

O-539-17

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3196078
BY COLGATE-PALMOLIVE COMPANY
TO REGISTER**



**AS A TRADE MARK IN CLASS 3
AND IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 60000637
BY DUF LTD**

BACKGROUND

1. On 10 November 2016, Colgate-Palmolive Company (“the applicant”) applied to register the mark shown on the cover page of this decision in respect of “toothpaste and mouthwash” in class 3.
2. The application was published for opposition purposes on 20 January 2017 and a notice of opposition was subsequently filed by Duf Ltd (“the opponent”) under the fast-track procedure. The opposition is based upon Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is directed against all of the goods in the application. The opponent relies on its UK trade mark registration number 3086604 for the following mark:



3. The opponent’s mark was applied for on 18 December 2014 and its registration procedure was completed on 15 May 2015. The opponent relies upon some of the goods in its registration, namely:

Class 3: Soaps; perfumery, essential oils, articles for body and beauty care; hair lotions.

4. As these are the only comments I have from the opponent, they are reproduced below in full as presented:

“I feel the proposed trade mark will cause confusion to my customers, as it is too similar, especially as it has a clock face surrounding the number 12, which is suggesting “time”. I currently make men’s accessories and I have included in the attached picture my watches, and aftershave, from my body product range. The proposed oral products, toothpaste and mouthwash are body and beauty care products covered by my registration”.

5. The applicant filed a counterstatement in which it denies the ground of opposition. It also submitted that the opposition should be dismissed on the basis that the notice of opposition had not been signed in writing. However, since this point had not been brought to the opponent's attention when the notice of opposition was admitted into the proceedings, the Registry allowed the opponent to rectify this formality. The matter drew no further objection.

6. Rules 20(1)-(3) of the Trade Marks Rules 2008 ("TMR") (the provisions which provide for the filing of evidence) do not apply to fast-track oppositions but Rule 20(4) does. It reads:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

7. The net effect of the above is to require parties to seek leave in order to file evidence (other than the proof of use evidence which is filed with the notice of opposition) in fast-track oppositions. In a letter to the Registry dated 26 July 2017, the applicant sought leave to file evidence in relation to the similarity of goods; however, given the nature of the goods involved, the Registry considered that the evidence was unnecessary to reach a decision. Accordingly, the request was refused and the applicant did not ask to be heard in relation to that decision.

8. Rule 62(5) (as amended) states that arguments in fast-track proceedings shall be heard orally only if 1) the Office requests it or 2) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise written arguments will be taken. A hearing was neither requested nor considered necessary. Neither party filed written submissions.

9. In these proceedings, the applicant has been represented by Kilburn & Strode LLP. The opponent is not professionally represented.

DECISION

10. Section 5(2)(b) of the Act reads:

“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.”

11. An earlier trade mark is defined in Section 6 of the Act, which states:

“6.-(1) In this Act an “earlier trade mark” means –

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

12. In these proceedings, the opponent is relying upon the mark shown at paragraph 2, above, which qualifies as an earlier trade mark under the above provisions. As the opponent’s earlier mark had not been registered for five years or more at the publication date of the opposed application, it is not subject to the proof of use provisions under section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods it has identified.

Section 5(2)(b) - case-law

13. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case

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

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

- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

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

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

17. In *Gérard Meric v OHIM*, Case T- 133/05, the GC stated:

“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”.

18. In *YouView TV Ltd v Total Ltd* ,[2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the

observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49].

Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

19. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

"I should add that I see no reason to give the word "cosmetics" and "toilet preparations"... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context."

20. The competing goods are as follows:

The applied for goods	The opponent's goods
Class 3 Toothpaste and mouthwash	Class 3 Soaps; perfumery, essential oils, articles for body and beauty care; hair lotions.

