

O/595/17

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NO 3 164 073:



IN THE NAME OF AKEEM FAMUYIWA AND FOOTWEAR SAVAGE
LTD

AND

IN THE MATTER OF AN APPLICATION FOR INVALIDATION BY KAVEH SAVAGE

Background and pleadings

1. Akeem Famuyiwa and Footwear Savage Ltd are the Registered Proprietors of



the following UK Registered Trade Mark No 3 164 073. It was applied for on 11th May 2016 and accepted and published in the Trade Marks Journal on 10th June 2016 in respect of the following goods and services:

Class 09:

Software (Computer -), recorded; Software drivers; Software; Software for processing images, graphics and text; Software for the operational management of portable electronic devices and electronic cards; Software for tablet computers; Software development kit [SDK]; Software and applications for mobile devices; Software for mobile phones; Software for customising footwear; safety footwear; interactive computer software; Computer software; computer software platforms; software and software applications to enable transmission, access, uploading, posting, displaying, sharing or otherwise providing electronic media or information, text, web links and images over the internet or other communications networks; software downloadable via the internet and wireless devices; downloadable software in the field of custom made prototyping; downloadable software in the form of a mobile application.

Class 25:

Footwear; sandals; slippers; boots; boot uppers; boots for sports; beach shoes; camisoles; football boots; football shoes; footmuffs; footwear uppers; non-slipping devices for footwear; ski boots; socks; inner

soles;soles for footwear;wooden shoes;highheels namely wedges; loafers;moccasin; sneakers; trainer;rainboots;riding boots;rollerblades;rollerskates;running shoes;saddle shoes;sandals;shoes;skates;skate shoes;slides;slingbacks;slippers;sneakers;steel-toe boots;stiletto heels;cleats;climbing shoes;clogs;court shoes;cowboy boots;cycling shoes.

Class 35:

Retail services, retail store services connected with the sales of footwear mail order retail services, online and internet retail services connected with the sale of new and used footwear, namely leisure footwear; advertising; business management; business administration; office functions; marketing, advertising and promotional services; online advertising and marketing services; market research and information services; publication of advertising texts; promoting the goods and services of others via computer and communication networks; online business networking services; dissemination of advertising for others via an on-line electronic communications network; business data analysis; providing statistical business information; business networking; business information services, all provided via an online electronic database on a global computer network; business monitoring and consulting services, namely, providing strategy, insight and marketing guidance; computerised database management services; retail and online retail services in relation to footwear and fashion procurement.

2. It was registered on 19th August 2016.

3. Kaveh Savage, the applicant, applies for invalidation of the trade mark on the basis of Section 5(1), 5(2)(a), Section 5(2)(b) and Section 5(3) of the Trade

Marks Act 1994 (the Act). This is on the basis of its earlier UK Trade Mark No 2 244 426. The following goods are relied upon in this opposition:

Class 18:

Bags, wallets, purses, briefcases, articles made of leather and artificial leather, belts.

Class 25:

Clothing; headgear; footwear.

4. The applicant argues that the respective goods are identical or similar and that the marks are similar.
5. The registered trade mark is also attacked on the basis of Section 5(4)(a) and 3(6). The basis of the Section 5(4)(a) claim is the alleged goodwill that the applicant asserts it has acquired in its business in respect of Class 25 under the sign SAVAGE. Use of the later trade mark would amount to a misrepresentation and damage to the applicant. Under Section 3(6), the applicant alleges that the RP must have been aware of its business and reputation/goodwill. As such, applying for a similar trade mark is clearly an act of bad faith.
6. The RP filed a counterstatement denying all of the claims made (and requesting that the opponent provides proof of use of its earlier trade mark relied upon).
7. Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary.
8. No hearing was requested and so this decision is taken following a careful perusal of the papers.

Relevant statutory provision: Section 47:

9. **47.** - (1) The registration of a trade mark may be declared invalid on the ground that the trade mark was registered in breach of section 3 or any of the provisions referred to in that section (absolute grounds for refusal of registration).

