

O-516-17

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3165889
BY KHALED SERAG TO REGISTER THE FOLLOWING TRADE MARK**

The logo for "Mummy Hug" features the words "Mummy" and "Hug" in a stylized, bubbly font. The letters are red with a white outline and a drop shadow effect. The word "Mummy" is in a lowercase, rounded font, while "Hug" is in a similar but slightly more upright font. A small white heart is visible inside the letter 'g' of "Hug".

IN CLASSES 5, 10, 12, 18, 20, 21 & 25

**AND IN THE MATTER OF OPPOSITION THERETO UNDER NO. 407360
BY KIMBERLY-CLARK WORLDWIDE, INC**

BACKGROUND AND PLEADINGS

1) Khaled Serag (hereafter “the applicant”) applied to register the trade mark 3165889 the relevant details of which are:



Filing date: 22 May 2016

Publication date: 10 June 2016

2) For the purposes of these proceedings, it is sufficient that I record that the applicant’s list of goods include:

Class 5: *Cloth diapers; Nappy covers; Nappy liners of cellulose for incontinents; Nappy liners of paper for incontinents; Babies' swim diapers; Babies' diapers of paper; Babies' napkin-pants [diaper-pants]; Babies' disposable diaper pants of cellulose; Babies' disposable diaper pants of paper; Babies' disposable napkins made of cellulose; Babies' disposable napkins made of paper; Babies' napkins made of paper; Babies' nappies [paper or cellulose]; Babies' diapers of cellulose or paper; Babies' nappies [paper or cellulose]; Pregnancy testing preparations for home use; Nappy covers; Nappy liners of cellulose for incontinents; Nappy liners of paper for incontinents; Nappy pants for incontinents; Breast-nursing pads; Infants' disposable training pants of cellulose; Infants' disposable training pants of paper; Infants' diapers [disposable] of cellulose; Infants' disposable diapers of cellulose; Infants' disposable diapers of paper; Infants' diapers [disposable] of paper; Infant formula.*

Class 10: *Baby teething rings; Baby bottle nipples; Baby dummies; Baby nursers; Maternity support belts for medical purposes; Maternity belts; Babies'*

bottles; Babies' pacifiers [teats]; Babies' bottles; Maternity belts; Breast pumps; Breast milk storage bottles; Breast pumps for use by nursing mothers; Nipples for baby bottles; Nipple shields for personal use; Nipples for babies feeding bottles; Baby nursers; Wheeled trolleys adapted for use as walking aids; Infants' feeding bottles; Infants' neonatal pacifiers; Infants' pacifiers.

Class 12: *Baby carriages [prams]; Baby carriages; Baby carriages (Covers for -); Baby carriages (covers for-); Baby strollers; Babies' carriages; Babies' strollers; Babies' buggies; Harnesses (safety-) for vehicle seats; Harnesses for prams; Harnesses for use with pushchairs; Vehicle safety belts for children; Vehicle safety seats for children; Vehicle safety seats; Vehicle booster seats for children; Vehicle booster seats for use with a safety harness; Pushchairs; Pushchair covers; Pushchair hoods; Pushchair covers and hoods; Pushchairs for use with carry cots; Prams [baby carriages]; Prams; Canopies for baby strollers; Infants' carriages with removable infant supports; Infants' carriages; Children's safety seats for cars; Children's safety seats for vehicles; Children's safety belts for use in vehicles; Children's seats for use in cars; Children's seats for use in vehicles; Children's car seats; Children's bicycles.*

Class 18: *Baby carrying bags; Baby backpacks; Baby carriers [slings]; Baby carriers worn on the body; Baby carriers [slings or harnesses]; Baby slings; ...; Baby backpacks; Baby carriers [slings]; Baby carriers worn on the body; Baby carriers [slings or harnesses]; Diaper bags; Changing bags; School bags; Infants (Slings for carrying -); Infant carriers worn on the body.*

Class 20: *Baby gates; Baby bolsters; Baby head support cushions; Baby walkers; Baby changing platforms; Baby changing mats; Baby changing tables; Nappy changing tables; Maternity pillows; Babies' baskets; Babies' bouncing chairs; Babies' chairs; Babies' cradles; Babies' bouncing chairs; Babies' chairs; Babies' baskets; Babies' bouncing chairs; Babies' chairs; Babies' cradles; Baby bolsters; Baby changing mats; Baby changing platforms; Baby changing tables; Baby gates; Baby head support cushions; Baby nests in the nature of padded baby carriers; Baby walkers; Bath seats;*


Bathroom stools; Playpens for babies; Seats adapted for babies; Cots; Cots for use by children; Cots for use by infants; Furniture; Nursery furniture; Children's cradles; Bouncing cradles; Travel cots; Bedding for cots [other than bed linen]; Expandable safety gates for stairs; Expandable safety gates for door openings; Baby walkers; Baby walkers; Infant playpens (Mats for -); Infant walkers; Infants' cradles; Infant cradles; Infant beds; Children's cradles; Children's beds; Children's mats used for sleeping; Children's furniture; Children's beds made of cloth in the form of a bag.

