O/1098/25

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION NUMBER WO0000001757132
BY HYDROGEN-REFUELING-SOLUTIONS
TO REGISTER THE FOLLOWING TRADE MARK:

HRS

IN CLASSES 1, 6, 7, 37 AND 42

AND

AN OPPOSITION THERETO UNDER NUMBER OP000447018
BY HRS INVESTMENTS LTD.

BACKGROUND AND PLEADINGS

1. International trade mark 1757132 ("the holder's mark") consists of the sign shown on the cover page of this decision. The holder is HYDROGEN-REFUELING-SOLUTIONS. The holder's mark is registered with effect from 11 July 2023 and with effect from the same date, the holder designated the UK as a territory in which it seeks to protect the holder's mark under the terms of the Protocol to the Madrid Agreement. The holder's mark was accepted and published in the Trade Marks Journal for opposition purposes on 19 January 2024. The holder seeks protection of the holder's mark in relation to goods and services in classes 1, 6, 7, 37 and 42, as set out in **Annex 1** of this decision.

2. The holder's mark enjoys a priority date of 23 May 2023, which stems from an earlier French trademark owned by the holder, being that under number 4963554. This date is the relevant date for these proceedings.

3. On 19 April 2024, the holder's mark was opposed by HRS Investments Ltd. ("the opponent"). The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and the opposition is directed at the application in its entirety. The opponent relies upon the mark detailed below:

UK trade mark number: UK00800955497
Filing date: 27 December 2007
Date of entry in register: 09 February 2009
Relying on all its goods and services, namely:

Class 11: Thermal exchangers; heat exchanger; heat regenerators; stoves; heat pumps; apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary installations; ventilation hoods; taps for pipes; distillation columns; water heaters; refrigerating chambers.

Class 37: Services of installation, repair and maintenance of industrial installations, and heat exchangers.

4. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Registration designating the EU. As a result, the opponent's mark was converted into a comparable UK trade mark. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.[1]

5. By virtue of its earlier filing date of 27 December 2007, the above mark constitutes an earlier mark in accordance with section 6 of the Act. As it was registered on 09 February 2009, more than five years prior to the date the contested mark was filed, this mark is subject to proof of use in accordance with section 6A of the Act.

6. The opponent submits that the marks are similar to a high degree and that the goods and services at issue are similar or identical. The holder filed a defence and counterclaim denying all the grounds of the opposition and puts the opponent to proof of use for all goods and services relied upon.

7. The holder is represented by Squire Patton Boggs (UK) LLP; and the opponent is represented by Murgitroyd & Company. During the evidence rounds, only the opponent filed evidence. Neither party requested a hearing, nor did they file written submissions in lieu.

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

EVIDENCE

9. The opponent filed evidence in the form of a witness statement of Ian Sheriff dated 24 September 2024, which is accompanied by 10 exhibits being IS1 – IS10. Mr Sheriff is the Managing Director of the opponent, a position he has held since 17 January 2023.

[1] See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

10. I do not intend to summarise the evidence any further at this stage. However, I have taken it all into consideration in reaching my decision and will refer to it below, where necessary.

DECISION

Proof of use

11. Section 6A of the Act states:

> "(1) This section applies where
>
> (a) an application for registration of a trade mark has been published,
>
> (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
>
> (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.
>
> (1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.
>
> (2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.
>
> (3) The use conditions are met if – (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.
>
> (4) For these purposes – (a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and (b) use in the United

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

(5)-(5A) [Repealed]

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

12. Section 100 of the Act states that:

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

13. The opponent's mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

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

(2) […]

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

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

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

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

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 W.F. *Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

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

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

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

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

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns:

Ansul at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

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

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

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

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

15. While section 6A of the Act (cited above) is silent on the issue of IRs, the Trade Marks (International Registration) Order 2008 sets out that this section of the Act extends to apply to IRs. As such, the relevant period for the present assessment is the five-year period prior to the

priority date of the IR, being 23 May 2023. The relevant period is, therefore, 24 May 2016 to 23 May 2023 ("the relevant period"). By virtue of paragraph 7 of Part 1, Schedule 2A of the Act, use within the EU is relevant for the relevant period which falls prior to IP Completion Day (i.e., 31 December 2020).

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

Form of the mark

17. Before considering whether the opponent has made genuine use of the mark and, if so, for what goods, I shall deal with the question of the form of the mark. The opponent's registration can be seen below.

18. In all instances throughout the evidence where the opponent has used the mark as registered – this is clearly use upon which the opponent can rely. The mark has also been demonstrated in the following form:

[2]

19. As seen above, some of the evidence shows the use of the mark with the additional words 'heat exchangers'. I consider that the additional words will be viewed as descriptive of the goods provided, and that the opponent's mark maintains its role as an independent indication of origin within the example above. These words do not alter the distinctive character of the mark as registered to the point that it would not be considered use of the mark as

[2] Exhibit IS8, pg 103

registered.[3] Therefore, the mark shown above is an acceptable variant of the opponent's mark.

