

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3194029  
BY ZNU (UK) LIMITED  
TO REGISTER THE TRADE MARK:**

**JPC**

**IN CLASSES 6, 7, 20, 21 AND 24**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 408552 BY IP CLEANING S.R.L.**

## **Background and pleadings**

1. On 31 October 2016, ZNU (UK) Limited (“the applicant”) applied to register the trade mark **JPC** for a range of goods in classes 6, 7, 20, 21 and 24.

2. The application was published for opposition purposes on 18 November 2016. It is opposed by IP Cleaning S.R.L. (“the opponent”), formerly IP Cleaning S.p.a. The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against the following goods in the application:

Class 7: Shoe polishers, electric; washing apparatus; dust exhausting installations for cleaning purposes; parquet wax polishers, electric; centrifugal pumps; hydraulic valves; air extracting pumps; rust removers [electric]; dry-cleaning machines; spraying machines.

Class 21: Shoe polisher; window glass cleaner; brooms; toilet cases; brushes for footwear.

3. The opponent relies upon the following earlier marks:

- (i) European Union trade mark (“EUTM”) number 15360969 for the mark shown below, which has a filing date of 21 April 2016 and was entered in the register on 31 August 2016:



There is a colour claim for the colour Green Pantone 7488. The trade mark is registered for a range of goods in classes 3, 7 and 21. For the purposes of this

opposition, the opponent relies upon all of the goods in classes 7 and 21 (listed in full in the appendix to this decision);

(ii) EUTM number 5010351 for the mark shown below:



The mark has a filing date of 10 April 2006 and was entered in the register on 17 April 2008. A priority date of 21 December 2005 is claimed. The trade mark is registered for a range of goods in classes 3, 7, 11 and 21; in this opposition, the opponent relies on all of the goods in classes 7 and 21 (see appendix);

(iii) International trade mark (EU) (“IR”) number 924623 for the following trade mark:



The mark description reads “The trademark consists of a sign composed of a stylized figure of a sliced lemon placed in combination with the wording IPC in fancy characters”. The mark has an international registration date of 18 August 2006, with the EU being designated on the same date. Protection in the EU was granted on 13 May 2008. The mark is protected for various goods in classes 3, 7, 11 and 21; all of the goods in classes 7 and 21 (see appendix) are relied upon.

4. The opponent claims that the mark for which registration is sought is similar to the earlier marks and that the goods are identical or highly similar. As a consequence, it claims that there is a likelihood of confusion.

5. The applicant filed a counterstatement in which it denies the grounds of opposition.

6. The applicant is not professionally represented. The opponent has been represented throughout by Keltie LLP. Neither party filed evidence, though the opponent did file written submissions during the evidence rounds. Whilst neither party asked to be heard, the opponent filed written submissions in lieu of a hearing. I will bear the submissions in mind and refer to them, as necessary, below. This decision is taken following a careful reading of all of the papers.

### **Decision**

7. The opposition is based upon s. 5(2)(b) of the Act, which reads 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”.

8. An earlier trade mark is defined in s. 6 of the Act, the relevant part of which states:

“6. – (1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), a European Union trade mark or international trade mark (EC) 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, [...]”.

9. In these proceedings, the opponent is relying upon the trade marks shown at paragraph 3, above. Notwithstanding the applicant’s complaint in its counterstatement that the earlier marks have protection in the EU rather than just the UK, it is clear from the above provisions that all of the marks relied upon qualify as earlier trade marks. As EUTM 5010351 and IR 924623 had both been registered for five years or more at the publication date of the opposed application, they are, in principle, subject to the proof of use provisions under s. 6A of the Act. The opponent provided a statement that it had used these marks for all of the goods upon which it relies. In its counterstatement, the applicant indicated that it did not require proof of use. Accordingly, the opponent may rely upon all of the goods it has identified, without being required to show evidence of use.

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

(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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## **Comparison of goods**

11. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

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

12. Guidance on this issue has also come from Jacob J. (as he then was) *British Sugar Plc v James Robertson & Sons Ltd* (the *Treat* case), [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

14. I also remind myself of the guidance given by the courts on the correct approach to the interpretation of specifications. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant



language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question”.

15. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods and services. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC stated that “complementary” means:

“[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.


16. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL O/255/13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes”.


17. I also bear in mind Mr Alexander’s comments in the same case, where he warned against applying too rigid a test when considering complementarity:


“20. In my judgment, the reference to “legal definition” suggests almost that the guidance in Boston is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to Boston”.

18. The goods relied upon are set out, below. Although the opponent has not formally dropped its reliance on all of the goods listed in the relevant classes, it has, helpfully, provided a list of the particular goods which it considers to be identical or similar to the opposed goods.<sup>1</sup> Those terms are set out, below:

Earlier marks	Specification relied upon
<p>(i) EUTM 15360969</p> 	<p><u>Class 7</u>: Cleaning machines; Floor cleaning machines; Machines for cleaning vertical surfaces and windows using high pressure water jets; Machines for washing walls; Cleaning machines using hot water; Cleaning machines using cold water; Hot water jet washers; Cold water jet washers; Sweeping machines; Walk-behind sweeping machines; Ride-on sweeping machines; Vacuum cleaners; Wet vacuum cleaners; Machines for cleaning carpets and armchairs; Machines for washing floors; Electrically powered or hand-operated machines for washing and drying, for cleaning</p>

<sup>1</sup> Submissions dated 21 August 2017.

	<p>surfaces and flooring of all kinds; Machines for atomising and spraying chemicals and detergents; Wax polishers; Self-service installations for washing with hot water; Self-service installations for washing with cold water; Self-service installations for washing, rinsing and polishing of vehicles by means of equipment using high pressure water jets; Self-service vacuum cleaners for cleaning vehicle interiors; Valves (machine parts); Nozzles with water brushes for cleaning devices using water (parts of machines); Discs for polishing, washing, de-waxing machines; Pistols for cleaning devices using water; Steam guns for washing devices using water.</p> <p><u>Class 21:</u> Cleaning articles; Cleaning instruments, hand-operated; Glass cleaning implements; Brushes for cleaning; Mops; Squeegees [hand-operated] for cleaning; Toilet roll dispensers; Paper towel dispensers; Polishing gloves.</p>
<p>(ii) EUTM 5010351</p> 	<p><u>Class 7:</u> Machines for cleaning; hot water cleaners; cold water cleaners; walk-behind floor sweepers, ride-on floor sweepers; dry vacuum cleaners, wet vacuum cleaners, machines for carpet and armchair shampooing, scrubber-driers being machines, chemical nebulizing and spraying machines, polishers; self-service hot water washing installations, self-service cold water washing installations; discs for machines for polishing, washing, de-waxing; valves being parts of machines; spraying machines, drying machines, washing machines, hydraulic turbines, pumps being machines, vacuum cleaners.</p> <p><u>Class 21:</u> Hand-operated floor sweepers without engine; carpet sweepers; brushes except for paint brushes; articles for cleaning purposes being cleaning cloths; manual wipers for all</p>

	types of glass.
<p>(iii) IR 924623</p> 	<p><u>Class 7</u>: Machines for cleaning; hot water cleaners; cold water cleaners; walk-behind floor sweepers, ride-on floor sweepers; dry vacuum cleaners, wet vacuum cleaners, chemical nebulizing and spraying machines; self-service hot water washing installations, self-service cold water washing installations; discs for machines for polishing, washing, de-waxing; valves being parts of machines; spraying machines, drying machines, washing machines, hydraulic turbines, pumps being machines, vacuum cleaners.</p> <p><u>Class 21</u>: Non-electric hand-operated floor sweepers; carpet sweepers; brushes except for paint brushes; articles for cleaning purposes being cleaning cloths; hand-operated glass cleaning instruments being glass pane wipers.</p>

19. The applicant has not commented on the similarity between the goods at issue. I do not, however, consider that its silence ought to be taken as an admission that the goods are similar.

Class 7

*Shoe polishers, electric; washing apparatus; parquet wax polishers, electric*

20. These goods fall within the broad terms “cleaning machines” and “machines for cleaning” in the earlier specifications. They are identical on the principle outlined in *Meric*.