Class 21: *Baby baths, portable; Baby bath tubs; Baby baths, portable; Baby baths; Baby bathtubs; Baby bath tubs; Babies' potties.*

Class 25: *Clothing for wear in judo practices; Clothing for wear in wrestling games; Clothing for gymnastics; Cloth bibs for adult diners; Cloth bibs; Clothing for children; Clothing for infants; Clothes for sports; Clothing for cycling; Clothing ;Nappy pants [clothing]; Maternity bands; Maternity sleepwear; Maternity lingerie; Maternity smocks; Maternity clothing; Maternity wear; Babies' clothing; Babies' pants [clothing]; Leggings [trousers]; Leggings [leg warmers]; Nappy pants [clothing]; Shower caps; Pyjamas; Nappy pants [clothing]; Infants' boots; Children's headwear; Children's footwear.*

3) Kimberly-Clark Worldwide, Inc. (hereafter “the opponent”) partially opposes the trade mark on the basis of section 5(2)(b) and section 5(3) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against only the goods set out above and is on the basis of the following four earlier European Union (formerly Community) trade marks:

Mark and relevant dates	Goods relied upon
EU224204	Class 3: <i>Premoistened tissues or wipes for infants and children.</i>
HUGGIES	Class 16: <i>Disposable products for infants and children, disposable diapers</i>
Seniority claimed from: 5 December	

<p>1983</p> <p>Filing date: 4 April 1996</p> <p>Publication date: 10 August 1998</p> <p>Date completed registration procedure: 29 March 1999</p>	<p><i>or napkins, disposable diaper liners; training pants made primarily of paper; disposable wipes and tissues.</i></p> <p>Class 25: ... <i>disposable diapers, training pants or napkins; disposable liners for infants diapers or napkins; ...; all made primarily of non-woven fabric.</i></p>
<p>EU12899399</p>  <p>Filing date: 22 May 2014</p> <p>Publication date: 8 July 2014</p> <p>Date completed registration procedure: 15 October 2014</p>	<p>Class 3: <i>Premoistened tissues or wipes for infants and children.</i></p> <p>Class 5: <i>Disposable diapers, disposable diaper liners, disposable diaper pants.</i></p> <p>Class 10: <i>Disposable baby bottles, nipples for baby bottles, pacifiers for babies and holders thereof, teething rings, cap rings for baby bottles, nipple covers for baby bottles, sealing discs for baby bottles and parts and accessories thereof, manual breast pumps.</i></p> <p>Class 21: <i>Baby training cups, caps and units consisting of a training cup cap and bottle.</i></p>
<p>EU14980825</p> <p>HUGGIES</p> <p>Filing date: 6 January 2016</p> <p>Publication date: 28 January 2016</p> <p>Date completed registration procedure: 6 May 2016</p>	<p>Class 3: ...; <i>Premoistened tissues or wipes for infants and children.</i></p> <p>Class 5: ...; <i>disposable diapers; disposable diaper pants; disposable swimpants.</i></p>

EU14979488

HUGGIES

Filing date: 7 January 2016

Publication date: 21 March 2016

Date completed registration procedure:
28 June 2016

Class 3: *Baby shampoo; baby bath soaps and cleansers; baby lotions and powders; disposable wash mitts impregnated with bath soaps; premoistened tissues or wipes for infants and children.*

Class 5: *Diaper rash creams and ointments; diapers; diapers made of cloth; disposable diapers; disposable diaper pants; disposable swimpants.*

Class 25: *Clothing for infants including bibs and swimsuits.*

4) The opponent claims that the respective marks are earlier marks within the meaning of section 6(1) of the Act and that they are similar to the applicant's mark (that is in respect of identical or similar goods). The opponent also claims that its trade marks have a reputation that extends beyond the precise goods for which it is used and registered and that use of the applicant's mark will result in it taking unfair advantage of, and would be detrimental to both their reputation and distinctive character. It further claims that the consumer, upon seeing the applicant's mark, is likely to make a link to the opponent's mark and that use of the applicant's mark:

(i) will result in detriment to the opponent's mark where the applicant's goods are of inferior quality, and:

(ii) the presence of another mark incorporating "HUG" would take unfair advantage and be detrimental to the distinctive character of the opponent's marks.

5) The opponent also relies upon grounds based upon section 5(4)(a) in respect of its unregistered rights in HUGGIES and a logo sign that corresponds to its EU12899399 mark. It claims that it has used the marks since 1993 and 2015, respectively, throughout the UK. It submits that the second of these marks shares

the same bulbous font as the applicant's mark and also the same use of bright red and, consequently, misrepresentation will occur, leading to damage.

6) The applicant filed a counterstatement denying the claims made. It also requests that the opponent provides proof of use of its earlier trade mark EU224204 in respect of *clothing for infants and children* in Class 25, however, these goods are not relied upon by the opponent for this registration. Therefore, the opponent is not required to provide proof of use. The consequence of this is that it is entitled to rely on the full list of goods set out above.

7) Both sides filed evidence and written submissions. I will summarise the evidence to the extent that it is considered necessary and I will keep the submissions in mind.

