

O/0847/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003638149

BY MISHA COSMETICS LIMITED

TO REGISTER THE TRADE MARK:

**Misha Cosmetics**

**MISHA Cosmetics**

(SERIES OF 2)

IN CLASS 3

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 428379

BY JETHARAM NEMARAM GAHLOT

## BACKGROUND AND PLEADINGS

1. On 7 May 2021, Misha Cosmetics Limited (“the applicant”) applied to register the series of two trade marks shown on the cover page of this decision in the UK. The application was published for opposition purposes on 20 August 2021. The applicant seek registration for the following goods:

Class 3      Cosmetics; Cosmetics and cosmetic preparations; Milks [cosmetics]; Eyebrow cosmetics; Cosmetic dyes; Creams (Cosmetic -); Cosmetic soaps; Cosmetic soap; Cosmetic pencils; Pencils (Cosmetic -); Nail cosmetics; Functional cosmetics; Moisturisers [cosmetics]; Skincare cosmetics; Cosmetic powder; Eye cosmetics; Cosmetic preparations; Cosmetics preparations; Cosmetic creams; Multifunctional cosmetics; Natural cosmetics; Dyes (Cosmetic -); Cosmetic kits; Kits (Cosmetic -); Tonics [cosmetic]; Cosmetic rouges; Cosmetic moisturisers; Cosmetic masks; Cosmetic oils; Hair cosmetics; Mousses [cosmetics]; Decorative cosmetics; Colour cosmetics; Lip cosmetics; Organic cosmetics; Skin balms [cosmetic]; Cosmetic bath salts; Cleansing creams [cosmetic]; Non-medicated cosmetics; Cosmetic eye pencils; Suntan lotion [cosmetics]; Body paint (cosmetic); Bath powder [cosmetics]; Cosmetic massage creams; Cosmetic eye gels; Cosmetic hand creams; Facial washes [cosmetic]; Cosmetic facial lotions; Facial masks [cosmetic]; Cosmetic facial packs; Body scrubs [cosmetic]; Facial gels [cosmetics]; Cosmetic body mud; Cosmetic tanning preparations; Cosmetic face powders; Sun block [cosmetics]; Skin care cosmetics; Nail hardeners [cosmetics]; Moisturising concentrates [cosmetic]; Powder compacts [cosmetics]; Skin creams [cosmetic]; Nail primer [cosmetics]; Facial creams [cosmetics]; Facial lotions [cosmetic]; Cosmetic sunscreen preparations; Cosmetic facial masks; Cosmetic nail preparations; Lip stains [cosmetics]; Humectant preparations [cosmetics]; Cosmetic skin enhancers; Smoothing emulsions [cosmetics]; Cosmetic mud masks; Acne cleansers, cosmetic; Body creams [cosmetics]; Sun barriers [cosmetics]; Lip protectors [cosmetic]; Facial cleansers [cosmetic]; Skin masks [cosmetics]; Night creams [cosmetics]; Nail tips [cosmetics]; Nail

paint [cosmetics]; Toning creams [cosmetic]; Moisturising gels [cosmetic]; Cosmetic cotton wool; Skin fresheners [cosmetics]; Cosmetic nourishing creams; Face wash [cosmetic]; Facial scrubs [cosmetic]; Cosmetic suntan lotions; Face packs [cosmetic]; Suntan oils [cosmetics]; Tanning oils [cosmetics]; Cosmetics containing keratin; Mineral oils [cosmetic]; Facial moisturisers [cosmetic]; Cosmetic-impregnated tissues; Facial toners [cosmetic]; Lip coatings [cosmetic]; Cosmetics for suntanning; Skin cleansers [cosmetic]; Skin toners [cosmetic]; Cosmetic skin fresheners; Henna [cosmetic dye]; Body care cosmetics; Tanning milks [cosmetics]; Tanning gels [cosmetics]; Facial creams [cosmetic]; Cosmetic sun oils; Cosmetic suntan preparations; Tanning preparations [cosmetics]; Facial packs [cosmetic]; Suntanning oil [cosmetics]; Beauty care cosmetics; Cosmetic hair lotions; Cosmetic body scrubs; Fluid creams [cosmetics].