### *Centrifugal pumps; air extracting pumps*

21. Both of these terms are included within the broader term “pumps being machines” in the earlier specifications for marks (ii) and (iii), above. The goods are identical under *Meric*. The opponent has not identified which, if any, of the goods for which EUTM 15360969 is registered are identical or similar. I note that the earlier specification includes a range of machines and their spare parts. However, it is not obvious to me that either of the pumps above will be a spare part for the machines included in the specification. In the absence of any submissions, I find that there is no similarity between “centrifugal pumps” and “air extracting pumps” and the goods listed for EUTM 15360969.

### *Hydraulic valves*

22. This term is included within the wider terms “valves (machine parts)”/“valves being parts of machines” in each of the earlier specifications. The goods are identical under *Meric*.

### *Rust removers [electric]*

23. The opponent submits that these goods are identical to “machines for cleaning”. I accept that removing rust from metal would be understood as cleaning the metal surface and that metal cleaning machines are included within the earlier specifications’ “cleaning machines”/“machines for cleaning”. Consequently, I find that the goods are identical under *Meric*.

### *Spraying machines*

24. The specification for earlier mark (i) includes the term “machines for atomising and spraying chemical and detergents”, which are identical under *Meric*. Specifications (ii) and (iii) include “spraying machines”, which are self-evidently identical.

*Dust exhausting installations for cleaning purposes.*

25. This term, as I read it, suggests a fixed installation rather than a portable machine. There is, nevertheless, some overlap in nature and purpose between these goods and vacuum cleaners (in all of the earlier specifications), as both involve the removal of dust and dirt by suction, usually by way of pipes. Their users will intersect, as will their channels of trade. The goods may be purchased as alternatives to the other. In the absence of any submissions on the point, I also consider that there may also be a complementary relationship between the goods if, for example, a vacuum cleaner (which includes heavy-duty vacuum cleaners) may be attached to fixed ducting. The goods are similar to a reasonably high degree.

*Dry-cleaning machines*

26. The opponent identifies “drying machines” (marks (ii) and (iii)) as the conflicting term. The goods are different in purpose: one is for cleaning, the other drying. Their nature may overlap to a degree and, insofar as they are both bought by industry professionals, their users will overlap. The channels of trade are likely to be shared and there may be some similarity in their method of use. However, they are not in direct competition and they are not complementary. The goods are similar to a fairly low degree.

Class 21

*Shoe polisher*

27. The earlier specifications include the terms “cleaning articles” (mark (i)) and “articles for cleaning purposes being cleaning cloths” (marks (ii) and (iii)). These earlier terms include items such as cloths for polishing shoes. They are identical under *Meric*.

### *Window glass cleaner*

28. The opponent relies upon “glass cleaning implements”, “manual wipers for all types of glass” and “hand-operated glass cleaning instruments being glass pane wipers”, in each of the earlier specifications, respectively. These terms all appear to me to be different ways of describing the same products. The goods are identical.

### *Brooms*

29. Brooms are, in my understanding, a type of brush. The earlier specification for mark (i) includes “brushes for cleaning”. These goods are identical. If that is not right, they are highly similar, being identical in all respects apart from nature, due to a traditional besom being made from twigs rather than bristles. The opponent relies upon “hand-operated floor sweepers without engine”/“non-electric hand-operated floor sweepers” and “carpet sweepers” in the other earlier marks. These are similar to brooms to a medium degree, sharing some similarity of purpose, users, method of use, channels of trade and being in competition. However, the earlier specifications for marks (ii) and (iii) also include “brushes except for paint brushes”, which are identical to “brooms” on the principle outlined in *Meric*, or are at least highly similar for the reasons given above.

### *Brushes for footwear*

30. In respect of these goods, the opponent relies upon “brushes for cleaning” (mark (i)) and “brushes except for paintbrushes” (marks (ii) and (iii)). The goods are identical, for the reasons given above.

### *Toilet cases*

31. The opponent submits that these goods are identical or similar to “toilet roll dispensers” and “paper towel dispensers” (EUTM 15360969). It offers no further explanation. “Toilet cases” are receptacles with compartments for, typically, toiletries

and cosmetics, which they are used to transport. They would not usually be used either for toilet roll or for paper towels. The purpose therefore differs, as do the nature and method of use. The users may overlap but this is at a very high level of generality, and the goods are neither in competition nor complementary. The goods are not similar.

