

O/1002/23

TRADE MARKS ACT 1994

**IN THE MATTER OF
UK REGISTRATION NO. 3621479
IN THE NAME OF SHENZHEN SHIJIDAFEI TECHNOLOGY CO., LTD
IN RESPECT OF THE TRADE MARK**

LOVELLE

IN CLASS 8

AND

**AN APPLICATION FOR A DECLARATION OF
INVALIDITY THEREOF
UNDER NO. 505413
BY LIFETIME BRANDS EUROPE LIMITED**

BACKGROUND AND PLEADINGS

1. UK Trade Mark (“UKTM”) No. 3621479 for the trade mark “**LOVELLE**” stands registered in the UK in the name of Shenzhen Shijidafei Technology Co., Ltd (“the proprietor”). The application for registration was filed on 06 April 2021, and the trade mark was registered on 02 September 2022, in respect of the following goods:

Class 8: *Scissors; Tweezers; Table cutlery [knives, forks and spoons]; Hand tools, hand-operated; Vegetable knives; Trowels [gardening]; Blade sharpening instruments; Cuticle tweezers; Cuticle nippers; Hair-removing tweezers; Pedicure sets; Garden tools, hand-operated; Nail files; Razors, electric or non-electric; Nail files, electric; Nail buffers, electric or non-electric; Fingernail polishers, electric or non-electric; Hair clippers for personal use, electric and non-electric; Nail clippers, electric or non-electric; Manicure sets; Depilation appliances, electric and non-electric; Manicure sets, electric; Pizza cutters, non-electric; Eyelash curlers; Ceramic knives; Emery boards; Table knives, forks and spoons for babies; Vegetable peelers [hand tools]; Wine bottle foil cutters, hand-operated; Fruit segmenters; Kitchen mandolines; Wick trimmers [scissors]; Can openers, non-electric; Tin openers, non-electric; Penknives; Artificial eyelash tweezers.*

2. On 04 October 2022, Lifetime Brands Europe Limited (“the cancellation applicant”) filed an application to have this trade mark declared invalid under the provisions of section 47(2) of the Trade Marks Act 1994 (“the Act”), and is based upon section 5(2)(b) of the Act. The application for invalidation was filed in respect of some of the goods as registered, as listed in the table under paragraph 29 of this decision. The cancellation applicant relies upon the following two comparable UK marks:

LOVELLO

UKTM Registration No. 914629851

Filing date: 01 October 2015

Registration date: 26 January 2016

Registered in classes 8, 9 and 21

Relying on goods in classes 8 and 21 only, as follows:

Class 8: *Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use; cutlery; mortars and pestles; bar and kitchen utensils; parts and fittings for all the aforesaid goods.*

Class 21: *HOLDERS and containers for kitchen and household utensils; ice buckets; straw dispensers; household, cooking and kitchen utensils and containers (not of precious metal or coated therewith); fruit baskets; biscuit barrels; biscuit, flour, sugar, tea and coffee containers; cake tins; kitchen worktop protectors; cooling trays; trays, trivets and serving trays; cheese covers; cloches for serving food; oven gloves and mitts; bread bins; food containers; lids, stoppers and air-tight closures for containers, bottles and jars; containers and moulds for food; flour/sugar sprinklers; food displaying containers; storage boxes; cake stands; cake boards (for display purposes); kitchen towel holders and dispensers; knife blocks and knife sets; parts and fittings for all the aforesaid goods.*

(The '851 mark); and



UKTM Registration No. 916862385

Filing date: 15 June 2017

Registration date: 25 October 2017

Registered in classes 8, 9 and 21

Relying on goods in classes 8 and 21 only, as follows:

Class 8: *Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use; cutlery; mortars and pestles; knives; knife sets; parts and fittings for all the aforesaid goods.*

Class 21: *HOLDERS AND CONTAINERS FOR KITCHEN AND HOUSEHOLD UTENSILS; ICE BUCKETS; STRAW DISPENSERS; HOUSEHOLD, COOKING AND KITCHEN UTENSILS AND CONTAINERS (NOT OF PRECIOUS METAL OR COATED THEREWITH); HOLDERS FOR CUTLERY; FRUIT BASKETS; BISCUIT BARRELS; BISCUIT, FLOUR, SUGAR, TEA AND COFFEE CONTAINERS; CAKE TINS; KITCHEN WORKTOP PROTECTORS; COOLING TRAYS; TRAYS, TRIVETS AND SERVING TRAYS; CHEESE COVERS; OVEN GLOVES AND MITTS; BREAD BINS; FOOD CONTAINERS; LIDS, STOPPERS AND AIR-TIGHT CLOSURES FOR CONTAINERS, BOTTLES AND JARS; CONTAINERS AND MOULDS FOR FOOD; FLOUR/SUGAR SPRINKLERS; FOOD DISPLAYING CONTAINERS; CAKE STANDS; CAKE BOARDS (FOR DISPLAY PURPOSES); KITCHEN TOWEL HOLDERS AND DISPENSERS; KNIFE BLOCKS AND KNIFE SETS; WASTE BINS; PEDAL BINS; KITCHEN UTENSILS; UTENSILS USED IN PREPARING AND SERVING ALCOHOLIC AND NON-ALCOHOLIC BEVERAGES; PARTS AND FITTINGS FOR ALL THE AFORESAID GOODS.*

(The '385 mark).

3. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Trade Mark designating the EU. As a result, the opponent's marks were each converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.¹

4. The cancellation applicant submits that the contested mark is visually and aurally similar to both the earlier marks, and that the contested goods are identical and/or highly similar to the goods covered by the earlier registrations. It submits that

¹ See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

consumers will believe that the proprietor's goods originate from, or are otherwise associated with, the cancellation applicant, and that the contested registration should be invalidated.

5. The proprietor filed a counterstatement denying the claims and has requested that the cancellation applicant provide proof of use in respect of the earlier marks.²

6. The proprietor filed written submissions which will be referred to as and where appropriate during this decision. The cancellation applicant filed evidence and written submissions in lieu. Neither party requested a hearing, therefore this decision is taken following careful consideration of the papers.

7. In these proceedings, the cancellation applicant is represented by Forresters IP LLP and the proprietor is represented by IBE Avocat, Isabelle Bertaux.

CANCELLATION APPLICANT'S EVIDENCE

8. The cancellation applicant filed evidence by way of a witness statement dated 06 March 2023 in the name of Matthew Benedict Canwell, alongside ten exhibits. Mr Canwell is a Director of the opponent, a position he has held since 01 October 2016.

9. The main purpose of the evidence is to provide information and evidence to show that the '851 mark has been put to genuine use in the UK within the relevant period.³

10. I have read and considered all of the evidence and I will refer to the relevant parts at the appropriate points in the decision

DECISION

11. Although the UK has left the European Union, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in

² See paragraph 13 of this decision.

³ Ibid.

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. Therefore, this decision contains references to the trade mark case-law of the European courts.

Statutory provision under Section 47

12. Section 5 of the Act has application in invalidation proceedings by virtue of section 47 of the Act. So far as is relevant, section 47 of the Act is as follows:

“47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

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

(2ZA) [...]

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

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

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

(c) the use conditions are met.

(2B) The use conditions are met if –

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

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

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

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

(2C) For these purposes –

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

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

(2D)-(2DA) [Repealed]

(2E) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

(2F) Subsection (2A) does not apply where the earlier trade mark is a trade mark within section 6(1)(c).

(2G) An application for a declaration of invalidity on the basis of an earlier trade mark must be refused if it would have been refused, for any of the reasons set out in subsection (2H), had the application for the declaration been made on the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application.

(2H) The reasons referred to in subsection (2G) are-

(a) that on the date in question the earlier trade mark was liable to be declared invalid by virtue of section 3(1)(b), (c) or (d), (and had not yet acquired a distinctive character as mentioned in the words after paragraph (d) in section 3(1));

(b) that the application for a declaration of invalidity is based on section 5(2) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of section 5(2);

(c) that the application for a declaration of invalidity is based on section 5(3)(a) and the earlier trade mark had not yet acquired a reputation within the meaning of section 5(3).

(3) [...]

(4) [...]

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

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

13. By virtue of its earlier filing date, each of the trade marks upon which the cancellation applicant relies qualifies as an earlier trade mark pursuant to section 6 of the Act. Only the earlier ‘851 mark had completed the registration process more than 5 years before the application for a declaration of invalidity was filed, and is therefore subject to the use conditions contained in section 47(2B) of the Act. As the earlier ‘385 mark is not subject to the use conditions, the cancellation applicant is entitled to rely upon it in relation to all of the goods indicated without having to prove that genuine use has been made of it.

Proof of use

14. Under the section 5(2)(b) grounds, the cancellation applicant has claimed that use has been made of all of its goods on which it relies for the mark as registered. I must consider whether, or the extent to which, the evidence shows genuine use of the earlier mark in relation to the goods covered.

15. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Limited v Verweij Fashion BV* [2018] EWHC 1608 (Ch):

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de*

minimis rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

16. Section 100 of the Act states that:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

17. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is, therefore, not genuine use.⁴

18. In assessing whether there has been genuine use of the mark, as explained in the above legislation, there are two relevant periods. The first is the period of 5 years ending with the date of the application for invalidity i.e. 05 October 2017 to 04 October 2022, and the second is the period of 5 years ending with the filing date of the contested mark i.e. 07 April 2016 to 06 April 2021.

