

O-485-18

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3201194

BY NITROGEN INTERNATIONAL LTD

NITROGEN

IN CLASSES 3, 14, 25, 26 AND 38

AND

THE OPPOSITION THERETO UNDER NUMBER 409409

BY

NITRO AG

Background

1. On 8 December 2016, Nitrogen International Ltd (“the applicant”) filed trade mark application number 3201194, for the mark NITROGEN, for the following goods and services¹:

Class 3: *Perfumery; essential oils; cosmetics; make-up; eye make-up; eyeliners; blushers; lipsticks; hair lotions; soaps.*

Class 14: *Precious metals; jewellery; precious stones; chronometric instruments.*

Class 25: *Clothing; footwear; headgear; swimwear; sportswear; leisurewear.*

Class 26: *Lace; embroidery; ribbons; braid; buttons; hooks and eyes; pins; needles; artificial flowers.*

Class 38: *Telecommunication services; communication services for the electronic transmission of voices; transmission of data; electronic transmission of images, photographs, graphic images and illustrations over a global computer network; transmission of data, audio, video and multimedia files; simulcasting broadcast television over global communication networks, the Internet and wireless networks; provision of telecommunication access to video and audio content provided via an online video-on-demand service; satellite communication services; telecommunications gateway services.*

2. The application was accepted and published in the *Trade Marks Journal* for opposition purposes on 10 March 2017. Nitro AG (“the opponent”) opposes the application under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”)², relying upon the following earlier International trade mark registration designating the EU:

¹ Following restrictions to the specifications which were originally filed.

² By way of a letter dated 31 October 2017, the opponent withdrew its grounds under sections 5(3) and 5(4)(a), originally pleaded with the section 5(2)(b) ground.

(i) IR 573078

NITRO

Class 25: *Clothing for sports.*

Class 35: *Sporting articles particularly snowboards.*

Date of designation of the EU: 8 January 2009; completion of protection in the EU: 4 September 2012.

3. The opponent claims that the marks are similar and that the goods and services are identical or similar, leading to a likelihood of confusion under section 5(2)(b) of the Act.

4. The applicant filed a defence and counterstatement, denying a likelihood of confusion. The counterstatement consists of legal submissions, which I bear in mind in making this decision.

5. The opponent is professionally represented by Groom Wilkes & Wright LLP, whilst the applicant represents itself. Both parties filed submissions and the opponent also filed evidence. Neither party chose to be heard. The opponent filed written submissions in lieu of a hearing.

Evidence

6. The opponent's evidence consists of a witness statement and exhibits from Sylvie Tate, the opponent's trade mark attorney. I will return to this evidence later in my decision.

Decision

Section 5(2)(b) of the Act

7. 5(2)(b) of the Act states:

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

(a) ...

(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. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“the CJEU”) 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.

Comparison of goods and services

9. The opponent's earlier mark had been registered for less than five years on the date on which the contested application was published. It is, therefore, not subject to the proof of use provisions under section 6A of the Act. The consequence of this is that the opponent may rely upon all the goods of its registration without having to prove that it has made genuine use of any of them.

10. In its written submissions dated 18 October 2018 (which accompanied its evidence), the opponent said this:

“We wish to focus our arguments here against classes 25 and 26 of the contested application.”

This is equivocal as to whether the opponent still pursues its opposition in respect of the applicant's class 3, 14 and 38 goods and services. Although it makes no submissions about why the class 3, 14 and 38 goods and services are similar to its own, I will deal with them briefly since there has been no formal withdrawal by the opponent of its opposition to the applicant's class 3, 14 and 38 goods and services.

