

O-258-18

TRADE MARKS ACT 1994

**IN THE MATTER OF INTERNATIONAL REGISTRATION NO. 1335529
AND THE REQUEST BY VERİTAS TEKSTİL KONFESİYON PAZARLAMA
SANAYİ VE TİCARET ANONİM SİRKETİ
TO PROTECT IN THE UK THE TRADE MARK:**

HYDROLUXE

IN CLASSES 24, 25 AND 27

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 409644
BY WELSPUN GLOBAL BRANDS LIMITED**

Background and pleadings

1. On 1 July 2016, Veritas Tekstil Konfesiyon Pazarlamasanayi Ve Ticaret Anonim Sirketi (“the holder”) requested protection in the UK of International Trade Mark number 1335529 for the following trade mark:

HYDROLUXE

A priority date of 12 January 2016 is claimed. The mark was accepted and published in the Trade Marks Journal on 31 March 2017 in respect of the following goods:

Class 24 Woven textiles, namely, fabrics for use in the manufacture of clothing, towels, table linen, bed linen, household linen; non-woven textiles, namely, fabrics for use in the manufacture of clothing, towels, table linen, bed linen, household linen; fiberglass fabrics for textile use; fabric, impervious to gases, for aeronautical balloons; waterproof fabrics, namely, waterproof fabric for manufacturing clothing, furniture, luggage and automobile upholstery; gummed waterproof cloth; fabric of imitation animal skins; textile linings, namely, linen lining fabric for shoes, textile used as lining for clothing; buckram; filtering materials of textile, namely, chemical fiber fabrics, synthetic fiber fabrics, inorganic fiber mixed fabrics all for use in filtering liquids and powders; quilts of textile, woolen blankets; bath mitts, bath linen, hand towels, face towels of textile, bathing towels; tapestries of textile, traveling rugs, namely, lap rugs; curtains of textile, shower curtains of textile, shower curtains of plastics; oilcloth for use as table cloths; bed blankets, bed sheets, bedspreads, bed linen, diapered linen, pillowcases, quilt covers; furniture coverings of textile, namely, unfitted fabric furniture covers; upholstery fabrics; table napkins of textile; bed covers of paper; banners of textile, namely, cloth banners; flags not of paper, namely, cloth flags, fabric flags; cloth labels; baby bedding, namely,

swaddling blankets, fitted crib sheets, crib skirts, crib blankets, and diaper changing pad covers not of paper.

Class 25 Clothing, namely, trousers, jackets, overcoats, coats, skirts, suits, jerseys, waistcoats, shirts, ready-made leather linings (parts of clothing), t-shirts, sweatshirts, dresses, bermuda shorts, shorts, pajamas, pullovers, jeans, tracksuits, rainwear, beachwear, bathing suits, swimming suits; clothing for sports (for exclusive use for sports), clothing for babies, namely, shirts, pants, coats, dresses; underclothing, namely, boxer shorts, brassieres, briefs, pants; socks; footwear, namely shoes excluding orthopedic shoes, sandals, waterproof boots, walking boots, booties, sporting shoes, slippers; shoe parts namely heelpieces, insoles for footwear, footwear uppers; headgear, namely caps, skull caps, sports caps, hats, berets; gloves (clothing), stockings, belts (clothing), camisoles, sarongs, scarves, neck scarves, shawls, collars, neckties, ties, suspender belts.

Class 27 Carpets, rugs, mats; prayer rugs; linoleum, artificial turf, linoleum for covering floors; gymnasium mats; wallpaper, wall hangings not of textile.

2. The application is opposed by Welspun Global Brands Limited (“the opponent”). The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all of the goods in the application. The opponent relies upon its European Union trade mark (“EUTM”) number 8482317 for the trade mark **HYGRO**, which has a filing date of 10 August 2009 and for which the registration procedure was completed on 22 March 2010. The mark is registered for goods and services in classes 22, 23, 24, 25, 26, 27 and 35; for the purposes of this opposition, only goods in classes 24, 25 and 27 are relied upon.

3. Given its date of filing, the opponent’s mark qualifies as an earlier mark in accordance with s. 6 of the Act. The opponent stated in its Notice of Opposition that it has used its mark in relation to all of the goods in classes 24, 25 and 27. That statement

was made because the earlier mark is subject to the proof of use provisions found at s. 6A of the Act. According to s. 6A, the relevant period in which genuine use must be established is the five-year period ending on the date of publication of the mark applied for. The relevant period is, therefore, 1 April 2012 to 31 March 2017.

4. The opponent claims that the marks are similar and that the goods are identical or similar. It claims that there is a likelihood of confusion, including a likelihood of association.

5. The holder filed a counterstatement denying the grounds of opposition and putting the opponent to proof of its claims. It denies that the marks are visually, aurally or conceptually similar and submits that there is no likelihood of confusion.