19. Because the earlier mark is a comparable mark, paragraph 9 of Part 1, Schedule 2A of the Act is also relevant. This provision means that use in the EU will be relevant for any part of the relevant periods which fall prior to IP Completion Day (i.e. 31 December 2020). For those parts of the relevant periods which fall after that date, only use in the UK will be relevant.

Evidence of use

20. I note the following from the cancellation applicant’s evidence:

⁴ *Jumpman* BL O/222/16.

- The Sales Revenue (GBP) generated from the cancellation applicant's Lovello products during the relevant period in the United Kingdom is given as follows:

Year	Sales Revenue (GBP)
2016	223,597.00
2017	495,409.00
2018	513,520.00
2019	670,080.00
2020	748,253.00
2021	581,025.00
2022*	272,167.00
Total:	3,504,051.00

*01 January 2022- 30 September 2022⁵

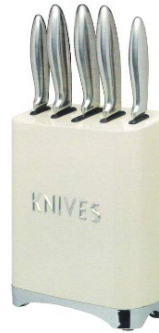
- Exhibit MBC1 comprises examples of product catalogues from 2016, 2017, 2018, 2020 and 2021 which feature a range of the LOVELLO brand of products. I note that the mark is shown at the top of each page, as well as being shown in stylised form within the catalogue pages:



⁵ Exhibit MBC4.

LOVELLO
 STYLE THAT STANDS OUT
Midnight black kitchen statements

LOVELLO
 STYLE THAT STANDS OUT
Vanilla cream kitchen statements



- The mark is also referred to in the catalogues in plain text within the written descriptions of the goods:

LOVELLO

LOVELLO TEXTURED COUNTER TOP STORAGE
 Powder-coated metal with elevated bases and mirror polished lettering. Designed for counter top storage with space effective curved contours.

hinged lid

easy-access handle



LOVELLO KitchenCraft Retro Metal Kitchen Roll Holder, 35 cm (14") - Vanilla

181

£21³⁰

RRP: £21.99 (3% off)

✓prime

Add to Basket

KitchenCraft Lovello Five Piece Knife Sets with Storage Block

Set of five stainless steel knives with taper ground cutting edges, full length tangs and ergonomic, contoured, weighted handles. Designed for superior and effortless cutting performance. Beautifully co-ordinated storage block with powder coated metal body with elevated base, raised mirror polished lettering and anti-slip feet. Twenty-five year guarantee. Gift boxed.



- A sample of 36 invoices, dated between 04 October 2017 and 30 September 2022 have been provided.⁶ The invoices are all headed Lifetime Brands Europe Ltd and the Buyer and Consignee details show various locations across the UK. While I note that the mark does not appear on any of these invoices, Mr Canwell states that the product codes referred to in the invoices are broken down in Exhibit MBC6, and that some of these codes are also listed in the product catalogues attached as Exhibit MBC1:



Lifetime Brands Europe Ltd.
KitchenCraft, The Hub, Nobel Way,
Birmingham, B6 7EU, United Kingdom.
Telephone: +44 (0) 121 604 6000
Fax No: +44 (0) 121 604 2222 / 4444
Email: sales@lifetimebrands.com
Website address: www.kitchencraft.co.uk

AEO (F) Certified GB AEO F/0070/18
Company Reg: 03411690
WEEE Reg: WEE/FH007LUZ
ITC No: MISC/26/YYN/000
VAT/EORI: GB110284322/000
EORI: XI10284322000
BEGB001069



Invoice

Page: 2 of 3
Invoice No: 9012136979
Invoice Date: 04.05.2021
Despatch Date: 04.05.2021
Shipment ID No.: 813782046
Carrier Name & Address:

Freight Payable Prepaid

Product Code EAN	COO	Description Customer Product Code	Qty. Shipped	Trade Price	Gross Price	VAT %	Gross Weight
7310299000							
LOVTEBLU 5028250785497 7310299000	CN	LV TEA CANISTER 11X18CM NAVY	1 EA	7.05	7.05	20	0.446
LOVTEAGRY 5028250785541 7310299000	CN	LV TEA CANISTER 11X18CM GREY	1 EA	7.05	7.05	20	0.405
LOVTEAHT 5028250785558 7310299000	CN	LV TEA CANISTER 11X18CM WHITE	1 EA	7.05	7.05	20	0.446
LOVCANBLU 5028250808424 7321100000	CN	LV STORAGE CANISTER 11X11X19CM NAVY	1 EA	4.22	4.22	20	0.430
LOVCTRLU 5028250785848 7310299000	CN	LV CAKE STORAGE TIN 26X19CM BLUE	1 EA	14.08	14.08	20	1.531
LOVBBLU 5028250787811 7310299000	CN	LV BREAD BIN 42X22X19CM BLUE	1 EA	21.29	21.29	20	2.635
LOVTENBLU 5028250785800	CN	LV UTENSIL HOLDER TEXTURED BLUE	1 EA	7.05	7.05	20	0.514

⁶ Exhibit MBC5.