Evidence of use

20. For use to be genuine, it must have been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant territory during the relevant five-year period. In making my assessment, I am required to consider all relevant factors, including:

- the scale and frequency of the use shown;
- the nature of the use shown;
- the goods for which use has been shown;
- the nature of those goods and the market(s) for them; and
- the geographical extent of the use shown.

21. I note that the holder reiterated that it did not consider the evidence to show use of the mark in relation to the goods and services relied upon. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[4] I note that as the opponent's mark is a comparable mark it is possible for the opponent to rely on evidence of use in the EU as set out in Tribunal Practice Notice 2/2020. [5]

22. I note that the opponent has provided evidence regarding its turnover in the UK during the relevant period. In its witness statement, the opponent states that its primary focus is the "design, manufacture, installation and maintenance of heat exchangers and thermal processing solutions,"[6] which includes a range of heat exchangers that are designed for specific industries and customers. The table in relation to turnover is as follows:

Year	**Turnover (£)**
2018	30 million
2019	35 million

[3] *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22
[4] *New York SHK Jeans GmbH & Co KG v OHIM*, T-415/09
[5]https://www.gov.uk/government/publications/tribunal-practice-notice-22020-end-of-transition-period-impact-on-tribunal-proceedings/tribunal-practice-notice-22020-end-of-transition-period-impact-on-tribunal-proceedings accessed 1/2/2022.
[6] Witness statement of Mr Sheriff, Paragraph 8

2020	31 million
2021	12 million
2022	43 million
2023	45 million

23. Extracts from the annual reports of the opponent were provided for the years 2018 to 2020 and an annual report for 2022, to verify the turnover figures provided in the table above.[7] However, it is noted that the opponent's turnover for 2021 is only inclusive of the period of 20 July 2021 to 30 December 2021. I note that these turnover figures have not been broken down into the goods and services for which they are attributable.

24. The opponent has also provided evidence of advertising in various forms including the attendance of various industry specific events,[8] newsletters produced by the opponent,[9] advertisements in publications,[10] and social media.[11] Some of these pieces of evidence have issues concerning its size which affect my ability to read them clearly, I will refer to the particular pieces of evidence affected, where necessary, below. Further, the opponent has provided approximate advertising and marketing spend in the UK, which I have replicated in the table below:

Year	**Spend (£)**
2019	£162K
2020	£178K
2021	£182K
2022	£294K
2023	£301K

25. In relation to the industry specific events, one of the events is clearly outside of the relevant period being in 2024, the remaining events total 13 events between 2017 to 2023. The events were located in Birmingham, Harrogate, Telford, Manchester and online. However, I note that in relation to the industry specific events, no mention has been made of the audience or the number of people in attendance. This criticism is not echoed in relation to the newsletters

[7] Exhibit IS4 witness statement of Mr Sheriff
[8] In support of the events the opponent attended, exhibit IS6 shows details of the CHEMUK exhibitions attended annually by the opponent.
[9] Exhibit IS7 witness statement of Mr Sheriff
[10] Exhibit IS8 witness statement of Mr Sheriff
[11] Exhibit IS9 witness statement of Mr Sheriff

produced by the opponent. The newsletters were published in April and June 2017. The English version of the April edition was sent to 6,175 recipients of which 194 were opened by UK consumers and the Spanish version was opened by a single UK consumer. In June 2017, there were 207 recipients of the newsletter and 9% were opened. However, given the size of the evidence provided (even when zoomed in via electronic documents) it is unclear whether those in the audience included consumers in the UK. Not all of the advertisements in the publications are dated in the relevant period, with 5 out of the 16 advertisements in publications or invoices for those publications being dated outside of the relevant period. Finally, in relation to social media evidence, it demonstrates 9,000 followers on LinkedIn. I am able to ascertain, after zooming in on the evidence provided, that there is mention of the demographics of the audience. Nonetheless, due to the size of the evidence and the blurriness after focussing on the document; I am unable to determine the geographic location of the followers or when the followers were gained (as I note the snapshots were taken 4 April 2024).

26. I do not have evidence or submissions from the parties to assist me on the matter of the size of the UK/EU market for the goods and services concerned, so it is hard to contextualise the figures. The figures of £196 million over a five-year period appears substantial and have taken place throughout the relevant period. No evidence concerning the cost of individual goods and services has been provided but given the nature of the goods and services, I consider that the price may vary with some of the goods and services being of a moderate to high value.

Assessment of the evidence

27. Before discussing the evidence filed, I consider it necessary to refer to the case of *Awareness Limited v Plymouth City Council,* Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

> "22. The burden lies on the registered proprietor to prove use. […] However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is

inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

28. I also note Mr Alexander Q.C.'s comments in *Guccio Gucci SpA v Gerry Weber International AG*, Case BL O/424/14. He stated:

"The Registrar says that it is important that a party puts its best case up front – with the emphasis both on "best case" (properly backed up with credible exhibits, invoices, advertisements and so on) and "up front" (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. […] The rule is not just "use it or lose it" but (the less catchy, if more reliable) "use it – and file the <u>best evidence first time round</u> – or lose it"" [original emphasis]

29. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd,* Case BL 0/404/13*,* Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

"21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller-General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can

be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not *'show'* (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use."

