O-0729-23

TRADE MARKS ACT 1994

IN THE MATTER OF

TRADE MARK APPLICATION NO 3735568

BY CASSIE BRAKE

TO REGISTER

Fox & Co Candle Company

AS A TRADE MARK IN CLASSES 3 & 4

AND

OPPOSITION THERETO (UNDER NO. 600002306)

BY

EVELYN FOX

BACKGROUND

1) On 21 December 2021, Cassie Brake ('the applicant/Ms Brake') applied to register 'Fox & Co Candle Company' as a trade mark in respect of the following goods:

> **Class 3**: Massage candles for cosmetic purposes; Scented wax melts; Wax melts [fragrancing preparations]; wax melts [fragrancing preparations].
>
> **Class 4:** Candles; Perfumed candles; Tallow candles; Floating candles; Candle torches; Soy candles; soy candles; Tealight candles; Scented candles; Fragranced candles; Candles (Perfumed -);Table candles; Fruit candles; Nightlights [candles]; Candle wax; Votive candles; Candle assemblies; Church candles; Candles and wicks for candles for lighting; Wicks for candles; Aromatherapy fragrance candles; Tea light candles; Christmas tree candles; Candles in tins; Candles (Christmas tree -); Candles for lighting; Christmas lights [candles]; Special occasion candles; Musk scented candles; Candles containing insect repellent; Candles for night lights; Candles for use as nightlights; Wicks for candles for lighting; Candles and wicks for lighting.

2) The application was published in the Trade Marks Journal on 21 January 2022 and notice of opposition was later filed, under the fast track opposition procedure, by Evelyn Fox ('the opponent/Ms Fox'). Ms Fox claims that the trade mark application offends under section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). She relies upon the following trade mark registration:

UKTM No: 3590481 (for a series of 2 marks)

Fox Cub & Co
Fox Cub and Co

Filing date: 4 February 2021
Date of entry in the register: 10 September 2021

3) The trade mark relied upon by the opponent is an 'earlier' mark, in accordance with section 6 of the Act. As it had not been registered for five years or more at the filing date of the contested application, it is not subject to the proof of use conditions as per Section 6A of the Act.

4) The applicant filed a counterstatement. Ms Brake states that she does not accept the points raised by the opponent in its statement of grounds. She provides a detailed explanation of why she considers the respective marks and goods to be different (with the exception of 'scented wax melts', which she accepts are present in both parties' specifications). I have read all of Ms Brake's submissions made in the counterstatement and will refer to them if, and when, it is appropriate to do so in this decision.

5) Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that: "(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit."

6) The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. Further, rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.

7) The applicant made a request to file evidence prior to filing the counterstatement.[1] A preliminary view was given to refuse that request and the applicant was given a period of 14 days in which to request a hearing on the matter if she wished to contest that view.[2] No request for a hearing was made within the time allowed and, accordingly, the preliminary view was automatically confirmed. Subsequent to the filing of the applicant's counterstatement the official letter, dated 20 March 2023,

[1] As per Ms Brake's email of 16 August 2022
[2] As per the official letter of 3 March 2023

allowed either party a period until 3 April 2023 to seek leave to file evidence and/or request a hearing. The same letter allowed until 17 April 2023 to provide written submissions in lieu. Neither party sought leave to file evidence in that period nor requested to be heard. Both parties did, however, file written submissions in lieu of a hearing. I have read all of those submissions and will refer to them if, and when, it is appropriate to do so.

DECISION

8) Section 5(2)(b) of the Act states:

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

Case law

9) Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. Accordingly, it is appropriate to take account of the case law of EU courts in determining the matter before me.

10) The leading authorities which guide me are from the Court of Justice of the European Union: *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v*

Klijsen Handel B.V. Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P.

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The correct approach

11) The applicant makes a number of comments in the counterstatement and submissions in lieu about the actual way in which both parties currently sell their goods and the particular kinds of packaging used etc. In the light of these comments, it is necessary for me to explain what the correct approach is that I must take when assessing the similarity between the parties' goods and the overall likelihood of confusion.