### **The average consumer and the nature of the purchasing act**

32. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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”.

33. The opponent submits that the relevant average consumer is “the public at large and business customers with specific professional knowledge or expertise whose level of attention varies from average to high”.<sup>2</sup> The applicant has made no submissions on the point.

34. Some of the goods at issue, such as shoe polishers (both electric and hand-operated) and brushes/brooms are relatively inexpensive items which, although not frequent purchases, are consumer items. The average consumer for these goods is a

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<sup>2</sup> Submissions dated 21 August 2017, §12.



member of the general public. Other goods in the specifications, such as parquet wax polishers and dry-cleaning machines, are unlikely to be bought by a member of the public but are, instead, the subject of purchases by business consumers. The member of the public purchasing the goods at issue is likely to be attentive to factors such as suitability for the job in hand and will pay, in general, a medium degree of attention. The purchase for the business consumer is likely to be more involved, requiring a higher degree of care to ensure, for example, that the goods will be compatible with existing machinery. The purchase for the business consumer may also involve a higher outlay or be subject to lengthy contracts. Accordingly, the business consumer is likely to pay a reasonably high degree of attention when purchasing the goods at issue.

35. The purchasing process itself is, for both groups of average consumer, likely to involve the inspection of goods in physical shops or online, in catalogues and in brochures. The purchase will, therefore, be primarily visual. I do not discount that there will be an aural element as, for example, discussions with sales representatives may form part of the process.

### **Comparison of trade marks**

36. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.




37. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“[...] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and

of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion”.

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

39. The trade marks to be compared are as follows:

Earlier trade marks	Contested trade mark
(i) 	JPC
(ii) 	
(iii) 	

40. The applicant states (reproduced as written) that:

“[...] IPC is shorted for the full name of IP Cleaning S.p.a. [now IP Cleaning S.R.L.] that can be very easy to make a very clear distinguish between JPC

and IP Cleaning S.p.a.in visually. What is more, the whole image for IP Cleaning S.p.a composes the letter IPC and an image with a shape like a cutting orange. But the applicant did not designed any image for Trade Mark JPC, and presented with three letter JPC only”.

41. It further states that the trade marks are not similar and that they are “two independent trademarks [sic]”.

42. The opponent submits that:

“[...] the presence of the simple device element within its Trade Marks does not detract from the overall visual similarities and certainly is not sufficient to render the marks dissimilar following a visual comparison. Furthermore, the simple device element contained within its Trade Marks does not affect any aural comparison between the Opponent’s Trade Marks and the Applicant’s Sign”.

43. The opponent submits that marks are similar overall. I also note its claim that the letters “I” and “J” are “visually highly similar and are often mistaken for one another”, though it has provided no evidence in support of the latter proposition.

44. The application consists of the letters “JPC”, presented in capital letters. There are no other elements in the mark and the overall impression is, therefore, contained in the abbreviation “JPC”.

45. The opponent’s earlier trade mark (i), above, consists of two principal elements. The first is a device. It comprises eight solid shapes, presented in green, in the form of wedges which also come to a point at their widest end. They are arranged in a circle, with the narrow end toward the centre, and are surrounded by an octagonal border, in the same shade of green. The effect is something akin to that of an angular sliced citrus fruit. The second element is placed underneath the device and is the letters “IPC”,

presented in green and in capital letters. The opponent argues that the earlier mark is dominated by the letters “IPC”. I do not agree: whilst the rule of thumb is that words speak louder than devices, the device in earlier mark (i) is both larger than and placed above the letters. Neither element dominates the other and, in my view, each makes a roughly equal contribution to the overall impression.

46. There is some visual similarity between the application and the opponent’s mark (i), due to the shared presence of the letters “PC” at the end of the only word element in each mark. However, there is a significant device element in the earlier mark, which has no counterpart in the application, and the first letter of the abbreviation is different. There is a fairly low (i.e. between low and medium) degree of visual similarity between these marks.

