

O/810/22

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3709413
BY FORTIS THERAPY AND TRAINING LTD
TO REGISTER AS A SERIES OF TRADE MARKS:**



IN CLASSES 9, 14, 16, 18, 21, 25, 28 & 35

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 60002195
BY ENNOVATIVE ECOMMERCE, INC**

Background and pleadings

1. On 13 October 2021, Fortis Therapy and Training Ltd (“the applicant”) applied to register the series of two trade marks displayed on the cover of this decision in the UK, under application number 3709413. As the only difference between the marks which comprise the series is the use of colour in one and greyscale in the other, I will refer to them in the singular (i.e. “the contested mark”) unless it becomes necessary to distinguish between them. The contested mark was published in the Trade Marks Journal for opposition purposes on 5 November 2021. Registration is sought for the goods and services listed in Annex A.

2. On 3 February 2022, Ennovative Ecommerce, Inc (“the opponent”) filed a notice of opposition. The partial opposition is brought under sections 5(1), 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is directed against the following goods and services:¹

Class 9: Cameras and parts and fittings therefor; optical goods; sound recording and sound reproducing apparatus and instruments; radios; record, compact disc, and digital versatile disc players; audio-visual apparatus; telephones; mobile telephones; mechanical signs; neon signs; sockets; plugs and switches.

Class 16: Maps.

Class 18: Bags; sports bags; suitcases, trunks and travelling bags; umbrellas.

Class 25: Clothing; gloves and mittens

Class 35: Retail and wholesale services in connection with the sale of [...] maps, [...] suitcases, trunks and travelling bags, [...] umbrellas, [...] oven gloves, [...] gloves and mittens, [...] clothing.

¹ The Class 21 term “Oven gloves” was previously opposed but was removed from the application by the applicant as referenced on Form TM8, section 8.

3. The opponent relies upon its comparable UK trade mark number 801477625,² **FORTEM** (“the earlier mark”). The earlier mark was filed on 17 April 2019 and became registered on 20 December 2019 in respect of the goods listed at Annex B, all of which are relied upon for the purposes of the opposition.

4. Given the respective filing dates, the opponent’s mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods and services for which the earlier mark is registered without having to establish genuine use.

5. The opponent essentially argues that the respective marks and the goods and services are identical under section 5(1) and/or that the competing marks are identical and the goods and services are similar under section 5(2)(a), giving rise to a likelihood of confusion. In the alternative it is also argued that the marks are similar and the goods and services are similar, giving rise to a likelihood of confusion under section 5(2)(b).

6. The applicant filed a counterstatement denying each of the opponent’s claims. The applicant denies that the marks are identical, or that the goods and services are identical or similar. The applicant accepts that the marks are similar,³ though still disputes that there is a likelihood of confusion.

7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1 to 3 of rule 20 of the Trade Mark Rules 2008 but provides that rule 20(4) shall continue to apply. Rule 20(4) stipulates that “the Registrar may, at any time, give leave to either party to file evidence upon such terms as the Registrar thinks fit”. The net effect of these changes is to require the parties to seek

² On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing IREU. As a result of the opponent’s IREU being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and the original IREU filing date remains.

³Applicant’s Form TM8, section 8

leave in order to file evidence in fast track oppositions. No leave was sought in respect of these proceedings.

8. The opponent is professionally represented by Downing IP Limited, whereas the applicant is professionally represented by Wilson Gunn. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard only if (i) the Office requests it, or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary. Only the opponent filed written submissions in lieu of an oral hearing. Whilst I do not intend to summarise these, I have taken them into consideration and will refer to them as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

9. 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 Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark case law.

Sections 5(1) and 5(2)(a)

10. Section 5(1) of the Act reads as follows:

“5(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.”

11. Section 5(2)(a) of the Act reads as follows:

“5(2) A trade mark shall not be registered if because-

- (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the 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”.

Identity of the marks

12. In order for claims under sections 5(1) and 5(2)(a) to succeed, the competing marks are required to be identical. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union (“CJEU”) held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

13. The earlier mark and the contested mark both contain the word “fortem”. However, the contested mark does not reproduce the earlier mark without any modification or addition. The contested mark contains an additional device element in the green/grey leaf in the background of the mark. This element contributes to the overall impression of the contested mark and has no counterpart in the earlier mark. Therefore, I find that the marks are not identical and the claims under sections 5(1) and 5(2)(a) of the Act fail in their entirety.

Section 5(2)(b)

14. Sections 5(2)(b) and 5A of the Act read 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”.

“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.”

Case law

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

(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

16. 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.”

17. Put simply, this means that whether the goods and services are in the same or different classes is not decisive in determining whether they are similar or dissimilar. Therefore, what matters is the actual goods at issue and whether they are similar or not having regard to the case law that follows.

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

“In assessing the similarity of the goods or services concerned, [...] 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”.

19. 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.

20. 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”.

21. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Merici')*, Case T-133/05, the General Court (“the GC”) stated that:

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

22. For the purposes of considering the issue of similarity of goods or services, it is permissible to consider groups of terms collectively where they are sufficiently

comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

23. 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 ‘complementary’ means:

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

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

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

whilst on the other hand:

“[...] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together”.

25. The goods and services to be compared are outlined in paragraph 2 and Annex B.

Class 9

Cameras and parts and fittings therefor; optical goods; audio-visual apparatus.

