

**O/193/20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3387786 BY  
FENG GUANGHONG  
TO REGISTER:**

**HOLYSNOW**

**AS A TRADE MARK IN CLASSES 21 & 25**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 416505 BY  
CBM CREATIVE BRANDS MARKEN GMBH**

## BACKGROUND AND PLEADINGS

1. Feng Guanghong (“the applicant”) applied to register HOLYSNOW as a trade mark in the United Kingdom on 29 March 2019. It was accepted and published in the Trade Marks Journal on 5 April 2019 in respect of the following goods:

### Class 21

*Exfoliating brushes; Eye make-up applicators; Eyebrow brushes; Eyelash brushes; Eyelash combs; Eyeliner brushes; Bath brushes; Boot brushes; Kitchen boards for chopping; Kitchen containers; Kitchen grinders, non-electric.*

### Class 25

*Corsets; Underwear; Anti-sweat underwear; Babies’ pants [underwear]; Briefs [underwear]; Disposable underwear; Functional underwear; Gussets for underwear [parts of clothing]; Jockstraps [underwear]; Knitted underwear; Ladies’ underwear; Long underwear; Maternity underwear; Men’s underwear; Sweat-absorbent underclothing [underwear]; Sweat-absorbent underwear; Thermal underwear; Trunks [underwear]; Women’s underwear; Camisoles; Beach clothes; Underpants; Down jackets; Clothing; Clothing containing slimming substances; Clothing for babies; Clothing for children; Clothing for cycling; Clothing for cyclists; Clothing for fishermen; Clothing for gymnastics; Clothing for horse-riding [other than riding hats]; Clothing for infants; Clothing for leisure wear; Clothing for martial arts; Clothing for men, women and children; Clothing for skiing; Clothing for sports; Clothing for wear in judo practices; Clothing for wear in wrestling games; Clothing layettes; Clothing made of fur; Clothing made of imitation leather; Dresses; Dresses for evening wear; Swim briefs; Swim caps; Swim shorts; Swim suits; Swim trunks; Swim wear for children; Swim wear for gentlemen and ladies; Swimsuits; Swimwear.*

2. The application was opposed by CBM Creative Brands Marken GmbH (“the opponent”) on 5 June 2019. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and concerns all goods of the application. The opponent is relying on EU Trade Mark (EUTM) No. 17674301: HOLY. This mark was applied for on 9 January 2018 and registered on 3 August 2018 in respect of goods and services

in Classes 9, 14, 18, 25 and 35. In these proceedings, the opponent is relying upon the following goods and services:

Class 18

*Luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and bandoliers, leather and imitations of leather, animal skins, hides and goods made of these materials, namely luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and bandoliers, leather straps, leather laces, bandoliers, sheets of imitation leather for further processing.*

Class 25

*Clothing, footwear and headgear.*

Class 35

*Retailing, including via websites and teleshopping, in relation to clothing, footwear, headgear, bleaching preparations and; Other substances for laundry use, cleaning, polishing, scouring and abrasive preparations, soaps, perfumery, essential oils, cosmetics, hair lotions, jewellery, precious stones, luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and; Bandoliers, leather and imitations of leather, animal skins and hides and goods made therefrom, namely luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and bandoliers, leather thongs, leather laces, bandoliers, clothing accessories, textile goods, bags, forks, spoons, household or kitchen utensils and containers, glassware, porcelain and; earthenware, electric and electronic household goods, electric and electronic consumer goods, home appliances, Electric utensils for; Household, electrical cosmetic apparatus, lighting installations, heating apparatus, fans, tools, DIY products and gardening tools.*

3. The opponent claims that the contested mark is closely similar to the earlier mark and that the applicant's goods are identical or similar to the opponent's goods and services, and that, as a result of this similarity, there is a likelihood of confusion.
4. The applicant filed a defence and counterstatement, denying all the grounds.
5. Neither party filed evidence in these proceedings or requested a hearing. The opponent filed written submissions on 2 October 2019 and the applicant filed written submissions on 15 November 2019. These will not be summarised but will be referred to as and where appropriate during this decision, which I have taken following a careful consideration of the papers.
6. In these proceedings, the opponent is represented by Bird & Bird LLP and the applicant by The Trade Marks Bureau.