6. Only the opponent filed evidence. Both parties filed submissions during the evidence rounds, which I will take into account. A hearing took place before me on 26 March 2018, by telephone conference, at which the opponent was represented by Clare Cornell of Finnegan Europe LLP, the opponent's professional representatives. The holder chose not to attend the hearing. It has been represented throughout by HGF Limited.

The evidence

Opponent's evidence

7. This consists of the witness statement of Kamalkishor Oza, with eight accompanying exhibits. Mr Oza states that he has been "General Manager marketing" for the opponent since April 2015.

8. Mr Oza states that "HYGRO" has been used since 2013 on towels and bed sheets, bathrobes and bathmats. He claims that the mark has been used in London and Manchester, as well as UK-wide through retailers including Costco, Debenhams and

Tesco. He also states that the opponent's goods are sold in France, Germany and Denmark.

9. Mr Oza provides sales figures for the period from 2013 to the date of his statement (November 2017). The figures are not broken down and are neither in sterling nor in euros. I also note that Mr Oza does not give any indication of the territories to which these sales relate. The claimed sales are as follows:

2013-2014	\$1,044,555
2014-2015	\$1,987,777
2015-2016	\$7,147,421
2016-2017	\$6,981,987

Advertising spend is put at 10% of the total sales but no further details are given.

10. Exhibit KO1 consists of nine website prints from retailers including Sainsbury's, wilko, Tesco and Next showing towels and bath mats on sale. None is dated. Examples of the way the mark is used are: "Charisma 100% Hygro Cotton Bath Sheet" (p. 1), "Sainsbury's Home Luxury Egyptian Hygro Cotton Towel White" (p. 2) and "Christy Supreme Hygro® towel collection" (p. 8).

11. Exhibit KO2 consists of five extracts from retailers' magazines which feature the opponent's goods. These are:

- Christy Autumn/Winter 2016: the extract shows washing guidelines. The sub-heading "HYGRO® TECHNOLOGY" and the explanation that "Hygro cotton is a unique cotton fibre which has a hollow core" are visible. UK contact details are given;
- Christy Spring/Summer 2014: the following statements are made in a description of the "Supreme towel collection": "now has the added benefit of our unique Hygro® technology", "our patented Hygro® technology creates towel which is luxuriously soft [...]" and "100% Supima Hygro Cotton in the pile". The

description of the “Supreme robe” does not include the term “Hygro”, nor is the term shown in the composition information (unlike the Supreme towels, which are “100% Supima Hygro Cotton in the pile, 650gsm”, the bathrobe is “100% Cotton, 400gsm”);

- Sainsbury’s (Spring/Summer 2017): there are two products advertised as “Sainsbury’s Home Collection Egyptian Hygro Cotton Bath Towel”;
- Tesco (September 2016): a “Hygro cotton bath towel” is advertised;
- Tesco (April 2016): there is an item described as a “Hygro® cotton bath towel”.

12. Exhibit KO3 is said to show images of swing tags and label designs used by the opponent’s retailers. Images of swing tags for Carrefour show towels and gloves described as “ULTRA ABSORBANT HYGRO®”, with a brief explanation of the “technologie hygro®”. These are not dated. The Sainsbury’s label shows use of “Hygro” in the combination “Egyptian Hygro Cotton” and refers to “innovative Hygro® technology”. It is not dated. There is also a product label from Wilkinson, where the mark appears in the combination “100% hygro cotton®” and which shows a date in October 2012.

13. Exhibit KO4 shows “a sample of the artwork for a retail tray” said to be for use by Costco in the UK in 2015, with an accompanying email dated September 2015. The mark is used in word-only form in the combinations “CHARISMA HYGRO COTTON TOWELS” and “Hygro Cotton towels improve with age”, as well as in the manner shown below:



14. Exhibit KO5 consists of three invoices to Tesco, with corresponding packing lists (all dated November 2015), and one invoice to Debenhams (dated July 2013). They are all

directed to UK addresses. The mark is shown in the form “Tesco Hygro Cotton [towel, face cloth etc.]” (pp. 3-8) and “Christy Hygro Towel” (p.9). The goods are various types of towel and face cloths. The cost of the goods is not shown but the Tesco invoices show quantities in the hundreds for each item, with one invoice showing 5,200 “HYGRO” pieces (p. 8). The Debenhams invoice is for in excess of 30,000 “HYGRO” items.

