

O/0615/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003764887

BY NANJING YC TECHNOLOGY LIMITED

TO REGISTER:

AUXTUR

AS A TRADE MARK IN CLASSES 7, 8 & 9

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP600002593 BY

YIJUAN CAI

BACKGROUND AND PLEADINGS

1. On 12 March 2022, Nanjing YC Technology Limited (“the applicant”) applied to register the trade mark on the cover page of this decision in the UK (“the applicant’s mark”). The application was published for opposition purposes on 15 July 2022 and registration is sought for the following goods:

Class 7: Robotic electric glue guns; Cordless electric drills; Drilling hammers; Electric chain saws; Power-operated jig saws; Electric knife sharpeners; Electric planers; Shears, electric; Thread mills [power tools]; Power-driven wrenches; Power-operated ratchet wrenches; Power-operated rivet guns; Screwdrivers, electric; Power hammers; Centrifugal pumps; Washing installations for vehicles.

Class 8: Vegetable slicers; Garden tools, hand-operated; Weeding forks [hand tools]; Abrading instruments [hand instruments]; Bits [hand tools]; Cutting tools [hand tools]; Graving tools [hand tools]; Hollowing bits [parts of hand tools]; Saws [hand tools]; Utility knives; Adjustable spanners; Spanners [hand tools]; Pipe bending apparatus [hand-operated tool]; Polishing irons [glazing tools]; Squares [hand tools]; Hand tools, hand-operated; Multi-purpose shears; Tool belts [holders]; Dog clippers; Screwdrivers, non-electric.

Class 9: Cases for smartphones; Carpenters' rules; Electronic distance meters; Folding rulers; Measuring rulers; Measuring tapes; Micrometers; Slide calipers; Glass graduated scales; Protractors [measuring instruments]; Square rulers for measuring; Surveying instruments; Surveyors' levels; Sunglasses; Goggles for sports; Gloves for protection against accidents; Dust protective masks.

2. On 14 October 2022, the applicant’s mark was partially opposed under the fast track procedure by Yijuan Cai (“the opponent”). The opposition is based on section

5(2)(b) of the Trade Marks Act 1994 (“the Act”), is aimed at the applicant’s class 9 goods only and is reliant upon the following trade mark:

AuxTop

UK registration no. 3735140

Filing date 21 December 2021; registration date 1 April 2022

Relying on all goods, namely:

Class 9: Mouse [computer peripheral]; Keyboards; Card readers; Scales; Headphones; Gauges; Telescopes; Chargers.

(“the opponent’s mark”)

3. By virtue of relying on 5(2)(b) grounds, the opponent’s argument is that the applicant’s mark is similar to its own and is to be registered for identical or similar goods. As such, the opponent claims that there is a likelihood of confusion between the marks at issue.
4. The applicant has filed a counterstatement wherein it, generally, denied the claims against it. However, I note that the applicant, when discussing its own class 9 goods admits that “only a small part of the products are similar.”¹
5. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008 but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

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

6. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. While no leave was sought in respect of these proceedings, I do consider it necessary to discuss the position regarding the applicant’s correspondence dated 10 March 2023, which I will do so as a preliminary issue below.

¹ See paragraph 2 of the applicant’s counterstatement

7. The applicant is represented by Rarlon Business Consulting Ltd and the opponent is represented by Globevat Ltd. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally 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 and I note that neither party filed written submissions in lieu. This decision is taken following a careful perusal of the papers.
8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

PRELIMINARY ISSUE

9. As alluded to above, on 10 March 2023 (being during the period allowed for parties to file written submissions), the applicant filed an email which included what was referred to as 'relevant evidence materials'.² As these are fast track proceedings, if either party wished to file evidence, they are required to first seek leave from the Tribunal. As I have set out above, neither party made any formal request for leave to file evidence. Therefore, it was not appropriate for the applicant to simply attempt to file evidence of fact without any request to do so. That being said, an issue before me now is that following the filing of this evidence, the Tribunal did not confirm the issues to the applicant. Ordinarily, the Tribunal would have confirmed the preliminary view that the evidence was not accepted and provided the applicant with an opportunity to make the appropriate request if it so wished (and to re-file

