

O/0286/25

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NUMBERS

3733375, 3734126, 3733182 AND 3733146

BY

GLOBAL BEAUTY PRODUCTS LIMITED

TO REGISTER THE FOLLOWING TRADE MARKS

BROW BOMB

LIFT & BROW BOMB

BOMB BROW & LASH LIFT SYSTEM

BROW BOMB BROW GLUE

AND CONSOLIDATED OPPOSITIONS THERETO UNDER NUMBERS

432650, 432652, 432654 AND 432835

BY

SELITA SRL

Background and pleadings

1. Global Beauty Products Limited (“the Applicant”), has applied for a number of trade marks (collectively “the contested marks”) in the UK, the details of which are as follows:

UKTM no. 3733375

(“the ‘375 mark”)

BROW BOMB

Filed on 15 December 2021 and published on 14 January 2022 for goods and services in classes 3, 41 and 44.

UKTM no. 3734126

(“the ‘126 mark”)

LIFT AND BROW BOMB

Filed on 17 December 2021 and published on 14 January 2022 for goods and services in classes 3, 41 and 44.

UKTM no. 3733182

(“the ‘182 mark”)

BOMB BROW AND LASH LIFT SYSTEM

Filed on 15 December 2021 and published on 14 January 2022 for goods and services in classes 3, 41 and 44.

UKTM no. 3733146

(“the ‘146 mark”)

BROW BOMB BROW GLUE

Filed on 15 December 2021 and published on 21 January 2022 for goods and services in classes 3, 8, 11, 16, 21, 41 and 44.

2. Each application seeks registration for the following goods and services:

Class 3: Cosmetic and beauty preparations; non-medicated toilet preparations; depilatory preparations, lotions, waxes, oils and creams; wax treatments for removing body hair; wax strips for removing body hair; exfoliants; hair regrowth inhibitors; preparations for use before, during and after shaving or hair removal; personal care products; beauty products; makeup; makeup sets; cosmetics for use on the face; cosmetics for use on hair; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

Class 41: Educational services; providing of training and instruction in the field of cosmetic beauty; advice, information and consultancy relating to the aforesaid; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

Class 44: Hygiene and beauty care treatment and services for humans; salon and spa services (beauty); rental of equipment for human hygiene and beauty care; advice, information and consultancy relating to the aforesaid services; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

3. Additionally, the '146 mark seeks registration for the following goods and services:

Class 8: Razors; epilators; hair removal devices and implements; hair growth inhibitor devices; hand instruments for use in shaving or depletion, namely, depilatory appliances, non-electric shavers; parts fittings and accessories for the aforesaid goods.

Class 11: Apparatus and appliances for heating, melting and dispensing depilatory waxes and creams; parts fittings and accessories for the aforesaid goods.

Class 16: Printed matter and promotional publications; stationery and office requisites, excluding furniture; instructional and teaching materials; parts, fittings and accessories for the aforesaid goods.

Class 21: Cosmetic spatulas for use with depilatory preparations; articles for cleaning purposes.

4. Each application is opposed by Selita srl (“the Opponent”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).¹ It relies on the following trade mark registration for the purpose of each of its oppositions:

UKTM no. 918299870

(“the earlier mark”)

Brow Bomber

Filed: 31 August 2020

Registered: 23 December 2020

Class 3: Essential oils and aromatic extracts; Toiletries; Cleaning and fragrancing preparations

Class 8: Hand-operated hygienic and beauty implements for humans and animals.

Class 35: Advertising, marketing and promotional services.

Class 41: Education, entertainment and sports; Education, entertainment and sport services; Publishing, reporting, and writing of texts.

5. The trade mark upon which the Opponent relies qualifies as an earlier mark pursuant to section 6 of the Act. The earlier mark is not subject to proof of use since it

¹ The Opponent also originally relied upon a ground of opposition under section 3 of the Act in its original pleadings but following a lengthy procedural process, which resulted in an appeal to the Appointed Person, that ground is to be dealt with separately. This decision shall therefore deal with the section 5(2)(b) ground only.

completed its registration process less than 5 years before the filing date of the each of the contested marks. Consequently, the Opponent may rely upon all the goods and services of its registration without having to show what use it has made of them on the market.

6. Under section 5(2)(b) of the Act, the Opponent claims that as a result of the similarity between the marks and the identity/similarity of goods and services, there exists a likelihood of confusion, including a likelihood of association, as between the respective marks on the part of the relevant public.

7. The Applicant filed a defence and counterstatement for each opposition denying any similarity between the marks or that there is similarity between the respective goods and services, putting the Opponent to strict proof of its claims.

8. The Applicant is represented by Asenda Law Ltd and the Opponent is represented by Beck Greener LLP. Both parties filed evidence during the evidence rounds. A hearing was requested and took place before me via video conference on 16 November 2023. At the hearing Mr Kime appeared as counsel for the Applicant instructed by Asenda Law Ltd and Mr Buehrlen appeared for the Opponent. Both parties filed skeleton arguments and authorities ahead of the hearing. Suffice to say, I have read and considered all the evidence, authorities and submissions (both oral and written) advanced by the parties. Whilst I do not propose to summarise these in full, I have taken them into account in coming to this decision. I shall refer to any salient points to the extent that I consider necessary during my decision.