11. The parties' respective specifications are:

Earlier mark	Application
Class 25: <i>Clothing for sports.</i>	Class 3: <i>Perfumery; essential oils; cosmetics; make-up; eye make-up;</i>
Class 35: <i>Sporting articles particularly</i>	<i>eyeliners; blushers; lipsticks; hair lotions;</i>

<p>snowboards.</p>	<p>soaps.</p> <p>Class 14: <i>Precious metals; jewellery; precious stones; chronometric instruments.</i></p> <p>Class 25: <i>Clothing; footwear; headgear; swimwear; sportswear; leisurewear.</i></p> <p>Class 26: <i>Lace; embroidery; ribbons; braid; buttons; hooks and eyes; pins; needles; artificial flowers.</i></p> <p>Class 38: <i>Telecommunication services; communication services for the electronic transmission of voices; transmission of data; electronic transmission of images, photographs, graphic images and illustrations over a global computer network; transmission of data, audio, video and multimedia files; simulcasting broadcast television over global communication networks, the Internet and wireless networks; provision of telecommunication access to video and audio content provided via an online video-on-demand service; satellite communication services; telecommunications gateway services.</i></p>
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12. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the 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.”

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

“82 ... there is a close connection between [the goods], 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...”.

14. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

15. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

“... 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."

16. The GC has held that there is no similarity between clothing and jewellery (in *Oakley* and in *Beyond Retro Ltd v OHIM*, Case T-170/12):

"The intervener's argument that eyewear, jewellery and watches could be similar or complementary to items of clothing cannot succeed, since, as correctly pointed out by OHIM, the relationship between those goods is too indirect to be regarded as conclusive. It must be borne in mind that the search for a certain aesthetic harmony in clothing is a common feature in the entire fashion and clothing sector and is too general a factor to justify, by itself, a finding that all the goods concerned are complementary and, thus, similar (*SISSI ROSSI*, paragraph 49 above, paragraph 62)."

Consequently, the opponent's goods are not similar to the applicant's class 14 goods; the goods in Class 14 of the application which are not 'jewellery' are even further away from any aesthetic harmony argument which, in any case, was not made.

17. There is no similarity between the opponent's goods and the applicant's goods in class 3. They do not share nature, purpose or method of use. That the users are members of the public is too high a level of generality. They do not share trade channels, are not in competition and are not complementary, as per *Frag Comercio Internacional, SL v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (*OHIM*) Case T-162/08 (General Court):

"30 Secondly, the Board of Appeal did not err in finding, in paragraph 20 of the contested decision, that the goods in Classes 18 and 25 covered by the earlier Community mark were not complementary in relation to the 'perfumery' in Class 3 covered by the mark applied for. In that regard, the Court has held previously that perfumery goods and leather goods in Class 18 cannot be considered similar. Perfumery goods and leather goods are plainly different as

regards both their nature and their intended purpose or their method of use. Moreover, there is nothing that enables them to be regarded as in competition with each other or functionally complementary. The same conclusion must be drawn concerning a comparison between perfumery goods and clothing in Class 25. Those goods, as of themselves, also differ as regards both their nature and their intended purpose or their method of use. There is nothing, either, that enables them to be regarded as in competition with each other or complementary (Case T-150/04 *Mülhens v OHIM – Minoronzoni (TOSCA BLU)* [2007] ECR II-2353, paragraphs 31 and 32).”

18. There is no similarity between the opponent’s goods and the applicant’s services in class 38 on any level.

19. In its counterstatement, the applicant says “...we recognize that Class 25 of the Earlier Mark i.e. clothing for sports includes that of ‘Sportswear’ sought to be applied by the Applicant.” The law requires that goods and services be considered identical where one party’s description of its goods or services encompasses the specific goods or services covered by the other party’s description (and vice versa): see *Gérard Meric v OHIM*, Case T-33/05, GC. Sportswear and clothing for sports are interchangeable terms and are identical. Further, on the *Meric* principle, the remaining goods in class 25 of the application are also identical because the opponent’s ‘clothing for sports’ is broad enough to cover the applicant’s ‘footwear, headgear, swimwear and leisurewear’, and the applicant’s term ‘clothing’ includes the opponent’s goods ‘clothing for sports’. The parties’ class 25 goods are identical.

20. The opponent’s written submissions draw my attention to a decision of the registrar³ in which the opponent was also a party, relying on the same earlier mark as in these proceedings in order to oppose an application for exactly the same goods as those applied for in these proceedings. I note that the opponent relies upon the hearing officer’s findings in relation to both classes 25 and 26 of the application. Whilst identity of goods was found (as I have found) in relation to the earlier goods in

³ BL O/038/18.

class 25 and the applicant's goods in class 25, the hearing officer found no similarity between the opponent's goods and the applicant's goods in class 26.