² The materials filed are the same as those included with the applicant's initial TM8 which was not accepted into proceedings due to the evidentiary content thereof. The applicant was informed of this issue in the letter dated 1 February 2023. Further, on 20 December 2022, the applicant was also made aware of the fact that these proceedings are fast track proceedings and it was confirmed that it was expected that the parties will not be permitted to file evidence.

said evidence in the appropriate format, i.e. being accompanied with a signed statement of truth).

10. As this was overlooked, it is open for me to now write out to the applicant on similar terms. However, having considered the evidence filed, I do not consider that it is necessary to do so. This is on the basis that even if I were to accept the evidence into the present proceedings, it would be of no assistance to the applicant for a number of reasons. Firstly, it is not clear the purpose of the evidence filed as it is not accompanied by any narrative evidence such as a witness statement or affidavit. Secondly, the evidence consists of a range of un-dated photographs showing products bearing the 'AUXTUR' branding that are of no assistance to the issues before me. Thirdly, the print-outs from websites show either the products for sale in US dollar or confirmation of actual sales to customers in the United States of America and are, as such, of no assistance to the position in the relevant territory, being the UK. Lastly, the evidence is either undated or taken from after the filing date of the applicant's mark (being 13 March 2022) so is of no assistance to the position as at the relevant date.

11. In light of my comments above, the evidence filed by the applicant is dismissed and I will say no more about it.

DECISION

Section 5(2)(b): legislation and case law

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

“(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 or association with the earlier trade mark.”

13. Section 5A of the Act states as follows:

“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.”

14. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

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

15. The opponent’s mark qualifies as an earlier trade mark under the above provisions. As the opponent’s mark had not completed its registration process more than five years before the application date of the contested mark, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent can rely upon all of the goods for which its mark is registered.

16. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (“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 goods

17. The competing goods are as follows:

The opponent's goods	The applicant's goods
<u>Class 9</u> Mouse [computer peripheral]; Keyboards; Card readers; Scales; Headphones; Gauges; Telescopes; Chargers.	<u>Class 9</u> Cases for smartphones; Carpenters' rules; Electronic distance meters; Folding rulers; Measuring rulers; Measuring tapes; Micrometers; Slide calipers; Glass graduated scales; Protractors [measuring instruments]; Square rulers for measuring; Surveying instruments; Surveyors' levels; Sunglasses; Goggles for sports; Gloves for protection against accidents; Dust protective masks.

18. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

“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”.

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

- (a) The respective 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.

20. The only comments I have in respect of the comparison of goods from either party are those put forward by the applicant in the counterstatement which are reproduced as follows:

“The goods of the two trademark applications are different. Our applicants applied for three class of 7, 8, and 9, while the opponent only applied for class 9, only a small part of the products are similar, and there is no similarity. Therefore, it is unreasonable for the other party to ask the Trademark Office to reject our trademark application on the grounds of a small amount of similarity.”

21. The above submissions are not particularly clear. However, I am willing to take away from them that the applicant concedes that there is a ‘*small*’ level of similarity between ‘*a small part*’ of the goods at issue. This concession means that I must conclude that at least *some* goods are similar, but not *all* of them. On this point, I am of the view that the concession of the applicant is not sufficiently clear in assisting in the determination as to which goods it considers to be similar and which it does not. I will, therefore, proceed to conduct a comparison of the goods in the ordinary way but will bear the applicant’s concession in mind.

22. Upon review, the only point of similarity I can find between the applicant’s goods and those of the opponent lies between the opponent’s “scales” and “gauges” and the following goods of the applicant:

“Carpenters’ rules; Electronic distance meters; Folding rulers; Measuring rulers; Measuring tapes; Micrometers; Slide calipers; Glass graduated scales; Protractors [measuring instruments]; Square rulers for measuring; Surveying instruments; Surveyors’ levels.”