8) A Hearing took place on 20 July 2017 with the opponent represented by Alice Findley for Reddie & Grose LLP. The applicant represented himself.

Opponent's Evidence

9) This takes the form of the following three witness statements:

- Mary J Frank, Senior Paralegal for the opponent;
- Alice Findley, Registered Trade Mark Attorney at, and partner of, Reddie & Grose LLP, the opponent's representative in these proceedings;
- Filippa Anne Evans, Trainee Trade Mark Attorney at Reddie & Grose LLP.

10) The main relevant points can be summarised as follows:

- The HUGGIES mark has been used in the UK since 1993;
- Net sales values (£ GBP) for HUGGIES products are shown below (and reflect that the opponent withdrew from the UK nappy market in 2013 for commercial reasons:

	2011	2012	2013	2014	2015	2016
Diapers	45,217,941	55,237,041	6,527,616	-81,798	-235,621	-5,765
Diaper pants	4,326,553	2,851,280	343,398	3,989	-2	-2,025
Baby Wipes	14,046,586	17,240,279	21,568,736	22,074,175	17,006,441	13,576,127
Pull-Ups	12,991,129	13,799,191	13,789,584	12,528,441	12,335,549	9,977,372
DryNites	15,534,960	16,756,463	20,706,168	3,177,554	22,227,552	22,358,508
Little Swimmers	2,892,423	3,137,463	4,056,942	3,648,969	3,177,554	3,440,730
TOTAL	95,009,592	109,021,679	66,992,444	59,087,661	54,511,473	49,344,946

- In 2014, approximately 359,000 people in the UK used the opponent's most popular HUGGIES nappy. Five other types of HUGGIES nappies were used by between 277,000 and 99,300 people during the same period (see Ms Evans' Exhibit FE1);
- Approximately 212,000 used other HUGGIES disposable nappy products (see the same exhibit);
- HUGGIES nappies, together with a competitor's PAMPERS nappies accounted for 79% market share in the UK between 2005 and 2010 (see independent research from *Mintel* at Exhibit FE1);
- Extracts from the website of UK retailers such as *Asda*, *Boots*, *Costco*, *Morrisons*, *Sainsburys*, *Tesco* and *Waitrose* show use of the mark HUGGIES in respect of baby wipes, absorbent bed mats and a wide range of nappies/pants (see Exhibit FE3);
- In the UK, the HUGGIES brand is promoted via such means as:
 - An extensive online presence including four websites (www.huggies.co.uk, www.huggieswipes.co.uk,

www.pottytraining.co.uk and www.littleswimmers.co.uk) and use on social media platforms such as *Facebook*, *Twitter*, *Instagram* and *YouTube* (see Exhibits FE5 and FE11);

- Nationwide marketing campaigns including sponsorship of the primetime television show *You've Been Framed* between 2012 and 2014 (see Exhibits FE6);
- In 2013, of the 400 expectant mothers and mothers with babies younger than 42 months in the UK asked in a survey by Millward Brown, 96% had heard of HUGGIES, 90% had tried HUGGIES products and 57% bought them regularly (Witness Statement of Mary J Frank, paragraph 25 and Exhibit MF15);

Applicant's Evidence

11) This takes the form of a witness statement by the applicant. This contains numerous submissions and also a historical description of his application's progress through the registration process. I do not detail these here, but keep them in mind. The evidence can be summarised as follows:

- The Cambridge dictionary defines MUMMY as "a child's word for mother" and HUG as "holding someone close to the body" (paragraph 12 of Mr Serag's witness statement);
- The applicant conducted various searches of the register and found 26 marks incorporating HUG, 144 marks containing an element similar to HUG, 108 marks containing the element HUG and 417 marks beginning with HUG (see his paragraph and Exhibits KS4 – KS6);
- Some of these are used in respect of goods for babies and children and include HUGGABABY, Hugme and Premier nappies hugs your baby with love (see Exhibit KS7);

Opponent's evidence-in-reply

12) This consists of a further witness statement by Ms Evans and a further witness statement by Ms Frank. The main points are:

- In response to Mr Serag's submission that the reputation in the mark HUGGIES was frozen beyond 2012, Ms Evans states that in an annual list of "superbrands" in the UK, HUGGIES was included in the years 2015, 2016 and 2017 (Witness Statement, paragraphs 5 to 7 and Exhibit FE15);
- A number of articles demonstrating a continued reputation are provided, and include:
 - The second largest "parenting title" in the UK, called *Gurgle*, carried an article dated 19 October 2015 where it is stated that Olympic swimmer, Rebecca Adlington "is pleased to support Huggies Little Swimmers" (Exhibit FE16);
 - An article dated 9 January 2017 from the website www.birminghammail.co.uk and entitled "Asda Baby Event 2017: Best deals on ...Huggies ...and more". The offer relates to HUGGIES pure baby wipes (Exhibit FE17);
 - extracts from the website www.motherandbaby.co.uk (that describes itself as "the online home of the UK's No. 1 Pregnancy, Baby and Toddler Magazine" illustrate that HUGGIES Pull-Ups were awarded a prize at the 2016 and 2017 Mother & Baby Awards (Exhibit FE20);
- In response to the applicant's evidence of numerous HUG marks on the register, Ms Evans draws attention to the fact that the HUGGABABY registration is limited to explicitly exclude "wipes" and its Class 25 and Class 35 specifications has also been limited. These limitations were made at the request of the opponent in the current proceedings. Similarly, the HUGME registration has, subsequent to the applicant's evidence, been limited at the request of the current opponent;
- Ms Frank provides the following retail sales values and market value share of HUGGIES products sold in the UK between 2013 and 2016:

	2013		2014		2015		2016	
	Value Sales	Value Share	Value Sales	Value Share	Value Sales	Value Share	Value Sales	Value Share
Huggies Drynites	£21.4m	89%	£24.0m	90%	£25.0m	92.4%	£25.7m	94.6%
Huggies Pull Ups	£20.1m	30%	£17.8m	30%	£18.4m	33.1%	£14.6m	24.5%
Huggies Little Swimmers	£5.7m	85%	£5.5m	84%	£5.3m	88.4%	£5.4m	85.7%
Huggies Wipes	£45.5m	21%	£45.3m	21%	£37.3m	19.5%	£29.8m	16.0%

DECISION

Section 5(2)(b)

13) Section 5(2)(b) of the Act is 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”.

Comparison of goods and services

14) In the judgment of the Court of Justice of the European Union (“the CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all

the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

15) The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) 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;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

16) I also keep in mind the following guidance of the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05 (“*Meric*”):

“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”.

17) In her skeleton arguments, Ms Findley helpfully produced a table of the parties' goods that the opponent submits are identical. This is produced in full, below:

	Goods covered by Opponent's earlier HUGGIES Registrations and relied on Opposition No. OP000407360	Opposed identical goods covered by UK Trade Mark Application No. UK0003165889
Class 5	<ul style="list-style-type: none"> • <i>Diaper rash creams and ointments</i> • <i>Diapers</i> • <i>Diapers made of cloth</i> • <i>Disposable diapers</i> • <i>Disposable diaper liners</i> • <i>Disposable diaper pants</i> • <i>Disposable swimpants</i> 	<ul style="list-style-type: none"> • <i>Cloth diapers</i> • <i>Babies' swim diapers</i> • <i>Babies' napkin-pants [diaper-pants]</i> • <i>Nappy liners of cellulose for incontinents</i> • <i>Nappy liners of paper for incontinents</i> • <i>Nappy pants for incontinents</i>
Class 10	<ul style="list-style-type: none"> • <i>Disposable baby bottles</i> • <i>Nipples for baby bottles</i> • <i>Pacifiers for babies and holders thereof</i> • <i>Teething rings</i> • <i>Cap rings for baby bottles</i> • <i>Nipple covers for baby bottles, sealing discs for baby bottles and parts and accessories thereof</i> • <i>Manual breast pumps</i> 	<ul style="list-style-type: none"> • <i>Babies' bottles</i> • <i>Infants' feeding bottles</i> • <i>Baby nursers</i> • <i>Baby dummies</i> • <i>Babies' pacifiers [teats]</i> • <i>Infants' pacifiers</i> • <i>Infants' neonatal pacifiers</i> • <i>Nipples for baby bottles</i> • <i>Nipples for babies feeding bottles</i> • <i>Baby bottle nipples</i> • <i>Baby teething rings</i> • <i>Breast pumps</i> • <i>Breast pumps for use by nursing mothers</i>
Class 16	<ul style="list-style-type: none"> • <i>Disposable products for infants and children</i> • <i>Disposable diapers or napkins</i> • <i>Disposable diaper liners</i> • <i>Training pants made primarily of paper</i> • <i>Disposable wipes and tissues</i> 	<ul style="list-style-type: none"> • <i>Babies' diapers of paper</i> • <i>Babies' disposable diaper pants of paper</i> • <i>Babies' disposable diaper pants of cellulose</i> • <i>Babies' disposable napkins made of cellulose</i> • <i>Babies' disposable napkins made of paper</i> • <i>Babies' napkins made of paper</i> • <i>Babies' nappies [paper or cellulose]</i> • <i>Babies' diapers of cellulose or paper</i> • <i>Infants' disposable training pants of cellulose</i> • <i>Infants' disposable training pants of paper</i>

		<ul style="list-style-type: none"> • <i>Infants' diapers [disposable] of cellulose</i> • <i>Infants' disposable diapers of cellulose</i> • <i>Infants' disposable diapers of paper</i> • <i>Infants' diapers [disposable] of paper</i>
Class 25	<ul style="list-style-type: none"> • <i>Disposable diapers, training pants or napkins all made primarily of non-woven fabric</i> • <i>Disposable liners for infants diapers or napkins all made primarily of non-woven fabric</i> • <i>Clothing for infants including bibs and swimsuits</i> 	<ul style="list-style-type: none"> • <i>Cloth bibs</i> • <i>Clothing for children</i> • <i>Clothing for infants</i> • <i>Babies' clothing</i> • <i>Babies' pants [clothing]</i> • <i>Nappy pants [clothing]</i>

18) When keeping the guidance in *Meric* in mind, I find that many of these goods are indeed identical because the goods of at least one of the opponent's earlier marks are either self-evidently the same or because the opponent's goods are contained within a broader term present in the application.

