O-745-22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3590837

BY MY FABULOSA LTD

AND

OPPOSITION THERETO

UNDER NO. 425213

BY POUNDSTRETCHER LIMITED

Background and pleadings

1. This is an opposition against trade mark application number 3590837, shown below ("the contested mark"):

1, 3, 4, 5, 11, 16, 18, 20, 21, 24, 25, 39 and 40.

2. The application is opposed in part by Poundstretcher Limited ("the opponent") under s. 5(4)(a) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against the following goods and services in classes 1, 3, 5, 21, 24 and 40:[1]

> Class 1: Additives (chemical -) for use in the disinfection of water; detergents having disinfectant properties for use in manufacturing processes.
>
> Class 3: Cleaning sprays; cleaning fluids; cleaning foam; cleaning chalk; chalk (cleaning -); cleaning preparations; floor cleaning preparations; oven cleaning preparations; carpet cleaning preparations; window cleaning compositions; glass cleaning preparations; wallpaper cleaning preparations; caustic cleaning agents; foam cleaning preparations; dry cleaning preparations; windshield cleaning liquids; windscreen cleaning liquids; household cleaning substances; hand cleaning preparations; windscreen cleaning preparations; dry-cleaning preparations; windscreen cleaning fluids; automobile cleaning preparations; toilet cleaning gels; lavatory cleaning compositions; vehicle cleaning preparations; carpet freshening

[1] The opposition was narrowed in the opponent's skeleton argument (at [5]).

preparations; soaps for personal use; glass cloth [abrasive cloth]; emery cloth; abrasive cloth; glass cloth.

Class 5: Air fresheners; air freshener sprays; car air freshener; air freshener refills; car air fresheners; air-freshening preparations; air refresheners; air deodorisers; air deodorants; air deodorizer; air deodorising and air purifying preparations; air purifying preparations; disinfectants; disinfecting handwash; disinfectant swabs; disinfectant soap; disinfectant dressings; sticks (sulphur -) [disinfectants]; contact lens disinfectants; sulfur sticks [disinfectants]; sulphur sticks [disinfectants]; disinfectants and antiseptics; disinfectants for medical instruments; disinfectants for hygienic purposes; disinfectants for sanitary purposes; fumigating sticks as disinfectants; disinfectants for chemical toilets; disinfectants for household use; disinfectants for swimming pools; disinfectants impregnated into tissues; disinfectants for hygiene purposes; disinfectants for contact lenses; disinfectants for medical use; disinfectants for sanitary use; sulphur sticks as disinfectants; washes (disinfectant -) [other than soap]; solutions for disinfecting contact lenses; disinfectants for medical apparatus and instruments; disinfectants for dental apparatus and instruments; disinfectants for medical apparatus and instruments; cleaning cloths impregnated with disinfectant for hygiene purposes.

Class 21: Cleaning brushes; cleaning rags; cleaning leathers; cleaning articles; cleaning pads; cleaning cloths; cleaning combs; cleaning tow; cleaning sponges; cleaning cotton; cleaning cloth; lintless cleaning cloths; bottle cleaning brushes; brushes for cleaning; pot cleaning brushes; cloths for cleaning; rags for cleaning; squeegees [cleaning instruments]; eyeglass cleaning cloths; buckskin for cleaning; carpet-cleaning brushes; glass cleaning implements; pads for cleaning; air fragrancing apparatus; dish cloths; floor cloths; scouring cloths.

Class 24: Cloths; cloth; disposable cloths; linen cloth; cotton cloths rubberized cloth; rubberised cloth.

Class 40: Air freshening; air deodorising; air treatment; air regeneration; air deodorizing; air purification; regeneration of air.

3. The opponent relies upon use since 5 December 2020 of two signs in relation to "household cleaning products; oven cleaners; kitchen cleaners; glass cleaners; bathroom cleaners; carpet and upholstery cleaners; liquid sprays; furniture polish; air fresheners; room fresheners; air deodoriser". The first sign relied upon is the words "FAB FRESH" ("the earlier word sign"); the second is the figurative sign shown below ("the earlier figurative sign"):[2]

4. The opponent asserts that its use has generated a protectable goodwill of which the signs are distinctive. It contends that use of the contested mark constitutes a misrepresentation which will lead consumers to believe that the goods sold by the applicant are those of the opponent. This will, it says, damage the opponent's goodwill and lead to a loss of custom and/or detriment to its reputation. Accordingly, the application should be refused under s. 5(4)(a).