21. In the present proceedings, the opponent relies upon evidence which, it submits, shows similarity between goods in classes 25 and 26. As an example, the opponent submits that buttons, hooks and eyes are integral parts of clothing, and that spare buttons and fastenings are often provided with clothing. The opponent submits that they are complementary. The evidence relied upon (Exhibit ST1) is a copy of an extract from the Similarity of Goods and Services Database, reproduced here:

Goods and Services http://euipo.europa.eu/sim/myList/show?from=compare

Similarity

Similarity » Compare terms » Selected Pairs

Selected Pairs

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Show 25 entries

Pair ID	Office	Class 1	Term 1	Similarity	Class 2	Term 2	Reason
0045917-0057407	EUIPO (EM)	25	Fittings of metal for footwear	Similar	26	Shoe buckles	
0013940-0010957	EUIPO (EM)	25	Ready-made linings [parts of clothing]	Similar	26	Skirt flounces	
0007042-0033896	EUIPO (EM)	25	Hat frames [skeletons]	Low degree	26	Hat ornaments	
0007042-0027795	EUIPO (EM)	25	Hat frames [skeletons]	Low degree	26	Embroidery	

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22. The pagination of the opponent's evidence tells me that the exhibit consists of the single page shown above. I cannot see any references to buttons, hooks and eyes. Furthermore, the opponent's class 25 goods do not include, or cover, any of the class 25 goods listed in the exhibit (fittings of metal for footwear, ready-made clothing linings, or hat frames). I do not find the exhibit to be of assistance.

23. The hearing officer in the earlier decision said this:

"17. As the case law explains, for goods to be regarded as complementary, there must be "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". In addition, in *Les Éditions Albert René v OHIM*, Case T-336/03, the GC found:

"61... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different."

18. Whilst I note the contents of exhibit ST1, they are not, of course, binding upon me. Given the nature of its goods in class 28, the opponent sensibly bases its submissions upon its goods in class 25 i.e. "clothing for sports"; I will adopt the same approach. Applying the guidance in, inter alia, *Canon*, *Boston Scientific* and *Les Éditions Albert René*, I am unable to identify any similarity or competitive/complementary relationship between the opponent's goods and the applicant's "pins; needles; artificial flowers".

19. I will return to "lace" in a moment. The goods that remain are either used to adorn clothing i.e. "embroidery; ribbons; braid" (the first category) or are components of clothing i.e. "buttons; hooks and eyes" (the second category). Although the users of all these goods and those of the opponent may be the same, that level of generality tells one very little. In relation to the first

category of goods, these may have a similar physical nature to the opponent's goods. However, their intended purpose and method of use are different and there is no competitive relationship between them. Whilst such goods may be used to adorn articles of clothing, that does not (for the reasons explained in *Les Éditions Albert René*) make them similar nor (in the absence of evidence to suggest that those conducting a trade in clothing also conduct a trade in such goods), does it make them complementary in the sense outlined in *Boston Scientific* i.e. that the consumer would think that the responsibility for the applicant's named goods lies with the opponent. The opposition to "embroidery; ribbons; braid" fails and is dismissed accordingly.

20. As for the second category of goods, the nature of these goods and the opponent's goods is different as is their intended purpose and method of use. There is no competition between such goods. While it is true that such goods have an important role to play in the use of clothing, in relation to complementarity, I reach the same conclusions in relation to this category of goods that I did in relation to the first category of goods and the opposition to "buttons; hooks and eyes" also fails.

21. That leaves "lace" to consider. Lace shares a similar nature to the opponent's goods. Although the method of use differs, once made-up it may be used for a similar purpose i.e. as an item of clothing, a dress for example. Whilst I think the trade channels of the competing goods are likely to differ and there is no complementary relationship (in the sense envisaged by the case law), in relation to clothing at large there is likely to be an element of competition in that one might buy an item of clothing made of lace or elect to buy lace in the piece and make it up into an item of clothing oneself. However, the opponent's specification in class 25 is for "clothing for sports". Although such goods may be adorned with lace, I think it most unlikely that they would be made of lace. In short, I am not satisfied that there is any meaningful degree of similarity/complementarity between the opponent's goods and "lace" in the applicant's specification and the opposition to lace also fails."