47. Aurally, there is a greater degree of similarity between the marks, as the device element in the earlier mark will not be articulated. The earlier mark will be vocalised as “JAY-PEE-SEE”, whilst the application will be verbalised as “EYE-PEE-SEE”. The last two syllables are identical but the first is obviously different. There is a medium degree of aural similarity.

48. Neither mark has any concept attached to it. Although in describing the marks I indicated, above, that the device somewhat resembles a sliced citrus fruit (a submission also made by the applicant), I do not think that the average consumer will attribute that or any other meaning to the device. The marks are conceptually neutral.

49. The opponent’s marks (ii) and (iii) (there is no material difference between them) also consist of a device accompanied by the letters “IPC”. The marks are presented in black/grey and white. The device consists of eight wedge shapes arranged around a central circle. The wedge-shaped elements have a very small diamond-shaped pattern all over, and are curved at the widest point. They are surrounded by a thin circular border. The letters “IPC” are presented in capitals and are placed to the right of the device. They are roughly one third of the height of the device. I consider that the two

elements of the mark, given their relative size and position, play a roughly equal role in the overall impression.

50. In terms of the comparison between the application on the one hand and marks (ii) and (iii) on the other, there is, again, some visual similarity because both contain the letters “PC” at the end of the only word element in the marks. However, the significant device element in the earlier mark is not present in the application, and the first letter of the abbreviation is different. There is a fairly low degree of visual similarity between these marks.

51. In terms of the aural comparison, my findings, above, are equally applicable here, since the device will not be articulated. There is a medium degree of aural similarity.

52. Neither mark has a concept attached. Notwithstanding the greater resemblance of the device to a sliced citrus fruit in these marks, it is not such a clear representation that a concept will be attributed to the device. The marks are conceptually neutral.

### **Distinctive character of the earlier trade mark**

53. The distinctive character of the earlier marks must be assessed, as the more distinctive the earlier marks, either inherently or through use, the greater the likelihood of confusion (*Sabel* at [24]). In *Lloyd Schuhfabrik*, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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)".

54. The opponent has not claimed that the earlier marks have an enhanced distinctive character through use and has filed no evidence in this regard. I therefore have only the inherent position to consider. The earlier marks consist of a device and a series of three letters, neither of which elements is allusive or descriptive of the goods at issue in any of the marks. Taking into account all of the above, I consider that the earlier marks have an average degree of inherent distinctive character.

### **Likelihood of confusion**

55. The factors considered above have a degree of interdependency (*Canon* at [17]), i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. A global assessment of the competing factors must be made when determining whether there is a likelihood of confusion (*Sabel* at [22]). It is a matter of considering the various factors from the perspective of the average consumer and deciding whether they are likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]). Confusion can be direct (where the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are

not the same but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). The different types of confusion were explained by Iain Purvis, Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc.*, Case BL O/375/10, where he stated that:

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

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

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

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

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

56. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., sitting as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls another mark to mind. This is mere association not indirect confusion.

57. The opponent relies upon *Institut für Lernsysteme GmbH v OHIM*, Case T-388/00, in which the GC found that the word-only trade mark “ELS” was confusingly similar to a figurative mark containing the letters “ILS”. Whilst the decisions of the GC are binding on points of law, they are not binding on points of fact. Although the decisions of the GC do have some persuasive value on points of fact, it is not inevitable that because in that case a one-letter difference at the beginning of a three-letter abbreviation gave rise to a likelihood of confusion the same will apply in the instant proceedings. The opponent also refers to *AON Corporation v E.ON AG* (BL O/485/02), a previous decision of this tribunal, and *Mazsits & Mazsits KEG v JME Group Limited* (R 1554/2010-1), a decision of the Board of Appeal at the EUIPO. Those decisions are neither binding nor persuasive nor, given that none of the marks involved included an independent device element, particularly helpful.