23. While the opponent’s terms can cover a range of different types of scales or gauges, they are broad enough to cover those types of goods used in the trade, such as for the purpose of building or carpentry, for example. As a result, I consider that there is some degree of overlap in purpose between these goods on the basis that they can all be used for the end purpose of measuring something. That being said, I consider any overlap to be somewhat limited on the basis that the opponent’s goods measure either weight or pressure whereas the applicant’s measure distance or the level of a surface. Given that the goods are all types of measurement tools, they can be said to be used by the same user, being a member of a trade that may require use of various types of measurement devices for their

work. As for trade channels, I have nothing before me to suggest that a producer of a scale or a gauge would also produce the goods of the applicant. While that may be the case, the goods may be available for sale via the same specialist retailer, albeit in different sections. Lastly, I do not consider that any of the remaining factors overlap as the nature and method of use of the goods are different and neither do they have a competitive or complementary relationship. Taking all of this into account, I am of the view that level of overlap discussed above are only sufficient to warrant a finding that these goods are similar to only a low degree.

24. It can be said that “gloves for protection against accidents” and “dust protective masks” in the applicant’s specification can be used by the same user as the opponent’s goods, being members of the trade. Further, following the same reasoning in the preceding paragraph, the goods can be said to overlap to a degree in trade channels as they are goods that may be available for sale via the same specialist retailers, albeit in different sections. While I appreciate the overlap in user and limited overlap in trade channels, I am of the view that all other factors differ and I do not consider that the aforementioned overlaps are sufficient to warrant a finding that the goods are similar to any sufficient degree. These goods are, therefore, dissimilar.

25. As for the remaining goods of the applicant, namely “cases for smartphones”, “sunglasses” and “goggles for sports”, I see no obvious level of similarity with any of the opponent’s goods. As a result, I consider that these goods are dissimilar.

26. As some degree of similarity between goods is necessary to engage the test for likelihood of confusion, this means that the opposition under section 5(2)(b) aimed against those goods will fail.³ However, the opposition against the following goods may proceed:

Class 9: Carpenters' rules; Electronic distance meters; Folding rulers;
 Measuring rulers; Measuring tapes; Micrometers; Slide calipers;

³ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

Glass graduated scales; Protractors [measuring instruments]; Square rulers for measuring; Surveying instruments; Surveyors' levels.

The average consumer and the nature of the purchasing act

27. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

28. I have set out above that the average consumer for the goods at issue will be members of the trade. That being said, I consider that some goods at issue have a wider reach amongst members of the general public. For example, the applicant's “protractors [measuring instruments]” will cover those goods used by schoolchildren in mathematics class and the opponent's “scales” can cover ordinary household bathroom or kitchen scales. Therefore, I find that the average consumer for the goods at issue will be both members of the general public at large and members of the trade.

29. For the most part, the goods are targeted at both sections of the average consumer base and are likely to be available at either general retailers, be that supermarkets or DIY retailers or their online equivalents. While that may be the case for a majority of the goods, I am of the view that some goods (such as surveying instruments, for

example) will only be selected by members of the trade and, for those consumers, the goods will be available via specialist retailers or their online equivalents. Regardless of who the consumer is, the purchases will involve primarily visual considerations, however, I also consider that there may be an aural element to the selection of the goods in the form of advice from sales representatives or word of mouth recommendations.

30. I do not consider that the goods at issue are everyday items meaning that the purchase of these goods will take place on an infrequent basis. The goods and services at issue are likely to range in cost from relatively inexpensive items such as protractors to fairly expensive items such as surveying instruments. As for the level of attention paid by the average consumer, this will also vary on the basis that the average consumer, depending on what they are selecting, is likely to have different considerations. For the most part, I consider that a medium degree of attention will be paid as the consumer, regardless of who it is, will consider factors such as price, durability and materials used. However, for some goods, I consider that this will extend to both lower and higher (but not high) degrees of attention. For example, when selecting something like a protractor for schoolchildren, the average consumer is likely to pay a lesser degree of attention. However, for goods such as surveying instruments, the average consumer is likely to consider the ordinary factors set out above but is also likely to give enhanced consideration to factors such as accuracy and precision of the instrument itself.