15. Exhibit KO6 is a blog post, dated 22 August 2016. There is a reference in the article to “Egyptian Cotton Hydro (a low twist technology [...])”, which appears to be a mistaken reference to the goods listed as “Home Collection Egyptian Hygro Cotton” towels on the following page.¹

16. Exhibit KO7 consists of purchase orders which Mr Oza describes as a sample taken from the opponent’s records. All are dated within the relevant period and are as follows:

- Tesco: towels and face cloths are identified as “TESCO HYGRO COTTON [bath sheet, etc]”, with their destination being the UK. There are no values but quantities run into the hundreds, occasionally thousands;
- Sainsbury’s: there are a number of references to “Home Collection Egyptian Hygro Cotton” goods. The goods identified in this way are all towels and face cloths. Again, the cost of the goods is not given but the quantities are several hundred, if not thousand, per item. The destination for the goods is not specified;
- Carrefour: the delivery destination is in France. Many descriptions are in French but there are instances of towels, of various types, and gloves identified in the form “HYGRO [HAND/BATH SHEET/GLOVE etc.]”. Quantities vary but, for example, p. 27 records 1,584 “HYGRO” gloves and p. 46 shows 1,008 “HYGRO HAND” (which I take to be hand towels). Although bath mats and bathrobes appear on the invoices (e.g. pp. 85 and 90), the word “HYGRO” does not appear with these goods;
- Christy/Welspun UK Ltd: all of the goods are identified by the term “Hygro”. An example of the format is “Supreme Hygro Bath Black”. They appear to be towels

¹ pp. 12-13.

and face cloths: I can see neither bath mats nor bathrobes in the purchase order. Again, the quantities of each item are not insignificant. The purchase order records in excess of 62,000 individual items in total.

17. Exhibit KO8 consists of nine invoices, seven of which are in the relevant period and addressed to businesses in the EU. Bathrobes are noted on the invoices in the form "Supreme Robe Medium Honey" (p. 8): the term "Hygro" is not associated with these goods on the invoices, in contrast to other goods (towels, face cloths and bath mats) which are identified as, for example, "Supreme Hygro Bath Sheet Damson" (ibid.). Quantities for the individual items identified by the term "Hygro" are small, mostly in single figures. Sales of bath mats total 123 across the relevant invoices.

18. As the holder filed no evidence, that concludes my summary of the evidence, insofar as I consider it necessary.

Proof of use

19. The first issue is whether, or to what extent, the opponent has shown genuine use of the earlier mark. The relevant statutory provisions are as follows:

"Raising of relative grounds in opposition proceedings in case of non-use

6A- (1) This section applies where -

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, 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.

(5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) 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”.

20. Section 100 of the Act is also relevant, which reads:

“100. 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”.

21. When considering whether genuine use has been shown, I must apply the same factors as if I were determining an application for revocation based on grounds of non-use. What constitutes genuine use has been subject to a number of judgments. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of trade marks. He said:

“219. I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, 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]; *Centrotherm* at [71]; *Leno* 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]; *Centrotherm* at [71]; *Leno* at [29].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56].

(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]; *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]”.

22. As the earlier mark is an EUTM, the comments of the Court of Justice of the European Union (“CJEU”) in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, are relevant. The court noted that:

“36. It should, however, be observed that [...] the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use”.

And

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark”.

And

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77)”.

23. The court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial

borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to 'genuine use in the Community' within the meaning of that provision.

A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity".

24. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. reviewed the case law since the *Leno* case and concluded as follows:

"228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issues in London and the Thames Valley. On that basis, the General Court dismissed the applicant's

challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State". On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use".

25. The General Court (“GC”) restated its interpretation of *Leno Merken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union.

26. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods/services at issue in the Union during the relevant 5-year period. In making the required assessment I am required to consider all relevant factors, including:

- i) The scale and frequency of the use shown
- ii) The nature of the use shown
- iii) The goods and services for which use has been shown
- iv) The nature of those goods/services and the market(s) for them
- iv) The geographical extent of the use shown

27. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use [...]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a

case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public”,

and further at paragraph 28:

“28. [...] I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as “tuition services”, is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to “tuition services” even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted”.

28. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J.

observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘*show*’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use”.

29. In *Jumpman* BL O/222/16, Mr Daniel Alexander QC, as the Appointed Person, upheld the registrar’s decision to reject the sale of 55k pairs of training shoes through

one shop in Bulgaria over 16 months as insufficient to show genuine use of the EU trade mark in the European Union within the relevant 5 year period.

30. 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 [European Union] market for the goods or services protected by the mark” is therefore not genuine use.

31. The correct approach to assessing the evidence is to view the picture as a whole, including whether individual exhibits corroborate each other.²

32. The holder submits that the use which has been shown is not use in accordance with the essential function of a trade mark. It claims that the mark is used with other trade marks (e.g. Sainsbury’s, Kingsley) which do indicate origin and that the earlier mark is, instead, used to indicate a characteristic of the goods, i.e. “to indicate that the products are made with a textile which absorbs moisture”.³ The holder states that “the average consumer will not understand “Hygro” to mean “wet” or “moist” but rather will see it as a word they do not recognise but that one that refers [sic] to the fabric because of the context and order of its use”.⁴

33. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the CJEU found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’

² See the comments of Mr Geoffrey Hobbs QC, sitting as the Appointed Person in *Brandconcern BV v Scooters India Limited* (“Lambretta”) BL O/065/14.