Relevance of EU law

9. 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

Opponent's evidence in chief

10. The Opponent chose not to file evidence in chief.

Applicant's evidence

11. The Applicant's evidence consists of the witness statement of Mr Thomas Broster dated 20 January 2023 accompanied by twenty eight exhibits marked TB1-TB28. Mr Broster is a solicitor and director at Asenda Law, the Applicant's firm of representatives. His statement goes to support the Applicant's contention that the goods and services at issue are dissimilar or only similar to a very low degree, that the marks are dissimilar and that there would be no likelihood of confusion.

12. Noting that Mr Broster's witness statement consists of both evidence of fact and submissions, he files the following evidence:

- Various screenshots taken from the EUIPO goods/services comparison tool website www.euipo.europa.eu accessed on 12 January 2023 to show that the various goods and services at issue are not similar or only similar to a low degree.²
- A first instance decision numbered O/333/11 where it was found that there was no similarity between class 8 goods and cosmetics in class 3.
- Dictionary definitions of the terms 'cosmetics', 'toiletries' and 'makeup' in order to show that the respective goods and services are not similar.³
- Screenshots taken from www.healthline.com, Superdrug and Boots' main websites, the latter two entities described as the UK's largest health and beauty retailers. Reference is made within these extracts to the primary nature of essential oils and aromatic extract goods which are described and categorised as products being for health and wellbeing/wellness, alternative therapy or medicinal purposes as opposed to beauty and cosmetic products.⁴ This it is argued demonstrates that there is no similarity between the respective parties' goods/services.

² Exhibits TB1-TB7

³ Exhibits TB11-TB13.

⁴ Exhibits TB8-TB10.

- Screenshots taken from Superdrug and Boots' websites showing the categories in which they market their goods and to demonstrate that these retailers categorise beauty products including make-up, cosmetics and toiletries separately, under entirely different sections on their websites. It is said that these retailers do not market these goods side by side or categorise them together under one heading.⁵
- Evidence to show that Boots and Superdrug are the market leaders in these sectors.⁶
- Submissions regarding the characteristics of toiletries which it lists as dental, deodorant, female hair removal, incontinence, menstrual care, travel size minis, and washing and bathing products.⁷ A list is produced giving examples of the types of products falling within this category as displayed on Boots' and Superdrug's websites which it is said bear no similarity to cosmetics and makeup.
- A list of brands which is said Superdrug categorises as toiletries is produced to include brands such as Dove, Oral B, Veet, Venus and Always. A further list is produced of those it categorises as makeup to include Max Factor, Kiss and Rimmel. It is said that toiletries are purely functional hygienic-centric goods coming within the aforementioned dictionary definitions.
- A sample list is produced of well-known and well-regarded cosmetic brands said to market their goods purely as 'cosmetic and beauty goods' to consumers within the UK. These include Benefit, Charlotte Tilbury, Mac Cosmetics, Max Factor and Urban Decay.⁸
- A YouGov survey extract dated 2018 is produced in which it was found that 93% of men have never worn make-up, whereas 13% of women have never worn makeup.⁹ This is said supports the contention that make up and cosmetic goods are generally marketed towards women and that this category are the largest consumers and users of these products, whereas toiletries are not gender specific.

⁵ Exhibit TB15.

⁶ Exhibit TB14.

⁷ Paragraphs 24-25 and Exhibit TB17.

⁸ Paragraphs 27-32 and Exhibits TB18-23.

⁹ Exhibit TB24.

- A Facebook IQ research report is produced titled “Understanding the make-up shopping journey of today’s connected consumer in the UK”¹⁰ in which it is said 91% of those participating in the survey discovered new products in self-service stores or online but that 79% of those surveyed purchased new products in-store. This it is said supports the contention that marks are more likely to be purchased via visual means.

Opponent’s evidence in reply

13. The Opponent filed evidence in reply in the form of a witness statement of Tetyana Shcherbyna dated 28 February 2023 accompanied by twelve exhibits marked XX01-XX12.

14. Ms Shcherbyna is the founder and director of the Opponent and has worked for the company since 2017. The purpose of Ms Shcherbyna’s statement is to counter the Applicant’s claim that a number of goods and services are dissimilar.

15. Ms Shcherbyna produces various screenshots taken from the Applicant’s website showing that it markets the goods and the services that they offer as cosmetics.¹¹ Further screenshots are produced taken from the Opponent’s website www.londonlash.com showing its BROW BOMBER product and the step by step procedure for its application. It is also said that the Opponent offers online training courses, to illustrate how it trains beauticians to apply its products. The Opponent’s products are promoted via Facebook and two screenshots taken from this platform dated 9 September 2020 and 25 September 2020 are produced. Further screenshots are produced showing the range of products on offer by the Opponent in the UK.¹² A further undated post is produced headed THE BROW BOMBER which received 3 likes and 268 views. A description within the text states that the ‘brow bomber kit’ contains essential oils to include macadamia oil, argan oil, marigold extract and chamomile flower extract. This is said to show that there is similarity between cosmetics and essential oils.