12) The first point to make is that, as I noted earlier, the opponent's mark is not subject to the 'proof of use' requirement. The opponent is therefore entitled to rely upon all of the goods covered by its registration without having to show that it has actually used its mark in relation to any of those goods. The second point is that I am required to make the assessment of the likelihood of confusion notionally and objectively based on the opponent's goods, as registered, and the applicant's goods, as applied for, in accordance with the relevant case law. That assessment requires

that I must not take into account the actual way that either party has used their marks in the marketplace or the kinds of goods that those marks have been used in relation to thus far. Further, I must consider all of the circumstances in which the mark applied for might be used if it were registered[3]. This is because trade mark registrations are items of property which may be sold by the applicant and/or opponent to third parties in the future and may therefore be used in a different way, or upon/in relation to different goods, than those used by the current proprietors of those marks. Further, even if the trade marks are not sold to third parties, the applicant and/or opponent themselves may decide to change/adapt the way they market their goods in the future. In this connection, in *Devinlec Développement Innovation Leclerc SA v OHIM,* Case C-171/06P, the CJEU stated:

> "59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks."

The actual goods which either party may currently be providing in the marketplace is therefore not relevant to my assessment.

13) Ms Brake's submissions about having used her mark since 2020 (such use pre-dating the application for, and registration of, the earlier mark) are also not relevant. The viability of such a defence was considered by Ms Anna Carboni, sitting as the Appointed Person in *Ion Associated Ltd v Philip Stainton and Another*, BL O-211-09. Ms Carboni rejected such a defence as being wrong in law. If the applicant considers that she has an earlier right which could be relied upon to invalidate the opponent's mark, the proper course is for the applicant to apply to invalidate the opponent's mark. No such application has been made.

[3] As per *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited,* Case C- 533/06, [66]

Comparison of goods

14) All relevant factors relating to the goods should be taken into account when making the comparison. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU, Case C-39/97, stated at paragraph 23 of its judgment:

> "In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary."

15) Guidance on this issue has also come from Jacob J where, in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, the following factors were highlighted as being relevant:

> (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.

16) In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

> "It is true that goods are complementary if 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.."

In Sanco SA v OHIM Case T-249/11, the General Court ('GC') found that goods and services may be regarded as 'complementary' and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services was very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in Sandra Amelia Mary Elliot v LRC Holdings Limited (BL-0-255-13):

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

Whilst on the other hand:

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

17) Finally, I note the decision in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM* Case T-133/05) ('*Meric*'), where the GC held:

> "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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedial v OHIM – France Distribution (HUBERT) [2002] ECR II-5275,paragraphs 43 and 44; and Case T-10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42)."

18) The goods to be compared are:

Opponent's goods	Applicant's goods
Class 3: Room fragrances; Household fragrances; Room fragrancing products; Air fragrance reed diffusers; Fragrance for household purposes; Scented wax melts; Soap; Soaps; Perfumed Soap; Granulated soap; Shower soap; Bath soap; Hand soaps; Bar soap; Facial soaps; Skin soap; Handmade soap; Liquid soaps; Liquid soap; Perfumed soaps; Hand soap; Granulated soaps; Scented soaps; Soap products; Body Soap; Bars of Soap; Liquid bath soaps; Liquid Bath Soap; Soaps for personal	**Class 3**: Massage candles for cosmetic purposes; Scented wax melts; Wax melts [fragrancing preparations]; wax melts [fragrancing preparations]. **Class 4:** Candles; Perfumed candles; Tallow candles; Floating candles; Candle torches; Soy candles; soy candles; Tealight candles; Scented candles; Fragranced candles; Candles (Perfumed -);Table candles; Fruit candles; Nightlights [candles]; Candle wax; Votive candles; Candle

use; Soaps in liquid form; Liquid soaps for hands and face. **Class 4:** Unfragranced candles; scented candles; nightlights [candles]; Christmas tree candles; candles in tins; fragranced candles; Aromatherapy fragrance candles; Perfumed candles; Candles (Perfumed -); Candles; Tealight candles; Table candles; Special occasion candles; Candles for lighting; Beeswax for use in the manufacture of candle. (my emphasis)	assemblies; Church candles; Candles and wicks for candles for lighting; Wicks for candles; Aromatherapy fragrance candles; Tea light candles; Christmas tree candles; Candles in tins; Candles (Christmas tree -); Candles for lighting; Christmas lights [candles]; Special occasion candles; Musk scented candles; Candles containing insect repellent; Candles for night lights; Candles for use as nightlights; Wicks for candles for lighting; Candles and wicks for lighting.

19) I will consider each of the classes of the application in turn, beginning with class 3. I will also group certain goods together, for the purposes of the comparison, where it is appropriate to do so[4].