26. The applicant's above terms and the opponent's term "anti-slipping dashboard mats for holding personal items that are affixed or specially adapted to the automobile" differ in nature, method of use and intended purpose. The example used by the opponent is a "dash cam".⁴ A 'dash cam' or camera is a device that is attached to the dashboard of a vehicle for recording visual images. In contrast, the opponent's good is a mat which typically has a textured surface to prevent items placed on it from sliding or moving from the dashboard. The trade channels differ as typically the opponent's goods, which are specially adapted for vehicles, would not be offered by the same undertakings that offer cameras, or optical goods, although I acknowledge that there may be some overlap. For example, "dash cams" may be sold in the same outlets that sell other car accessories such as the opponent's anti-slipping dashboard mats. Users would overlap but only on a generalised level. The goods are not in competition as the use of one does not negate the need for the other. Neither are the goods complementary as one is not important or indispensable to the other in such a way that sufficiently engages the case law. Overall, although there is some overlap in trade channels and users, these overlaps are too limited to engage any similarity between the goods. Therefore, I find that the goods are dissimilar.

Sound recording and sound reproducing apparatus and equipment; radios; record, compact disc, and digital versatile disc players.

27. The applicant's above terms and the opponent's terms "anti-slipping dashboard mats for holding personal items that are affixed or specially adapted to the automobile" and "aftermarket automobile accessories, namely, car interior organiser bags, nets and trays specially adapted for fitting in vehicles" differ in nature, method of use and intended purpose as the opponent's goods are all vehicle accessories for the core purpose of holding or storing items, which the applicant's goods are not. The applicant's goods are all types of sound recording or producing equipment which (with the exception of a "record, compact disc") could be integrated into the vehicle for use.

⁴ Opponent's written submissions, page 3

Merely because these goods could both be used in connection with a vehicle is not enough to engage similarity. The trade channels would be different as the applicant's goods would typically be sold in electronic stores, whereas the opponent's goods would be sold in car accessory stores. Even if sold in the same outlets, such as in supermarkets, they would typically be found in entirely different aisles. The goods are not competitive as the purchase of a radio will not satisfy the need for secure storage in a vehicle. Neither are the goods complementary even though an "anti-slipping mat" or a "car interior organiser bag" may be used to hold a record or compact disc in place whilst the car is moving, they are not important or indispensable to each other in such a way that the consumer will believe that the responsibility for both lies with the same undertaking. Taking all the above into account, I find that the goods are dissimilar.

Telephones; mobile telephones

28. The applicant's above terms and the opponent's terms "anti-slipping dashboard mats for holding personal items that are affixed or specially adapted to the automobile" and "aftermarket automobile accessories, namely, car interior organiser bags, nets and trays specially adapted for fitting in vehicles" differ in nature, method of use and intended purpose as the core purpose of the applicant's goods is to communicate with people which differs from the opponent's goods. The trade channels are different as telephones and mobile phones are not usually offered by the same undertaking that would offer the opponent's goods. The applicant's goods are likely to be found in a telecommunication store or their online equivalent, whereas the opponent's goods are likely to be sold in a store that sells vehicle accessories and equipment. I also note that, where the competing goods are sold in a supermarket, they would be located on very different aisles. The users may overlap on a superficial level, but this is not sufficient for a finding of similarity. The goods are not in competition nor are they complementary. Consequently, I am of the opinion that these goods are dissimilar.

Mechanical signs; neon signs

29. The applicant's above terms and the opponent's terms "anti-slipping dashboard mats for holding personal items that are affixed or specially adapted to the automobile" and "aftermarket automobile accessories, namely, car interior organiser bags, nets

and trays specially adapted for fitting in vehicles” differ in nature, method of use and intended purpose. The trade channels are different as the applicant’s goods are not typically sold in the same establishments that sell car accessories such as the opponent’s, instead they are likely to be sold by electronic stores or by companies that create signage. The goods are not competitive nor complementary in nature and the users will be different. Therefore, overall, I find that the goods are dissimilar.

Sockets, plugs and switches

30. The applicant’s above terms and the opponent’s class 12 terms differ in nature, as the applicant’s goods could include, at best, devices that would be built into the car when manufactured before they are sold, unlike the opponent’s goods which are all aftermarket accessories which can be easily fixed or placed in the car. The method of use also differs as the applicant’s goods are used in connected with electrical devices to switch them on or off or to charge them for continued use, whereas the opponent’s goods are for storing or holding items. Therefore, their intended purpose also differs. The trade channels are different as the applicant’s goods would typically be sold in a hardware or DIY store, whereas the opponent’s goods are more likely to be sold at a specialist vehicle accessory store. The users may overlap, but only to a very generalised degree. The goods are neither competitive nor complementary. Consequently, in my opinion, the goods are dissimilar.

Class 16

Maps

31. The opponent has argued that the applicant’s above goods are similar to “other aftermarket automobile accessories in The Registration” as they would be sold via the same trade channels and to the same customers. I have taken this to mean the terms relating to aftermarket automobile accessories in class 12 of the earlier mark. Although the trade channels may overlap insofar as maps could be sold by the same undertakings that offer the opponent’s goods, typically, maps are sold by undertakings such as book shops that are unlikely to sell automobile accessories. Furthermore, even though users may overlap, this is on a generalised level and would not on its own be enough to engage similarity. Maps and automobile accessories are different

in nature, method of use and intended purpose. Maps are diagrammatic representations of land or sea showing physical features such as cities or roads; they are used for the purpose of charting a route from one place to another by using markers characterised on the map. This is quite different from the method of use and intended purpose of the opponent's goods discussed above. Although maps and the opponent's vehicle accessories can both be used in the car this is not enough to engage any complementarity. Neither are the goods competitive in nature. Therefore, overall, in my view, the goods are dissimilar.