## **DECISION**

7. 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,

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

8. Section 5A of the Act states that:

"Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which

the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

9. An “earlier trade mark” is defined in section 6(1) of the Act:

“In this Act an ‘earlier trade mark’ means –

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

10. The earlier mark qualifies as an earlier trade mark under the above provision. As it was registered within the five years before the date of the application for the contested mark, it is not subject to the proof of use requirement under section 6A of the Act and the opponent is therefore entitled to rely on all the goods and services for which the mark stands registered.

11. In considering the opposition, I am guided by the following principles, gleaned from the decisions of the Court of Justice of the European Union (CJEU) 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 BV* (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-334/05 P) and *Bimbo SA v OHIM* (Case C-529/12 P):

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. The average consumer is deemed to be

reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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 the earlier mark to mind, is not sufficient;

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

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

### **Comparison of goods and services**

12. When comparing the goods and services, all relevant factors should be taken into account, per *Canon*:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or complementary.”<sup>1</sup>

13. Guidance was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] RPC 281. At [296], he identified the following relevant factors:

“(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found, or likely to be found, in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

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<sup>1</sup> Paragraph 23.

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

14. In *Kurt Hesse v OHIM*, 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 or services. The General Court (GC) clarified the meaning of “complementary” goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06:

“... 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.”<sup>2</sup>

15. 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):

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. 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.”<sup>3</sup>

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<sup>2</sup> Paragraph 82.

<sup>3</sup> Paragraph 12.

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

Opponent's goods and services	Applicant's goods
<p><u>Class 18</u> Luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and bandoliers, leather and imitations of leather, animal skins, hides and goods made of these materials, namely luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and bandoliers, leather straps, leather laces, bandoliers, sheets of imitation leather for further processing.</p> <p><u>Class 25</u> Clothing, footwear and headgear.</p> <p><u>Class 35</u> Retailing, including via websites and teleshopping, in relation to clothing, footwear, headgear, bleaching preparations and; Other substances for laundry use, cleaning, polishing, scouring and abrasive preparations, soaps, perfumery, essential oils, cosmetics, hair lotions, jewellery, precious stones, luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and; Bandoliers, leather and imitations of leather, animal skins and hides and goods made therefrom, namely luggage, trunks and travelling bags, bags, handbags, pocket wallets, purses, key cases, backpacks, pouches, shoulder belts and bandoliers, leather thongs, leather laces, bandoliers, clothing accessories, textile goods, bags, forks, spoons, household or kitchen utensils and containers, glassware, porcelain and; earthenware, electric and electronic</p>	<p><u>Class 21</u> Exfoliating brushes; Eye make-up applicators; Eyebrow brushes; Eyelash brushes; Eyelash combs; Eyeliner brushes; Bath brushes; Boot brushes; Kitchen boards for chopping; Kitchen containers; Kitchen grinders, non-electric.</p> <p><u>Class 25</u> Corsets; Underwear; Anti-sweat underwear; Babies' pants [underwear]; Briefs [underwear]; Disposable underwear; Functional underwear; Gussets for underwear [parts of clothing]; Jockstraps [underwear]; Knitted underwear; Ladies' underwear; Long underwear; Maternity underwear; Men's underwear; Sweat-absorbent underclothing [underwear]; Sweat-absorbent underwear; Thermal underwear; Trunks [underwear]; Women's underwear; Camisoles; Beach clothes; Underpants; Down jackets; Clothing; Clothing containing slimming substances; Clothing for babies; Clothing for children; Clothing for cycling; Clothing for cyclists; Clothing for fishermen; Clothing for gymnastics; Clothing for horse-riding [other than riding hats]; Clothing for infants; Clothing for leisure wear; Clothing for martial arts; Clothing for men, women and children; Clothing for skiing; Clothing for sports; Clothing for wear in judo practices; Clothing for wear in wrestling games; Clothing layettes; Clothing made of fur; Clothing made of imitation leather; Dresses; Dresses for evening wear; Swim briefs; Swim caps; Swim shorts; Swim suits; Swim trunks; Swim wear for children; Swim wear for gentlemen and ladies; Swimsuits; Swimwear.</p>

