O/0005/24

TRADE MARKS ACT 1994

IN THE MATTER OF

APPLICATION NO. 3876511

IN THE NAME OF POIZON GLOBAL LIMITED

TO REGISTER

Even odds

AS A TRADE MARK IN CLASSES 14, 18, 20, 21, 25

AND

OPPOSITION THERETO UNDER NO. 440965

BY

ZALANDO SE

Background and pleadings

1. On 9 February 2023, POIZON GLOBAL LIMITED ("***the Applicant***") applied to register in the UK the trade mark shown on the cover page of this decision, under number 3876511 ("***the Contested Mar*k**"). Details of the application were published for opposition purposes on 3 March 2023. Registration is sought for the following goods:

Class 14 Wristwatches; clocks; precious metal alloys; jewellery boxes; bracelets [jewellery]; agates; necklaces [jewellery]; shoe jewellery; pearls [jewellery]; jewellery.

Class 18 Leather, unworked or semi-worked; purses; school bags; rucksacks; handbags; bags; travelling bags; pocket wallets; reusable shopping bags; briefcases.

Class 20 Sofas; chests for toys; hand-held mirrors [toilet mirrors]; bamboo, unworked or semi-worked; figurines of wood, wax, plaster or plastic; figurines of resin; unworked or semi-worked bone, horn, whalebone or mother-of-pearl; coathooks, not of metal; sleeping pads; camping mattresses.

Class 21 Bottle openers, electric and non-electric; glass bottles; glass mugs; ceramics for household purposes; works of art of porcelain, ceramic, earthenware, terra-cotta or glass; liqueur sets; tea services [tableware]; coffee services [tableware]; sprinklers; vases; candelabra [candlesticks]; combs; toothbrushes; cosmetic utensils; crystal [glassware].

Class 25 Clothing; shoes; hats; hosiery; gloves [clothing]; scarves; leather belts [clothing]; sashes for wear; shower caps; wedding dresses.

2. On 23 May 2023 Zalando SE ("***the Opponent***") opposed the application under section 5(2)(b) of the Trade Marks Act 1994 (***"the Act"***). The opposition is directed against all of the goods in classes 14, 18 and 25 only. The Opponent relies upon the following UK trade mark registration ("***the Earlier Mark***"):

Mark: even & odd

UK registration number: UK00910571701

Filing date: 02 January 2012

Registration date: 01 February 2013

Priority date: 13 July 2011 (Germany)

Goods relied upon:

Class 14: Precious metals and their alloys and goods in precious metals or coated therewith, not included in other classes; Jewels; Rings, earrings, ear clips, brooches, chokers, necklace chains, necklaces, pendants, chains, bracelets; Gold jewellery, silver jewllery, pearl jewellery, platinum jewellery, jewellery of rhinestone and coloured stone, wedding rings, men's jewellery, precious stones, pearls; Horological and chronometric instruments, in particular small clocks, wrist watches, parts for clocks and watches, straps for wrist watches, faces, casings for clocks and watches, clockworks, parts for clockworks; parts and fittings for the aforesaid goods (included in class 14); Housings for clocks and watches; Cases for watches [presentation]; Clock cases; Movements for clocks and watches.

Class 18: Leather and imitations of leather, and goods made of these materials and not included in other classes; Animal skins, hides; Trunks and travelling bags; Casual bags; Backpacks; Umbrellas, parasols and walking sticks; Whips, harness and saddlery; Attaché cases; Backpacks; Sport bags; Leather shoulder belts; Beach bags; Briefbags; Card cases [notecases]; Clothing for pets; Frames for umbrellas or parasols; Bags (Game) [hunting accessories]; Handbags; Haversacks; Key cases; Music cases; Net bags for shopping; Wallets; Pouch baby carriers; Purses; Satchels; Shopping bags; Sling bags for carrying infants; Slings for carrying infants; Straps for skates; Strap for soldiers' equipment; Umbrella sticks; Vanity cases, not fitted; Wheeled shopping bags.

Class 25: Clothing, footwear, headgear, excluding pyjamas and underwear for men, women and child.

3. For the purposes of the opposition, the Opponent relies upon some of the goods for which the Earlier Mark is registered as indicated above.