5. The applicant filed a counterstatement putting the opponent to proof of its goodwill and denying that there would be passing off. It says that the presence of "by Fabulosa" will prevent misrepresentation. It also says, "FabFresh, Fab-Fresh and Fab Fresh are common abbreviations and/or indicia used in the course of trade in the UK for Fabric

[2] The notice of opposition gives an earlier date but the opponent now appears to rely on this date: opponent's skeleton argument at [4].

Fresh, Fabric Freshener, and Fabric Refresher related cleaning products and services all of which were in use in the UK significantly pre-dating the Opponent's claimed first use".

6. Both parties filed evidence. A hearing was requested and held before me, by videoconference, on 22 June 2022. The opponent was represented at the hearing by Jamie Muir Wood of Counsel, instructed by Trade Mark Wizards Ltd. The applicant was represented by Melanie Harvey of Birketts LLP.

Evidence

Opponent's evidence

7. The opponent's evidence is given in the witness statement, with accompanying exhibits GL01 to GL12, of Gerry Loughran, the opponent's Property and Legal Director. He provides background about the opponent's business and details of the use of the earlier signs.

Applicant's evidence

8. The applicant's evidence is provided in the witness statement of Melanie Harvey. Ms Harvey is a Trade Mark Attorney and Legal Director with the applicant's professional representatives. Her evidence goes to what she describes as widespread third-party use of the "FAB FRESH" badge for cleaning products.

9. Neither witness was cross-examined. I have read all of the evidence and will return to it to the extent I consider necessary in the course of this decision.

Section 5(4)(a)

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

> "(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) […]

(b) […]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an "earlier right" in relation to the trade mark".

11. Subsection (4A) of Section 5 states:

"(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application".

12. In *Reckitt & Colman Products Limited v Borden Inc. & Ors* [1990] RPC 341 HL, Lord Oliver of Aylmerton described at [406] the 'classical trinity' that must be proved in order to reach a finding of passing off:

"First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff. Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the

defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff".

13. There is no claim that the contested mark has been used. Consequently, the relevant date for the assessment is the filing date, i.e. 5 February 2021.[3]

Goodwill

14. In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL), goodwill was described as follows:

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

15. Goodwill which is protectable under the law of passing off must be more than trivial: *Hart v Relentless Records* [2002] EWHC 1984 (Ch).

16. At the hearing, Ms Harvey accepted that the opponent had goodwill in respect of dehumidifiers, carpet cleaning mousse, bath foam cleaner and carpet freshener. The opponent claims that it has goodwill in a wider range of goods than those conceded.

Evidence

17. The evidence is that the opponent has 370 stores nationwide in which it sells its "Fab Fresh" products.[4] 34 million people visit its stores each year.[5]

18. The opponent first began using the earlier signs on 5 December 2020 in relation to glass cleaner and scented humidifiers and dehumidifiers. A further dehumidifier product

[3] *Maier & Anor v Asos & Anor* [2015] EWCA Civ 220 at [165]. See also *Advanced Perimeter Systems Limited v Multisys Computers Limited,* BL O/410/11.
[4] Loughran at [9]-[10], 16; GL1.
[5] Loughran, [28].

and mini gel air fresheners followed later in December in 2020. In early January 2021, carpet fresheners and carpet mousse/upholstery cleaner were launched, with bath and bathroom cleaners following on 16 January 2021.[6] Prints from Facebook dated 15 January 2021 announce that carpet fresheners from the opponent's "new cleaning brand Fab Fresh" are in store.[7] Archive prints of the opponent's website dated 17 January 2021 show carpet freshener for sale. It is described as "FAB FRESH CARPET FRESHENER"; there are various fragrances for which different colourways are used. Two examples are shown below:

19. Additional prints from the opponent's website show examples of the packaging for the range, including glass cleaner, hanging dehumidifiers, bathroom cleaner and carpet freshener. These prints appear to be dated after the relevant date, as some of the goods shown were not launched until later, but the sign used is broadly consistent with that reproduced above.