2. The application was opposed by Jetharam Nemaram Gehlot (“the opponent”) on 19 November 2021. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following trade mark:<sup>1</sup>

# Nisha

UK registration no. UK00003394767

Filing date 25 April 2019.

Registration date 23 August 2019.

Relying upon some of the goods for which the mark is registered, namely:

**Class 3** Henna; henna powder/paste; black mehendi; hair colour; hair dye; cosmetics; depilatory preparations; cleaning lotions; abrasives; soaps; shampoos; hair oils; hair gels; bath oils; deodorants; anti-perspirants for personal use, dentifrices.

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<sup>1</sup> I note that the opponent originally relied upon the above earlier mark, and its stylised version, UK00003137653. However, the opponent wish to withdraw its reliance on this mark, and therefore the opposition only proceeds on the UK00003394767 mark.

3. The opponent claims that there is a likelihood of confusion because the marks are highly similar, and the goods are identical or similar.

4. The applicant filed a counterstatement denying the claims made.

5. The opponent and applicant are unrepresented.<sup>2</sup> A hearing was neither requested nor considered necessary, however, the applicant filed evidence in chief, and the opponent filed written submissions. I have taken all of the evidence and submissions into consideration in reaching my decision and will refer to them where necessary below.

### **RELEVANCE OF EU LAW**

6. 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. This is why this decision continues to make reference to the trade mark case-law of EU courts.

### **EVIDENCE AND PRELIMINARY ISSUES**

7. The applicant's evidence consist of the witness statement of Manisha Kanda dated 28 March 2023. Ms Kanda is the Director of the applicant, a position which she has held since 2018. Ms Kanda's statement is accompanied by 8 exhibits (JS1-JS8).

8. I note that **exhibits JS1** and **JS2** contain images of the opponent's Amazon and eBay stores, and **exhibit JS3** contains print outs from the applicant's website ([www.mishacosmetics.com](http://www.mishacosmetics.com) and [www.mishacosmetics.co.uk](http://www.mishacosmetics.co.uk)). These exhibits demonstrate how the applicant's trade mark has been used on their goods. **Exhibit JS8** also contains promotional material and images of the applicant's product packaging, again, showing use of its mark.

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<sup>2</sup> The opponent was previously represented by Tennant IP, however, they withdrew their representation, as stated in their email dated 18 August 2023.

9. The applicant has also provided evidence of its advertising costs with Amazon Prime in **exhibit JS4**, and examples of advertising at Christmas fair stalls and exhibitions, including the Professional Beauty London exhibition, in **exhibits JS5** and **JS6**. Furthermore, the applicant has provided evidence of turnover supported by sales invoices in **exhibit JS7**.

10. Moreover, in its Form TM8, the applicant states that the parties “operate in different parts of the world”, with the opponent “based in Maharashtra”, (a location which I understand is based in India), and that the “companies are targeting different markets and different customers” with the applicant holding a UK website domain.

11. Lastly, the applicant has requested that the opponent provide proof of use of its mark for henna, black mehendi, hair colouring and hair dye.

12. Firstly, my comparison must be of the marks as registered. Therefore, the evidence contained within **exhibits JS1, JS2** and **JS8**, showing the way in which the applicant’s mark is used in practice, does not assist the applicant.

13. Secondly, the applicant has provided both turnover and advertising figures. Ms Kanda has not provided any further explanation as to why this information has been provided, and how it is useful or relevant in these proceedings. It, therefore, does not assist the applicant. Furthermore, the applicant has not claimed that the evidence was filed to support an argument that the parties marks have been co-existing in the market place. In any event, the opponent has not filed any evidence of use, and the applicant’s evidence alone would not be sufficient to establish honest concurrent use.

14. Thirdly, the submission that the parties target different markets also does not assist the applicant. I have to carry out a notional assessment based upon all the ways in which the goods covered by the respective specifications could be used and sold. The way in which they are used and sold in practice is not relevant to my assessment.