21. As a starting point, it is worth considering what goods are covered by the earlier mark. The opponent submits that the term *articles for body and beauty care* in its registration encompasses the contested *toothpaste and mouthwash*. The applicant denies this claim and highlights in its counterstatement, the TMclass database which is used by various EU national offices including the UK for classification purposes. It states:

- “[...] *Articles for body care*” include goods used on the exterior of the body, and are normally interpreted as being such goods as body moisturisers, lotion and treatments, body scrubs and exfoliators, facial creams and lotions, foot and hand creams, hair removal products, tanning products, sun creams and lotions. An e-classification search on the TMDN website lists a number of “body care” products under the umbrella of “*Body cleaning and body care preparations*” (sub-categories of “*soaps and gels*”, “*deodorants and antiperspirants*”, “*skin, eye and nail care preparations*”);

[...]

- “*Articles for beauty care*” include goods used on the exterior of the body, and are normally interpreted as being such goods as makeup, face and body creams, make up tools and accessories. An e-classification search on the TMDN websites lists a number of “*beauty care*” products under the umbrella of “*Body cleaning and beauty care preparations*” (sub-category “*skin, eye and nail preparations*”) and “*essential oils and aromatic extracts*”.

[...]

The applicant’s “*toothpaste and mouthwash*”, on the other hand, is used internally for oral hygiene purposes and is classified as “oral hygiene preparations” on the TMDN e-classification search engine”.

22. In relation to the opponent’s reference to the classification tool for goods and services TMclass, it has no legal effect on the comparison of goods and services: the scope of protection under the trade mark law is determined by the usual meaning of a term¹. The question, nevertheless, arises as to the breadth of the expression *articles for body and beauty care*. Whilst the terms covered by the earlier mark are reasonably broad, I agree with the applicant that they are not identical to the more specific goods of the contested mark. In my view, *articles for body care* covers products that one would apply to one’s body to clean, moisturise and improve its appearance and fragrance. *Articles for beauty care* is another term for cosmetic

¹ GAT Microencapsulation GmbH v OHIM, Case T-720/13

products and includes articles and preparations intended to beautify the person. The contested *toothpaste and mouthwash* are oral products for dental hygiene used for cleaning teeth and freshening breath and though they could be described as personal care products (like certain body care products, such as, for example, deodorants and body washes), I doubt that they would ordinarily be described as *articles for body care* (or, indeed, *articles for beauty care*). Although they are not identical, I must still consider whether they are similar. The main purpose of *toothpaste and mouthwash* is to clean teeth and keep the mouth healthy; though they may claim to lighten teeth, they are different from dental products such as teeth whitening preparations, whose function is primarily cosmetic. Although the users are the same and the goods share the same general purpose (the care of the person), the nature of the goods is different, as is the method of use. The goods are not competitive; although, like certain body care products, *toothpaste and mouthwash* form part of a person's personal hygiene routine, I do not see that there is any particular complementarity in the sense described by the case-law. Finally, even if the goods are distributed through the same channels, i.e. supermarkets, drugstores and pharmacies, it is unlikely that they are found in close proximity. Overall, I consider that **the goods are similar to a low to medium degree**.

The average consumer and the nature of the purchasing act

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

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied

objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

24. The average consumer of the parties’ class 3 products is the general public. Although it is not excluded that goods may be sold in response to an oral order, the purchase of class 3 goods is, in my experience, overwhelmingly a visual purchase whether in physical retail environments, beauty salons or from websites. The level of attention when purchasing the goods will be, at least, average and it will be sufficient to ensure that the correct product is selected, taking into account factors such as ingredients, properties and appropriateness for the consumer’s needs.

Comparison of marks

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

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

27. The marks to be compared are:

Applied for mark	Earlier mark
	

Overall impression

28. The contested mark consists of what is likely to be perceived as a clock face over which the number 12 has been superimposed; both elements are slightly tilted on one side. Due to their nature, size and positioning, both elements make a roughly equal contribution to the overall impression of the contested mark.

29. The earlier mark consists of the number 12 represented in standard characters placed within a plain square. Below this element appears the word TWELVE presented in upper case lettering, in an unremarkable font. As the word TWELVE is separated from the number 12, it is likely to be perceived as the verbal representation of the same number. Although the presentation of the mark contributes to its overall impression, I still find that the number 12 is the most distinctive component of the mark.