Opponent's goods and services	Applicant's goods
<i>household goods, electric and electronic consumer goods, home appliances, Electric utensils for; Household, electrical cosmetic apparatus, lighting installations, heating apparatus, fans, tools, DIY products and gardening tools.</i>	

17. The applicant admits that its Class 25 goods are identical to the opponent's *clothing, footwear and headgear*.<sup>4</sup>

18. I turn now to the applicant's Class 21 goods and will, where appropriate, deal with them as groups per *SEPARODE Trade Mark*, BL O-399-10, paragraph 5. The applicant's *exfoliating brushes, eye make-up applicators, eyebrow brushes, eyelash brushes, eyelash combs and eyeliner brushes* are all implements that are used with cosmetics. Their trade channels overlap with those of the applicant's *Retailing, including via websites and teleshopping, in relation to ... cosmetics*. Their users are the same, although the nature and purpose differ. I remind myself that selling goods does not in itself amount to providing retail services in Class 35: see *Tony Van Gulck v Wasabi Frog Ltd (MissBoo)*, BL O/391/14, paragraph 9. In paragraph 25 of that decision, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said that retail services

“... had to be seen as involving real and significant performance of the functions of selecting an assortment of goods offered for sale and offering a variety of retail services aimed at inducing consumers to purchase goods of the kind specified.”

The applicant's goods are not in competition with the opponent's services, but there may be a small degree of complementarity as some retailers would sell their own-brand products. Taking all these factors into account, I find there to be a low degree of similarity.

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<sup>4</sup> Written submissions, paragraph 7.

19. In a similar way, *bath brushes*, which are brushes for use when bathing, can be compared with *Retailing, including via websites and teleshopping, in relation to ... cleaning preparations* and for the same reasons I find there to be a low degree of similarity.

20. The applicant's *boot brushes* have the same users as the opponent's *footwear*. While the purpose and nature of the goods are not the same, they share trade channels, as footwear retailers will often sell accessories to help the customer take care of their boots and shoes. The goods are not in competition, but there is a degree of complementarity, as the same undertaking may produce brushes for use with its boots. I find there to be a no more than medium degree of similarity between the goods.

21. The applicant's specification includes *kitchen containers*, while the opponent's includes *Retailing, including via websites and teleshopping, in relation to ... kitchen ... containers*. The users are the same, but the nature and purpose of the goods and services are different. They share trade channels and have a degree of complementarity. I find them to be similar to a medium degree.

22. The applicant's *Kitchen boards for chopping* and *Kitchen grinders, non-electric* are both types of kitchen utensil. For the reasons set out in the previous paragraph, I find that they are similar to a medium degree to the opponent's *Retailing, including via websites and teleshopping, in relation to ... kitchen utensils*.

### **The average consumer and the purchasing process**

23. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J 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.”<sup>5</sup>

24. For the purpose of assessing the likelihood of confusion, I must bear in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: see *Lloyd Schuhfabrik Meyer*.

25. The average consumer is a member of the general public. The goods are fairly frequent purchases, which will be made usually by the consumer selecting the goods themselves in a physical shop, or from websites, catalogues or television shopping channels. It follows that the visual element will be most significant, although I do not discount the aural element, as purchases may be made by telephone or with the assistance of sales staff. The price of the goods will vary. Kitchen containers and chopping boards will tend to be inexpensive, while the price of clothing can be low or high. The average consumer will, in my view, be paying an average level of attention.

### **Comparison of marks**

26. It is clear from *SABEL* (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* that:

“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”<sup>6</sup>

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<sup>5</sup>Paragraph 60.

<sup>6</sup> Paragraph 34.

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

28. The respective marks are shown below:

Earlier mark	Contested mark
HOLY	HOLYSNOW

29. The earlier mark consists of the word “HOLY” in capital letters in a standard font. The overall impression of the mark rests in the word itself.

30. The contested mark consists of the word “HOLYSNOW” in capital letters in a standard font. The average consumer will identify two familiar words, both of which play an independent role and make an equal contribution to the overall impression of the mark.