³ Submissions, §15.

⁴ Ibid.

within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1)” (emphasis added).

34. As the decision in *Colloseum* indicates, use alongside another trade mark is not an impediment provided that the mark at issue will be understood as an indication of the origin of the goods. The evidence shows that the earlier mark has consistently been used alongside another trade mark, such as “Charisma” (e.g. KO4, pp. 3-4). There also appears to be use alongside marks such as “Tesco” and “Christy” (KO5, KO8), though most of the evidence dating from the relevant period consists of invoices rather than documents which clearly show the way in which the consumer was exposed to the mark. There are, in addition, examples from the relevant period which show use of the trade mark “Hygro” on its own (such as KO2, p. 12; KO7, pp. 26-29 and pp. 46-49) or accompanied by the ® symbol (e.g. p. KO2, pp. 12 and 14).

35. In contrast to the use noted above, there are other examples of use of the mark which are, in my view, unlikely to be considered use as a trade mark, particularly the use of the mark in the form “100% Supima Hygro Cotton in the pile” (KO2, p. 7), “100% Egyptian Hygro Cotton” (e.g. KO3, pp. 7-8) and “100% hygro cotton” (KO3, p. 9). I accept that the opponent has used, or allowed the use of, its mark in a number of formats, some of which are unlikely to be taken as indications of trade origin. Notwithstanding the deficiencies in the evidence, I come to the view that, when considered overall, the examples outlined at paragraph 34, above, are sufficient—just—to show use of “Hygro”/“HYGRO” in a form which is likely to have communicated a trade mark message to the average consumer of the goods at issue and is consistent with the essential function of a trade mark.

36. In terms of sufficiency of sales, as the holder points out, the total sales figures provided by Mr Oza are not helpful, since they do not identify the territory to which they relate. Ms Cornell submitted at the hearing that the opponent’s evidence resulted from a request by her firm to provide evidence of sales in the EU. It may well be that the sales figures provided by Mr Oza do relate to the EU but there is nothing in the evidence to confirm that fact, a matter which it would have been straightforward to clarify. However, while the values of the invoices and purchase orders in evidence have been redacted, the quantities of goods being sold, some of which are significant, are included (for

example, KO5, p. 9 and KO7, pp. 139-163). I also take into account that the invoices and purchase orders are said to be indicative of sales, rather than a comprehensive account, and that they involve national supermarket chains or retailers over a wide geographical area. The evidence could certainly have been clearer and better presented but I am satisfied that there have been sales of *something* under the mark and in the relevant period which are sufficient to constitute genuine use. However, I must now consider whether, or the extent to which, the evidence shows use for all of the goods relied upon.

37. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person, summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned”.

38. 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".

39. It is plain that the evidence does not support the claim of use in relation to all of the goods claimed in the notice of opposition. I note the holder's assertion that any use

which has been shown is use on or in relation to the raw material rather than finished products but I do not agree with this assessment of the evidence. In my view, there have clearly been sales of various types of towels, face cloths and bath gloves, all under the mark “HYGRO”.

40. The evidence does show sales of bathrobes. However, I can identify no instances where there is use of the term “HYGRO” in connection with the sales of these goods. At the hearing, I asked Ms Cornell to direct me to the relevant pages in the evidence showing bathrobes sold under the term “HYGRO”. Whilst she referred me to certain pages of exhibits KO2 and KO7, none of those examples clearly shows bathrobes which have been sold under or in connection with the term “HYGRO”; indeed, the bathrobes at KO7 are identified under the mark “NATURAL LINE”.

41. There is also evidence of sales of bath mats. The descriptions of the items at KO8 (in the relevant period) suggest that the bath mats sold under the name “HYGRO” are sold in the same colour palette as the towels and it is possible that they are part of the same range. I also keep in mind Ms Cornell’s submission that the retailers whose invoices are shown at KO8 are small businesses and that product volumes are necessarily smaller as a consequence. However, it is clear from the case law cited above that not every instance of real commercial use (i.e. use which is not token) will be sufficient to establish that the use is genuine in the sense defined in the case law. I consider that that is the position in relation to bath mats. These are relatively inexpensive goods which I would expect to be sold in reasonable numbers. Apart from the invoices at KO8, there is a no other evidence from the relevant period to show that bathmats were sold under the mark at issue. The sales shown at KO8 of just 123 bath mats are not, in my view, sufficient to qualify as genuine use in the UK over a five-year period, let alone in the EU market as a whole.