20. Sales of "Fab Fresh" products in the period 5 December 2020 to 30 January 2021 were as follows:[8]

[6] Loughran, [11].
[7] GL4.
[8] Loughran, [17]; GL6, GL7. The corresponding goods are shown at GL8 (not dated). See also GL12.

Product	Quantity	Total sales excl. VAT
Dehumidifiers (including scented and hanging)	166,218	£279,534
Scented dehumidifier 6pk	3,606	£13,481
Damp trap (dehumidifier)	7,474	£24,836
Carpet cleaning mousse	1,481	£1,839
Bath foam cleaner	361	£448
Carpet freshener	19,177	£23,789
Total	**198,317**	**£343,927**

21. The evidence shows that the products are low-cost items, ranging from £0.99 to £5.99.[9]

22. Posters which were displayed in-store prior to the relevant date show images of the products and the earlier figurative sign in both black and white and colour.

23. Figures are given for followers and likes for the opponent's social media accounts. The opponent has 412,219 Facebook followers, 29,600 Twitter followers and 112,000 followers on Instagram.[10] The date of these figures is not provided. Some prints are in evidence showing posts on the opponent's social media accounts relating to its "Fab Fresh" range of goods.[11] Whilst they show products and signs consistent with the above, most are after the relevant date; the highest number of likes is 280 for a 15 January post on Instagram.

[9] Loughran, [19]; GL8.
[10] Loughran, [24].
[11] GL11.

24. An internal document dated 18 January 2021 instructs stores to use an edging strip for shelving which shows the earlier figurative sign.[12] The document includes an image of shelving with the strip and products bearing the earlier figurative sign, in different colours; these goods appear to be carpet fresheners.

Assessment

25. Although Mr Loughran states that there was use for humidifiers, there is no documentary evidence which shows these goods, nor is it obvious to me how they would be covered by the goods relied upon. Given that various different dehumidifier products are identified in the sales figures, it may be that this is a typographical error. The dehumidifier products shown in evidence are not machines for extracting moisture but appear to be desiccants. Some are scented. They strike me as goods which the relevant public would consider fall within the very broad category of "household cleaning" products. The applicant has not argued that there is any disconnect between the pleaded case and the goods in respect of which it has conceded goodwill. I proceed on that basis.

26. Whilst it is also said that the signs were used in respect of glass cleaner and gel air fresheners, there is no evidence that any sales occurred; indeed, the sales tables indicate zero sales of glass cleaner before March 2021. There are no documented sales of any goods apart from those where goodwill is conceded. In the absence of any sales figures, it is impossible to know whether any goods were sold under either sign before the relevant date. In my view, the opponent has not established goodwill beyond the conceded dehumidifiers, carpet cleaning mousse, bath foam cleaner and carpet freshener.

27. In accepting that goodwill existed, Ms Harvey did not attempt to argue that the signs were not distinctive of the opponent's goodwill, nor did she draw any distinction between the signs relied upon. The focus of her submissions was that there would be no misrepresentation because of additional distinguishing matter in the contested sign. My understanding at the hearing was that the applicant did not dispute that both the earlier word sign and the earlier figurative sign were distinctive of the opponent's goodwill at the

[12] GL12.

relevant date. Mr Muir Wood's submissions in reply clearly indicated that he understood the same, as he made specific points relating to the conceded goodwill in respect of the earlier word sign, and Ms Harvey made no attempt to clarify the nature of the concession. Accordingly, I proceed on the basis that both earlier signs were distinctive of the opponent's goodwill at the relevant date.

28. That is not quite the end of the matter. No concession was made regarding the strength of the goodwill. On this point, Ms Harvey expressly highlighted the short period of use prior to the relevant date.

