

BL O-424-19

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3310355
BY SHENZHEN UWELL TECHNOLOGY CO., LTD.
TO REGISTER:**

UWELL

AND:

UWELL

AS A SERIES OF TWO TRADE MARKS IN CLASS 34

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 413593
BY OLIVIER SARFATI**

BACKGROUND & PLEADINGS

1. On 11 May 2018, Shenzhen Uwell Technology Co., Ltd. (“the applicant”) applied to register the series of two trade marks shown on the cover page of this decision for the goods shown in paragraph 12 below.

The application was published for opposition purposes on 1 June 2018.

2. The application has been opposed in full by Olivier Sarfati (“the opponent”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the goods (shown in paragraph 12 below) in European Union Trade Mark (“EUTM”) no. 12705431 for the trade mark **J WELL** which was applied for on 18 March 2014 and which was entered in the register on 15 September 2014.

3. The applicant filed a counterstatement in which it denies there will be a likelihood of confusion. However, in its counterstatement (paragraph 2.2.1), the applicant accepts “that the goods in this particular matter are either identical or highly similar.”

4. In these proceedings, the opponent is represented by a chartered trade mark attorney, Ms Claire Lazenby and the applicant by Snipe Chandrahasen LLP. Both parties filed evidence and submissions. While neither party requested a hearing, the opponent filed written submissions in lieu of attendance. In reaching a conclusion I will bear all of these submissions in mind referring to them to the extent I consider it appropriate to do so.

EVIDENCE

The opponent’s evidence

5. This consists of a witness statement from Ms Lazenby in which she states:

“I attach as Exhibit JCL 1 one original product, which consists of a small rectangular outer box, which carries the health warning *“this product contains nicotine, which is a highly addictive substance”* and in which there's a blister

pack holding four coils, which I purchased from a London store on the 11 January 2019, and the receipt from the store for this purchase.”

The front and back of the outer box provided look like this:



6. I take the references to “services@myuwell.com” and “Designed by UWELL Made in China” which appear on the back of the outer box to be references to the applicant. The receipt provided indicates that the item was purchased from The London Vape Co Ltd in Park Way, London on 11 January 2019 at a cost of £52.50.

The applicant’s evidence

7. This consists of a witness statement (accompanied by four exhibits), from Yucheng Xiao, the director of the applicant company. While I do not intend to provide a summary of the evidence filed here, for the avoidance of doubt, I confirm I have read it and will, to the extent I consider it necessary, comment upon it later in this decision.

DECISION

8. The opposition is based upon section 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.”

9. An earlier trade mark is defined in section 6 of the Act, which states:

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

(a) a registered trade mark, international trade mark (UK), Community 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,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

10. The trade mark relied upon by the opponent qualifies as an earlier trade mark under the above provisions. Given the interplay between the dates on which the opponent’s trade mark was registered and the publication date of the application for registration, this earlier trade mark is not subject to the proof of use provisions.

Case law

11. The following principles are gleaned from the decisions of the courts of the European Union 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 greater 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

12. The competing goods are as follows:

The goods being relied upon by the opponent	The applicant's goods
Class 34 - Cigarettes not for medical purposes; Electronic devices for smokers replacing cigarettes, containing tobacco substitutes, not for medical purposes; Vaporiser tubes for	Class 34 - Cigarettes containing tobacco substitutes, not for medical purposes; cigarettes; electronic cigarettes; liquid solutions for use in electronic cigarettes; cigarette cases;

<p>smokeless cigarettes; Tobacco substitutes; Goods based on tobacco and nicotine; Electrical devices for the inhalation of flavourings and nicotine; Mouthpieces for cigarette holders; Electronic tips being parts of electronic cigarettes, other than for medical purposes; Smokers' articles; Lighters for smokers; Cigarette boxes or cases; Burners for cigarettes; Electronic devices for smokers replacing cigarettes, containing tobacco substitutes, for medical purposes.</p>	<p>oral vaporizers for smokers; lighters for smokers; cigarette filters; flavorings, other than essential oils, for use in electronic cigarettes; Flavorings, other than essential oils, for tobacco.</p>
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13. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court (“GC”) stated:

“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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

14. Given the admission contained in the applicant’s counterstatement (paragraph 3 above refers), it is not strictly necessary for me to review this aspect of the case any further. However, for the sake of completeness, even a cursory review confirms that the competing specifications contain terms which are either literally identical, are to

be regarded as identical on the principles outlined in *Merix* or are identical on the basis they are alternative ways of describing the same commercial articles.