42. I can see no evidence of sales of any other goods covered by the specification relied upon. Although Mr Oza has claimed that there has been use in relation to bed sheets, there is nothing in the evidence to support that claim. I do not consider that any

use has been shown in relation to goods in class 25 (bath gloves being proper to class 24). Nor do I consider that the use shown would justify the retention of the terms, in class 24, “textile and textile goods, not included in other classes” or “household linen”, as submitted by Ms Cornell at the hearing. As I have indicated, there has been no use demonstrated in relation to textiles proper to class 24 other than towels, face cloths and bath gloves. I consider that these goods fall within the category of “bath linen”. As regards class 27, I found, above, that there has not been genuine use in relation to bath mats. There has been no use at all in relation to any other type of floor covering. Consequently, I consider that a fair specification, upon which the opponent may rely, is:

Class 24: Bath linen

Decision

Section 5(2)(b)

43. The opposition is based upon s. 5(2)(b) of the Act, which reads as follows:

“5 (2) 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”.

44. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P. The principles are:

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

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

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

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

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

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

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

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

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

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

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

Comparison of goods

45. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, the CJEU stated at paragraph 23 of its judgment:

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

46. Guidance on this issue has also come from Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Ltd* (the *Treat* case), [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

47. The GC confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

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

48. For the purposes of considering the issue of similarity of the goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* BL O/399/10 and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs [30] to [38]).

49. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (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”.

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

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

51. I also bear in mind Mr Alexander’s comments in the same case, where he warned against applying too rigid a test when considering complementarity:

“20. In my judgment, the reference to “legal definition” suggests almost that the guidance in Boston is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to Boston”.

52. I note that, in relation to finished articles and their component parts, in *Les Éditions Albert René v OHIM*, Case T-336/03, the GC found that:

“61. [...] The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different”.

53. In its counterstatement, the holder accepted that some of the contested goods are identical to those in the earlier specification, though it did not specify which. In its written submissions, it only commented on the potential similarity between the contested specification and “towels”. It claims that, although the goods are all textile products, that is insufficient for a finding of overall similarity. It submits that many of the goods for

which registration is sought are not finished products and have a different purpose, nature and distribution channel from the opponent's goods. Other than hand towels, face towels of textile and bathing towels, it claims that none of the contested goods is similar to towels.

54. At the hearing, Ms Cornell made a number of submissions regarding the similarity between the respective goods, arguing that all of the contested goods are identical or similar to the opponent's goods. I note in particular the submission that the relevant consumer might overlap and that raw fabrics are similar to the finished goods, particularly in the case of items such as towels, where the level of finishing is "minimal".

Class 24

Bath mitts, bath linen, hand towels, face towels of textile, bathing towels

55. All of these goods are included within the term "bath linen" in the earlier specification. They are identical under the principle outlined in *Meric*.

Bed sheets, bed linen, diapered linen; pillowcases; baby bedding, namely fitted crib sheets, crib skirts, crib blankets, and diaper changing pad covers not of paper

56. These goods may be made from the same fabric as bath linen, and their users will intersect. There may be some overlap in their channels of trade as it is common for retailers of bath linen also to sell other items of household linen, though towels and bed linen are not generally sold on the same shelves. Their intended purpose differs and the goods are not complementary. However, there may be a degree of competition, as a towel may be purchased and used instead of, for example, a nappy changing pad. The goods are similar to a fairly low (i.e. between low and medium) degree.

Woven textiles, namely, fabrics for use in the manufacture of towels; non-woven textiles, namely, fabrics for use in the manufacture of towels

57. There is an overlap in the nature of these goods, to the extent that both are made of the same fabric. The specific purpose will differ since the opponent's goods are, as the holder points out, a finished product. The users are unlikely to overlap: in the absence of any evidence that the general public commonly makes their own towels, my view is that the consumer purchasing fabric for manufacturing towels is likely to be a towel manufacturer, whereas the purchaser of towels is likely to be a member of the general public. Channels of trade are unlikely to intersect. Due to the different users, there is no complementarity between the goods and no competition. The goods are similar to a low degree.

Woven textiles, namely, fabrics for use in the manufacture of clothing, table linen, bed linen, household linen; non-woven textiles, namely, fabrics for use in the manufacture of clothing, table linen, bed linen, household linen

58. There may be some similarity in the nature of these goods, as all could be of towelling fabric, though the opponent's goods are finished articles. There may be an overlap in users, though, as I indicated above, that is unlikely to apply to towelling fabrics as it is not, to my knowledge, common for these fabrics to be sold retail for consumers to make their own towelling goods. Their intended purpose is different and there is unlikely to be any meaningful overlap in channels of trade. The opponent's goods would not be purchased instead of the goods listed above and there is, as a result, no competition. There is no complementarity. The goods are similar to a low degree.