15. Fourthly, the opponent’s mark has not completed its registration process more than five years before the relevant date (the filing date of the mark in issue). Accordingly, the use provisions at s.6A of the Act do not apply. The opponent is entitled

to rely upon its full specification, and it is not required to demonstrate that it has marketed or sold its goods in the UK.

## **DECISION**

### **Section 5(2)(b)**

16. Section 5(2)(b) 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

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

### **Section 5(2)(b) case law**

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

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

- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### **Comparison of goods**

18. For the purpose of this comparison, the applicant's goods are listed at paragraph 1, and the opponent's goods are listed at paragraph 2 of this decision.

19. In *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, Case T-133/05, the General Court ("GC") stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut 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."

*Cosmetics.*

20. The term "cosmetics" appears identically in both specifications.

*Henna [cosmetic dye].*

21. The applicant's above term is self-evidently identical to "henna" in the opponent's specification.

*Cosmetics and cosmetic preparations; Milks [cosmetics]; Eyebrow cosmetics; Cosmetic dyes; Creams (Cosmetic -); Cosmetic soaps; Cosmetic soap; Cosmetic*

pencils; Pencils (Cosmetic -); Nail cosmetics; Functional cosmetics; Moisturisers [cosmetics]; Skincare cosmetics; Cosmetic powder; Eye cosmetics; Cosmetic preparations; Cosmetics preparations; Cosmetic creams; Multifunctional cosmetics; Natural cosmetics; Dyes (Cosmetic -); Cosmetic kits; Kits (Cosmetic -); Tonics [cosmetic]; Cosmetic rouges; Cosmetic moisturisers; Cosmetic masks; Cosmetic oils; Hair cosmetics; Mousses [cosmetics]; Decorative cosmetics; Colour cosmetics; Lip cosmetics; Organic cosmetics; Skin balms [cosmetic]; Cosmetic bath salts; Cleansing creams [cosmetic]; Non-medicated cosmetics; Cosmetic eye pencils; Suntan lotion [cosmetics]; Body paint (cosmetic); Bath powder [cosmetics]; Cosmetic massage creams; Cosmetic eye gels; Cosmetic hand creams; Facial washes [cosmetic]; Cosmetic facial lotions; Facial masks [cosmetic]; Cosmetic facial packs; Body scrubs [cosmetic]; Facial gels [cosmetics]; Cosmetic body mud; Cosmetic tanning preparations; Cosmetic face powders; Sun block [cosmetics]; Skin care cosmetics; Nail hardeners [cosmetics]; Moisturising concentrates [cosmetic]; Powder compacts [cosmetics]; Skin creams [cosmetic]; Nail primer [cosmetics]; Facial creams [cosmetics]; Facial lotions [cosmetic]; Cosmetic sunscreen preparations; Cosmetic facial masks; Cosmetic nail preparations; Lip stains [cosmetics]; Humectant preparations [cosmetics]; Cosmetic skin enhancers; Smoothing emulsions [cosmetics]; Cosmetic mud masks; Acne cleansers, cosmetic; Body creams [cosmetics]; Sun barriers [cosmetics]; Lip protectors [cosmetic]; Facial cleansers [cosmetic]; Skin masks [cosmetics]; Night creams [cosmetics]; Nail tips [cosmetics]; Nail paint [cosmetics]; Toning creams [cosmetic]; Moisturising gels [cosmetic]; Cosmetic cotton wool; Skin fresheners [cosmetics]; Cosmetic nourishing creams; Face wash [cosmetic]; Facial scrubs [cosmetic]; Cosmetic suntan lotions; Face packs [cosmetic]; Suntan oils [cosmetics]; Tanning oils [cosmetics]; Cosmetics containing keratin; Mineral oils [cosmetic]; Facial moisturisers [cosmetic]; Cosmetic-impregnated tissues; Facial toners [cosmetic]; Lip coatings [cosmetic]; Cosmetics for suntanning; Skin cleansers [cosmetic]; Skin toners [cosmetic]; Cosmetic skin fresheners; Body care cosmetics; Tanning milks [cosmetics]; Tanning gels [cosmetics]; Facial creams [cosmetic]; Cosmetic sun oils; Cosmetic suntan preparations; Tanning preparations [cosmetics]; Facial packs [cosmetic]; Suntanning oil [cosmetics]; Beauty care cosmetics; Cosmetic hair lotions; Cosmetic body scrubs; Fluid creams [cosmetics].

