

O-059-09

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No. 2459310  
BY DEBRA CAMPBELL TO REGISTER A SERIES OF  
TRADE MARKS IN CLASSES 18 & 25**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 95639 BY A.S.H.S. LIMITED**

## BACKGROUND

1. On 22 June 2007 Debra Campbell applied to register ELLEBURY and Ellebury as a series of two trade marks. Following examination, the application was accepted and published for opposition purposes on 10 August 2007 in Trade Marks Journal No.6696 for the following goods in classes 18 and 25:

**Class 18:** Articles of luggage; travelling bags or cases; suitcases; sports bags; computer bags; briefcases; attaché cases; portfolios; bags for toiletries; make-up bags; purses and wallets; handbags; rucksacks; duffle bags; bags made of leather; casual bags; clutch bags; evening bags; overnight bags; sling bags; work bags; parasols; umbrellas; articles made of leather and/or imitation leather; parts and fittings for the aforementioned goods.

**Class 25:** Clothing, footwear, headgear; belts (clothing).

I note that following publication the specification of goods in class 25 was amended to include the following wording: “but not including socks, stockings, body stockings, tights and hosiery.” Nothing turns on this amendment and I need say no more about it in this decision.

2. On 9 November 2007 A.S.H.S. Limited (AL) filed a notice of opposition. This consists of a single ground based upon section 5(2)(b) of the Trade Marks Act 1994 (as amended) (the Act). In their Statement of Grounds AL indicate that the opposition, which is only directed at the class 18 element of the application, is based on the following trade mark:

Trade Mark	No.	Application Date	Registration date	Goods
EBURY	CTM3272713	23.07.2003	10.12.2004	18 - Bags; handbags; purses; wallets; suit-cases, travelling bags and luggage; umbrellas and parasols.

3. On 19 November 2007 Ms Campbell filed a counterstatement which consists, in essence, of a denial of the ground on which the opposition is based. That said, I note that in paragraph 5 of her counterstatement Ms Campbell says:

“The Applicant admits that some of the goods covered by the Opponent’s registration are similar...”

4. Both parties filed evidence in these proceedings and both seek an award of costs in their favour. Neither party requested to be heard but both filed written submissions in lieu of a hearing. After a careful consideration of all the material before me, I give this decision.

## EVIDENCE

### AL's evidence

5. This consists of a witness statement by Hugh Seymour who is AL's Finance Director. He explains that he has been a Director of the company since 2000 and confirms that the information in his statement comes from his own knowledge or company records.

6. Mr Seymour explains that AL is, and has been since its incorporation in 1996, the trading company of the ANYA HINDMARCH designer fashion label. This label has, in his opinion, acquired an international reputation for the design and manufacture of luxury leather goods and accessories and, in particular, for the design and manufacture of luxury handbags.

7. Mr Seymour states that the EBURY trade mark has been used by AL in the United Kingdom since at least June 2001. He adds that the trade mark has been used on bags, handbags, purses, wallets, suit-cases, travelling bags, luggage, umbrellas and parasols; it is, he says, particularly associated with luxury bespoke handbags. Exhibit HJS1 consists of a brochure for the EBURY bespoke handbag together with pages from the website [www.anyahindmarch.com](http://www.anyahindmarch.com), which Mr Seymour says show indicative use of the EBURY trade mark prior to the filing date of the application for registration. The brochure and pages from the website (none of which can be positively dated) all refer to THE BESPOKE EBURY ladies' handbag.

8. Mr Seymour states that AL have sold in excess of 3,100 handbags under the EBURY trade mark with total sales in the period 2003-2008 amounting to some £880k. Exhibit HJS2 consists of a breakdown of sales (by design) for handbags sold under the EBURY trade mark. Annual sales in the period 2003 to 2008 were as follows:

Year	Amount (£)
2003	945
2004	483,535
2005	143,805
2006	134,021
2007	88,037
2008 to 31/3/08	29,318

Of course for the purpose of these proceedings, I can only take into account sales made up to the date of the application for registration i.e. 22 June 2007.