4. The Opponent's registration is a comparable mark[1] and claims a priority date of 13 July 2011 from the German (DE) trade mark number 302011039269. By virtue of its earlier filing date, the Earlier Mark qualifies as an earlier mark under section 6(1) of the Act. As the Earlier Mark completed its registration procedure more than five years before the filing date of the Contested Mark, it is, in principle, subject to the use provisions set out in section 6A of the Act. The Opponent has stated that it has used the mark for all the goods relied on.

5. In its statement of grounds, the Opponent contended that, overall, the respective marks are very closely similar visually, aurally, and conceptually because the distinctive elements in both marks are "EVEN" and "ODD" and the marks' minor differences do not differentiate them sufficiently. The Opponent also submitted that that the parties' goods are identical and closely similar, giving rise to a likelihood of confusion (including a likelihood of association).

6. On 8 August 2023 the Applicant filed its defence and counterstatement essentially denying all the grounds of opposition. The Applicant also requested that the Opponent provide proof of use.

7. The Opponent is represented by Boult Wade Tennant LLP.[2] The Applicant is represented by Trademarkit LLP.

Relevance of EU law

8. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Evidence and submissions

[1] Following the end of the transition period of the UK's withdrawal from the EU, all EU trade marks ("EUTM") registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (EU)' retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

[2] The Opponent's representative was initially D Young & Co LLP for these proceedings and responsible for the filing of evidence. On 24 December 2024 the Opponent requested a change in representative to Boult Wade Tennant LLP.

9. The Opponent filed evidence from three witnesses. The first is the Witness Statement of Sarah Patricia Brooks and Exhibits SB1 – SB2. Ms Brooks has been a Senior Associate and Trade Mark Attorney at D Young & Co LLP since March 2023.[3] The second is the witness statement by Dr Stefan Naumann and Exhibits SN1 – SN10. Dr Naumann is the Director of Legal Business Partner Team at Zalando, position he has held since July 2022.[4] The third, is the witness statement from Mr Frederic Teufel. Mr Teufel is the Director of Private Label Commercial at Zalando and has been working in the Private Labels division at Zalando since March 2023.[5] Therefore, all three witnesses are duly authorised to provide evidence on behalf of the Opponent.

10. Neither party requested a hearing, but the Opponent filed written submissions in lieu. I will not summarise the submissions here, but I will refer to them as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

Decision

Proof of use

11. I will begin by assessing whether there has been genuine use of the Earlier Mark.

The law

11. Section 6A of the Act states:

> "(1) This section applies where
>
> (a) an application for registration of a trade mark has been published,
>
> (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
>
> (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

[3] Witness Statement dated 11 December 2023.
[4] Witness Statement dated 11 December 2023.
[5] Exhibit SN3 dated 5 December 2023.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

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

(3) The use conditions are met if –

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

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

(4) For these purposes –

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

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

(5)-(5A) [Repealed]

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

12. As the Earlier Mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

"7. - (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) […]

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day -

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A to the United Kingdom include the European Union".

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

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

14. Consequently, the onus is upon the Opponent to prove that genuine use of the registered trade mark was made in the relevant period. The relevant period in which genuine use must be established is the five-year period ending on the date of filing of the Contested Mark. The Opponent states that the relevant period is 9 February 2018 – 8 February 2023. I find this calculation of the proof of genuine period to be erroneous. In the case before me, the correct relevant period is **10 February 2018 - 9 February 2023**. By virtue of paragraph 7 of Part 1, Schedule 2A of the Act, use within the EU is relevant for the first two years (and ten months) of the relevant period which falls prior to IP Completion Day (i.e., 31 December 2020).

Case law

15. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v*

Office for Harmonisation in the Internal Market (Trade Marks and Designs) [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

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

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

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

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

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

Form of the mark

17. For the sake of completeness, before I move on to assess if the Opponent has shown genuine use, I must first consider if I find the use of the mark as shown in the evidence to be use of the mark as registered. As outlined in *Lactalis McLelland Limited v Arla Foods AMBA*, Case O/265/22,[6] the use of the mark in a different form may also constitute use of the mark as registered. While the Earlier Mark is registered as a word-only mark, I note that some evidence shows use of the mark with some stylisation (i.e., letters represented in a round style with the words and the '&' sign pushed together without spaces):

Exhibit SN5 (page 2)

[6] At [13 – 15]. See also *Hyphen GmbH v EUIPO*, Case T-146/15, at [28-32].