58. I have found that some of the goods at issue are identical. That represents the opponent’s strongest position as, according to the interdependency principle, the greater the similarity between the goods the more likely it is that there will be confusion. It is the position I consider first, as if the opposition fails in relation to identical goods, it will also fail where the goods are less (or not) similar.<sup>3</sup> The opponent’s earlier marks all have an average level of distinctive character. I have assessed the visual similarity

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<sup>3</sup> If there is no similarity between the goods, the opposition is bound to fail: see *Waterford Wedgwood plc v OHIM – C-398/07 P* (CJEU) and *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA at [49



between the application and the earlier marks as fairly low, the aural similarity as medium and have found the marks to be conceptually neutral. As regards earlier mark (i), even for the average consumer paying no higher than a medium level of attention and whilst taking into account the effect of imperfect recollection, I am satisfied that the differences between the opponent's mark and the application are sufficient to avoid a likelihood of confusion, whether direct or indirect. The similarity between the letters "PC" at the end of the abbreviation, to which no meaning is attached, is not sufficient, bearing in mind the other differences between the marks, to give rise to confusion. I have reflected on whether there is a risk that the average consumer may simply not notice that the application begins with "J" and the abbreviation in the earlier mark with "I", particularly given that the purchase is likely to be primarily visual, giving rise to indirect confusion. However, given that at least a medium level of attention will be paid, I do not consider that this is likely. The opposition fails in respect of the identical goods. It follows that it also fails in respect of goods which have a lower degree of similarity.

59. The position is similar for the opponent's earlier marks (ii) and (iii), which also have a fairly low degree of visual similarity, a medium degree of aural similarity and which are conceptually neutral. Notwithstanding that some of the goods are identical and that the earlier marks are averagely distinctive, I do not consider that there is a likelihood of confusion, even for the average consumer subject to the effects of imperfect recollection and paying a medium degree of attention. The opposition having failed in respect of identical goods, it also fails where the goods have a lower degree of similarity.

## **Conclusion**

60. The opposition has failed. Subject to appeal, the application will proceed to registration.

## **Costs**

61. The applicant has been successful and would ordinarily be entitled to an award of costs. However, as the applicant is an unrepresented party, the tribunal wrote to the applicant and asked it to complete and return a costs pro-forma if it intended to seek an award of costs. It was advised that, if the pro-forma was not returned, no award of costs would be made. The pro-forma has not been received by the tribunal and I therefore direct that the parties bear their own costs.

**Dated this 16<sup>th</sup> day of April 2018**

**Heather Harrison  
For the Registrar**

## APPENDIX

### LIST OF GOODS AND SERVICES RELIED UPON

#### **EUTM 15360969**

Class 7: Cleaning machines; Floor cleaning machines; Steam cleaning machines; Machines for cleaning vertical surfaces and windows using high pressure water jets; Machines for washing walls; Cleaning machines using hot water; Cleaning machines using cold water; Hot water jet washers; Cold water jet washers; Sweeping machines; Sweepers; Walk-behind sweeping machines; Ride-on sweeping machines; Sand-blasting apparatus; Hydrosanders; Sandblasters (parts of machines); Vacuum cleaners; Wet vacuum cleaners; Machines for cleaning carpets and armchairs; Machines for washing floors; Electrically powered or hand-operated machines for washing and drying, for cleaning surfaces and flooring of all kinds; Machines for atomising and spraying chemicals and detergents; Wax polishers; Self-service installations for washing with hot water; Self-service installations for washing with cold water; Self-service installations for washing, rinsing and polishing of vehicles by means of equipment using high pressure water jets; Self-service vacuum cleaners for cleaning vehicle interiors; Spare parts for all of the aforesaid machines, in particular boilers, steam boilers for machines, steam boilers; Suction motors; Pressure adapters (parts of machines); Wheels and scratch-resistant wheels (parts of machines); Ejectors (parts of machines); Ejectors for suctioning detergent solutions (parts of machines); Valves (machine parts); High- and low-pressure tubes for cleaning devices using water (parts of machines); Hose pipe connectors for machines; Exhaust pipes (parts of machines); Vacuum cleaner hoses; Mechanical reels for flexible hoses; Boiler tubes (parts of machines); Nozzles and supports for nozzles for machines; Nozzles with water brushes for cleaning devices using water (parts of machines); Water tanks and tanks (parts of machines); Tanks for solutions and water (parts of machines); Boxes for collecting dirt (parts of machines); Devices for distributing and mixing detergents (parts of machines); Squeegees and blades of rubber (parts of machines); Squeegees and blades of rubber for emulsion oils (parts of machines); Squeegees and blades of rubber being parts of sweeping

