

O/136/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003438124

BY NINGBO AIYOU HOLDINGS CO., LTD.

TO REGISTER THE FOLLOWING MARK:

SUP

IN CLASSES 8, 9, 11 AND 34

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 418952

BY CHAPTER 4 CORP D.B.A. SUPREME

Background and pleadings

1. On 21 October 2019, Ningbo Aiyou Holdings Co., Ltd. (“the applicant”) applied to register the trade mark shown below and the application was published for opposition purposes on 1 November 2019.

SUP

2. The registration is sought for the following goods:

Class 8 Beard clippers; Eyelash curlers; Depilation appliances, electric and non-electric; Manicure sets; Shaving cases; Razor blades; Hand implements for hair curling; Razor cases; Hand tools, hand-operated; Table cutlery [knives, forks and spoons]; Flat irons.

Class 9 Chargers for electronic cigarettes; Electronic book readers; Batteries for electronic cigarettes; Batteries, electric; Computer programs, downloadable; Intercommunication apparatus; Selfie sticks [hand-held monopods]; Computer peripheral devices; Electronic interactive whiteboards.

Class 11 Hair dryers; Kettles, electric; Steam facial apparatus [saunas]; Hydromassage bath apparatus; Radiators, electric; Water heaters; Fans [air-conditioning]; Electric fans for personal use; Lamps; Refrigerators.

Class 34 Electronic cigarettes; Liquid solutions for use in electronic cigarettes; Cigarette filters; Oral vaporizers for smokers; Cigarettes; Cigarette tips; Pipe racks for tobacco pipes; Flavourings, other than essential oils, for use in electronic cigarettes; Cigars.

3. Chapter 4 Corp d.b.a. Supreme (“the opponent”) opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all of the goods in the application and is reliant on a number of its marks as set out below.
4. UK00003011586 (“Opposition Mark 1”), filed on 26 June 2013, registered on 27 November 2015.

Series 1 of 2



Series 2 of 2



Opposition Mark 1 is registered for the following goods on which the opponent relies in its opposition:

Class 18 toiletry and vanity cases sold empty; tool bags sold empty.

5. UK00003380415 (“Opposition Mark 2”), published on 16 July 2018, registered on 22 November 2019.



Opposition Mark 2 is registered for the following goods on which the opponent relies in its opposition:

Class 34 Lighters for smokers.

6. International Registration designating the UK, WO0000001457502 (“Opposition Mark 3”), date of designation 29 November 2018, protection was granted on 30 May 2019.



Opposition Mark 3 is protected for the following goods on which the opponent relies in its opposition:

Class 9 portable satellite radios.

The opponent also quotes the following goods under this mark that it seeks to rely on, but which the records do not show as being protected:

Class 9 Spectacles; MP3 players; laptops; computers; personal digital assistants; remote controls; television satellite recorders.

7. International Registration designating the EU¹, WE00001457502 (“Opposition Mark 4”), date of designation 29 November 2018, with the mark yet to achieve protection.



¹ Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 – please see Tribunal Practice Notice 2/2020 for further information.

Opposition Mark 4 seeks protection for the following goods on which it relies in its opposition:

Class 9 portable satellite radios.

The opponent also quotes the following goods under this mark that it seeks to rely on, but which the records do not show as being listed:

Class 9 Spectacles; downloadable graphics for mobile phones; MP3 players; laptops; computers; personal digital assistants; remote controls; television satellite recorders.

8. EU Trade Mark 016815763 (“Opposition Mark 5”), filing date 7 June 2017, date of registration 25 August 2020.



Opposition mark 5 is registered for the following goods on which the opponent relies in its opposition:

Class 18 Tool pouches sold empty; Cosmetic purses; Vanity cases, not fitted.

9. In its Form TM7 and an accompanying statement of grounds, the opponent argues that the respective goods are identical or similar and that the marks are similar.
10. The applicant filed a Form TM8 and an accompanying counterstatement, denying the claims made. In paragraph 3 of its statement of case, it contended that the owner of Opposition Mark 3 on the WIPO database was shown as Chapter 4 Corp as opposed to the stated owner in this case being

“Chapter 4 Corp d.b.a. Supreme” and that therefore the opposition under Opposition Mark 3 should be disregarded as not being owned by the opponent.

11. Neither party filed evidence.

12. The opponent filed a written submission, while the applicant did not file a written submission. In its written submission, the opponent denied the applicant’s claim concerning Opposition Mark 3. It explained that its legal company name is Chapter 4 Corp and that the additional “d.b.a.” refers to “doing business as”. Therefore, both Chapter 4 Corp and Chapter 4 Corp d.b.a. Supreme are one and the same. I accept this explanation and include this mark in the opposition.

