O/1025/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3884726

IN THE NAME OF

MOONROCK STUDIOS LTD

TO REGISTER THE FOLLOWING TRADE MARK:

Nothing to see here

IN CLASS 25

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600003062

BY LORNA JANE PTY LTD

Background and pleadings

1. On 03 March 2023, Moonrock studios ltd ("the Applicant") applied to register the trademark shown on the front page of this decision in the UK under application number 3884726. The application was published for opposition purposes on 07 July 2023 and registration is sought for the following goods:

> *Class 25: Clothing; Knitwear [clothing]; Jackets [clothing]; Ready-to-wear clothing; Woolen clothing; Furs [clothing]; Clothing layettes; Layettes [clothing]; Garments for protecting clothing; Linen clothing; Headbands for clothing; Headbands [clothing]; Clothes; Gloves as clothing; Gloves [clothing]; Aprons [clothing]; Maternity clothing; Kerchiefs [clothing]; Jerseys [clothing]; Shorts [clothing]; Denims [clothing]; Cashmere clothing; Capes (clothing); Oilskins [clothing]; Gabardines [clothing]; Silk clothing; Clothing of leather; Leather clothing; Leather (Clothing of -); Parts of clothing, footwear and headgear; Collars [clothing]; Veils [clothing]; Knitted clothing; Corsets [clothing, foundation garments]; Embroidered clothing; Hoods [clothing]; Windproof clothing; Wristbands [clothing]; Belts for clothing; Belts [clothing]; Casual clothing; Rainproof clothing; Bandeaux [clothing]; Waterproof clothing; Jackets being sports clothing; Visors [clothing]; Jackets (Stuff -) [clothing]; Stuff jackets [clothing]; Clothing for leisure wear; Ready-made clothing; Bottoms [clothing]; Latex clothing; Trunks being clothing; Playsuits [clothing]; Woven clothing; Infant clothing; Drawers [clothing]; Drawers as clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Ties [clothing]; Clothing for children; Muffs [clothing]; Bodies [clothing]; Clothing for infants; Clothing for babies; Tops [clothing]; Weatherproof clothing; Clothing for cycling; Water-resistant clothing; Fabric belts [clothing]; Pockets for clothing; Handwarmers [clothing]; Clothing for skiing; Beach clothing; Triathlon clothing; Chaps (clothing); Thermal clothing; Cowls [clothing]; Fishing clothing; Men's clothing; Dance clothing; Mitts [clothing]; Braces for clothing; Plush clothing.*

2. On 04 October 2023, Lorna Jane Pty Ltd ("the Opponent") opposed the application in full under section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The

Opponent relies upon the following international trade mark registration designating the UK:

NOTHING 2 SEE HERE

International registration no.: 1456529
International registration date: 31 January 2019;
Protection conferred date: 06 June 2019.
Relying on all goods in classes 24 and 25, namely:

Class 24: Apparel fabrics; knitted elastic fabrics; knitted fabric; mixed and synthetic fabrics; printed fabrics; badges made of fabric material; breathable waterproof fabrics; cotton fabrics; fabric; fabric for manufacturing women's outerwear; fabric for use in the manufacture of clothing; fabrics (piece goods); fabrics for shirts.

Class 25: Apparel (clothing, footwear, headgear); raincoats, rain jackets, crop tops, singlets, tank tops, tee-shirts, hooded tops, (polo shirts) shirts, vests, cardigans, sweatshirts, jumpers, shorts, tights, pants, trousers, tracksuits, skirts and dresses, jackets, coats, gloves, mittens, scarves, belts, sleep shirts, sleep tops, robes and pyjamas; swimwear, namely, rash guards, swim vests, bikinis, swimsuits and board shorts; headgear for wear, namely, headbands, bandanas, hats, caps, swim caps, beanies and visors; sportswear, namely, sports bras, sports pants, sports skirts, sports vests, bib shorts, sports coats, sport stockings, sweat bands, sweat pants, sweat shirts, sweat suits; underwear, briefs, bras, boxer shorts, hosiery and socks; exercise wear, namely, yoga pants, yoga shirts; eye masks, sleep masks.

3. By virtue of its earlier filing date, the Opponent's mark constitutes an earlier mark within the meaning of section 6 of the Act. As the mark had not completed the registration process more than five years before the relevant date (the filing date of the mark in issue), it is not subject to proof of use pursuant to section 6A of the Act.

The Opponent can, therefore, rely upon all of the goods it has identified without having to show any use at all.

4. The Opponent claims that the Applicant's mark is similar to the Opponent's and the respective goods are identical or similar, giving rise to a likelihood of confusion.