24. Whilst I am not bound by the earlier decision, I find the hearing officer's reasoning to be entirely persuasive. I agree with it. In the absence of any more detailed and focussed submissions from the opponent as to why the goods in class 26 of the application are similar to the opponent's goods, I decline to find any similarity. The goods are not similar.

The average consumer and the purchasing process

25. Since I have found no similarity in respect of the applicant's goods and services in classes 3, 14, 26 and 38 I will confine my consideration of the average consumer and the purchasing process to the parties' class 25 goods. 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.

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

“50. The applicant has not mentioned any particular conditions under which the goods are marketed. 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.”

27. The average consumer of the goods at issue is a member of the general public who is likely to choose the goods from a shop, or from a website or catalogue. In such a purchasing process, the mark will, primarily, be seen rather than heard which means the visual perception of the mark will be the most important. I do not, however, ignore the potential for the marks to be spoken; for example, by sales

assistants providing assistance. The opponent submits that the goods are “mass consumption items aimed at the general public” and that, therefore, “the level of attentiveness of the relevant consumer will be low to average”. I disagree. The average consumer will take into consideration the cost, size, colour, material and suitability of the goods, meaning that he or she will pay an average degree of attention to their selection.

Comparison of marks

28. 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 analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

29. 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. The marks to be compared are:

Earlier mark	Applicant's mark
NITRO	NITROGEN

30. Since both marks consist of single word elements, and no part of the words are highlighted, their overall impressions and their distinctiveness lie in the single words of which they are composed.

31. The font used in the earlier mark is unremarkable, so this is not a distinguishing visual feature between the marks. The first five letters of the eight-letter word in the application are identical (and in identical sequence) to the entirety of the earlier mark, NITRO. It is a rule of thumb that the beginnings of trade marks tend to have more visual and aural impact than their endings (see *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02). UK average consumers read words from left to right. I find there to be a good level of visual similarity between the marks.

32. The first two syllables of the applicant's mark will be pronounced identically to the opponent's mark, NYE-TRO. The third syllable of the applicant's mark, which will be said as 'JEN', does not have a counterpart in the earlier mark. Taking into account the similarities and differences, there is a good level of aural similarity between the marks.

33. The opponent submits that the average consumer would see its mark, NITRO, as "a prefix used to indicate something 'of or containing nitric acid, nitrates, or nitrogen'. Indeed, 'nitro' is a mass noun for compounds in the nitro group. All words in the English language beginning with 'nitro' relate in some way to the element." As support, the opponent exhibits (Exhibits ST2 and ST3) dictionary and encyclopedic definitions (from the online The Free Dictionary and from a source attributed to The Columbia Electronic Encyclopedia) of 'nitro', which support its submissions. The applicant submits that 'nitro' in the application is a not prefix and submits that its mark signifies "a colourless element that has no smell and is usually found as a gas which forms about 78% of the earth's atmosphere, and is found in all living things" (attributed to the online Collins Dictionary). However, the applicant also says this:

"The Earlier Mark 'NITRO' refers to a prefix which "combines with nouns to form other nouns referring to things which contain nitrogen and oxygen".⁴

⁴ Also attributed to the Collins online Dictionary.

34. It seems to me that the applicant's submissions are contradictory and that they indicate a level of conceptual similarity, at least an evocative one, between the applicant's mark and the earlier mark, which the applicant says is a prefix used to form the word of which its own mark consists. In my view, whilst the average consumer for the goods may not be well versed in the finer points of chemical composition, nevertheless, there will be a recognition that NITRO forms part of the well-known word NITROGEN and a conceptual hook of a chemical or gas will be formed in the mind of the average consumer (see, for example, the decision of the GC in *IG Communications Ltd v OHIM*, 301/09 [2013] ETMR 17). On this basis, I consider there will be a reasonably high degree of conceptual similarity between the marks. If I am wrong about that, and the average consumer will attach no conceptual meaning to NITRO, the marks are neutral in terms of conceptual similarity.