13. The applicant’s specification detailed above has been amended compared with the applicant’s original specification. In a letter in response to this amendment, dated 26 May 2020, the opponent declined to withdraw its opposition.

14. The opposition proceedings were suspended on 29 June 2020, pending the outcome of a number of EU applications on which it was relying, and proceedings were resumed on 5 October 2020. I note that, just prior to the resumption of proceedings, the opponent correctly referred to an opposition to Opposition Mark 4 having been withdrawn. However, the EUIPO database continues to show Opposition Mark 4 as yet to receive protection.

15. The case is being considered under section 5(2)(b) of the Act, detailed below, based on the five marks set out above. The opponent withdrew its section 5(3) opposition based on its mark UK00003011437, the mark having been put to proof of use, and the remaining claims under sections 5(3), 5(4)(a), 3(6) and 56 were deemed by the Tribunal to be withdrawn due to no evidence having been filed.

16. The applicant is represented by Trademarkit LLP and the opponent is represented by Kemp Little LLP.

DECISION

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

“5(2) A trade mark shall not be registered if because –

(a)...

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

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

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

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

(a) a registered trade mark, international trade mark (UK) a European Union 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.”

19. Given their respective filing dates, the trade marks upon which the opponent relies qualify as an earlier trade mark as defined above. Furthermore, given the dates on which they were registered/protected, neither are any of the earlier marks subject to the proof of use provisions as detailed below in section 6A of the Act:

“(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), (b) 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.

...”

Section 5(2)(b) – case law

20. Although the UK has left the EU, section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

21. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a greater 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 to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.


Comparison of the trade marks

22. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

23. It would 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.

24. All the opponent's marks are the same, the only variant being that the second in the series of two of Opposition Mark 1 is in black and white as opposed to red, and I will consider it as if it were a single mark for comparison with the applicant's mark. The opponent's and the applicant's marks are shown below:

Opponent's trade mark	Applicant's trade mark
	<p data-bbox="1015 479 1145 533">SUP</p>

25. The applicant states that its mark has one syllable, whereas the opponent's mark has two and that its mark is not a recognised abbreviation of the opponent's mark. The applicant also contends that its mark is likely to be pronounced with a "short "u"", while the opponent's mark is pronounced "soo-preem". The applicant asserts that the words in the two marks differ conceptually. It states that the word in the opponent's mark means "very great, or the best" while its word would be regarded as having no meaning or meaning to drink, or to eat.

26. Arguing that, reading from the left, consumers will notice letters appearing on the left, the opponent states that the first three letters of the marks are identical and that the applicant's mark is "wholly contained" within the opponent's mark. The opponent asserts that the first three letters of the respective marks will be pronounced identically.

27. Conceptually, the opponent contends that the word "Supreme" "has no meaning in English (save in relation to gastronomy)", arguing that meanings that stem from "authority, qualities, power, position or judgement" only become "possessed of meaning when used in relation to a person, people, or some higher being." It asserts that the applicant's word "SUP" has no particular meaning for the average UK consumer "in respect of the goods and services on either side." It views the marks as conceptually similar.

28. I set out my analysis below.

29. The opponent's mark is figurative, but with the word "Supreme" being the element of the mark which strongly dominates the overall impression. The other aspects of the stylisation play a much more limited role.
30. The applicant's mark is the plain word "SUP", the only thing that contributes to the overall impression.
31. Visually, the word in the earlier mark, "Supreme" is given emphasis by the limited stylisation of contrasting italicised text against a solid background rectangle. As a word mark, the applicant's mark, "SUP", has potential notional use as "Sup" and constitutes the first three letters of the word in the opponent's mark. However, there is a contrast between there being stylisation versus no stylisation and the word in the opponent's mark is noticeably longer, being of seven letters in all, four of which are not present in the applicant's mark. I consider the marks to be of low similarity visually.
32. Aurally, the opponent's mark would be pronounced "Soopreem", while the applicant's mark would be voiced as "SUPP". As whole words, they differ aurally. Furthermore, while both begin with the letter "S", the first part of each word forms different sounds i.e. "Soo" versus "SUH". I find the marks to be of very low similarity aurally.
33. Conceptually, the word "Supreme" has a clear meaning, denoting quality. It conveys the concept of something that is "the best" or "being above all others". The word "SUP" could be seen as a word meaning "to drink", or as initial letters without the average consumer knowing what those letters stood for. Either way, the concept is different from that evoked by the opponent's mark. I find the marks to be conceptually different.
34. Given the low and very low levels of visual and aural similarity, plus the conceptual difference, I consider the marks not to be similar overall and, thus, there can be no likelihood of confusion. I will nevertheless continue my

analysis in case I am found to be wrong on this, from which perspective the overall similarity between the marks is in my view very low.