Exhibit SN5 (page 3)

18. Where the Opponent has used the mark in its registered word only form this is clearly use upon which it may rely. Most of the evidence displays the mark used as word only, whilst a few pieces of evidence show the Earlier Mark used with some stylisation as shown above.

19. I find that use of the Earlier Mark, also in its minimal stylisation, amounts to use of the mark as registered because that particular form of use does not alter the distinctive character of the mark. Consequently, it is use upon which the Opponent can rely.

Evidence of use

20. The Opponent has claimed that genuine use has been made in relation to some of the goods on which it relies under the Earlier Mark for the opposition purposes as indicated above in this decision. I must consider whether, or the extent to which, the evidence shows genuine use of the Earlier Mark in relation to such goods covered under classes 14, 18, and 25.

21. The Opponent's evidence shows various extracts from the Zalando website for the UK showing the online retail of the relevant goods (displayed along with the Earlier Mark), extracts from marketing campaigns and related documentation, invoices for

the UK and Italy respectively within the relevant period, social media advertising/engagement, third-party media coverage, and annual sale figures throughout the relevant period.

22. In **Exhibit SN2** the Opponent provided extracts from the Zalando website where the opponent's goods (i.e., shoes, earrings, bracelets, necklaces (jewellery), tops (including bodysuits), sweatshirts, bags, handbags, rucksacks, trousers, jumpers, , watches, hats, caps, belts, wallets, dresses) are offered on sale. I note that this evidence is aimed at the UK consumer (prices of the goods are expressed in pounds). Although the extracts are dated after the relevant period, the Opponent clarified that the goods reported above were available on the Opponent's website within the relevant period.[7]

23. **Exhibit SN4** comprises 'Wayback Machine' prints of pages of the UK Zalando website showing details of products available for purchase. The extracts refer to November/December 2020, the majority of 2021, and August/July 2022 showing a variety of articles of clothing (i.e., shoes, top, t-shirts, jumpers, trousers, dresses, bags, scarfs, watches, jumpsuits, belts, handbags, caps, hats, rucksacks, and necklaces). The evidence is aimed at the UK consumer (the prices are shown in pounds) and covers part of the relevant period (2020 – 2022).

24. **Exhibit SN5** contains examples of advertising material in the form of marketing briefs for the entire relevant period. The evidence spans from 2019 to 2023 and refers to a variety of products (i.e., tops, dresses, shoes, dresses, caps, jumpers, t-shirts handbags, skirts, belts, scarfs). The Earlier Mark is clearly visible in the marketing material.

25. **Exhibit SN6** features promotional material in the form of marketing briefs for the period 2019-2020 referring to a range of clothing articles (i.e., dresses, shoes, handbags, tops, trousers, hats).

26. **Exhibit SN8** comprises a selection of invoices issued by the Opponent to UK clients throughout the whole relevant period (pages 1-33) and invoices issued to clients in Italy for the relevant period between 2018 and 2020 (pages 33-61). Both invoices for the UK and Italy contain a description with the initials 'EV' to identify the Opponent's mark ('Even & Odd'). The UK invoices refer to some of the relevant goods (i.e.,

[7] Witness statement by Frederic Teufel contained in Exhibit SN3 dated 5 December 2023.

dresses, watches, shoes, belts, bags, tops, wallets, rucksacks). In the invoices for Italy, I can identify some of the Opponent's goods (e.g., top, jeans, t-shirt, jumpsuits, leggings, sandals (which appears to me to be the likely meaning of 'sandali')), however most of the goods' descriptions are in Italian words which have no obvious correlation to any known English words. The Opponent has not provided further clarification on the type of goods being marketed or a translation for the invoices to enable me to understand the range of goods sold in Italy.

27. **Exhibit SN9** features a selection of articles (from print and online publications) in the UK and EU that mention the Opponent's mark as examples to show the level of media attention for the Opponent's mark. The articles provided are dated 2018, 2019, 2020, 2021 and 2022 with the majority being in English along with Italian and German issues. The articles in the English language include references to a 'jumpsuit', a 'bag', 'heels', 'cotton masks' and 'sunglasses'.

28. **Exhibit SN10** contains screenshots from the Opponent's Instagram and Facebook social media accounts showing the online promotion of the Earlier Mark throughout the relevant period along with the number of followers and likes for each social media platform. The evidence shows social media advertising mostly for clothing and accessories (for women); considering the size of this type of market in the UK (especially online), I find 28 thousand followers for the Instagram and Facebook social media platform to be of some relevance, although not extremely high. Overall, the evidence does provide a certain level of recognition of the Earlier Mark among the relevant consumers.

