

**O/405/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3449038  
IN THE NAME OF POLISHED BRANDS PTY. LTD.  
IN RESPECT OF THE TRADE MARK**

**GROW**

**IN CLASSES 3 AND 8**

**AND**

**OPPOSITION THERETO UNDER NO. 421269  
BY WATERMAN CORPORATE ENTERPRISES LIMITED**

## Background and pleadings

1. Polished Brands Pty. Ltd (“the applicant”) applied to register the trade mark no. 3449038 for the mark GROW in the UK on 4 December 2019. It was accepted and published in the Trade Marks Journal on 22 May 2020 in respect of the following goods:

*Class 3: Hair care preparations; Hair care products; Hair cleaning preparations; Hair colouring preparations; Hair conditioning preparations; Hair cosmetics; Hair grooming preparations; Hair lotions; Hair preparations; Hair preparations for colouring the hair; Hair preparations in aerosol form; Hair preparations in spray form; Hair products; Hair styling compositions; Hair styling preparations; Hair tinting preparations; Hair waving preparations; Non-medicated preparations for the care of the hair; Non-medicated preparations for use on the hair; Preparations for dressing the hair; Preparations for the cleaning of the hair; Conditioners in the form of sprays for the scalp; Gels for use on the scalp; Non-medicated preparations for the care of the scalp; Non-medicated scalp treatments; Preparations for the maintenance of the scalp; Preparations for the scalp (shampoo).*

*Class 8: Hair tools; hair styling apparatus; hair cutting and removal implements; hand tools and implements.*

2. Waterman Corporate Enterprises Limited (“the opponent”) partially opposes the trade mark in respect of all goods in class 3 on the basis of both section 3(1)(b) and (c) of the Trade Marks Act 1994 (“the Act”). The opponent argues that the mark GROW consists exclusively of a sign that will serve in trade to designate the intended purpose of the goods, namely “haircare preparations or products that allow hair to increase in length, thickness or quality”, and that it is devoid of distinctive character for the same reason.
3. The opponent also partially opposes the trade mark in respect of all of the class 3 goods filed on the basis of Section 5(2)(b) of Act. This is on the basis

of its earlier trade mark registrations listed in the table below. A full list of the goods relied upon is set out at paragraph 51 of this decision.

<b>Territory of protection<sup>1</sup></b>	<b>Trade Mark</b>	<b>Filing date</b>	<b>Registration date</b>	<b>Registration number</b>	<b>Goods relied upon</b>
EU	GROW ME	3/09/2015	18/12/2015	14528442	All goods (Class 3)
EU	GROW MORE	24/08/2016	9/12/2016	15774276	All goods (Class 3)
EU	GROWPRO	29/12/2016	21/08/2017	16215601	All goods (Class 3 & Class 5)

4. By virtue of the earlier filing dates, all three registrations relied upon constitute earlier marks under section 6 of the Act. As none of the earlier marks were over five years old at the time that the application was filed, section 6A of the Act is not applicable, and proof of use of the earlier marks is not required. The opponent is therefore entitled to rely upon its full list of goods within the opposition.
5. The opponent argues that the respective goods are all identical or similar to its earlier goods, and that the marks are all visually, phonetically and conceptually similar to a high degree. In addition, the opponent pleads that the three earlier marks constitute a family of marks, increasing the likelihood of confusion with the mark filed.
6. The applicant filed a counterstatement denying that the mark lacks distinctive character, denying that it is indicative of a characteristic of the goods, and denying that the mark is used generically to indicate the purpose of the products. The applicant requested that the opponent provides proof that the


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<sup>1</sup> Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 – please see Tribunal Practice Notice 2/2020 for further information.

consumer would view the mark as descriptive and provide proof that the mark is used generically in the way claimed.

7. The applicant also denied that the marks are confusingly similar. The applicant admitted that its mark is wholly incorporated in the earlier marks, but states this does not automatically render them confusingly similar. The applicant submits the marks are different conceptually, and that the additional visual and conceptual elements in the opponent's marks distinguish them from the applicant's mark. The applicant denies that the opponent owns a family of marks and denies that the ownership of three marks increases the likelihood of confusion. The applicant has admitted that some of the goods are identical but denies similarity in respect of the remaining goods. The applicant has requested from the opponent proof of "each and every factor that it relies upon to assert similarity of goods...".
8. Only the opponent filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. Both sides filed written submissions during the evidence rounds. These will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.
9. Both parties are professionally represented in these proceedings. The opponent is represented by Atkinson & Company Intellectual Property Limited, and the applicant is represented by Haseltine Lake Kempner LLP.
10. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

## Evidence

11. The opponent's evidence consists of a witness statement in the name of Alexandra Kathleen Reid. Ms Reid is described as an employee of the opponent's representative. The witness statement introduces a total of eight exhibits, namely Exhibit AKR1 to Exhibit AKR8.
12. Within the witness statement, Ms Reid explains that the opponent sells a range of hair products including shampoos and conditioners, as well as hair masks, sprays and vitamins.
13. **Exhibit AKR1** is a screenshot of the opponent's website from 9 July 2017 as provided via internet archiving website Wayback Machine. It shows products for sale under the marks GROWPRO, GROWMORE and GROWME. A growth serum is offered under the GROWMORE mark, vitamins are offered under the GROWPRO mark, and shampoos are offered under the GROWME mark. Prices are displayed in GBP. All of the products are offered under what appears to be the house mark , and the website address is <https://watermanshair.com/>.
14. Ms Read explains in her witness statement that the marks on the bottles have remained unchanged since the website displayed in Exhibit AKR1 was published. Further images of products are provided at **Exhibits AKR2, AKR3 and AKR4**. The packaging shown in these exhibits appears to display the same mark and products as shown on the website. These are as below:



15. The description besides the products describes these as “GROW ME SHAMPOO – HAIR GROWTH SHAMPOO WITH BIOTIN”, “GROW MORE ELIXIR – LUXURY HAIR GROWTH SERUM...” and “GROWPRO – BIOTIN PLUS HAIR VITAMENS + NAIL GROWTH FORMULA...”. The screenshots are undated and the prices are in GBP.
16. **Exhibits AKR5 and AKR6** are articles from the Independent Online dated 20 February 2019, and The Mirror dated 17 July 2020 respectively. Both articles appear to be in British publications on .co.uk domains. The first article recommends hair products “to help grow your hair or make it thicker” and includes a round-up of products including the opponent’s shampoo above. The second article does not appear to feature the opponent’s products, but describes a third party’s “super shampoo, conditioner and split end treatment that’s going to help your hair grow”. The article claims the products can help hair grow by an extra six inches in a year.
17. **Exhibit AKR7** comprises a print out from a third party’s website [www.hairburst.com](http://www.hairburst.com) that describes shampoo for “longer stronger hair”. The site explains that the products increase hair growth, and the product is offered in GBP. **Exhibit AKR8** is a print out from the website [www.superdrug.com](http://www.superdrug.com) showing a leave in conditioner product from a third party claiming to help hair

grow longer and stronger, available to purchase in GBP. The packaging states “FOR HAIR THAT GROWS LONGER”.