22. All of the applicant's remaining above goods falls within the broader category of "cosmetics" in the opponent's specification. They are identical on the principle outlined in *Meric*.

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

23. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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."

24. The average consumer for the goods will be members of the general public, however, I do not discount that it could also include a professional user such as a beautician. The cost of the goods in question is likely to vary, however, on balance it is likely to be relatively low. The goods will be purchased relatively frequently. The average consumer will take various factors into consideration such as the cost, quality, aesthetic, scent and the suitability for their specific needs. Therefore, the level of attention paid during the purchasing process will be medium.

25. The goods are likely to be obtained by self-selection from the shelves of a (beauty) retail outlet, or online equivalent. I also note that cosmetics can be on display with tester products, for the user to test and use in store. Alternatively, the goods may be purchased following perusal of advertisements or inspection of a catalogue. Visual

considerations are, therefore, likely to dominate the selection process. However, I do not discount that there may also be an aural component to the purchase through advice sought from a sales assistant or representative.

### **Comparison of the trade marks**

26. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade 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.”

27. It would be wrong, therefore, to artificially dissect the trade marks, 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.

28. The respective trade marks are shown below:

| <b>Opponent's trade mark</b> | <b>Applicant's trade marks</b> |
|------------------------------|--------------------------------|
| <b>Nisha</b>                 | <b>Misha Cosmetics</b>         |

|  |                                 |
|--|---------------------------------|
|  | <h1><b>MISHA Cosmetics</b></h1> |
|--|---------------------------------|

**(SERIES OF 2)**

29. The opponent's mark consists of the word "Nisha". There are no other elements to contribute to the overall impression which lies in the word itself.

30. The applicant's series of two trade marks consists of the words "Misha" and "Cosmetics". The first mark presents the first word in one upper-case first letter, with the rest of the letters in lower case, whereas the second mark presents the first word all in upper-case. For reasons I will come to discuss in the conceptual comparison, the descriptive word "cosmetics" will play a lesser role in the overall impression of the mark, with the word "MISHA" playing a greater role.

31. Firstly, I note that both the parties' marks are word marks, and that registration of these covers use in any standard typeface, including presenting the marks in upper and lower-case.

32. Visually, the marks coincide in the letters I, S, H and A. The opponent's mark begins with the letter N and the applicant's mark begins with the letter M. However, as highlighted by the opponent, I note that these letters are highly visually similar, with the only difference between them being that the letter "M" has an additional horizontal line adjoined at the end. Furthermore, the letter "n" and "m" in lower-case are also highly visually similar. The above, therefore, all acts as visual points of similarity. The applicant's marks end in the word "Cosmetics", which acts as a visual point of difference, however, given its descriptive nature, the visual impact of this element has limited weight (although it is not negligible). Therefore, taking all of the above into account, I consider that the marks are visually similar to between a medium and high degree.

33. Aurally, the opponent submits that its mark will be pronounced as NEE-SHUH, and the applicant's mark will be pronounced as MEE- SHUH. I agree, however, I also bear

in mind that in the recent appeal decision by Philip Harris, sitting as the Appointed Person, in *Purity Wellness Group Ltd v Stockroom (Kent) Ltd*, Case BL-O/115/22, it was determined that “descriptiveness does not of itself render an element negligible or aurally invisible”. Therefore, as the applicant’s marks ends in the word “cosmetics”, this element will be articulated, and given its ordinary dictionary pronunciation (COS-MET-ICK-SS). Therefore, as the marks overlap in the “EE” element of the first syllable and the “SHUH” syllable, I consider that the marks are aurally similar to between a medium and high degree.

34. Conceptually, the opponent submits that the average consumer would recognise the words “Misha” and “Nisha” in the parties’ marks, as “names”. I agree. I consider they would be recognised by the average consumer as names typically assigned to girls/women. I also refer to the case of *Luciano Sandrone v EUIPO* T-268/18 wherein the GC stated that:

“85. [...] a first name or a surname which does not convey a ‘general and abstract idea’ and which is devoid of semantic content, is lacking any ‘concept’, so that a conceptual comparison between two signs consisting solely of such first names or surnames is not possible.