9. Exhibit HJS3 consists of advertisements for THE BESPOKE EBURY all of which are said to originate from before the date of the application. The examples provided are:

Weekend FT (September 2003), Harpers & Queen (October 2003), Harrods (undated), Tatler (indicates October but the year is obscured), Vogue (indicates October but no year is provided) and Weekend FT (undated).

10. Insofar as the United Kingdom is concerned, the EBURY trade mark has been used in relation to handbags in a range of London locations i.e. Pont Street, Notting Hill, Knightsbridge (Harvey Nicholls and Harrods), New Bond Street and Sloane Square and on the website mentioned above.

11. Mr Seymour states that the EBURY trade mark has built up a considerable reputation in relation to luxury handbags and is: “..universally recognised within the fashion sector...” He adds that goods sold under the EBURY trade mark are typically high value luxury goods with handbags retailing for as much as £6,500.

12. Exhibit HJS4 consists of a range of press cuttings which Mr Seymour says attest to the reputation the EBURY trade mark has acquired in relation to luxury handbags. These are as follow: FT Weekend (September 2003), The Times T2 (September 2003), Harpers & Queen (October and December 2003), The Sunday Times Style (October 2003), InStyle (November but no year is indicated), Tatler (December but no year is indicated) and Vogue (November but no year is indicated).

13. Exhibit HJS5 consists of two “To whom it may concern” letters dated 14 and 18 March 2008 from Lisa Armstrong the Fashion Editor of the Times Newspaper and Natalie Massenet the Founder & Chairman of NET-A-PORTER.COM which I note Mr Seymour describes as “testimonials...further attesting to the reputation which the EBURY mark has acquired in relation to luxury handbags”. The Trade Marks Registry has issued guidance on how it will approach letters of this kind in Tribunal Practice Notice (TPN) 1 of 2008, the relevant parts of which state:

“ 1. The Registrar has noted an increasing trend for evidence to be filed in the form of letters from third parties solicited by the parties to the proceedings. Typically, it is the Registrar’s experience that such letters are headed “To whom it may concern”, or even addressed to the Registrar, whilst others are less obvious in format. The procedures for filing evidence in trade mark proceedings before the registrar is governed by rule 55 of the Trade Marks Rules (2000) as amended.....

2. Letters of the kind described above are not therefore a suitable means of introducing statements made by the person signing such a letter as his or her evidence in the proceedings. This is because such letters do not comply with the requirements of Rule 55(1) or (3).

3. Where such a letter is relied upon by a witness and attached as an exhibit to his or her affidavit, statutory declaration or witness statement, the statements of the person signing the letter are normally admissible as part of the evidence of

the person making the affidavit, statutory declaration or witness statement. However, in these circumstances statements made by the person signing the letter are hearsay evidence.

4. Hearing Officers will give hearsay evidence of this kind such weight as it deserves. Statements made in letters which have been sent to a party for a purpose unconnected with the proceedings are, in general, likely to be given more weight than statements made in letters solicited for the purpose of the proceedings. However, each case will be assessed on its own merits.”

14. Subject to the above caveats, I will bear the contents of these letters in mind when making my decision.

### **Ms Campbell's evidence**

15. This consists of a witness statement by the Applicant Debra Campbell. Ms Campbell confirms that unless stated otherwise the information in her statement comes her own personal knowledge.

16. Ms Campbell explains that the ELLEBURY brand was launched in June 2005 by Oby Onyema who designed the range of bags; she adds that the trade mark has been in continuous use since that date. The trade mark has, she says, been used in relation to leather bags such as handbags, shoulder bags, tote bags, clutch bags and travel bags, adding that these bags retail for between £50 and £130 and are sold through independent boutiques, the website [www.ellebury.com](http://www.ellebury.com) and TK Maxx stores. Exhibits DC 1a and 1b are said to consist of “print screens” from the website showing the range of bags sold under the ELLEBURY trade mark. The two pages provided (which appear to be undated) are of a very poor quality; that said, the words “ELLEBURY luxury leather bags” and a range of handbags can be discerned.