5. The Applicant filed a counterstatement denying the claims made.

6. The Opponent is represented by Bates Wells & Braithwaite London LLP; the Applicant is unrepresented.

7. This is an opposition to which the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013 applies, deemed a 'Fast Track' opposition which does not include the routine filing of evidence.[1] Neither party sought leave to file evidence and neither party requested a hearing. The Opponent filed written submissions in lieu of a hearing on 03 June 2024. This decision is taken following careful consideration of all the papers before me.

Preliminary issue

8. Within their counterstatement the Applicant has raised a point that I intend to address as a preliminary issue. Before going further into the merits of the Opposition, it is necessary to explain why, as a matter of law, this point will have no bearing on the outcome of this opposition.

9. The Applicant states that the Opponent's trade mark "is being used for activewear only" and that "there should be no confusion as they do not intend to make fitness clothes for women". The assessment I will carry out is a notional one and will be based upon how the goods within the parties' respective specifications could be used and sold, and the circumstances in which the mark applied for might be used if it were registered.[2] How the parties' goods are used and sold in practice (including which consumers they currently target) is not relevant to my assessment. Therefore, this submission does not assist the Applicant.

[1] Other than proof of use evidence, which is not a requirement in the present proceedings.
[2] O2 Holdings Limited & Anor v Hutchison 3G UK Limited, Case C-533/06, paragraph 66.

DECISION

10. 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.

Section 5(2)(b)

11. Section 5(2)(b) of the Act is 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".

12. 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 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

13. In *Canon*, the Court of Justice of the European Union ("CJEU") stated at paragraph 23 of its judgment:

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

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

a) The respective users of the respective goods or services;

b) The physical nature of the goods or acts of services;

c) The respective trade channels through which the goods or services reach the market;

d) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

16. Further, in *Kurt Hesse v OHIM*,[3] 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 OHIM*,[4] the General Court ("GC") stated that "complementary" means:

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

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

[3] Case C-50/15 P
[4] Case T-325/06

18. The competing goods are as follows:

Opponent's goods	Applicant's goods
Class 24: Apparel fabrics; knitted elastic fabrics; knitted fabric; mixed and synthetic fabrics; printed fabrics; badges made of fabric material; breathable waterproof fabrics; cotton fabrics; fabric; fabric for manufacturing women's outerwear; fabric for use in the manufacture of clothing; fabrics (piece goods); fabrics for shirts. **Class 25:** Apparel (clothing, footwear, headgear); raincoats, rain jackets, crop tops, singlets, tank tops, tee-shirts, hooded tops, (polo shirts) shirts, vests, cardigans, sweatshirts, jumpers, shorts, tights, pants, trousers, tracksuits, skirts and dresses, jackets, coats, gloves, mittens, scarves, belts, sleep shirts, sleep tops, robes and pyjamas; swimwear, namely, rash guards, swim vests, bikinis, swimsuits and board shorts; headgear for wear, namely, headbands, bandanas, hats, caps, swim caps, beanies and visors; sportswear, namely, sports bras, sports pants, sports skirts, sports vests, bib shorts, sports coats, sport stockings, sweat bands, sweat pants, sweat shirts, sweat suits; underwear, briefs, bras, boxer shorts, hosiery and socks; exercise wear,	**Class 25:** Clothing; Knitwear [clothing]; Jackets [clothing]; Ready-to-wear clothing; Woolen clothing; Furs [clothing]; Clothing layettes; Layettes [clothing]; Garments for protecting clothing; Linen clothing; Headbands for clothing; Headbands [clothing]; Clothes; Gloves as clothing; Gloves [clothing]; Aprons [clothing]; Maternity clothing; Kerchiefs [clothing]; Jerseys [clothing]; Shorts [clothing]; Denims [clothing]; Cashmere clothing; Capes (clothing); Oilskins [clothing]; Gabardines [clothing]; Silk clothing; Clothing of leather; Leather clothing; Leather (Clothing of -); Parts of clothing, footwear and headgear; Collars [clothing]; Veils [clothing]; Knitted clothing; Corsets [clothing, foundation garments]; Embroidered clothing; Hoods [clothing]; Windproof clothing; Wristbands [clothing]; Belts for clothing; Belts [clothing]; Casual clothing; Rainproof clothing; Bandeaux [clothing]; Waterproof clothing; Jackets being sports clothing; Visors [clothing]; Jackets (Stuff -) [clothing]; Stuff jackets [clothing]; Clothing for leisure wear; Ready-made clothing; Bottoms [clothing]; Latex clothing; Trunks being clothing; Playsuits [clothing]; Woven clothing; Infant

namely, yoga pants, yoga shirts; eye masks, sleep masks.	clothing; Drawers [clothing]; Drawers as clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Ties [clothing]; Clothing for children; Muffs [clothing]; Bodies [clothing]; Clothing for infants; Clothing for babies; Tops [clothing]; Weatherproof clothing; Clothing for cycling; Water-resistant clothing; Fabric belts [clothing]; Pockets for clothing; Handwarmers [clothing]; Clothing for skiing; Beach clothing; Triathlon clothing; Chaps (clothing); Thermal clothing; Cowls [clothing]; Fishing clothing; Men's clothing; Dance clothing; Mitts [clothing]; Braces for clothing; Plush clothing.