Waterproof fabrics, namely, waterproof fabric for manufacturing clothing, furniture, luggage and automobile upholstery; gummed waterproof cloth; fabric of imitation animal skins; textile linings, namely, linen lining fabric for shoes, textile used as lining for clothing; buckram; filtering materials of textile, namely, chemical fiber fabrics, synthetic

fiber fabrics, inorganic fiber mixed fabrics all for use in filtering liquids and powders; oilcloth for use as table cloths; upholstery fabrics

59. Whilst all of these goods are textiles in the wide sense, none of them strikes me as having a similar physical nature to towels: the fabrics themselves are unlikely to bear any particular resemblance to one another. The goods listed above are raw materials which are components of other goods and their specific purpose (e.g. waterproofing, filtering) is different from that of towels, which is to dry something. Any overlap with the users of towels is likely to be at a very superficial level. These goods are not likely to share channels of trade: many of the goods listed above are unlikely to be readily available in supermarkets, department stores or ordinary haberdasheries but, even if they are sold under the same roof (for example, textile used as a lining for clothing may be available in department stores), they are not likely to be sold in close proximity to bath linen. The goods are not in competition, nor are they complementary. The goods are not similar.

Quilts of textile; Woolen blankets; tapestries of textile, traveling rugs, namely, lap rugs; curtains of textile, shower curtains of textile; bed blankets, bedspreads, quilt covers; bed covers of paper; banners of textile, namely, cloth banners; flags not of paper, namely, cloth flags, fabric flags; cloth labels; baby bedding, namely, swaddling blankets; furniture coverings of textile, namely, unfitted fabric furniture covers; table napkins of textile

60. Although all of these goods may be oblong textile items, and therefore could be said to have some similarity in nature with towels, they are unlikely to be made from the same materials. Their purpose differs and there is unlikely to be any particular overlap in their channels of trade. Whilst their users may be the same, it is at a very high level of generality which is not sufficient to engage overall similarity. The goods are neither in competition nor complementary. They are not similar.

Shower curtains of plastics

61. There is no similarity in the nature of these goods with bath linen. They differ in purpose and method of use and are not in competition. Whilst they may be used together, in the sense that they are items which are used by someone taking a shower, it is clear that this type of relationship is not one which qualifies as complementary as defined in the case law. Although their users may be the same, that tells one very little, and they are not likely to be sold in close proximity. They are not similar.

Class 25

Clothing, namely, trousers, jackets, overcoats, coats, skirts, suits, jerseys, waistcoats, shirts, ready-made leather linings (parts of clothing), t-shirts, sweatshirts, dresses, bermuda shorts, shorts, pajamas, pullovers, jeans, tracksuits, rainwear, beachwear, bathing suits, swimming suits; clothing for sports (for exclusive use for sports), clothing for babies, namely, shirts, pants, coats, dresses; underclothing, namely, boxer shorts, brassieres, briefs, pants; socks; footwear, namely shoes excluding orthopedic shoes, sandals, waterproof boots, walking boots, booties, sporting shoes, slippers; shoe parts namely heelpieces, insoles for footwear, footwear uppers; headgear, namely caps, skull caps, sports caps, hats, berets; gloves (clothing), stockings, belts (clothing), camisoles, sarongs, scarves, neck scarves, shawls, collars, neckties, ties, suspender belts

62. The effect of “namely” after “clothing”, “clothing for babies”, “footwear”, “shoe parts” and “headgear” in the specification applied for is to limit the coverage to the particular goods identified. With the exception of socks and slippers, I can see no goods which share any similarity of nature with towels; I accept that socks and slippers may be made from towelled fabric. There is no similarity of purpose or method of use, no competition and no complementarity. Ms Cornell suggested at the hearing that footwear and bath linen may be sold in the same establishments and that there would therefore be similarity between the goods. I reject that submission: the goods are not likely to be sold in the same shops or in the same areas of larger shops (such as department stores).

The users will be the same but, again, that is not determinative of overall similarity. I find that there is no similarity between any of these goods and bath linen: I do not consider that any overlap in nature between socks and slippers and the opponent's specification is sufficient to result in overall similarity.

Class 27

Mats

63. This term includes bath mats. As they may be made from the same fabrics as the opponent's bath linen, there is some similarity in nature. To the extent that they are used for absorbing water after bathing, there is a degree of overlap in their purpose. They are also likely to share channels of trade with the opponent's goods. Their users will be the same but their method of use is different and the goods are not in competition. Although often used at the same time, the goods are not indispensable for the other. They are similar to a medium degree.