## **DECISION**

### **Section 3(1)(b) and 3(1)(c)**

18. I will begin with the assessment of the opposition in relation to the objection under sections 3(1)(b) and 3(1)(c) of the Act. I bear in mind that the above grounds are independent and have differing general interests. It is possible, for example, for a mark not to fall foul of section 3(1)(c), but still be objectionable under section 3(1)(d) and/or 3(1)(b) of the Act: *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 P at [25].

## **Legislation**

### **Section 3(1)**

“3(1) The following shall not be registered –

- (a) signs which do not satisfy the requirements of section 1(1),
- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for

registration, it has in fact acquired a distinctive character as a result of the use made of it.”

19. The position under 3(1)(b) and 3(1)(c) must be assessed from the perspective of the average consumer, who is deemed to be reasonably observant and circumspect: *Matratzen Concord AG v HuklaGermany SA*, Case C-421/04. In this instance I find the average consumer will consist of both hair care professionals and members of the general public.

### **Section 3(1)(c)**

20. I will begin with the examination of the trade mark under section 3(1)(c) of the Act.

### **General principles of section 3(1)(c)**

21. The case law under section 3(1)(c) (corresponding to article 7(1)(c) of the EUTM Regulation, formerly article 7(1)(c) of the CTM Regulation ) was set out by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch) as follows:

“91. The principles to be applied under art.7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in *Agencja Wydawnicza Technopol sp. z o.o. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services (as regards Article 3 of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade



marks ( OJ 1989 L 40 , p. 1), see, by analogy, [2004] ECR I-1699 , paragraph 19; as regards Article 7 of Regulation No 40/94 , see *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Wm Wrigley Jr Co* (C-191/01 P) [2004] 1 W.L.R. 1728 [2003] E.C.R. I-12447; [2004] E.T.M.R. 9; [2004] R.P.C. 18 , paragraph 30, and the order in *Streamserve v OHIM* (C-150/02 P) [2004] E.C.R. I-1461 , paragraph 24).

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94 . Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it (see, inter alia , *Henkel KGaA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (C-456/01 P) [2004] E.C.R. I-5089; [2005] E.T.M.R. 44 , paragraph 45, and *Lego Juris v OHIM* (C-48/09 P) , paragraph 43).

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services (see, to that effect, *OHIM v Wrigley* , paragraph 31 and the case-law cited).

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94 , it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes (*OHIM v Wrigley*, paragraph 32; *Campina Melkunie* , paragraph 38; and the order of 5 February 2010 in *Mergel and Others v OHIM* (C-80/09 P), paragraph 37).

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question (Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* [1999] ECR I-2779, paragraph 35, and Case C-363/99 *Koninklijke KPN Nederland* [2004] ECR I-1619, paragraph 38). It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration (*Koninklijke KPN Nederland*, paragraph 57).

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive (see, with regard to the identical provision laid down in Article 3 of Directive 89/104, *Koninklijke KPN Nederland*, paragraph 86, and *Campina Melkunie*, paragraph 19).

. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation (see, by analogy, *Koninklijke KPN Nederland*, paragraph 67), Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94 , the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word 'characteristic' highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics (see, by analogy, as regards the identical provision laid down in Article 3 of Directive

89/104, *Windsurfing Chiemsee*, paragraph 31, and *Koninklijke KPN Nederland*, paragraph 56).”

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned: see *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* (C-363/99 [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].”

22. In assessing the mark under section 3(1)(c), I keep in mind that the objective of this section of the Act is to ensure that signs designating a characteristic of the goods remain free for use by traders of those goods.

23. In respect of the opposition under section 3(1)(c), the opponent submits:

*“31. As noted previously, ‘Grow’ is an English verb meaning to increase in size. The intended purpose of hair care preparations and hair care products, and indeed all the goods listed in the Application, is to improve the quality, cleanliness and/or appearance of the hair. It follows that this includes hair products which affect hair growth.*

*32. ‘Grow’ in isolation must therefore be understood by the general public to be a term, when applied to hair products, to provide products which affect the nature in which hair grows.”*

24. The applicant does not dispute the meaning of GROW as being to increase in size or amount but adds that it also means to become more advanced or developed. However, the applicant denies that it directly describes a characteristic of the goods. The applicant submits:

*“4.6 Take, for example, shampoo, which is defined as “a soapy liquid that you use for washing your hair”. The purpose of shampoo is to clean hair; shampoo does not make hair grow. It is accepted that*

*haircare products, like shampoo, can be designed and purchased for the purpose of not only cleaning the hair but also to make it feel thicker or fuller, or to treat the scalp. This is demonstrated in the Opponent's evidence at Exhibit AKR5. However, the products may thicken the hair, or perhaps prevent the hair from breakage, but the products themselves do not actively make hair grow.*

*4.7 The name "GROW" is therefore not an apt descriptor of the Applicant's products, as would be "CLEAN" for shampoo, for example. Accordingly, during the purchasing process, the name "GROW" on a shampoo product could only be perceived by consumers as a brand name; it is not a direct reference to the goods themselves..."*

25. I will begin by assessing the mark GROW in relation to the applicant's goods below:

*Class 3: Hair colouring preparations; Hair preparations for colouring the hair; Hair tinting preparations;*

26. It is clear to me the purpose of products above is for altering the colour of hair. I have considered the opponent's argument that the consumer will readily understand the mark as identifying the affect the products will have on the hair, and it appears to me that the opponent is saying the mark, used in relation to these goods, will inform the consumer of the intended purpose of the goods to help hair grow. However, I do not believe that the average consumer of the goods would reasonably believe the sign GROW will indicate this characteristic of the goods when used on hair colouring products, which are clearly not for the purpose of growing hair. Reverting back to the purpose of the provision under section 3(1)(c), in the absence of any evidence on the contrary, it is my view that there is no real requirement for GROW to remain free for use in respect of the goods above, as traders will not reasonably require the use of the word GROW for describing products for hair colouring. Further, I do not see that this may be required in future.

27. In the absence of any convincing submissions or evidence in relation to hair colouring or tinting products, it is my view that the word 'GROW' could not be used to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods, or any other characteristics of the goods, and there is no requirement for it to remain free for use. GROW therefore does not fall foul of the provisions under 3(1)(c) in respect of these goods.

28. Next, I will consider the applicability of section 3(1)(c) to the applicant's goods below:

*Class 3: Hair styling compositions; Hair styling preparations; Hair waving preparations; Preparations for dressing the hair;*

29. The applicant has argued that the above goods are for the purpose of arranging or setting the hair, or making it appear wavy. Again, the opponent's argument in respect of all of the goods is that the word GROW would be understood by the public as referring to the products which affect the nature in which hair grows. I consider that styling products may be used by the consumer to give the hair lift or volume, and they may, in this respect, make the hair appear to be larger. However, it is my view that should this be the case, it will be due to the action of the consumer in using the products to style the hair in a particular way according to preference, and not due to a characteristic of the products themselves.