Where the trade mark was registered in breach of subsection (1)(b), (c) or (d) of that section, it shall not be declared invalid if, in consequence of the use which has been made of it, it has after registration acquired a distinctive character in relation to the goods or services for which it is registered.

(2) The registration of a trade mark may be declared invalid on the ground-

- (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or
- (b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2A) But the registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

- (a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,
- (b) the registration procedure for the earlier trade mark was not completed before that date, or
- (c) the use conditions are met.

(2B) The use conditions are met if –

- (a) within the period of five years ending with the date of the application for the declaration 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) it has not been so used, but there are proper reasons for non-use.

(2C) 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.

(2D) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Union.

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c)

(3) An application for a declaration of invalidity may be made by any person, and may be made either to the registrar or to the court, except that-

- (a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and
- (b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(4) In the case of bad faith in the registration of a trade mark, the registrar himself may apply to the court for a declaration of the invalidity of the registration.

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made.

Provided that this shall not affect transactions past and closed.

10. Section 100 of the Act states that:

“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.”

Evidence

Applicant's evidence

11. This is a witness statement, dated 1st March 2017, from Mr Kaveh Savage. The initial hurdle for Mr Savage is in respect of demonstrating use and reputation of the mark **and** goodwill in the sign that he relies upon. If he cannot do so, then his attack on the registered trade mark will fail. This summary will therefore focus upon any information pertinent to these points:

- According to Mr Savage, he has used SAVAGE continuously since December 2009. Further, that he has been the chief designer and owner of the brand SAVAGE LONDON since 1999.

- According to Mr Savage, he has maintained a high retail profile both on the high street as well as in e-commerce. Locations include London's West End (4 shops in total). It is noted that there is no evidence to support this. The main website in use is www.savagelondon.com from which Mr Savage claims to have been selling products (non-specific) from since "the early days". Exhibit KS1 is a list of other websites and domains which is allegedly under the control of Mr Savage. It is noted that there are no screenshots from these websites or other evidence in support.
- Exhibit KS2 is a press sample. According to Mr Savage, this demonstrates the brand's success and celebrity patronage. The following is noted: there are two examples of Savage being used to sell t-shirts. These are dated from 2002 and 2003 respectively. The remaining evidence makes no reference at all to Savage.
- Exhibit KS3 are copies of letters sent from the applicant to the RP in respect of the RP's trade mark application and outlining the applicant's concerns regarding confusion between the respective signs. It is noted that these are dated July 2016. The attacked trade mark was applied for in May 2016. The significance of this will be assessed further below.

12. The remainder of the witness statement contains a number of allegations about the RP, none of which are directly relevant to the proceedings here. They include whether or not the RP is a dormant company and the status of its representative (whether an Intellectual Property Lawyer or a Company Director). As such, I will not continue with the summary, but simply state that while the remainder of the witness statement has been perused and considered, the points raised must be set aside.

13. In considering whether or not the applicant has made genuine use of its earlier trade mark, I bear in mind the following:

In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of trade marks. He said:

“I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve

an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

14. It is considered that the evidence of use provided by the applicant suffers from a number of defects. Firstly, no sales/turnover figures are provided; there are no invoices; there is nothing to indicate market share nor is there other contextual information. There are two examples of Savage t shirts in magazines. One is dated in 2002 and the other in 2003. This is several years before the relevant dates in these proceedings, namely the five year period

ending in the date of the application for invalidation: that is 5th October 2016. The Trade Marks Act 1994 is clear on this at Section 47 2B(a). The (again very limited) use shown in respect of Mr Savage's enterprise prior to trading under Savage, namely Rock N Roll Wardrobe is also not relevant as it is use/trade/reputation under Savage which is critical to the invalidation application.