29. In his Witness Statement, Dr Naumann submits that the global 'Net Merchandise Value' (NMV) (i.e., annual sales) for the Opponent's goods is the following:

Global NMV (in excess of) (EUR)

NMV	2018	2019	2020	2021	2022	2023 YTD
Total	75,000,000	80,000,000	90,000,000	120,000,000	110,000,000	82,000,000

30. The NMV for the UK amounts to the following:[8]

[8] Exhibit SN7.

UK NMV (in excess of) (EUR)

NMV	2018	2019	2020	2021	2022	2023 YTD
Total	525,000	445,000	550,000	635,000	495,000	330,000

31. The evidence shows that the revenues for the UK market throughout the whole relevant period, broken down per year, have been an average of almost 500 thousand euros. The evidence is not broken down per category of goods, so I will assess these revenues in conjunction with the invoices the Opponent provided in **Exhibit SN8**. In its submissions in lieu,[9] the Opponent submitted that the evidence shows "impressive annual sales figures", however, considering that the (women's) clothing and accessory industry in the UK is likely to be worth millions, or even, billions of pounds, I find that the sales figures, albeit significant, are not excessively large. Nonetheless, to determine whether there has been genuine use, I remind myself that the test is not whether the use has been quantitatively significant, but whether there has been real commercial exploitation of the mark intended to create and preserve an outlet for the goods which are sold under or in relation to that mark. I also remind myself that the assessment of genuine use is not simply about sales figures, and I must consider them alongside other evidence of use.[10] This requires looking at the evidential picture as a whole, and not whether each individual piece of evidence shows use by itself.[11] Overall, I find that the Opponent has successfully shown consistent use of the Earlier Mark online in relation to shoes, jewellery (earrings, bracelets, necklaces), tops, t-shirts, sweatshirts, bags, handbags, rucksacks, trousers, jumpers, caps, hats, watches, belts, wallets, trousers, dresses, scarfs, jumpsuits, and skirts along with their purchase and distribution in the UK and part of the EU (Italy) as per the invoices provided. The Opponent has also promoted its mark on social media and the Earlier Mark appears in third-party journals; this further contributes to show the Earlier Mark's use.

Fair specification

[9] Dated 18 March 2024.
[10] Case T-467/20 *Industria de Diseño Textil, SA (Inditex) v EUIPO*, EU:T:2021:842.
[11] *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09.

32. Having reached the above conclusion, I must determine a fair specification upon which the Opponent is entitled to rely, bearing in mind the use that has been demonstrated.

33. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person summed up the law as being (my underlying and emphasis):

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

34. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows (at [47]) (my underlining):

> "iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd [2014]* EWHC 2631 (Ch) ("Thomas Pink") at [52].
>
> iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; Thomas Pink at [53].
>
> v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in Pan World Brands v Tripp Ltd (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; Thomas Pink at [53].
>
> vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected

to use a mark in relation to all possible variations of the particular goods or services covered by the registration. Maier v Asos Plc [2015] EWCA Civ 220 ("Asos") at [56] and [60].

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

35. In its submissions in lieu,[12] the Opponent stated that the evidence provided shows use of the Earlier Mark on class 14 goods such as necklaces, bracelets, watches, earrings, and wristwatches. I agree with the Opponent and find that the Opponent's registered specification does not cover "jewellery" at large and there is no evidence before me that shows use of any jewellery which would fall within the term "goods in precious metals or coated therewith" because the jewellery sold by the Opponent does not appear to be made from precious metals or coated therewith (albeit that some of it is described as gold or silver coloured). Therefore, bearing in mind the Opponent's specification, as registered, and the nature of the use shown, I find the fair specification for class 14 to be: "Watches; Jewellery, namely, earrings, bracelets and necklaces" rather than also containing the broad term "jewellery". Regarding class 18, the Opponent submits that the evidence shows use of the Earlier Mark for a broad selection of leather products, including, belts, wallets, handbags, backpacks, and rucksacks. Regarding the term "belts", I did not allow this term in class 18. This because "belts" in class 18 is only identified as part of bags (e.g., "shoulder belt for bags"). Differently, "belts" as clothing (which is the case here) falls within the wider definition of "clothing" in class 25. Turning to class 25, the Opponent provided a list of

[12] Dated 18 March 2024.

articles of clothing for which the evidence shows use in relation to the Earlier Mark.[13] Regarding this latter submission, I agree with the Opponent, however I find that the goods the Opponent listed, in light of the evidence provided, all are women's clothes. For this reason, I find that the fair specification for class 25 should read: "Clothing, footwear, headgear for women, excluding pyjamas and underwear".