29. Most of the sales were in respect of dehumidifiers (£279,534). The figures for bath foam cleaner are tiny (£448). Carpet cleaning mousse and carpet freshener make up the remainder (£25,628). This equates to 198,317 individual units sold. I do not think this is trivial but there is no indication of the size of the relevant market and, as these are everyday consumer goods, that market is likely to be vast. I also bear in mind that the words "Fab Fresh" are inherently non-distinctive, the laudatory "fab" (i.e. great) combined with the equally non-distinctive word "fresh" (i.e. that the goods are clean-smelling or make things clean/smell clean). Thomas Mitcheson Q.C., sitting as the Appointed Person, pointed out in *Smart Planet Technologies, Inc. v Rajinda Sharma*, that the element of descriptiveness in the sign "Recup" for recycled, reusable or recyclable cups meant it would take longer to carry out sufficient trade to establish sufficient goodwill in the sign so as to make it distinctive of the opponent.[13] This was in the context of crossing the threshold of a protectable goodwill or not. However, while the words "Fab Fresh" must be deemed to have acquired a secondary meaning in view of the applicant's concession, my view is that their inherently weak capacity to distinguish means that proportionately more trade is required to increase the strength of the goodwill than would be the case for a sign which has a higher degree of inherent distinctiveness.

30. The evidence shows some use of the words alone but most of the use is of the earlier figurative sign. The figurative sign is what appears on the goods, whereas the words "Fab Fresh" alone appear in text-only descriptions where one would not expect to find a

[13] BL O/304/20.

figurative sign reproduced. The archive prints of the opponent's website do not offer an online shopping facility. Rather, the prospective buyer is directed to the store-finder tool if they wish to purchase the product. The fact that goods cannot be bought online is likely to reduce the pull of the website, though it will not eliminate it: if the customer has to shop in-store anyway, particularly for the goods at issue, which are not of the kind which often requires advance consideration and research, they are less likely to add the additional step of looking at the website. The more prevalent use of the figurative sign suggests that the relevant public is likely to associate that sign more strongly with the opponent's goodwill than the earlier word sign; the former is also the more inherently distinctive of the two. Notwithstanding the opponent's nationwide network of stores and what are not negligible sales figures, the short period of sale (a little over four weeks), the likely very small place in the market occupied by the opponent's goods and the weak or non-existent inherent distinctiveness of the earlier signs results in only a modest goodwill, of which the earlier figurative sign is more distinctive than the word sign.

31. It is convenient to pause at this point to address the evidence filed by the applicant in an attempt to show that the words "Fab Fresh" are commonly used as an abbreviation for Fabric Fresh, Fabric Freshener, and Fabric Refresher. Given the concession that the words have acquired a secondary meaning, and my finding that the words "Fab Fresh" are inherently non-distinctive for other reasons, the point is somewhat moot so I will deal with it briefly.

32. The first product shown in the applicant's evidence is an odour-neutralising product. It was available on three websites, all with UK domain names, although none is dated.[14] A safety data sheet for this product is in evidence which has an issue date of 7 October 2015.[15] The branding is shown below:

[14] Harvey, [7]; exhibits MH1 to MH3.
[15] MH4.

33. There are also screenshots from www.allianceonline.co.uk showing "Brilliant FabFresh" concentrated fabric softener for sale and a safety data sheet for the product dated 16 August 2016.[16] I reproduce below an example of the branding:

34. There is evidence of additional products said to be available in the UK which use "fab fresh" in relation to fabric freshening or cleaning products.[17] There is no evidence concerning the outlets for these goods or the role they may have in the market. This is how "Fab Fresh" is presented on the labels:

35. A print from wilko.com (prices are in pounds sterling) offers the "Febreze Fabric Fresh Antibacterial Spray" for sale.[18] In the heading, the product name is abbreviated to "Febreze Fab Fresh Anti-Bac". The print is not dated but indicates that delivery is available by 18 February. Given that Ms Harvey's statement is dated 14 February 2022, it is likely that the print is from around that time (i.e. after the relevant date).

[16] MH5 to MH8.
[17] MH9 to MH11.
[18] MH12.

36. There are also in evidence pages from a Facebook account for “Fab Fresh” cleaning services.[19] The account appears to have been created in November 2016 and remained live in December 2021.

37. The evidence is not persuasive. It is plain that all of the products use “Fab Fresh” in relation to fabric softener, freshener and detergent. However, all bar the “Brilliant” product (the detail of which I cannot make out) also include a product description on the packaging. The get-up of the words “Fab Fresh” and their placement on the goods are suggestive of use to indicate commercial origin rather than purely descriptive use. The only clear example of the words being an abbreviation of “Fabric Fresh” is the print from wilko.com and it is not clear that this is a recognised abbreviation so much as the site editor attempting to include each part of the product name in the title. The applicant has not established that the words “Fab Fresh” will readily be understood as an abbreviation of “Fabric Fresh”, “Fabric Freshener” or “Fabric Refresher”.