The average consumer and the nature of the purchasing act

15. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue. 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.”

16. While it may not be true of all the goods in the competing specifications (cigarette cases for example), the average consumer of the vast majority of the goods at issue is a member of the general public over the age of 18. Although I am aware that both conventional and e-cigarettes are subject to a range of trading restrictions, I am also aware that such goods may be bought from bricks-and-mortar retail outlets on the high street and on-line. While those trading restrictions indicate that when bought on the high street conventional cigarettes are likely to be requested by the average consumer using oral means, as that is not the case when such goods are bought on-line and as e-cigarettes are on public display both on the high street and on-line, visual considerations are likely to play an important part in the selection process. That said, as all of the goods at issue may be the subject of word-of-mouth recommendations from one consumer to another or the subject of oral enquiries to sales assistants, aural considerations will also play their part. The applicant’s specification also includes “cigarette cases” and “lighters for smokers”, in relation to

which similar considerations are likely to apply, but which, in my experience, are most likely to be selected by visual means.

17. As to the degree of care the average consumer will display, the evidence shows that the cost of the goods at the heart of this dispute varies. While none of the costs are terribly high, the evidence also shows that such goods are sold in a range of styles, strengths and flavours. In his submissions, the opponent refers to the comments of the Hearing Officer in BL-O31-16, in which he characterised the degree of care the average consumer will display when selecting, inter alia, e-cigarettes and flavouring for such goods as “low to medium”, whereas in its counterstatement, the applicant suggests that the average consumer will pay an “above average degree” of attention and “purchasers of tobacco products are generally very attentive.” In my view the applicant’s position is to be preferred, concurring as it does with the comments of Mr Justice Birss in [2017] EWHC 3393 (Ch) which, in relation to broadly speaking the same goods at issue in these proceedings, he stated:

“11. Next (paragraphs 22-24) the decision deals with the average consumer, concluding that the average consumer will be a member of the public over 18 years of age and, having regard to the prices for the relevant goods (ranging from about £40 to about £200), the average consumer will pay a reasonably high degree of attention to the selection of the goods and a reasonable level of attention relating to services. Rightly, neither party criticises that finding.”

18. It is upon the above basis I intend to proceed, reminding myself that the applicant’s specification also includes “cigarette cases” and “lighters for smokers”, in relation to which the degree of attention paid during the selection process maybe somewhat lower.

Comparison of trade marks

19. 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 them, 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.”

20. It would be wrong, therefore, artificially to dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The trade marks to be compared are as follows:

Opponent's trade mark	Applicant's trade marks
J WELL	<p style="text-align: center;">UWELL</p> And: UWELL

21. The opponent's trade mark consists of the letter "J" and word "WELL" presented in block capital letters; the letter and word are separated by a space. The word "WELL" and its meaning will be very well-known to the average consumer. Both the letter and word will, in my view, make a roughly equal contribution to both the overall impression the trade mark conveys and its distinctive character.

22. The applicant's trade marks consist of the single word "UWELL" presented in block capital letters and the same word presented in block capital letters in bold. As the minor difference in presentation will have no material impact on my assessment,

I will proceed on the basis of the applicant's trade mark presented in block capital letters. Although no part of the word is highlighted in any way and the overall impression it conveys and its distinctiveness lies in its totality, I think it likely that some average consumers will notice that it contains within it the word "WELL".

I will now compare the competing trade marks from the visual, aural and conceptual standpoints with the above conclusions in mind.

The visual comparison

23. The trade marks at issue consist of five letters, the last four of which are identical. However, their first letters i.e. "J" and "U" differ and the opponent's trade mark contains a space between the first and second letters whereas the applicant's trade mark does not. Balancing the similarities and differences (including the degree of visual similarity between the differing first letters), results in what I consider to be a fairly high degree of visual similarity.