¹⁰ Exhibit TB27.

¹¹ Exhibits XX1 and XX2.

¹² Exhibits XX8-XX12.

DECISION

Section 5(2)(b)

16. Section 5(2)(b) of the Act states as follows:

“5(2) A trade mark shall not be registered if because-

(a)

(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.

17. Section 5A of the Act reads as follows:

“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.”

The principles

18. 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 to mind the earlier mark, is not sufficient;

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

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

Comparison of the goods and services

19. When conducting a goods and services comparison, all relevant factors should be considered as per the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc*, Case C-39/97, where the court stated at paragraph 23 that:

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

20. I am also guided by the relevant factors for assessing similarity identified by Jacob J in *Treat* [1996] R.P.C. 281, namely:

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

21. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) stated that:

“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 für Lernsysteme v OHIM - Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or Applicant relies on those goods as listed in paragraph where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

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

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

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

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

24. Whilst on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

25. Further in accordance with section 60A of the Act the fact that goods and services may be recorded in different classes is not a basis for a finding of dissimilarity on this fact alone. Likewise, the fact that goods and services appear in the same class does not automatically make them similar either.

26. The goods and services to be compared are as follows:

Applied for goods and services	Opponent's goods and services
Class 3: Cosmetic and beauty preparations; non-medicated toilet preparations; depilatory preparations, lotions, waxes, oils and creams; wax treatments for removing body hair; wax strips for removing body hair; exfoliants; hair regrowth inhibitors; preparations for use before, during and after shaving or hair removal; personal care products; beauty products; makeup; makeup sets; cosmetics for use on the face; cosmetics for use on hair; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.	Class 3: Essential oils and aromatic extracts; Toiletries; Cleaning and fragancing preparations.
Class 8: Razors; epilators; hair removal devices and implements; hair growth inhibitor devices; hand instruments for use in shaving or depletion, namely, depilatory appliances, non-electric shavers; parts fittings and accessories for the aforesaid goods.	Class 8: Hand-operated hygienic and beauty implements for humans and animals.
Class 11: Apparatus and appliances for heating, melting and dispensing depilatory waxes and creams; parts fittings and accessories for the aforesaid goods.	

Class 16: Printed matter and promotional publications; stationery and office requisites, excluding furniture; instructional and teaching materials; parts, fittings and accessories for the aforesaid goods.	
Class 21: Cosmetic spatulas for use with depilatory preparations; articles for cleaning purposes.	
	Class 35: Advertising, marketing and promotional services.
Class 41: Educational services; providing of training and instruction in the field of cosmetic beauty; advice, information and consultancy relating to the aforesaid; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.	Class 41: Education, entertainment and sports; Education, entertainment and sport services; Publishing, reporting, and writing of texts.
Class 44: Hygiene and beauty care treatment and services for humans; salon and spa services (beauty); rental of equipment for human hygiene and beauty care; advice, information and consultancy relating to the aforesaid services; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and	

conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.	
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27. A good proportion of the evidence/submissions filed by the Applicant focussed on arguing that the goods and services at issue were dissimilar or only similar to a very low degree. Further it was argued that since the Opponent had not filed evidence to counter the Applicant's claims then this evidence should be accepted without question. Whilst I have taken into account all the submissions and evidence in this regard there is no requirement for me to follow the evidence or submissions advanced by the Applicant particularly if those do not accord with my own understanding of the market. As Arden LJ stated by in *esure Insurance Ltd v Direct Line Insurance Plc*:¹³

"56What the hearing officer had to determine was what the average consumer would have thought of the two marks and whether they would have confused him. The services sold by the parties were identical and were of a kind familiar to members of the public. In those circumstances, I see no reason why the hearing officer should not have decided the issue of similarity on his own in the absence of evidence apart from the marks themselves and evidence as to the goods or services to which they were, or, in the case of *esure's* mark, were to be applied. As Lord Diplock held in *Re GE Trade Mark* at 321:

"My Lords, where goods are of a kind which are not normally sold to the general public for consumption or domestic use but are sold in a specialised market consisting of persons engaged in a particular trade, evidence of persons accustomed to dealing in that market as to the likelihood of deception or confusion is essential. A judge, though he must use his common sense in assessing the credibility and probative value of that evidence is not entitled to supplement any deficiency in evidence of this kind by giving effect to his own subjective view as to whether or not he himself would be likely to be deceived or confused...But where goods are sold to the general public for consumption or domestic use,

¹³ [2008] EWCA Civ 842 and reaffirmed by Mr Whitehead sitting as the appointed person in O/0064/24.

the question whether such buyers would be likely to be deceived or confused by the use of the trade mark is a “jury question”. By that I mean: that if the issue had now, as formerly, to be tried by a jury, who as members of the general public would themselves be potential buyers of the goods, they would be required not only to consider any evidence of other members of the public which had been adduced, but also to use their own common sense and to consider whether they would themselves be likely to be deceived or confused.