30. It is my view that the average consumer would not reasonably see GROW on hair styling products and without further consideration believe that these products will impact the way their hair grows. It is possible the consumer may consider the sign, and determine after some thought that the reference to GROW on the products alludes to the fact the products will assist them with styling their hair in a way that makes it appear to have a larger silhouette, perhaps due to a particularly good ability to lift or hold the hair. In this regard, I do note in the evidence provided by the opponent that there is a reference to

a styling liquid named “thicken up” that is designed for thinning hair.<sup>2</sup> However, I see nothing to indicate this product is for the purpose of growing hair, and I do not find this undermines my conclusions on these goods. I do not therefore, believe the mark is directly descriptive of a characteristic of the above goods, or that the consumer would believe it to be without further thought. Further, with consideration to the objective of this ground, I see no reason that the word GROW would need to remain free for other traders to use in respect of these goods. I therefore do not find the mark falls foul of section 3(1)(c) of the Act in relation to the goods above.

31. The remaining class 3 goods for consideration under this ground are as below:

*Class 3: Hair care preparations; Hair care products; Hair cleaning preparations; Hair conditioning preparations; Hair cosmetics; Hair grooming preparations; Hair lotions; Hair preparations; Hair preparations in aerosol form; Hair preparations in spray form; Hair products; Non-medicated preparations for the care of the hair; Non-medicated preparations for use on the hair; Preparations for the cleaning of the hair; Conditioners in the form of sprays for the scalp; Gels for use on the scalp; Non-medicated preparations for the care of the scalp; Non-medicated scalp treatments; Preparations for the maintenance of the scalp; Preparations for the scalp (shampoo).*

32. The opponent has provided evidence, albeit fairly limited evidence, showing various hair care products that claim to thicken or lengthen the hair. This includes two articles referring to the best products to buy to help the hair grow, showing various shampoos, conditioners, serums and scalp masks all of which claim to assist in making hair appear or get thicker, fuller or longer. In addition, there are two third party websites showing both shampoo and conditioner claiming to help grow the hair. I note that the evidence provided shows the words ‘thickening’ and ‘lengthening’ are more popular in relation to

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<sup>2</sup> Exhibit AKR5

the products, and whilst the articles use the word 'grow', it does not appear to be used as commonly by the product providers themselves. However, I also note that as is identified in the case law above, the fact that these terms are used more commonly in relation to the goods at present, is irrelevant to whether the word GROW will be viewed as descriptive of a characteristic of the goods and should remain free for use by other traders. I also note that the possible future use of the word in a descriptive manner must also be considered.

33. The word GROW is one that is commonly used, at least by the general public, in relation to the lengthening of hair, but I find it is also a word that would be easily understood by the average consumer in relation to new hair growth, for example increasing the number of strands of hair growing, or increasing the size of the thickness of the existing strands. The applicant submits that the goods for which protection is sought do not actively make the hair grow, and so GROW is not an apt descriptor of the products. However, the applicant has also stated that the products may thicken the hair. Considering both parties agreement that 'grow' means to increase in size, I see no reason why this does not apply in relation to thickening the hair in addition to lengthening it, or why the consumer would not see it this way. Whilst at a technical level, some of the thickening products may not actually make the hair itself get larger, rather than making it appear thicker, it seems to me that this distinction is not one that will be necessarily made by the general public looking for hair growth products to treat thinning hair. I find this is reinforced by the articles provided, in which hair 'thickening' products are being commented on and recommended as products to help the hair grow. Whilst this is not definitive, it does indicate that the public may see hair thickening products as products which help the hair to grow. In addition, even if I am wrong and this distinction is made, it is not always the case that these products claim to just make hair appear thicker, with some products claiming to directly encourage growth and increase length.

34. Taking into account the evidence that traders are already offering products for the purpose of increasing or encouraging hair growth, which fall into the



descriptions of the goods above, and bearing in mind the average consumer, it is my view that the use of GROW in respect of the above goods may immediately and reasonably be construed as indicating the products are for the purpose of helping the hair grow. Further, it is my view that other traders may reasonably wish to use the word GROW as part of a description of their goods to describe a characteristic of the product itself. I do not find that the fact some of these products may also have the dual purpose of cleaning the hair takes away from the word GROW describing a fundamental characteristic of the product. I consider that, for these reasons, the term GROW is descriptive and should remain free for use by other traders in relation to the goods above. The objection under section 3(1)(c) therefore succeeds in respect of the same.

### **Section 3(1)(b)**

35. I will now consider the opposition in relation to section 3(1)(b) of the Act.

### **General principles of section 3(1)(b)**

36. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by the CJEU in *OHIM v BORCO-Marken-Import Matthesen GmbH & Co KG* (C-265/09 P) as follows:

“29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37)."

37. The objective of section 3(1)(b) is to prevent marks that are incapable of serving to identify that goods derive from a single origin from being registered as trade marks. As stated in *Starbucks (HK) Ltd v British Sky Broadcasting Group plc*

(at para 46) descriptive signs are also devoid of any distinctive character. It, therefore, follows that to the extent that the opponent has succeeded under section 3(1)(c), it must also succeed based upon its section 3(1)(b) ground. For this reason, I find the mark GROW to be devoid of distinctive character under section 3(1)(b) in respect of the following goods:

*Class 3: Hair care preparations; Hair care products; Hair cleaning preparations; Hair conditioning preparations; Hair cosmetics; Hair grooming preparations; Hair lotions; Hair preparations; Hair preparations in aerosol form; Hair preparations in spray form; Hair products; Non-medicated preparations for the care of the hair; Non-medicated preparations for use on the hair; Preparations for the cleaning of the hair; Conditioners in the form of sprays for the scalp; Gels for use on the scalp; Non-medicated preparations for the care of the scalp; Non-medicated scalp treatments; Preparations for the maintenance of the scalp; Preparations for the scalp (shampoo).*

38. The opponent makes no independent claim as to why the mark is non-distinctive other than because it is claimed to be descriptive. This points to there being no need to consider the section 3(1)(b) ground separately to the section 3(1)(c) ground.<sup>3</sup>

39. Therefore, whilst recognising that section 3(1)(b) and section 3(1)(c) are independent of each other, the circumstances in this case are such that it is not necessary for me to consider separately the ground based upon section 3(1)(b).

40. I conclude that the ground based upon section 3(1)(b) succeeds partially and to the same extent as the ground based upon section 3(1)(c).

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<sup>3</sup> See the comments of Anna Carboni, sitting as the Appointed Person in O-363-09 *COMBI STEAM Trade Mark*

## **Section 5(2)(b)**

41. I will now move on to my assessment of the opposition in relation to section 5(2)(b) of the Act. This states 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”.

42. Although I have found partial success for the opponent under sections 3(1)(b) and 3(1)(c) of the Act above, for completeness I will consider the opponent’s case under section 5(2)(b) entirely, assuming as is required, that the marks meet the requirement of a minimum level of distinctive character under this ground. This way, if I am wrong about my findings under section 3(1)(c), section 5(2)(b) will have been considered in its entirety.

## **Section 5A**

43. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

## **The Principles of section 5(2)(b)**

44. The following principles are gleaned from the decisions of the Court of Justice of the European Union (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**

45. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the "Nice Classification" means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975."

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

(a) The respective 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.

47. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

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

48. 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 für 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”.

49. 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. 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 goods may be considered “complementary” where:

“...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”.