Visual similarity

30. The visual similarity resulting from the common element 12 is offset, to some extent, by the different configuration of the marks overall and, in particular, by the clock device which appears in the contested mark. In my view, the degree of visual similarity is low to medium.

Aural similarity

31. Both marks are likely to be articulated as the number 12. I reject the applicant's argument's that the average consumer will pronounce the earlier mark as TWLEVE-TWELVE since I have already found that the word TWELVE in that mark will not be perceived separately. The marks are aurally identical.

Conceptual similarity

32. The applicant states:

“Conceptually the marks are highly dissimilar. The dominant effect created by the Applicant's mark is an allusion to the concept of time. This is brought about by the combination of what can only be described as a clock face and the addition of the numerals 12, suggesting “12 hours” or “12 o'clock”, which we submit would be immediately obvious to consumers when purchasing the applicant's goods.

33. Given that the only possible use of the contested mark is in relation to toothpaste and mouthwash, this is likely to lead consumers to see the mark as highly allusive of the length of time for which the goods' effects (such as breath freshening) will last.

34. In relation to the earlier mark, given the range of potential uses, the number 12 is also likely to be taken as allusive in the context of most goods for which the concept of long-lasting effects/12-hour protection, is relevant. For example in relation to deodorants and make-up products, which are goods covered by the terms *articles for body and beauty care* in the earlier mark, the number 12 is likely to be regarded by the relevant public as a reference to the product working for 12 hours. Although the shared numerical element 12 creates a degree of conceptual similarity between the marks, the concepts of both marks relate, essentially, to a suggestion of a period of time, and, as I will explain below, this is not a particularly distinctive concept.

Distinctive character of the earlier trade mark

35. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*²⁶, 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).”

36. As no evidence of use has been filed by the opponent, I have only the inherent distinctive character of the mark to consider. As I have already found, in the context of most goods, the number 12 in the earlier mark would be perceived as referring to the effects of the product lasting for 12 hours, in which case the number per se would have a very low (if any) degree of distinctive character. The distinctiveness of the earlier mark lies in its totality, but even from this perspective, it is still strongly allusive. I consider that the earlier mark has only a low to moderate level of inherent distinctive character.

Likelihood of confusion

37. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods and vice versa. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has retained in his mind.

38. There are two types of relevant confusion to consider: direct confusion (where one mark is mistaken for the other) and indirect confusion (where the respective similarities lead the consumer to believe that the respective goods come from the same or a related trade source). This distinction was summed up by Mr Iain Purvis Q.C. sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“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).”

39. The applicant refers, in its counterstatement, to the coexistence of the contested mark with other marks incorporating the number 12 and registered in respect of goods in class 3. However, the coexistence of the marks on the register is irrelevant and the applicant has provided no evidence of show the marks coexisting on the market. In *British Sugar Plc v. James Robertson & Sons Ltd* [1996] RPC 281 Jacob J (as he then was) said:

“In particular the state of the register does not tell you what is actually happening out in the market and in any event one has no idea what the circumstances were which led the registrar to put the marks concerned on the register. It has long been held under the old Act that comparison with other marks on the register is in principle irrelevant when considering a particular mark tendered for registration, see e.g. *Madame Trade Mark* and the same must be true under the 1994 Act. I disregard the state of the register.”

40. In *Digipos Store Solutions Group Limited v Digi International Inc.* [2007] EWHC 3371 (Ch), Mr Daniel Alexander Q.C. sitting as a Deputy High Court Judge said:

“38 In L’Oreal, the applicant for registration of FLEXI AIR, L’Oreal, had argued that, in the case of an earlier mark with weak distinctive character there would only be a likelihood of confusion if the mark was completely reproduced: see paragraph 11 of the Judgment. The ECJ rejected that argument: see paragraphs 45 and 47 of the Judgment. But, in so doing, it did not suggest that the weakness of the earlier mark should not be taken into account. Although it is not particularly easy to understand paragraphs 42 and 43 of the judgment, taken in context, the ECJ was not in my view, there saying that the court should take no account of the weakness of the earlier mark in assessing the likelihood of confusion: that would have been to depart from Lloyd. Rather, that, in that case, notwithstanding the finding of weakness of FLEX, the CFI rightly concluded that there was a likelihood of confusion. The conclusion on the facts may be unsurprising: the marks there related to products in class 3 of the Nice Classification more likely to be purchased in a high street environment.