The question does not cease to be a “jury question” when the issue is tried by a judge alone or on appeal by a plurality of judges. The judge’s approach to the question should be the same as that of a jury. He, too, would be a potential buyer of the goods. He should, of course, be alert to the danger of allowing his own idiosyncratic knowledge or temperament to influence his decision, but the whole of his training in the practice of the law should have accustomed him to this, and this should provide the safety which in the case of a jury is provided by their number. That in issues of this kind judges are entitled to give effect to their own opinions as to the likelihood of deception or confusion and, in doing so, are not confined to the evidence of witnesses called at the trial is well established by decisions of this House itself.”

28. The evidence filed by Mr Broster on behalf of the Applicant to show that third party retailers (particularly Boots and Superdrug) market and sell cosmetics and toiletries separately, therefore rendering the respective goods dissimilar is not in my view indicative of the sector in which the parties operate. Firstly, as these retailers are extremely large undertakings, they may not necessarily reflect what is typical in the market. Secondly, the evidence that brands only sell toiletries or only sell cosmetics with no overlap between them, does not accord with my own understanding of that market. The goods and services are of a kind that are normally sold to the general public for consumption or domestic use, and I believe that average consumers would easily understand this market. The assessment is, therefore, a ‘jury question’ and despite Mr Kime’s arguments at the hearing it is entirely permissible for me to question the credibility and probative value of that evidence. Mr Kime argued that it was inappropriate for me to regard myself as a ‘typical average consumer’ because I would

have a greater perception and understanding of the goods/services at issue due to my role as a Hearing Officer. I disagree. Provided that I do not allow any particular 'idiosyncratic knowledge or temperament' to influence my decision then it is entirely permissible for me to take a common-sense approach when undertaking a comparison of the goods and services at issue. Furthermore, it is also open to me to take judicial notice of notorious facts which are sufficiently well known that there can be no dispute.¹⁴

29. Before undertaking the comparison I note that in its pleadings, save for '*depilatory preparations, lotions, waxes, oils and creams; wax treatments for removing body hair; wax strips for removing body hair; hair regrowth inhibitors; preparations for use before, during and after shaving or hair removal*' the Applicant admitted that the respective goods/services were identical or similar as pleaded by the Opponent, but not necessarily the extent of similarity.

30. I shall bear this in mind, as I go through the terms in turn, grouping terms together where appropriate.¹⁵

Class 3

Cosmetic and beauty preparations; beauty products; makeup; makeup sets; cosmetics for use on the face; cosmetics for use on hair;... none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

31. The Applicant's goods can be categorised as all types of beauty and cosmetic products. The Applicant provided dictionary definitions, defining 'cosmetics' as substances used on the body or face to improve your appearance;¹⁶ 'make up' as a substance used in the face to improve or change your appearance¹⁷ and 'toiletries' as substances used in washing yourself and preventing the body from smelling unpleasant.¹⁸ It was argued that the average consumer would understand them to be

¹⁴ Iain Purvis KC in *Harley* O/168/22 paragraphs 8-25

¹⁵ *Separode* Trade Mark BL O-399-10 (AP)

¹⁶ Paragraph 18 of Mr Broster's statement.

¹⁷ Paragraph 19 of Mr Broster's statement.

¹⁸ Paragraph 20 of Mr Broster's statement.

significantly different in nature and serving different purposes namely the former being used for the purposes of changing or improving the appearance whereas the latter is used for hygiene and cleansing purposes.

32. The Opponent's goods include the term *toiletries* which I consider is a broad term which includes beauty preparations and goods for personal hygiene to enhance a person's appearance. As such I consider that this broad term encompasses all the aforementioned applied for goods and are identical in according to the principles on Meric. If I am wrong then I consider that they are highly similar overlapping in nature, purpose, end user, channels of trade and provider/producer. I also consider that the goods are complementary. I do not agree with the narrow interpretation as advanced by the Applicant in its evidence or that consumers would view toiletries and cosmetics/makeup separately and distinct from each other. It is my understanding that a significant proportion of average consumers would understand that beauty brands sell both cosmetics and toiletries side by side. Whilst evidence has been produced showing that Boots and Superdrug market their goods on their websites under separate categories this does not mean that the goods are dissimilar. There may be a number of reasons why Boots and Superdrug categorise their goods under separate headings one of which may purely be to make the search function easier for its consumers. It has to be remembered that both Boots and Superdrug predominantly sell cosmetic, toiletries and medicine and whilst their respective websites may not display the goods under the same category when selling the goods online, the position in their physical stores is different. Here the goods are sold side by side or within close proximity to each other. Further other stores other than the ones identified also sell both toiletries and cosmetics within the same department. Consequently, I place little weight on the Applicant's evidence that purports to show otherwise.