15. The evidence filed is wholly unconvincing as regards evidence of either genuine use, reputation or goodwill. However, this is not the end of the matter as in reply, the RP filed a witness statement, dated 2nd May 2017, from Yewande Akinmokun, the RP's company owner. In it, he accepts that the applicant has used the earlier trade mark in respect of t-shirts. He supports this by filing screenshots from the applicant's website, showing use of SAVAGE and SAVAGE LONDON in respect of t-shirts. As such, genuine use has been established to this extent.

16. Although genuine use has been demonstrated via the evidence of the RP, it does not show use across all of the earlier goods as registered. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

"In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

17. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows.

"iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the

specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

18. As such, and bearing in mind the above guidance, it is considered that a fair specification reads as follows:

Class 25:

Tops and t-shirts.

19. The invalidation action will therefore be assessed on the basis of the above goods only.

DECISION

Section 5(2)(b)

20. Sections 5(2)(b) of the Act is as follows:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

Comparison of goods – general case law

21. In the judgment of the Court of Justice of the European Union in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

22. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

The earlier goods are:

Class 25:

Tops and t-shirts

The later goods are:

Class 09:

Software (Computer -), recorded; Software drivers; Software; Software for processing images, graphics and text; Software for the operational management of portable electronic devices and electronic cards; Software for tablet computers; Software development kit [SDK]; Software and applications for mobile devices; Software for mobile phones; Software for customising footwear; safety footwear; interactive computer software; Computer software; computer software platforms; software and software applications to enable transmission, access, uploading, posting, displaying, sharing or otherwise providing electronic media or information, text, web links and images over the internet or other communications networks; software downloadable via the internet and wireless devices; downloadable software in the field of custom made prototyping; downloadable software in the form of a mobile application.

Class 25:

Footwear; sandals; slippers; boots; boot uppers; boots for sports; beach shoes; camisoles; football boots; football shoes; footmuffs; footwear uppers; non-slipping devices for footwear; ski boots; socks; inner soles; soles for footwear; wooden shoes; highheels namely wedges; loafers; moccasin; sneakers; trainer; rainboots; riding boots; rollerblades; rollerskates; running shoes; saddle shoes; sandals; shoes; skates; skate

shoes;slides;slingbacks;slippers;sneakers;steel-toe boots;stiletto heels;cleats;climbing shoes;clogs;court shoes;cowboy boots;cycling shoes.

Class 35:

Retail services, retail store services connected with the sales of footwear mail order retail services, online and internet retail services connected with the sale of new and used footwear, namely leisure footwear; advertising; business management; business administration; office functions; marketing, advertising and promotional services; online advertising and marketing services; market research and information services; publication of advertising texts; promoting the goods and services of others via computer and communication networks; online business networking services; dissemination of advertising for others via an on-line electronic communications network; business data analysis; providing statistical business information; business networking; business information services, all provided via an online electronic database on a global computer network; business monitoring and consulting services, namely, providing strategy, insight and marketing guidance; computerised database management services; retail and online retail services in relation to footwear and fashion procurement.

Comparison of goods in Class 09:

23. The earlier goods are items of clothing. They have nothing in common with the later goods. They are not similar.

Comparison of goods in Class 25:

24. The later goods are (overwhelmingly), footwear. Both the later and earlier goods are used to dress, cover and protect the body (albeit particular areas). They can be selected for similar reasons – season, use, function, fashion. They can employ the same trade channels and indeed the same producers. They are considered to be similar to a high degree. The one contested item

that is not footwear are camisoles. Camisoles can be types of tops and so are considered to be identical to the earlier term.

