark:

Conservatories, frames for conservatories, parts and fittings for conservatories and for frames for conservatories in Class 6:

Canopies and awnings in Class 17:

Canopies, awnings, articles made of plastics materials, parts and fittings for conservatories and for frames for conservatories in Class 19:

Fabrication and installation of conservatories in Class 37.

44. I will consider each in turn.

Conservatories, frames for conservatories, parts and fittings for conservatories and for frames for conservatories in Class 6:

45. The Nice Classification shows that blinds are appropriate to a number of different classes depending on the material from which the blind is made and whether it is intended for indoor or outdoor use. Outdoor blinds of metal are proper to class 6.

46. A conservatory was traditionally a type of greenhouse often attached to a dwelling. In more recent years, I believe it has become common for them to be used as an additional living space. Whilst I have no direct evidence on this point, the evidence submitted at TEH15 to TEH17, whilst post-dating the relevant date, supports this view. Used as a living space, conservatories may also be furnished as any other room within a dwelling might be, with the glazing dressed with blinds. But the fact that a conservatory may be dressed in such a way does not make the blind similar to the conservatory or its frame.

47. In *React Trade Mark* [2000] RPC 285, Mr Simon Thorley QC sitting as the Appointed Person stated:

“The burden of proof in an opposition such as this lies on the opponent. It is for the opponent to show that the relevant likelihood of confusion exists.”

48. As I indicated earlier, the only blinds proper to class 6 are outdoor blinds of metal. I am not aware, and certainly there is no evidence before me, that outdoor blinds are a part or fitting for a conservatory. Absent such evidence, I find that there is no similarity between the goods in class 6 of the earlier mark and the application for which registration is sought.

Canopies and awnings in class 17:

49. Canopies and awnings are roof-like structures used to provide protection from the weather. Whilst blinds may also have a purpose in providing protection from the weather, e.g. by providing shade from the sun, the nature and method of use of the respective goods differ. I do not consider the respective goods to be in competition with each other nor do I consider them to be complementary. Again, absent evidence, I find there is no similarity between the respective goods.

Canopies, awnings, articles made of plastics materials, parts and fittings for conservatories and for frames for conservatories in class 19:

50. For the same reasons as given above, I do not consider *canopies, awnings or parts and fittings for conservatories or for frames for conservatories*, as are appropriate to class 19, to be similar to blinds.

51. *Articles of plastics materials* is a very broad term but would include any article which is proper to class 19 and which is made of plastics. According to the Nice Classification class 19 includes outdoor blinds made of plastic. The application in Class 20 includes indoor blinds of plastic. Whilst the average consumer may have particular reasons for choosing an indoor blind rather than an outdoor one, and vice versa, it seems to me that both are used e.g. to shade a window. The respective users may be the same. Whilst one may expect a blind intended for outdoor use to be able to withstand the prevailing weather conditions whereas a blind for indoor use may not need to be so robust, the physical nature of the two may be the same. I have no evidence before me as to the trade channels through which outdoor and indoor blinds reach the market place, how outdoor and indoor blinds are classified by the trade nor whether they appear in the same or different market sectors but it seems to me not unlikely that there would be at least some commonality.

52. Whilst the Nice classification confirms that outdoor blinds made of plastics are proper to class 19, it also confirms that outdoor blinds of textiles are proper to class 24. As set out above, the application seeks registration for a variety of different types of blind within class 24. Whilst the materials from which a blind proper to class 19 is made may differ from those used to make a blind proper to class 24, their nature and end users as well as their method of use are the same. One could be substituted for the other and the respective goods are likely to be in competition.

53. In short, I find that the term *articles made of plastics materials* includes plastic, outdoor blinds and thus would be at least similar goods to *plastic vertical louvre blinds* and *blinds* in class 20 and similar to *blinds, blinds of voile, louvre, pleated, conservatory, vertical, venetian and roller blinds* and *made to measure blinds* in class 24 within the specification of goods as applied for.

Fabrication and installation of conservatories in Class 37.

54. Again, I bear in mind the comments of Jacob J in *Avnet Incorporated v Isoact Ltd* [1998] FSR 16 where he said:

“ In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meaning attributable to the rather general phrase.”