Class 18

Bags; sports bags; suitcases, trunks and travelling bags

32. The above terms and the opponent's term in class 12 "car interior organiser bags specially adapted for fitting in vehicles" differ in nature, method of use and intended purpose as a bag is a flexible container, with an opening at the top. Bags are used for the purpose of carrying generalised items around, usually wherever a person travels, from one location to another. Whereas the opponent's goods are adapted with the intention of them solely being used in the car, so items can be held in one place whilst the car is moving; typically, they are not used in other settings. The opponent's goods are less like conventional bags and more akin to a storage accessory. Trade channels would not generally overlap, as the opponent's goods are adapted to fit inside cars, this is a very niche product that would not usually be sold by the same establishments that sold bags, such as handbags, sports bags or suitcases. It is far more likely that these specially adapted car interior bags would be sold at establishments that sold car accessories rather than bags of the kind that fall into class 18. There is no material competition between the competing goods as the opponent's goods are for a particular use and purpose. Neither are the goods complementary in nature. Users will be the same at a generalised level, however, this is not enough to engage similarity. Overall, I find that the respective goods are dissimilar.

Umbrellas

33. The opponent argues⁵ “Car manufacturers (such as Rolls Royce and Porsche) sell umbrellas which are specially adapted to fit into their vehicles for easy access upon leaving the car. Without limiting language umbrellas include these types of umbrellas modified to fit into a particular space inside a vehicle.” I recognise that there may be some overlap in nature as both the goods could be adapted for fitting cars, but this does not engage similarity overall. Although some luxury branded umbrellas might be adapted to fit particular luxury cars, this is not typical in trade. The opponent has attempted to compare umbrellas with goods that have been specially adapted to fit into cars, trucks or SUVs, such as car interior bags, nets, trays, bins and storage bins. In my opinion none of these items are similar in method of use or intended purpose to umbrellas in class 18. Umbrellas are used for the purpose of keeping users dry whilst outside the vehicle, whereas the opponent’s goods are for use inside the vehicle. Furthermore, they have different trade channels as the opponent’s goods would be offered in stores that sold vehicle accessories whereas umbrellas would ordinarily be sold in clothing stores or alongside outdoor gear and equipment. Even if luxury car manufacturers produce umbrellas especially adapted to fit into their vehicles, for which there is no evidence, that is not typical in trade as discussed above. Users would also be different, except in a very generalised sense. The goods are not complementary, nor are they in competition. Consequently, I am of the opinion that the goods are dissimilar.

Class 25

Clothing

34. The opponent argues,⁶ “The goods objected to are those which are [...] b) sufficiently generic to include gloves for household purposes (i.e. “clothing”) [...]”. In my opinion, clothing is not such a broad term that it would encompass “gloves for household purposes”. When confined to their core and natural meaning, I do not agree that gloves for household purposes are items of clothing. The respective goods differ in nature, as clothing covers the body and can be worn either for fashion or for practical

⁵ Opponent’s written submissions, page 3, goods and services table

⁶ Opponent’s notice of opposition, section 12

reasons such as to keep warm, whereas gloves for household purposes are worn only on the hands, to protect them whilst carrying out domestic chores. Consequently, the method of use and intended purpose also differs. The competing goods are not complementary nor competitive in nature. The trade channels would differ as clothing is sold within clothing stores, whereas the opponent's goods would be sold in homeware stores. I acknowledge the respective goods may be sold in large department stores that offer both clothing and home items, however, where this is the case, the goods would be found in different sections of these stores. Users may overlap but only to a general degree. Overall, I find that the goods are dissimilar.

Gloves and mittens

35. The applicant's terms in class 25 and the opponent's class 21 term "gloves for household purposes" overlap in nature insofar as they are both worn on the hands. However, the method of use and intended purpose differ. The applicant's goods are items of clothing used for fashion but also for the intended purpose of keeping consumers hands warm in cold environments, usually outside the home. They are typically made of soft, cosy, material to achieve their intended purpose. In contrast, the opponent's gloves are to be used inside the house, usually for the purpose of protecting consumers' hands. They are usually comprised of protective materials, such as plastic, to protect against cleaning chemicals or heat. The trade channels differ as the applicant's goods are usually found in clothing stores whereas the opponent's goods are typically found in domestic or homeware stores. Users will only be the same to a generalised degree that does not engage similarity. Neither are the goods complementary, or competitive as gloves and mittens for keeping warm cannot be used effectively for protecting consumer hands whilst cleaning the household. Overall, in my view, the goods are dissimilar.

Class 35

36. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the GC held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

37. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs K.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his judgment) that:

“9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent’s earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are ‘*similar*’ to goods are not clear cut.”

38. However, on the basis of the European courts’ judgments in *Sanco SA v OHIM*⁷, and *Assembled Investments (Proprietary) Ltd v. OHIM*⁸, upheld on appeal in *Waterford Wedgwood Plc v. Assembled Investments (Proprietary) Ltd*⁹, Mr Hobbs concluded that:

i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer’s point of view, they are unlikely to be offered by one and the same undertaking;

ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent’s goods and

⁷ Case C-411/13P

⁸ Case T-105/05, at paragraphs [30] to [35] of the judgment

⁹ Case C-398/07P

then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

Retail and wholesale services in connection with the sale of [...] maps, [...] suitcases, trunks and travelling bags, [...] umbrellas, [...] gloves and mittens, [...] clothing.