50. The case law provides further guidance on how the wording of goods and services as registered and filed should be interpreted within the comparison. 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."

51. With these factors in mind, the goods and services for comparison are below:

<b>Goods relied upon</b>	<b>Goods opposed</b>
<p><b>GROW ME</b>  <i>Class 3: Shampoo; Shampoos; Hair shampoo; Medicated shampoo; Dandruff shampoo; Hair shampoos; Body shampoos; Non-medicated shampoos; Non-medicated hair shampoos; Shampoos for personal use; Dandruff shampoos, not for medical purposes.</i></p>	<p><i>Class 3: Hair care preparations; Hair care products; Hair cleaning preparations; Hair colouring preparations; Hair conditioning preparations; Hair cosmetics; Hair grooming preparations; Hair lotions; Hair preparations; Hair preparations for colouring the hair; Hair preparations in aerosol form; Hair preparations in spray form; Hair products; Hair styling compositions; Hair styling preparations; Hair tinting preparations; Hair waving preparations; Non-</i></p>
<p><b>GROW MORE</b>  <i>Class 3: Shampoo; Shampoos; Dandruff shampoo; Waterless shampoo; Shampoo-conditioners; Hair rinses [shampoo-conditioners]; Skin conditioners; Cuticle conditioners; Lip conditioners; Hair conditioners; Hair moisturising</i></p>	

<p>conditioners; Conditioners in the form of sprays for the scalp; Conditioners for use on the hair; Conditioners for treating the hair; Hair conditioners for babies; Adhesives for affixing false hair; Adhesives for false eyelashes, hair and nails; Baby hair conditioner; Bleaches for use on the hair; Bleaching preparations for the hair; Color-removing preparations for hair; Colouring lotions for the hair; Conditioning preparations for the hair; Cosmetic hair care preparations; Cosmetic hair dressing preparations; Cosmetic hair lotions; Cosmetic hair regrowth inhibiting preparations; Cosmetic preparations for the hair and scalp; Cosmetics for the use on the hair; Creams for fixing hair; Dyes for the hair; False hair (Adhesives for affixing -); Gels for fixing hair; Gels for use on the hair; Hair balm; Hair balsam; Hair bleach; Hair moisturisers; Hair cream; Hair powder; Hair liquids; Hair texturizers; Hair frosts; Hair lighteners; Hair emollients; Hair serums; Hair care lotions; Hair care creams [for cosmetic use]; Hair care creams; Hair care agents; Hair bleaching preparations; Hair bleaches; Hair care lotions [for cosmetic use]; Hair care masks; Hair care preparations; Hair care preparations, not for medical purposes; Hair care serums; Hair cleaning preparations; Hair color; Hair color removers; Hair colorants; Hair coloring preparations; Hair colourants; Hair colouring; Hair colouring and dyes; Hair colouring preparations; Hair conditioner; Hair conditioner bars; Hair cosmetics; Hair sprays; Hair tonic; Hair shampoo; Hair glaze; Hair tonics; Hair lacquers; Hair spray; Hair moisturizers; Hair masks; Hair decolorants; Hair fixers; Hair wax; Hair mascara; Hair gel; Hair gels; Hair rinses; Hair mousses; Hair mousse; Hair pomades; Hair oils; Hairstyling serums; Hairstyling masks; Hair lotion; Hair lotions; Hair relaxers; Hair dye; Hair dyes; Hair nourishers; Hair creams; Hair decolorant preparations; Hair</p>	<p>medicated preparations for the care of the hair; Non-medicated preparations for use on the hair; Preparations for dressing the hair; Preparations for the cleaning of the hair; Conditioners in the form of sprays for the scalp; Gels for use on the scalp; Non-medicated preparations for the care of the scalp; Non-medicated scalp treatments; Preparations for the maintenance of the scalp; Preparations for the scalp (shampoo).</p>
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<p><i>permanent treatments; Hair protection lotions; Hair styling waxes; Hair styling lotions; Hair protection creams; Hair protection mousse; Hair treatment preparations; Hair grooming preparations; Hair dyeing preparations; Hair styling gels; Hair protection gels; Neutralizing hair preparations; Beauty serums; Serums for cosmetic purposes; Non-medicated skin serums; Scalp treatments (Non-medicated -); Non-medicated scalp treatment cream.</i></p>	
<p><b>GROWPRO</b></p> <p><i>Class 3: Shampoo; Shampoos; Waterless shampoo; Dandruff shampoo; Shampoo bars; Medicated shampoo; Baby shampoo; Shampoo-conditioners; Hair shampoo; Body shampoos; Waterless shampoos; Hair shampoos; Medicated shampoos; Dry shampoos; Pet shampoos; Non-medicated hair shampoos; Shampoos for personal use; Shampoos for human hair; Hair rinses [shampoo-conditioners]; Shampoos for pets; Shampoos for babies; Pets (Shampoos for -); Non-medicated shampoos; Shampoo for animals; Baby hair conditioner; Bleaches for use on the hair; Bleaching preparations for the hair; Color-removing preparations for hair; Colouring lotions for the hair; Conditioners for treating the hair; Conditioners for use on the hair; Conditioning preparations for the hair; Cosmetic hair care preparations; Cosmetic hair dressing preparations; Cosmetic hair lotions; Cosmetic hair regrowth inhibiting preparations; Cosmetic preparations for the hair and scalp; Cosmetics for the use on the hair; Creams for fixing hair; Dyes for the hair; False hair (Adhesives for affixing -); Gels for fixing hair; Gels for use on the hair; Hair balm; Hair balsam; Hair bleach; Hair cream; Hair bleaches; Hair texturizers; Hair nourishers; Hair frosts; Hair masks; Hair relaxers; Hair creams; Hair curling preparations; Hair decolorant</i></p>	

*preparations; Hair decolorants; Hair desiccating treatments for cosmetic use; Hair dressings for men; Hair dye; Hair dyeing preparations; Hair dyes; Hair emollients; Hair fixers; Hair fixing oil; Hair gel; Hair gels; Hair glaze; Hair grooming preparations; Hair lacquer; Hair lacquers; Hair lighteners; Hair liquids; Hair lotion; Hair lotions; Hair mascara; Hair spray; Hair sprays; Hair oils; Hair pomades; Hair rinses; Hair color; Hair colourants; Hair colouring; Hair conditioner; Hair conditioners; Hairdressing preparations; Hairstyling serums; Hairstyling masks; Hair wax; Hair tonic; Hair tonics; Hair colorants; Hair mousses; Hair mousse; Hair styling lotions; Hair treatment preparations; Hair conditioner bars; Hair care masks; Hair care serums; Hair protection gels; Hair protection lotions; Neutralizing hair preparations; Hair tinting preparations; Hair care agents; Hair styling gels; Hair straightening preparations; Hair styling preparations; Hair removing cream; Hair relaxing preparations; Hair permanent treatments; Hair styling gel; Hair colouring preparations; Hair waving preparations; Hair-washing powder; Hair cleaning preparations; Tints for the hair; Hair permanent wave kit; Hair care lotions; Hair conditioners for babies; Preparations for setting hair; Hair strengthening treatment lotions; Hair tonic [non-medicated]; Hair preparations and treatments; Non-medicated hair lotions; Oils for hair conditioning; Hair colouring and dyes; Styling paste for hair; Hair piece bonding glue; Styling gels for the hair; Styling sprays for the hair; Wax treatments for the hair; Products for protecting coloured hair; Preparations for protecting coloured hair; Non-medicated balm for hair; Preparations for permanent hair waves; Hair tonics [for cosmetic use]; Hair tonic [for cosmetic use]; Mousses being hair styling aids; Oil baths for hair care; Hair care lotions [for cosmetic use];*