19) These identical goods present the opponent with its best case and I will proceed with my other considerations on this basis. For procedural economy, I will not consider the level of similarity between the other of the parties' goods.

Comparison of marks

20) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23), Case C-251/95, that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of

that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

22) Whilst the opponent relies upon four earlier marks, two of these are identical and, therefore, for the purposes of comparing the respective marks there are only three versions of the opponent’s marks to consider. Consequently, the respective marks are:

Earlier trade marks	Contested trade mark
<p data-bbox="411 981 560 1014">HUGGIES</p>  <p data-bbox="331 1368 635 1442">HUGGIES</p>	

23) My comments regarding the dominant and distinctive elements of the various marks are:

- The opponent’s first mark consists of the single word HUGGIES in ordinary typeface. Obviously, its distinctive character resides in this word;
- The opponent’s second mark consists of the same word, this time with the letters appearing as if they are 3-dimensional free standing letters, not quite perfectly lined up. The hint of a shadow behind some of the letters adds to this impression. The word appears within a “bean” shaped device. Whilst the

device cannot be ignored, it is the word element that is the dominant and distinctive element of the mark;

- The third mark consists of the word HUGGIES in black block lettering, once again, not being perfectly lined up. Whilst this presentation adds to the distinctive character, it is the word that is the dominant and distinctive element;
- The applicant's mark consists of the two word MUMMY and HUG presented in red, the first letters of each word being presented in capitals and the other letters in lower case. All letters are surrounded by a white shadow boundary. This particular presentation contributes to the distinctive character of the mark, but the dominant and distinctive element is the phrase "Mummy Hug".

24) At the hearing Ms Findley submitted that when comparing what she described as the opponent's "bean mark" with the applicant's mark she referred to the opponent's mark being "red on white", however, there is no colour description or limit on the opponent's mark. Nevertheless, I must consider notional and fair use of the mark that may include colours as Ms Findley described. She identified what she believed were "bulbous letters" present in both marks and the similar shading of both. She concluded that the respective marks have a similar look and feel. I concur that the general shape of the letters is similar. Further, the first three letters of the word element of the opponent's mark is present in the applicant's mark as its second word. However, there also numerous differences between the marks:

- not least that the applicant's mark contains the word "Mummy" but the opponents mark does not;
- the opponent's mark consists of a single seven letter word, whereas the applicant's mark consists two words of six and three letters respectively;
- the "bean" device/background of the opponent's mark is absent in the applicant's mark;
- the letters in the opponent's mark have depth giving the illusion of being three-dimensional whereas the letters in the applicant's mark are two-dimensional in appearance.

25) Taking all of the above similarities and differences into account, I conclude that the visual similarity is low to medium.

26) Aurally, the opponent's mark is likely to be expressed as the two syllables HUG-GIES or HUG-IES. The applicant's mark splits naturally into the three syllables MUM-ME-HUG. Therefore the first syllable of the opponent's mark and the last syllable of the applicant's mark are the same. This is the only similarity and I conclude that the respective marks share a low to medium level of aural similarity.

27) To counter the applicant's submission that HUGGIES has no conceptual meaning Ms Findley submitted that the evidence shows the opponent's mark alongside imagery of happy babies and mothers holding or playing with their children thus emphasising the concept of "hug". This is not relevant. In *J.W.Spear & Sons Ltd and Others v Zynga Inc.* [2015] EWCA Civ 290, paragraphs 46 and 47, Floyd L.J. considered the CJEU's judgment in *Specsavers*, Case C-252/12, which was submitted as establishing that matter used with, but extraneous to, the earlier mark should be taken into account in assessing the likelihood of confusion with a later mark. The judge dismissed this. Nevertheless, even ignoring this extraneous matter, the opponent's mark is vaguely suggestive of the giving of hugs, but I would not put it higher than that. This is because, firstly, the word element is a made up word, and secondly, at least in respect of the goods where a good fit is a desirable feature (such as disposable diapers and swimpants) the mark may equally be perceived as a reference to the good fit of the product, i.e. it hugs the body to avoid leakage. The applicant's mark is likely to be understood as describing the giving of a hug by a mother. Therefore, there may be some conceptual similarity but I would not put this above a low to medium level.

28) The finding above in respect to aural and conceptual similarity also apply equally when comparing the opponent's other two marks with the applicant's mark. Visually, there are slight differences, most notably the absence of the "bean" device in the opponent's marks. Taking this into account, the level of visual similarity is increased but it is still no more than a medium level.

Average consumer and the purchasing act

29) 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 goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

30) 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.”

31) The average consumer of both parties' goods is likely to be the ordinary consumer with a young family. The nature of the purchasing act will vary to some degree with nappies, for example, being a more regular purchase than a purchase of a baby gate, or baby carrier. Nevertheless, such purchases will require a level of care and attention that may vary slightly but in respect of all of the parties' goods can still be described as average. The purchasing act will be predominantly visual in nature with the goods covered likely to be selected from a shelf or larger floor-display, but I do not ignore that aural considerations may play a part.

