O/0361/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003997067
BY MAX DERRICK DAVID ANDERSON
TO REGISTER THE TRADE MARK:

IN CLASS 25

AND IN THE MATTER OF OPPOSITION THERETO
UNDER NO. OP600003329
BY EVRYWEAR LTD

BACKGROUND AND PLEADINGS

1. On 30 December 2023, Max Derrick David Anderson ("the applicant") applied to register the mark displayed on the cover of this decision, under UK trade mark number UK00003997067 ("the contested mark"). The application was published for opposition purposes on 12 April 2024. Registration is sought for the following goods:

    Class 25: Jackets [clothing]; Ready-to-wear clothing; Clothes; Jerseys [clothing]; Hoods [clothing]; Casual clothing; Jackets being sports clothing; Clothing for leisure wear; Sports clothing; Leisure clothing; Athletic clothing; Clothing for cycling; Triathlon clothing; Men's clothing.

2. On 6 June 2024, EVRYWEAR LTD ("the opponent") filed a notice of opposition. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is directed against all the goods of the application. The opponent relies upon its following series of marks to support its claim.

    EVRYWEAR

    UK trade mark number: UK00003949467
    Filing date: 28 August 2023
    Registration date: 17 November 2023
    Goods relied upon, class 25: Clothing

3. Given the respective filing dates, the opponent's mark is an earlier mark, in accordance with section 6 of the Act. As it had not been registered for more than five years at the date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. Therefore, the opponent can rely on all of the goods identified without having to demonstrate use.

4. Within its pleadings the opponent claims that the same goods and similar marks will result in a likelihood of confusion, arguing that these factors will potentially lead

consumers to believe that the products associated with the EVRYWEAR mark are connected in some way to our brand.

5. The applicant denies the ground of opposition.

6. Both parties represent themselves.

7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1 to 3 of rule 20 of the Trade Mark Rules 2008 but provides that rule 20(4) shall continue to apply. Rule 20(4) stipulates that:

> "the Registrar may, at any time, give leave to either party to file evidence upon such terms as the Registrar thinks fit".

The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. The applicant requested to file evidence to show use of its mark and that both marks have co-existed on the UK market for a significant period of time without confusion, which was granted.

8. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard only if (i) the Office requests it, or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary, neither did the parties elect to file written submissions in lieu. This decision is taken following a careful perusal of the papers.

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

10. The applicant filed evidence on 4 September 2024. The applicant's evidence comprises the witness statement of Mr Max Derrick David Anderson, the applicant, dated the same, together with exhibits JS1 to JS3. The purpose of the evidence is to show that the competing trade marks have co-existed on the market for a long period of time without consumer confusion.

DECISION

Legislation

11. Section 5(2)(b) of the Act reads as follows:

> "5(2) A trade mark shall not be registered if because-
>
> […]
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

Case law

12. I am guided by the following principles which are gleaned from the decisions of the Court of Justice of the European Union ("CJEU") in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany*

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

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

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

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

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

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

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

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

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

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

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

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

Comparison of the goods

13. The goods to be compared are set out in the table below:

Opponent's goods	Applicant's goods
Class 25: Clothing	Class 25: Jackets [clothing]; Ready-to-wear clothing; Clothes; Jerseys [clothing]; Hoods [clothing]; Casual clothing; Jackets being sports clothing; Clothing for leisure wear; Sports clothing; Leisure clothing; Athletic clothing; Clothing for cycling; Triathlon clothing; Men's clothing.

14. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Meric'),*[1] the General Court held that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category designated by the trade mark application and vice versa.

15. The applicant's goods are all clothing goods, consequently, under the principles of *Meric* the competing goods are identical.