Distinctive character of the earlier mark

35. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*⁵ 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 *WindsurfingChiemsee 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

⁵ Case C-342/97

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).”

36. The relevance of the level of distinctiveness of the earlier mark is explained in *Sabel*: 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. There is no evidence that the opponent has used the earlier mark, so it cannot claim any ‘extra’ distinctiveness from the public having been made aware of it. As it stands (*per se*), the mark does not describe or allude to the goods, but is a chemical prefix. That said, it is not in the camp of a regular everyday English word. For average consumers who see it this way it has an above average degree of inherent distinctiveness. For those who see it as an invented word, it has a high degree of inherent distinctiveness.

Likelihood of confusion

37. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. One of those principles states that a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*). However, if the goods or services are not similar at all, there can be no likelihood of confusion (*Canon*). I have found that the applicant’s goods and services in classes 3, 14, 26 and 38 are not similar to the opponent’s goods. The opposition therefore fails in respect of these goods and services.

38. I have found that the goods in class 25 of the application are identical to the opponent’s class 25 goods. The average consumer rarely has the opportunity to

make direct comparisons between trade marks and must instead rely upon the imperfect picture of them in his mind. The marks are similar to a good degree visually (and aurally), which is relevant because the goods will primarily be purchased visually. If this similarity is retained in the mind, together with the 'nitro' conceptual evocation, for identical goods, and considering that the distinctiveness of nitro is at least above average in this scenario, there will be a likelihood of confusion. Even if there is no conceptual hook and NITRO will be perceived as an invented word, the good levels of visual and aural similarity, the high level of distinctiveness of the earlier mark and the identity of the goods will also result in a likelihood of confusion. In neither case will the level of attention, which is average, militate against imperfect recollection. I consider that the marks will be imperfectly recalled and will be directly mistaken for one another.

39. However, if I am wrong in that conclusion, I still consider that there will be an 'indirect' type of confusion, in that the average consumer will recognise that the trade marks are not the same but assume that the undertakings using them are the same or economically linked. The level of distinctiveness of the earlier mark, for identical goods which are not bought with a high level of circumspection, will lead to an assumption that the marks are variations on a 'nitro' theme, with or without the conceptual hook or evocation.

Outcome

40. The opposition succeeds against the class 25 goods because there is a likelihood of confusion under section 5(2)(b) of the Act. The opposition fails against the other goods and services of the application.

41. The application is refused for:

Class 25: Clothing; footwear; headgear; swimwear; sportswear; leisurewear.

42. The application may proceed to registration for:

Class 3: *Perfumery; essential oils; cosmetics; make-up; eye make-up; eyeliners; blushers; lipsticks; hair lotions; soaps.*

Class 14: *Precious metals; jewellery; precious stones; chronometric instruments.*

Class 26: *Lace; embroidery; ribbons; braid; buttons; hooks and eyes; pins; needles; artificial flowers.*

Class 38: *Telecommunication services; communication services for the electronic transmission of voices; transmission of data; electronic transmission of images, photographs, graphic images and illustrations over a global computer network; transmission of data, audio, video and multimedia files; simulcasting broadcast television over global communication networks, the Internet and wireless networks; provision of telecommunication access to video and audio content provided via an online video-on-demand service; satellite communication services; telecommunications gateway services.*

Costs

43. The applicant has had the greater share of success based on its retention of its goods in classes 3, 14 and 26 and, ordinarily, would be entitled to a contribution towards its costs. As the applicant is unrepresented, at the conclusion of the evidence rounds the tribunal invited it to indicate whether it intended to make a request for an award of costs and, if so, to complete a pro-forma indicating a breakdown of its actual costs, including providing accurate estimates of the number of hours spent on a range of given activities relating to the prosecution of the proceedings. It was made clear to the applicant that if the pro-forma was not completed “no costs, other than official fees arising from the action and paid by the successful party...will be awarded”. The applicant did not respond to that invitation within the timescale allowed (nor has any response been received from it prior to the date of the issuing of this decision). It did not incur any official fees in the proceedings and so I make no award of costs.

Dated this 3rd day of August 2018

Judi Pike

**For the Registrar,
the Comptroller-General**