

O-129-18

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3162122
BY WEAVE IP HOLDINGS MAURITIUS PVT LTD
TO REGISTER:**

DARLING

AS A TRADE MARK IN CLASSES 3 & 26

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 407277 BY ADDITIVE LTD**

BACKGROUND & PLEADINGS

1. On 29 April 2016, Weave IP Holdings Mauritius Pvt Ltd (“the applicant”) applied to register the trade mark **DARLING** for goods in classes 3 and 26 (shown in paragraph 9 below). The application was published for opposition purposes on 27 May 2016.

2. The application has been opposed in full by Additive Ltd (“the opponent”). The opposition, which was originally based upon sections 5(1), 5(2)(a), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”), is now proceeding under sections 5(1) and 5(2)(a) of the Act only, in relation to which the opponent relies upon European Union Trade Mark (“EUTM”) registration No. 12165718 for the trade mark **DARLING** which was applied for on 24 September 2013 (claiming an International Convention priority date of 14 August 2013 from an earlier filing in the United Kingdom) and registered on 18 February 2014. The opponent indicates that it relies upon all the goods and services for which the trade mark is registered, shown in paragraph 9 below. The opponent states:

“...The marks are therefore identical and the respective marks cover related goods in classes 3 and 26 which are identical or highly similar...”

3. Although in its counterstatement the applicant admits that the competing trade marks are identical, it denies there is a likelihood of confusion.

4. In these proceedings, the opponent is represented by Sipara Limited and the applicant by Kilburn & Strode LLP. Although neither party filed evidence, the applicant filed written submissions during the course of the evidence rounds. The applicant also elected to file written submissions in lieu of attendance at a hearing. I shall refer to these submissions, as necessary, later in this decision.

DECISION

5. The opposition is based upon sections 5(1) and 5(2)(a) of the Act which read as follows:

“5. - (1) - A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.

(2) A trade mark shall not be registered if because –

(a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or

(b)...

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

6. An earlier trade mark is defined in section 6 of the Act, which states:

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

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

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered,

would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

7. In these proceedings, the opponent is relying upon the EUTM shown in paragraph 2 above, which qualifies as an earlier trade mark under the above provisions. As this earlier trade mark had not been registered for more than five years at the date the application was published, it is not subject to the proof of use provisions contained in section 6A of the Act. As a consequence, the opponent is entitled to rely upon it without having to demonstrate genuine use.

Comparison of trade marks

8. As I mentioned earlier, the applicant admits the competing trade marks are identical.

Comparison of goods and services

9. The competing goods and services are as follows:

Opponent’s goods and services	Applicant’s goods
<p>Class 3 - cosmetics and toiletries; non-medicated preparations for the application to, conditioning and care of hair, scalp, skin and nails; soaps; perfumes; perfumery; eau de cologne; toilet waters; essential and herbal oils; make-up preparations; lipsticks; nail varnishes; nail varnish removers; non-medicated toilet preparations; hair lotions; hair sprays and hair gels; preparations for use in the bath or shower; bath and shower oils, gels,</p>	<p>Class 3 - Hair care products and preparations; hair colors, hair dyes, hair colorant creams, hair creams and conditioners, hair serum, hair highlighting powder, hair styling gel, hair oils, hair lotions, hair shampoos, hair tonics (non-medicated), hair washes, hair vitaliser, bleaching preparations for the hair; hair mousse, soaps, essential oil, cosmetics, bleaching preparations, perfumery, deodorants, detergents, body creams and</p>

creams and foams; face and body masks; face and body scrubs; facial washes; skin cleansers and hydrators; skin toners; skin moisturizers; blemish creams and blemish gels; deodorants; antiperspirants; preparations for use before shaving and after shaving; shaving soaps; shaving creams; shaving gels; after-shave preparations; pre-shave preparations; talcum powders; dentifrices; toothpastes.

Class 24 - Textiles and textile goods, not included in other classes; bed and table covers; bed linen; sheets; blankets; throws; duvets; duvet covers; eiderdown covers; quilts; pillow covers; pillow cases; cushion covers; bolster cases; curtains; household linen; sheets; placemats; towels; towels of textiles face towels of textile; kitchen towels; beach towels; bath towels.