Misrepresentation

38. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt L.J. stated that:

> “There is no dispute as to what the correct legal principle is. As stated by *Lord Oliver of Aylmerton in Reckitt & Colman Products Ltd. v. Borden Inc. [1990] R.P.C. 341 at page 407* the question on the issue of deception or confusion is
>
> > “is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]”
>
> The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville*

[19] MH13.

Perfumery Ltd. v. June Perfect Ltd. (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101".

39. The contested mark is dominated by the words "Fab Fresh" which are centrally positioned and in large font relative to the words "By Fabulosa". There are also some presentational elements to the mark, namely the circular background, the white-on-gold colour and the particular typeface. When assessed against the earlier word mark, there is a high degree of visual similarity. Both contain the words "Fab Fresh", the earlier mark exclusively so, but there is some difference because of the words "By Fabulosa" and the stylisation in the contested mark. I doubt that "By Fabulosa" will be articulated when the contested mark is spoken, given its very subordinate size and position, meaning that the mark and sign will be aurally identical. If the words are spoken, the marks have a medium degree of aural similarity. Conceptually, there is a medium degree of similarity, the difference being that the contested mark refers to the specific source of the goods.

40. *In Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA), Millet LJ noted that there is no requirement in passing-off law for the defendant to be carrying on a business which competes with that of the plaintiff or which would compete with any natural extension of the plaintiff's business. However, he continued:

> "The absence of a common field of activity, therefore, is not fatal; but it is not irrelevant either. In deciding whether there is a likelihood of confusion, it is an important and highly relevant consideration
>
> > '…whether there is any kind of association, or could be in the minds of the public any kind of association, between the field of activities of the plaintiff and the field of activities of the defendant':
>
> *Annabel's (Berkeley Square) Ltd. v. G. Schock (trading as Annabel's Escort Agency)* [1972] R.P.C. 838 at page 844 per Russell L.J.

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

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

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

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

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

> ‘…in a case such as the present the burden of satisfying Lord Diplock's requirements in the *Advocaat* case, in particular the fourth and fifth requirements, is a heavy burden; how heavy I am not sure the judge fully appreciated. If he had, he might not have granted the respondents relief. When the alleged “passer off” seeks and gets no benefit from using another trader's name and trades in a field far removed from competing with him, there must, in my judgment, be clear and cogent proof of actual or possible

> confusion or connection, and of actual damage or real likelihood of damage to the respondents' property in their goodwill, which must, as Lord Fraser said in the *Advocaat* case, be substantial'".

41. Most of the goods are everyday consumer items and will be purchased frequently by the general public. Some care will be taken to select the correct product for the task. This will result in a medium degree of attention. However, there are certain goods in the contested specification which are unlikely to be purchased by the general public and will be bought and used by professional business users. The level of attention for such users is likely to be above average, given that quantities are likely to be larger and requirements more specific. Examples of such goods are the detergents for use in manufacturing (class 1), disinfectants for medical apparatus and instruments (class 5), dry cleaning preparations/dry-cleaning preparations, glass cloth, emery cloth and abrasive cloth (class 3). These cloths all appear to be for abrading, i.e. containing glass rather than for cleaning it. There is no evidence about abrasive cloths but the goods strike me as having a specialised use in manufacture or craftsmanship. There is nothing to indicate that such goods would be widely available in, for example, DIY stores, nor is that consistent with my own experience. I also consider that the same applies to all of the contested services, which do not strike me as likely to be offered in domestic settings.