[1] Case T-133/05, paragraph 29

The average consumer and the nature of the purchasing act

16. As indicated in the caselaw cited above, it is necessary to decide who the average consumer is for the parties' goods and how they purchase them. "Average consumer" in the context of trade mark law means the "typical consumer."[2] The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question.[3]

17. I find that the average consumer of the goods at issue is likely to be a member of the general public. The cost of the purchase is likely to vary, depending on the item of clothing, but, overall, they will be relatively inexpensive. On average, consumers are likely to purchase these goods rather frequently. I find that consideration will be given to the materials used, the fit, the aesthetic appearance and the durability of the goods. Taking the above factors into account, I find that the average consumer will demonstrate a medium level of attention in respect of these goods. The goods are likely to be obtained by self-selection from the shelves of a retail outlet, online or through a catalogue equivalent. Overall, I am of the view that visual considerations would dominate the purchasing process.[4] However, I do not discount aural considerations entirely as it is possible that the purchasing of these kinds of goods would involve discussions with sales assistants.

Distinctive character of the opponent's mark

18. The distinctive character of a trade mark can be measured only, first, by reference to the goods in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

[2] *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).
[3] *Lloyd Schuhfabrik Meyer*, Case C-342/97.
[4] *New Look Limited v OHIM,* joined cases T-117/03 to T-119/03 and T-171/03, paragraph 50

> “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).
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> 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).”

19. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods will be somewhere in between. 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.

20. Further, although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use (nor was it required to do so). Consequently, I have only the inherent position to consider.

21. I have no submissions from either party regarding the distinctiveness of the earlier mark. Despite this, I observe that the opponent's mark is a word only mark that consists of the word "EVRYWEAR", which is an invented word with no dictionary definition. Nevertheless, consumers tend to naturally break down trade marks into elements which they can identify and understand, as such, they will identify the word "WEAR" within the earlier mark which will be allusive of the intended purpose of the goods. Whilst the letters "EVRY" will be perceived as short for, or a misspelling of, EVERY. In relation to the clothing goods registered, I have considered whether the mark could be perceived as being allusive of the goods. Whilst it does contain the element "WEAR" at the end of the mark which would be allusive of the goods, the mark as a whole would still be viewed as a made-up word. I have considered whether the mark could be understood as referring to every type of clothing wear and therefore allusive of the goods, however, this would be an unusual phrasing that does not fit with the natural meaning of all types of clothing wear and that would not be immediately grasped by the average consumer. Further, I retain in my mind that words can have more than one meaning and that the mark may be understood as a play on words for the common word 'everywhere', particularly when encountered aurally. Overall, taking everything into consideration I consider the earlier mark possesses a medium degree of inherent distinctive character.

Comparison of the marks

22. It is clear from *Sabel BV v. Puma AG,*[5] that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM,* Case C-591/12P, that:

> "34. […] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is

[5] Case C-251/95, paragraph 23

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."

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

24. The respective trade marks are shown below:

Applicant's mark	Opponent's mark
	EVRYWEAR

Overall impressions

25. As described above, the opponent's earlier mark is a word only mark comprising the word "EVRYWEAR". Therefore, the overall impression of the mark lies within the word itself.

26. The contested mark is a black and white figurative mark which includes the word "EVRYWEAR" in large standard typeface in upper font, with "EST.2023" in smaller font underneath surrounded with the outline of a globe on a horizontal axel. Below this is the word "LONDON" again presented in small font. All of this is presented

in white on a black square background. In my view, the overall impression is dominated by the word “EVRYWEAR” which is displayed in large font in the center of the mark, with the globe providing a contribution. As for the “EST.2023” and “LONDON” these play a smaller role as they are presented in much smaller font.

Visual comparison

27. Both competing marks contain the word “EVRYWEAR”. However, the applicant’s mark also contains the elements “EST.2023” and “LONDON” in addition to the outline of a globe surrounding the words “EVRYWEAR” and “EST.2023” on a black square background, all of which is absent from the opponent’s mark. Taking into account the overall impressions, I find that the competing marks are visually similar to a medium degree.