Comparison of goods in Class 35:

25. Retail services, retail store services connected with the sales of footwear mail order retail services, online and internet retail services connected with the sale of new and used footwear, namely leisure footwear; retail and online retail services in relation to footwear and fashion procurement.
26. The above services aim to provide items to be worn on the body according to use, function, fashion. The same applies to the earlier goods. Those supplying retail services in this area can also manufacture clothing. They are similar, to a low to moderate degree.
27. The remaining contested services have nothing in common with the earlier terms and are considered to be not similar.
28. The net result is that the following goods and services are similar to the earlier terms:

Class 25:

Footwear; sandals; slippers; boots; boot uppers; boots for sports; beach shoes; camisoles; football boots; football shoes; footmuffs; footwear uppers; non-slipping devices for footwear; ski boots; socks; inner soles; soles for footwear; wooden shoes; highheels namely wedges; loafers; moccasin; sneakers; trainer; rainboots; riding boots; rollerblades; rollerskates; running shoes; saddle shoes; sandals; shoes; skates; skate shoes; slides; slingbacks; slippers; sneakers; steel-toe boots; stiletto heels; cleats; climbing shoes; clogs; court shoes; cowboy boots; cycling shoes.

Class 35:

Retail services, retail store services connected with the sales of footwear mail order retail services, online and internet retail services connected with the sale of new and used footwear, namely leisure footwear; retail and online retail services in relation to footwear and fashion procurement.


Comparison of marks

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

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

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

31. The respective trade marks are shown below:

SAVAGE	
Earlier trade mark	Contested trade mark

32. In assessing if there is any similarity between the marks, I must first ascertain the distinctive and dominant components. This is only noteworthy in the later trade mark as the earlier is in any case, comprised of the sole element SAVAGE. This element appears in the later trade mark, preceded by the word FOOTWEAR. It is also separated from this element by a vertical line and both words are also encased in black box like background. Footwear describes items worn on the feet and so the relatively more distinctive component in the later trade mark is SAVAGE. As regards visual dominance, both FOOTWEAR and SAVAGE catch the eye simultaneously. The background to the verbal elements, namely the black box adds little of consequence. Rather, it is the verbal elements that are key.

33. Visually, the marks coincide in SAVAGE and differ in respect of the additional elements in the later trade mark. They are considered to be visually similar to a medium degree.

34. Aurally, the marks coincide in the distinctive element SAVAGE and differ in respect of FOOTWEAR which does have an aural impact. Despite this, they are considered to be similar to a medium to high degree.

35. Conceptually, it is possible that SAVAGE will be understood as being a surname. However it will also, at least among some consumers be

understood to mean fierce, violent or uncontrolled. The addition of footwear does not have the effect of creating a conceptual gap though it does have some impact. However, its addition merely avoids a finding of conceptual identity. It is concluded that irrespective of the addition of footwear, the marks are highly similar conceptually.

Average consumer and the purchasing act

36. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

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

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

38. The average consumer is likely to be the public at large. This is likely to be a visual purchase though aural and conceptual considerations are also important. An average degree of attention is likely to be displayed.

Distinctive character of the earlier trade mark

39. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

40. It is noted that the applicant claims to enjoy a reputation in its earlier trade mark. However, for the reasons described above, it has not shown this. In any case, SAVAGE is entirely meaningless in respect of the earlier goods. Indeed it is fanciful. It is considered to have an above average degree of distinctiveness.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

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

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

42. The goods and services have been found to be identical or similar. The marks are visually, aurally and conceptually similar, the first being most important in respect of the goods in question: In *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03, the General Court stated that:

“49. However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the

objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

And

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

43. The earlier trade mark is of above average distinctiveness, the identical distinctive element appearing in totality in the later trade mark. In this regard I bear in mind the following: In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said

in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

44. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

45. Further the additional element of the later trade mark is entirely descriptive or otherwise lowly distinctive of the goods and services found to be identical and/or similar.

46. It is true that the average consumer will not display a low level of attention during the purchasing process, which can negate against imperfect recollection. However, when considering all the matters in the round, it is considered that it is inevitable that confusion will occur. This is considered to be true even in respect of the services, that have been found similar only to a low to medium degree. The opposition therefore succeeds under Section 5(2)(b) in respect of the goods found to be identical and similar.