39. The opponent's goods are self-evidently different in nature to the applicant's retail services. The intended purpose of retail services is to encourage the sale of various goods, which means that the purpose of the goods and services is different. The method of use also differs. Furthermore, I find that the goods and services cannot be complementary in nature as none of the opponent's goods are important or indispensable to the operation of the applicant's retail services. The goods and services are not in competition. Equally, the trade channels do not overlap and users will also differ. In light of the foregoing, I find that the goods and services are dissimilar.

Retail and wholesale services in connection with the sale of [...] oven gloves

40. "Gloves for household purposes" in the opponent's specification overlap with the applicant's above terms in class 35. As set out in the case law above, although retail services may be different in nature, method of use and intended purpose, retail services for particular goods may be complementary to those goods, and distributed through the same channels, and therefore similar to a degree. I consider the same applies to the competing goods and services as oven gloves are a particular example of gloves for household purposes, so the goods are important or indispensable to the retail services and consumers would reasonably believe that the responsibility for these goods and services rests with the same undertaking. Users would be the same

and goods and services would reach the market through the same trade channels. Accordingly, the goods and services are similar to a medium degree.

41. I have also considered the other goods relied upon by the opponent, though none puts it in a more favourable position.

42. For section 5(2)(b) to apply, there needs to be some degree of similarity between the goods and services. My findings above mean that the opposition must fail against goods and services of the application that I have found to be dissimilar, namely:¹⁰

Class 9: Cameras and parts and fittings therefor; optical goods; sound recording and sound reproducing apparatus and instruments; radios; record, compact disc, and digital versatile disc players; audio-visual apparatus; telephones; mobile telephones; mechanical signs; neon signs; sockets; plugs and switches.

Class 16: Maps.

Class 18: Bags; sports bags; suitcases, trunks and travelling bags; umbrellas.

Class 25: Clothing; gloves and mittens

Class 35: Retail and wholesale services in connection with the sale of [...] maps, [...] suitcases, trunks and travelling bags, [...] umbrellas, [...] gloves and mittens, [...] clothing.

Average consumer

43. 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

¹⁰ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, paragraph 49.

according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

44. 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.”

45. I find that the relevant consumers of the goods and services that I have found similar (and therefore at issue) is mainly the general public but may include business users.

46. On average the general public are likely to select these goods and services occasionally and the cost is likely to be low. The purchasing process is likely to be more casual than measured, however the public will assess factors such as the ease of use and value for money of the goods and services in addition to the protective qualities, and the aesthetics of the goods. Overall, I find that the level of attention of the general public would be below average. The goods and services are likely to be purchased directly from the service provider after viewing the goods and information in magazines, brochures, on the internet or in shop fronts. In these circumstances, visual considerations would dominate, however, I do not discount aural considerations entirely as it is possible that the purchasing of these kinds of goods and services would involve oral discussions with sales advisors or word of mouth recommendations.

47. In respect of the services for business users, i.e. wholesale services, the cost will be at the lower end of the spectrum. The goods are likely to be purchased through the wholesale services relatively frequently to meet the ongoing demand in the re-sale

business. The selection of the services would be relatively important for business consumers as they will wish to ensure the reliability of the goods subject to the wholesale services and the integrity of the provider. In light of the above, I find that the level of attention of business users would be average. The services of the wholesale provider are likely to be obtained after viewing the wholesale items, such as oven gloves, in trade magazines, trade brochures or on the internet. In these circumstances, visual considerations would dominate, however, I do not discount aural considerations entirely as it is possible that the purchasing of these kinds of services would involve discussions with sales representatives.

Distinctive character of the earlier mark

48. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. 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).”

49. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods and services will be somewhere in between. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion, the more distinctive the earlier mark, the greater the likelihood of confusion.

50. Further, although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use (nor was it required to do so). Consequently, I have only the inherent position to consider.

51. The earlier mark is a word-only mark consisting of the word “FORTEM”. The distinctiveness of the mark lies in the word itself. The opponent refers to the Latin meaning of the word “FORTEM” and its concept of bravery.¹¹ However, I find that the average consumer would be unaware of the Latin meaning of this word and instead perceive the mark as an invented word. As such, the mark is not laudatory, allusive or descriptive of the goods and services for which the mark is registered. Consequently, I find that, overall, the earlier mark possesses a high degree of inherent distinctive character.

Comparison of the marks


52. It is clear from *Sabel BV v. Puma AG* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, Case C-591/12P, that:

¹¹ Opponent’s written submissions, paragraph 4

“34. [...] 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.”

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

54. The respective trade marks are shown below:

| Earlier mark | Contested mark |
|---------------|--|
| FORTEM |  |

Overall impressions

55. The earlier mark is a word-only mark and comprises the word “FORTEM”. The word is presented in upper case; there are no other components to the mark. The overall impression of the mark therefore lies in the word itself.

56. The contested mark is a figurative mark consisting of the word “fortem” in standardised font and in lower case. The word “fortem” is in the foreground with a green/grey leaf device sat behind the word element. The word dominates the overall impression as it is presented in large font and situated at the forefront of the mark. Furthermore, consumers eyes are often drawn to elements of the mark that they can read. However, the device also provides a contribution.

Visual comparison

57. The competing marks are similar as they both contain the identical word “fortem”. I do not consider the distinction in letter case between the earlier mark and the contested mark to be a point of significant difference between them. This is because the registration of word-only marks provides protection for the word itself, irrespective of whether it is presented in upper or lower case. The respective marks differ as the applicant’s mark contains a figurative green/grey leaf device in the background. Taking into account the overall impressions, I find that the competing marks are visually similar to a medium degree.

