

O-034-09

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2430291

BY LAUNDRY ATHLETIC LLP TO REGISTER THE TRADE MARK:

SUPERDRY

IN CLASSES 18 & 25

AND

IN THE MATTER OF OPPOSITION NO 94931 BY

ASAHI BREWERIES LTD

TRADE MARKS ACT 1994

**IN THE MATTER OF Application No 2430291
By Laundry Athletics LLP to register the trade mark
SUPERDRY in class 18 & 25**

and

**IN THE MATTER OF Opposition No 94931 by
Asahi Breweries**

BACKGROUND

1. On 18 August 2006 Laundry Athletics LLP ("*Laundry*") applied to register the trade mark SUPERDRY in classes 18 and 25 of the *Nice International Classification of Goods and Services*. Asahi Breweries ("*Asahi*") oppose registration under sections 3(1)(b) and (c) of the Trade Marks Act 1994 ("the Act") because, it claims, the mark describes (3(1)(c)) clothing or goods which either stay very dry or keep the wearer very dry and that it is devoid of distinctive character (3(1)(b)) for identical reasons. *Asahi's* opposition is directed at all of the goods in *Laundry's* application, namely:

Class 18:

Bags, handbags, shoulder bags, toiletry bags, kit bags, rucksacks, sports bags, beach bags, swing bags, hip bags, travel bags, luggage, wallets, purses, umbrellas, parasols; leather and imitations of leather and goods made of these materials.

Class 25:

Clothing, footwear, headgear; casual clothing, hooded sweatshirts, jeans, printed t-shirts, lined and unlined jackets, short sleeve and long sleeve shirts, baggy shorts, long sleeve embroidered t-shirts, printed and embroidered sweatshirts, trousers, fleece pullovers, socks, shorts, scarves, gloves, underwear.

2. *Laundry* filed a counterstatement denying the grounds of opposition. Both sides filed evidence (this is summarised below) and the matter came to be heard before me on 16 December 2008. At the hearing, *Laundry* were represented by its trade mark attorney, Ms Kate Szell of Venner Shipley LLP. *Asahi* did not attend the hearing nor did it file any written submissions.

***Asahi's* evidence**

3. This consists of a witness statement and accompanying exhibits from Shingo Hirai a general manager in the General and Legal Affairs Management Department of *Asahi*. Exhibit SH1 of his evidence consists of extracts from the

Concise Oxford English Dictionary showing definitions for the words SUPER and DRY. Exhibit SH2 is filed to show the words SUPER and DRY used together in common parlance and consists of an article from the *BBC NEWS* web-site dated (or at least printed) on 14 September 2007. The article is about a desert in Chile and is headed: "Chile desert's super-dry history". There is a further Internet extract from "sofeminine.co.uk" which refers to "Super-Dry Skin"; this was also printed on 14 September 2007.

4. Mr Hirai's final exhibit (SH3) consists of what he describes as further extracts showing how the words SUPER and DRY are commonly employed together to describe a variety of different products. These extracts (all of which were printed on 14 September 2007) consist of:

An advertisement on the product review web-site *Ciao!* for a particular brand of nappies headed "Huggies Super Flex Super Dry Nappies". One of the reviews is headed "Super flex...but Super Dry?"

A print from a web-site with what appears to be an advertisement for second hand nappies (unused) for "Huggies super dry 5"

A print from an Internet shop selling climbing rope - the product is a "Mammut – Galaxy Super Dry 10mm x 60m"

A further print from *Ciao!* with a reference to the climbing rope "Mammut Universe 9mm Superdry"

Laundry's evidence

5. This consists of a witness statement and accompanying exhibits from Mr Theo Karpothios who is the international sales purchasing director of *Laundry*. He states that *Laundry* first started selling clothing and accessories (such as belts) under the SUPERDRY mark in 2004 and although it sells other brands, SUPERDRY is its largest. He states that prior to this, a partnership called S2 used the mark, the goodwill in which was assigned to *Laundry*.