Class 35 - Retail services connected with the sale of cosmetics, toiletries, perfumes, shaving preparations, hair care preparations, clothing, footwear, headgear, hosiery, hair accessories, bags, jewellery, household linens, cushion covers, curtains, towels, watches and eyewear; the bringing together in a retail outlet or concession, for the benefit of others, of cosmetics, clothing, footwear, headgear,

body wash.

Class 26 - Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; hair additions and attachments, namely, false hair, bows for the hair, hair extensions, wigs, plaited hair, tresses of hair, plastic styling inserts that create height and volume on the crown of the head; hair pieces, braids, buttons, press buttons, hooks and eyes, hair pins; sewing pins; curling pins; waving pins for hair; embroidery needles; knitting needles; sewing needles.

hosiery, hair accessories, bags, jewellery, watches and eyewear, thereby to enable customers conveniently to view and to purchase those goods; the bringing together, for the benefit of others, of a variety of cosmetics, clothing, footwear, headgear, hosiery, hair accessories, bags, jewellery, watches and eyewear in a catalogue, thereby to enable customers conveniently to view and to purchase those goods by mail order; the bringing together, for the benefit of others, of a variety of cosmetics, clothing, footwear, headgear, hosiery, hair accessories, bags, jewellery, watches and eyewear on an Internet website, thereby to enable customers conveniently to view and to purchase those goods via the internet or by other on-line means; provision of information, advice and assistance to customers relating to the aforementioned services.

10. In reaching a conclusion, I shall keep in mind (but do not intend to record here) the applicant's submissions on this aspect of the case (paragraphs 6-13 of its written submissions refer). I do, however, note the applicant's submission to the effect that other than the brief comment contained in its Notice of Opposition (in which the opponent states the goods and services are "related"), the opponent has made no effort to identify what goods and services in its earlier trade mark it considers to be identical/similar to the goods in the application and to explain why. Where the position is obvious, that may not matter. However, as the opponent's earlier trade mark is not

registered in class 26, it ought to have made its position clear. In approaching the issue, I am guided by the case law which follows. Firstly, in the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the Court stated at paragraph 23 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”.

11. 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.

12. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

13. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated:

"I should add that I see no reason to give the word "cosmetics" and "toilet preparations"... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context."

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

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

15. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the 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 (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

16. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the GC held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

17. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He stated (at paragraph 9 of his judgment):

“9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to

providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are '*similar*' to goods are not clear cut."

18. However, on the basis of the European courts' judgments in *Sanco SA v OHIM*¹, and *Assembled Investments (Proprietary) Ltd v. OHIM*², upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd*³, Mr Hobbs concluded:

(i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;

ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

¹ Case C-411/13P

² Case T-105/05, at paragraphs [30] to [35] of the judgment

³ Case C-398/07P

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

Class 3

19. "Soaps", "essential oil", "cosmetics", "perfumery", "deodorants" and "hair lotions" appear in both parties' specification in this class and are literally identical. In addition, as well as containing the term "hair lotions", the opponent's specification also includes the phrase "non-medicated preparations for the application to, conditioning and care of hair, scalp..." and the terms "hair sprays" and "hair gels" which are, collectively, in my view, broad enough to include the following goods in the applicant's specification which are, as a consequence, to be regarded as identical on the *Meric* principle:

"Hair care products and preparations", "hair colors", "hair dyes", "hair colorant creams", "hair creams and conditioners", "hair serum", "hair highlighting powder", "hair styling gel", "hair oils", "hair shampoos", "hair tonics (non-medicated)", "hair washes", "hair vitaliser", "bleaching preparations for the hair" and "hair mousse".

20. The opponent's specification also includes "bath and shower oils, gels, creams and foams" which would include "body creams and body wash" in the application which are to be regarded as identical on the *Meric* principle. "Bleaching preparations" in the application includes "bleaching preparations for the hair" which I have dealt with above.

21. That leaves "detergents" in the application to consider. Collinsdictionary.com defines "detergent" as "a chemical substance, usually in the form of a powder or liquid, which is used for washing things such as clothes or dishes". That is how I understood the term and, more importantly will, in my view, be how the average consumer understands the term. The opponent's specification includes "soaps" which would include laundry soap. Although the nature of the goods and method of use is likely to differ, the users, intended purpose and trade channels are the same and the goods are in competition

with one another. Balancing those factors leads, in my view, to a high degree of similarity between the applicant's "detergents" and the opponent's "soaps".