36. Consequently, I consider that a fair specification for the Earlier Mark to be:

Class 14: Watches; Jewellery, namely, earrings, bracelets, and necklaces.

Class 18: Bags; handbags; rucksacks; wallets.

Class 25: Clothing, footwear, headgear for women, excluding pyjamas and underwear.

Section 5(2)(b)

37. Sections 5(2)(b) and 5A of the Act read 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."

"5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

Case law

38. The leading authorities which guide me are from the Court of Justice of the European Union (***"CJEU"***): *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.*

[13] According to the Opponent these are: caps, coats, dresses, jeans, jumpers, bodysuits, skirts, joggers, tops & t shirts, trousers, shorts, hoodies, leggings, high heels, boots, sandals, trainers, hats.

Thomson Multimedia Sales Germany & Austria GmbH, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The Principles

(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.

Comparison of goods

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

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

40. In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

> "It is true that goods are complementary if 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".

41. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

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.

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

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

43. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market* (Trade Marks and Designs) (OHIM), Case T-325/06, the General Court 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."

44. The competing goods are as follows:

Opponent's goods	Applicant's goods
Class 14	**Class 14**
Watches; Jewellery, namely, earrings, bracelets, and necklaces.	Wristwatches; clocks; precious metal alloys; jewellery boxes; bracelets [jewellery];

	agates; necklaces [jewellery]; shoe jewellery; pearls [jewellery]; jewellery.
Class 18	**Class 18**
Bags; handbags; rucksacks; wallets,	Leather, unworked or semi-worked; purses; school bags; rucksacks; handbags; bags; travelling bags; pocket wallets; reusable shopping bags; briefcases.
Class 25	**Class 25**
Clothing, footwear, headgear, excluding pyjamas and underwear for women.	Clothing; shoes; hats; hosiery; gloves [clothing]; scarves; leather belts [clothing]; sashes for wear; shower caps; wedding dresses.

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

Class 14

- "*precious metal alloys"*

46. I understand the term "*precious metal alloys*" to refer to the raw materials that are used to make goods such as jewellery. Differently, the Opponent's "*Jewellery, namely, earrings, bracelets, and necklaces*" constitute jewellery per se. Therefore, whilst the competing goods may share the same nature to some extent (i.e., goods made of precious metal), they would have different purpose and method of use. The Applicant's goods are more likely to be purchased by manufacturers, rather than the general public who would be the users of the Opponent's goods. However, precious metals may also be bought as an investment by members of the public. They are not in competition with each other; neither are they complementary. There would, in my view, be some shared trade channels as precious metals may be bought from jewellers. Taking all these factors into account, I find that there is a low degree of similarity between the goods.

- *"jewellery*"

47. The Applicant's term above encompasses the Opponent's "*earrings, bracelets, and necklaces*" and vice versa. Therefore, the respective terms are identical in line with the principle outlined in *Meric*.

- *"bracelets [jewellery]; necklaces [jewellery]"*

48. The terms above are identically contained in the Opponent's specification.

- *"pearls [jewellery]*"

49. I find the term above to be highly similar to the Opponent's "*Jewellery, namely, earrings, bracelets, and necklaces*". Goods such as "*earrings/bracelets/necklaces"* and "*pearls [jewellery]*" share the same nature (jewellery), method of use (jewellery worn by the user) and intended purpose (adornment of the body). These competing goods are likely to share the same trade channels as they are both usually sold in specialised shops (e.g., jewelleries) and can be in competition.

- *"Wristwatches*"

50. Albeit worded differently, the above term is identical to the Opponent's "*watches*".

- "*Clocks"*

51. "*clocks*" and "*watches*" share the same nature (both horological instruments) and intended purposes (to tell the time). However, clocks differ in their method of use from watches (the former being normally placed on a wall or a table, whilst the latter is usually worn by the user). The competing goods can also share the same trade channels (e.g., jewelleries or less specialised retail shops). Given their different method of use, the competing goods are unlikely to be in competition. Overall, I find these goods to have a high degree of similarity.