Distinctive character of the earlier mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

36. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

37. I must make an assessment of the inherent distinctive character of the earlier mark. The word “Supreme”, as the dominant element of the earlier mark, is indicative of the quality of the goods and services for which it is registered. I therefore find the mark to be inherently distinctive to a low degree.

38. I note from the UKIPO records that when the opponent applied to register Opposition Mark 1, its application was accepted on the basis of distinctive character acquired by use. Also, in general terms, in its statement of grounds, the applicant sets out criteria against which it argues all of its marks brought in opposition are “possessed of an enhanced distinctive character”. However, it does not follow that the earlier mark benefits from an enhanced level of distinctiveness at the relevant date in these proceedings. Furthermore, the opponent did not provide the evidence relating to Opposition Mark 1’s acceptance, nor indeed did it file any evidence at all.

Comparison of goods and services

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

“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.”

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

- (a) The respective 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.

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

“... 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.”

42. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

"...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded."

43. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court ("GC") stated that:

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

44. 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 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 the responsibility for those goods lies with the same undertaking.”

45. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

While on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

46. The applicant points out that it has deleted “Spectacles” and “Lighters for smokers” from its original specification. Having done that, it asserts that the remaining goods are different from the goods and services covered by the opponent’s earlier marks. Citing the case law for carrying out an assessment

of similarity, it contends that the goods covered by the contested application are fundamentally different from the goods covered by the opponent's marks. It states that its goods are mostly small domestic appliances or household items that have no relation to clothing, fashion, or fashion accessories.

47. The opponent claims its goods are identical in respect of "Lighters for smokers" and "Spectacles". The records for Opposition Mark 3 and Opposition 4 do not show the term "Spectacles" as being registered/listed. However, those marks are registered/listed for "Eyewear" which covers spectacles and therefore that pleading would be acceptable. However, the applicant amended its specification, deleting "Lighters for smokers" and "Spectacles" and so the opponent's claims of identity do not now apply.

48. The opponent contends that its "Lighters for smokers" are similar to the applicant's smoking-related goods. It then lists a number of items under Opposition Mark 3 and Opposition Mark 4 which it says are similar to specified items among the applicant's Class 8, Class 9 and Class 11 goods. However, having checked the relevant UK and EU records, only "portable satellite radios" are listed for these marks. The opponent goes on to state that its toiletry and vanity cases and cosmetic purses are similar to the applicant's items that relate to personal grooming. Finally, it considers its tool bags/pouches to be similar to the applicant's hand tools.

49. The goods in question are as follows, the terms listed under the various marks being combined into one table and the marks being dealt with effectively as one:

Opponent's goods	Applicant's goods
	<u>Class 8</u> Beard clippers; Eyelash curlers; Depilation appliances, electric and non-electric; Manicure sets; Shaving cases;

	Razor blades; Hand implements for hair curling; Razor cases; Hand tools, hand-operated; Table cutlery [knives, forks and spoons]; Flat irons.
<u>Class 9</u> portable satellite radios	<u>Class 9</u> Chargers for electronic cigarettes; Electronic book readers; Batteries for electronic cigarettes; Batteries, electric; Computer programs, downloadable; Intercommunication apparatus; Selfie sticks [hand-held monopods]; Computer peripheral devices; Electronic interactive whiteboards.
	<u>Class 11</u> Hair dryers; Kettles, electric; Steam facial apparatus [saunas]; Hydromassage bath apparatus; Radiators, electric; Water heaters; Fans [air-conditioning]; Electric fans for personal use; Lamps; Refrigerators.
<u>Class 18</u> toiletry and vanity cases sold empty; Cosmetic purses; Vanity cases, not fitted; tool bags sold empty; Tool pouches sold empty.	
<u>Class 34</u> Lighters for smokers.	<u>Class 34</u> Electronic cigarettes; Liquid solutions for use in electronic cigarettes;

	Cigarette filters; Oral vaporizers for smokers; Cigarettes; Cigarette tips; Pipe racks for tobacco pipes; Flavourings, other than essential oils, for use in electronic cigarettes; Cigars.
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Class 8