17. Exhibit DC2a-2g consist of a brochure (again it would appear undated), but which bears the words “ELLEBURY accessories in style” on the front page and which I note contains references to a range of, inter alia, bags. Ms Campbell goes on to say that since its launch the brand has been exhibited at various trade shows such as Pure 2006, Top Drawer 2006/07, Clothes Show Live and Moda 2006. She describes these shows as large and well attended and which has resulted in the brand receiving “good exposure”. She adds that the brand has featured in Real Magazine, New Woman, Fashion Extra (a trade publication), Futura and WWB (also trade publications). Exhibits DC3a-3c consists of a page from WWB (from 2006) and pages from Futura (described as Ireland's Fashion Business Magazine) from October/November 2006, in which the Ellebury trade mark is mentioned.

18. Ms Campbell explains that since its launch, turnover under the ELLEBURY trade mark has been approximately £55k with advertising spend “to date” amounting to some

£25k. As I mentioned above, it is only turnover/promotional spend prior to the date of the application that I can take account of for the purposes of this decision.

19. The remainder of Ms Campbell's statement consists primarily of submissions (in relation to the difference in cost, average consumer and retail outlets through which the respective parties' goods will be sold) with her adding that no confusion has arisen between the respective trade marks. While it is not necessary for me to summarise these submissions here in any more detail than this, I will bear them in mind when making my decision.

20. That concludes my summary of the evidence filed in these proceedings to the extent that I consider it necessary.

### **The written submissions**

21. The professional representatives of both parties filed written submissions. Both appear to accept that the factors I set out below in paragraph 24 are those I must keep in mind when reaching my decision. While it is not necessary for me to summarise the competing written submissions here, I will refer to them when necessary below.

### **DECISION**

22. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

(a)....

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, or

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade mark” means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

23. In these proceedings AL is relying on the registered Community Trade Mark shown in paragraph 2 above. This has an application date of 23 July 2003 and as such it clearly qualifies as an earlier trade mark under the above provisions. The application for registration was published for opposition purposes on 10 August 2007 and the registration procedure for AL’s earlier trade mark was completed on 10 December 2004. Consequently, the registration is not subject to The Trade Marks (Proof of Use, etc) Regulations 2004.

24. In reaching my decision I have taken into account the guidance provided by the European Court of Justice (ECJ) in a number of judgments germane to this issue, some of which I note were specifically mentioned by the parties in their written submissions. The cases I shall keep in mind are: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05),

It is clear from all these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all the relevant factors: *Sabel BV v. Puma AG*, paragraph 22;

(b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and circumspect and observant – but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;

(e) when considering composite marks, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out

solely on the basis of the dominant element; *Shaker di L. Laudato & Co. Sas* (C-334/05), paragraph 42;

(f) an element of a mark may play an independent distinctive role within it without necessarily constituting the dominant element; *Medion AG V Thomson multimedia Sales Germany & Austria GmbH*, paragraph 30;

(g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;

(h) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;

(i) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;

(j) further, 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; *Marca Mode CV v. Adidas AG + Adidas Benelux BV*, paragraph 41;

(k) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

25. There is nothing in the evidence or submissions which suggests that I should treat the two trade marks in Ms Campbell's application any differently. That being the case, I shall (whenever possible) refer to Ms Campbell's trade marks in the singular.

### **The average consumer and the nature of the purchasing decision**

26. As the case law above indicates, it is necessary for me to determine who is the average consumer for the respective parties' goods and then determine the manner in which these goods are likely to be encountered by the average consumer in the course of trade. The goods at issue in these proceedings are bags of one sort or another, wallets, purses, umbrellas and parasols; the sort of goods which will be bought by the public at large. While the evidence indicates that the parties' primary interest (at present) is in relation to bags for women, it is also clear that the bags are targeted at different ends of the market; this is not however reflected in either of their specifications. I must therefore proceed on the basis that the respective parties' trade marks will be used on all the goods for which they have either been applied for or registered, and that the respective parties' goods could move through the same trade channels and be supplied to the same average consumer.