Non-medicated toilet preparations; depilatory preparations, lotions, waxes, oils and creams; wax treatments for removing body hair; wax strips for removing body hair; exfoliants; hair regrowth inhibitors; preparations for use before, during and after shaving or hair removal; personal care products; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

33. The Applicant argued that those goods that relate to removing excess or unwanted body hair serve a purely functional purpose and that such use would be for practical purposes. Examples were given to include for religious, sporting or medical reasons.¹⁹ Consequently, it was argued that these goods were not similar to the Opponent's goods in class 3. I disagree. All of the applied for goods can be categorised as toiletry preparations or goods for the removal of hair. For the same reasons as I set out earlier, I consider that these goods would fall within the broader category of the Opponent's toiletry goods and are therefore identical in according to *Meric*. If I am wrong then they are similar to a high degree overlapping in nature, purpose, end user, channels of trade, provider/producer and are complementary to the Opponent's *toiletries*.

Class 8

Razors; epilators; hair removal devices and implements; hair growth inhibitor devices; hand instruments for use in shaving or depletion, namely, depilatory appliances, non-electric shavers; parts fittings and accessories for the aforesaid goods.

34. The Opponent has registered "*hand-operated hygienic and beauty implements for humans ...*" in the same class, which clearly encompass the applied for goods. They are all instruments implements used for hygienic and beauty purposes. They are identical in according to *Meric*. Further the *parts fittings and accessories* of the aforementioned goods are clearly similar to between a medium and high degree, to the Opponent's goods overlapping in purpose, nature, user, trade channels and producer. Further they are complementary.

Class 11

Apparatus and appliances for heating, melting and dispensing depilatory waxes and creams; parts fittings and accessories for the aforesaid goods.

35. These goods would be similar to the Opponent's class 3 *toiletries* on the basis that apparatus and appliances for the purpose of use in hair removal, waxing and creams would be complementary to the preparations and toiletries themselves and vice versa being essential and indispensable to the other. Further consumers would assume that the responsibility for the goods is the same undertaking. I consider that they would

¹⁹ Paragraph 19 of counterstatement.

also be directed at the same user via the same trade channels. They are similar to a medium degree.

Class 16

Printed matter and promotional publications; stationery and office requisites, excluding furniture;parts, fittings and accessories for the aforesaid goods.

36. The Applicant has admitted similarity of these goods to the Opponent's *education ... services* on the basis that these goods would be used in training or teaching. I agree. I also note that the Opponent's specification includes '*publishing, reporting, and writing of texts*' services. Whilst the services have a different nature and end user to the goods, there is nevertheless a complementary nature between the goods and services as the goods would not exist were it not for the provision of services for their publication and therefore indispensable. I consider that the goods and services are similar to a low degree.

Instructional and teaching materials; parts, fittings and accessories for the aforesaid goods

37. I consider that these goods are similar to the Opponent's education services in class 41 in so far that they are complementary and are directed at the same end user. Those involved in the provision of *education and training services* would also provide the instructional manuals and teaching materials to accompany these services. I consider that they are similar to a low degree.

Class 21

Cosmetic spatulas for use with depilatory preparations; articles for cleaning purposes.

38. These goods are used for the application of the Opponent's products and as such I consider them to be complementary to the Opponent's *toiletries*. The respective goods are directed at the same user, through the same trade channels. I consider that they are similar to a medium degree to the Opponent's toiletries.

Class 41

Educational services; providing of training and instruction in the field of cosmetic beauty; advice, information and consultancy relating to the aforesaid; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels,

body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

39. The Applicant admitted that the applied for services in class 41 were identical or highly similar to the Opponent's "*education.. services*". In this regard, I consider the Opponent's "*education ...services*" to be a broad term which are clearly either self-evidently identical or identical in accordance with *Meric*, encompassing the applied for terms or vice versa.

Class 44

Hygiene and beauty care treatment and services for humans; salon and spa services (beauty);none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes, shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

40. The applied for services are those specifically related to beauty or hygiene and provided for by beauty salons or beauticians and the like. Whilst the Opponent does not have services in class 44, its goods in class 3 would be the subject matter of the services as applied for by the Applicant in class 44. Hygiene and beauty care treatment and services would include services that use the products for which the Opponent has registered namely *toiletries, essential oils and cleaning and fragrance preparations* in class 3 as well as the *hand operated hygienic and beauty implements for humans...* in class 8. I consider that the goods are complementary to the services since they are indispensable or important for the provision of treatments and beauty services and would be regarded as being provided by the same undertaking and target the same public. I also consider that there would be a degree of competition between the goods and the services since a consumer may choose to buy a kit and undertake the treatment themselves as opposed to treatment at a salon. Consequently, I consider that the applied for services are similar to a medium degree, being closely aligned with the Opponent's class 3 and 8 goods.

Rental of equipment for human hygiene and beauty care; advice, information and consultancy relating to the aforesaid services; none of the aforesaid goods/services for use in relation to bath bombs, bubble cars, shower gels, body scrubs and polishes,

shower gels bath salts, soap, shampoo, conditioner, shampoo and conditioner bars, solid deodorant, solid shower gels, candles, wax melts or accessories thereof.

41. The Applicant has admitted that all the applied for services in class 44 were similar to the Opponent's goods and services because such services would include the use of class 3 and 8 goods when providing those services through the same channels of trade and to the end user. The goods and service would be provided alongside each other. Given this admission I consider that the goods and the services are similar to a low to medium degree.