Aural comparison

58. In the contested mark, consumers will make no attempt to articulate the device element. Therefore, the competing marks both consist of two syllables, i.e. “FOR-TEM”, and are aurally identical.

Conceptual comparison

59. As noted above, the earlier mark will be perceived as an invented word with no meaning, rather than understood as the Latin for bravery. This applies equally to the word element in the contested mark. Therefore, this element is conceptually neutral.

The leaf device in the contested mark would be perceived as such and, therefore, provides a concept which has no counterpoint in the earlier mark. The leaf device offers a minimal conceptual difference, but a conceptual difference, nonetheless. Accordingly, overall, I find that the competing marks are conceptually dissimilar.

Likelihood of confusion

60. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services, and vice versa. It is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be aware of the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

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

62. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis K.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on

the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

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

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

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

63. These examples are not exhaustive but provide helpful focus.

64. I have found that the respective goods and services are similar to a medium degree. I have found that relevant consumers of the goods and services will predominantly include members of the general public as well as businesses users. I have found that business users would pay an average level of attention, whilst the level of attention the general public would pay would be below average when selecting the goods or services. I have found that the purchasing process will be

largely visual, however, I have not discounted aural considerations. The word “FORTEM” in both the respective marks dominates the overall impression. I have found that the earlier mark and the contested mark are visually similar to a medium degree, aurally identical and conceptually dissimilar. I have also found that the earlier mark has a high level of inherent distinctive character.

65. The marks differ in the figurative leaf device which is included in the contested mark but is not replicated in the earlier mark. However, in my opinion, taking into account the identity of the word element of the marks (which is the most distinctive and dominant element of the competing marks), this difference is likely to be insufficient to distinguish between the parties’ marks. I consider it likely that consumers will misremember the device element, as the device is in the background, and the conceptual difference relating to the device element is weak, whereas the identical word “FORTEM” is highly distinctive. In my judgement, taking into account imperfect recollection, it is entirely feasible that, consumers paying, at best, an average level of attention during the purchasing process would fail to recall the device element. Therefore, I find that there is a likelihood of direct confusion.

66. In the event I am wrong about direct confusion, I will now go on to consider indirect confusion. I bear in mind that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.¹²

67. Even in the event that consumers accurately recall the device element in the contested mark, they will also recognise the identical word “FORTEM” that appears in both the respective marks, which is highly distinctive and dominates the overall impressions. Whether consciously or unconsciously, this will lead the average consumer through the mental process described in *L.A. Sugar*. The inclusion of the leaf device is likely to be seen as either a brand extension or a variation of the brand with a decorative device element added to the distinctive word element “FORTEM”. Taking all this into account, I am satisfied that consumers, paying no more than an average level of attention, would assume a commercial association between the

¹² *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

parties, or sponsorship on the part of the opponent, due to the highly distinctive and identical element "FORTEM". Consequently, I consider there to be a likelihood of indirect confusion.

Conclusion

68. The opposition under section 5(2)(b) has been partially successful. Subject to any appeal against my decision, the application will be refused for the following services:

Class 35: Retail and wholesale services in connection with the sale of [...] oven gloves.

69. The application will proceed to registration in the UK in respect of the following goods and services, which were not opposed or against which the opposition has failed:

Class 9: Computer hardware and software; computer software applications for mobile devices; computer games and computer games software; smart cards; telephone cards; encrypted smart cards; cameras and parts and fittings therefor; binoculars; calculating machines; eye glasses and spectacles, cases, chains, cords and frames therefor; cases for photographic apparatus and instruments; containers for contact lenses; optical goods; sound recording and sound reproducing apparatus and instruments; compact discs; digital versatile discs; juke boxes; radios; record, compact disc, and digital versatile disc players; audio-visual apparatus; telephones; mobile telephones; magnets; magnifying glasses; measuring apparatus and instruments; mechanical signs; neon signs; sockets; plugs and switches; sunglasses; sunshades; electronic publications (downloadable); mobile phone cases and covers; cases and covers for tablet computers and computers; computer mouse mats; none of the aforesaid being in the field of smoking, vaping, smoking cessation or vaping cessation.

Class 14: Precious metals and their alloys; jewellery, precious and semi-precious stones; horological and chronometric instruments; costume jewellery; rings; earrings; bracelets; brooches; necklaces; jewellery chains; jewellery charms; pendants; cases and boxes for jewellery; clocks and watches; watch straps; cases and boxes for watches; cuff links; tie pins; tie clips; ornamental pins; lapel pins; badges of precious metals; ornaments of precious metals; key rings; key fobs; key holders; parts and fittings for all of the aforesaid goods.

Class 16: Printed matter; newspapers; magazines and periodical publications; books; brochures; flyers; leaflets; programme binders and binding material; stationery; instructional teaching materials; manuals; writing or drawing books and pads; birthday cards and cards; greeting cards; postcards; tickets; timetables; note pads and note books; photo engravings, photograph albums and albums; address books; almanacs; holders, cases and boxes for pens; pens and pencils; pencil and pen holders; paper, cardboard and articles made from these materials; erasers and erasing products; pencil sharpeners; rulers; books and booklets; book markers and book ends; letter trays; calendars; paper weights and paper clips; gift bags and bags for packaging; gift wrap and packaging paper; envelopes, folders, labels, seals, blackboards and scrap books; height charts and charts; carrier bags and garbage bags; ink and ink wells; paper knives; poster magazines; signs and advertisement boards, paper and cardboard; adhesive tapes and dispensers; office requisites and diaries; hat boxes; pads of paper; stickers and stencils; beer mats; catalogues; paper and cardboard coasters; transfers and diagrams; drawing instruments and materials; paint boxes and brushes; patterns and embroidery design; engravings and etchings; paper towels and hankies; paper flags; toilet paper; maps; paper and cardboard place mats; lithographs and

lithographic works of art; paper table cloths and napkins; cheque book holders.