Product Code	Product Type
LOVBBBLK	Bread Bin (black)
LOVBBCRE	Bread Bin (cream)
LOVBBGRY	Bread Bin (grey)
LOVBBWHT	Bread Bin (white)
LOVBBBLU	Bread Bin (blue)
LOVBBGRN	Bread Bin (green)
LOVBBLAT	Bread Bin (latte)
LOVUTENBLK	Utensil Store (black)
LOVUTENCRE	Utensil Store (cream)
LOVUTENRED	Utensil Store (red)
LOVUTENGRY	Utensil Store (grey)
LOVUTENWHT	Utensil Store (white)
LOVUTENLAT	Utensil Store (latte)
LOVUTENBLU	Utensil Store (blue)
LOVUTENGRN	Utensil Store (green)
LOVBIN30CRE	30 Litre Pedal Bin (cream)
LOVTOWELBLK	Towel holder (black)
LOVTOWELCRE	Towel holder (cream)
LOVKNBCRE	Knife Block (cream)
LOVKNBLK	Knife Block (black)



Bread Bin
42cm x 22cm x 18cm
LOVBBRED



Cake Tin
26cm x 26cm x 19cm
LOVCTRED

- Powder coated metal storage with elevated bases
- Raised mirror polished lettering
- Space effective curved contours
- Key kitchen colours for cross sell
- Gift tag packaging



Tea Canister
11cm x 11cm x 19cm
LOVTEARED



Coffee Canister
11cm x 11cm x 19cm
LOVCOFFERED



Sugar Canister
11cm x 11cm x 19cm
LOVSUGARRED



Utensil Store
20cm x 10cm x 18cm
LOVUTENRED

Utensils not included



Biscuit Canister
14cm x 14cm x 19cm
LOVBISCREd

- The goods have been advertised for sale in the UK through the cancellation applicant's website, as well as via the Amazon sales platform:⁷




⁷ Exhibit MBC2.

Lovello

Keep your homemade bread from drying out and organise your... 5

Best Selling

Refine By

<p>Lovello</p> <p>SAVE £20.98</p>  <p>3pc Midnight Black Kitchen Storage Set With Tea...</p> <p>£44.99 Worth: £65.97</p> <p>QUICK ADD</p>	<p>Lovello</p> <p>SAVE £22.97</p>  <p>4pc Vanilla Cream Kitchen Storage Set With Tea...</p> <p>£64.99 Worth: £87.96</p> <p>QUICK ADD</p>	<p>Lovello</p> <p>SAVE £28.99</p>  <p>4pc Gift-Boxed Shadow Grey Kitchenware Set With...</p> <p>£74.99 Worth: £103.98</p> <p>QUICK ADD</p>
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Amazon.co.uk Today's Deals Warehouse Deals Outlet Subscribe & Save Vouchers Amazon Family Amazon Prime Prime Video Prime Student



LOVELLO

STYLE THAT STANDS OUT

Lovello Knife Blocks

HOME KITCHEN APPLIANCES KNIFE BLOCKS KITCHEN STORAGE

Search all Lovello

LOVELLO KitchenCraft Retro 5-Piece Stainless Steel Knife Set and Knife Block – Midnight Black

61

£54⁸⁰

prime

Only 9 left in stock (more on the way).



- Exhibit MBC3 shows the mark as it appears on product labels and point of sale materials:



- The estimated expenditure on promotion, advertising and marketing of the LOVELLO brand is given as follows:⁸

⁸ Exhibit MBC7.

	2016	2017	2018	2019	2020	2021	Total (£):
Catalogues	555	543	866	981	904	904	4753
Catering Catalogue	100	96	100	0	100	0	396
Advertising	3750	100	100	200	100	100	4350
Digital Advertising	822	822	822	1644	822	822	5754
Showroom	100	100	0	20000	0	100	20300
POS / Digital Asset Creation	822	822	822	1644	822	822	5754
Trade Shows	14000	1000	1000	14000	0	0	30000
Total (£):	20149	3483	3710	38469	2748	2748	71307

- The cancellation applicant has conducted marketing campaigns at industry trade shows:⁹



Spring Fair, 2018 - Spring Fair, NEC, Birmingham, 4-7 February 2018



- The cancellation applicant has been nominated for and won awards for its Lovello range of kitchenware:¹⁰

⁹ Exhibit MBC8 and MBC9.

¹⁰ Exhibit MBC10.