Clothing; Knitwear [clothing]; Jackets [clothing]; Ready-to-wear clothing; Woolen clothing; Furs [clothing]; Clothing layettes; Layettes [clothing]; Linen clothing; Headbands for clothing; Headbands [clothing]; Clothes; Gloves as clothing; Gloves [clothing]; Aprons [clothing]; Maternity clothing; Kerchiefs [clothing]; Jerseys [clothing]; Shorts [clothing]; Denims [clothing]; Cashmere clothing; Capes (clothing); Oilskins [clothing]; Gabardines [clothing]; Silk clothing; Clothing of leather; Leather clothing; Leather (Clothing of -); Collars [clothing]; Veils [clothing]; Knitted clothing; Corsets [clothing, foundation garments]; Embroidered clothing; Hoods [clothing]; Windproof clothing; Wristbands [clothing]; Casual clothing; Rainproof clothing; Bandeaux [clothing]; Waterproof clothing; Jackets being sports clothing; Visors [clothing]; Jackets (Stuff -) [clothing]; Stuff jackets [clothing]; Clothing for leisure wear; Ready-made clothing; Bottoms [clothing]; Latex clothing; Trunks being clothing; Playsuits [clothing]; Woven clothing; Infant clothing; Drawers [clothing]; Drawers as clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Ties [clothing]; Clothing for children; Muffs [clothing]; Bodies [clothing]; Clothing for infants; Clothing for babies;

Tops [clothing]; Weatherproof clothing; Clothing for cycling; Water-resistant clothing; Fabric belts [clothing]; Handwarmers [clothing]; Clothing for skiing; Beach clothing; Triathlon clothing; Chaps (clothing); Thermal clothing; Cowls [clothing]; Fishing clothing; Men's clothing; Dance clothing; Mitts [clothing]; Braces for clothing; Plush clothing

19. The Opponent's specification contains the broad term *Apparel (clothing, footwear, headgear).* The above goods are all forms of clothing and would be encompassed by the Opponent's broader term. I therefore find the goods to be identical in line with the principle set out in *Meric*.

Belts for clothing; Belts [clothing].

20. Albeit worded differently, the above goods are identical to the Opponent's *belts.*

Parts of clothing […] and headgear; pockets for clothing.

21. I understand the above goods to be the component parts of clothing and headgear. When compared to the Opponent's *Apparel fabrics*; *fabric for manufacturing women's outerwear; and fabric for use in the manufacture of clothing* in class 24 I consider there to be an overlap in the nature and purpose of the goods as they would likely share the same material and all be used for the purpose of manufacturing or repairing clothing and headgear. The goods are likely to be sought by clothing and headgear manufacturers or members of the general public with an interest in creating their own clothing and headgear, as such they will share the same users. The goods will also share the same trade channels, such as fabric wholesalers or fabric shops or their online equivalents. Overall, I consider the goods to be similar to a low to medium degree.

Parts of […] footwear […]

22. I compare the above term to the Opponent's *apparel fabrics* in class 24, since 'apparel' is a broad term which encompasses 'footwear'. I consider the opponent's

term would therefore encompass fabrics used in the production of shoes (for example, canvas fabric) – and thus those fabrics form 'parts of footwear'. Consequently, there is some overlap in the nature and purpose of the goods. The goods may share the same trade channels and users, with each being sought by those making footwear. As such, I consider the goods to be similar to a low degree.

The average consumer and the nature of the purchasing act

23. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited,* [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

24. The goods in question are all forms of clothing, footwear or headgear and their component parts. The average consumer of the finished articles will be members of the general public at large and in the case of the component parts, either members of the general public with an interest in creating their own clothing, footwear and headgear or manufacturers of the same. The average consumer who is a member of the general public will likely encounter the goods on the shelves of a retail outlet or online equivalent where those goods will be chosen by self-selection; a manufacturer may browse product catalogues and their online equivalents. As such the purchasing

act will be predominantly visual in nature,[5] (although I do not discount an aural consideration where advice is sought from sales assistants for example). The goods will be purchased relatively frequently and the cost of purchase is likely to vary. The average consumer who is a member of the general public will likely be alive to considerations such as the aesthetic appearance, style, material and durability of the goods. I find the same to be true for the consumer of those goods which are not finished articles but are instead component parts. Overall, I consider that the average consumer will demonstrate a medium level of attention during the purchasing process, or slightly higher when approached by a professional such as a manufacturer.