6. More details on UK use are then provided. Mr Karpothios states that the goods are sold in stores dedicated to their sale and through concessions in larger department stores. The first SUPERDRY store opened in Convent Garden in 2005 and a second opened there in 2006. Mr Karpothios estimates that in 2004 there were 50 outlets and by 2006 200 outlets throughout the UK. Turnover figures for *Laundry* are then provided. I have added a further column to the table for sales of SUPERDRY goods because Mr Karpothios states that SUPERDRY accounts for approximately 90% of *Laundry's* total sales:

	Year ending April 2004	Year ending April 2005	Year ending April 2006	Year ending April 2007	Year ending April 2008
<i>Laundry</i>	£688,800	£2,874,900	£3,804,000	£7,639,000	£18,000,000
SUPERDRY	£619,920	£2,587,410	£3,423,60	£6,875,100	£16,000,000

7. Detailed next is the amount spent on marketing. This is said to be around £500,000 per annum with nearly all of this on trade shows. These trade shows are said to take place outside of the UK but attended by UK retailers. Exhibit TK2 contains an extract from a magazine called *BB Bulletin* which features a SUPERDRY advertisement. This magazine was prepared for one of the overseas trade shows. The exhibit also contains an extract from *Hooker* magazine featuring some SUPERDRY garments, no circulation figures are provided for this publication. There are two further magazine extracts but I note that both of these are from after the date of application of *Laundry's* trade mark.

8. Exhibit TK1 consists of sample invoices, the invoices carry the codes MLA and GLA which are said to relate to SUPERDRY goods. Reference is also made to Exhibit TK3 which consists of a retail strategy brochure for the SUPERDRY brand. Although, again, this is from after the date of application of *Laundry's* trade mark, Mr Karpathios states that the way in which the brand is displayed on clothing etc is consistent with the way in which it was used beforehand.

***Asahi's* reply evidence**

9. This consists of a witness statement from Toyokazu Yokota, a general manager of the Department of Intellectual Property of *Asahi*. His evidence is merely a critique of Mr Karpathios' evidence. He highlights that some of the turnover figures for goods sold by *Laundry* are from after the date of application and that some of the invoices relied upon contain the product codes MLA and GLA and that there is no independent evidence to show that these are SUPERDRY goods.

DECISION

10. Before assessing the relevant grounds of opposition, I note that *Laundry* has filed evidence to demonstrate that its mark has acquired a distinctive character through use. I will, therefore, assess the grounds of opposition *prima facie* and then, if the opposition succeeds to any extent, I will consider whether the mark has instead acquired a distinctive character through use.

Section 3(1)(c)

11. Section 3(1)(c) states that the following shall not be registered:

“trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose,

value, geographical origin, the time of production of goods or of rendering services, or other characteristics of goods or services”

12. The European Court of Justice (“ECJ”) has issued judgments germane to this issue on a number of occasions. A helpful summary of the position was given in *Wm. Wrigley Jr. Company v. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-191/01 P, where it was stated:

“32. In order for OHIM to refuse to register a trade mark under Article 7(1)(c) of Regulation No 40/94, it is not necessary that the signs and indications composing the mark that are referred to in that article actually be in use at the time of the application for registration in a way that is descriptive of goods or services such as those in relation to which the application is filed, or of characteristics of those goods or services. It is sufficient, as the wording of that provision itself indicates, that such signs and indications could be used for such purposes. A sign must therefore be refused registration under that provision if at least one of its possible meanings designates a characteristic of the goods or services concerned.”

13. I also take into account the decision of the ECJ in *Postkantoor* (Case C-363/99) which considered the registrability of combinations of descriptive words. Paragraphs 98–100 of the judgment are reproduced below:

“98. As a general rule, a mere combination of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, itself remains descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive. Merely bringing those elements together without introducing any unusual variations, in particular as to syntax or meaning, cannot result in anything other than a mark consisting exclusively of signs or indications which may serve, in trade, to designate characteristics of the goods or services concerned.