47. In respect of the remaining goods found to be not similar, I will go on to consider the additional grounds raised, namely Section 5(3), 5(4)(a) and 3(6).

Section 5(3) – REPUTATION

48. Section 5(3) states:

“(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

49. In considering the ground of opposition based upon Section 5(3), the following is taken into account:

The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Addidas-Salomon*, [2004] ETMR 10 and C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

50. The first hurdle for the invalidation applicant is to establish that its earlier trade mark enjoys a reputation. For the reasons already provided above, the evidence filed fails to do so. The ground of opposition under Section 5(3) therefore fails.

Section 5(4)(a) – PASSING OFF

51. Section 5(4)(a) states:

“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.”

52. The following guidance is borne in mind: Halsbury’s Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165 provides the following analysis of the law of passing off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.”

53. Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

“To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant’s use of a name, mark or other feature which is the same or sufficiently similar that the defendant’s goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

(a) the nature and extent of the reputation relied upon;

(b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;

(c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;

(d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and

(e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.”

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

GOODWILL

54. Guidance as regards the meaning of goodwill is found in the following decision: *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL):

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

55. As already stated, the evidence from the applicant failed to establish any use, reputation or indeed goodwill. However, the admission from the RP (and the evidence it filed) leads to the conclusion that the applicant does enjoy a goodwill in its business at least in respect of tops and t-shirts. The (very) limited evidence in this regard, however, means that the goodwill is modest and its scope constrained to tops and t-shirts. Though under Section 5(4)(a), there is no requirement for the fields of activity of the respective parties to coincide, I bear in mind the following:

56. In *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA), Millet L.J. made the following findings about the lack of a requirement for the parties

to operate in the a common field of activity, and about the additional burden of establishing misrepresentation and damage when they do not:

“There is no requirement that the defendant should be carrying on a business which competes with that of the plaintiff or which would compete with any natural extension of the plaintiff's business. The expression “common field of activity” was coined by *Wynn-Parry J. in McCulloch v. May* (1948) 65 R.P.C. 58, when he dismissed the plaintiff's claim for want of this factor. This was contrary to numerous previous authorities (see, for example, *Eastman Photographic Materials Co. Ltd. v. John Griffiths Cycle Corporation Ltd.* (1898) 15 R.P.C. 105 (cameras and bicycles); *Walter v. Ashton* [1902] 2 Ch. 282 (The Times newspaper and bicycles) and is now discredited. In the *Advocaat* case Lord Diplock expressly recognised that an action for passing off would lie although “the plaintiff and the defendant were not competing traders in the same line of business”. In the *Lego case Falconer J.* acted on evidence that the public had been deceived into thinking that the plaintiffs, who were manufacturers of plastic toy construction kits, had diversified into the manufacture of plastic irrigation equipment for the domestic garden. What the plaintiff in an action for passing off must prove is not the existence of a common field of activity but likely confusion among the common customers of the parties.

57. The absence of a common field of activity, therefore, is not fatal; but it is not irrelevant either. In deciding whether there is a likelihood of confusion, it is an important and highly relevant consideration

‘...whether there is any kind of association, or could be in the minds of the public any kind of association, between the field of activities of the plaintiff and the field of activities of the defendant’:

Annabel's (Berkeley Square) Ltd. v. G. Schock (trading as Annabel's Escort Agency) [1972] R.P.C. 838 at page 844 per Russell L.J.

58. In the *Lego case Falconer J.* likewise held that the proximity of the defendant's field of activity to that of the plaintiff was a factor to be taken into account when deciding whether the defendant's conduct would cause the necessary confusion.

“Where the plaintiff's business name is a household name the degree of overlap between the fields of activity of the parties' respective businesses may often be a less important consideration in assessing whether there is likely to be confusion, but in my opinion it is always a relevant factor to be taken into account”.