Kitchenware Innovation Award, sponsored by Harts of Stur

- Auteur – Bobble Insulate
- Eddingtons – Smoothie Straws
- Europasonic – Pro Chef Saucepan Separator
- I.O Shen – Maoui Deba Multi-purpose Blade
- Joseph Joseph – Stack 4 Food Waste Caddy
- Kitchen Craft – Lovello Range

Form of the mark

21. As outlined in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12,¹¹ the use of the mark encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark. The mark is shown within the evidence in plain text, in a stylised form, and in conjunction with the words “KitchenCraft”, which I perceive to be the house brand. I consider that these forms continue to indicate origin and may be relied upon by the opponent.

Assessment on genuine use

22. I note the submissions of the proprietor that the evidence does not show the earlier mark embossed, printed or applied to the goods in question, or that the cancellation applicant has not demonstrated that the mark LOVELLO has been put to genuine use in the United Kingdom within the relevant period.¹² However, the exhibits clearly show the mark being used in conjunction with the goods through the swing tags and packaging, as well as the written descriptions next to the goods on the webpages. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself. It is possible for an accumulation of evidence to show use, even if

¹¹ At [31 – 35].

¹² Pages 10-11 of the proprietors written submissions filed on 07 May 2023.

individual items of evidence would on their own be insufficient proof: see *New Yorker SHK Jeans GmbH & Co. KG v OHIM*, Case T- 415/09, paragraph 53.

23. I have no evidence relating to the size of the corresponding kitchenware market or the percentage market share enjoyed by the cancellation applicant. I further note that no information has been provided on the number of catalogues distributed, or to whom, or the amount of sales which were generated through the catalogues or through the cancellation applicant's attendance at trade fairs. However, the combination of the invoices and the Sales Revenue (GBP) figures which span the two relevant periods indicate that there has been substantial commercial use of the mark LOVELLO in relation to certain kitchenware products within the relevant periods and within the relevant territory, which is further supported by the overall advertising expenditure figures. I am satisfied that there is sufficient evidence to justify genuine use during the relevant periods in relation to at least some of the goods relied on.

Fair specification

24. The applicant is relying on a range of products in classes 8 and 21. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

25. I do not consider that the cancellation applicant has provided evidence of use to support the following goods:

Class 8 - *Cutlery; mortars and pestles; parts and fittings for all the aforesaid goods.*¹³

¹³ I note that the term "*parts and fittings for all the aforesaid goods*" comes at the end of the specification in both classes 8 and 21 and therefore applies to all of the goods in each class preceding the term. However, as I have found no evidence of use for parts and fittings of any of the goods being provided, I do not consider that the term should form part of the specification for those goods listed under paragraph 26 for which genuine use has been shown.

Class 21 - *Ice buckets; straw dispensers; fruit baskets; kitchen worktop protectors; cooling trays; trays, trivets and serving trays; cheese covers; cloches for serving food; oven gloves and mitts; lids, stoppers and air-tight closures for containers, bottles and jars; moulds for food; flour/sugar sprinklers; cake stands; cake boards (for display purposes); parts and fittings for all the aforesaid goods.*

26. Consequently, I consider the following to be a fair specification:

Class 8 - *Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use; bar and kitchen utensils.*¹⁴

Class 21 - *Holders and containers for kitchen and household utensils; household, cooking and kitchen utensils and containers (not of precious metal or coated therewith); biscuit barrels; biscuit, flour, sugar, tea and coffee containers; cake tins; bread bins; food containers; containers for food; food displaying containers; storage boxes; kitchen towel holders and dispensers; knife blocks and knife sets.*¹⁵

Section 5(2)(b) –

27. Section 5(2)(b) of the Act is as follows:

“A trade mark shall not be registered if because -

...

(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,

¹⁴ I acknowledge that these terms are broad and may also cover goods which have not specifically been shown in the evidence as being provided by the cancellation applicant. However, I consider that the average consumer would perceive the specification as exemplifying the category of goods for which genuine use has been demonstrated: *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10.

¹⁵ *Ibid.*

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

28. In considering the application for invalidity under this section, I am guided by the following principles which 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 Office for Harmonisation in the Internal Market (Trade Marks and Designs) (“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 greater degree of similarity between the marks, and vice versa;

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

(i) mere association, in the strict sense that the later mark brings to mind the earlier mark, 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.