99. However, such a combination may not be descriptive within the meaning of Article 3(1)(c) of the Directive, provided that it creates an impression which is sufficiently far removed from that produced by the simple combination of those elements. In the case of a word mark, which is intended to be heard as much as to be read, that condition must be satisfied as regards both the aural and the visual impression produced by the mark.

100. Thus, a mark consisting of a word composed of elements, each of which is descriptive of characteristics of the goods or services in respect of which registration is sought, is itself descriptive of those characteristics for the purposes of Article 3(1)(c) of the Directive, unless there is a perceptible difference between the word and the mere sum of its parts: that assumes either that, because of the unusual nature of the

combination in relation to the goods or services, the word creates an impression which is sufficiently far removed from that produced by the mere combination of meanings lent by the elements of which it is composed, with the result that the word is more than the sum of its parts, or that the word has become part of everyday language and has acquired its own meaning, with the result that it is now independent of its components. In the second case, it is necessary to ascertain whether a word which has acquired its own meaning is not itself descriptive for the purpose of the same provision.”

14. *Laundry* submits that the opposition under this ground is ill founded for a number of reasons. It submits that the combination of the words SUPER and DRY is an unusual construction of language. A reference is made to the judgment of the ECJ in *Baby-Dry* (Case C-383/99P) to support this proposition. It also argues that the goods in question are not sold by reference to their dryness, and, therefore, there is no “direct and specific” relationship between the mark and the goods; this is a reference to the judgment of the CFI in *Ford Motor Co v. OHIM* (Case- T-67/07) where it was stated:

“24. It follows that, for a sign to be caught by the prohibition set out in that provision, there must be a sufficiently direct and specific relationship between the sign and the goods and services in question to enable the public concerned immediately to perceive, without further thought, a description of the category of goods and services in question or one of their characteristics (Case T-19/04 *Metso Paper Automation v OHIM(PAPERLAB)* [2005] ECR II2383, paragraph 25, and *RadioCom*, paragraph 22 above, paragraph 29).”

and

“33. The fact that an undertaking wishes to give its goods a positive image, indirectly and in an abstract manner, yet without directly and immediately informing the consumer of one of the qualities or specific characteristics of the goods, is a case of evocation and not designation for the purposes of Article 7(1)(c) of Regulation No 40/94 (see, to that effect, Case T-24/00 *Sunrider v OHIM(VITALITE)* [2001] ECR II 449, paragraph 24; Case T-360/00 *Dart Industries v OHIM(UltraPlus)* [2002] ECR II 3867, paragraph 27; and *EUROPREMIUM*, paragraph 32 above, paragraph 37).”

15. Finally, *Laundry* submits that even though a sentence can be constructed which contains the trade mark and the goods, this is not sufficient to indicate that the mark is lacking distinctiveness or descriptive; in its skeleton argument it states “Clothes or bags would not be described as being “superdry” clothes or “superdry” bags any more than nappies would be described as “baby-dry” nappies”.

16. I will comment firstly on the construction of the words and whether I regard them as an unusual combination. The *Baby-Dry* case makes reference to the importance of considering the construction of words. More recent judicial comment can be seen in the ECJ's judgment in *Postkantoor* where reference was made to combinations of descriptive words only being registrable if they introduce "unusual variations, in particular as to syntax or meaning".

17. The words in question here need little definition. DRY relates to an absence of moisture or liquid, SUPER, in addition to being a laudatory term (e.g. excellent), is a word that may be used in combining form to indicate something of great or extreme degree¹; SUPER, being a combining form, means that the conjoined nature of the mark is of little significance. *Laundry* highlights that there is little by way of evidence from the opponent to support that the words would be used in combination, further, that there are more obvious and usual expressions that would be used (e.g. "very dry" or "extremely dry"). Whilst I accept that the other combinations referred to may be used more frequently, this does not equate to the combination here being an inapt combination of words. Indeed, my view of the dictionary definitions is that there is no reason why the words would not be combined in this way, with the word combination indicating dryness of a high degree.