59. Where there is no or only a tenuous degree of overlap between the parties' respective fields of activity the burden of proving the likelihood of confusion and resulting damage is a heavy one. In *Stringfellow v. McCain Foods (G.B.) Ltd.* [1984] R.P.C. 501 Slade L.J. said (at page 535) that the further removed from one another the respective fields of activities, the less likely was it that any member of the public could reasonably be confused into thinking that the one business was connected with the other; and he added (at page 545) that

‘even if it considers that there is a limited risk of confusion of this nature, the court should not, in my opinion, readily infer the likelihood of resulting damage to the plaintiffs as against an innocent defendant in a completely different line of business. In such a case the onus falling on plaintiffs to show that damage to their business reputation is in truth likely to ensue and to cause them more than minimal loss is in my opinion a heavy one.’

60. In the same case Stephenson L.J. said at page 547:

‘...in a case such as the present the burden of satisfying Lord Diplock's requirements in the *Advocaat* case, in particular the fourth and fifth requirements, is a heavy burden; how heavy I am not sure the judge fully appreciated. If he had, he might not have granted the respondents relief. When the alleged “passer off” seeks and gets no benefit from

using another trader's name and trades in a field far removed from competing with him, there must, in my judgment, be clear and cogent proof of actual or possible confusion or connection, and of actual damage or real likelihood of damage to the respondents' property in their goodwill, which must, as Lord Fraser said in the *Advocaat* case, be substantial.' ”

61. Bearing in mind the above guidance, it is considered that in the light of the limited goodwill proven, it is difficult to see how there can by any misrepresentation in respect of the remaining goods and services of the registration. This ground of opposition therefore also fails.

Section 3(6) – BAD FAITH

62. Section 3(6) of the Act states:

“(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith.”

63. In assessing whether the RP acted in bad faith in applying for this trade mark, I take the following guidance into account:

The law in relation to section 3(6) of the Act (“bad faith”) was summarised by Arnold J. in *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch):

“130. A number of general principles concerning bad faith for the purposes of section 3(6) of the 1994 Act/Article 3(2)(d) of the Directive/Article 52(1)(b) of the Regulation are now fairly well established. (For a helpful discussion of many of these points, see N.M. Dawson, "Bad faith in European trade mark law" [2011] IPQ 229.)

131. First, the relevant date for assessing whether an application to register a trade mark was made in bad faith is the application date: see *Case C- 529/07 Chocoladenfabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH* [2009] ECR I-4893 at [35].

132. Secondly, although the relevant date is the application date, later evidence is relevant if it casts light backwards on the position as at the application date: see *Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2008] EWHC 3032 (Ch), [2009] RPC 9 at [167] and cf. *Case C-259/02 La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159 at [31] and *Case C-192/03 Alcon Inc v OHIM* [2004] ECR I-8993 at [41].

133. Thirdly, a person is presumed to have acted in good faith unless the contrary is proved. An allegation of bad faith is a serious allegation which must be distinctly proved. The standard of proof is on the balance of probabilities but cogent evidence is required due to the seriousness of the allegation. It is not enough to prove facts which are also consistent with good faith: see *BRUTT Trade Marks* [2007] RPC 19 at [29], *von Rossum v Heinrich Mack Nachf. GmbH & Co KG* (Case R 336/207-2, OHIM Second Board of Appeal, 13 November 2007) at [22] and *Funke Kunststoffe GmbH v Astral Property Pty Ltd* (Case R 1621/2006-4, OHIM Fourth Board of Appeal, 21 December 2009) at [22].

134. Fourthly, bad faith includes not only dishonesty, but also "some dealings which fall short of the standards of acceptable commercial behaviour observed by reasonable and experienced men in the particular area being examined": see *Gromax Plasticulture Ltd v Don & Low Nonwovens Ltd* [1999] RPC 367 at 379 and *DAAWAT Trade Mark* (Case C000659037/1, OHIM Cancellation Division, 28 June 2004) at [8].