#### *Visual comparison*

31. The opponent submits that the word “HOLY” is the dominant and distinctive element of the contested mark and that therefore an assessment of the visual similarity should primarily focus on the comparison between “HOLY” and the earlier mark. The applicant, on the other hand, submits that the marks are visually “highly dissimilar”, as the earlier mark has four letters and the contested mark eight. The applicant’s submission discounts the fact that those four letters in the earlier mark are the four letters at the beginning of the contested mark. The average consumer tends to pay more attention to the beginning of words: see *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02. I find that there is a medium degree of visual similarity between the marks.

### *Aural comparison*

32. The earlier mark will be articulated as follows: “HOE-LEE”. The contested mark will be articulated as “HOE-LEE-SNOH”. It will be seen that the contested mark has three syllables, the first two of which are the earlier mark. I find there to be a medium degree of aural similarity between the marks.

### *Conceptual comparison*

33. The opponent submits that the marks are conceptually identical or at least highly similar, while the applicant submits that they are dissimilar. I agree with the applicant that the average consumer will understand the opponent’s mark to mean “sacred” or “with a religious purpose or nature”. “SNOW” is a meteorological phenomenon which tends to appear in the winter. These are words that do not naturally fit together so the average consumer will identify the separate meanings of the two words. I find the marks to be conceptually similar to a low to medium degree.

### **Distinctiveness of the earlier marks**

34. There is, as has already been noted, a greater likelihood of confusion if the earlier mark is highly distinctive. The CJEU provided guidance on assessing a mark’s distinctive character in *Lloyd Schuhfabrik Meyer*:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or

does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

35. The opponent does not claim that the distinctiveness of its mark has been enhanced through use, nor has it adduced any evidence to that effect. I therefore have only the inherent position to consider. The word “HOLY” is a familiar English word, but it does not describe the goods or services covered by it, neither does it allude to any quality that might be found in them. Consequently, I find that the earlier mark has a medium level of inherent distinctiveness.

### **Conclusions on likelihood of confusion**

36. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred in paragraph 11. I must also have regard to the interdependency principle, that a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the marks, and vice versa.<sup>7</sup> The distinctiveness of the earlier mark must also be taken into account.

37. Such a global assessment does not imply an arithmetical exercise, where the factors are given a score and the result of a calculation reveals whether or not there is a likelihood of confusion. I must keep in mind the average consumer of the goods and services and the nature of the purchasing process. I note that it is generally accepted that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture they have kept in their mind.<sup>8</sup>

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<sup>7</sup> *Canon*, paragraph 17.

<sup>8</sup> *Lloyd Schuhfabrik Meyer*, paragraph 27.

38. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor QC, sitting as the Appointed Person, gave helpful guidance on making the global assessment:

“81.2 ... in my view it is important to keep in mind the purpose of the whole exercise of a global assessment of a likelihood of confusion, whether direct or indirect. The CJEU has provided a structured approach which can be applied by tribunals across the EU, in order to promote a consistent and uniform approach. Yet the reason why the CJEU has stressed the importance of the ultimate global assessment is, in my view, because it is supposed to emulate what happens in the mind of the average consumer on encountering, for example, the later mark applied for with an imperfect recollection of the earlier mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.

81.3 Third, when a tribunal is considering whether a likelihood of confusion exists, it should recognise that there are four options:

81.3.1 The average consumer mistakes one mark for the other (direct confusion);

81.3.2 The average consumer makes a connection between the marks and assumes that the goods or services in question are from the same or economically linked undertakings (indirect confusion);

81.3.3 The various factors considered in the global assessment lead to the conclusion that, in the mind of the average consumer, the later mark merely calls to mind the earlier mark (mere association);

81.3.4 For completeness, the conclusion that the various factors result in the average consumer making no link at all between the marks, but this will only be the case where either there is no or very low similarity between the marks and/or significant distance between the respective goods or services;

81.3.5 Accordingly, in most cases, it is not necessary to explicitly set out this fourth option, but I would regard it as a good discipline to set out the first three options, particularly in a case where a likelihood of indirect confusion is under consideration.”

39. Given the differences in length of the marks, it seems to me unlikely that the average consumer will mistake one for the other, even though the beginnings of the marks are the same and bearing in mind the imperfect recollection of the consumer. The combination of “HOLY” and “SNOW” is unusual and the average consumer would be struck by this juxtaposition. I find this to be the case even where the goods are identical. In my view, there is no likelihood of direct confusion.