18. *Asahi's* evidence is not overwhelming, however, some uses of the phrase are shown such as the reference to the super-dry desert, super-dry skin and, indeed, a reviewer of *Huggies Super-Flex Super-Dry* questioning whether the nappies are super dry. At the hearing, Ms Szell suggested that the *Huggies* and *Mammut* references may simply be examples of trade mark use. This may be so for *Mammut* as I am unsure how rope relates to dryness. However, the *Huggies* reference seems to be descriptive rather than being indicative of trade origin, with the SUPER FLEX SUPER DRY striking me as words used to indicate two potential characteristics relating to the flexibility of the nappies and to their ability to keep the wearer dry.

19. The references provided in evidence do not strike me as unusual uses of language and, at the very least, support my view based on the dictionary meanings. The comparison with *Baby-Dry* is not, in my view, well founded. Each mark must be assessed on its own merits whilst, of course, bearing in mind the ECJ's rationale. *Baby-Dry* may be a combination of words which is unusual as to syntax, but I see nothing unusual in the combination SUPERDRY which seems to me to be a natural, grammatically correct combination of descriptive words. The absence of overwhelming use on the Internet (or more correctly the absence of use filed in evidence) is not particularly relevant given the comments of the ECJ in *Doublemint* to the extent that a mark does not have to be in use to fall foul of the relevant provisions. In summary, I do not regard the word combination SUPERDRY to be unusual in construction.

¹ These definitions are taken from the dictionary definitions contained in *Asahi's* evidence

20. The fact that I have found nothing unusual in the construction of the word combination is not the end of the matter. I must, of course, assess the mark in relation to the goods sought to be registered, and also in light of *Laundry's* further submissions. One of its further submissions is that there is not a direct and specific enough relationship between the mark and the goods. Reference is made to *Ford Motor Co v. OHIM* on this point. Whilst it is clear that there must be a directness of relationship, this does not mean, in my view, that the goods in question must be capable of direct description with reference to the mark. In other words, it is not a requirement, when applied to this case, that the clothing (or bags) may be described as SUPERDRY clothing. Section 3(1) itself refers to a number of potential characteristics that are relevant for consideration including descriptions of the intended purpose of the goods. To this extent, if the description is of the intended purpose of the goods, as opposed to a description of the actual goods themselves, this is equally applicable when considering whether a mark falls foul of section 3(1)(c).

21. In terms of the directness of the message, I am aware from my own experience that many items of clothing are sold on the basis of a capacity to keep the wearer dry (from rain) and that this would also apply to certain bags used in the outdoors to keep the contents dry. Furthermore, I am also aware that certain items of clothing (normally those that are in direct contact with the body) have a "wicking" effect in order to keep the wearer dry (from perspiration). Therefore, for these goods there is the clear potential for the mark to be seen as a simple reference to the intended purpose and effect of the goods, namely, to keep the wearer (or contents) very dry. The judgment of the CFI in *Ford Motor Co v. OHIM* is relevant, but I also bear in mind that in that case the issue was further explained as whether the mark was designative or merely evocative. In my view, the word combination here is more than mere evocation, the message of intended purpose is quite clear and direct.

22. A further argument put forward at the hearing was that use of the word SUPER, as a description intensifier for the goods at issue here, was unlikely because it indicates not just being very dry but something that was incredibly dry. Therefore, whilst the combination may be apt for a desert it would be an unusual combination for clothes etc. Whilst I can see the distinction in terms of meaning, my view is that for goods sold on the basis of keeping the wearer (or contents) dry, there is no reason why the intensifier would not be used to indicate an ultimate degree of dryness.