Class 18: Bags; sports bags; wallets; purses; handbags; suitcases, trunks and travelling bags; school bags and satchels; back packs and beach bags; make-up bags; cosmetics bags; vanity cases; wash bags for carrying toiletries; umbrellas.

Class 21: Household or kitchen utensils and containers; water bottles; plastic water bottles; aluminium water bottles; mugs; plates; bowls; dishes; porcelain ware; glass ware; pots; pans; cookware; cooking utensils; tableware; place mats; coasters; plastic storage containers; paper cups; bread bins; bread boards; candelabra; candlesticks; china ornaments; crystal (glassware); decanters; drinking glasses and vessels; earthenware; goblets; tableware; mosaics of glass; works of art of porcelain, terra-cotta or glass; combs and brushes.

Class 25: Clothing, footwear and headgear; sleep masks; sportswear; leisurewear; lingerie; hosiery; underwear; coats; overalls; ear muffs; socks; baseball caps; hats; bobble hats; beanie hats; scarves; jackets; dressing gowns; pyjamas; sandals; slippers; boxer shorts; beach clothes and shoes; baby boots; romper suits; baby pants and sleep suits; braces; belts and berets; wrist bands; track suits; ties; cravats; aprons; bathrobes; bathing caps and suits; bathing trunks; gloves and mittens; headbands; jumpers and knitwear; leggings; vests; belts; ties.

Class 28: Games, toys and playthings; board games; football goals and nets; party novelty hats; gloves for games; balloons; balls; gymnastic and sporting articles and equipment; playing balls; footballs; plush toys; decorations for Christmas trees; Christmas crackers; synthetic Christmas trees and stands; jokes and novelties; playing cards; spinning tops; kites; knee guards and protective padding; marbles; slides; skittles; sleighs; masks;

mobiles; rattles; roller skates; in-line skates; bodybuilding apparatus; confetti, exercise apparatus.

Class 35: Marketing, advertising and publicity services; provision of on-line advertising space; operation and management of gift card, discount card and customer loyalty schemes; none of the aforesaid being in the field of smoking, vaping, smoking cessation or vaping cessation; Retail and wholesale services in connection with the sale of precious metals and their alloys, jewellery, precious and semi-precious stones, horological and chronometric instruments, costume jewellery, rings, earrings, bracelets, brooches, necklaces, jewellery chains, jewellery charms, pendants, cases and boxes for jewellery, clocks and watches, watch straps, cases and boxes for watches, cuff links, tie pins, tie clips, ornamental pins, lapel pins, badges of precious metals, ornaments of precious metals, key rings, key fobs, key holders, parts and fittings for all of the aforesaid goods, Printed matter, newspapers, magazines and periodical publications, books, brochures, flyers, leaflets, programme binders and binding material, stationery, instructional teaching materials, manuals, writing or drawing books and pads, birthday cards and cards, greeting cards, postcards, tickets, timetables, note pads and note books, photo engravings, photograph albums and albums, address books, almanacs, holders, cases and boxes for pens, pens and pencils, pencil and pen holders, paper, cardboard and articles made from these materials, erasers and erasing products, pencil sharpeners, rulers, books and booklets, book markers and book ends, letter trays, calendars, paper weights and paper clips, gift bags and bags for packaging, gift wrap and packaging paper, envelopes, folders, labels, seals, blackboards and scrap books, height charts and charts, carrier bags and garbage bags, ink and ink wells, paper knives, poster magazines, signs and advertisement boards, paper and cardboard, adhesive tapes and dispensers, office requisites and diaries, hat boxes, pads of

paper, stickers and stencils, beer mats, catalogues, paper and cardboard coasters, transfers and diagrams, drawing instruments and materials, paint boxes and brushes, patterns and embroidery design, engravings and etchings, paper towels and hankies, paper flags, toilet paper, maps, paper and cardboard place mats, lithographs and lithographic works of art, paper table cloths and napkins, cheque book holders, bags, sports bags, wallets, purses, handbags, suitcases, trunks and travelling bags, school bags and satchels, back packs and beach bags, make-up bags, cosmetics bags, vanity cases, wash bags for carrying toiletries, umbrellas, Household or kitchen utensils and containers, water bottles, plastic water bottles, aluminium water bottles, mugs, plates, bowls, dishes, porcelain ware, glass ware, pots, pans, cookware, cooking utensils, tableware, place mats, coasters, plastic storage containers, [...] paper cups, bread bins, bread boards, candelabra, candlesticks, china ornaments, crystal (glassware), decanters, drinking glasses and vessels, earthenware, goblets, tableware, mosaics of glass, works of art of porcelain, terra-cotta or glass, combs and brushes, clothing, footwear and headgear, sleep masks, sportswear, leisurewear, lingerie, hosiery, underwear, coats, overalls, ear muffs, socks, baseball caps, hats, bobble hats, beanie hats, scarves, jackets, dressing gowns, pyjamas, sandals, slippers, boxer shorts, beach clothes and shoes, baby boots, romper suits, baby pants and sleep suits, braces, belts and berets, wrist bands, track suits, ties, cravats, aprons, bathrobes, bathing caps and suits, bathing trunks, gloves and mittens, headbands, jumpers and knitwear, leggings, vests, belts, ties, Games, toys and playthings, board games, football goals and nets, party novelty hats, gloves for games, balloons, balls, gymnastic and sporting articles and equipment, playing balls, footballs, plush toys, decorations for Christmas trees, Christmas crackers, synthetic Christmas trees and stands, jokes and novelties, playing cards, spinning tops, kites, knee guards and protective padding, marbles, slides,

skittles, sleighs, masks, mobiles, rattles, roller skates, in-line skates, bodybuilding apparatus, confetti, exercise apparatus.