Carpets, rugs; prayer rugs; linoleum, artificial turf, linoleum for covering floors; gymnasium mats; wallpaper, wall hangings not of textile.

64. I do not consider that these goods include bath mats: they are related but separate terms. I can see no meaningful similarity between these goods and the opponent's specification. They are different in nature, intended purpose and method of use. Their channels of trade are unlikely to overlap and there is neither competition nor complementarity. The overlap in users is at too high a level of generality to lead, on its own, to overall similarity. The goods are not similar.

The average consumer and the nature of the purchasing act

65. It is necessary for me to determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be

selected by the average consumer in the course of trade. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. 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 services in question: *Lloyd Schuhfabrik*.

66. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

67. The relevant goods are those which I have found to be identical or similar. The parties are agreed, and I agree with them, that the average consumer of the goods is a member of the general public. The purchase of the goods at issue is likely to be predominantly visual, with goods being self-selected from the shelves of retail premises or chosen from websites and catalogues, though I do not rule out that there may be an aural component to the purchase.

68. Both parties submit that the average consumer will pay an average level of attention to the purchase. I agree: the goods are general consumer items which are not, in general, expensive. Whilst not bought terribly often, they will at least be subject to considerations regarding size and colour which will mean that the average consumer pays a medium degree of attention to the purchase.

Comparison of trade marks

69. 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 at paragraph 34 of its judgment 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 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”.

70. It would be wrong, therefore, artificially to dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks. Due weight must be given to any other features which are not negligible and therefore contribute to the overall impressions created by the marks. The marks to be compared are:

Opponent's mark	Holder's mark
HYGRO	HYDROLUXE

71. At the hearing, Ms Cornell submitted that the marks are visually and aurally very similar and that they are conceptually neutral. Whilst Ms Cornell acknowledged that the

marks must be viewed as wholes, she submitted that the contested mark will be broken down by the average consumer into the two elements “HYDRO” and “LUXE” (the latter being a known, non-distinctive element) and that “HYDRO” is the dominant element of the mark. For its part, the opponent submits that the contested mark is a single word which will not be dissected and that “[there] are not two or more identifiable components from which an assessment of dominance can be carried out”.⁵ The opponent submits that the marks are visually and aurally dissimilar and that they “cannot be conceptually compared”, neither having a discernible meaning.⁶

72. The earlier mark consists of the word “HYGRO”, presented in capital letters. There being no other elements, the overall impression is contained in that single word.

73. The contested mark consists of the word “HYDROLUXE”, also presented in capital letters in a particular but unremarkable typeface. Although the mark is categorised as a figurative mark on the official record, the stylisation is minimal and is unlikely to be noticed by the average consumer. I am not persuaded by the opponent’s submission that “HYDRO” is an element which dominates the overall impression. As there are no other elements in the mark, the overall impression is therefore contained in the single word “HYDROLUXE”.

74. The marks both begin with the letters “H-Y”. There is then a one-letter difference and the same letters “R-O” appear in both marks. There is evidently some similarity because of the sequence of letters “H-Y-*-R-O”. However, the middle letter in that sequence is different. The contested mark also has a third syllable “LUXE”, which has no counterpart in the earlier mark. The marks are visually similar to a fairly low degree.

75. The earlier mark is likely to be pronounced “HI-GRO”, whilst the later mark will be articulated as “HI-DRO-LUX”. There is some aural similarity in the first and second syllables of the marks. There is also dissimilarity because of the different consonants

⁵ Submissions, §32.

⁶ Idem, §§35-36.

“G” and “D” and because the later mark has an additional syllable. The marks are aurally similar to a fairly low degree.

76. Both parties acknowledge that, although “HYGRO” means wet or moist, that meaning is not likely to be known to the general public.⁷ I agree. The earlier mark will be perceived as an invented word. As far as the contested mark is concerned, the opponent submits that “HYDRO” “originates from the ancient Greek word ‘hÿdōr’ meaning water, and is well understood by the general public”,⁸ though I note that, at the hearing, Ms Cornell submitted that the marks are conceptually neutral, as there is no particular concept which would be understood. The holder claims that its mark will be perceived as “an invented, fanciful word with no discernible meaning”.⁹

77. I bear in mind that, for a conceptual message to be relevant, it must be capable of immediate grasp by the average consumer.¹⁰ I also keep in mind the comments of Anna Carboni, sitting as the Appointed Person, in *Chorkee Ltd v Cherokee Inc.* (BL O/048/08), to which I was referred at the hearing. In that case, Ms Carboni stated:

“36. [...] Judicial notice may be taken of facts that are too notorious to be the subject of serious dispute. But care has to be taken not to assume that one’s own personal experience, knowledge and assumptions are more widespread than they are”.