Class 26

22. As I mentioned earlier, the opponent provides no explanation of what goods and services in its earlier trade mark it considers to be similar to the goods in this class. Unsurprisingly, the applicant submits there is no similarity between its goods in this class and any of the opponent's goods and services. Irrespective of the opponent's failure to identify where it considers the conflict to lie, it is still necessary for me to examine its claim.

23. My conclusion is that having applied the relevant case law there is no similarity between the opponent's goods in class 3 and the applicant's goods in this class. That is unlikely to be controversial.

24. Turning to the opponent's specification in class 24, this includes "Textile and textile goods, not included in other classes" and its class 35 specification includes:

"Retail services connected with the sale of...hair accessories...household linens, cushion covers, curtains, towels...", "the bringing together in a retail outlet or concession, for the benefit of others, of...hair accessories...thereby to enable customers conveniently to view and to purchase those goods", "the bringing together, for the benefit of others, of a variety of...hair accessories...in a catalogue, thereby to enable customers conveniently to view and to purchase those goods by mail order" and "the bringing together, for the benefit of others, of a variety of...hair accessories...on an Internet website, thereby to enable customers conveniently to view and to purchase those goods via the internet or by other on-line means."

25. Insofar as the opponent's goods in class 24 are concerned, my own experience (which I am content will accord with that of the average consumer), informs me that such goods are frequently combined with or assembled using some of the applicant's goods in this class. There are, in my view, obvious similarities in the nature of some of the goods in this class (lace, embroidery and braid for example) as well as in the intended purpose and method of use of the competing goods. The average consumer will also, in my view, be aware of the well-established practice in which the retailing of some of the goods in class 24 often takes place directly alongside and in the same retail outlets as some of the applicant's goods in class 26.

26. As the case law explains, for goods to be regarded as complementary, there must be "a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking". I am satisfied that there is a complementary relationship between, for example, the opponent's "Textile and textile goods, not included in other classes" in class 24 and the applicant's "Lace and embroidery, ribbons and braid; buttons, press buttons, hooks and eyes and artificial flowers" and a further complementary relationship between the opponent's retail services in class 35 in relation to named goods which are proper to class 24 and the applicant's "pins and needles", "sewing pins", "embroidery needles", "knitting needles" and "sewing needles" in class 26, both of which result in a medium degree of similarity overall.

27. The opponent's specification also includes a range of retail services relating to the sale of "hair accessories". In my view, the term "hair accessories" is broad enough to include the following goods in the application: "hair additions and attachments, namely, false hair, bows for the hair, hair extensions, wigs, plaited hair, tresses of hair, plastic styling inserts that create height and volume on the crown of the head; hair pieces", "braids", "hair pins", "curling pins" and "waving pins for hair". Proceeding on the basis indicated above, I am similarly satisfied there is a complementary relationship (and a corresponding medium degree of similarity) between the opponent's "retail services

connected with the sale of hair accessories” and the applicant’s hair related goods mentioned.

Conclusion under section 5(1) in relation to Class 3

28. As the competing trade marks are identical and as I have concluded that with the exception of “detergents” the goods in the application are either literally identical or identical on the *Meric* principle to goods in class 3 of the earlier trade mark, the opposition to all the goods in class 3 (except detergents) succeeds.

The opposition based upon section 5(2)(a) in relation to “detergents” in class 3 and the goods in class 26

29. Bearing in mind that the competing trade marks are identical and the competing goods and services similar to a high degree (class 3) and medium degree (class 26), in considering the matter under section 5(2)(a) of the Act, I take into account the following principles gleaned from the decisions of the courts of the European Union 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) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(d) 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;

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

(f) 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;

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

The average consumer and the nature of the purchasing act

30. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods and services in classes 3, 24, 26 and 35 I have concluded are similar. I must then determine the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the

court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

31. The average consumer of the goods and services at issue is a member of the general public. As a member of the general public will, for the most part, self-select the goods in classes 3, 24 and 26 from the shelves of a bricks and mortar retail outlet or from the equivalent pages of a website or catalogue and the services in class 35 from, inter alia, websites, advertisements and signage on the high street, visual considerations are likely to dominate the selection process. That said, as such goods and services may also be the subject of, for example, word-of-mouth recommendations or oral requests to sales assistants (both in person and by telephone), aural considerations must not be forgotten.