55. The opponent has filed a number of exhibits (TEH14 to 17) to support what I understand is its claim that replacement window and conservatory companies also supply blinds and that therefore this will be part of the installation service. I am not persuaded by these exhibits. Firstly they do not tell me what the position was at the relevant date in these proceedings as they were either all printed some considerable time after that date or are undated. There is no evidence to show how large the relevant market sector might be nor is there any independent trade evidence to support the claim. In addition, TEH15, whilst referring to furniture and furnishings, makes no

reference to blinds. TEH16, is undated and untitled but Mr Hardy says it is from The Sunday Times of 17 July 2005. If that is the case, it dates from after the relevant date. In any event it is a poor copy as the left hand side of what appears to be an advertisement is missing. Whilst it indicates that the customer can choose blinds to go with a conservatory, it does not indicate who supplies those blinds or the mark under which they may be provided. TEH17 similarly gives no information of the mark under which any blinds may be supplied. It is the responsibility of each of the parties to ensure the evidence it files is complete and directed to the relevant date. In this case, the evidence does not support the opponent's claim that the services covered by the earlier mark are in any way similar to the goods for which registration is sought.

Comparison of marks

56. As set out earlier in this decision, the application consists of a series of two marks. Each consists of the words THE FUTURE IS SHEER followed by six dots, with the word FUTURE being in a larger font, the word SHEER in a slightly smaller font and the words THE and IS being in small font. Regardless of font size, all words are presented in lower case. The first mark in the series appears in what seems to me to be a pink colour. The opponent's mark is the word SHEER in upper case. Clearly, the marks applied for contain the whole of the earlier trade mark.

57. Where marks employ a common element, competing considerations are likely to come into play in determining the proper outcome. In *10 Royal Berkshire Polo Club Trade Mark*, [2001] RPC 32, Mr Hobbs QC, sitting as the Appointed Person, said:

“31..... I am satisfied that the use of the word POLO as part of the applicant's mark does not capture the distinctiveness of the opponent's earlier trade marks [POLO]. I do not think that people exposed to the use of the applicant's mark would notice that it contained the word POLO without also noticing that it contained the words ROYAL BERKSHIRE and CLUB. The message of the mark comes from the words in combination and that is not something that I would expect people to overlook or ignore in the ordinary way of things.”

58. The weight of other matter and the context in which the common element occurred was sufficient in that case for the Appointed Person to hold that consumers' attention would not focus on the element POLO to the point where the marks would be regarded as sharing a distinctive character.

59. In *Cardinal Place Trade Mark*, BL O/339/04, Mr Hobbs QC, again sitting as the Appointed Person, had before him the mark CARDINAL (and small device) and CARDINAL PLACE. He held that:

“15. The perceptions and recollections triggered by the earlier mark are likely to have been ecclesiastical whereas the perceptions and recollections triggered by the Applicant's mark are likely to have been locational as a result of the qualifying effect of the word **PLACE** upon the word **CARDINAL**. A qualifying effect of that kind can be quite powerful as indicated by the examples cited in argument on behalf of the Applicant: **SOMERSET** as compared with **SOMERSET HOUSE**; **COUNTY** as compared with

COUNTRY HALL; CANARY as compared with CANARY WHARF.”

60. He posed the following question:

“17. So why should it be thought that the visual, aural and conceptual differences are sufficiently significant to render the marks distinguishable, but not sufficiently significant to enable them to be used concurrently without giving rise to a likelihood of confusion? This, to my mind, is the critical question. The answer to it depends upon how much or how little the word **PLACE** would be likely to contribute to the distinctive character of the mark **CARDINAL PLACE** taken as a whole.”

61. His conclusion was that the overall effect and impact of the combination **CARDINAL PLACE** was sufficiently different to the word **CARDINAL** on its own that the two marks could be used concurrently without giving rise to a likelihood of confusion.

62. In Case T-22/04 the Court of First Instance (CFI) annulled the decision of OHIM’s Second Board of Appeal in a case involving the marks **WESTLIFE** and **WEST**. In its judgment the Court said:

“37. It must also be borne in mind that the Court of First Instance has already held that, on an initial analysis, where one of the two words which alone constitute a word mark is identical, both visually and aurally, to the single word which constitutes an earlier word mark, and where those words, taken together or in isolation, have no conceptual meaning for the public concerned, the marks at issue, each considered as a whole, are normally to be regarded as similar (Case T-286/02 *Oriental Kitchen v OHIM – Mou Dybfrost (KIAP MOU)* [2003] ECR II-0000, paragraph 39).