Aural comparison

28. Consumers will not attempt to verbalise the element “EST.2023” as this will merely be seen as referring to the establishment date of a company or mark and in my view, consumers do not generally tend to articulate information about establishment dates. Neither will the word “LONDON” be pronounced as this is presented in very small font and will be viewed as referring to the geographical origin of the goods. As such, both the competing marks encompass three identical syllables, i.e. “EV-REE-WARE”. Consequently, I find that the competing marks are aurally identical.

Conceptual comparison

29. The competing marks will conceptually overlap due to the presence of the identical word “EVRYWEAR” found within each of the respective marks, which will be perceived as discussed above under the distinctive character. As for the applicant’s mark, the globe device will be understood as such. The additional elements of the applicant’s mark “EST.2023” and “LONDON” will merely be seen as denoting the year the mark was established and the geographical area in which the mark is trading, both of which are weak concepts. Consequently, the marks are conceptually similar to a medium degree.

Honest and concurrent use

30. I note that within the applicant's defence, it states *"Our business was actively trading before the opposer applied for their trademark and therefore has already built up a loyal consumer presence who would not confuse our brand with a new brand on the market."*[6] The applicant filed evidence to show that its mark and the opponent's mark co-existed on the market at the same time under the defence of honest and concurrent use. The evidence is made up of four pages. The first two relate to the applicant's mark and the second two pages relate to the opponent's mark. The first page shows photos of people wearing clothing displaying the applicant's mark. However, the photos are undated, and the photos do not appear to be from a webpage marketing the clothing. The second page displays what is claimed to be data taken from the applicant's website showing sessions of activity between July 2023 and March 2024. However, evidence of the website is not provided, only evidence of social media platforms which do not display the applicant's mark, nor show that the goods are offered to the public. Consequently, from the evidence provided, I am unconvinced that the applicant's mark has had any material presence on the market that would warrant a defence of honest concurrent use. Notwithstanding this, even if I were to find that it had, for reasons discussed below, the evidence filed fails to demonstrate honest and concurrent use.

31. In *Match Group, LLC & Ors v Muzmatch Ltd & Anor* [2023] EWCA Civ 454 at [115] to [117], Arnold LJ held that honest concurrent use is not a separate defence in a trade mark case, but a factor which can be taken into account in deciding whether use of the later mark will affect the functions of the earlier mark. A use which was initially infringing could eventually cease to be infringing if the trade mark proprietor took no action, there was substantial parallel trade for a long period, and as a result the trade marks came to be understood by the relevant class of consumers as denoting the goods/services of more than one trader. In that scenario there would no longer be a likelihood of confusion.

[6] TM8 Q8

32. Taking the first point, that no action was taken (in this case by the opponent) and keeping in mind *Aceites del Sur-Coosur SA v OHIM, Case C-498/07 P*,[7] whilst these proceedings appear to be the first that I am aware of between the parties regarding the "EVRYWEAR" marks, I note that the opponent took action against the applied for mark as soon as feasibly possible, i.e. once the contested mark had been applied for and published.

33. With regards to the length of time that the marks co-existed on the market, I observe that in *Budejovicky Budvar NP v Anheuser-Busch Inc, Case C-482/09*,[8] the courts found that there was honest and concurrent use where the marks co-existed on the market for a period of 30 years.

34. In the case before me, even if I were to accept the applicant's claim that its mark was used on the market since July 2023 (which is not a clear finding that I can make from the evidence provided), I am unable to determine when the opponent's mark was first used on the market. Therefore, it is impossible for me to determine the period of co-existence. Even if I were to accept that the marks had co-existed from July 2023, at best, this gives little over a year before opposition proceedings were brought against the applicant's mark. In my view, keeping in mind the case law, I do not consider this to be a sufficiently lengthy period of time. Moreover, as discussed above, there is no evidence of substantial parallel trade in this time.