The aural comparison

24. Both trade marks consists of two syllables i.e. "J-WELL" and "U-WELL"; the second syllables are identical. When spoken, the space present in the opponent's trade mark is not relevant. The competing trade marks are, in my view, most likely to be pronounced by the average consumer as "jaywell" and "youwell" respectively. Considered overall, I regard the competing trade marks as aurally similar to a fairly low degree.

The conceptual comparison

25. In its submissions, the applicant suggests that while the opponent's trade mark has no conceptual meaning, its trade mark is:

"2.3.6...an invented word which could be considered to be a derivative of "YOUWELL"....The meaning of the application mark...alluding to personal wellness."

26. In his evidence, Mr Xiao confirms that the applicant's trade mark was chosen "because it is derived from YOUWELL" (paragraph 5). As I mentioned above, I accept that despite its integration with the letter "U" which precedes it, some average consumers will notice that the word "WELL" appears in the word the subject of the applicant's trade mark and may construe it in the manner the applicant suggests. However, it is, in my view, equally likely that some average consumers will not "unpack" the meaning of the applicant's trade mark and will simply treat it as an invented word.

27. As to the opponent's trade mark, despite the average consumer's familiarity with the letter "J" and word "WELL", when considered as a totality, I think it unlikely that it will convey any concrete conceptual message to the average consumer. However, in its submissions, the opponent argues that even if the applicant is correct regarding how its trade mark will be conceptualised, to the extent that both trade marks contain the word "WELL" within them, they "share at least some conceptual similarity."

28. I think for some average consumers neither trade mark will convey any concrete conceptual message; for those average consumers the conceptual position is neutral. For those average consumers who conceptualise the applicant's trade mark in the manner it suggests, its trade mark will convey a conceptual message, whereas the opponent's trade mark may not. However, as some average consumers may, as the opponent suggests, interpret the word "WELL" in his trade mark in the same manner i.e. as relating to wellness, it results in what I consider to be a moderate i.e. between low and medium degree of conceptual similarity overall.

Distinctive character of the earlier trade mark

29. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular

undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

30. As the opponent has filed no evidence of any use he may have made of his earlier trade mark, I have only its inherent characteristics to consider. In its counterstatement, the applicant states:

“2.3.3..To that end, it should be noted that 'Well' has a rather descriptive meaning in relation to consumer goods i.e. goods which encourage feelings of being 'well' in the consumer, perhaps because cigarette substitutes such as electronic cigarettes claimed in both the Registration and Application mark are reported to pose only a fraction of the risk of traditional cigarettes to the user. For this reason it is submitted that the word 'Well'...where it appears in stand-alone fashion, possessing only a minimum degree of distinctiveness at most...”

31. Later in its counterstatement, the applicant states:

“4...relates only to the non-distinctive word 'WELL' which cannot serve as an indicator of origin given the frequency with which this word appears on consumer items...”

32. As the opponent points out in his submissions, the applicant has provided no evidence in support of the above. Regardless, as the word “WELL” and its meaning will be very well-known to the average consumer, I accept that when considered in isolation in relation to many of the goods upon which the opponent relies, it may be construed as alluding to wellness. That is, however, unlikely to be the case in relation to conventional cigarettes. In his submissions, the opponent characterises this word as having “at least an average degree of inherent distinctiveness.” While that may be the case in relation to conventional cigarettes, when considered in relation to the vast majority of the opponent’s goods, for example, e-cigarettes and tobacco substitutes, the word alone is, in my view, likely to have somewhat less inherent distinctive character, with a moderate degree likely to be a more appropriate

characterisation. However, when considered as a whole, the opponent's trade mark is, in my view, possessed of a medium degree of inherent distinctive character.

Likelihood of confusion

33. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle 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. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact 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.

34. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related. Earlier in this decision I concluded that:

- the competing goods are identical;
- the average consumer for the majority of goods at issue is a member of the general public over the age of 18, who will select such goods using a combination of visual and aural means, paying a reasonably high degree of attention during that process to the vast majority of the goods at issue;
- the letter "J" and word "WELL" make a roughly equal contribution to the overall impression conveyed by the opponent's trade mark and its distinctiveness;

- although the overall impression conveyed by the applicant's trade mark and its distinctiveness lies in the single word of which it is composed, some average consumers are likely to notice that it contains within it the word "WELL";
- the competing trade marks are visually similar to a fairly high degree and aurally similar to a fairly low degree;
- while for some average consumers the conceptual position will be neutral and for others the applicant's trade mark will convey a concept whereas the opponent's trade mark may not, for those average consumers who notice the presence of the word "WELL" in the applicant's trade, as the word "WELL" is a stand-alone component in the opponent's trade mark, it results in a moderate degree of conceptual similarity;
- although when considered as a totality the opponent's trade mark possesses a medium degree of inherent distinctive character, the word "WELL" alone possesses only a moderate degree of inherent distinctiveness for the majority of the opponent's goods.

35. 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 trade marks that are identical or similar. He stated:

"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.”

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

37. In reaching a conclusion, I begin by reminding myself that identical goods are in play and that the competing trade marks are visually similar to a fairly high degree and aurally similar to fairly low degree. I must also keep in mind that for the majority of the goods at issue the average consumer will pay a reasonably high degree of attention.

38. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginnings of words tend to have more visual and aural impact than their endings. I shall keep that guidance in mind.

39. I shall first consider the position from the perspective of an average consumer for whom the conceptual position is neutral. Even though such a consumer will pay a reasonably high degree of attention during the selection process, they will still, albeit to a lesser extent, be prone to the effects of imperfect recollection. That, combined with the overall degree of, in particular, visual similarity between the competing trade marks (including the degree of visual similarity between the letters “J” and “U”) and the lack of any conceptual hook to aid the average consumer’s recall is, in my view, likely to result in the average consumer mistaking one trade mark for the other i.e. there will be direct confusion.

40. For an average consumer who notices that the applicant’s trade mark includes the word “WELL”, its presence in both trade marks creates an obvious point of conceptual similarity in addition to the degree of visual and aural similarity I have already commented upon. Although that point of conceptual similarity is in relation to a component with only a moderate degree of inherent distinctive character, it simply creates a further point of overall similarity leading to the same conclusion.

41. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person explained the difference between direct and indirect confusion stating:

“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.”

42. In his Notice of opposition, the opponent argues that the differing first letters may be considered by the average consumer to:

“19...denote a new line extension of the WELL cigarettes or e-cigarettes already known to him...”

43. However, if the competing trade marks are not mistaken for one another, as they only coincide in respect of a word i.e. “WELL” which has only a moderate degree of inherent distinctive character, I think the opponent’s argument is, at best, speculative. Even for those average consumers who notice the applicant’s trade mark contains the word “WELL”, I think the likelihood of indirect confusion is remote.

Other considerations

The relevance of the applicant's evidence/absence of confusion

44. In his statement, Mr Xiao refers to the use the applicant has made of its "UWELL" trade mark in various countries including, since "early 2016", in the UK and he provides four exhibits in support. The relevance of this evidence is not, however, clear to me. As the opponent has not filed any evidence of any use he may have made of his earlier trade mark, it does nothing to, for example, assist me in assessing any potential argument based upon side-by-side trading. Mr Xiao further states:

"6...there have been no instances of actual consumer confusion in relation to the J WELL brand..."

45. However, this argument does not assist the applicant for the reasons explained in *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, in which Kitchen L.J. stated:

"80.the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side by side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur."

The relevance of the opponent's evidence

46. Having decided in the opponent's favour on the basis of the trade marks as registered and applied for, there is no need for me to comment upon the party's competing positions in relation to what they consider constitutes notional and fair use of their respective trade marks.

Overall conclusion

47. The opposition has succeeded and, subject to any successful appeal, the application will be refused.

Costs

48. As the opponent has been successful, he is entitled to a contribution towards his costs. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice ("TPN") 2 of 2016. Applying the above guidance, I award costs to the opponent on the following basis:

Preparing the Notice of opposition and reviewing the counterstatement:	£200
Preparing evidence and considering and commenting upon the applicant's evidence:	£500
Written submissions:	£400
Official fee:	£100
Total:	£1200

49. I order Shenzhen Uwell Technology Co., Ltd to pay to Olivier Sarfati the sum of **£1200**. This sum is to be paid within twenty one days of the expiry of the appeal period or within twenty one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated 23 July 2019

C J BOWEN

For the Registrar