40. It will be recalled that the applicant admitted that its Class 25 goods were identical to the opponent’s Class 25 goods. In such a case, it is my view that the earlier mark would be brought to mind, as “HOLY” has a medium level of inherent distinctiveness for these goods. What I must decide is whether it is likely that the average consumer would assume that the goods are from the same or economically linked undertakings. The opponent submits that the word “SNOW” may be understood by the average consumer as indicating products for the winter, or coloured white, while the applicant submits that as “SNOW” does not describe any characteristics of the applicant’s goods, the average consumer would not be indirectly confused. It seems to me that the average consumer would assume that the applicant’s mark referred to a sub-brand of the opponent representing a collection of clothes designed for winter sports or to be worn during snowy weather conditions. However, this would not cover all of the Class 25 goods in the application. In my view, the average consumer would be indirectly confused if the mark were used in connection with the goods shown below. These include general terms as well as terms that specifically refer to clothes for winter, as I must consider the fair and notional use of the mark:

*Underwear; Babies’ pants [underwear]; Briefs [underwear]; Functional underwear; Knitted underwear; Ladies’ underwear; Long underwear; Maternity underwear; Men’s underwear; Thermal underwear; Trunks [underwear]; Women’s underwear; Camisoles; Underpants; Down jackets; Clothing; Clothing containing slimming substances; Clothing for babies; Clothing for children;*

*Clothing for infants; Clothing for leisurewear; Clothing for men, women and children; Clothing for skiing; Clothing for sports; Clothing made of fur.*

41. I find it unlikely that if the mark were used in connection with the remaining Class 25 goods the average consumer would assume a connection. I recall that in *Duebros*, Mr Mellor stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. The fact that both marks begin with “HOLY” is not, in itself, enough. I must also guard against giving the earlier mark too great a penumbra of protection. After all, I found that it had a medium level of distinctiveness, and no higher. There is no evidence before me to indicate that this distinctiveness has been enhanced through use. I cannot see why the average consumer would make the assumption that the contested mark was from the same or connected undertaking as the opponent. They would not, in my view, think of “SNOW” as a natural brand extension for items of clothing such as swimwear, beachwear, cycling clothes or dresses.

42. I found the applicant’s Class 21 goods to share a low or medium degree of similarity with the opponent’s goods and services. For the same reasons that I set out in the previous paragraph, I find no likelihood of indirect confusion.

## **Conclusion**

43. The opposition has been partially successful. The application by Feng Guanghong may proceed to registration in respect of the following goods:

### Class 21

*Exfoliating brushes; Eye make-up applicators; Eyebrow brushes; Eyelash brushes; Eyelash combs; Eyeliner brushes; Bath brushes; Boot brushes; Kitchen boards for chopping; Kitchen containers; Kitchen grinders, non-electric.*

### Class 25

*Corsets; Anti-sweat underwear; Disposable underwear; Gussets for underwear [parts of clothing]; Jockstraps [underwear]; Sweat-absorbent underclothing [underwear]; Sweat-absorbent underwear; Beach clothes; Clothing for cycling;*

*Clothing for cyclists; Clothing for fishermen; Clothing for gymnastics; Clothing for horse-riding [other than riding hats]; Clothing for martial arts; Clothing for wear in judo practices; Clothing for wear in wrestling games; Clothing layettes; Clothing made of imitation leather; Dresses; Dresses for evening wear; Swim briefs; Swim caps; Swim shorts; Swim suits; Swim trunks; Swim wear for children; Swim wear for gentlemen and ladies; Swimsuits; Swimwear.*

## **Costs**

44. Both parties have enjoyed some success in these proceedings, with the applicant having the greater share. It is entitled to a contribution towards its costs. In the circumstances, I award the applicant the sum of £400 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

*Preparing a statement and considering the other side's statement: £250*

*Preparation of submissions: £350*

*Reduction by 1/3 to take account of the relative success of the parties: -£200*

*Total: £400*

45. I therefore order CBM Creative Brands Marken GmbH to pay Feng Guanghong the sum of £400. 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 27<sup>th</sup> day of March 2020**

**Clare Boucher**  
**For the Registrar,**  
**Comptroller-General**