Distinctive character of the earlier trade mark

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

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

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

33) As I have already noted, the word HUGGIES is suggestive of the giving of hugs or that the goods “hug” the body i.e. they are a close fit. In respect of children’s goods, this suggestiveness results in the word not being endowed with the highest level of inherent distinctive character. With this in mind, I find that the opponent’s word mark and stylised word mark are endowed with a similar level of inherent distinctive character, being a medium level. In respect to the opponent’s “bean” device mark, its presentation lifts the level of inherent distinctive character to a medium to high level.

34) At the hearing, the applicant submitted that the opponent might have some reputation in respect of wipes, but nothing else, citing that the opponent withdrew from the nappy market in 2013. The evidence indicates that this withdrawal from the market related to “diapers” and “diaper pants”, but sales continued in respect of “pull-ups”, “DryNites” and “little Swimmers”, all of which I consider to be very similar goods

to “diapers” The relevant date in these proceedings is 22 May 2016, so the opponent had not conducted any trade in the UK in respect of nappies for 2.5 years prior to the relevant date, but prior to that time, half of the opponent’s total UK sales were derived from these products and amounted to £40 million - £50 million a year. The applicant also criticised the opponent’s evidence on the basis that it shows use of the earlier marks as secondary marks to identify its goods. I dismiss this. Whilst the evidence does show the use of secondary marks, this does not detract from the use of the marks relied upon in addition to these secondary marks. Further, sales of the opponent’s “baby wipes” were consistently between £14 million and £17 million in the five years prior to the relevant date. This is a significant level of sales. Further, there is no reason why use as a secondary mark cannot result in it acquiring an enhanced level of distinctive character.

35) Taking all of the above into account, I conclude that all three of the opponent’s earlier marks benefit from an enhanced level of distinctive character because of the use made of them in respect of at least *swim pants*, *trainer pants*, *night pants* and *wipes*.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

36) The following principles are gleaned from the decisions of the 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 B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the

chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

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

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

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

37) The applicant provided evidence of many marks on the Register consisting of, or including, the word HUG. Two of these specific examples have been addressed in the opponent's evidence (both marks have been limited following an approach from the opponent). However, more generally, I keep in mind the guidance of the CJEU in *Henkel KGaA v Deutsches Patent- und Markenamt*, Case C-218/01, where it found that:

“65... The fact that an identical trade mark has been registered in one Member State as a mark for identical goods or services may be taken into consideration by the competent authority of another Member State among all the circumstances which that authority must take into account in assessing the distinctive character of a trade mark, but it is not decisive regarding the latter's decision to grant or refuse registration of a trade mark.

On the other hand, the fact that a trade mark has been registered in one Member State for certain goods or services can have no bearing on the examination by the competent trade mark registration authority of another Member State of the distinctive character of a similar trade mark for goods or services similar to those for which the first trade mark was registered.”

38) Taking this guidance into account, I find that the applicant's evidence of the current state of the register and the number of marks consisting of or containing HUG, is not persuasive.

39) Ms Findley submitted that the high similarity between the respective marks, particularly conceptually, the identity or similarity between the respective goods and the high level of distinctive character of the opponent's marks will result in there being direct and indirect confusion. I have found that:

- the word HUGGIES is the only element or the dominant and distinctive element in the opponent's earlier marks;
- the words MUMMY and HUG appear together to form the dominant and distinctive element of the applicant's mark;
- the opponent's "bean" mark shares a low to medium level of aural, visual and conceptual similarity with the applicant's mark;
- the opponent's word mark and stylised word mark also share the same level of aural and conceptual similarity with the applicant's mark, but their visual similarity is slightly higher, but still no more than a medium level;
- the average consumer consists of ordinary consumers with a family and the purchasing process is primarily visual in nature (but I don't ignore aural considerations) and these consumers pay an average level of care and attention during the purchasing act;
- the opponents word only and stylised word marks are all endowed with a medium level of inherent distinctive character and this is enhanced through use.

40) Taking all of the above into account, I do not agree with Ms Findley's conclusions regarding direct confusion. Whilst a number of my findings point towards a finding of a likelihood of confusion, it is my view that the differences between the marks are too great for the consumer to confuse one mark for the other, even taking into account imperfect recollection. Whilst the concept of a "hug" is present in both, this is outweighed by the visual and aural differences I identified earlier. These will not go un-noticed. Further, I have recognised that the word HUGGIES that is present in all of the opponent's earlier marks may also be perceived as having a further, equally likely meaning, namely, that of a close fit. This meaning is absent in the applicant's mark. In conclusion, I find that there is no direct confusion.