*Hair care creams [for cosmetic use]; Refill packs for hair fixer dispensers; Hair preservation treatments for cosmetic use; Waving preparations for the hair; Japanese hair fixing oil (bintsuke-abura); Hair care preparations, not for medical purposes; Mousses [toiletries] for use in styling the hair; Preparations for protecting the hair from the sun; Hydrogen peroxide for use on the hair.*

**Class 5:** *Food supplements; Dietary food supplements; Mineral food supplements; Medicated food supplements; Anti-oxidant food supplements; Mineral supplements to foodstuffs; Food supplements for medical purposes; Food supplements for veterinary use; Antibiotic food supplements for animals; Food supplements for dietetic use; Food supplements for non-medical purposes; Food supplements consisting of amino acids; Food supplements consisting of trace elements; Medicated supplements for foodstuffs for animals; Health food supplements made principally of vitamins; Health food supplements made principally of minerals; Vitamin preparations in the nature of food supplements; Bee pollen for use as a dietary food supplement; Health food supplements for persons with special dietary requirements; Prenatal vitamins; Gummy vitamins; Preparations of vitamins; Dietary supplements consisting of vitamins; Vitamins and vitamin preparations; Hair growth stimulants; Hair growth preparations (Medicinal -); Medicinal hair growth preparations; Medicinal preparations for stimulating hair growth; Anti-fungal dermatological preparations for use on the nails; Nail care preparations for medical use; Nail fungus treatment preparations; Nail sanitizing preparations; Preparations for preventing nail biting; Preparations to prevent nail-biting; Human growth hormone; Medicated skin creams; Skin*

<p>care (Pharmaceutical preparations for -);  Medicinal creams for skin care; Medicated preparations for skin treatment; Pharmacological preparations for skin care; Skin care creams for medical use; Skin care preparations for medical use; Medicated ointments for application to the skin; Medicinal creams for the protection of the skin; Dietary supplements; Zinc dietary supplements; Wheat dietary supplements; Enzyme dietary supplements; Alginate dietary supplements; Glucose dietary supplements; Lecithin dietary supplements; Casein dietary supplements; Protein dietary supplements; Yeast dietary supplements; Propolis dietary supplements; Pollen dietary supplements; Albumin dietary supplements; Linseed dietary supplements; Flaxseed dietary supplements; Dietary food supplements; Dietary supplements for infants; Dietary and nutritional supplements; Dietary supplements for pets; Wheat germ dietary supplements; Royal jelly dietary supplements; Soy protein dietary supplements; Dietary supplements for animals; Linseed oil dietary supplements; Soy isoflavone dietary supplements; Health food supplements for persons with special dietary requirements; Dietary pet supplements in the form of pet treats; Dietary supplements for pets in the nature of a powdered drink mix; Hair growth stimulants; Medicated hair care preparations; Medicinal hair growth preparations; Medicinal hair growing preparations; Hair growth preparations (Medicinal -); Medicinal preparations for stimulating hair growth; Preparations for destroying lice in the hair.</p>	
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52. Within its written submissions, the applicant has accepted that all of the goods under the subject mark are either identical or similar to the opponent's earlier goods but it has not particularised this statement further. Therefore, I must still

determine which goods are identical, which goods are similar and to what extent the similarity exists.

## **GROW ME**

***Contested goods: Hair care preparations; Hair care products; Hair cleaning products; Hair preparations; Hair products; Non-medicated preparations for the care of the hair; Non-medicated preparations for use on the hair; Preparations for the scalp (shampoo)***

53. The opponent submits that the goods above are identical to those covered by its earlier mark. I agree with the opponent that all of the above goods incorporate the opponent's goods, including, amongst other goods, *Non-medicated shampoos*. I therefore find the above goods to be identical to the opponent's goods covered by this earlier mark within the meaning of *Meric*.

***Contested goods: Preparations for the cleaning of the hair;***

54. This term does not appear to have been identified specifically by the opponent, but it appears obvious to me that this term includes the opponent's goods, including, amongst others, *Shampoos*. I therefore find identity under *Meric*.

***Contested goods: Hair cosmetics; Hair grooming preparations; Non-medicated preparations for the care of the scalp; Non-medicated scalp treatments; Preparations for the maintenance of the scalp.***

55. The opponent has submitted these goods are highly similar to its own. It is my view that the above categories of goods covered by the applicant will include the opponent's *Hair Shampoos* and *Dandruff shampoos* as well as other goods under this mark, and as such I accept the opponent's submission and I find the above goods are at least highly similar to those covered by the opponent under this mark.

***Contested goods: Hair preparations in spray form; Hair preparations in aerosol form;***

56. Again, the opponent has submitted these goods are highly similar to its goods under this mark. It is my view that the above goods will include items such as dry shampoo, and shampoo in aerosol or spray form. I therefore again accept that the opponent's submission and I find these goods are at least highly similar to those covered by the applicant in this instance.

***Contested goods: Hair conditioning preparations; Conditioners in the form of sprays for the scalp;***

57. Whilst I note that the above goods, or at least *Hair conditioning preparations* could be construed as including shampoo for the conditioning of the hair, I find this to be straining the ordinary meaning of the term. Instead, I find the goods above to include hair conditioners in all forms including spray form. Hair conditioners are often bought together with the opponent's *hair shampoos* by the same users, and will frequently share trade channels, manufacturers, and be provided by the same entities as hair shampoos. They are both for the broader purpose of improving the appearance of the hair, although at a deeper level the purpose may differ slightly, be it for cleaning or improving condition. The goods will all generally be applied to the hair and rinsed out. The goods will be placed next to each other on shelves in supermarkets and in other stores. Overall, I find the goods to be similar to a high degree.

***Contested goods: Hair styling compositions; Hair styling preparations; Preparations for dressing the hair; Hair waving preparations; Gels for use on the scalp; Hair lotions;***

58. Whilst the above goods may share a similar nature, and a similar purpose at a broader level to the opponent's shampoo, for improving the look of the hair, the above goods will be for the purpose of creating a particular style, rather than making the hair appear clean or shiny. However, I find these goods will often be provided by the same entities as the opponent's shampoo, and will



be placed at least in the same section, if not directly next to each other in the shops. I find these goods to be similar to the opponent's to a medium degree.

***Contested goods: Hair colouring preparations; Hair preparations for colouring the hair; Hair tinting preparations;***

59. Again, whilst the above goods may share a similar nature, and a similar purpose at a broader level to the opponent's shampoo, for improving the look of the hair, the above goods will be for the purpose of changing the colour of the hair, which will generally differ from the purpose of shampoo. However, I find these goods will often be provided by the same entities as the opponent's shampoo and will be placed at least in the same section of larger supermarkets, and generally near each other in more focused shops. Overall, I find these goods to be similar to the opponent's goods to a medium degree.