Comparison of goods

29. The goods to be compared are:

Cancellation applicant's goods	Proprietor's goods
The '851 mark: <u>Class 8</u> <i>Hand tools and implements (hand operated), all for kitchen, dining, food-</i>	<u>Class 8</u> <i>Scissors; Tweezers; Table cutlery [knives, forks and spoons]; Hand tools, hand-operated; Vegetable knives; Trowels</i>

<p><i>preparation, cooking and culinary use; bar and kitchen utensils.</i></p> <p><u>Class 21</u></p> <p><i> Holders and containers for kitchen and household utensils; household, cooking and kitchen utensils and containers (not of precious metal or coated therewith); biscuit barrels; biscuit, flour, sugar, tea and coffee containers; cake tins; bread bins; food containers; containers for food; food displaying containers; storage boxes; kitchen towel holders and dispensers; knife blocks and knife sets.</i></p>	<p><i>[gardening]; Blade sharpening instruments; Garden tools, hand-operated; Pizza cutters, non-electric; Ceramic knives; Table knives, forks and spoons for babies; Vegetable peelers [hand tools]; Wine bottle foil cutters, hand-operated; Fruit segmenters; Kitchen mandolines; Can openers, non-electric; Tin openers, non-electric; Penknives.</i></p>
<p>The '385 mark</p> <p><u>Class 8</u></p> <p><i>Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use; cutlery; mortars and pestles; knives; knife sets; parts and fittings for all the aforesaid goods.</i></p> <p><u>Class 21</u></p> <p><i>Holders and containers for kitchen and household utensils; ice buckets; straw dispensers; household, cooking and kitchen utensils and containers (not of precious metal or coated therewith); holders for cutlery; fruit baskets; biscuit barrels; biscuit, flour, sugar, tea and coffee containers; cake tins; kitchen worktop protectors; cooling trays; trays, trivets and serving trays; cheese covers; oven gloves and mitts;</i></p>	

<p><i>bread bins; food containers; lids, stoppers and air-tight closures for containers, bottles and jars; containers and moulds for food; flour/sugar sprinklers; food displaying containers; cake stands; cake boards (for display purposes); kitchen towel holders and dispensers; knife blocks and knife sets; waste bins; pedal bins; kitchen utensils; utensils used in preparing and serving alcoholic and non-alcoholic beverages; parts and fittings for all the aforesaid goods</i></p>	
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30. In *Gérard Meric v OHIM*, Case T-133/05, the General Court (“GC”) stated that:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM - Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.¹⁶

31. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated that:

“In assessing the similarity of the goods or services concerned, ... 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”.¹⁷

¹⁶ Paragraph 29

¹⁷ Paragraph 23

32. Additionally, the factors for assessing similarity between goods and services identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] R.P.C. 281 include an assessment of users and the channels of trade of the respective goods or services.

33. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.¹⁸

34. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where appropriate. In *Separode Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, said:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”¹⁹

35. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

¹⁸ Paragraph 82

¹⁹ Paragraph 5

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. ... Nevertheless the principle should not be taken too far. ... Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."²⁰

36. In its written submissions in lieu, the cancellation applicant submits that many of the contested goods are entirely encompassed by the broad term "*bar and kitchen utensils*" covered by the '851 mark and are therefore identical, and are also identical/highly similar to the terms "*knives; knife sets*" covered by the '385 mark.

37. In its written submissions, the proprietor has said that it "cannot deny that some of the goods invoked by the cancellation applicant and covered by its application, in particular the kitchen tools are similar...". However, it submits that this cannot be applied to all of the contested goods.

38. In accordance with section 60A of the Act, I am mindful that just as the appearance of respective goods in the same class is not sufficient in itself to find similarity between those goods, neither are goods to be automatically found to be dissimilar simply because they fall in a different class.

Hand tools, hand-operated.

39. The proprietors broad term "*Hand tools, hand-operated*" encompass the cancellation applicant's "*Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use*", as covered by both earlier marks, and as such, the goods at issue are identical as per the principal outlined in *Meric*.

Table cutlery [knives, forks and spoons]; Table knives, forks and spoons for babies;

²⁰ Paragraph 12

40. The above listed items are covered by the cancellation applicant's broad term "cutlery" (the '385 mark), and "*Hand tools and implements (hand operated), all for ... dining, ... use*" (both earlier marks), rendering them identical as per *Meric*.

Vegetable knives; Ceramic knives.

41. These are encompassed by the broader term "*knives*" of the cancellation applicant's '385 mark and so are *Meric* identical. I also consider them to be covered by the term "*Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use*" of the '851 mark, and as such are also *Meric* identical.

Pizza cutters, non-electric; Vegetable peelers [hand tools]; Fruit segmenters; Kitchen mandolines; Can openers, non-electric; Tin openers, non-electric.

42. These goods are encompassed by the cancellation applicant's "*Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use*" which is common to both the earlier marks. I therefore find them to be identical as per *Meric*.

Wine bottle foil cutters, hand-operated.

43. These goods are covered by the broad term "*bar and kitchen utensils*" as found in both the earlier marks, rendering the goods identical as per *Meric*.

Scissors; Tweezers; Blade sharpening instruments.