135. Fifthly, section 3(6) of the 1994 Act, Article 3(2)(d) of the Directive and Article 52(1)(b) of the Regulation are intended to prevent abuse of the trade mark system: see *Melly's Trade Mark Application* [2008] RPC 20 at [51] and *CHOOSI Trade Mark* (Case R 633/2007-2, OHIM Second Board of Appeal, 29 February 2008) at [21]. As the case law makes clear, there are two main classes of abuse. The first concerns abuse vis-à-vis the relevant office, for example where the applicant knowingly supplies untrue or misleading information in support of his application; and the second concerns abuse vis-à-vis third parties: see *Cipriani* at [185].

136. Sixthly, in order to determine whether the applicant acted in bad faith, the tribunal must make an overall assessment, taking into account all the factors relevant to the particular case: see *Lindt v Hauswirth* at [37].

137. Seventhly, the tribunal must first ascertain what the defendant knew about the matters in question and then decide whether, in the light of that knowledge, the defendant's conduct is dishonest (or otherwise falls short of the standards of acceptable commercial behaviour) judged by ordinary standards of honest people. The applicant's own standards of honesty (or acceptable commercial behaviour) are irrelevant to the enquiry: see *AJIT WEEKLY Trade Mark* [2006] RPC 25 at [35]-[41], *GERSON Trade Mark* (Case R 916/2004-1, OHIM First Board of Appeal, 4 June 2009) at [53] and *Campbell v Hughes* [2011] RPC 21 at [36].

138. Eighthly, consideration must be given to the applicant's intention. As the CJEU stated in *Lindt v Hauswirth*:

"41. ... in order to determine whether there was bad faith, consideration must also be given to the applicant's intention at the time when he files the application for registration.

42. It must be observed in that regard that, as the Advocate General states in point 58 of her Opinion, the applicant's intention at the relevant time is a subjective factor which must be determined by reference to the objective circumstances of the particular case.

43. Accordingly, the intention to prevent a third party from marketing a product may, in certain circumstances, be an element of bad faith on the part of the applicant.

44. That is in particular the case when it becomes apparent, subsequently, that the applicant applied for registration of a sign as a Community trade mark without intending to use it, his sole objective being to prevent a third party from entering the market.

45. In such a case, the mark does not fulfil its essential function, namely that of ensuring that the consumer or end-user can identify the origin of the product or service concerned by allowing him to distinguish that product or service from those of different origin, without any confusion (see, *inter alia*, Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48)."

64. The applicant claims that the RP must have been aware of its use of its earlier trade mark. This is due to the fact that the applicant sent letters regarding the potential issue. However as already stated, these were sent after the application date of the registered trade mark. As such, they do not cast any light on the position at the application date. Further, there is no evidence to indicate in any way that the RP was either aware of the applicant or sought to capitalise on any earlier use by the applicant.

65. The claim of bad faith on the part of the RP also therefore fails.

66. The net result is that the application for invalidation succeeds in respect of the following goods and services:

Class 25:

Footwear; sandals; slippers; boots; boot uppers; boots for sports; beach shoes; camisoles; football boots; football shoes; footmuffs; footwear uppers; non-slipping devices for footwear; ski boots; socks; inner soles; soles for footwear; wooden shoes; highheels namely wedges; loafers; moccasin; sneakers; trainer; rainboots; riding boots; rollerblades; rollerskates; running shoes; saddle shoes; sandals; shoes; skates; skate shoes; slides; slingbacks; slippers; sneakers; steel-toe boots; stiletto heels; cleats; climbing shoes; clogs; court shoes; cowboy boots; cycling shoes.

Class 35:

Retail services, retail store services connected with the sales of footwear mail order retail services, online and internet retail services connected with the sale of new and used footwear, namely leisure footwear; retail and online retail services in relation to footwear and fashion procurement.

67. It fails in respect of the remaining goods and services.

COSTS

68. It is considered that both parties have achieved a fairly equal measure of success in these proceedings. I direct therefore that each party should bear its own costs.

Dated this 23rd day of November 2017

Louise White

For the Registrar,