## **GROW MORE**

***Contested goods: Hair care preparations; Hair care products; Hair cleaning preparations; Hair colouring preparations; Hair conditioning preparations; Hair cosmetics; Hair grooming preparations; Hair lotions; Hair preparations; Hair preparations for colouring the hair; Hair preparations in spray form; Hair products; Hair styling compositions; Hair styling preparations; Non-medicated preparations for the care of the hair; Non-medicated preparations for use on the hair; Preparations for dressing the hair; Preparations for the cleaning of the hair; Conditioners in the form of sprays for the scalp; Gels for use on the scalp; Non-medicated preparations for the care of the scalp; Non-medicated scalp treatments; Preparations for the maintenance of the scalp; Preparations for the scalp (shampoo).***

60. The opponent submits that all of the above goods are identical to those covered by the opponent's registration for GROW MORE. I agree that all of the above goods are either directly identical to those covered by the opponent's earlier goods, or that the opponent's goods fall into a broader

category of the applicant's goods, or vice versa, and are therefore identical under *Meric*.

***Contested goods: Hair preparations in aerosol form; Hair tinting preparations; Hair waving preparations;***

61. The opponent argues that the above goods are highly similar to those covered under its earlier mark GROW MORE. It is my view that *Hair preparations in aerosol form* as covered by the applicant will include the opponent's goods such as *Hair spray*. In addition, I find goods such as *Cosmetics for the use on the hair*; and *Dyes for the hair* covered by the opponent's earlier mark will include *Hair tinting preparations* filed. I also find that the opponent's goods such as *Hairstyling serums; Creams for fixing hair* and *Cosmetic hair dressing preparations* may all include the applicant's *Hair waving preparations* in class 3. I therefore accept the opponent's submission, and I find these goods to be similar to at least a high degree to those under the earlier mark GROW MORE.

## **GROWPRO**

***Contested goods: Hair care preparations; Hair care products; Hair cleaning preparations; Hair colouring preparations; Hair conditioning preparations; Hair cosmetics; Hair grooming preparations; Hair lotions; Hair preparations; Hair preparations for colouring the hair; Hair preparations in spray form; Hair products; Hair styling compositions; Hair styling preparations; Hair tinting preparations; Hair waving preparations; Non-medicated preparations for the care of the hair; Non-medicated preparations for use on the hair; Preparations for dressing the hair; Preparations for the cleaning of the hair; Gels for use on the scalp; Non-medicated preparations for the care of the scalp; Non-medicated scalp treatments; Preparations for the maintenance of the scalp; Preparations for the scalp (shampoo).***

62. The opponent submits all of the above goods are identical to those covered by its earlier mark GROWPRO. It is my view that all of the above goods are included identically within the opponent's specification, either directly, or under *Meric*.

***Contested goods: Hair preparations in aerosol form; Conditioners in the form of sprays for the scalp;***

63. The opponent submits the above goods are highly similar to the goods covered by its earlier mark GROWPRO. It is my view that *Hair care preparations, not for medical purposes*; as covered by the opponent under this mark includes the applicant's goods *Hair preparations in aerosol form*. Further, it is my view that the goods *Conditioners in the form of sprays for the scalp* will be included within the opponent's *Hair care preparations, not for medical purposes* or alternatively within *Cosmetic preparations for the hair and scalp* as I find conditioners for the scalp are likely to be products for applying to the scalp to improve the appearance and condition of the hair and scalp. However, if I am wrong, alternatively I find *Conditioners in the form of sprays for the scalp* will share a similar nature to the goods *Conditioners for treating the hair*; included within the opponent's specification, both being conditioners, and that they will share the purpose of treating or enriching and improving the condition and appearance of the hair or skin on the head. I find it likely these products would be sold by the same entities, via the same trade channels, and that they would be located next to, or at least near each other in shops. I therefore accept the opponent's submissions and find the above goods to be at least highly similar to those under the opponent's earlier mark GROWPRO.

**Comparison of the marks**

64. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by

reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

66. The respective trade marks are shown below:

Earlier trade marks	Contested trade mark
<p style="text-align: center;">GROW ME</p> <p style="text-align: center;">GROW MORE</p> <p style="text-align: center;">GROWPRO</p>	<p style="text-align: center;">GROW</p>

67. The first two earlier marks namely GROW ME and GROW MORE are made up of two English words. The mark GROW ME appears to be instructive, and the overall impression resides in the mark as a whole. In respect of the mark GROW MORE, again the overall impression of the mark resides in the

combination of the two words, with MORE acting as an intensifier to the word GROW.

68. The third earlier mark is presented as the single word GROWPRO. Despite its presentation as a single word, the mark comprises two clearly identifiable elements, namely GROW and PRO. Alone, each element alone has no, or very low distinctive character, and the overall impression resides in the combination of the two elements.

69. The contested mark comprises one single English word GROW, and this is where the overall impression resides.

### **Visual comparison**

70. The contested mark is included within all three earlier marks in its entirety and is the first element in each mark. The earlier marks differ at the end of the marks through the use of 'MORE', 'ME' and 'PRO', which changes the length of the marks to varying degrees. With the addition of only two extra letters, I find the earlier mark GROW ME to be visually similar to the contested mark to between a medium and high degree. Considering the slightly increased number of letters in the marks GROWPRO and GROW MORE, I find these visually similar to the contested mark to a medium degree.

### **Aural comparison**

71. All of the marks begin with the single syllable and recognisable English word GROW. Whilst this is the contested mark in its entirety, the earlier marks all include a second syllable, namely 'MORE', 'ME' and 'PRO'. I find all three earlier marks to be aurally similar to the contested mark to a medium degree.

## Conceptual comparison

72. The contested mark is the English word GROW. The word GROW will most likely be viewed as reference to an increase in size. In the context of at least a large portion of the goods, the mark may be understood by the consumer as referring to the products increasing the length or thickness of the hair.
73. The earlier mark GROW ME includes the same concept of increasing in size, however, this mark appears is framed as instructive, or referring to something in particular. In the context of the goods, this is still likely to be understood by the consumer as a reference to hair or hair follicles, albeit with the slightly unusual context of the instruction coming from the hair or hair follicle itself.
74. The earlier mark GROW MORE will again convey to the consumer the concept of growth, but on a larger scale, and in the context of the goods the mark will convey to the consumer that the product may assist with growing hair, but the addition of 'MORE' suggests these may assist with growing more hair than other products offering this promise, or that the user's hair will grow more than if they did not use the product.
75. The earlier mark GROWPRO conveys the concept of growth (as above), and that the product is of professional quality or produces professional results. Although the words are combined as one, it is my view that these two concepts would be easily understood in the mark, and when combined, would produce the same concept of growth or hair growth of a professional quality.
76. Considering the concept of the earlier marks and the contested mark all primarily concern growth, I find the marks all to be conceptually similar to a degree. In respect of GROWPRO, I find the conceptual similarity to be high due to the identical concept of to grow being included in both marks, with 'pro' conveying only a weaker concept that the products are of a professional standard. GROW MORE also conveys the concept of growth, but this is intensified in the later mark through the use of MORE, and the marks remain conceptually similar to a fairly high degree. I find the slightly more unusual

context of GROW ME helps to change the concept slightly from GROW alone, but I find the marks GROW and GROW ME remain conceptually similar to at least a medium degree.