32. I must now consider the degree of care the average consumer will display when selecting the goods and services at issue. The cost of the goods in class 3 is likely to be low. In my experience, such goods are likely to be bought on a fairly regular basis with the average consumer paying no more than a moderate (i.e. between low and medium) degree of attention during the selection process. The cost of the goods in class 24 are likely to vary considerably. However, whether the goods in this class are used to create other goods or are finished goods in their own right, as the average consumer will, in my experience, be conscious of factors such as material, size, colour, cost, compatibility with other items etc. they are likely to pay an average degree of attention during the selection process.

33. The cost of the goods in class 26 is, perhaps with the exception of lace, false hair, hair extensions, wigs, plaited hair, tresses of hair and hair pieces, likely to be relatively low. I would expect the average consumer to pay a low degree of attention to the selection of functional items with a low degree of sophistication (i.e. pins, needles, sewing pins, embroidery needles, sewing needles) and an average degree of attention to those goods with a decorative purpose (i.e. lace and embroidery, ribbons, braid,

artificial flowers, bows for the hair, plastic styling inserts that create height and volume on the crown of the head, hair pins, curling pins, waving pins for hair) or higher degree of functional sophistication (i.e. buttons, hooks and eyes, press buttons and knitting needles). Finally, given their likely cost and as they will all be worn by and contribute to the average consumer's appearance, I would expect an above degree of attention to be paid to the selection of false hair, hair extensions, wigs, plaited hair, tresses of hair, hair pieces and braids.

34. As to the degree of care with which the services may be selected, in my experience, the average consumer is likely to be mindful of a range of considerations such as the breadth of goods/brands stocked, customer reviews, delivery times/costs and, in relation to a bricks and mortar outlet, proximity to their home, opening times, parking etc. all of which suggests an average degree of attention being paid during the selection process.

Distinctive character of the earlier trade mark

35. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade marks to identify the goods and services for which they have been registered as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

36. As the opponent has filed no evidence, I have only the inherent characteristics of its trade mark to consider. In its submissions, the applicant states:

“2. Darling is an affectionate or familiar term of address, which is commonly used in the cosmetics industry. Therefore, it is a term of low distinctive character...”

37. Although the word DARLING and its meaning will be well-known to the average consumer, there is no evidence to suggest that the word is “commonly used in the cosmetics industry”, let alone in relation to the goods and services in classes 24 and 35 upon which the opponent relies. Absent use it is, in my view, a trade mark possessed of a normal degree of inherent distinctive character.

Likelihood of confusion

38. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent’s trade mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods and services the nature of the purchasing process and 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 he has retained in his mind.

39. 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 goods/services down to the responsible undertakings being the same or related.

40. The competing trade marks are identical and I have concluded that the applicant’s “detergents” in class 3 are similar to the opponent’s “soaps” in class 3 to a high degree and its goods in 26 are similar to the opponent’s goods and services in classes, 24 and

35 to a medium degree. Reminding myself that the opponent's trade mark possesses a normal degree of inherent distinctive character and keeping the interdependence principle firmly in mind, I am satisfied that an average consumer paying even an above average degree of attention during the selection process is likely to fall prey to direct confusion and the opposition to the remaining goods in class 3 (i.e. "detergents") and all the goods in class 26 succeeds accordingly. That conclusion is even starker in respect of an average consumer paying an average or moderate degree of attention during the selection process, who will, as a consequence, be even more susceptible to the effects of imperfect recollection.

Overall conclusion

41. The opposition has succeeded in full and, subject to any successful appeal, the application will be refused.

Costs

42. As the opponent has been successful, it is entitled to a contribution towards its costs. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice ("TPN") 2 of 2016. Applying the guidance in that TPN (but only awarding the opponent £100 in respect of the official fee it would have paid had the opposition been filed in the manner in which it ultimately proceeded), I award costs to the opponent on the following basis:

Preparing a Notice of Opposition and reviewing the counterstatement:	£200
Official fee:	£100
Total:	£300

43. I order Weave IP Holdings Mauritius Pvt Ltd to pay to Additive Ltd the sum of **£300**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 26th day of February 2018

C J BOWEN

For the Registrar