- "*jewellery boxes*"

52. The Opponent argues[14] that "*jewellery boxes*" are highly similar to the Opponent's "jewellery" goods (e.g., necklaces, pendants, chains, bracelets) since these goods are complementary (jewellery boxes are exclusively used to store jewellery) and the respective goods often share the same users and trade channels. I appreciate the Opponent's arguments, however, I find that these goods differ in their nature, intended purpose, and method of use. In addition, these goods are, in my view, neither complementary in the sense identified in *Boston Scientific* (i.e. is not essential to store jewellery in a jewellery box or case) nor in competition. Nonetheless, I believe the competing goods to likely originate from the same undertakings and bearing in mind the similarity in users and trade channels through which the respective goods reach the market, I find that the Opponent's "*Jewellery, namely, earrings, bracelets, and necklaces*" and "*jewellery boxes*" have at least a low degree of similarity.

- "*agates*"

53. "*agates*" and "jewellery" goods in the Opponent's specification (i.e., earrings, bracelets, and necklaces) are commonly sold through the same trade channels. It is not unusual for jewellery shops to also deal in precious stones, and consumers can also take the raw materials to a jeweller for them to be incorporated into an item of jewellery. There is, therefore, overlap in trade channels and users. There is also a degree of complementarity between the goods. I consider them to be similar to a medium degree.

- "*shoe jewellery*"

54. "*shoe jewellery*" shares with the Opponent's "*jewellery goods*" (i.e., earrings, bracelets, and necklaces) the same nature (jewellery) and intended purpose (aesthetic), however, it is my view that these goods differ in their method of use (bracelets, earrings, and necklaces are usually not attached to shoes). The competing goods are likely to share the same users and trade channels, even if I do not find them to be directly in competition. I consider them to be similar to a medium degree.

Class 18

[14] Submissions in lieu dated 18 March 2024.

- *"Leather, unworked or semi-worked"*

55. In its submissions in lieu,[15] the Opponent contended that:

"[…] the Class 18 goods in the Application can be subsumed under the respective category *"Leather and imitations of leather, and goods made of these materials"* of the Earlier Mark, as goods such as bags and purses are generally made of leather and imitations of leather."

56. I acknowledge that the Applicant's goods may be used in the manufacture of the Opponent's "*bags*". However, while the Opponent's finished products may be reliant on the Applicant's goods, that in itself does not make them similar in nature. In *Les Éditions Albert René v OHIM*, Case T-336/03, the GC found that:

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

57. I find this to be true of the goods before me. The respective purpose and method of use of the goods is different and the trade channels are unlikely to be the same. The users are also likely to be different with the Applicant's goods being purchased primarily by manufacturers and the Opponent's goods being purchased by the general public. Neither do I consider the goods at hand to be either in competition, or complementary in a trade mark sense. Taking all of these factors into account, and in the absence of further submissions from the Opponent, I find the respective goods to be dissimilar.

- *"purses"*

58. Albeit worded differently, purses are defined as small bags;[16] hence, the Applicant's "*purses*" is clearly identical to the Opponent's "*bags*".

- *"travelling bags; bags; reusable shopping bags"*

[15] Dated 18 March 2024.
[16] https://www.collinsdictionary.com/dictionary/english/purse.

59. The Applicant's terms above all fall within the Opponent's 'bags'. They are identical as per *Meric.*

- *"Handbags"*

60. The term above is self-evidently identical to the Opponent's "*handbags*".

- "*school bags"*

61. Albeit worded differently, I find the terms above to be identical to the Opponent's "*Backpacks*".

- "*Rucksacks*"

62. The above term is self-evidently Identical to the Opponent's "*rucksacks*".

- "*pocket wallets*"

63. The Applicant's "*pocket wallets*" falls within the wider category of the Opponent's "*wallets*". Therefore, the respective terms are identical in line with *Meric*.

- *"briefcases"*

64. I find that "*briefcases*" and the Opponent's "*bags*" share the same nature (carriers), intended purposes (carry personal items), method of use, and trade channels. However, the competing goods address different consumers (being briefcases generally more formal and less versatile than bags) and they are unlikely to be in competition. Overall, I consider these competing goods to be highly similar.