### **Average consumer and the purchasing act**

77. 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.

78. 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.”

79. Before deciding on the likelihood of confusion, I must first identify the relevant consumer of the goods.

80. In this instance, I find the goods will be purchased by both members of the general public, as well as hair care professionals. The goods themselves are all items that may be purchased fairly frequently by both groups.

81. In respect of members of the general public, whilst it might be true that some consumers will pay a higher than average level of attention to the goods on the basis of having particular skin conditions or allergies, for the most part the consumer will have no reason to pay a particularly high level of attention. In respect of shampoos and conditioners and other hair creams and styling items, the consumer may contemplate the promises offered by the product before purchasing them, whether they be aimed at making the hair appear shiny, soft, healthy or otherwise, but on the whole the price point of the products will be relatively low and the consumer is likely to pay a below average level of attention in respect of the same. In respect of the products for dying or colouring hair, I find the fact that the products will result in at least a semi-permanent and immediate change to the consumers appearance may increase the level of attention slightly, and the consumer will likely consider factors such as the particular shade and longevity offered by the product. However, I do not find the products, which will be relatively low cost, will warrant a particularly high level of attention, and I find the level of attention paid will be average.

82. I find the professional consumer, namely hair care providers or stockists, will likely pay a higher level of attention due to the increased responsibility and liability that comes with using products on client's, and will likely pay closer attention to the ingredients, chemicals and reviews of the products being purchased. For these reasons, I find the professional consumer will likely pay an above-average to high level of attention in respect of the goods.

83. I find the goods will generally be purchased visually, in retail stores, online, or in the case of professionals from online wholesale stores or via brochures, but verbal recommendations may also play a part in the purchasing process, both between professionals and between members of the general public, but also in the case of recommendations from hairdressers to their clients. The visual comparison is therefore of primary importance, but I cannot ignore the aural comparison.



## Distinctive character of the earlier trade mark

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

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

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

85. All three earlier marks include elements that will be easily understood by the consumer. The earlier mark GROW ME is the most distinctive of the three marks in relation to the shampoos covered, due to the slightly unusual context meaning the mark appears to be an instruction given from the hair itself. However, I still find that for the goods covered by this earlier mark it will hold a low degree of distinctive character due to its reference to the purpose of the

products, with the exception of the earlier goods body shampoo, for which I find this mark to hold an average degree of distinctive character.

86. In respect of hair care preparations, including items such as shampoos and conditioners, the earlier mark GROW MORE is likely to be perceived by the average consumer as a reference to growing more hair, and I therefore find this to mark to hold at best a low degree of distinctive character in respect of these goods. In relation to the goods for colouring or styling the hair, I find the idea of growing hair to be slightly further removed, but I note the mark may be viewed as allusive of increasing the hairs size or silhouette in relation to styling products. Whilst the mark does not appear descriptive in relation to hair colouring items, the concept of hair growth may still allude to the idea of the products being kinder to the hair, and so it will still not be overly distinctive. In respect of these goods, I find the mark to hold a below average degree of distinctive character.

87. Although I note the mark GROWPRO appears as a single word, I find this does little to increase its inherent distinctive character, as the mark will be understood by the consumer as comprising of two elements, GROW and PRO. The opponent argues that the fact that the first and second element rhyme add to the marks distinctive character, but it is my view that any increase to the distinctive character on this basis will be marginal. Again, the mark will be perceived as relating to the growing of hair and the professional standard of the product, and I find that the mark holds at best a low degree of distinctive character in respect of hair care preparations including shampoos and conditioners. However, again I find the concept of growing hair may be viewed as slightly more unusual in respect of products for colouring and styling the hair, but for the same reasons given in respect of these goods under the mark GROW MORE, I find the mark is inherently distinctive to a below average degree in relation to the same. For completeness, I also note here that in respect of the additional goods covered by this mark in relation to class 5, namely vitamin and dietary supplements for hair growth, the mark will also be inherently distinctive to only a low degree due to its message about growth to the consumer.

88. I note the opponent has filed some evidence of the use of its earlier mark. Whilst it appears that the marks may have been used in the UK, the extent of the use and promotion of the same is unclear from the evidence filed. I do not find from the evidence provided that the distinctive character of the earlier marks has been enhanced through use.

### **Family of marks**

89. The opponent has pleaded that its three earlier marks relied upon constitute a family of marks. All three marks begin with the identical element GROW, followed by a second word. It appears, *prima facie*, that the marks may be capable of constituting a family. In order for a family of marks argument to succeed, the trade marks constituting that family must be present on the market.<sup>4</sup> I note that the opponent's goods under the marks do appear to be available for purchase on the UK market. However, I find the evidence of this to be so limited (no evidence relating to any actual sales has been provided), that it is impossible to determine to what extent they are *present* on the market and to what extent, if any, the consumer has been exposed to all three marks. For this reason, I reject the opponent's claim to a family of marks.

### **GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.**

90. Prior to reaching a decision under Section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 44 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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 they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind

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<sup>4</sup> *Il Ponte Finanziaria SpA v OHIM*, Case 234/06 at paragraph 64

their distinctive and dominant components. I must consider that the level of distinctive character held in the earlier marks will have an impact on the likelihood of confusion. I must consider that the likelihood of confusion may be increased where the distinctive character held in the earlier mark is high and may be less likely where it is low. I must remember that the distinctive character of the earlier mark may be inherent, but that it may also be increased through use, and that the distinctiveness of the common elements is key.<sup>5</sup> I must keep in mind that a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the goods or services are obtained will have a bearing on how likely the average consumer is to be confused.

91. I consider at this point that there are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.<sup>6</sup>

92. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), 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 to mind another mark. This is mere association not indirect confusion.

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<sup>5</sup> See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

<sup>6</sup> *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

93. I found the distinctiveness of the earlier marks to range between low (at best) and average. I found the average consumers will include both members of the general public as well as hair care professionals and stockists, and I found the level of attention paid to the goods will range from below average to above average, depending on both the product and the consumer. I found the marks to be visually similar to either a medium or medium to high degree, to be aurally similar to a medium degree, and to be conceptually similar to between at least a medium to a high degree. I found the goods ranged from similar to at least a medium degree, to identical. I found the goods will generally be purchased following visual inspection, but that verbal recommendations may also play a part in the purchasing process.

## **GROW ME**

94. I will begin by considering the position in respect of direct confusion with the opponent's earlier mark GROW ME. I note the marks coincide both visually and aurally at the beginning of the marks where the consumer tends to pay more attention. I consider that I found the element 'ME' in the later mark created a slightly unusual context of an instruction from the hair itself, and I consider that this weighs against the opponent, as it will help the consumer to remember the mark as a whole. However, I still found that the marks were conceptually similar to at least a medium degree on the basis that the word GROW featured in each mark. In addition, I found the mark GROW ME is visually similar to the contested mark to between a medium and high degree. I consider also that a number of the goods are identical or highly similar under this mark, as well as that some are similar to at least a medium degree, and also that the consumer will pay a below average to average level attention to the same. However, whilst keeping in mind the consumers imperfect recollection, after weighing up all of the factors, it is my view that the differences between the marks visually and aurally by way of the additional word 'me', as well as the change in context of the mark and the earlier marks low degree of inherent distinctive character, will mean the consumer will notice and remember the differences between the marks, and not directly

mistake one mark for the other. On this basis, I find there is no likelihood of direct confusion between these marks.