41) The opponent also claims there is a likelihood of indirect confusion where the consumer notices differences between the marks but, nevertheless, believes that the goods provided under each mark originate from the same or linked undertaking. Once again, I disagree. The existence of the concept of a "hug" present in both the earlier marks and the applicant's mark is insufficient to off-set the aural and visual

differences and also, in the applicant's mark, the additional concept of the giver of the hug being a mother. As a result of these differences, I find that the consumer is not likely to believe that goods sold under the respective marks originate from the same or linked undertaking. Such a likelihood becomes even less likely where the opponent's marks are perceived as being a reference to close fitting products. At best, the applicant's mark may fleetingly bring the opponent's mark to mind, but I don't believe this is likely. Nevertheless, even if I am wrong, the mere bringing to mind is insufficient for the purposes of section 5(2). I find there is no likelihood of indirect confusion.

42) The opposition, insofar as it is based upon section 5(2)(b) of the Act fails in its entirety.

Section 5(4)(a)

43) Section 5(4)(a) states:

"A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

(b) [.....]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of "an earlier right" in relation to the trade mark."

44) Halsbury's Laws of England (4th Edition) Vol. 48 (1995 reissue) at paragraph 165 provides the following analysis of the law of passing off. The analysis is based on guidance given in the speeches in the House of Lords in *Reckitt & Colman Products Ltd v. Borden Inc.* [1990] R.P.C. 341 and *Erven Warnink BV v. J. Townend & Sons (Hull) Ltd* [1979] AC 731. It is (with footnotes omitted) as follows:

“The necessary elements of the action for passing off have been restated by the House of Lords as being three in number:

(1) that the plaintiff’s goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;

(2) that there is a misrepresentation by the defendant (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by the defendant are goods or services of the plaintiff; and

(3) that the plaintiff has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the defendant’s misrepresentation.

The restatement of the elements of passing off in the form of this classical trinity has been preferred as providing greater assistance in analysis and decision than the formulation of the elements of the action previously expressed by the House. This latest statement, like the House’s previous statement, should not, however, be treated as akin to a statutory definition or as if the words used by the House constitute an exhaustive, literal definition of passing off, and in particular should not be used to exclude from the ambit of the tort recognised forms of the action for passing off which were not under consideration on the facts before the House.”

45) Further guidance is given in paragraphs 184 to 188 of the same volume with regard to establishing the likelihood of deception or confusion. In paragraph 184 it is noted (with footnotes omitted) that:

“To establish a likelihood of deception or confusion in an action for passing off where there has been no direct misrepresentation generally requires the presence of two factual elements:

(1) that a name, mark or other distinctive feature used by the plaintiff has acquired a reputation among a relevant class of persons; and

(2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other feature which is the same or sufficiently similar that the defendant's goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as successive hurdles which the plaintiff must surmount, consideration of these two aspects cannot be completely separated from each other, as whether deception or confusion is likely is ultimately a single question of fact.

In arriving at the conclusion of fact as to whether deception or confusion is likely, the court will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the plaintiff and the defendant carry on business;
- (c) the similarity of the mark, name etc. used by the defendant to that of the plaintiff;
- (d) the manner in which the defendant makes use of the name, mark etc. complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances."

In assessing whether confusion or deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action."

Relevant date

46) In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC as the Appointed Person considered the relevant date for the purposes of Section 5(4)(a) of the Act and quoted with approval the following summary provided by Mr Allan James, for the Register, in *SWORDERS TM* O-212-06:

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’

47) The applicant claimed use from 2012 but has provided no evidence of this, therefore, the only relevant date for the purposes of these proceedings is the filing date of 22 May 2016.

Goodwill, misrepresentation and damage

48) At the hearing, Ms Findley conceded that the opponent’s case is closely aligned to its case based upon section 5(2)(b) and its success under section 5(4)(a) should follow the outcome in respect of section 5(2)(b). This is a sensible approach. I recognise that the test for misrepresentation is different to that for likelihood of confusion, namely, that misrepresentation requires “a substantial number of members of the public are deceived” rather than whether the “average consumer are confused”. However, as recognised by Lewinson L.J. in *Marks and Spencer PLC v Interflora*, [2012] EWCA (Civ) 1501, it is doubtful whether the difference between the legal tests will produce different outcomes. Certainly, I believe that this is the case here. Even accepting that the opponent has a large goodwill identified by its signs (something disputed by the applicant) I, nonetheless, find that members of the public are unlikely to be misled into purchasing the applicant’s goods in the belief that they

are the goods of the opponent. For the reasons set out earlier, I consider that the differences between the respective marks are so great that no economic connection will be made.

49) In conclusion, I find that grounds, insofar as they are based upon section 5(4)(a), also fail.

Section 5(3)

50) Section 5(3) states:

“(3) A trade mark which –

- (a) is identical with or similar to an earlier trade mark,
- (b) (repealed)

shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EU) in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

51) The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman, paragraph 29* and *Intel, paragraph 63*.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark

have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV*, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

Reputation

52) In *Iron & Smith kft v Unilever NV*, Case C-125/14, the CJEU held that:

“If the earlier Community trade mark has already acquired a reputation in a substantial part of the territory of the European Union, but not with the relevant public in the Member State in which registration of the later national mark concerned by the opposition has been applied for, the proprietor of the Community trade mark may benefit from the protection introduced by Article 4(3) of Directive 2008/95 where it is shown that a commercially significant part of that public is familiar with that mark, makes a connection between it and the later national mark, and that there is, taking account of all the relevant factors in the case, either actual and present injury to its mark, for the purposes of that provision or, failing that, a serious risk that such injury may occur in the future.”