Average consumer and the purchasing process

42. When considering the opposing marks, the average consumer is deemed reasonably informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion the average consumer's level of attention is likely to vary according to the category of goods/services in question.²⁰

43. 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

44. Whilst accepting that the average consumer would be members of the general public, Mr Broster filed evidence to suggest that cosmetics were predominantly directed at women whilst toiletries were not gender specific.²¹ Whilst survey evidence was produced to support this argument, I note that no permission was sought to file such evidence, neither were the requirements as set out in the Trade Mark Manual or

²⁰ *Lloyd Schuhfabrik Meyer*, case c-342/97.

²¹ Ibid Paragraph 39 of Mr Broster's witness statement and Exhibit TB24.

the criteria as laid out in *Imperial Group plc & Another v. Philip Morris Limited & Another*²² adhered to. In particular, I have no indication as to the parameters in which the questions were put to those surveyed and the pool of people from which the survey was taken appears to be very small. Further the survey was taken in 2018. Whilst it may well be true that cosmetics and makeup are predominantly purchased by women, I do not consider that it is necessary to categorise the average consumer into subcategories based on gender, because I do not consider that men or women would pay different levels of attention or would undertake different considerations when selecting the respective goods/services. Consequently, even if permission had been sought to introduce this evidence it is of little relevance. The results are not particularly insightful or helpful and I place little weight on it. It is sufficient to say that the average consumer includes general members of the public who wear/use the products or receive the treatments. Furthermore, I consider that the average consumer would include business professionals working in the beauty sector, for example, those running beauty salons or beauticians/technicians and the like.

45. In so far as the considerations undertaken when selecting the goods the parties agree that visual considerations would dominate the process with the marks being encountered in catalogues, advertisements in magazines and being self-selected from retail outlets, and or their online equivalents. Aural considerations cannot be discounted however, as a result of requests made to sales staff or via word of mouth recommendations. Similarly, the services will include the same visual and aural considerations from the actual signage at the premises themselves or via advertisements/leaflets or word of mouth recommendations.

46. Considerations such as cost, suitability, quality and reputation will be taken into account in the purchasing process for both the goods and the services. The goods/services cover a range of prices and would be purchased/selected in varying degrees of frequency. Consequently, I consider that an average (medium) level of attention would be undertaken in the selection process of both the goods and the services for both the general member of the public and professionals.

²² [1984] RPC 293

Comparison of the trade marks

47. 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 the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

49. The respective trade marks are shown below:

Contested marks	Earlier mark
<u>The ‘375 mark</u> BROW BOMB	Brow Bomber
<u>The ‘126 mark</u> LIFT AND BROW BOMB	
<u>The ‘182 mark</u> BOMB BROW AND LASH LIFT SYSTEM	

The '146 mark	
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BROW BOMB BROW GLUE	
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Overall impression

THE CONTESTED MARKS

The '375 mark - BROW BOMB

50. The '375 mark is for the two words BROW and BOMB presented in upper case. There are no other elements to contribute to the mark beyond the words themselves. Whilst there are a number of meanings attributed to the word brow (as outlined by the Applicant) to include the forehead and summit of a hill, I consider that in the context of the goods/services in question, the word is more likely to be regarded by a significant proportion of average consumer as shorthand for eyebrow. Consequently, whilst the overall impression lies in the two words in combination, I consider the word BOMB to be more distinctive due to the non-distinctive nature of the word BROW which describes the part of the body on which the goods and services are to be used/directed. As I will deal with later in my decision when considering the conceptual message of the mark, the words in combination, give the impression of something that will make one's eyebrows explode; that is ones that are more prominent, defined and voluminous.

The '126 mark - LIFT AND BROW BOMB

51. Similar considerations will be given to the elements BROW and BOMB in the '126 mark. The addition of the words 'LIFT AND...' to these words are purely descriptive and non-distinctive since they will be regarded as boosting, elevating or enhancing the appearance of the eyebrow. The overall impression thus resides in the totality of the words, but less impact will be given to the words LIFT, AND and BROW given their non distinctive, descriptive nature.

The '182 mark - BOMB BROW AND LASH LIFT SYSTEM

52. The addition of the words '...AND LASH LIFT SYSTEM' in the '182 mark will again be seen as descriptive of or related to eyelashes and eyebrows being boosted/enhanced and the technique used to make them appear more voluminous,

prominent and defined. The overall impression resides in the totality of the words but again weighted in favour of the words BROW BOMB as before but of the two words the word BROW being less distinctive, for the same reasons as outlined.

The '146 mark - BROW BOMB BROW GLUE

53. Similarly, the overall impression of the '146 mark resides in the totality of the words with the words BROW BOMB having more impact relative to the words 'BROW GLUE' because the latter will be regarded as descriptive of the adhesive that affixes the product onto the eyebrow. These words therefore play a less distinctive role in the overall impression of the mark when regarded as a whole. Of the two words BROW and BOMB it is the word BOMB that dominates for the same reasons as previously outlined.

Overall conclusion

54. In all the contested marks it is the combination of the words BROW BOMB weighted in favour of the word BOMB which carries the message as to the origin of the goods/services and in which the overall impression resides. The additional words will be regarded as referring to the end result, technique or application of affixing or using the product to/on the eyebrows.