Costs

70. Although the opposition has succeeded in part, the applicant has achieved a greater measure of success than the opponent. Therefore, the applicant is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice (“TPN”) 2/2015, with an appropriate reduction to reflect the opponent’s level of success. Applying the guidance in that TPN, I award the applicant the sum of **£150** as a contribution towards the cost of considering the opponent’s notice of opposition and filing a counterstatement.

71. I therefore order Ennovative Ecommerce, Inc to pay Fortis Therapy and Training Ltd the sum of **£150**. 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 20th day of September 2022

Sarah Wallace
For the Registrar

Annex A

Goods and services of UK application no. 3709413

- Class 9: Computer hardware and software; computer software applications for mobile devices; computer games and computer games software; smart cards; telephone cards; encrypted smart cards; cameras and parts and fittings therefor; binoculars; calculating machines; eye glasses and spectacles, cases, chains, cords and frames therefor; cases for photographic apparatus and instruments; containers for contact lenses; optical goods; sound recording and sound reproducing apparatus and instruments; compact discs; digital versatile discs; juke boxes; radios; record, compact disc, and digital versatile disc players; audio-visual apparatus; telephones; mobile telephones; magnets; magnifying glasses; measuring apparatus and instruments; mechanical signs; neon signs; sockets; plugs and switches; sunglasses; sunshades; electronic publications (downloadable); mobile phone cases and covers; cases and covers for tablet computers and computers; computer mouse mats; none of the aforesaid being in the field of smoking, vaping, smoking cessation or vaping cessation.
- Class 14: Precious metals and their alloys; jewellery, precious and semi-precious stones; horological and chronometric instruments; costume jewellery; rings; earrings; bracelets; brooches; necklaces; jewellery chains; jewellery charms; pendants; cases and boxes for jewellery; clocks and watches; watch straps; cases and boxes for watches; cuff links; tie pins; tie clips; ornamental pins; lapel pins; badges of precious metals; ornaments of precious metals; key rings; key fobs; key holders; parts and fittings for all of the aforesaid goods.
- Class 16: Printed matter; newspapers; magazines and periodical publications; books; brochures; flyers; leaflets; programme binders and binding material; stationery; instructional teaching

materials; manuals; writing or drawing books and pads; birthday cards and cards; greeting cards; postcards; tickets; timetables; note pads and note books; photo engravings, photograph albums and albums; address books; almanacs; holders, cases and boxes for pens; pens and pencils; pencil and pen holders; paper, cardboard and articles made from these materials; erasers and erasing products; pencil sharpeners; rulers; books and booklets; book markers and book ends; letter trays; calendars; paper weights and paper clips; gift bags and bags for packaging; gift wrap and packaging paper; envelopes, folders, labels, seals, blackboards and scrap books; height charts and charts; carrier bags and garbage bags; ink and ink wells; paper knives; poster magazines; signs and advertisement boards, paper and cardboard; adhesive tapes and dispensers; office requisites and diaries; hat boxes; pads of paper; stickers and stencils; beer mats; catalogues; paper and cardboard coasters; transfers and diagrams; drawing instruments and materials; paint boxes and brushes; patterns and embroidery design; engravings and etchings; paper towels and hankies; paper flags; toilet paper; maps; paper and cardboard place mats; lithographs and lithographic works of art; paper table cloths and napkins; cheque book holders.

Class 18: Bags; sports bags; wallets; purses; handbags; suitcases, trunks and travelling bags; school bags and satchels; back packs and beach bags; make-up bags; cosmetics bags; vanity cases; wash bags for carrying toiletries; umbrellas.

Class 21: Household or kitchen utensils and containers; water bottles; plastic water bottles; aluminium water bottles; mugs; plates; bowls; dishes; porcelain ware; glass ware; pots; pans; cookware; cooking utensils; tableware; place mats; coasters; plastic storage containers; paper cups; bread bins; bread boards; candelabra; candlesticks; china ornaments; crystal (glassware); decanters;

drinking glasses and vessels; earthenware; goblets; tableware; mosaics of glass; works of art of porcelain, terra-cotta or glass; combs and brushes.

Class 25: Clothing, footwear and headgear; sleep masks; sportswear; leisurewear; lingerie; hosiery; underwear; coats; overalls; ear muffs; socks; baseball caps; hats; bobble hats; beanie hats; scarves; jackets; dressing gowns; pyjamas; sandals; slippers; boxer shorts; beach clothes and shoes; baby boots; romper suits; baby pants and sleep suits; braces; belts and berets; wrist bands; track suits; ties; cravats; aprons; bathrobes; bathing caps and suits; bathing trunks; gloves and mittens; headbands; jumpers and knitwear; leggings; vests; belts; ties.