78. I have considered whether the average consumer will know the meaning of the word “HYDRO”, bearing in mind the above guidance. There is no evidence to assist me on this point but that is not unusual in Registry proceedings. The existence of common terms prefixed with “hydr” and “hydro”, such as “hydrate” and “hydroelectric”, which are used to indicate a connection with water, leads me to conclude that the average consumer will know that “hydro” is a term used in relation to water. I put it no higher

⁷ Holder’s submissions at §31 and opponent’s skeleton at p. 10.

⁸ Submissions dated 7 November 2017, §2.3.

⁹ Submissions, §35.

¹⁰ See Case C-361/04 P *Ruiz-Picasso and Others v OHIM* [2006] ECR I-00643; [2006] E.T.M.R. 29.

than that. The parties are agreed that “LUXE” is a dictionary word meaning “luxury” or “luxurious”.¹¹ My view is that the average consumer is likely to perceive the mark as an invented word combination that indicates water as well as luxury. I have considered whether the average consumer will simply perceive the mark as an invented word, without identifying its constituent parts and without attributing to it any meaning. I accept that there may be some average consumers who fall into that camp but they would, in my view, be only a very small minority. Taking all of the above into account, I find that the marks are conceptually different.

Distinctive character of the earlier trade mark

79. 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. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In *Lloyd Schuhfabrik*, 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-2779, paragraph 49).

¹¹ Counterstatement, §3, skeleton argument p. 10.

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)".

80. Ms Cornell stated at the hearing that there is no claim to enhanced distinctive character but that the earlier mark has a good level of inherent distinctive character. For the avoidance of doubt, I do not consider that the distinctiveness of the earlier mark has been shown to have been enhanced through use. Whilst there is some evidence of the quantities of sales under the mark, there is no evidence as to their value. There is nothing to explain the size of the market or the opponent's position in it and only very limited evidence as to the advertising and marketing efforts made by the opponent in the relevant period. Having said that, I indicated, above, that the earlier mark is likely to be perceived as an invented word. That means that it enjoys a high degree of inherent distinctive character.

Likelihood of confusion

81. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep 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]).

82. Confusion can be direct (where the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). The concept of indirect confusion was explained by Mr Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 as follows:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example”).

83. I have found that some of the goods at issue are identical. That represents the opponent’s strongest position as, according to the interdependency principle, the greater the similarity between the goods the more likely it is that there will be confusion. It is the position I consider first, as if the opposition fails in relation to identical goods, it will also fail where the goods are less (or not at all) similar.¹² The earlier mark has a high degree of inherent distinctive character, which is a point in the opponent’s favour. The goods will be purchased with an average level of attention, with a purchasing process which is mainly visual. However, the marks are visually and aurally similar to a fairly low degree. Although it is not a question of two distinct, competing meanings, there is a conceptual difference between the marks. The impact of conceptual differences was considered in *The Picasso Estate v OHIM*, Case C-361/04 P, where the CJEU found that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law”.

¹² If there is no similarity between the goods, the opposition is bound to fail: see *Waterford Wedgwood plc v OHIM* – C-398/07 P (CJEU) and *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA at [49].

84. However, it is not always the case that conceptual differences will overcome the visual and aural similarities between two marks. In *Nokia Oyj v OHIM*, Case T-460/07, the GC stated that:

“Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98)”.

85. Taking into account all of the competing factors, my view is that the average consumer will not be confused. The meaning of “hydro” will convey a meaning to the average consumer faced with the mark “HYDROLUXE” and will act as a conceptual hook for the average consumer’s recollection. Even when exposed to the mark “HYGRO”, to which no meaning is attached, the consumer will differentiate between the marks and will not be confused. As a result of the conceptual difference between the marks, it is unlikely that one mark will be recalled for the other, thus avoiding imperfect recollection. I have also considered whether the average consumer purchasing the goods at issue may simply overlook that the earlier mark is “HYGRO” whilst the sequence in the later mark is “HYDRO”. However, even though the level of care in the purchase will be no higher than a medium degree, it is sufficient, in my view, that the average consumer will avoid such a mistake. The opponent’s position is even weaker in relation to the goods which are only similar. There is no likelihood of confusion.

Conclusion

86. The opposition has failed. Subject to a successful appeal, the application will proceed to registration.

Costs

87. The holder has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by Tribunal Practice Notice (“TPN”) 2/2016. Using that TPN as a guide but bearing in mind the holder filed no evidence, I award costs to the holder on the following basis:

Considering the notice of opposition and
considering the counterstatement: £200

Considering the other party’s evidence
and filing submissions: £500

Total: £700

88. I order Welspun Global Brands Limited to pay Veritas Tekstil Konfesiyon Pazarlamasanayi Ve Ticaret Anonim Sirketi the sum of **£700**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25th day of April 2018

**Heather Harrison
For the Registrar**