Distinctive character of the opponent's mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-

108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

32. 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 or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has not pleaded that its mark has obtained an enhanced level of distinctiveness nor has it filed any evidence to that effect. Therefore, I have only the inherent position to consider.

33. The opponent's mark is a word only mark, being 'AuxTop'. While presented with a capital 'A' and a capital 'T', its nature as a word only mark means that it may be presented as both 'auxtop' and 'AUXTOP'. I am of the view that average consumers will view the mark as a made-up word with no obvious meaning and, as such, I do not consider that the mark will be descriptive of or allusive to the goods at issue. As a result, I am of the view that the opponent's mark enjoys a high degree of inherent distinctive character.

34. While I appreciate that this argument has not been raised by either party, I consider it necessary, for the sake of completeness, to discuss the possibility that, when presented as 'AuxTop', the opponent's mark may be viewed as two conjoined words. I make this point on the basis that both 'Aux' and 'Top' have known

meanings to the consumer in that ‘Aux’ may be viewed as short for ‘auxiliary’⁴ and ‘Top’ is a well-known dictionary word. However, in giving consideration to this point, I note that neither ‘auxiliary’ or ‘top’ have any connection whatsoever to the goods at issue. Further, viewing the mark in this way would, in my view, be as a result of an artificial dissection of the mark. I am, therefore, not convinced that the average consumer would understand the mark in this way and will proceed on the basis as discussed in the preceding paragraph.

Comparison of the marks

35. It is clear from *Sabel v Puma AG* (particularly paragraph 23) 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 the trade marks, bearing in mind their distinctive and dominant components.

36. 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.”

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

⁴ On this point, I am conscious not to assume my own knowledge is more widespread than it is but I do not consider it a point of serious dispute to suggest that the letters ‘AUX’ are widely known as a type of audio port known as an auxiliary port.

38. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
AuxTop	AUXTUR

39. The parties' marks are both word only marks made up of just one word. There are no other elements that contribute to the overall impressions of either mark, which lie in the words themselves.

40. I have set out above that the opponent's mark, as a word only mark, may be presented as 'AuxTop', 'AUXTOP' or 'auxtop'. The same applies to the applicant's mark in that it can be presented as 'AuxTur', 'AUXTUR' or 'auxtur'. As a result, the differences between the cases used in the marks as registered is of no relevance to the visual comparison.

41. Both marks consist of single words made up of six letters. The first four letters of both marks, being 'A-U-X-T', are identical. As for the last two letters, these are different. I remind myself that the average consumer tends to focus on the beginnings of marks,⁵ being where these marks are identical. Taking all of this into account, I am of the view that the marks are visually similar to a high degree.

42. I have no submissions from either party as to the pronunciation of either mark. Without such, I am of the view that the opponent's mark will be pronounced as 'AWX-TOP' whereas the applicant's mark will be pronounced as 'AWX-TER'. I note that the marks at issue are two syllables in length and are, therefore, short marks from an aural perspective. While I note that there is no special test which applies to the comparison of 'short' marks,⁶ I am of the view that, in the present case, the shortness of the marks at issue means that the average consumer is more likely to notice the differences. Having said that, the first syllables of the marks are identical and the second syllables, while not identical, are similar in their shared use of the

⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

⁶ See paragraph 44 of *BOSCO*, BL O/301/20

letter 'T'. Taking all of this into account, I am of the view that the marks are aurally similar to between a medium and high degree.

43. Moving on to the conceptual comparison, I remind myself that I have found the opponent's mark to be a made-up word with no obvious meaning. I consider that the same applies to the applicant's mark. Therefore, as both marks have no obvious meaning, I am of the view that they are conceptually neutral.