Class 28: Games, toys and playthings; board games; football goals and nets; party novelty hats; gloves for games; balloons; balls; gymnastic and sporting articles and equipment; playing balls; footballs; plush toys; decorations for Christmas trees; Christmas crackers; synthetic Christmas trees and stands; jokes and novelties; playing cards; spinning tops; kites; knee guards and protective padding; marbles; slides; skittles; sleighs; masks; mobiles; rattles; roller skates; in-line skates; bodybuilding apparatus; confetti, exercise apparatus.

Class 35: Marketing, advertising and publicity services; provision of on-line advertising space; operation and management of gift card, discount card and customer loyalty schemes; none of the aforesaid being in the field of smoking, vaping, smoking cessation or vaping cessation; Retail and wholesale services in connection with the sale of precious metals and their alloys, jewellery, precious and semi-precious stones, horological and chronometric instruments, costume jewellery, rings, earrings, bracelets, brooches, necklaces, jewellery chains, jewellery charms, pendants, cases and boxes for jewellery, clocks and watches, watch straps, cases and boxes for watches, cuff links, tie pins, tie

clips, ornamental pins, lapel pins, badges of precious metals, ornaments of precious metals, key rings, key fobs, key holders, parts and fittings for all of the aforesaid goods, Printed matter, newspapers, magazines and periodical publications, books, brochures, flyers, leaflets, programme binders and binding material, stationery, instructional teaching materials, manuals, writing or drawing books and pads, birthday cards and cards, greeting cards, postcards, tickets, timetables, note pads and note books, photo engravings, photograph albums and albums, address books, almanacs, holders, cases and boxes for pens, pens and pencils, pencil and pen holders, paper, cardboard and articles made from these materials, erasers and erasing products, pencil sharpeners, rulers, books and booklets, book markers and book ends, letter trays, calendars, paper weights and paper clips, gift bags and bags for packaging, gift wrap and packaging paper, envelopes, folders, labels, seals, blackboards and scrap books, height charts and charts, carrier bags and garbage bags, ink and ink wells, paper knives, poster magazines, signs and advertisement boards, paper and cardboard, adhesive tapes and dispensers, office requisites and diaries, hat boxes, pads of paper, stickers and stencils, beer mats, catalogues, paper and cardboard coasters, transfers and diagrams, drawing instruments and materials, paint boxes and brushes, patterns and embroidery design, engravings and etchings, paper towels and hankies, paper flags, toilet paper, maps, paper and cardboard place mats, lithographs and lithographic works of art, paper table cloths and napkins, cheque book holders, bags, sports bags, wallets, purses, handbags, suitcases, trunks and travelling bags, school bags and satchels, back packs and beach bags, make-up bags, cosmetics bags, vanity cases, wash bags for carrying toiletries, umbrellas, Household or kitchen utensils and containers, water bottles, plastic water bottles, aluminium water bottles, mugs, plates, bowls, dishes, porcelain ware, glass ware, pots, pans, cookware, cooking utensils, tableware, place mats, coasters,

plastic storage containers, oven gloves, paper cups, bread bins, bread boards, candelabra, candlesticks, china ornaments, crystal (glassware), decanters, drinking glasses and vessels, earthenware, goblets, tableware, mosaics of glass, works of art of porcelain, terra-cotta or glass, combs and brushes, clothing, footwear and headgear, sleep masks, sportswear, leisurewear, lingerie, hosiery, underwear, coats, overalls, ear muffs, socks, baseball caps, hats, bobble hats, beanie hats, scarves, jackets, dressing gowns, pyjamas, sandals, slippers, boxer shorts, beach clothes and shoes, baby boots, romper suits, baby pants and sleep suits, braces, belts and berets, wrist bands, track suits, ties, cravats, aprons, bathrobes, bathing caps and suits, bathing trunks, gloves and mittens, headbands, jumpers and knitwear, leggings, vests, belts, ties, Games, toys and playthings, board games, football goals and nets, party novelty hats, gloves for games, balloons, balls, gymnastic and sporting articles and equipment, playing balls, footballs, plush toys, decorations for Christmas trees, Christmas crackers, synthetic Christmas trees and stands, jokes and novelties, playing cards, spinning tops, kites, knee guards and protective padding, marbles, slides, skittles, sleighs, masks, mobiles, rattles, roller skates, in-line skates, bodybuilding apparatus, confetti, exercise apparatus.

Annex B

Goods of UK registration no. 801477625

- Class 7: Electric handheld portable car vacuum cleaner.
- Class 12: Aftermarket automobile accessories, namely, car interior organizer bags, nets and trays specially adapted for fitting in vehicles; car interior organizer bags specially adapted for fitting in vehicles; car window shades, cargo storage bins especially adapted to fit in cars; cargo storage bins especially adapted to fit in trucks or SUV; automotive windshield shade screens, air pumps for bicycles, anti-slipping dashboard mats for holding personal items that are affixed or specially adapted to the automobile, automobile windshield sunshades, car window shades, luggage nets for vehicles, sun blinds adapted for automobiles, sun shields and visors for motor cars, wastebaskets specially adapted for fitting in vehicles; vehicle seat cushions; backseat rearview mirror for automobiles; electric air compressor vehicle tire inflator (terms considered too vague by the International Bureau - Rule 13 (2) (b) of the Common Regulations).
- Class 20: Lumbar support pillows not for medical purposes; seat cushions.
- Class 21: Gloves for household purposes.
- Class 22: Bungee cord; ratchet cargo tie down straps comprised of synthetic materials excluding artificial leather.
- Class 24: Unfitted fabric car seat covers.