30. Clearly there are problems with the opponent's evidence. For example, whilst advertising evidence has been provided by the opponent in various forms, and expenditure has also been provided, there are often limitations; there are issues with the geographic scope or number of attendees (of those aspects of evidence I am able to interpret and are in the relevant period). Whilst there may be evidence of the geographic scope of the industry events attended by the opponent, that is where the geographical scope of use ends. For example, I am unable to identify the geographic scope of the opponent's customers.

31. Further, whilst the turnover figures provided by the opponent are indicative of a substantial turnover in the UK throughout the relevant period, the opponent has not provided any breakdown to explain how the turnover figures relate to the different goods and services provided by the opponent. The brochures provided mention a wider range of goods and services than are contained within the opponent's specification, and without a breakdown, I am unable to determine, for example, how much of the turnover can be attributed to heat exchangers as opposed to piston pumps. In light of the cases of *Plymouth Life* and *Dosenbach* (both cited above) as well as section 100 of the Act (which is reproduced above), I am of the view that it is reasonable to expect the opponent to have provided a sufficient breakdown relating to the goods and services it sells, especially when considering the varying nature of the opponent's goods and services. Without such, I consider that I am entitled to be sceptical of the evidence before me.

32. Despite this, plainly, the opponent operates a large global business with a focus on heat exchangers and thermal solutions. Based on all the information I do have before me; I am satisfied that the opponent has put its mark to genuine use in the UK. The opponent has indicated a substantial turnover in the UK, it is my view that given the scale of these figures it

is reasonable to infer that at least a sufficient proportion of the same can be attributed to the goods and services at issue in a genuine attempt to make use of the mark. Undoubtedly, there has been a reasonable amount of promotional activity surrounding the mark and the promotional events attended by the opponent took place in the UK. In addition, advertising expenditure is reasonable. I am satisfied that given the scale of the sales figures, they are not demonstrative of one-off sales but are repeated[12] throughout the relevant period. Taking all of this into account, I am satisfied that the opponent has demonstrated proof of use of the earlier right in the UK during the relevant period. Taking into consideration the criticism I made above concerning a lack of breakdown of figures, I am mindful not to merely take a broad-brush approach in apportioning use in relation to the varying goods and services, but I do note that the narrative evidence states that the opponent's main focus is 'heat exchangers and thermal solutions'. No clarification has been provided to demonstrate what 'thermal solutions' is inclusive of, to allow a comparison between that term and the specification; I consider that the evidence shows use in relation to the following goods and services:

Class 11: Heat exchangers.

Class 37: Installation of heat exchangers.

DECISION

33. Sections 5(2)(b) and 5A of the Act state:

"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] Witness statement of Mr Sheriff, paragraph 8

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

34. The following principles 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.

The principles

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

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

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

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

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

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

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

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

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

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

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

COMPARISON OF THE GOODS AND SERVICES

35. A full list of the holder's goods and services can be found in **Annex 1** of this decision, as previously mentioned. However, I will go through them all term by term in the comparison below. In relation to the opponent's goods and services, following the assessment of genuine use, the remaining goods and services in the specification, for the purposes of this comparison, are:

Class 11: Heat exchangers.

Class 37: Installation of heat exchangers.

36. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant

factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary."

37. 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.

38. Further, in *Kurt Hesse v OHIM*,[13] 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*,[14] 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."

[13] Case C-50/15 P
[14] Case T-325/06

39. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court ("GC") stated:

> "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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

40. Whilst I note that the opponent has made submissions concerning the general class of goods and services where they find there to be similarity, the opponent has not clarified the specific goods and services within the classes that it finds to be similar. In these circumstances, I remind myself of the case of *Abus August Bremicket Sohne KG v Muhammad Ali (*O/0911/24) Mr Iain Purvis K.C.,[15] and I will proceed by only comparing goods and services that I consider offer the best prospect of a finding of similarity within the classes mentioned.

Class 1

Hydrogen; hydrocarbon gases; gaseous hydrocarbon compounds; industrial gases; green hydrogen.

41. In its counterstatement, the opponent submits that the holder's goods in class 1 are similar to the opponent's goods in class 11 on the basis that they are complementary. In particular, the opponent submits that *"industrial gases and such goods are often used in the heat industry where the opponent's goods in class 11 are used."* Further, the opponent submitted that the goods would coincide in distribution channels, method of use and targeted public. The holder denies that there is any similarity between the goods at issue.