THE EARLIER MARK

Brow Bomber

55. The earlier mark consists of the two words 'Brow Bomber' presented in title case. The overall impression of the earlier mark lies in the combination of these words, however as with the contested marks, I consider that it will be weighted in favour of the word Bomber given that the word Brow would be perceived by a significant proportion of average consumers as shorthand for eyebrow.

Comparison between the '375 mark and the earlier mark (BROW BOMB v Brow Bomber)

56. No consideration will be given to the difference in casing between the respective marks as notional and fair use of word marks means that they may be presented in any case, colour or font. The marks coincide visually and aurally with the identical words BROW and BOMB**, each word presented in the same order. As the words are

ordinary English dictionary words they will also be pronounced identically. When each mark is pronounced, they differ only to the extent that, the addition of the letters *ER at the end of the word BOMB in the earlier mark makes the second element two syllables long as opposed to one. The earlier mark is therefore marginally longer in length, overall, both visually and aurally. However, given that as a general rule the beginning of marks have greater impact than their endings, I consider that they are highly visually and aurally similar.

57. Conceptually the marks share the same concept of eyebrows exploding meaning that they allude to products/services which make the eyebrow more prominent, defined and voluminous. I have considered the other meanings as advanced by the Applicant but do not consider that those meanings would be immediately graspable upon first impression particularly in the context of the goods. Neither do I consider that a significant proportion of average consumers would see the word bomber as referring to a military aircraft or vehicle when regarded in the context of the goods. If anything the addition of the letters 'E','R' turns the word Bomb into an agentive noun namely pertains to the person i.e. the person as opposed to the thing. Whilst such a grammatical distinction is unlikely to be noticed by the average consumer, I accept that the addition of the letters E-R to the word Bomb may alter the meaning slightly in the mind of the consumer, from the 'brow bomb' product to the person doing the 'brow bombing'. I do not consider that this changes the conceptual comparison to any significant degree, however. Consequently, I consider that the marks are conceptually highly similar.

Comparison between the '126 mark and the earlier mark (LIFT AND BROW BOMB v Brow Bomber)

58. The same considerations apply in respect of the elements BROW BOMB/Brow Bomber as set out above. However, the contested '126 mark also contains additional words namely LIFT AND...These add points of visual and aural difference to the respective marks. In light of my comments regarding the role these additional elements play in the overall impression of the '126 mark (due to them being non-distinctive and descriptive) balanced against their position at the beginning of the '126 mark, I consider that, overall, the respective marks are visually and aurally similar to a below medium degree.

59. Conceptually the same considerations are in play in respect of the elements already referred to. However, whilst the words LIFT AND.. add a point of conceptual difference they do not change the conceptual comparison to any significant degree. The words will merely be perceived as products that boost and elevate the eyebrows and make them more defined, prominent and voluminous. Overall, I consider that these merely reinforce/complement the meaning already attributed. I consider that the marks are conceptually similar to between a medium and high degree.

Comparison between the ‘182 mark and the earlier mark (BROW BOMB AND LASH LIFT SYSTEM v Brow Bomber)

60. The same considerations apply as set out in relation to the ‘375 mark above. However, the ‘182 mark also contains additional words namely ...AND LASH LIFT SYSTEM which appear after the words BROW BOMB. These words add points of visual and aural difference to the marks, however, not significantly so, in light of their position at the end of the mark and their non distinctive/descriptive nature. Weighing up the similarities as against the differences I consider that the respective marks are aurally and visually similar to a medium degree.

61. Conceptually the words ...AND LASH LIFT SYSTEM add the concept of the additional dual application or technique that would be applicable to the eyelashes, making them also more pronounced and voluminous. Again, for the same reasons whilst these additional words contribute some conceptual meaning to the ‘182 mark which differs to the earlier mark, I do not consider that those additions are particularly distinctive or conceptually significant. Consequently, I consider that the respective marks are conceptually similar to a medium degree.

Comparison between the ‘146 mark and the earlier mark (BROW BOMB BROW GLUE v Brow Bomber)

62. The additional of the words BROW GLUE to the words BROW BOMB in the ‘146 mark creates a visual and aural difference such that the marks are visually and aurally similar to between a medium to high degree. Conceptually the additional words will be regarded as descriptive and non-distinctive referring to an adhesive that affixes the BROW BOMB products to the eyebrow. Again, the additional words do not create any significant conceptual difference over and above the word BROW BOMB/Brow

Bomber as aforesaid. I consider that the marks are conceptually similar to between a medium and high degree.

Distinctive character of the earlier mark

63. The case of *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, sets out the legal position to determine the distinctive character of a mark. In this case 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).”

64. Registered trade marks possess varying degrees of inherent distinctive character, some being suggestive or allusive of a characteristic of the goods and services on offer, to those with high inherent distinctive character such as invented words which have no allusive qualities. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark the greater the likelihood of confusion.