53) That case deals with a situation where, in the relevant member state, there was no reputation of the EU mark. In the current case, I have found significant use in the UK and therefore, in the absence of anything that suggests that this non-UK EU

reputation impacts upon UK consumers, I find that it is right that I consider only the reputation in the UK. As this is significant, the fact that I do not consider the reputation elsewhere in the EU does not have any material effect.

54) In line with my earlier comments, I find that the opponent's reputation in the UK extends to, at least, the following goods:

Swim pants, trainer pants, night pants and wipes

Link

55) When assessing the existence of a link, I keep in mind the following guidance of the CJEU in Case C-408/01, *Adidas-Salomon*:

“28. The condition of similarity between the mark and the sign, referred to in Article 5(2) of the Directive, requires the existence, in particular, of elements of visual, aural or conceptual similarity (see, in respect of Article 5(1)(b) of the Directive, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23 in fine, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 25 and 27 in fine).

29. The infringements referred to in Article 5(2) of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421, paragraph 23).”

56) Therefore, the assessment of similarity between the respective marks is the same as for section 5(2). However, I also keep in mind that the level of similarity required for the public to make a link between the marks for the purposes of 5(3) may be less than the level of similarity required to create a likelihood of confusion (*Intra-Press SAS v OHIM*, Joined cases C-581/13P & C-582/13P, paragraph 72).

57) I have found that the similarities between the respective marks are not sufficient for me to reach a finding of likelihood of confusion. The presence of HUG in both the opponent's marks and the applicant's mark creates some level of visual and aural similarity, but as I have noted this is no more than to a low to medium level. As I have already noted, as far as a conceptual hook goes, it is quite weak in the opponent's marks and may allude to the giving of a hug or that the goods are a close fit, as in they "hug" the body. In the applicant's mark, the reference to the known word "hug" is clear both visually, aurally and as a concept of the giving of a hug, in this case, by a mother. Taking all of this into account, whilst there may be some weak overlap of concept, to my mind, this is not sufficient for the applicant's mark to create a link in the mind of the consumer to the opponent's marks. The differences between the marks identified when considering the grounds under section 5(2)(b) are such that they counter any similarities to the extent that the consumer is not likely to have the opponent's marks brought to mind upon encountering the applicant's mark, even when identical goods are concerned. I find that the necessary link is not established.

58) This finding is not dislodged when factoring the opponent's strong reputation demonstrated in its evidence and the fact that I have found its earlier marks benefit from an enhanced level of distinctive character because of the use made of them by the opponent. The similarity of the marks is just too low for the consumer to make a link between them.

59) Even if I am wrong and the consumer does make a link between the respective marks, it will be no more than a fleeting bringing to mind and quickly dismissed by the consumer.

60) In light of my finding, it is not necessary for me to consider the opponents case in respect of detriment and unfair advantage.

Summary

61) The opposition fails on all grounds and the application can proceed to registration.

Costs

62) The applicant has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 2 of 2016. As the applicant was unrepresented, at the conclusion of the evidence rounds the tribunal invited him to indicate whether he intended to make a request for an award of costs, and if so, to complete a pro-forma indicating a breakdown of his actual costs, including providing accurate estimates of the number of hours spent on a range of given activities relating to the prosecution of the opposition.

The applicant completed a pro-forma listing the following time spent preparing and presenting his case:

Completing the notice of defence:	6 hours
Considering forms filed by the other party:	20 hours
Considering other side's evidence:	40 hours
Commenting on other side's evidence:	70 hours
Preparing for, and attending the hearing	45 hours

63) As an unrepresented party, I accept it was necessary for the applicant to familiarise himself with the Notice of Opposition and having done so, to research the position and to formulate an appropriate response. This is likely to have taken the applicant some time. Therefore, his claim of a total of 26 hours (6 hours + 20 hours) is not, in my view, unreasonable especially in light of the detailed counterstatement provided. However, the large amounts of time claimed in respect of reviewing the opponent's evidence and for the preparation of his own evidence does strike me as being excessive. Certainly to review the opponent's evidence, to identify the evidence required to counter this and to formulate this evidence will have taken some time, but the applicant's evidence is reasonably brief (consisting of a 4 page witness statement and ten exhibits). I consider a total of 25 hours is reasonable for these two tasks. The applicant appeared in person and was well prepared for the hearing, but once again, a claim of 45 hours appears excessive. I award costs in respect of 10 hours for travel to and from, and attendance at the hearing and a further 15 hours in respect of preparation.

64) All of the above amounts to a total of 76 hours (26 + 25 + 25) rather than the 182 hours claimed. A figure of £18 an hour is the minimum level of compensation for litigants in person in The Litigants in Person (Costs and Expenses) Act 1975. Therefore, the total is calculated as being £1368 (76 hours x £18).

65) I order Kimberley-Clark Worldwide, Inc. to pay to Khaled Serag the sum of **£1368**. 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 17th day of October 2017

Mark Bryant
For the Registrar
The Comptroller-General