42. The opponent's goodwill is mainly in dehumidifiers, including scented dehumidifiers, but a part extends to carpet and bath cleaners. The field is household cleaning products and many of the applicant's goods are in the same field. However, there is more limited or no overlap for a number of goods, including some in classes 3 and 5. For example, vehicle cleaning products have a degree of shared purpose (cleaning) but are a step removed from the goods sold by the opponent because of their exact use and because they are not generally produced by the same undertakings as household cleaning products or sold alongside them. Dry cleaning preparations are specialised goods bought by professionals and, whilst they do clean, have a specific use which means they are unlikely to be sold through the same outlets or manufactured by the same undertakings as the opponent's goods. "Disinfectants" at large includes ordinary household disinfectant. However, household disinfectant is not really comparable to certain other

disinfectants, like disinfectants for swimming pools or for contact lenses: these disinfectants have a particular use for specific goods, their composition is likely to be different even if their disinfecting purpose is the same, and they are not commonly sold near household cleaning products (including household disinfectants) or by manufacturers of such goods.

43. The articles for cleaning in class 21 are connected to cleaning preparations but are not in the identical field, as they are articles for cleaning rather than cleaning preparations. I have no evidence on the point but the skills and knowledge required to manufacture cloths, sponges and brushes are likely to be different from those for manufacturing cleaning preparations, and it is unlikely that the same entity would routinely produce both. It appears to me that "air fragrancing apparatus" in class 21 consists of machines and apparatus such as those used to release controlled amounts of fragrance or deodoriser in spaces such as offices and commercial buildings or public facilities; it would not include plug-in air fresheners for use in the home. Absent any evidence or submissions to the contrary, I conclude that these goods are in a field some distance removed from that in which the opponent enjoys goodwill.

44. The goods in class 24 of the contested specification, whilst all cloths, are not articles for cleaning. Given that the opponent's goodwill is not for cleaning cloths but for chemical compositions to clean and freshen, the fields are wholly distinct.

45. As for the contested services in class 40, I accept that an air freshening service may use, or even sell, air fresheners and dehumidifiers. There is also an overlap in purpose. However, the nature of the goods and service is different and it is doubtful that the services in class 40 would be used by the general public. The fields are not wholly unrelated but they are not the same.

46. At the hearing, Ms Harvey's submissions were focused on what the applicant regards as the absence of misrepresentation. In particular, Ms Harvey underlined the "need for a signifier", by which I understood her to mean that the words "By Fabulosa" in the contested mark were the indicators of origin because "Fab Fresh" is not distinctive. However, her concession as to goodwill means that the words "Fab Fresh" alone (i.e. the

earlier word sign), as well as the earlier figurative sign, must be deemed to have acquired a secondary meaning which is distinctive of the opponent's business.

47. Where the fields of activity are the same, i.e. everyday household cleaning products, and the goods sufficiently close that they would represent a reasonable extension of the opponent's existing goodwill, my view is that the relevant public is likely to be deceived where the earlier word sign is concerned. In making this finding, I have borne in mind the weakness of the goodwill enjoyed by the opponent and the guidance from cases such as *Office Cleaning Services Limited v Westminster Window & General Cleaners Limited* [1946] 63 RPC 39 which indicate that very small differences will suffice to avoid confusion where the common elements are weak or non-distinctive. However, whilst I acknowledge that the contested mark indicates the origin as "By Fabulosa", this does not assist the applicant because it does not show why the contested mark, dominated by the words "Fab Fresh", has a different commercial origin from the "Fab Fresh" word sign used by the opponent; the stylisation in the contested mark is, in my view, too slight to have that effect. I consider that use of the contested mark in relation to the following goods will give rise to a misrepresentation:

> Class 3: Cleaning sprays; cleaning fluids; cleaning foam; cleaning chalk; chalk (cleaning -); cleaning preparations; floor cleaning preparations; oven cleaning preparations; carpet cleaning preparations; window cleaning compositions; glass cleaning preparations; wallpaper cleaning preparations; caustic cleaning agents; foam cleaning preparations; household cleaning substances; toilet cleaning gels; lavatory cleaning compositions; carpet freshening preparations.
>
> Class 5: Air fresheners; air freshener sprays; air freshener refills; air-freshening preparations; air refresheners; air deodorisers; air deodorants; air deodorizer; air deodorising and air purifying preparations; air purifying preparations; disinfectants; disinfectant soap; disinfectants for hygienic purposes; disinfectants for sanitary purposes; disinfectants for household use; disinfectants impregnated into tissues; disinfectants for hygiene purposes; disinfectants for sanitary use; washes

(disinfectant -) [other than soap]; cleaning cloths impregnated with disinfectant for hygiene purposes.