65. While the Opponent filed evidence in reply, it did not file evidence in chief to support a claim for enhanced distinctive character. Notwithstanding this, the evidence that was filed was not of such a nature that would support a claim in this regard, in any event. I only, therefore, have the inherent position to consider.

66. The earlier mark consists of the two ordinary dictionary words Brow and Bomber in combination. The distinctiveness of the mark lies in the combination of these two words, weighted in favour of the word Bomber for the same reasons as before. The words in combination have no direct connection to the goods and services of the registration, other than being allusive as to goods and services directed at the eyebrow. The combination of words is unusual and is likely to be perceived by the average consumer of products that make the eyebrows explode that is to be more prominent, defined and voluminous. In this regard I consider that when taken as a whole the earlier mark is inherently distinctive to a medium degree.

Likelihood of Confusion

67. When considering whether there is a likelihood of confusion between the marks, I must consider whether there is direct confusion, where one mark is mistaken for the other or whether there is indirect confusion; where the consumer recognises that the marks are not the same but, nevertheless, puts the similarities between the marks and the respective goods/services down to the same or related source.

68. A number of factors must also be borne in mind when undertaking the assessment of confusion. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods/services and vice versa. It is also necessary for me to keep in mind a global assessment of all relevant factors when undertaking the comparison and that the purpose of a trade mark is to distinguish the goods and services of one undertaking from another. In doing so, I must consider 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 that he has retained in his mind.

69. The differences between the two types of confusion were explained in *L.A. Sugar Limited v By Back Beat Inc*,²³ by Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, who noted that:

“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 recognised 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, 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.).

²³ BL O/375/10

(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).”

70. I bear in mind that the examples as set out by Mr Purvis in *L.A.Sugar* (above) are not exhaustive and that they are only intended to be illustrative of the general approach.²⁴ Furthermore, in *Liverpool Gin*, Arnold L.J. pointed out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion. A finding of indirect confusion should not be made merely because two marks share a common element; it is not enough that one mark merely calls to mind another, this is mere association, not indirect confusion.²⁵

71. I remind myself that I found the following:

- The respective goods and services are either identical or similar in varying degrees.
- The average consumer will include members of the general public as well as professionals, beauticians and those who run their own salons for instance. In either capacity they will pay an average level of attention during the selection/purchasing process, predominantly via visual means but not discounting aural considerations.
- The respective marks are similar visually, aurally and conceptually ranging between a high and a below medium degree.
- The earlier mark is inherently distinctive overall to a medium degree.

72. Dealing with the ‘375 mark first. Having found that the marks are highly similar visually, aurally and conceptually for goods and services that are identical or similar, I consider that average consumers whether they are the general members of the public or professionals will imperfectly recall the marks and mistake the one for the other. I do not consider that the difference created by the inclusion/omission of the letters ‘ER’ positioned at the end of the second element in the earlier mark is sufficient for the average consumer to be able to distinguish between the marks, especially given that they will not be compared side by side. Since as a general rule greater emphasis is

²⁴ *Liverpool Gin Distillery Limited v Sazerac brands LLC* [2021] EWCA Civ 1207

²⁵ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

placed on the beginning of marks the difference created by the letters 'ER' is unlikely to create a sufficient impact and may be swallowed up by the identity of the remaining elements. Taking account of the interdependency principle, the same finding would apply even for those goods and services that I found to be similar to only a low degree, because the high similarity between the marks in all other respects counteracts the low similarity between the respective goods and services. There is a likelihood for the '375 mark to be directly confused with the earlier mark.

73. In so far as the remainder of the contested marks I consider that the addition of the other elements is sufficient for these marks not to be directly confused with the earlier mark. However, given that the additional words are non-distinctive and/or descriptive, the combination of the words BROW and BOMB/Bomber will be imperfectly recalled or misremembered within these marks with the average consumer believing that the additional elements to these combination of words as indicative of sub brands or brand extensions namely related to different ranges provided for by the same or related undertaking. Despite the marks being further away in terms of similarity as a result of the additional words they are still similar to a medium/below medium degree as a result of the common elements being perceived as identical. This is sufficient for the marks to be indirectly confused. The average consumer having imperfectly recalled the BROW BOMB/Brow Bomber element will put the differences down to variant marks, giving different descriptive/non-distinctive information about the goods/services sold under the marks.

74. I consider that the shared common use of the words BROW BOMB** in all the marks will lead the average consumer paying an average level of attention to conclude that the goods/services originate from the same or related undertaking.

Conclusion

75. The oppositions have succeeded in their entirety under section 5(2)(b).

Overall outcome

76. I note that the Applicant has issued cancellation proceedings against the earlier mark and therefore this decision is a provisional decision pending resolution of those proceedings. If the earlier mark remains registered for the goods and services

considered in this decision, my decision will become final, and all the applications shall be refused registration for those goods/services.

77. A final decision in respect of the applications will be made once the outcome of the cancellation proceedings is known. These proceedings are, therefore, suspended until such time.

78. Any period of appeal will run from the date of my final decision.

Costs

79. Costs will be covered in the final decision when the full outcome of this opposition becomes clear.

Dated this 27th day of March 2025

Leisa Davies

For the Registrar