50. A potential point of similarity between the applicant's "Beard clippers; Eyelash curlers; Depilation appliances, electric and non-electric; Manicure sets; Razor blades" and "Hand implements for hair curling" is the opponent's "toiletry and vanity cases sold empty". All of the items relate to personal grooming and there is a degree of complementarity in cases for such goods being important to house the item. The nature of the relationship is one where it is also possible that the average consumer may think the responsibility for those goods lies with the same undertaking. The trade channels coincide. However, their nature, intended purpose and method of use differ and they are not in competition. I find these goods to be of low similarity.
51. "Shaving cases" and "Razor cases", when compared with the opponent's "toiletry ... cases sold empty", are in competition because the average consumer would have a choice between a dedicated case for the storage of shaving kit or razors and a more general storage case for toiletries. The trade channels coincide and they have the same broad nature and purpose. I find these goods to be highly similar.
52. "Hand tools, hand-operated", when compared with the opponent's "tool bags sold empty" exhibit a degree of complementarity in that protective/storage receptacles for such goods could be important. The nature of the relationship is one where it is also possible that the average consumer may think the responsibility for those goods lies with the same undertaking, particularly as they both relate to the same goods - tools. The trade channels coincide.

However, their nature, intended purpose and method of use differ and they are not in competition. I find these goods to be of low similarity.

53. In relation to “Table cutlery [knives, forks and spoons]” and “Flat irons”, the opponent cites “portable satellite radios” as similar. I struggle to see any point of similarity here. The goods are not in competition with table cutlery, nor are they complementary. The trade channels differ as do the nature and purpose of the goods. I find the goods to be dissimilar.

Class 9

54. “Chargers for electronic cigarettes” and “Batteries for electronic cigarettes” have a superficial relationship with the opponent’s Class 34 “Lighters for smokers”. While the goods all relate to the use of cigarettes, the divide between electronic and conventional cigarettes is such that the consumer tends to habitually partake of one or the other. Consequently, the power source for an electronic cigarette is not in meaningful competition with the source of a flame which lights a conventional cigarette. While the trade channels coincide, the goods differ in nature, and their purposes differ in that the former enables use of an electronic cigarette and the latter enables use of a conventional cigarette. I find these goods to be of very low similarity.

55. The opponent cites “portable satellite radios” as similar to the applicant’s “Electronic book readers”. The goods are not in competition, nor are they complementary. The trade channels coincide to a degree, but the goods differ in nature. Their purposes are also different, the one intended for reading books, the other for listening to the radio. I find the goods to be dissimilar.

56. In relation to “Computer programs, downloadable” and “Computer peripheral devices”, the opponent cites “portable satellite radios” as similar. The goods are not in competition with computer programs and peripherals, nor are they complementary in that satellite radios are self-contained units that receive satellite broadcasts without recourse to software and do not utilise computer

peripherals. The trade channels do not overlap in a meaningful way and the goods differ in nature and purpose. I find the goods to be dissimilar.

57. Regarding “Selfie sticks [hand-held monopods]”, the opponent cites “portable satellite radios” as similar. The goods are not in competition with selfie sticks, nor are they complementary. While the trade channels may superficially overlap in that they could all be sold by a general retailer such as a supermarket or department store, the goods differ in nature and purpose. I find the goods to be dissimilar.

58. The opponent cites a number of Class 9 goods as similar to “Electronic interactive whiteboards”, but of those quoted only “portable satellite radios” are actually registered for the marks brought in opposition. For this term, the goods are not in competition with electronic whiteboards, nor are they complementary. The trade channels do not coincide and the goods differ in nature and purpose. I find the goods to be dissimilar.

59. In relation to “Batteries, electric” and the opponent’s goods and services, the opponent cites a number of Class 9 goods as similar, but only “portable satellite radios” are actually registered for the marks brought in opposition. For this term, while it is conceivable that portable satellite radios could be powered by electric batteries, I do not think that this is a significant enough point of connection for it to be regarded as a strong argument for similarity. Electric batteries are required to support the supply of power to numerous other goods such as cordless tools and electric cars. The extent of complementarity is outweighed by the goods’ different core purposes – supplying power and receiving satellite radio broadcasts. Consequently, the average consumer would not think that responsibility for those goods lies with the same or linked undertakings. Overall, I find these goods to be of low similarity.

60. “Intercommunication apparatus” could be similar to the opponent’s “portable satellite radios”. While they are both communications systems of sorts, the former uses two-way communication, usually over relatively short distances

within buildings. The latter is a receiver of communications, but it does not make them. It is a portable device that receives radio stations broadcast via satellite. The two have some elements in common in respect of their natures – circuitry and speakers. They are not in competition. The trade channels would not overlap substantially as intercom apparatus would generally be retailed by companies specialising in building security, whereas satellite radios would be sold through electrical retailers. I find these goods to be of low similarity.