27. I have no evidence as to how the goods are likely to be purchased. In my experience however, the selection of the goods at issue is most likely (initially at least) to consist of a visual act made on the basis of self selection in either a retail environment, from a catalogue or on-line (see the comments of the Appointed Person in *React Trade Mark* [2000] RPC 285 albeit in relation to items of clothing). Whilst this is likely, in my view, to be the principal means by which the goods are selected, I do not rule out that orders will be placed by telephone or that word of mouth recommendations will play a part in the selection process.

28. There are, of course, many types of goods that would be described as bags; bags which in turn are used for a wide variety of different purposes. A brief review of the specification of Ms Campbell’s application mentions bags whose purposes range from holding make-up to those for use with computers. In addition, the cost of the goods at issue (as the evidence demonstrates insofar as handbags are concerned) is likely to vary from quite modest sums to many thousands of pounds. In my view, the average consumer when selecting a bag would be conscious of, inter alia, its cost, its design, its material, its size, its colour and ultimately if it was suitable for the purpose for which they intended to use it. All of these factors point to the average consumer paying a relatively high level of attention to their purchase. As the cost of, for example, the handbag increases, so one assumes will the level of attention the average consumer pays to it selection.

**Comparison of goods**

<b>AL’s goods</b>	<b>Ms Campbell’s goods</b>
Bags; handbags; purses; wallets; suit-cases, travelling bags and luggage; umbrellas and parasols	Articles of luggage; travelling bags or cases; suitcases; sports bags; computer bags; briefcases; attaché cases; portfolios; bags for toiletries; make-up bags; purses and wallets; handbags; rucksacks; duffle bags; bags made of leather; casual bags; clutch bags; evening bags; overnight bags; sling bags; work bags; parasols; umbrellas; articles made of leather and/or imitation leather; parts and fittings for the aforementioned goods.

29. In her counterstatement Ms Campbell accepts that some of AL’s goods are similar to those in her application. In their written submissions AL say:

“The majority of the goods of the opposed application can simply be regarded as “bags” as expressly cited in the specification of the earlier registration; and as to

the remaining goods of the opposed application these are expressly recited in the specification of the earlier registration.”

30. Many of the terms appearing in Ms Campbell’s specification find a direct counterpart in AL’s registration i.e. luggage, travelling bags, suit cases, purses, wallets, handbags, parasols and umbrellas. Some of the goods which remain are expressly described as bags i.e. sports bags; computer bags, bags for toiletries, make-up bags, duffle bags, bags made of leather, casual bags, clutch bags, evening bags, overnight bags, sling bags and work bags and are therefore identical goods to the bags contained in AL’s registration. Of the other goods that remain i.e. cases, briefcases, attaché cases, portfolios and rucksacks, these are so similar in their nature and purpose as to be considered at the very least highly similar if not identical to the bags mentioned above. The remaining goods i.e. articles made of leather and/or imitation leather could well be the same goods specified above albeit made from one of those two materials and again would be either identical or highly similar. Finally, the parts and fittings are linked to the goods in Ms Campbell’s specification and would once again be either identical, highly similar or complementary to the goods in AL’s registration.

### **Comparison of trade marks**

For the sake of convenience, the trade marks to be compared are as follows:

<b>Ms Campbell’s trade marks</b>	<b>AL’s trade mark</b>
ELLEBURY & Ellebury	EBURY

31. It is well established that the average consumer is considered to be someone who is reasonably well informed, circumspect and observant, who perceives trade marks as a whole and who does not pause to analyse their various details; in addition, he/she rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he/she has kept in his or her mind. In reaching a conclusion I must also identify what I consider to be the distinctive and dominant components of the respective trade marks.