23. I must deal with *Laundry's* final submission, that whilst the words may be capable of being used as part of a longer sentence, SUPERDRY, in isolation, will not be required for descriptive purposes. A further reference is made to the use of *Baby-Dry* as part of a longer sentence. Again, the difference with *Baby-Dry* is that, when taken out of context and away from use as part of a sentence, the words were found to consist of an unusual juxtaposition of words. I have already found that this is not the case with SUPERDRY. Furthermore, I have found that

the message in SUPERDRY is direct and clear as to intended purpose. I am also conscious of the judgment in *Postkantoor* which refers to combinations of descriptive words only being registrable if such a combination is unusual or that the word combination has its own meaning divorced from its descriptive meaning; both these factors, if they exist, resulting in the combination being more than the sum of its parts. I do not see this in the mark before me. The word combination is not more than the sum of its parts; whether alone or as part of a longer sentence it sends a clear descriptive message relating to the intended purpose of the goods.

24. Before concluding on this ground, I must, of course, assess the found descriptiveness in relation to the specific goods sought to be registered. I have so far dealt with the matter in general terms to the goods at issue. This is important because, from an initial assessment, it is clear that the objection does not relate to all of the goods listed. For example, purses are unlikely to be sold on the basis of keeping its contents dry. I will, therefore, go on to make specific findings for all of the goods listed. I should add that when I make these findings, it is only those goods which would obviously fall foul of the allegation for which the opposition can be upheld. I say this because *Asahi* has filed no evidence to show the range of goods likely to face objection. Going through each and every term my findings are:

Class 18:

Bags, kit bags, rucksacks, sports bags, travel bags, luggage:

The above bags and holdalls seem likely to be ones where the ability to keep the contents dry would be a desirable selling point. They seem to me to be obvious examples and the objection must, therefore, be upheld.

Handbags, shoulder bags, toiletry bags, wallets, purses, beach bags:

These do not strike me as goods sold with reference to their ability to keep contents dry. Without evidence to the contrary, the objection cannot be upheld.

Parasols:

This is an umbrella like device for keeping off the sun not the rain. The objection cannot be upheld.

Swing bags, hip bags:

I do not know what these goods are or what their function is. No evidence has been provided on this, therefore, I cannot say that the objection is valid.

Umbrellas:

These goods clearly have the purpose of keeping the user dry. At the hearing, Ms Szell argued that an umbrella either keeps you dry or it does

not, therefore, it is unlikely that a trader would need to indicate a degree of dryness. Whilst I can see the point, it seems to me that an umbrella may give its user a wider degree of rain protection (for example, a golf or fishing umbrella) and, therefore, it is not unlikely, in my view, that a trader would wish to utilise terminology to indicate that their particular umbrella would keep the user extremely dry. For this reason, the objection is valid.

Leather and imitations of leather and goods made of these materials:

In my experience, and as submitted by Ms Szell, leather goods in this class are rarely sold on the basis of their capacity to keep contents dry. Without evidence to overcome this view, the objection cannot be upheld.

Class 25:

Clothing, footwear, headgear; casual clothing:

These are broad terms covering a large range of clothing which may be designed to keep the wearer dry. The objection is upheld.

Hooded sweatshirts, jeans, baggy shorts, printed and embroidered sweatshirts, fleece pullovers, short sleeve and long sleeve shirts, shorts, scarves.

These do not strike me as goods that have an obvious function of keeping the wearer dry from rain or perspiration. Without evidence to the contrary, the objection cannot be upheld.

Printed t-shirts, lined and unlined jackets, long sleeve embroidered t-shirts, trousers, socks, underwear, gloves,

These goods are either close to the skin (t-shirts, underwear etc) which may have a wicking function or are goods with a clear capacity to keep the rain off (jackets & trousers, particularly waterproof ones), therefore, the objection is upheld here.

Section 3(1)(b)

25. Section 3(1)(b) states that the following shall not be registered:

“trade marks which are devoid of any distinctive character”

26. The test to be applied under this ground has been dealt with by the ECJ in a number of its judgments, notably in Joined Cases C-53/01 to C- 55/01 *Linde AG, Winward Industries Inc and Rado Uhren AG* (8 April 2003). The test equates to assessing the impact that the sign will have on the average consumer when used in relation to the goods at issue and then deciding whether they will see it as something that is identifying to them goods originating from a particular undertaking. Although this ground of opposition has full and independent scope from the other ground of objection, I note that in *Postkantoor* the ECJ stated:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

27. *Asahi's* pleaded case is that the mark is devoid of distinctive character because it is descriptive. Taking this pleading into account, together with the comments made in *Postkantoor*, there is little to say on this ground of opposition given that I have already determined that the mark is descriptive for certain goods. There are, however, two matters to deal with.

28. The first matter is whether, for the goods I have found not to fall foul of the allegation of descriptiveness, the mark is nevertheless devoid of distinctive character. On this, I note that if I were to make a finding of being devoid of distinctive character in respect of these goods then I would, effectively, be going beyond the scope of the pleaded case. In any event, I can see no reason why, for these goods, they would lack distinctiveness; neither has any reason been put forward by *Asahi*.

29. The second matter is if, in the event of appeal, I am found to be wrong on the issue of the directness of description, whether the mark is nevertheless devoid of any distinctive character. If I am found to be wrong, my view is that the average consumer of the goods would still take some form of descriptive message (but clearly a less direct description if I was found to be wrong initially), and, therefore the mark will not, upon first impression, be taken as an indication of the undertaking responsible for the goods. **In summary, the ground under section 3(1)(b) succeeds to the same extent as the ground under section 3(1)(c).**
Acquired distinctiveness

30. The proviso to section 3 of the Act permits registration of a mark that is otherwise unacceptable under the provisions of section 3(1)(b) & (c) if it has, in fact, acquired a distinctive character because of the use made of it. In terms of what is required to demonstrate this, in *Windsurfing Chiemsee* (C108 &109/97) [1999] ETMR 585 the ECJ stated:

“If the competent authority finds that a significant proportion of the relevant class of persons identify goods as originating from a particular undertaking because of the trade mark, it must hold the requirement for registering the mark to be satisfied.”

and

“In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: 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 class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations.”

31. I must also consider whether the mark has acquired distinctiveness throughout the UK. This consideration stems from the judgment of the ECJ in Case C-108/05 *Bovemij Verzekeringen NV v Benelux-Merkenbureau (EUROPOLIS)* [2006] ECR I-7605. On this, Mr Richard Arnold QC (sitting as the Appointed Person) made the following statement in *The Journal* (BL O/273/08):

“22. Given the applicant’s opposition to a reference, however, I shall give my own answer to the question. In absence of further guidance from the Court of Justice, I consider that it is not possible to overcome an objection under section 3(1)(b), (c) or (d) of the 1994 Act by demonstrating that the mark applied for has acquired a distinctive character within a particular locality or region. The Court of Justice’s first ruling in *EUROPOLIS* appears to be quite unequivocal on this point: “registration of a trade mark can be allowed on the basis of [Article 3(3) of the Directive] only if it is proven that that trade mark has acquired distinctive character through use throughout the part of the territory of the Member State ... where there exists a ground for refusal”. Moreover, its reasoning is that the mark must be free from objection throughout the Member State in question.”

32. The position on acquired distinctiveness must be assessed at the material date, namely the date of application of 18 August 2006. Taking this into account, *Laundry* can rely on approximately two and a half years of use. No market share information is provided nor any information on the size of the market as a whole. However, I am aware from my own experience that the market for clothing (and accessories such as bags) is a huge one and is also one that is quite fragmented. Sales in the two full financial years prior to the material date were £2.5million and £3.4million. Whilst this may not equate to SUPERDRY being a market leading brand, it does, nevertheless, strike me as reasonably significant. Outlets for sales of such goods have risen from around 50 in 2004 to around 200 in 2006. This, again, is reasonably significant. It is also clear from the totality of the evidence that the mark is used as a trade mark at both point of sale and on the clothing items themselves. I should add that I am content to take the contents of TK3 into account, even though it is after the material date, it merely highlights the nature of use of the mark and the declarant has confirmed that this is consistent with its earlier use; this has not been challenged by *Asahi*.

33. The lack of promotion is, however, a concern. Most promotion has taken place at trade fairs, indeed, trade fairs outside of the UK. The relevant public to

consider in this matter are the consumers or end-users of the goods in question. Given the nature of the goods, this equates to the general clothing (and bag) buying public. Therefore, regardless of where the trade fairs took place, they will have done little to assist the actual consumer or end-users to see the mark as an indication of trade origin. The only other relevant (to the material date) promotional activity included in the evidence is the advertisement in *Hooker*, but I do not know what impact this would have had at consumer level. Despite this concern, I am prepared to accept that the level of turnover demonstrated in evidence is sufficient enough when taken with the number of sales outlets to persuade me that the mark is likely to have been known by a significant proportion of the relevant public by the material date. The nature of the sales outlets is also a factor which supports this proposition given that many occupy space in department stores which, given their nature, are visited by a range of consumers, not just those who may be interested in *Laundry's* wares.

34. I should add that I have considered the affect of the *EUROPOLIS* judgment and whether the mark has acquired distinctiveness throughout the UK. On this I note that Mr Karpothios states that the sales outlets are located throughout the UK; this evidence is unchallenged. Further support comes in the form of invoices exhibited at TK2. These are only sample invoices yet they show addresses in Hertfordshire, Tyne and Wear, Gloucestershire, Yorkshire, Essex, Northants, Cornwall, Cheshire and, Caithness (in Scotland). The evidence also refers directly to stores in London and Manchester. Taking all of this into account, I am prepared to accept that the use is more than of mere local or regional significance.

35. In terms of the goods for which the mark has been used, the invoices provided list a number of different products such as shorts, t-shirts, shirts, hoodies, jackets, jeans, polo shirts, dresses, tracksuit tops. Although in *Asahi's* evidence it highlights that there is nothing to corroborate that these invoices relate to SUPERDRY goods, I am prepared to accept that they do. Mr Karpothios has not been called for cross-examination nor does any of the evidence strike me as inconsistent with the rest of his evidence. There is no reason to disbelieve it. The manner of use in the mark shown in TK3 shows that it is, indeed, these types of garments that are sold and that they are casual in nature rather than formal. Given this, and based on the terms sought for registration that require acquired distinctiveness for registration, the mark has acquired distinctiveness for: "casual clothing" (use has been shown for a wide enough range of casual clothing for this term to be accepted), "printed t-shirts", "lined and unlined jackets", "long sleeve embroidered t-shirts". None of the evidence relates to goods in class 18.

Summary

36. Taking into account my findings in relation to both the *prima facie* case and in relation to acquired distinctiveness, the opposition succeeds in relation to:

Class 18:

Bags, kit bags, rucksacks, sports bags, travel bags, luggage, umbrellas.

Class 25:

Clothing, footwear, headgear; trousers, socks, gloves, underwear.

but fails in relation to:

Class 18:

Handbags, shoulder bags, toiletry bags, beach bags, swing bags, hip bags, wallets, purses, parasols; leather and imitations of leather and goods made of these materials.

Class 25:

Casual clothing, hooded sweatshirts, jeans, printed t-shirts, lined and unlined jackets, short sleeve and long sleeve shirts, baggy shorts, long sleeve embroidered t-shirts, printed and embroidered sweatshirts, fleece pullovers, shorts, scarves.

Fall-back position

37. At the hearing, Ms Szell highlighted goods for which she felt the mark should be registered for even if I found against *Laundry* in the *prima facie* case and also goods for which she felt acquired distinctiveness was proven. Most of these goods are taken care of in the summary above. The exception to this is the term “belts”, however, belts was never included specifically in the list of goods in class 25 (If the term had appeared then it would have remained in the specification as the opposition would not have been upheld in relation to them). If “belts” is, nevertheless, a term which falls within the term “clothing” at large it would also fall within the term “casual clothing” which remains. Therefore, I do not intend returning to the parties for further submissions on fall-back specifications.

COSTS

38. Both sides have achieved a measure of success. Therefore, I do not propose to favour either party with an award of costs.

Dated this 6th day of February 2009

**Oliver Morris
For the Registrar
The Comptroller-General**