Class 25

- *"Clothing; shoes; hats; hosiery; gloves [clothing]; scarves; leather belts [clothing]; sashes for wear; shower caps; wedding dresses"*

65. The terms above fall within the wider definition of the Opponent's "*Clothing, footwear, headgear […] for women*". Thus, the respective terms are identical on the basis of *Meric*.

Conclusion on the goods comparison

66. As some degree of similarity between the respective goods is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition reliant upon the 5(2)(b) ground aimed against those goods I have found to be dissimilar (i.e., *"Leather, unworked or semi-worked"*) must fail.[17]

The average consumer and the nature of the purchasing act

67. It is necessary to determine who the average consumer is for the respective parties' goods which I have found to be similar. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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".

68. For the purposes 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 in question.[18]

69. The average consumer for the goods in class 18 and class 25 will be members of the general public. The cost of purchase for these goods is likely to vary but not to be excessively high, and the goods will be purchased relatively frequently. However, various factors are still likely to be taken into consideration during the purchasing process, such as materials used, cut, aesthetic appearance, wearability, durability, and suitability for purpose. The average consumer for the goods in class 14 will be a

[17] See *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA and *Waterford Wedgwood PLC v OHIM* - C398/07 P.

[18] *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel BV*, (Case C-342/97, para 26).

member of the general public as well as professionals (i.e., jewellers). I consider the costs of the goods to range from relatively low (for jewellery/watches made with low-cost materials) to possibly fairly high (for products crafted from valuable metal such as gold and that may be adorned with precious or semi-precious stones). The average consumer will likely consider the material of which the goods are made, size, fit, and make aesthetic considerations. The professional public is likely to carry out further considerations on the materials' quality. Thus, for the goods in classes 14, 18, and 25 I find the degree of attention will be medium (average) for the general public and above average for the professionals regarding the goods in class 14. However, the likelihood of confusion must be assessed from the perspective of the former (the general public) since they are the group who will pay the lower degree of attention.[19] I consider the purchase of the goods to be mainly visual with the goods likely being obtained by self-selection from the shelves in retail outlets, displayed in specialised shops, or selected from online catalogues (i.e., pictures of items on websites); however, I do not discount aural considerations will play their part, particularly when advice is sought from sales representatives or for word of mouth recommendations.

70. Consequently, I consider that a medium degree of attention will be paid by the average consumer when selecting the goods.

Comparison of trade marks

71. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, the CJEU held that:

> "54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer."

72. The trade marks to be compared are as follows:

Earlier trade mark	Contested trade mark

[19] Case T-356/14, [25] – [26].

even & odd	Even odds

Overall impression

73. The Contested Mark is comprised of the words “even” (with capitalised first letter) and “odds” represented in plain font. The overall impression of the Contested Mark resides in the combination of the two words that form it.

74. The Earlier Mark consists of the words “even” and “odd” with an ampersand placed between them. I agree with the Opponent that “&” will be readily understood as representing the conjunction “and” functioning as conjunction for the words “even” and “odd”; however, I disagree that this symbol plays a lesser role in the mark’s overall impression.[20] I find that all the elements contained in the Earlier Mark are correlated to create a unitary meaning and equally contribute to the mark’s overall impression.

Visual similarity

75. Both marks are represented in standard typeface and share the same words “even” and “odd” placed in the same order. The only points of visual difference between the respective marks are the presence of the “&” in the middle of the Earlier Mark (separating “even” and “odd”) and the additional “s” in the Contested Mark for the word “odds”. Overall, the respective marks are visually similar to a high degree.

Aural similarity

76. The Contested Mark consists of eight letters forming the words “even” and “odds”. The Earlier Mark is comprised of seven letters consisting in the words “even” and “odd” with the addition of the conjunction “&” in the middle of the mark. The relevant consumer will read the ampersand as “and”. All the words constituting the competing marks are English dictionary words and the relevant consumers will voice them entirely predictably. The relevant consumers will find the Earlier Mark slightly longer

[20] Witness statement of Sarah Brooks dated 11 December 2023.

in its enunciation than the Contested Mark due to the additional "and" sound. I find the marks to be aurally similar to a high degree.

Conceptual similarity

77. Taken separately the words "even" and "odd" in the Earlier Mark can have multiple meanings, however, as they are conceptually linked by the ampersand, I consider them to be two adjectives conveying the mathematical definition of numbers divisible by two ("even") and not divisible by two ("odd").[21] The relevant consumers are likely to perceive the Contested Mark as conveying the expression "even odds" (i.e., a situation where the chance of success is equal to that of failure). In this circumstance, I find the respective marks to be conceptually dissimilar.