86. Conversely, a conceptual comparison remains possible where the first name or surname in question has become the symbol of a concept, due, for example, to the celebrity of the person carrying that first name or surname, or where that first name or that surname has a clear and immediately recognisable semantic content.

87. The Court has thus previously held that the relevant public would perceive marks containing surnames or first names of persons as having no specific conceptual meaning, unless the first name or surname is particularly well known as the name of a famous person (see, to that effect, judgments of 18 May 2011, *IIC v OHIM— McKenzie (McKENZIE)*, T502/07, not published, EU:T:2011:223, paragraph 40; of 8 May 2014, *Pedro Group v OHIM— Cortefiel (PEDRO)*, T38/13, not published, EU:T:2014:241, paragraphs 71 to 73; and of

11 July 2018, *ANTONIO RUBINI, T707/16*, not published, EU:T:2018:424, paragraph 65).”

35. With the above case law in mind, the parties’ marks will be considered as girls/women’s names which will hold no specific concept. However, I note that the applicant’s mark also ends in the word “Cosmetics”, which is descriptive of the applicant’s goods for which the mark is applied for. Consequently, as the differentiating concept is descriptive, it follows that it creates a non-distinctive conceptual difference to which the consumer will attach very little weight (if any).

### **Distinctive character of the earlier trade mark**

36. 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 C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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 promotion of 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).”

37. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

38. As the opponent has not filed any evidence to show that the distinctiveness of its mark has been enhanced through use, I only have the inherent position to consider.

39. As highlighted above, the opponent's mark consists of the name "Nisha". The word is neither allusive nor descriptive of the opponent's goods. I therefore consider it is inherently distinctive to a medium degree.

#### **Likelihood of confusion**

40. 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 scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. This includes the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

41. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually similar to between a medium and high degree.
- I have found the marks to be aurally similar to between a medium and high degree.
- I have found that the differentiating concepts between the marks is descriptive, and it follows that it creates a non-distinctive conceptual difference to which the consumer will attach very little weight (if any).
- I have found the opponent's mark to be inherently distinctive to a medium degree.
- I have identified the average consumer for the goods to be members of general public, and also professional users such as beauticians, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process for the goods.
- I have found the parties' goods to be identical.

42. Therefore, taking all of the above factors into account, bearing in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind, including that both marks are composed of very similar girls names, I find that there is direct confusion. I consider that because the marks share the letters I, S, H and A, with the differences being the first letter, and the applicant's marks ending the word "Cosmetics", that these will be easily overlooked by the average consumer. This is firstly on the basis that the visual similarities between the first letters (M and N / m and n) highlights that these letters would be easily mistakenly recalled or misremembered as each other. Secondly, the word "Cosmetics" in the applicant's marks is descriptive of the goods, and therefore, would also be easily overlooked. Given that the average consumer rarely has the opportunity to compare marks side-by-side and will instead encounter them in different settings at different times, to my mind, the closeness between the marks, and the identity of the goods will lead the average consumer to mistake one mark for the other. Therefore, taking all of the above into account, I consider there to be a likelihood of direct confusion.

## **COSTS**

43. Award of costs are governed by TPN 2/2016. The opponent has been successful and would normally be entitled to a contribution towards their costs. However, as the opponent is unrepresented, at the conclusion of the evidence rounds the tribunal wrote to the opponent and invited them to indicate whether they intended to make a request for an award of costs. The opponent was informed that, if so, they should complete a Pro Forma, providing details of their actual costs and accurate estimates of the amount of time spent on various activities associated with the proceedings. They were informed that “if the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time) may not be awarded”.

44. The opponent did not file a completed Pro Forma. That being the case I award the opponent the sum of £100 in respect of the official fee only.

45. I therefore order Misha Cosmetics Limited to pay Jetharam Nemaram Gehlot the sum of **£100**. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 7<sup>th</sup> day of September 2023**

**L FAYTER**

**For the Registrar**