48. As regards the remaining goods and services, I do not consider that a substantial part of the public would be deceived. The goods and services are too far removed from the opponent's existing business to represent an obvious expansion. The limited nature of the goodwill and the inherent non-distinctiveness of the words "Fab Fresh" are also such that the relevant public is not likely to believe that the use of the same words in different, even if connected, fields is more than coincidence.

49. As regards the opposition based upon the earlier figurative sign, I have found that this sign is more strongly distinctive of the opponent's goodwill than the words alone. The competing signs are, however, less similar. The earlier figurative sign has an important device element which, while subordinate to the verbal element, is a distinguishing hook which the relevant public will use to discriminate between the sign and the contested mark, given that the words "Fab Fresh" alone are weak. While I recognise that the presentational differences are small and that the stylistic elements in the contested mark alone were insufficient to avoid deception with the earlier word sign, when the stylisation of the earlier figurative sign is also borne in mind, the differences are sufficient to avoid the relevant public being deceived, even for goods in an identical field. There is no misrepresentation. The opposition based upon the earlier figurative sign is dismissed.

Damage

50. In *Harrods Limited V Harrodian School Limited* [1996] RPC 697, Millett L.J. described the requirements for damage in passing off cases like this:

> "In the classic case of passing off, where the defendant represents his goods or business as the goods or business of the plaintiff, there is an obvious risk of damage to the plaintiff's business by substitution. Customers and potential customers will be lost to the plaintiff if they transfer their custom to the defendant in the belief that they are dealing with the plaintiff. But this is not the only kind of damage which may be caused to the plaintiff's goodwill by the deception of the

public. Where the parties are not in competition with each other, the plaintiff's reputation and goodwill may be damaged without any corresponding gain to the defendant. In the *Lego* case, for example, a customer who was dissatisfied with the defendant's plastic irrigation equipment might be dissuaded from buying one of the plaintiff's plastic toy construction kits for his children if he believed that it was made by the defendant. The danger in such a case is that the plaintiff loses control over his own reputation.

51. This is a case where the most obvious type of damage, namely a loss of sales, is applicable. Damage is made out for the goods at paragraph 47, above, but not otherwise.

Conclusion

52. The opposition has succeeded in part. The application will be refused for the goods shown below; it will proceed to registration for the remainder of the goods and services in its specification:

Class 3: Cleaning sprays; cleaning fluids; cleaning foam; cleaning chalk; chalk (cleaning -); cleaning preparations; floor cleaning preparations; oven cleaning preparations; carpet cleaning preparations; window cleaning compositions; glass cleaning preparations; wallpaper cleaning preparations; caustic cleaning agents; foam cleaning preparations; household cleaning substances; toilet cleaning gels; lavatory cleaning compositions; carpet freshening preparations.

Class 5: Air fresheners; air freshener sprays; air freshener refills; air-freshening preparations; air refresheners; air deodorisers; air deodorants; air deodorizer; air deodorising and air purifying preparations; air purifying preparations; disinfectants; disinfectant soap; disinfectants for hygienic purposes; disinfectants for sanitary purposes; disinfectants for household use; disinfectants impregnated into tissues; disinfectants for hygiene purposes; disinfectants for sanitary use; washes (disinfectant -) [other than soap]; cleaning cloths impregnated with disinfectant for hygiene purposes.

Costs

53. Both parties have had a measure of success but the applicant has been slightly more successful, retaining four of the opposed classes in full and about half of the terms in the remaining two classes. The two classes where it had partial success were, however, the largest. I consider an award to the applicant appropriate. In making the award, I bear in mind that the evidence was not extensive on either side, the very brief nature of the applicant's own skeleton argument and submissions at the hearing, and that I must reduce the amount awarded to reflect the partial success. I therefore award costs to the applicant as follows:

Considering the notice of opposition and filing a defence:	£200
Filing evidence and considering the opponent's evidence:	£250
Preparing for and attending a hearing:	£300
Total:	**£750**

54. I order Poundstretcher Limited to pay My Fabulosa Ltd the sum of **£750**. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 31st day of August 2022

Heather Harrison

For the Registrar

The Comptroller-General