35. There is nothing to show the marks appear side by side in comparable market environments.[9] Furthermore, there is nothing to indicate that consumers have become accustomed to identifying that the marks have different commercial origins. Therefore, it does not follow that consumers have become conditioned to understanding that the goods are on offer from two different undertakings. Consequently, I do not therefore find that the defence of honest concurrent use has been made out.

[7] Paragraphs 82 and 83
[8] Case C-482/09, EU:C:2011:605
[9] *Compass publishing BV v Compass Logistics Ltd* [2004] RPC 41

Likelihood of confusion

36. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertaking being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and the nature of the purchasing act. In doing so, I must be alive to the fact that the average consumer rarely has an 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.

37. I have found:

- The goods to be identical.
- The average consumer of the goods will be the general public who will pay a medium level of attention during the purchasing process.
- The purchasing process will be predominantly visual, however, I have not discounted aural considerations.
- The competing marks are visually and conceptually similar to a medium degree and aurally identical. The opponent's mark is inherently distinctive to a medium degree.

38. The marks share the identical word "EVRYWEAR". The marks differ in the additional elements within the applicant's mark that are not replicated within the opponent's mark such as the globe device, "EST.2023" and "LONDON". As a result of the size and positioning of the globe device, it is my opinion that the visual differences are not overcome by the aural identity of the marks. In my judgement,

consumers paying a medium level of attention during the purchasing process would not mistake or misremember the marks for one another due to the clear visual differences. This is so even taking into account imperfect recollection and the interdependency principle. Consequently, I do not find that there is a likelihood of direct confusion, even where the parties' goods are identical.

39. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis QC, (as he then was) sitting as the Appointed Person, explained 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 recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.
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> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
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> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).

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

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

40. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal.[10] I recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.[11]

41. Furthermore, in *Liverpool Gin*,[12] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing 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.

42. Although consumers will recognise the differences between the competing marks, they will also identify the identical shared word “EVRYWEAR”, which is a creative and unusual phrase to use in relation to the goods and contains a unique spelling. Further it is the distinctive element within the marks and either the dominant (in the case of the opponent’s mark) or co-dominant element (in the case of the applicant’s mark). Whether consciously or unconsciously, this will lead the average consumer through the mental process described in *L.A. Sugar*. With this in mind, it is my view that the difference in the globe device, and use of non-distinct elements such as

[10] *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207
[11] *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17
[12] *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207

the establishment date and the geographical location will be perceived as a plausible brand extension, sub brand or brand variant. For example, the opponent's mark being viewed as a more basic variation, and the applicant's mark perceived as a more eye-catching variation with additional information/elements both of which are logical variant use. Therefore, I am satisfied that the use of the identical word "EVRYWEAR" which contains the same unusual phrasing and identical misspelling is unlikely to be perceived as merely coincidental. Instead, it will be believed that the competing marks originate from the same or economically linked undertakings, particularly as the goods are identical. Consequently, I consider there to be a likelihood of indirect confusion.

Conclusion

43. The opposition under section 5(2)(b) of the Act has been successful. Therefore, subject to any successful appeal against my decision, the application will be refused registration for the applied-for goods.

Costs

44. As the opponent has been successful, it is therefore, entitled to a contribution towards its costs. As the opponent is unrepresented, it was invited by the Tribunal on 19 October 2024 to indicate whether it intended to make a request for an award of costs in the event that it was successful, and if so, it was requested to complete a costs proforma including accurate estimates of the number of hours spent on a range of given activities relating to defending the proceedings. The deadline for providing the costs proforma was 18 November 2024. However, the opponent failed to file a completed cost proforma with the Tribunal. Consequently, no award for costs will be made other than for the official fees. I therefore award costs to the opponent on the following basis:

Official fee	£100
TOTAL	**£100**

45. Accordingly, I hereby order Max Derrick David Anderson to pay EVRYWEAR LTD. the sum of **£100**. 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 15th day of April 2025

Sarah Wallace
For the Registrar