38. In this instance one of the two words which alone constitute the word mark applied for is actually identical in appearance to the sole word forming the earlier word mark. Aurally there is a degree of similarity, although the pronunciation of the word ‘west’ is not identical, at least as regards the whole of the relevant public. In this instance, the two words forming the **Westlife** mark mean something to the relevant public but they do not describe either the goods or services in question or their qualities and therefore do not have any particular connotation in relation to them.

39. Although the approach described at paragraph 37 above is not therefore directly applicable in this case, it must nonetheless be stated that the only visual difference between the two word marks at issue is that one of them contains a further element added to the first. Moreover, as stated above, there is a degree of similarity between the two marks in aural terms and, in particular, in conceptual terms.

40. It must therefore be held, in this case, that the fact that the **Westlife** trade mark consists exclusively of the earlier **West** trade marks to which another word, ‘life’ has been added, is an indication that the two trade marks are similar.”

63. The CFI went on to find that the relevant public might consider the mark applied for to be a variant of the earlier mark or at least that there was an economic link between the companies or undertakings marketing goods or services under the marks.

64. It is apparent from these contrasting outcomes that questions of this kind are not susceptible to any single or mechanically applied solution. The test under Section 5(2) is, in essence, whether there are similarities in trade marks and goods/services which would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the trade marks, evaluating the importance to be attached to those different elements and taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed.

65. The word FUTURE is an ordinary dictionary word with a meaning that needs no explanation. The word SHEER is also an ordinary dictionary word but it has a number of meanings, defined in the Collins English Dictionary as:

1. perpendicular; very steep
2. (of textiles) so fine as to be transparent
3. pronominal; absolute; unmitigated
4. Obsolete; bright or shining
5. steeply or perpendicularly
6. completely or absolutely
7. any transparent fabric used for making garments

66. The opponent contends that the word SHEER “is the only distinctive part” of the mark applied for. However, in relation to the goods for which registration is sought, the evidence shows that SHEER is a word used to describe a fine or transparent fabric and is used in relation to the trade in curtains, voiles and blinds made with such materials (see e.g. exhibit JMLIV and JMLV). In relation to at least some of the particular goods for which registration is sought, the element, SHEER, has a highly descriptive meaning.

67. Of course, I have to consider the trade marks in their entirety and the fact that one trade mark appears within another does not, of itself, make them similar. Visually and aurally there is some similarity between the respective marks in that they have the word SHEER in common. However, there are clear visual and aural differences in that each of the applicant’s marks also contain the words THE FUTURE IS coming before the word SHEER with the words followed by the six dots.

68. Conceptually, the word SHEER may bring to mind something steep (as in a sheer drop), or, more likely, a type of fine, lightweight fabric. THE FUTURE IS SHEER may bring to mind the concept that sheer products are state of the art.

The evidence shows that the word SHEER has a descriptive meaning for the goods for which registration is sought in class 24. In my opinion, the goods for which registration is sought in class 20 are very closely allied to those goods. In *Steelco Trade Mark* (BL O/268/04) Mr Kitchin QC sitting as the Appointed Person stated:

“ In the case of marks which are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another.”

69. Taking all matters into account I consider that the marks are similar only in respect of an element of the mark applied for which is descriptive in nature in relation to the goods concerned.

Likelihood of confusion

70. This is a matter of global appreciation taking into account all relevant factors including the interdependency principle that a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods and services, and vice versa. The matter must be considered through the eyes of the average consumer taking in account the fact that he will rarely have the opportunity to compare marks side by side. Taking all matters into account, I find that there is no likelihood of confusion in respect of any of the goods and services for which registration is sought. As indicated at paragraph 34 above, I do not consider the opponent will be in any stronger position in relation to any other of the earlier marks relied on. The opposition under section 5(2)(b) fails in its entirety.

Section 5(4)(a)

71. In view of my findings under section 5(2)(b), I do not propose to go on to consider the opponent's objection under section 5(4)(a).

COSTS

72. The opposition having failed, the applicant is entitled to an award of costs. I order the opponent to pay the applicant the sum of £1400 as a contribution towards its costs. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 20th day of February 2007

ANN CORBETT

**FOR THE REGISTRAR
The Comptroller-General**