44. I consider all of these goods to be hand tools which may be used in a kitchen/food preparation environment, with tweezers often used to remove bones from fish, or to delicately place items such as herbs as a garnish to a dish. As such, I consider that they are covered by the broad term of both the earlier marks, being "*Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use*", and thus are *Meric* identical.

Penknives.

45. I consider *Penknives* to be clearly encompassed by the “*knives*” of the earlier ‘385 mark. A penknife is a small pocketknife which usually has a blade or blades which fold back into the handle. I consider it to be a hand tool, and I see no reason why it couldn’t be used in food-preparation, particularly, for example, during activities such as camping. I therefore find “*Penknives*” *Meric* identical to “*Hand tools and implements (hand operated), all for kitchen, dining, food-preparation, cooking and culinary use*” covered by the earlier ‘851 mark.

Trowels [gardening]; Garden tools, hand-operated.

46. While the proprietor’s goods may be classed as “*Hand tools and implements (hand operated), ...*”, they are clearly for use in the garden rather than for “... *kitchen, dining, food-preparation, cooking and culinary use*” as covered by the earlier marks. The goods are different in nature, purpose and method of use, are not in competition nor complementary to any of the cancellation applicant’s goods under either of the earlier marks. I see no reason why the average consumer would expect them to originate from the same or economically linked undertakings. I therefore find them dissimilar.

47. A degree of similarity between the goods is essential for there to be a finding of likelihood of confusion: see paragraph 49 of *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA. In relation to the goods which I have found to be dissimilar, as there can be no likelihood of confusion under section 5(2)(b), I will take no further account of such goods, with the opposition failing to that extent.

The average consumer and the nature of the purchasing act

48. 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. (as he was then) described the average consumer in these terms:

“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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.²¹

49. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

50. The cancellation applicant submits that the goods at issue are directed at the public at large, whose degree of attention is considered to be average. The proprietor also submits that the goods at issue are directed at the public at large, but also at customers with specific knowledge or expertise, and as such the degree of attention will vary from average to above average.

51. I agree with both parties that the average consumer for the competing goods will most likely be the general public, but I also acknowledge the proprietor's submissions that the goods may also be directed towards the professional consumer.

52. The goods are sold through a range of channels including supermarkets, and department stores, as well as online. In retail outlets, the goods will be displayed on shelves where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a web page. The selection process will, in my view, be a predominantly visual one, although aural considerations will play a part. Although the price of the goods can vary, on balance it seems to me that, for the most part, the cost of the purchase is likely to be relatively low, and although I do not consider that these type of goods will be purchased frequently, they are likely to be replaced/upgraded from time to time. Considered overall, I find that the level of

²¹ Paragraph 60

attention of the general public will be medium when selecting the goods, while the professional is likely to pay a higher than average degree of attention to the selection process, but not to the highest degree.

My approach

53. I consider it appropriate to approach the rest of this decision by comparing only the cancellation applicant's '851 mark against the proprietor's mark. This is because I have already found the same degree of similarity between the contested goods and those of each of the earlier marks. As the cancellation applicant's '851 mark is a word only mark which represents the cancellation applicant's strongest case, in the event that I find there to be a likelihood of confusion between these marks, I do not consider that assessing the remaining mark would improve the cancellation applicant's position. If, however, I find no likelihood of confusion between the marks, it follows that the same finding will apply to the earlier '385 mark on the basis that as a figurative mark, it shares a lesser degree of similarity with the contested word mark than the '851 mark. If required, I will address this point further when considering any final remarks at the conclusion of this decision. From this point onwards, for the purposes of the remaining assessments, I will refer to the '851 mark as "the earlier mark".

Comparison of marks

54. 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 in *Bimbo SA v OHIM* Case C-591/12P, 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.”²²

55. 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.

56. The competing marks each consist of a single word, presented in a standard typeface with no other elements to contribute to the overall impression: **LOVELLO** v **LOVELLE**. The overall impression of each mark therefore rests in the word itself.

57. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginning of words tend to have more visual and aural impact than the ends, although I acknowledge that this is not always the case.

58. Visually, the competing marks are both single words of seven letters in length, which share the same first six letters, **L O V E L L**, presented in the same order. In the earlier mark, the letter **O** follows, while the contested mark is completed by the letter **E**. Considering the marks as a whole, I find there to be a high degree of visual similarity between them.

59. Aurally, the common element of the competing marks is the first two syllables, with the earlier mark pronounced as three syllables, LO-VELL-OH, while the contested mark is likely to be articulated as two syllables, LO-VELL. The only aural difference between the marks is the additional third syllable at the end of the earlier mark. As such, the aural element of the contested mark in its entirety sits within the pronunciation of the earlier mark. Consequently, I consider the marks to be aurally similar to between a medium to high degree.