machines and washer-driers; Foam heads for machines; Anti-foam devices (parts of machines); Accessories for anti-foam heads for cleaning machines; Mechanical rotary heads for machines; Rotary heads for machines; Self-regulating and self-levelling cleaning and sweeping heads (parts of machines); Rotary arms for machines; Discs for polishing, washing, de-waxing machines; Standard transmission discs being parts of sweepers and washer-driers; Junction nozzles for machines; Brushes being parts of machines; Circular or cylindrical brushes (parts of machines); rotating brushes (machine parts); Roller brushes (parts of machines); Filters being parts of machines; Inlet and outlet filters (parts of machines); Self-cleaning filters (parts of machines); Filtration bags of polyester (parts of machines); Woven filters (parts of machines); cartridge filters for machines; Paper filters (parts of machines); Filtration bags of paper for sweepers and vacuum cleaners; Filters and discs for stop filters (parts of machines); Recycling filters for washer-driers; Pistols (parts of machines); Pistols for cleaning devices using water; Steam guns for washing devices using water; Steam guns (parts of machines); Containers being parts of machines; Supports for rolls of tissues (parts of machines); Supports for pads (parts of machines); Regulators (parts of machines); Water purifiers (parts of machines).

Class 21: Cleaning articles; Cleaning instruments, hand-operated; Cleaning rags; Scouring sponges; Pads for cleaning; Dusting cloths; Glass cleaning implements; Brushes for cleaning; Mops; Steelwool for cleaning; Squeegees [hand-operated] for cleaning; Buckets for cleaning purposes; Waste paper baskets; Toilet roll dispensers; Paper towel dispensers; Soap dispensers; Polishing gloves.

### **EUTM 5010351**

Class 7: Cleaning appliances utilizing steam; machines for cleaning; steam generating machines, machine boilers; hot water cleaners; cold water cleaners; sweeping machines; walk-behind floor sweepers, ride-on floor sweepers, sandblasters being parts of machines, high pressure/low pressure hoses for water cleaners, flexible hose couplings for water cleaners (being parts of machines); lances and lance holders for machines, hydro-brush lances for water cleaners, water tanks and reservoirs being

parts of machines; dry vacuum cleaners, wet vacuum cleaners, machines for carpet and armchair shampooing, scrubber-driers being machines, ride-on scrubber-driers, control cables for machines, chemical nebulizing and spraying machines, polishers, squeegees and rubber blades being parts of sweepers and scrubber-driers; self-service hot water washing installations, self-service cold water washing installations; hydro-sandblasters; foam heads for machines; vacuum cleaner hoses, boiler tubes being parts of machines; rotating heads for machines, rotating arms for machines; discs for machines for polishing, washing, de-waxing; standard driver discs being parts of sweepers and scrubber-driers; junction nozzles for machines, mechanical hose reels for flexible hoses; steam boilers for machines; brushes being parts of machines; cartridge filters for machines; paper filter bags for sweepers and vacuum cleaners, filters and stop filter discs being parts of machines; recycling filters for scrubber-driers; pressure adapters being parts of machines; humidifiers, depurators and steam-guns for steam generators being parts of machines; ejectors; valves being parts of machines; guns for water cleaners, guns being parts of machines, regulators being parts of machines; parts and fittings for the above mentioned products included in this class; mould (parts of machines), foundry machines, molding machines, piece casting machines, spraying machines, fodder presses, saws (machines), saw benches as parts of machines, spin-driers, printing presses, looms (machines), mixing machines, stamping presses, die-stamping machines, dyeing machines, drying machines, grinding machines, sandblasting machines, power operated grinders, wine presses, tobacco processing machines, hemming machines, rim machines, potter's wheels, engraving machines, roll line machines, bedding machines, packing machines, coalball tools, swaging machines, washing machines, blotter presses, embossing machines, glass cutting machines, glue clearing and grinding machines, drilling machines, cutters being machines, drifting machines, tarring machines, loading ramps (machines), pneumatic hammers, water presses, steam engines, gas engines, hydraulic turbines, pin tools being parts of machines, slide fastener machines, lathes being machines tools, riveting machines, dynamos, aerators, pumps being machines, belts for conveyors, electric welding machines, vacuum cleaners.