41 First, in undertaking the global assessment of likelihood of confusion (as to which see Lloyd passim) where the earlier mark, or an element of it, is said to be descriptive of goods or services or otherwise weak, the Registrar must take into account the extent to which the sign has a lesser capacity to distinguish as well as whether it has a greater capacity to distinguish (Canon, Windsurfing, Lloyd, Reed and L’Oreal). That involves evaluation of the evidence relating to that issue. Because the examination of capacity to distinguish is undertaken in the course of comparing the marks to see whether confusion is likely, for the purpose of a section 5(2)(b) determination, it is necessary to look at the characteristics of both the earlier trade mark and the mark applied for. In my judgment, although not expressly stated in the cases, it follows from the general principles that there are cases in which an element may be distinctive in the context in which it appears in the earlier mark, but not in the different context in the mark applied for. If, in that latter context, it is unlikely to be taken to denote trade origin, that must be taken into account in making the global assessment, since it is one aspect of the lesser capacity to distinguish.

42 Second, the fact that the element has a lesser capacity to distinguish should be taken into account in the global assessment by recognizing that the average consumer is more likely to consider that a descriptive element is not being used, in the mark applied for, to identify the origin of the goods or services in question and therefore is less likely to be confused as to origin. Although it is convenient shorthand to talk of the scope of protection of a weak earlier mark being reduced, that is neither a proposition of law nor a blueprint for assessment. A weak mark is, in practice, likely to have a reduced scope because there is a lesser likelihood that other marks will be confused with it, if all that the respective marks have in common is the descriptive element. That, in turn, is because, as a matter of fact, the common element would not be thought by the average consumer to signal that the goods in relation to which the respective marks are used come from the same trade source, not because of any special approach under section 5(2)(b) to marks composed of descriptive elements (Reed , L'Oreal).

43 Third, although the lesser capacity to distinguish (the “weakness”) of an earlier mark or element of the earlier mark should be taken into account in the global assessment, weakness of the earlier mark is not conclusive of whether there is likelihood of confusion. It is one factor which goes into the global assessment. In some cases, an earlier mark may be descriptive in whole or in part but nonetheless there may be a likelihood of confusion (L'Oreal).”

41. Earlier in this decision I found that the respective goods are similar to a low to medium degree. The goods are likely to be purchased with an average degree of attention. I found that the marks are visually similar to a low to medium degree and that the goods will be purchased primarily by the eye. Though the marks are aurally identical, aural considerations are less important. In term of conceptual similarity, I found that the number 12 in the contested mark is likely to be taken as highly allusive of the length of time for which the goods’ effects will last and that the applied for mark has a similar concept. Balancing all of these factors, I find that having regard to the nature of the respective goods and their differences, and taking into account the visual differences between the marks and the fact that any conceptual similarity is

created by an element which has a very low degree of distinctive character, **there is no real likelihood of confusion, either direct or indirect.**

42. For the avoidance of doubt, I should say that even if I were to find that in relation to the earlier mark there may be some goods for which the suggestion of time is not as strong, and the concept may be that of the number 12, it would not assist the opponent. While that would, I accept, increase the distinctive character of the earlier mark, it would create a further gap between the competing marks so there would still be no likelihood of confusion.

CONCLUSION

43. The opposition fails.

COSTS

44. As the applicant has been successful, it is entitled to a contribution towards its costs. Awards of costs in fast-track opposition proceedings are governed by Tribunal Practice Notice (TPN) 2/2015. I award costs on the following basis:

Preparing a statement	
and considering the other side's statement:	£200
Total:	£200

45. I order Duf Ltd to pay Colgate-Palmolive Company the sum of £200 as a contribution towards its costs. 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 October 2017

Teresa Perks

For the Registrar

The Comptroller – General