Comparison of marks

25. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by 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 relevant weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

26. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the trade 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.

[5] *New Look Limited v OHIM,* joined cases T-117/03 to T-119/03 and T-171/03, Paragraph 50

27. The marks to be compared are as follows:

Opponent's Mark	Applicant's Mark
NOTHING 2 SEE HERE	**Nothing to see here**

28. The Applicant's mark is a word only mark consisting of the four words "Nothing to see here". The Opponents mark consists of three words and a number; "Nothing 2 see here". As there are no other additional elements, the overall impression of each mark rests in the combination of the words (and number) of which they are comprised.

Visual comparison

29. Visually, the marks coincide in three of the four words of which they are comprised. The marks differ only in their second word, with the earlier right containing the number "2" and the contested mark the word "to". Notwithstanding this difference, I find the marks to be visually similar to a high degree.

Aural comparison

30. Aurally, the words "Nothing to see here" in the Applicant's mark will be given their ordinary dictionary pronunciations. The number "2" in the Opponent's mark will share the same pronunciation as the word "to" in the Applicant's mark. As such the marks are aurally identical.

Conceptual comparison

31. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and

the CJEU including *Ruiz Picasso v OHIM* [2006] ECR I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

32. Conceptually, the Applicant's mark is comprised of well-known dictionary words that will be understood by the average consumer. The Opponent's mark consists of a combination of words and a number. When faced with this combination it is natural to attempt to make sense of it. Given the aural identity between the number "2" and the word "to" I am of the view that the average consumer will perceive "NOTHING 2 SEE HERE" as "NOTHING TO SEE HERE". I consider that in the context of the goods in question the conceptual message conveyed by the parties' marks may be perceived by the average consumer as being a play on words or humorous message indicating that there is nothing noteworthy about, or that attention should not be drawn to the goods or the wearer of the goods. Overall, the conceptual message conveyed by the Opponent's mark is identical to that of the Applicant's.

Distinctive character of the earlier mark

33. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which it is registered and, secondly, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik*, 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)."

34. 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 and services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. The opponent has not pleaded that its mark has obtained an enhanced level of distinctiveness through the use made of it, nor has it filed any evidence of use. Therefore, I have only the inherent distinctiveness of the mark to consider.

35. As discussed above, the Opponent's mark is a combination of 3 ordinary dictionary words and a number, which will likely be read by the average consumer as the word "to" and be perceived as a play on words meaning "nothing to see here". These words are neither descriptive nor allusive to the goods in question. As such I find the earlier mark to be distinctive to a medium degree.

Likelihood of confusion

36. There is no simple formula for determining whether there is a likelihood of confusion. I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them i.e. that 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 (*Canon* at [17]) and considering the various factors from the perspective of the average consumer. In making my assessment, I must bear in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead

rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

37. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and the goods down to the responsible undertakings being the same or related.

38. Earlier in this decision I concluded that:

- The competing goods are for the most part identical; where similarity has been found, the goods are similar to a low or low to medium degree;
- The average consumer will comprise members of the general public who will demonstrate a medium level of attention during the selection process, or slightly higher from a professional perspective;
- The purchasing process will be predominantly visual in nature, though aural considerations will not be discounted;
- The Opponent's earlier mark holds a medium degree of inherent distinctiveness;
- The Opponent's mark is visually similar to the Applicant's mark to a high degree;
- The Opponent's mark is aurally identical to the Applicant's mark;
- The Opponent's mark is conceptually identical to the Applicant's mark.

39. Weighing the above factors and bearing in mind the principle of imperfect recollection, I find that the marks are likely to be mistakenly recalled or misremembered as each other by the average consumer. Due to the high level of visual similarity, and the conceptual and aural identity of the marks, the average consumer could easily misremember the Applicant's mark as containing the number "2" or recall the Opponent's mark as containing the word "to". Although I found some of the respective goods to be similar to a low degree, this is offset by the high degree of similarity between the marks. I therefore find a likelihood of direct confusion.

Conclusion

40. The opposition under section 5(2)(b) of the Act has succeeded in full. Subject to any successful appeal against my decision, contested trade mark application number 3884726 shall be refused registration.

COSTS

41. As the Opponent has been fully successful, they are entitled to a contribution towards their costs. Awards of costs in proceedings commenced on or after 1 February 2023 are governed by Annex A of Tribunal Practice Notice ('TPN') 1 of 2023. Taking account of that scale, I award the Opponent the sum of £700, calculated as follows:

Preparing a statement and considering the other side's statement:	£250
Filing submissions:	£350
Official fee:	£100
Total:	**£700**

42. I therefore order Moonrock studios ltd to pay the sum of £700 to Lorna Jane Pty Ltd. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 3rd day of November 2025

Jacob Robinson
For the Registrar