Class 3

20) The applicant's 'Scented wax melts; Wax melts [fragrancing preparations]; wax melts [fragrancing preparations]' are all self-evidently identical to the opponent's 'Scented wax melts'.

21) The applicant's 'Massage candles for cosmetic purposes' are, as I understand it, candles which are made from specific kinds of wax that, when melted, is safe to use on the body for the purposes of massage and/or cosmetic reasons. They are unlikely, therefore, to be made of the same kind of wax as the candles covered by the opponent's specification in class 4 (such candles being for the intended purpose of lighting and/or fragrancing a room rather than for use on the body). However, I see

[4] As per *Separode Trade Mark* (BL O-399-10)

no reason why the opponent's 'scented wax melts' in class 3 would not include melts that are made of the same kind of wax as the applicant's 'massage candles for cosmetic purposes'. Accordingly, the opponent's 'scented wax melts' may be similar in nature to the opponent's goods (being made of the same kind of wax) and may be used for the same purpose (the melted wax being used for massage of the body), have the same users and the same trade channels. They may also be in competition with each other. I find a high degree of similarity between the opponent's 'scented wax melts' and the applicant's 'massage candles for cosmetic purposes'.

Class 4

22) All of the applicant's goods in this class, with the exception of '…wicks for candles for lighting; Wicks for candles; Wicks for candles for lighting; …wicks for lighting', are types of candles. Those goods therefore fall within the opponent's term, 'Candles' and are identical, as per the *Meric* case referred to above.

23) As regards '…wicks for candles for lighting; Wicks for candles; Wicks for candles for lighting; …wicks for lighting' (there is some repetition of terms in the specification), there is a complementary relationship in play, in the sense described in the case law above, between those goods and the opponent's 'candles'. However, the respective nature is not the same (the applicant's goods are likely to be made of a material such as cotton whereas the opponent's candles are made of wax). There is, though, overlap in purpose (to provide light by flame) and the trade channels may overlap to some degree. I find a low-medium degree of similarity between the applicant's '…wicks for candles for lighting; Wicks for candles; Wicks for candles for lighting; …wicks for lighting' and the opponent's 'candles'.

Average consumer and the purchasing process

24) It is necessary to determine who the average consumer is for the respective goods and the manner in which they are likely to be selected. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

25) The average consumer of the relevant goods is the general public. In my experience, the goods at issue are generally low cost. The consumer may, though, take into account factors such as candle/wick size, burning time and fragrance. I would expect a low to medium degree of attention to be paid during the purchase. All of the goods are likely to be sought out visually in shops or their online equivalents and therefore the visual similarity between the marks is most important. However, I do not discount that there may also be an aural aspect to the purchase.

Comparison of marks

26) 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 Case C-591/12P, *Bimbo SA v OHIM*, 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 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."

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

27) The opponent's registration is for a series of 2 marks. I will use the 'Fox Cub & Co' mark for the purposes of the comparison. The opponent is in no stronger position as regards its other mark. Accordingly, the marks to be compared are:

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28) The earlier mark consists of the words 'Fox Cub & Co' in plain letters. The '& Co' part of the mark is, of itself, non-distinctive because it is a common abbreviation for 'and company'/'and others' and will immediately be perceived as such. That is not to say that '& Co' is negligible – it does contribute to the overall impression of the mark, but to a lesser extent than the words 'Fox Cub'. This is because the latter words are relatively more distinctive and enjoy a more prominent position at the beginning of the mark. The words 'Fox Cub' strongly dominate the overall impression of the earlier mark.

29) The applicant's mark consists of the plain words 'Fox & Co Candle Company'. The words 'Candle Company' are entirely descriptive and non-distinctive. The '& Co' element is, for the same reasons explained above, also, of itself, non-distinctive. Although those parts of the mark are far from negligible and contribute to the mark's overall impression, it is the relatively more distinctive, and prominently positioned, word 'Fox' which has the greatest weight in the overall impression.

30) Visually both marks begin with the same word, 'Fox'. Both also contain '& Co'. The contested mark contains the words 'Candle Company' which are not present in the earlier mark and the latter contains the word 'Cub' which is not present in the contested mark. Despite those visual differences and the contested mark being somewhat longer to the eye than the earlier mark, I find a medium-high degree of visual similarity between the marks overall. In reaching this view, I have borne in

mind that it is a general rule of thumb that the beginnings of marks will tend to have the greater impact upon the consumer's perception[5]. I find that to be the case here.