32. AL's trade mark consists of the five letter word EBURY presented in upper case, whereas Ms Campbell’s trade marks consist (in the first version) of the eight letter word ELLEBURY presented in upper case and in the second version with the initial letter E capitalised and the remaining letters in lower case.

33. The parties’ views on the similarity between the trade marks were expressed in their written submissions in the following terms:

#### **AL**

“The earlier registration is for the three syllable mark EBURY though clearly the dominant part of this mark is BURY. The initial letter E, though pronounced, is

not highly significant and a consumer clearly would be left with the impression of the BURY part of the mark.

The opposed application is also for a three syllable mark – ELLEBURY. Manifestly, the second part of this mark is identical to the second part of the earlier registration – BURY. Further, both marks start with the identical initial letter E. The sole difference is therefore the presence of the letters LLE contained within the opposed application and which letters are absent in the earlier registration.

It is the Opponent's case that the presence of those three letters do little to change the overall impression created by the mark of the opposed application, either when compared visually to the earlier registration or when spoken. Those three letters do almost nothing to change the way in which the opposed application is spoken, as compared to verbalising the mark the subject of the earlier registration. Taking into account regional accents, in some parts of the United Kingdom ELLEBURY may well be pronounced more or less the same as EBURY would be pronounced in other parts of the United Kingdom. Though there are three extra letters in the opposed application, these are of relatively minor significance compared to the dominant part of both the earlier registration and the opposed application.

It is to be noted that both marks are conceptually similar in that neither has any particular meaning; both marks are invented words. It is true that the first four letters of the opposed application are the French word "elle" meaning she (i.e. a woman) but it has been held...that the average consumer does not analyse a single word mark into its component parts; that consumer normally perceives a mark as a whole. Thus, both the opposed mark and the earlier registration are conceptually similar meaningless words."

## **Ms Campbell**

"There are significant visual, aural and conceptual differences between ELLEBURY and EBURY. EBURY is not the dominant or distinctive feature of the Applicant's trade mark. It is not a separate word within the context of the Applicant's trade mark and neither is it emphasised or highlighted in any way. It is merely an integrated component of the Applicant's mark.

As far as imperfect recollection is concerned it is the first part of a mark that plays the most important role as this is the part of the mark that tends to come to the mind of or be remembered by the consumer. The first four/five letters between the respective marks are very different indeed namely ELLE v EBUR or ELLEB v EBURY. It is nevertheless submitted that ELLE "something" would come to the mind of the average consumer if he/she could not quite recall the exact name of the Applicant's trade mark..."

34. In their submissions AL suggest that the letters BURY form the dominant element of their trade mark; I disagree. Consisting of single words presented in a conventional manner, neither parties' trade mark can, in my view, be said to possess a dominant element. In this regard, I agree with Ms Campbell's submissions to the effect that although the letters forming the word EBURY appear in the same order in her trade mark, as the word is not emphasised in any way it would not be identified as a separate element; it is, as she suggests, merely an integrated component part. Insofar as distinctive character is concerned this, in my view, lies in the totality of the respective parties' trade marks rather than in any particular element. Having reached these conclusions, I now go on to compare the trade marks from the visual, aural and conceptual standpoints mentioned in the case law.

### **Visual similarity**

35. I have described the trade marks above. Given their overall lengths (five and eight letters respectively) and as they both begin with the letter E and end with the same five letters i.e. EBURY they must share a degree of visual similarity. However, I disagree with AL when they say that the presence of the additional letters "do little to change the overall impression...when compared visually." Rather, I once again find myself agreeing with Ms Campbell's submission to the effect that given the overall differences in the first four/five letters of the respective trade marks, and bearing in mind that the beginnings of trade marks as opposed to their endings are likely to be more important for the purposes of comparison, I think the additional letters LL do help to distinguish the trade marks from a visual perspective. **When compared as totalities, I consider there to be at most only a modest degree of visual similarity between the respective trade marks.**