78. In the eventuality I am mistaken, and the relevant consumers will overlook the "&" in the Earlier Mark as contended by the Opponent,[22] I find that the relevant consumers could perceive both marks as conveying similar meanings referring to either the probability of chances or even/odd numbers. In this case I find the marks to be conceptually similar to a high degree.

Distinctive character of the Earlier Mark

79. 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 *WindsurfingChiemsee* 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

[21] Apart from stating that "&" is used to indicate "and", the Opponent did not provide any other meaning for the mark.
[22] Submissions in lieu dated 18 March 2024.

contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

80. Dealing first with the inherent distinctiveness of the Earlier Mark, the Opponent's mark does not seem to describe or allude in any way to the goods for which it has been registered. I find that it possesses a medium degree of inherent distinctive character.

81. Turning to the question of whether the inherent distinctiveness of the Earlier Mark has been enhanced through use, the Opponent provided evidence that the Earlier Mark has been used in relation to women's clothing and shoes, certain accessories, jewellery, and leather products (bags and belts) in the UK at least since 2018. The Opponent provided evidence of distribution of its goods in Italy and various parts of the UK, consumer engagement given by third-party mentions in journals online (in English, Italian, and German) and its social media platforms, and an average revenue of almost 500 thousand euros per year between 2018 and 2023 for the UK market. Albeit the Opponent did not provide evidence showing the market share it occupies, or the investments made in promoting the mark, I can assume the market for clothing, jewellery, and accessories is worth millions (if not billions) of pounds. Therefore, although I find that the Opponent sufficiently proved genuine use of the Earlier Mark, I do not believe that the evidence provided shows that the Earlier Mark has acquired enhanced distinctiveness through use.

Likelihood of confusion

82. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make

direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

83. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion occurs where the average consumer recognises that the marks are different but puts the similarities between them down to the respective goods coming from the same or linked undertaking(s).

84. I have found the respective goods to range from a low level of similarity to identity. The members of the general public are likely to pay an average (medium) level of attention for the contested goods. The distinctiveness of the Earlier Mark is medium. The marks have a high degree of visual similarity, they are aurally highly similar, and have either a high degree of conceptual similarity or are dissimilar (according to how the words "even" and "odd(s)" are perceived in both marks). The purchase of the contested goods is considered to be mainly visual but the potential for aural use is borne in mind. Weighing all of these factors, and bearing in mind the effects of imperfect recollection, I find that the average consumer is likely to misremember the presence of the "&" in the Earlier Mark and mistake that mark for the Contested Mark. Thus, there is a likelihood of direct confusion. I make this finding even in the event the consumers would consider the marks to be conceptually dissimilar. In those circumstances, I find that the identity/level of similarity between the competing goods and the aural/visual similarity between the marks outweighs the conceptual dissimilarity between them.

Conclusion

85. The opposition under section 5(2)(b) largely succeeds and the application will be refused in respect of the following goods in classes 14, 18, and 25 for which I found similarity or identity:

Class 14 Wristwatches; clocks; precious metal alloys; jewellery boxes; bracelets [jewellery]; agates; necklaces [jewellery]; shoe jewellery; pearls [jewellery]; jewellery.

Class 18 purses; school bags; rucksacks; handbags; bags; travelling bags; pocket wallets; reusable shopping bags; briefcases.

Class 25 Clothing; shoes; hats; hosiery; gloves [clothing]; scarves; leather belts [clothing]; sashes for wear; shower caps; wedding dresses.

86. The application may proceed to registration for '*Leather, unworked or semi-worked'* in class 18 for which the opposition has failed and the other goods applied for in classes 20 and 21 which were not opposed.

Costs

87. As the Opponent has been largely successful, it is entitled to an award of costs. Bearing in mind the relevant scale set out in the TPN 1/2023 I award costs as follows:

Official fee	£100
Preparing statement of grounds and considering the applicant's defence and counterstatement	£250
Preparing evidence	£600
Preparing submissions in lieu of a hearing	£350
Total:	**£1,300**

88. I order POIZON GLOBAL LIMITED to pay Zalando SE the sum of **£1,300**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 8th day of January 2025

Andrea Rossi

For the Registrar