42. I can see no basis for concluding that the parties' goods overlap in nature; the holder's goods are gases, whereas the opponent's (remaining) goods are devices that transfer thermal energy between two or more fluids at different temperatures wit hout mixing them. Contrary to the opponent's submissions, the method of use and purpose of the goods clearly differ. In terms of trade channels, there is nothing in the evidence to suggest that there will be an overlap in trade channels. Further, there is nothing in the evidence to suggest that the same businesses that produce or sell goods in class 11 would

[15] Paragraph 28

also sell class 1 goods. I have no evidence before me to suggest that there would be an overlap, nor do I consider it likely. The opponent suggests that the holder's goods are often used in the heat industry, I consider that there may be an overlap in users. There is no competition between the goods (given the differing purposes), nor do I consider that the goods are complementary. This is on the basis that I do not consider that the average consumer is likely to perceive that the same undertaking is responsible for the provision of the goods. I do not consider that a potential overlap in users is sufficient to substantiate similarity. Taking all of the above into accountm I consider the goods to be dissimilar.

Catalysts for use in hydrogen emission control

43. In the absence of any evidence or submissions to the contrary, it is my understanding that the above term refers to goods that convert pollutants into less toxic pollutants. Whilst I note the opponent's submissions that the goods are complementary to its class 11 goods, I am unable to see any basis for reaching that conclusion; I do not consider that the average consumer is likely to perceive the goods originating from the same undertaking. Further, it is not my view that the goods will overlap in nature, method of use, trade channels nor are they in competition. Therefore, I find the goods to be dissimilar.

Class 6

Pipes of metal; pipes of steel; pipes and tubes of metal; gas pipes of metal; tubes made of stainless steel; nuts of metal for pipes; pipes of metal for dispensing liquids and gases; pipes of metal, including in alloy steel and titanium; pipes, tubes and hoses, and parts thereof, including valves, of metal; conduits of metal for trunking gas pipes; conduits of metal for trunking liquid pipes; metal fittings for pipes [connectors]; junctions of metal for pipes; metal adapters for pipes

44. The opponent submits that the holder's goods in class 6 are similar to its goods in class 11. It submits that this is on the basis that the goods are complementary. The opponent has provided a general comparison between the classes and not mentioned the relationship between specific goods. Whilst I recognise that the holder's goods are materials that can be used in the production of heat exchangers, I bear in mind that *"the mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that*

the finished goods containing those components are similar."[16] This is because, in particular, the nature and intended purpose for those goods may be completely different.[17] In the present case, I do not consider that the goods overlap in nature, intended purpose or users, nor will they overlap in trade channels. I do not consider that the goods are in competition. To the contrary of the opponent's submissions, I do not consider the goods are complementary; average consumers will not be of the view the responsibility for the goods lies with the same undertaking. Consequently, I consider that the goods are dissimilar.

45. Applying the same reasoning above, I consider the opponent's goods to be dissimilar to the holder's following goods: *Metal gas storage tanks; tanks of metal for transporting compressed gases; metal tanks for transporting liquefied gases; metal cylinders sold empty for liquid or compressed gases; containers of metal for chemicals, liquids and compressed gases; containers of metal for compressed gas or liquid air; transportable constructions and structures of metal.*

Class 7

Hydrogen dispensers for service stations; hydrogen dispensing pumps for service stations; pneumatic pumps for the supply of liquefied gas; fueling nozzles

46. The opponent submits that the holder's goods are similar to the opponent's services in class 37. The opponent submits that whilst the goods and services are different in nature, the evidence demonstrates that it is common practice that companies that provide the goods in class 7 will also install, repair and maintain the goods. In addition, the opponent submits that the goods and services will coincide in distribution channels. I consider that *"installation of heat exchangers"* (the remaining service in that class following proof of use) in the opponent's specification and the holder's goods will differ in the method of use. In addition, it is my view that the purpose of the goods and services will differ, as the opponent's services will install heat exchangers, whereas the holder's goods will deliver compressed hydrogen to vehicles safely and accurately. Contrary to the opponent's submissions, I do not consider that the trade channels will overlap, as the suppliers of hydrogen dispensers etc and services to install heat exchangers will be provided by specialist companies. Further, it is not my view that the users will overlap, nor do I find there to be any competition or complementarity between the goods

[16] Les editions Albert Rene v OHIM, Case T-336/03, paragraph 61
[17] Les editions Albert Rene v OHIM, Case T-336/03, paragraph 61

and services. Taking all the above into consideration, I find the goods and services to be dissimilar.

47. Applying the same reasoning above, I also consider that *"machines for gas production by electrolysis"* and *"machines for hydrogen production by electrolysis"* are also dissimilar.

Carburetor supply pipes; pipe laying machines; cast iron parts for pipes [parts of machines]; pressure pipes of metal [parts of machines]

48. Applying the same reasoning above, I consider that the holder's goods and the opponent's services are dissimilar. The goods and services will differ in nature, purpose and method of use. In relation to trade channels, whilst I appreciate that installers of heat exchangers may also provide the holder's goods as part of their provision of service, when seeking to purchase the holder's goods, the average consumer will go to a hardware supplier as opposed to a heat exchanger installer. Further, I do not find the goods and services to be in competition, nor do I regard the goods and services to be complementary.