Likelihood of confusion

44. 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 and services down to the responsible undertakings 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 respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact 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.

45. I have found the goods to be similar to a low degree. I have found the average consumer for the goods to be both members of the public and members of the trade who will select the goods by primarily visual means, although I do not discount an aural component. I have concluded that the average consumer will mostly pay a medium degree of attention, however, this may be lower for some goods but higher (though not high) for others. I have found the opponent's mark enjoys a high degree of inherent distinctive character. I have found the marks to

be visually similar to a high degree, aurally similar to between a medium and high degree and conceptually neutral.

46. Taking all of these factors into account together with the principle of imperfect recollection, I consider that the average consumer is likely to mistake the parties' marks for one another, particularly in light of the high degree of distinctive character enjoyed by the opponent's mark. This finding is, in my view, supported by the fact that the differences, being the last two letters of each mark, are such that they are likely to be overlooked or forgotten, especially considering that, as I have set out above, the average consumer tends to focus on the beginnings of marks. In reaching this conclusion, I have borne in mind that the marks are conceptually neutral, however, I do not consider that this counteracts the high level of visual similarity between the marks, particularly given that the selection process of the goods at issue is primarily visual.⁷ Consequently, I consider there to be a likelihood of direct confusion between the marks. I am of the view that this finding applies even when considering that the marks will be viewed on goods that are only similar to a low degree. This is on the basis that, as per the interdependency principle, the level of similarity between the marks is sufficient to counteract the low degree of similarity between the goods. Lastly, I consider that this finding applies even where the average consumer pays a higher degree of attention when selecting the goods at issue.

CONCLUSION

47. The opposition has partially succeeded and, subject to any appeal, the application is refused for the following goods:

Class 9: Carpenters' rules; Electronic distance meters; Folding rulers; Measuring rulers; Measuring tapes; Micrometers; Slide calipers; Glass graduated scales; Protractors [measuring instruments]; Square rulers for measuring; Surveying instruments; Surveyors' levels.

⁷ See paragraphs 49 and 50 of *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03

48. Given that the opposition was not aimed at all goods applied for and was unsuccessful against some goods, the application may, subject to any appeal, proceed to registration for the following goods:

Class 7: Robotic electric glue guns; Cordless electric drills; Drilling hammers; Electric chain saws; Power-operated jig saws; Electric knife sharpeners; Electric planers; Shears, electric; Thread mills [power tools]; Power-driven wrenches; Power-operated ratchet wrenches; Power-operated rivet guns; Screwdrivers, electric; Power hammers; Centrifugal pumps; Washing installations for vehicles.

Class 8: Vegetable slicers; Garden tools, hand-operated; Weeding forks [hand tools]; Abrading instruments [hand instruments]; Bits [hand tools]; Cutting tools [hand tools]; Graving tools [hand tools]; Hollowing bits [parts of hand tools]; Saws [hand tools]; Utility knives; Adjustable spanners; Spanners [hand tools]; Pipe bending apparatus [hand-operated tool]; Polishing irons [glazing tools]; Squares [hand tools]; Hand tools, hand-operated; Multi-purpose shears; Tool belts [holders]; Dog clippers; Screwdrivers, non-electric.

Class 9: Cases for smartphones; Sunglasses; Goggles for sports; Gloves for protection against accidents; Dust protective masks.

COSTS

49. As the opponent has enjoyed the greater degree of success, it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2015 which governs costs in Fast Track proceedings issued after 1 October 2015. In the circumstances, to reflect the degree of success in defending part of the claim against it, I have reduced the costs award by 25%.

50.I award the opponent the sum of **£250** as a contribution towards the costs of proceedings. The sum is calculated as follows:

Filing a notice of opposition and considering the holder's counterstatement:	£200
<i>Reduction of 25%</i>	<i>-£50</i>
Official fee (not subject to reduction)	£100
Total	£250

51.I therefore order Nanjing YC Technology Limited to pay Yijuan Cai the sum of £250.

This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 29th day of June 2023

A COOPER
For the Registrar