²² Paragraph 34

60. For a conceptual message to be relevant, it must be capable of immediate grasp by the average consumer - Case C-361/04 P *Ruiz-Picasso and others v OHIM* [2006]²³.

61. Both parties agree that neither mark has any conceptual meaning. I also find that the competing marks are likely to be seen as conceptually neutral invented words with no allusive qualities. Accordingly, as neither mark contains any recognisable semantic concept, there is no conceptual comparison to be made.

Distinctive character of the earlier marks

62. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

63. 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 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically

²³ Paragraph 56.

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).”

64. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up 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 made of it.

65. The earlier mark comprises the invented word LOVELLO. As considered earlier in this decision, the mark has no allusive qualities. Therefore I find it to possess a high degree of inherent distinctiveness.

66. Earlier in this decision I considered the evidence filed by the cancellation applicant to support genuine use of the mark. Even allowing that the evidence demonstrates enhanced distinctive character through use within the relevant period in the UK, being the territory relevant to the assessment of enhanced distinctiveness, given that I have already found the earlier mark to be inherently distinctive to a high degree, it is unlikely that any finding of enhanced distinctiveness greatly improves the cancellation applicant’s already strong position on this front. I do not therefore intend to consider the evidence further.

Likelihood of confusion

67. There is no simple formula for determining whether there is a likelihood of confusion. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind.

68. It is clear then that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them 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 (*Canon* at [17]). In making my assessment, I must consider the various factors from the perspective of the average consumer, bearing in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

69. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different, but assumes that the goods and/or services are the responsibility of the same or connected undertakings: *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10.²⁴

70. Earlier in this decision, I found that with the exception of “*Trowels [gardening]; Garden tools, hand-operated*”, the contested goods were identical to the cancellation applicant’s goods. Further, the general public consuming the goods at issue would pay a medium degree of attention when choosing those goods, which, whilst not ignoring aural considerations, would be selected by predominantly visual means. I also acknowledged the professional consumer would be likely to pay a higher degree of attention to the selection process, although not to the highest degree. I considered the competing trade marks to be visually highly similar and aurally similar to between a medium to high degree and to be conceptually neutral. I found the earlier mark to be inherently distinctive to a high degree.

71. I have weighed up each of the competing factors in my decision, including the differences as well as the similarities between the competing marks. The average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind. Given the high degree of inherent distinctive character of the earlier mark as well as the degree of visual and aural similarity between the marks, in my view, the similarities between the marks are such that they are likely to be mistakenly recalled as each other. Consequently, I find

²⁴ At [16-17].

that there is a likelihood of direct confusion in relation to all the goods for which I found similarity.

CONCLUSION

72. The application for invalidation succeeds in respect of some of the goods against which it is directed. Subject to any successful appeal, the contested mark is declared invalid under the provisions of section 47 in respect of the following goods in Class 8:

Scissors; Tweezers; Table cutlery [knives, forks and spoons]; Hand tools, hand-operated; Vegetable knives; Blade sharpening instruments; Pizza cutters, non-electric; Ceramic knives; Table knives, forks and spoons for babies; Vegetable peelers [hand tools]; Wine bottle foil cutters, hand-operated; Fruit segmenters; Kitchen mandolines; Can openers, non-electric; Tin openers, non-electric; Penknives.

73. The contested mark will remain registered for the goods in its specification for which I found no similarity, as well as for the unopposed goods in Class 8, as follows:

Trowels [gardening]; Cuticle tweezers; Cuticle nippers; Hair-removing tweezers; Pedicure sets; Garden tools, hand-operated; Nail files; Razors, electric or non-electric; Nail files, electric; Nail buffers, electric or non-electric; Fingernail polishers, electric or non-electric; Hair clippers for personal use, electric and non-electric; Nail clippers, electric or non-electric; Manicure sets; Depilation appliances, electric and non-electric; Manicure sets, electric; Eyelash curlers; Emery boards; Wick trimmers [scissors]; Artificial eyelash tweezers.

COSTS

74. In these proceedings, both parties have enjoyed a share of success, with the greater degree of success on the part of the cancellation applicant who is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice ("TPN") 2/2016. I have made a reduction to the costs to reflect the partial extent of the success. Applying the guidance in the TPN, I award the cancellation applicant the sum of £1,000, which is calculated as follows:

Official fee:	£200
Preparing the form TM26(I) and considering the counterstatement:	£200
Preparing evidence:	£400
Considering the other side's written submissions and preparing written submissions in lieu:	£200
Total:	£1,000

75. I therefore order Shenzhen Shijidafei Technology Co., Ltd to pay Lifetime Brands Europe Limited the sum of £1,000. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 26th day of October 2023

Suzanne Hitchings
For the Registrar,
the Comptroller-General