Class 37

49. The opponent argues that all of the holder's services in class 37 are encompassed by the term *"services of installation, repair and maintenance of industrial installations"* in its specification. Accordingly, the opponent submits that the services should be found to be identical. As mentioned above, I have found genuine use of the opponent's class 37 services in relation to *"installation of heat exchangers"* only. I am unable to identify any points of similarity between the opponent's services and the holder's following services:

> *Hydrogen-gas refueling for vehicles; application of coatings for drainage pipes; Providing information relating to the repair or servicing of service station equipment; natural gas refuelling for motor vehicles; consulting services relating to pipe installation; advisory services in connection with the installation of pumps; vehicle service stations [refueling and maintenance]; repair or servicing of gasoline station equipment; installation of foundry products; installation of gas supply and distribution apparatus; installation, maintenance and repair of hydrogen-gas refueling stations for vehicles.*

The services do not overlap in method of use, trade channels, nature, purpose and are not in competition nor are they complementary. Therefore, I find the services to be dissimilar.

Pipe repair services

50. Contrary to the opponent's submissions, it is not my view that these services are either self-evidently identical or identical on the principle outlined in *Meric*. I do not consider that the holder's services would be encompassed by the term *"installation of heat exchangers"*. Whilst both are services and will, therefore, share the same nature, they will differ in purpose as one service is to install heat exchangers, and the other will repair pipes. There is a distinct possibility that service providers that install heat exchangers may also repair pipes for heat exchangers that have been installed, consequently, the service providers may overlap. The method of use associated with the service will also overlap. It is not my view that the services are in competition, as a user will not hire a pipe repairer if it wishes to install a heat exchanger. I also do not perceive the services to be complementary, as they are not important/indispensable to one another. Taking all the above into account, the services are similar to a medium degree.

Installation of pipe systems for gas conveyance; installation of pipe systems for liquid conveyance; installation of pipe systems

51. From the evidence provided and my own knowledge, I understand that part of the installation of a heat exchanger will include the installation of pipes. I appreciate that heat exchangers will involve the transfer of heat between two fluids at different temperatures that can be in the form of gas or liquid. Taking this into account, I consider that the opponent's *"installation of heat exchangers"* will encompass the above services in the holder's specification. Therefore, the services are identical on the principle outlined in *Meric*. However, if I am mistaken in this, I find the services to be at least similar to a medium degree.

Maintenance and repair of systems comprising flexible pipes for transporting fluids

52. I recognise that the holder's services are for maintenance and repair rather than installation, so, it is not my view that the services are identical as submitted by the opponent. Despite this, taking into account the relationship between heat exchangers and pipes, as discussed above, I consider that there may be an overlap in the users of the services, nature and potentially trade channels. As the providers of services that install heat exchangers will also maintain, and repair pipes used in the heat exchangers. The purposes of the services will differ, as one will install heat exchangers and the other will maintain and repair flexible pipes. The method of use for the services will overlap. However, the services will not be in competition, and they are not complementary, as they are not important/indispensable to one another. Bearing all the above in mind, I find the services to be similar to a medium degree.

Machinery installation; assembly [installation] of machinery installations; installation of industrial machinery; machine installation services

53. As far as I am aware, heat exchangers in the opponent's specification, are machinery that transfer heat between two or more fluids without mixing them. With this in mind, it is my view that the opponent's *"installation of heat exchangers"* are encompassed by the above terms in the holder's specification. Therefore, the services are identical on the principle outlined in *Meric.* In relation to the services " *machine installation, maintenance and repair"* in the holder's specification, the installation element is identical on the principle outlined in *Meric,* but the '*maintenance and repair'* aspects are similar to a medium degree applying the reasoning above.

Installation of industrial pressure equipment; installation of pressure safety devices

54. I have no evidence or submissions before me to explain what industrial pressure equipment or safety devices would be. Therefore, applying my own knowledge, I consider that they are used to contain, presumably fluids or gases, under pressure, which I perceive would be used in the transfer of fluids (as in a heat exchanger). Taking this into account, I consider that the opponent's *"installation of heat exchangers"* will encompass the above services in the holder's specification. Therefore, the services are identical on the principle outlined in *Meric*. However, if I am mistaken in this, I find the services to be similar to at least a medium degree.

Class 42

55. I note that the opponent submits that the holder's services in class 42 are complementary to the opponent's goods and services in classes 11 and 37, being heat exchangers (class 11) and installation of heat exchangers (class 37) following genuine use. Further, the opponent submits that as the terms in this class are not limited to a specific area of expertise, it could therefore encompass the repair and maintenance of industrial installations. I am unable to identify any points of similarity between the goods and services or even all the services at issue. The goods and services do not overlap in method of use, trade channels or purpose. The services at issue would overlap in nature, as they are both services, but there will be no overlap in nature for the goods and services. In addition, none of the goods and services at issue are in competition. Contrary to the opponent's submissions, I do not consider the goods and services at issue to be complementary, as they are not important/indispensable to one another. Further, it is not my view that the average consumer would think that they are provided by the same undertaking. I do not perceive that the shared nature, between the services at issue, is sufficient to substantiate a finding of similarity. I am unable to identify any points of similarity between the opponent's goods or services and the holder's following services and find them to be dissimilar:

> Class 42: Software as a Service [SaaS]; support services in the field of SaaS services; computer Platform as a Service [PaaS]; programming of software for inventory management; programming of energy management software; design and development of energy management software; technical design and development of hydrogen-gas refueling stations for vehicles; design and development of software for inventory management of hydrogen-gas refueling stations for vehicles; research in the field of hydrogen fuel cells.