Class 21: Hand-operated floor sweepers without engine; nozzles for sprinkler hoses; scouring pads; carpet sweepers; brushes except for paint brushes; articles for cleaning purposes being cleaning cloths, cleaning combs, cleaning cotton, cleaning mitts of fabric, cleaning pads, cleaning rags , cleaning sponges, dusting or cleaning cloths , eyeglass cleaning cloths; manual wipers for all types of glass; parts and fittings for the above mentioned products included in this class; griddles being cooking utensils, stewpans, cooking pots, bottles, glass rods, knobs of porcelain, statues of glass, beer mugs, flower pots, sprinklers, shoe horns, toothbrushes, toothpicks, shaving brushes, ice pails, furniture dusters, glass wool not for insulation, birdcages, fly swatters.

### **IR 924623**

Class 7: Cleaning appliances utilizing steam; machines for cleaning; steam engine boilers; hot water cleaners; cold water cleaners; sweeping machines; walk-behind floor sweepers, ride-on floor sweepers, sandblasters being parts of machines, high pressure/low pressure hoses for water cleaners, flexible hose couplings for water cleaners; lances and lance holders for machines, hydro-brush lances for water cleaners, water tanks and reservoirs being parts of machines; dry vacuum cleaners, wet vacuum cleaners, machines for carpet and armchair shampooing, scrubber-driers being machines, ride-on scrubber-driers, control cables for machines, chemical nebulizing and spraying machines, polishers, squeegees and rubber blades being parts of sweepers and scrubber-driers; self-service hot water washing installations, self-service cold water washing installations; hydro-sandblasters; foam heads for machines; vacuum cleaner hoses, boiler tubes being parts of machines; rotating heads for machines, rotating arms for machines; discs for machines for polishing, washing, de-waxing; standard driver discs being parts of sweepers and scrubber-driers; junction nozzles for machines, mechanical hose reels for flexible hoses; steam boilers for machines; brushes being parts of machines; cartridge filters for machines; paper filter bags for sweepers and vacuum cleaners, filters and stop filter discs being parts of machines; recycling filters for scrubber-driers; pressure adapters being parts of machines; ejectors; valves being parts of machines; guns for water cleaners, guns being parts of machines, regulators being parts of machines; parts and accessories for the above mentioned products included in

this class; mould (parts of machines), foundry machines, molding machines, piece casting machines, spraying machines, fodder presses, saws (machines), saw benches as parts of machines, spin-driers, printing presses, looms (machines), mixing machines, stamping presses, die-stamping machines, dyeing machines, drying machines, grinding machines, sandblasting machines, power operated grinders, wine presses, tobacco processing machines, hemming machines, rim machines, potter's wheels, engraving machines, roll line machines, bedding machines, packing machines, coalball tools, swaging machines, washing machines, blotter presses, embossing machines, glass cutting machines, glue clearing and grinding machines, drilling machines, cutters being machines, drifting machines, tarring machines, loading ramps (machines), pneumatic hammers, water presses, steam engines, gas engines, hydraulic turbines, pin tools, slide fastener machines, lathes being machines tools, riveting machines, dynamos, aerators, pumps being machines, belts for conveyors, electric welding machines, vacuum cleaners.

Class 21: Non-electric hand-operated floor sweepers; nozzles for sprinkler hoses; scouring pads; carpet sweepers; brushes except for paint brushes; articles for cleaning purposes being cleaning cloths, cleaning combs, cleaning cotton, cleaning mitts of fabric, cleaning pads, cleaning rags, cleaning sponges, dusting or cleaning cloths, eyeglass cleaning cloths; hand-operated glass cleaning instruments being glass pane wipers; parts and accessories for the above mentioned products included in this class; griddles being cooking utensils, stewpans, cooking pots, bottles, glass rods, knobs of porcelain, statues of glass, beer mugs, flower pots, sprinklers, shoe horns, toothbrushes, toothpicks, shaving brushes, ice pails, furniture dusters, glass wool not for insulation, birdcages, fly swatters.