95. Next, I consider the position in respect of indirect confusion with the earlier mark GROW ME. I consider again the relevant factors as outlined above, and I consider if the use of the common element GROW in each of the marks will cause the consumer to be confused into thinking the products derive from the same economic undertaking. However, I note firstly that the common element 'GROW' holds only a low level of distinctive character in respect of the goods covered by this mark in the context of this ground, and I consider that the element GROW hangs together with 'ME' in the earlier mark to create an instruction. It does not appear to be an independent indication of origin in the earlier mark, and I do not find the addition of 'me' in the earlier mark, or the omission of such in the later mark, to be a logical or natural brand extension. It is my view that should the consumer make the connection between the products based on the use of the word 'GROW' in each mark, any connection made will be mere association and will not be put down to the marks deriving from the same economic undertaking, and I therefore do not find a likelihood of indirect confusion in respect of these marks.

## **GROW MORE**

96. In respect of the earlier mark GROW MORE I will again start by considering if I find there will be direct confusion between this mark and the contested mark GROW. I consider that I have found conceptual similarity between these marks to be fairly high, with the identical concept of growth merely intensified by the addition of 'MORE' in the earlier mark. However, I also consider that I have found the visual similarities to be lower, with a medium degree of both visual and aural similarity between the marks. Whilst I note I have found identity between some of the goods, it is my view in this instance that the visual and aural differences between the marks will mean that the consumer will not directly mistake one mark for the other, even where only a below average level of attention is paid towards the goods. I do not believe the consumer will forget or ignore the addition (or omission) of a second four letter

word in this instance, or that it will go unnoticed, and it is my view that with consideration to all of the relevant factors, there will be no likelihood of direct confusion in the case of these marks. I will therefore move on to consider the likelihood of indirect confusion in respect of the same.

97. I consider that the word 'GROW' is included identically and in the same position in the earlier mark GROW MORE as it is in the contested mark. I consider that I found GROW MORE to hold only a low to below average degree of distinctive character in respect of the goods. However, I consider that the marks share a fairly high level of conceptual similarity, and that the second word 'MORE' in the earlier mark acts as an intensifier to the shared word 'GROW'. I consider on this basis that GROW MORE lends itself easily to a brand extension or sub brand of the contested mark GROW, on the basis that it indicates this product will result in the growth of *more* hair suggesting to the consumer it may simply be an improved or more effective product than one under the mark GROW due to the shared concept of the initial word merely being intensified by the second element. I note here that, although the earlier mark is the one that appears to be a sub brand, the concept of "wrong way round" confusion means this is irrelevant to the outcome.<sup>7</sup> I note the identity and high level of similarity between the goods and I find that, despite the low level of distinctive character in the earlier mark, it is my view the consumer would be likely to be confused into thinking that these two marks derived from the same economic undertaking. I therefore find a likelihood of indirect confusion between the earlier mark GROW MORE and the contested mark GROW in respect of all of the goods.

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<sup>7</sup> See case C-12/12 *Colloseum*, regarding "wrong way round confusion", referring to *Comic Enterprises v Twentieth Century Fox* [2016] EWCA 41 at §§75-84. In that case Kitchin LJ explained at §80: 80. "...whether a particular instance of confusion is "right way round" or "wrong way round" may be a consequence of nothing more meaningful than the order in which the consumer happened to come across the mark and the sign. Further, in both cases the consumer thinks that the goods or services in issue come from the same undertaking or economically linked undertakings, and they may be equally damaging to the distinctiveness and functions of the mark."

## GROWPRO

98. Whilst I note the opponent has already succeeded on this ground on the basis of its earlier mark GROW MORE, for completeness I will also consider its position in respect of the earlier mark GROWPRO. In respect of direct confusion, I note that the overall impression of the earlier mark resides in the combination of the two known words GROW and PRO to make GROWPRO. I found that the marks are visually and aurally similar to a medium degree, but that they are conceptually similar to a high degree, and I note the shared concept may stick in the consumers mind. Further, I found that the goods were either identical or highly similar under this mark, meaning the differences between the marks may be greater and confusion still be found. I note that element 'PRO' in the earlier mark is a laudatory word short for 'professional', however, I did not find the consumer will disregard this element of the earlier mark. Whilst I note the laudatory nature of this element may make it less memorable to the consumer, particularly with consideration to the imperfect recollection and the below average level of attention paid, I consider this in the context of the mark as a whole. I consider that PRO is joined with GROW as a single word, and that the element GROW itself also holds a below average level of distinctiveness in relation to the goods. I find these factors mean the consumer is more likely to remember the earlier mark in full, and therefore not be directly confused between the marks. Overall, and with consideration to all of the relevant factors, I do not find a likelihood of direct confusion between the mark earlier GROWPRO and the contested mark GROW.

99. I consider finally the position in respect of indirect confusion between the earlier mark GROWPRO and the contested mark GROW. Whilst I note that GROWPRO is filed as one word, I do not find this will prevent consumers from identifying the common element GROW in the two marks. I consider the examples of when indirect confusion may occur as set out by Mr Ian Purvis QC sitting as the Appointed Person in *L.A. Sugar (O/375/10)*, and whilst I note the examples are not determinative nor exhaustive, I do find this mark falls within category (b) as described by Mr Purvis Q.C. as follows:



“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).”

100. With consideration to all of the relevant factors, is my view that mark GROWPRO easily lends itself to a sub brand or brand extension in respect of all of the goods under the mark GROW in respect of a more professional or advanced range of the goods. Again, I find the fact that the sub brand in this instance appears to be the earlier mark is of no consequence to my finding. With consideration to all of the relevant factors, including both the level of distinctiveness of the earlier marks, I find a likelihood of indirect confusion between these marks in respect of all of the earlier goods.

## Final Remarks

101. The opposition under section 3(1)(b) and 3(1)(c) has achieved partial success for the opponent. The opposition under section 5(2)(b) has also been considered in full, and this has led to success for the opponent in respect of all of the goods opposed.
102. Subject to a successful appeal, the application will be refused for all goods in class 3 and will proceed to registration for the unopposed goods in class 8 only.

## COSTS

103. The opponent has been successful and is entitled to a contribution towards its costs. In the circumstances I award the opponent the sum of £1100 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee:	£200
Preparing and filing TM7 and considering the counterstatement:	£500
Preparing and filing written submissions:	£400
<b>Total:</b>	<b>£1100</b>

104. I therefore order Polished Brands Pty. Ltd to pay Waterman Corporate Enterprises Limited the sum of **£1100**. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 28<sup>th</sup> day of May 2021**

**Rosie Le Breton  
For the Registrar**