56. For completeness, even if genuine use was demonstrated for a wider selection of goods and services, the opponent would not have been placed in a better position regarding the goods and services comparison. As even with a wider selection of goods and services, those that I have found to be dissimilar on the basis of the remaining goods and services would still be found to be dissimilar. This applies the same in relation to those services that I have found to be similar. As some degree of similarity between the goods and services is necessary to engage the test for a likelihood of confusion, my findings above mean that the opposition

aimed against those goods and services I have found to be dissimilar will fail.[18] For ease of reference, the opposition fails against the following goods and services in the holder's specification:

> Class 1: Hydrogen; catalysts for use in hydrogen emission control; hydrocarbon gases; gaseous hydrocarbon compounds; industrial gases; green hydrogen.
>
> Class 6: Pipes of metal; pipes of steel; pipes and tubes of metal; gas pipes of metal; tubes made of stainless steel; nuts of metal for pipes; pipes of metal for dispensing liquids and gases; pipes of metal, including in alloy steel and titanium; pipes, tubes and hoses, and parts thereof, including valves, of metal; conduits of metal for trunking gas pipes; conduits of metal for trunking liquid pipes; metal fittings for pipes [connectors]; junctions of metal for pipes; metal adapters for pipes; metal gas storage tanks; tanks of metal for transporting compressed gases; metal tanks for transporting liquefied gases; metal cylinders sold empty for liquid or compressed gases; containers of metal for chemicals, liquids and compressed gases; containers of metal for compressed gas or liquid air; transportable constructions and structures of metal.
>
> Class 7: Hydrogen dispensers for service stations; hydrogen dispensing pumps for service stations; carburetor supply pipes; pipe laying machines; cast iron parts for pipes [parts of machines]; pressure pipes of metal [parts of machines]; fueling nozzles; machines for gas production by electrolysis; pneumatic pumps for the supply of liquefied gas; machines for hydrogen and oxygen production by electrolysis.
>
> Class 37: Hydrogen-gas refueling for vehicles; consulting services relating to pipe installation; application of coatings for drainage pipes; vehicle service stations [refueling and maintenance]; repair or servicing of gasoline station equipment; Providing information relating to the repair or servicing of service station equipment; natural gas refuelling for motor vehicles; installation of foundry products; advisory services in connection with the installation of pumps; installation, maintenance and repair of hydrogen-gas refueling stations for vehicles; installation of gas supply and distribution apparatus.
>
> Class 42: Software as a Service [SaaS]; support services in the field of SaaS services; computer Platform as a Service [PaaS]; programming of software for inventory

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

management; programming of energy management software; design and development of energy management software; technical design and development of hydrogen-gas refueling stations for vehicles; design and development of software for inventory management of hydrogen-gas refueling stations for vehicles; research in the field of hydrogen fuel cells.

AVERAGE CONSUMER AND THE PURCHASING ACT

57. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then determine the manner in which the services 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 (as he then was) 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."

58. Depending on whether the remaining services in class 37 are performed on an industrial scale or are intended for individuals, the targeted consumer is the public at large or professionals. Although the professional public can be considered to have a higher level of attention than the public at large, in the present case both the public at large and the professional public display a high level of attention. That high level of attention is due to the fact that the services concerned are not purchased on a regular basis, may be relatively expensive and have specific technical features and can present potential safety risks. Further, the services at issue involve specialised, high value machinery and services that require reliability, safety and performance to ensure efficient systems.

59. The services are likely to be selected following a perusal of signage on physical premises and in advertisements. Consequently, visual considerations will dominate the

selection process. However, I do not discount an aural component to the purchase given that advice may be sought from the providers and word of mouth recommendations may be made.

COMPARISON OF THE MARKS

60. The respective trade marks are shown below:

The holder's mark	The opponent's mark
HRS	

61. It is clear from *Sabel BV 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 trade marks must be assessed by reference to all the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated, at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

62. 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.

63. The holder's mark consists of the text 'HRS' which appears in a standard font. There are no other elements to the overall impression, which lies in the text as a whole.

64. The opponent's mark consists of the text 'HRS' which is presented in a slightly stylised font. To the right of the text is an orange circular device. The opponent submits in its

counterstatement that the dominant and distinctive element in the opponent's mark is 'HRS'. I agree with the opponent that the greater impression of the mark lies in the text 'HRS' with the device and stylisation playing lesser roles.

65. Visually, the marks share the text 'HRS', which I have found plays a greater role in the overall impression of the opponent's mark. I note that as the holder's mark is a word only mark it could be used in any standard typeface, form and colour.[19] The orange circle is a point of visual difference. Taking all this into account, I consider the marks to be visually highly similar.