Class 11

61. “Hair dryers” are potentially similar to the opponent’s “... vanity cases sold empty”. Both of them relate to personal grooming and there could be a degree of complementarity in receptacles for such goods being important. The nature of the relationship is one where it is also possible that the average consumer may think the responsibility for those goods lies with the same undertaking. The trade channels coincide. However, their nature, intended purpose and method of use differ and they are not in competition. I find these goods to be of low similarity.
62. The opponent cites “portable satellite radios” as similar to “Kettles, electric”. The goods are not in competition, nor are they complementary. The trade channels may coincide to a degree, but the goods differ in nature and purpose. I find the goods to be dissimilar.
63. Regarding “Steam facial apparatus [saunas]” and “Hydromassage bath apparatus” and the opponent’s goods and services, the opponent cites a number of Class 9 goods as similar, but only “portable satellite radios” are actually registered for the marks brought in opposition. For this term, the goods are not in competition with facial saunas or hydromassage apparatus, nor are they complementary. The trade channels do not overlap, and the goods differ in nature and purpose. I find the goods to be dissimilar.

64. The opponent cites “portable satellite radios” as similar to “Radiators, electric; Water heaters; Fans [air-conditioning], Electric fans for personal use, Lamps” and “Refrigerators”. The goods are not in competition with such heating, cooling and lighting equipment, nor are they complementary. The trade channels do overlap, but the goods would generally be found in different parts of an electrical retailer’s shop or website. The goods differ in nature and purpose. I find the goods to be dissimilar.

Class 34

65. “Electronic cigarettes; Liquid solutions for use in electronic cigarettes” and “Flavourings, other than essential oils, for use in electronic cigarettes” all relate to electronic cigarettes and therefore are of low similarity when compared with the opponent’s “Lighters for smokers”. This is in line with the rationale set out in paragraph 54.

66. “Cigarette filters” and “Cigarette tips” when compared with the opponent’s “Lighters for smokers” are all used in the act of smoking. However, the respective goods are not complementary, nor are they in competition. While the trade channels coincide, the goods differ in nature and purpose. I find these goods to be of low similarity.

67. “Pipe racks for tobacco pipes” and “Lighters for smokers” all relate to smoking. However, the respective goods are not complementary, nor are they in competition. While the trade channels coincide, the goods differ in nature and purpose. I find these goods to be of low similarity.

68. “Cigarettes” and “Cigars”, when compared with “Lighters for smokers” are complementary to a degree. Cigarettes and cigars can be lit by matches, but lighters are important to the use of cigarettes and cigars and the nature of the relationship is one where it is possible that the average consumer may think the responsibility for those goods lies with the same undertaking. The trade

channels coincide. Their nature, intended purpose and method of use differ and they are not in competition. I find these goods to be of medium similarity.

69. I find that no other of the opponent's goods and services put them in a stronger position than those discussed above.

70. As some degree of similarity between the goods and services is required for there to be a likelihood of confusion², the opposition must fail in respect of the following goods in the applicant's specification:

Class 8 Table cutlery [knives, forks and spoons]; Flat irons.

Class 9 Electronic book readers; Computer programs, downloadable; Selfie sticks [hand-held monopods]; Computer peripheral devices; Electronic interactive whiteboards.

Class 11 Kettles, electric; Steam facial apparatus [saunas]; Hydromassage bath apparatus; Radiators, electric; Water heaters; Fans [air-conditioning]; Electric fans for personal use; Lamps; Refrigerators.

The average consumer and the nature of the purchasing act

71. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and 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 described the average consumer in these terms:

² *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

“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.”

72. Goods that relate to personal grooming will be purchased by a member of the public in a chemist’s or supermarket, online retailers, and the like. The purchasing act will require a certain amount of consideration as to cost and quality, given the range of products available, but only to the extent that a medium level of attention will be required. Given the availability of such items on the shelves, while not entirely ruling out verbal factors, visual considerations will predominate. The exception to this evaluation is razor blades, which would only necessitate a low degree of attention.

73. Hand tools will be purchased by members of the public or professional people in a hardware shop or DIY superstore. The purchasing act will require a certain amount of consideration as to cost and quality, given the range of products available, but only to the extent that a medium level of attention will be required. Given the availability of such items on the shelves, while not entirely ruling out verbal factors, visual considerations will predominate.

74. In respect of smoking-related items, these will be purchased by members of the public. The cost of each purchase will be relatively low. The tobacco products that are included among the relevant goods are subject to legal restrictions sale and display and the goods in question will generally be behind a counter and will need to be requested verbally. