O/0356/26

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO. 4056193

IN THE NAME OF SUSAN BIRCHALL-ELLIS

FOR THE FOLLOWING TRADE MARK:

IN CLASSES 3, 11 AND 35

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY

UNDER NO. 508223

BY STELLA POSTIGO

Background and pleadings

1. Susan Birchall-Ellis ("the proprietor") is the registered proprietor of the trade mark shown on the front cover of this decision ("the proprietor's mark") under registration number 4056193. The proprietor's mark was filed on 25 May 2024 and became registered on 27 September 2024. It stands registered in respect of the following goods and services:

> *Class 3: Beauty preparations for the hair; Hair cosmetics; Adhesives for false eyelashes, hair and nails; Hair styling lotions; Hair lacquer; Hair balm; Hair styling waxes; Hair lighteners; Hair lotion; Hair shampoos; Hair moisturisers; Hair colouring; Hair gel; Styling gels for the hair; Cosmetic preparations for the hair and scalp; Hair tonics [for cosmetic use]; Hair styling spray; Hair bleaches; Hair care creams; Tints for the hair; Hair conditioner; Hair care serum; Nail cosmetics; Hair color removers; Shampoos for human hair; Beauty serums; Hair balsam; Hair powder; Nail paint [cosmetics]; Hair styling preparations; Dyes for the hair.*
>
> *Class 11: Hair driers for use in beauty salons.*
>
> *Class 35: Retail services in relation to hair products.*

2. On 13 May 2024, Stella Postigo ("the applicant") made an application for a declaration of invalidity in respect of the proprietor's mark pursuant to section 47 of the Trade Marks Act 1994 ("the Act"). The application is based upon section 5(2)(b) of the Act.

3. The applicant relies upon its UK trade mark registration number 3951455, **Level Up Beauty** ("the applicant's mark"). The applicant's mark was filed on 31 August 2023 and became registered on 29 December 2023. It stands registered for the following goods, all of which are relied upon:

> *Class 3: Cosmetics not being or comprising eyelash serums; Cosmetics for eye-lashes not being or comprising eyelash serums; Lip cosmetics; Make-up palettes containing cosmetics not being or containing eyelash serums; Eye cosmetics not being or comprising eyelash serums.*

4. In its statement of grounds, the applicant argues that the competing marks are highly similar, and that both parties operate “within the same industry and class”. On this basis, the applicant submits that there is a likelihood of confusion.

5. The proprietor filed a counterstatement denying the grounds of invalidation.

6. Neither the applicant nor the proprietor is professionally represented. Only the applicant filed evidence, and both parties filed submissions during the evidence rounds. No hearing was requested but the applicant filed written submissions in lieu.

7. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK’s withdrawal from the EU.

Evidence

8. The applicant’s evidence consists of a witness statement provided by Ms Stella Postigo (dated 25 June 2025) who is the applicant in these proceedings. She has filed Exhibits SP1 to SP18. These show a range of information, such as the parties’ classification terms as well as screenshots of various products being retailed by several brands. I have taken all the evidence into account in reaching my decision and will refer to it below where necessary

Decision

9. Section 5(2)(b) has application in invalidation proceedings because of the provisions of section 47 of the Act, the relevant parts of which read as follows:

> “47. (1) […]
>
> (2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-
>
> > (a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) […]

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[…]

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if –

(a) the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with their consent in relation to the goods or services for which it is registered-

(i) within the period of 5 years ending with the date of application for the declaration, and

(ii) within the period of 5 years ending with the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application where, at that date, the five year period within which the earlier trade mark should have been put to genuine use as provided in section 46(1)(a) has expired, or

(b) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes –

(a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

[…]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

10. By virtue of its earlier filing date, the trade mark relied upon by the applicant qualifies as an earlier trade mark pursuant to section 6 of the Act. However, as the applicant's mark had not completed its registration process more than five years before the date on which the application for declaration of invalidity was filed, it is not subject to the proof of use requirements specified within section 47(2B) of the Act. As a consequence, the applicant may rely upon all of the services identified without having to establish genuine use.

11. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor:*[1]

(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

[1] [2025] UKSC 25

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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

(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

12. In *Canon,*[2] the Court of Justice of the European Union ("CJEU") stated, at paragraph 23 of its judgment, that when considering whether goods are similar, all the relevant factors relating to the goods should be taken into account. The CJEU stated that those factors include their nature, intended purpose, method of use and whether they are in competition with each other or are complementary.

13. The relevant factors identified by Jacob J. (as he then was) in *Treat*[3] 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.

14. In *Kurt Hesse v OHIM,*[4] the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods.

[2] Case C-39/97
[3] [1996] R.P.C. 281
[4] Case C-50/15 P

In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM),*[5] the General Court ("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."

15. In *Gérard Meric v OHIM,*[6] the GC confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

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

16. The goods and services to be compared are shown in the table below:

The applicant's goods	**The proprietor's goods and services**
Class 3: Cosmetics not being or comprising eyelash serums; Cosmetics for eye-lashes not being or comprising eyelash serums; Lip cosmetics; Make-up palettes containing cosmetics not being or containing eyelash serums; Eye cosmetics not being or comprising eyelash serums.	*Class 3: Beauty preparations for the hair; Hair cosmetics; Adhesives for false eyelashes, hair and nails; Hair styling lotions; Hair lacquer; Hair balm; Hair styling waxes; Hair lighteners; Hair lotion; Hair shampoos; Hair moisturisers; Hair colouring; Hair gel; Styling gels for the hair; Cosmetic preparations for the hair and scalp; Hair tonics [for cosmetic use]; Hair styling spray; Hair bleaches;*

[5] Case T-325/06
[6] Case T-33/05

	Hair care creams; Tints for the hair; Hair conditioner; Hair care serum; Nail cosmetics; Hair color removers; Shampoos for human hair; Beauty serums; Hair balsam; Hair powder; Nail paint [cosmetics]; Hair styling preparations; Dyes for the hair. *Class 11: Hair driers for use in beauty salons.* *Class 35: Retail services in relation to hair products.*

17. In her submissions in lieu, the applicant argues that that there is "overlapping" between the parties' goods and classes. In addition to this, in her witness statement, the applicant makes several references to the evidence exhibits. For instance, Exhibits SP7 and SP8 demonstrate examples of brands retailing other brands' cosmetics, and Exhibits SP11 and SP12 demonstrate a beauty brand which sells both hairdryers and cosmetics. Whilst I acknowledge these exhibits, the existence of brands which undertake these commercial activities does not demonstrate that the goods and/or services are therefore similar to one another or that the average consumer would typically encounter the goods in this way. For example, the brands shown in the evidence are major beauty brands who sell lots of different beauty-related items, but it is my view that it would not be typical for brands to have such a diverse range of different cosmetic and electronic items.

18. In her counterstatement, the proprietor initially admitted that the competing parties' goods and services were similar.[7] However, in her submissions filed during the evidence rounds, she then changed her position and argued differently. In *Beak,*[8] Dr Brian Whitehead, sitting as the Appointed Person, stated at that:

[7] Although the handwriting at Q8 on the counterstatement is not clear, in her email dated 20 April 2025, the proprietor confirmed that the statement at point 5 contained the word "admit".
[8] O/096/25

"22. However, it is in principle possible for a party who has made an admission to seek to resile from that admission. By CPR 14.2(11), "The court's permission is required to amend or withdraw an admission". CPR 14.5 states:

> "In deciding whether to give permission for an admission to be withdrawn, the court shall consider all the circumstances of the case, including—
>
> (a) the grounds for seeking to withdraw the admission;
>
> (b) whether there is new evidence that was not available when the admission was made;
>
> (c) the conduct of the parties;
>
> (d) any prejudice to any person if the admission is withdrawn or not permitted to be withdrawn;
>
> (e) what stage the proceedings have reached; in particular, whether a date or period has been fixed for the trial;
>
> (f) the prospects of success of the claim or of the part of it to which the admission relates; and
>
> (g) the interests of the administration of justice".

19. On 22 March 2026, the Registry contacted the proprietor to clarify if she intended to ask for permission to change her plea in relation to the similarity of the goods and services, and the reason(s) for doing so. In the letter it was made clear that if no response was received by 9 April 2026, it would be presumed that the proprietor did not intend to ask for permission to change her pleading. The proprietor did not respond by the deadline given, and therefore I will proceed on the basis of the proprietor's original plea, i.e. that the parties' goods and services are similar.

20. Furthermore, in her counterstatement, the proprietor also argues that "we own a salon and provide a service", whereas she claims the applicant "told me she wants to be a manufacturer and is saving to start business" (sic). In her submissions filed in the evidence rounds, the proprietor also alleges that "the applicant's business is not yet

operational, and the inclusion of these classes appears speculative and disproportionate". However, as a matter of law, I must clarify that the proprietor's comments relating to the applicant's alleged business activities can have no bearing on the outcome of this application for invalidity. As previously explained, the mark relied upon by the applicant had not been registered for five years at the date on which the cancellation application was filed. Consequently, the applicant is not required to prove use in the UK for any of the goods for which its mark is registered. The applicant's mark is entitled to protection against a likelihood of confusion with the proprietor's mark based on its 'notional' use for all the goods listed in the register. The concept of notional use was explained by Laddie J in *Compass Publishing BV v Compass Logistics Ltd*[9] like this:

> "22. […] It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place."

21. So far as the proprietor's claimed use of its mark is concerned, as per the CJEU judgement in *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*,[10] (particularly paragraph 66), it is necessary to consider all the circumstances in which the proprietor's mark might be used. As a result, even though the proprietor has suggested that the applicant is not yet operational and wants to be a manufacturer, my assessment must take into account only the proprietor's mark and any potential

[9] [2004] RPC 41
[10] Case C-533/06

conflict with the applicant's mark. Any differences between the actual goods and/or services provided by the parties are not relevant unless those differences are apparent from the competing marks.

22. For the purposes of comparing goods and 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.[11] I have therefore assessed the applicant's goods and services by dividing the terms into groups as per below:

Class 3:

> *Beauty preparations for the hair; Hair cosmetics; Adhesives for […], hair […]; Hair styling lotions; Hair lacquer; Hair balm; Hair styling waxes; Hair lighteners; Hair lotion; Hair shampoos; Hair moisturisers; Hair colouring; Hair gel; Styling gels for the hair; Cosmetic preparations for the hair and scalp; Hair tonics [for cosmetic use]; Hair styling spray; Hair bleaches; Hair care creams; Tints for the hair; Hair conditioner; Hair care serum; Hair color removers; Shampoos for human hair; Beauty serums; Hair balsam; Hair powder; Hair styling preparations; Dyes for the hair.*

23. The Oxford English Dictionary defines "cosmetics" as "a preparation intended to beautify the hair, skin, or complexion". The proprietor's goods are all types of hair cosmetics, which, in my view, are included as a subcategory in the applicant's wider term *cosmetics not being or comprising eyelash serums.* As such, I am of the view that the goods are identical under the principle outlined in *Meric.* However, if I am wrong in this finding, then in the alternative, I am of the view that the goods are similar to a medium degree. The users of both will be the general public, as well as trade and professional users. The nature will overlap, as the applicant's goods and proprietor's goods will mostly be sold as liquids or solids. The purpose of the goods will overlap as both are used to improve the appearance of the user, although the applicant's goods are most commonly used on the skin whereas the proprietor's goods are used on the hair. They will be sold through the same trade channels, although they will appear in slightly different locations within those retail environments. It is my view that the goods

[11] *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38

are not complementary as one is not essential to the other. Given the slight difference in purpose, the goods are not in competition with each other.

Adhesives for false eyelashes, […].

24. It is my view that these goods are not included in the applicant's term *cosmetics for eye-lashes not being or comprising eyelash serums*, as these include products to use on the eyelashes themselves, rather than false eyelashes. The users of both will be the general public. Their nature and purpose overlap as both will be sold as liquids and are used within the process of decorating eyelashes, although *adhesives for false eyelashes* are applied to false eyelashes in order to stick them to eyelids, whereas *cosmetics for eye-lashes not being or comprising eyelash serums* are applied directly to the lashes. They will be sold through the same trade channels, and in my experience, will be sold in close proximity within those retail environments. They are not complementary as one is not essential to the other. Given the difference in core purpose, they are not in competition with each other. Taking these factors into account, I find that they are similar to a medium to high degree.

Nail cosmetics; Nail paint [cosmetics].

25. It is my view that the proprietor's terms above relating to nail cosmetics are a subcategory of the applicant's wider term *cosmetics not being or comprising eyelash serums.* On this basis, they are identical under the principle outlined in *Meric*.

Adhesives for […] nails.

26. It is my view that these goods are not included in the applicant's term *cosmetics not being or comprising eyelash serums*, as these include products to use on the false nails themselves, rather than nail cosmetics as a subcategory within cosmetics. The users of both will be the general public. Their nature and purpose overlap as both will be sold as liquids and are used within the process of decorating nails, although *adhesives for […] nails* are applied to false nails in order to stick them to the fingertips, whereas *cosmetics not being or comprising eyelash serums* are applied directly to the nails. They will be sold through the same trade channels, and in my experience, will be sold in close proximity within those retail environments. They are not complementary as one is not essential to the other. Given the difference in core

purpose, they are not in competition with each other. Taking these factors into account, I find that they are similar to a medium to high degree.

Class 11:

Hair driers for use in beauty salons.

27. The nature of these goods differs from the applicant's *cosmetics not being or comprising eyelash serums,* as the proprietor's goods are electronic products, whereas the applicant's goods are typically sold in liquid or solid form. If the applicant's goods *cosmetics not being or comprising eyelash serums* are deemed to include hair cosmetics as a narrower subcategory then the goods' purpose broadly overlaps as they will both be used to style hair. However, if *cosmetics not being or comprising eyelash serums* does not include hair cosmetics then the only overlap will be that the goods are used broadly to improve the user's appearance, albeit one being applied to the skin and the other used on the hair. The users of both will overlap as both will be used widely by the general public as well as professional users, although the proprietor's goods are aimed specifically at professionals in beauty salons. Whilst I recognise that in some instances some traders may sell both items, I do not consider that to be typical in trade and, even where they do, the goods are likely to appear in different sections within trade channels. They are unlikely to be seen as complementary as one is not indispensable for the other, and I find that they are not in competition with each other. It is my view that the goods are dissimilar to one another. However, in line with the proprietor's acceptance that the goods are similar, I find a very low degree of similarity.

Class 35:

Retail services in relation to hair products.

28. In my view, the applicant's *cosmetics not being or comprising eyelash serums* cover hair cosmetics, including goods such as *hair products* (which are the type of goods being retailed for the proprietor's services). The nature, purpose, and use will differ between these services and the applicant's *cosmetics not being or comprising eyelash serums.* However, it is my view that there will be an overlap in the users of the goods and services, who will be the general public. They will also have the same trade

channels as one another. The goods and services are also complementary as the goods are important or indispensable to the operation of the retailing of those goods, and consumers are likely to believe responsibility for the goods and the retailing thereof lies with the same undertaking. The goods are unlikely to be in competition with the services, however. Taking all of these factors into account, I find that there is a medium degree of similarity between the proprietor's services above and the applicant's goods.

29. However, even if I am wrong in finding that the applicant's *cosmetics not being or comprising eyelash serums* include goods such as *hair products,* then I still there is some degree of similarity between the goods and these services.[12] The nature, purpose, and use will differ between these services and the applicant's *cosmetics not being or comprising eyelash serums.* However, it is my view that there will be an overlap in the users of the goods and services, who will be the general public. They will also have the same trade channels as one another as it is not uncommon for retail establishments offering hair products to also offer cosmetics. However, the goods and services are unlikely to be complementary as they are not indispensable to one another. The goods are also unlikely to be in competition with the services. Taking all of these factors into account, if my primary finding is not correct, I find that there is a low degree of similarity between the proprietor's services above and the applicant's goods.

Average consumer and the purchasing act

30. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*,[13] the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)*,[14] where he pointed out that:

(a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;

[12] For example, see Geoffrey Hobbs (sitting as at the Appointed Person) at paras 30-35 in *Tony Van Gulck v Wasabi Frog Ltd* (BL O/391/14).
[13] [2025] UKSC 25
[14] [2024] EWCA Civ 262

(b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;

(c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;

(d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

31. The average consumer for the goods will be members of the general public, as well as trade customers. The cost of purchase is likely to vary considerably, with goods such as *hair gels* or *hair conditioner* for instance at one end of the spectrum and *hair dryers for use in beauty salons* at the other. Overall, the class 3 goods are likely to be purchased on a fairly frequent basis, although the class 11 goods will be purchased less frequently. Several factors may influence the average consumer when purchasing the class 3 goods, such as the effect of the hair product, the quality of the ingredients, and whether the product is tested on animals. Several factors may also influence the average consumer when purchasing the class 11 goods, such as the functionality of the hair dryer, the type of attachments sold with it, and the quality of manufacturing.

Taking these factors, I find that the average consumer is likely to pay a low to medium level of attention when purchasing the class 3 goods, and a medium level of attention when purchasing the class 11 goods. The goods will be selected from specialist shops (such as hair shops or homeware stores), general retail outlets, or online. The customer will self-select the goods from the display shelves, or by selecting the image of their desired product if purchasing online. The visual component will therefore dominate the purchasing process, but I do not discount aural considerations, such as word-of-mouth recommendations, or placing telephone orders.

32. The average consumer for the services will be the public at large, as well as trade customers. The cost of purchase is likely to vary greatly for the retail of the goods above depending on the type of hair products being sold. Several factors may influence consumers, such as the range of hair products available, the opening times, and the presentation of the premises. Taking into account all of these factors, it is my view that the average consumer is likely to pay a medium degree of attention. The consumer will choose the services after seeing the mark on signage or on the premises. They may also select the services after seeing advertisements or reviews in printed publications or online via websites and/or social media. The visual component is therefore likely to dominate the selection process, but I also do not discount the role that aural selection may play, especially when receiving word-of-mouth recommendations and when discussing the services with others via the telephone.

Comparison of marks

33. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*[15] that:

> "…it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means

[15] Case C-591/12P

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."

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

35. The respective trade marks are shown below:

The applicant's mark	The proprietor's mark
Level Up Beauty	

36. In her witness statement, the applicant states that "the key commercially dominant text of (the proprietor's)… that they operate under is 'Level Up Hair and Beauty'". She also highlights that both marks contain "the distinctive term of 'Level Up'" as well as "the same industry descriptive word of 'Beauty'".

37. The applicant's mark is a plain word mark written in title case. In Exhibit SP3, the applicant submitted a screenshot of the Merriam-Webster definition of "level up" to mean "to advance or improve (oneself)…", which is consistent with my own understanding of the term. Whilst it is suggestive of the idea of improving one's appearance, it is my view that this interpretation is allusive at worst. Due to this, and the fact that the final word "Beauty" will be understood by the average consumer as

being descriptive of the goods (and does not form a meaningful unitary phrase with the preceding words “Level Up”), I am of the view that the words “Level Up” dominate the overall impression of the applicant’s mark. The descriptive word “Beauty” still contributes, but to a much lesser degree.

38. The proprietor’s mark is a composite mark. The largest verbal element reads “Level UP” and is written in a stylised typeface. In the mark are several other verbal elements, such as “ESTD 2023”, “HAIR & BEAUTY”, an address, three social media handles which repeat the words “LEVEL UP”, and also “DM TO BOOK OR CALL 01952 460105”. The words “HAIR & BEAUTY” will be understood by the average consumer as being descriptive in relation to the goods and services. The additional verbal elements will be seen as contact information relating to the business itself. The mark also contains a roughly rectangular device surrounding some of the text, the use of colour, and the gold and pink background, which are all decorative in nature. The mark also contains what I understand to be three social media icons. Particularly considering the principle that the eye is naturally drawn to elements of marks which can be read,[16] it is considered that the verbal elements of the mark play a greater role in the mark’s overall impression. Out of these, it is my view that the distinctive and much larger words “Level UP” play the greatest role in the mark’s overall impression. The other verbal elements and the social media icons still contribute to the mark’s overall impression, but to a lesser degree. The stylisation, use of colour and background be perceived as decorative embellishments and, therefore, they play a lesser role too.

Visual comparison

39. In her submissions in lieu, the applicant submits that the competing marks “share identical spelling for all the words they share (‘level up’ and ‘beauty’), creating strong visual similarity”. In her counterstatement, the proprietor states that the marks have a “different style and colour”.[17]

[16] See paragraph 37 of *Wassen International Ltd v OHIM (SELENIUM-ACE)*, Case T-312/03

[17] Although the handwriting at Q8 on the counterstatement is not clear, in her email dated 20 April 2025, the proprietor confirmed the statement at point 2 was the word “colour”.

40. The competing marks are visually similar as they both contain the identical term "Level Up" which dominates the overall impression of both marks. The term is written in title case in the applicant's mark, whereas the first word is written in title case and the latter is written in upper case in the proprietor's mark. However, this does not create a significant visual difference, because word marks are protected regardless of the case type. This was shown in *LA Superquimica v European Union Intellectual Property Office (EUIPO)*[18], in which the GC held at [39] that word-only marks protect the word or words contained in the mark in whatever case, colour or typeface. The difference in capitalisation between "Level Up" and "Level UP" and use of a stylised typeface are therefore not significant. The competing marks also contain the common word "Beauty", although I acknowledge that this plays a lesser role as a result of it being descriptive. The competing marks differ visually as the proprietor's mark also has several additional verbal and figurative elements, such as the business establishment date, the descriptive words "HAIR &", the address, the social media icons and handles, and the use of colour and background. The beginnings of marks tend to have more visual impact than the ends,[19] which, in my view, results in the visual difference created by the additional words in the proprietor's mark being slightly less visually significant. Bearing in mind my analysis of the marks' overall impressions, I am of the view that the marks are visually similar to a low to medium degree.

Aural comparison

41. In her submissions in lieu, the applicant argues that there is a "high degree of aural similarity as the distinctive character 'Level Up' makes a significant aural impact". In her counterstatement and submissions, the proprietor does not specifically comment on the competing marks' aural similarity.

42. The marks are aurally similar as they both contain the identical words "Level Up"/"Level UP" at their beginnings. The beginnings of words tend to have more aural impact than the ends,[20] which, in my view, results in the shared use of the words having

[18] Case T-24/17
[19] See paragraph 81 of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02
[20] See paragraph 81 of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

greater aural significance. Furthermore, in *Pensa Pharma v OHIM*[21] the GC at [107] stated that:

> "…the relevant public generally pays greater attention to the beginning of a sign than to the end. In those circumstances, that public will focus its attention on the element 'pensa' in the contested mark and not on the element 'pharma' in that mark. It may be presumed that that public, which generally tends to contract long marks consisting of two words into a single word, will not pronounce the word 'pharma', inasmuch as that word is superfluous because of the nature of the goods and services covered by the contested mark, namely pharmaceutical goods and services."

43. Moreover, in *Onyinye Udokporo v Enrich International Ltd*[22], Phillip Johnson as the Appointed Person followed the GC's approach, stating at [18] that:

> "Accordingly, it was open to the Hearing Officer to treat the word "LEARNING" as descriptive in relation to education-related services. And in light of this finding, it was likewise perfectly acceptable for the Hearing Officer to conclude that this element of the mark would not usually be verbalised."

44. Whilst I acknowledge the comments made in *Purity Wellness Group Ltd v The Stockroom (Kent) Ltd*[23], by Philip Harris as the Appointed Person, where he said at [31] that "Descriptiveness does not of itself render an element negligible or aurally invisible", he also stated that the terms in question had "a unitary character". This differs from the immediate case, and I do not find that this is the case with either of the competing marks. As the word "Beauty" in the applicant's mark is descriptive in relation to the class 3 goods, it is my view that the average consumer would not articulate the word "Beauty" when saying the applicant's mark. I also consider this to be the case with the additional verbal elements in the proprietor's mark, as consumers would not verbalise the descriptive words "HAIR & BEAUTY" or any of the other verbal elements (such as the non-distinctive business establishment date or contact information). Taking this into account, I find that the marks are aurally identical as the average

[21] Case T-544/12
[22] BL O/1141/25
[23] BL O/115/22

consumer is likely to articulate both marks as “Level Up”. However, as the applicant has only pleaded that the marks are aurally similar, then I find instead that they are aurally similar to a very high degree.

Conceptual comparison

45. In her witness statement, the applicant states that the marks are conceptually similar as “both marks evoke the same conceptual impression and communicate an identical underlying idea”. Although the proprietor does not comment specifically on the conceptual similarity, in her counterstatement she highlights that the applicant “owns just words, we own logo” (sic).

46. The marks are conceptually similar as they both contain the identical words “Level Up”/”Level UP” as their dominant element. It is considered that these words will convey the same concept of being an allusive reference to improving oneself in both marks. The competing marks are different as the applicant’s mark has the descriptive word “Beauty” as its final word, whereas the proprietor’s mark contains several other verbal elements such as the descriptive words “HAIR & BEAUTY” (with the applicant’s mark also containing the descriptive word “BEAUTY”) as well as a number of figurative elements. Whilst the proprietor has commented that her mark is a logo, it is my view that the figurative elements do not provide any obvious meanings to the mark as a whole, and would not change the conceptual meaning of the words “Level UP”, as these would be understood in the same way in both marks regardless of the use of colour or other elements. The additional verbal elements such as the establishment date and address etc introduce further differences between the marks as they give information about the business. However, taking into account the marks’ overall impressions, it is my view that the marks are conceptually similar to a medium to high degree.

Distinctive character of the earlier trade mark

47. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV,*[24] the CJEU stated that:

[24] Case C-342/97

> “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).”

48. Registered trade marks possess various degrees of inherent distinctive character; marks which are suggestive or allusive of a characteristic of the goods tend to be at the lower end of the scale, whereas invented words with no allusive qualities tend to be at the higher end of the scale. A range of marks will fall in between, such as dictionary words with no obvious connection to the goods.

49. Although the distinctiveness of a mark can be enhanced by virtue of the use made of it, the applicant has not filed any evidence of use. As such, I have only the inherent position to consider.

50. In her submissions in lieu, the applicant refers to the inherent distinctiveness of her mark, stating that the words ‘Level Up’ “retains inherent distinctiveness, as it originates from video game terminology and is not ordinarily associated with beauty”.

51. As stated previously, the words ‘Level Up’ will be understood as meaning to improve oneself. In the context of the goods relied upon, the term does not convey a

directly descriptive or non-distinctive message. However, it is loosely allusive of the concept of improvement, and therefore it is my view that the term has a low to medium level of distinctiveness. The mark also contains the word 'Beauty'. This is descriptive of the goods relied upon, i.e. beauty products, and therefore lacks distinctiveness. The words "Level Up Beauty" in totality do not form a meaningful phrase. The distinctiveness of the mark lies in the words 'Level Up'. Overall, I find that the applicant's mark in totality has a low to medium level of inherent distinctive character.

Global assessment – conclusions on likelihood of confusion

52. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no set formula for establishing a likelihood of confusion between marks; it is a global assessment where a number of factors need to be borne in mind.

53. One such factor is the interdependency principle, i.e. a lesser degree of similarity between the competing marks may be offset by a greater degree of similarity between the respective goods and services, and vice versa. As mentioned above, it is necessary for me to keep in mind the distinctive character of the applicant's mark, the average consumer for the goods and services, and the nature of the purchasing process. In doing so, I must be mindful 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.

54. In her submissions in lieu, the applicant argues the similarity between the marks and "interlinking classes" would "cause consumer to believe that there is an affiliation with (her) mark, thus creating a high likelihood of indirect confusion". In her counterstatement, the proprietor argues against confusion on the basis that the two parties are based in different areas of the UK, with the applicant "being London, us being Shropshire". However, as a matter of law, the proprietor's comments regarding the parties' different locations can have no bearing on whether a likelihood of confusion exists. This is because both the applicant's and the proprietor's marks are a national

UK trade marks, so they have protection across the entirety of the UK. Therefore, whether or not the parties operate in different areas within the UK is not relevant.

55. Earlier in this decision I found that the proprietor's goods and services range from being identical to being similar to a very low degree to the applicant's goods (in line with the proprietor's pleadings). The average consumer of the goods and services will be the general public and trade customers. The average consumer is likely to pay a low to medium degree of attention when selecting the class 3 goods, and a medium amount of attention when selecting the class 11 goods and class 35 services. The goods and services will primarily be selected through visual means, although I do not discount an aural element to the selection process. I have found the marks to be visually similar to a low to medium degree, aurally similar to very high degree (in line with the opponent's pleadings), and conceptually similar to a medium to high degree. The earlier mark has a low to medium level of inherent distinctive character.

56. It is my view that, particularly when accounting for imperfect recollection, I considered that the average consumer, when paying a low to medium or medium degree of attention, may mistake or inaccurately recall the marks for one another. Both marks contain the identical verbal element "Level Up", which is the distinctive and dominant component of both marks. It is my view that the points of visual difference between the marks, such the variety of non-distinctive verbal elements and decorative figurative elements within the proprietor's mark would be overlooked or misremembered by the average consumer of the goods and services. The low to medium degree of visual similarity, the very high aural identity between the marks (in line with the applicant's pleading), and the medium to high degree of conceptual similarity between the competing marks, and the identical or similar nature of the goods and services are factors which support this finding. Whilst the proprietor's mark also contains the descriptive word 'BEAUTY', it is my view that this would also be overlooked in the context of goods and services at issue. The average consumer is more likely to retain and recall the identical and dominant words "Level Up", which exists in both marks. I therefore find that there is a likelihood of direct confusion, notwithstanding the points of difference between the marks. However, taking into account the interdependency principle, I only find this to be the case for the class 3 goods and class 35 services. I do not find this to be the case in respect of the class 11

goods which are only similar to the applicant's goods to a very low degree of similarity. This is on the basis that, notwithstanding the common dominant words, the marks are not sufficiently similar and the earlier mark not sufficiently distinctive to result in direct confusion where there is only a very low level of similarity between the goods. The opposition therefore fails in respect of the class 11 goods.

57. In case I am wrong in this finding, I now go on to consider indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*[25], Mr Iain Purvis Q.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).

[25] BL O/375/10

(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)."

58. I bear in mind that these categories are not intended to be an exhaustive list. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*[26], Arnold LJ approved Mr Purvis's formulation but added:

"13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

59. It is not sufficient that a mark merely calls to mind another mark (as per *Duebros Limited v Heirler Cenovis GmbH*[27]). This is mere association not indirect confusion. A finding of indirect confusion should not be made merely due to a shared element within marks. As per *L.A. Sugar Limited v By Back Beat Inc*[28] (set out above), indirect confusion should be identified in cases where the average consumer is likely to notice the differences between the competing marks but assume an economic link between the two undertakings based on their similarities.

60. It is my view that, even if consumers recognise the inclusion of the descriptive words "HAIR AND" and the other elements such as colour, the background, the stylised typeface, and the contact information in the proprietor's mark, these

[26] [2021] EWCA Civ 1207
[27] BL O/547/17
[28] BL O/375/10

differences appear consistent with a brand variant or brand extension. The words "LEVEL UP" are the most distinctive elements in both marks. I am of the view that consumers are likely to view the additional elements within the proprietor's mark as being a brand variant of the applicant's mark. It is not uncommon for brands to use word-only and logo versions of marks, in line with the stylisation used in the proprietor's latter mark. Furthermore, the addition of "HAIR &" in front of the word "BEAUTY" suggests a brand extension indicating that beauty products are offered under one mark and additional (hair) products under the other, given the close nature of the hair and beauty industries. Consequently, I find that there exists the likelihood of indirect confusion. However, taking into account the interdependency principle, I only find this to be the case for the class 3 goods and class 35 services. I do not find this to be the case in respect of the class 11 goods which are only similar to the applicant's goods to a very low degree of similarity. This is on the basis that, notwithstanding the common dominant words, the marks are not sufficiently similar and the earlier mark not sufficiently distinctive to result in indirect confusion where there is only a very low level of similarity between the goods. The application for invalidity therefore fails in respect of the class 11 goods.

Conclusion

61. The application for invalidation been partially successful. Subject to any appeal, the proprietor's mark will be declared invalid for the following goods and services:

> *Class 3: Beauty preparations for the hair; Hair cosmetics; Adhesives for false eyelashes, hair and nails; Hair styling lotions; Hair lacquer; Hair balm; Hair styling waxes; Hair lighteners; Hair lotion; Hair shampoos; Hair moisturisers; Hair colouring; Hair gel; Styling gels for the hair; Cosmetic preparations for the hair and scalp; Hair tonics [for cosmetic use]; Hair styling spray; Hair bleaches; Hair care creams; Tints for the hair; Hair conditioner; Hair care serum; Nail cosmetics; Hair color removers; Shampoos for human hair; Beauty serums; Hair balsam; Hair powder; Nail paint [cosmetics]; Hair styling preparations; Dyes for the hair.*
>
> *Class 35: Retail services in relation to hair products.*

62. Under section 47(6) of the Act, the registration is deemed to have never been made for these goods and services. However, the proprietor's mark will remain registered for the following services, for which the application for a declaration of invalidity has failed:

Class 11: Hair driers for use in beauty salons.

Costs

63. The applicant has enjoyed the most success and is therefore entitled to a contribution towards her costs. As this is a partial success, I have made a slight reduction in costs to reflect this. As a matter of practice, unrepresented parties are asked to complete a costs proforma if they intend to make a claim for costs. One was filed by the applicant on 13 June 2025. There is no right to be awarded the amount claimed. This is subject to an assessment of the reasonableness of the claim. The Tribunal awards costs on a contributory, not compensatory, basis, and therefore account must be taken of this when assessing the claim made. It should be noted that a person who represents themselves is entitled to a standard rate of £19 per hour in line with part 46 of the Civil Procedure Rules[29] for time reasonably spent on recoverable activities which were conducted before 1 October 2025, or £24 per hour for time spent on activities conducted on or after 1 October 2025.

64. I note that, within her costs proforma, the applicant has claimed a total of 38 hours in relation to these proceedings. This comprises one hour for filing a notice of cancellation. I find this to be wholly reasonable. She also claims four hours spent on considering the forms filed by the other party. Whilst I acknowledge that an unrepresented party would take longer to prepare and consider documents than a solicitor or trade mark attorney, the counterstatement filed by the particularly was not particularly lengthy in its claims. However, I appreciate that the applicant would have taken time to review the forms filed by the proprietor. In the circumstances, I consider two hours to be reasonable.

65. She has also claimed a further 33 hours. This figure comprises 16 hours for researching the law and drafting two sets of written submissions, eight hours for

[29] Rule 46.5(4)(b), Practice Direction 46.5 paragraph (3.4)

preparing and writing the witness statement, and nine hours for researching the market and filing evidence. I appreciate that time would have been taken when drafting both sets of submissions, especially as it would have taken time to review and respond to the proprietor's submissions filed during the evidence rounds when preparing the second set of submissions. I therefore find that 16 hours is wholly reasonable for an unrepresented applicant researching the law and drafting two sets of written submissions.[30] Whilst there were minor elements of the witness statement which were less relevant as they repeated elements of submissions made in other documents, the witness statement was reasonably detailed in its explanation of the exhibits and responded to several issues relevant to the case. I appreciate this would have taken time to prepare and write, and I find therefore that in the circumstances, eight hours is reasonable. Whilst I acknowledge that the applicant will have spent time preparing the exhibits, some of the exhibits were of limited use as they related to freely available information such as the parties' registrations (e.g. Exhibit SP1 and SP2) or classifications (e.g. Exhibits SP4 and SP5). However, I appreciate that the applicant will have spent time researching and filing the other exhibits, and as such, I find that six hours is reasonable for this activity. As stated previously, I have adjusted the figures below to represent the partial success.

66. The total sum is calculated as follows:

Official fees £200
Preparing a notice of cancellation £15
Considering forms filed by the other party £35
Preparing evidence £250
Preparing written submissions £330

67. I therefore order Susan Birchall-Ellis to pay Stella Postigo the sum of £830. This 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 28th day of April 2026

[30] As the second set of submissions were filed on 8 October 2025 and are likely to have been written after 1 October 2025, I have awarded eight hours at the previous rate of £19 per hour, and eight hours at the new rate of £24 per hour.

KATHRYN SERRAVALLE

For the Registrar