66. Aurally, the marks will both be articulated in the same way i.e. as the letters H-R-S. The device will not be pronounced. Consequently, I agree with the opponent's submission that the marks will be aurally identical.

67. Conceptually, the opponent submits that the marks are neutral although they both refer to the abbreviation of HRS. I agree with the opponent, that the marks are neutral. However, I would describe the text as being viewed as initialisms, rather than abbreviations, and can see no reason why the average consumer would attribute any meaning to the marks; neither mark has any clear concept. Consequently, the conceptual position is neutral.

DISTINCTIVE CHARACTER OF THE OPPONENT'S MARK

68. 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 C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR 1-2779, 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

[19] *LA Superquimica v EUIPO*, Case T-24/17, at paragraph [39]

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)."

69. 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. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it.

70. The letters are likely to be viewed as an initialism and will have a medium degree of distinctiveness. I do not consider that the minimal stylisation of the mark increases the distinctiveness of the mark to any material degree. In relation to the circular device, while it carries its own degree of distinctiveness, it only has a slight impact on the mark on the whole and is insufficient to increase the distinctiveness of the mark to the level beyond that which is created by the letters 'HRS'. Therefore, I consider that the mark is inherently distinctive to a medium degree.

71. I shall now consider whether the inherent distinctive character has been enhanced through the use made of the mark. For the present circumstances, it is use in the UK that is relevant. While I found the evidence was enough to prove use, as there is no *de minimis* level, the assessment of enhanced distinctiveness requires sufficient use for the capacity of the mark to identify the goods as originating from a particular undertaking. This is a higher test and, in my view, the evidence falls short of what would be required to pass this test. As previously mentioned, I note that the opponent has provided substantial turnover figures demonstrating sales throughout the relevant period which it states were for sales in the UK. However, no breakdown has been provided so I am unable to accurately determine how said turnover is attributable to the relevant goods and services at issue.[20] Further, I have no evidence to demonstrate the geographic scope of the sales throughout the UK and I am unable to distinguish whether sales were widespread or limited to one geographic area in the UK. I recognise that the opponent has provided clear figures demonstrating how much money was

[20] An inference in favour of genuine use was reasonable to make above, this is not the case in relation to enhanced distinctiveness. This is because the bar for proving enhanced distinctiveness is higher than that for proving use of the mark. Therefore, I do not consider that it is appropriate to stretch that inference beyond a level of use that is only satisfactory for genuine use.

spent on the promotion of its goods and services, which is to its benefit. However, the opponent has provided no evidence of the proportion of the relevant class of persons who, because of the mark, identify its goods and services as originating from a particular undertaking nor has it provided any evidence of the market share of the opponent's mark. Taking this all into account, it is my view that the opponent's evidence falls short of what would be required to show that the degree of inherent distinctive character has been enhanced through use which, in any case, remains as a medium degree.

LIKELIHOOD OF CONFUSION

72. 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 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 services or vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the services and the nature of the purchasing process. In doing so, I must be mindful of 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.

73. I have found the marks to be visually similar to a high degree, aurally identical and conceptually neutral. I have found the opponent's mark to have a medium degree of inherent distinctive character. I have found the average consumer to be the general public and professional users and that the services are likely to be selected visually, although I do not discount an aural component. Of the services that I have found a level of similarity, they vary in similarity from similar to a medium degree and identical. I have found the degree of attention paid during the purchasing process to be high.

74. Taking all of the above into account and bearing in mind the principle of imperfect recollection, I consider that the difference between the marks is insufficient to avoid confusion. I am of the view that the average consumer will overlook or misremember the differences between the marks given that the only points of difference is the slight stylisation and presence

of the orange circle device, which I have found play a lesser role in the overall impression of the mark. In addition, I have found the services to vary in similarity from a medium degree of similarity and identity and the marks to be visually similar to a high degree and aurally identical. Even applying a high degree of attention, the marks will be misremembered or mistakenly recalled as each other. I find that there is a likelihood of direct confusion between the marks.

75. However, even if the differences were noticed and recalled, in my view, consumers would believe that the marks are alternative marks used by the same undertaking in different contexts. For example, the opponent's mark could be used on packaging of the goods or services and the holder's mark could be used in promotional examples, or vice versa.

CONCLUSION

76. The opposition under section 5(2)(b) has been successful in part. The opposition succeeds in relation to the following services, for which the application is refused:

> Class 37: Pipe repair services; Installation of pipe systems for gas conveyance; installation of pipe systems for liquid conveyance; installation of pipe systems; maintenance and repair of systems comprising flexible pipes for transporting fluids; Machinery installation; assembly [installation] of machinery installations; installation of industrial machinery; machine installation services; installation of industrial pressure equipment; installation of pressure safety devices; machine installation, maintenance and repair.