### **Aural similarity**

36. In their submissions AL suggest that both trade marks consist of three syllables; I agree. Notwithstanding AL's submissions to the effect that in certain parts of the United Kingdom the two trade marks are likely to be pronounced in the same manner, no evidence has been filed which supports this assertion. In my view, Ms Campbell's trade mark is likely to be articulated with the emphasis on the ELLE element, whereas in AL's trade mark the emphasis is likely to be on the initial letter E. While I accept that the BURY endings of both trade marks will sound the same, the beginnings (which once again are likely to be more important) are likely to sound quite different. **When compared as totalities, I consider there to be only a small degree of aural similarity between the respective trade marks.**

### **Conceptual similarity**

37. In their submissions AL suggest that the respective trade marks are conceptually similar because they both consist of meaningless words. They also comment that while Ms Campbell's trade mark has ELLE as its first four letters (ELLE being a French word meaning "she"), this is not something that the average consumer would notice as they

perceive trade marks as wholes and do not analyse their component parts. I agree with the latter for the reasons indicated by AL, but disagree with the former. There is no evidence or submissions to suggest that both trade marks consist of anything other than invented words. If that is correct, I do not understand how they can be conceptually similar as neither trade mark will convey a concept of any kind. **In my view the respective trade are neither conceptually similar or conceptually dissonant.**

### **Likelihood of confusion**

38. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the goods and vice versa. It is also necessary for me to consider the distinctive character of the EBURY trade mark, as the more distinctive this trade mark is (either inherently or as a result of any use that has been made of it), the greater the likelihood of confusion. The distinctive character of the EBURY trade mark must be appraised by reference to the goods in respect of which it is registered (and used) and also by reference to the way it will be perceived by the average consumer. I must also keep in mind the average consumer for the goods and the nature of the purchasing process.

39. As far as I am aware, AL's trade mark consists of an invented word. If I am wrong in that regard, there is certainly no evidence or submissions to suggest that it has any meaning allusive or otherwise for the goods for which it is registered. As such, it is a trade mark which, absent use, is already possessed of a significant degree of inherent distinctive character. In addition, I am satisfied that as a result of the use that has been made of it and, inter alia, the nature of the advertising undertaken, the comments from those individuals mentioned in paragraph 13 above together with the success that it appears to enjoy amongst those in the public eye (and the impact that this is likely to have on the perception of the average consumer), that in relation to handbags for women its inherent distinctive character will have been further enhanced.

40. In summary, I have concluded that: (i) the respective goods at issue are identical or highly similar, (ii) that there is at most a modest degree of visual similarity, (iii) a small degree of aural similarity, (iv) no conceptual similarity or dissimilarity and, (v) that AL's use of their EBURY trade mark has, in relation to handbags for women, improved upon its already significant inherent distinctive character. I have also concluded given the nature of the goods at issue that the visual aspect of the comparison is likely to be the most important, although I accept that telephone orders and word of mouth recommendations will also play a part in the selection process.

41. I must now apply the global approach advocated to these findings to determine whether direct confusion (where one trade mark is mistaken for the other) or indirect confusion (where the goods would be assumed to come from economically linked undertakings) is likely to occur. Having done so, I have concluded, notwithstanding the proximity in the goods, that the differences in the respective trade marks when

considered in the context of the traits that the average consumer will display when selecting such goods, are more than sufficient to avoid the possibility of either direct or indirect confusion. The opposition fails accordingly.

**Costs**

42. As the opposition has failed, Ms Campbell is entitled to a contribution towards her costs. At the time these proceedings were launched awards of costs were governed by Annex A of Tribunal Practice Notice (TPN) 2 of 2000. Using that TPN as a guide, I award costs to Ms Campbell on the following basis:

Considering Notice of Opposition and Statement of Case in reply:	£500
Preparing & filing evidence:	£200
Considering AL's evidence	£100
Written submissions:	£100
<b>Total:</b>	<b>£900</b>

43. I order A.S.H.S. Limited to pay to Debra Campbell the sum of £900. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 27<sup>th</sup> day of February 2009**

**C J BOWEN**  
**For the Registrar**  
**The Comptroller-General**