31) Aurally, the respective '& Co' part of the marks is aurally identical. The respective 'Fox' elements, at the beginning of the marks, are also aurally identical. However, the marks differ as regards the 'cub' element of the earlier mark which is absent from the applicant's mark and the 'candle company' element of the later mark which is absent from the opponent's mark. The contested mark is, therefore, somewhat longer to the ear than the earlier mark. However, I again bear in mind that it is the beginnings of marks that tend to have the greater impact upon the ear and I find that to be the case here. Overall, I find a low-medium degree of aural similarity between the marks.

32) Conceptually, I have already addressed how the '& Co' part of the respective marks will be perceived. That concept is entirely descriptive and so too is the concept of a 'candle company' evoked by those words in the contested mark. Turning to the respective 'Fox' and 'Fox cub' elements of the marks (both of which evoke distinctive concepts), the word 'Fox' in the later mark may be perceived in one of two ways. I find that a significant proportion of average consumers are likely to perceive it as a surname and another, separate, significant proportion of average consumers are likely to perceive it as meaning the well-known animal (a wild dog). 'Fox cub' in the contested mark is likely to be perceived as meaning a baby fox (i.e. a baby wild dog). It follows that, for those average consumers who perceive the contested mark as meaning the animal (as opposed to a surname), the respective marks are obviously conceptually highly similar overall. However, for the average consumers who perceive the surname meaning from the contested mark, the marks are conceptually different overall.

Distinctive character of the earlier mark

33) The distinctive character of the earlier mark must be considered. The more distinctive it is, either by inherent nature or by use, the greater the likelihood of

[5] *El Corte Inglés, SA v OHIM,* Cases T-183/02 and T-184/02

confusion (*Sabel BV v Puma AG*). In *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV,* Case C-342/97 the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *WindsurfingChiemsee* 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)."

As I have no evidence before me to show that the earlier mark's distinctiveness may have been enhanced through use, I have only its inherent degree of distinctiveness to consider. The opponent's mark is neither descriptive nor allusive in relation to any of the goods relied upon. I find it to have a normal degree of inherent distinctiveness.

Likelihood of confusion

34) I note that the opponent claims that there have been 'a number of significant instances of actual confusion including: i) The Applicant's company information being attributed to the Opponent's goods by Vanity Fair; and ii) customers of the Opponent

inadvertently purchasing goods from the Applicant.'[6] However, in the absence of any further explanation or other supporting evidence to show how and why those instances occurred, those statements, of themselves, do not assist the opponent.

35) I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*); ii) the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and; iii) the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V).*

36) I have found some of the respective goods to be identical, some to be similar to a high degree and others similar to a low-medium degree. As for the marks, there is a medium-high degree of visual similarity and a low-medium degree of aural similarity between them. Conceptually, the marks are highly similar for a significant proportion of average consumers and conceptually different to another, separate, significant proportion of average consumers. In this connection, I remind myself that the test is whether a "sufficiently significant"[7] proportion of relevant consumers are likely to be confused (it is not necessary that all relevant consumers be confused). The opponent's mark also has a normal degree of inherent distinctiveness. Weighing all these factors, I find that, for those average consumers who perceive the marks as being conceptually highly similar, a sufficiently significant proportion of them are likely, through imperfect recollection, to mistake one mark for the other when paying a low-medium degree of attention during the purchase. I would also have come to the same conclusion even if I had found that the degree of attention was likely to be higher i.e. of a medium (rather than low-medium) level. **The opposition under section 5(2)(b) succeeds.**

[6] See, for example, the statement of grounds, [9]
[7] *J.W.Spear & Sons Ltd and Others v Zynga Inc.* [2015] EWCA Civ 290, [37]

COSTS

37) As Ms Fox has been successful, she is entitled to an award of costs. Awards of costs in fast track opposition proceedings are governed by Tribunal Practice Notice ("TPN") 2 of 2015. Applying the guidance in that TPN, I award costs to Ms Fox on the following basis:

TM7F (Official filing fee) = £100

Filing the notice of opposition = £200

Filing written submissions = £200

Total: £500

38) I order Cassie Brake to pay Evelyn Fox the sum of **£500**. This sum is to be paid within twenty-one days of the expiry of the appeal period or, if an appeal is filed, within twenty-one days of the final determination of this case if any such appeal against this decision is unsuccessful.

Dated this 28th day of July 2023

Beverley Hedley
For the Registrar,
the Comptroller-General