77. The application can proceed to registration in respect of the following goods and services**:**

> Class 1: Hydrogen; catalysts for use in hydrogen emission control; hydrocarbon gases; gaseous hydrocarbon compounds; industrial gases; green hydrogen.
>
> Class 6: Pipes of metal; pipes of steel; pipes and tubes of metal; gas pipes of metal; tubes made of stainless steel; nuts of metal for pipes; pipes of metal for dispensing liquids and gases; pipes of metal, including in alloy steel and titanium; pipes, tubes and hoses, and parts thereof, including valves, of metal; conduits of metal for trunking gas pipes; conduits of metal for trunking liquid pipes; metal fittings for pipes [connectors]; junctions of metal for pipes; metal adapters for pipes; metal gas storage tanks; tanks of metal for transporting compressed gases; metal tanks for transporting liquefied gases; metal cylinders sold empty for liquid or compressed gases; containers of metal

for chemicals, liquids and compressed gases; containers of metal for compressed gas or liquid air; transportable constructions and structures of metal.

Class 7: Hydrogen dispensers for service stations; hydrogen dispensing pumps for service stations; carburetor supply pipes; pipe laying machines; cast iron parts for pipes [parts of machines]; pressure pipes of metal [parts of machines]; fueling nozzles; machines for gas production by electrolysis; pneumatic pumps for the supply of liquefied gas; machines for hydrogen and oxygen production by electrolysis.

Class 37: Hydrogen-gas refueling for vehicles; consulting services relating to pipe installation; application of coatings for drainage pipes; vehicle service stations [refueling and maintenance]; repair or servicing of gasoline station equipment; Providing information relating to the repair or servicing of service station equipment; natural gas refuelling for motor vehicles; installation of foundry products; advisory services in connection with the installation of pumps; installation, maintenance and repair of hydrogen-gas refueling stations for vehicles; installation of gas supply and distribution apparatus.

Class 42: Software as a Service [SaaS]; support services in the field of SaaS services; computer Platform as a Service [PaaS]; programming of software for inventory management; programming of energy management software; design and development of energy management software; technical design and development of hydrogen-gas refueling stations for vehicles; design and development of software for inventory management of hydrogen-gas refueling stations for vehicles; research in the field of hydrogen fuel cells.

COSTS

78. The holder enjoyed a greater degree of success and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. However, the costs award will be slightly reduced to reflect the opponent's success in the opposition. The award is calculated as follows:

Preparing a statement and considering the other side's statement	£200
Filing evidence and considering on the other side's evidence	£500
Total	**£700**

79. I therefore order HRS Investments Ltd to pay HYDROGEN-REFUELING-SOLUTIONS the sum of £700. 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 final determination of the appeal proceedings.

Dated this 24th day of November 2025

A KLASS
For the Registrar

Annex 1

Class 1: Hydrogen; catalysts for use in hydrogen emission control; hydrocarbon gases; gaseous hydrocarbon compounds; industrial gases; green hydrogen.

Class 6: Pipes of metal; pipes of steel; pipes and tubes of metal; gas pipes of metal; tubes made of stainless steel; nuts of metal for pipes; pipes of metal for dispensing liquids and gases; pipes of metal, including in alloy steel and titanium; pipes, tubes and hoses, and parts thereof, including valves, of metal; conduits of metal for trunking gas pipes; conduits of metal for trunking liquid pipes; metal fittings for pipes [connectors]; junctions of metal for pipes; metal adapters for pipes; metal gas storage tanks; tanks of metal for transporting compressed gases; metal tanks for transporting liquefied gases; metal cylinders sold empty for liquid or compressed gases; containers of metal for chemicals, liquids and compressed gases; containers of metal for compressed gas or liquid air; transportable constructions and structures of metal.

Class 7: Hydrogen dispensers for service stations; hydrogen dispensing pumps for service stations; carburetor supply pipes; pipe laying machines; cast iron parts for pipes [parts of machines]; pressure pipes of metal [parts of machines]; fueling nozzles; machines for gas production by electrolysis; pneumatic pumps for the supply of liquefied gas; machines for hydrogen and oxygen production by electrolysis.

Class 37: Hydrogen-gas refueling for vehicles; pipe repair services; installation of pipe systems for gas conveyance; installation of pipe systems for liquid conveyance; maintenance and repair of systems comprising flexible pipes for transporting fluids; consulting services relating to pipe installation; application of coatings for drainage pipes; vehicle service stations [refueling and maintenance]; repair or servicing of gasoline station equipment; Providing information relating to the repair or servicing of service station equipment; natural gas refuelling for motor vehicles; machinery installation; assembly [installation] of machinery installations; installation of industrial machinery; installation of foundry products; machine installation services; installation of pipe systems; installation of industrial pressure equipment; machine installation, maintenance and repair; installation of pressure safety devices; advisory services in connection with the installation of pumps; installation of gas supply and distribution apparatus; installation, maintenance and repair of hydrogen-gas refueling stations for vehicles.

Class 42: Software as a Service [SaaS]; support services in the field of SaaS services; computer Platform as a Service [PaaS]; programming of software for inventory management;

programming of energy management software; design and development of energy management software; technical design and development of hydrogen-gas refueling stations for vehicles; design and development of software for inventory management of hydrogen-gas refueling stations for vehicles; research in the field of hydrogen fuel cells.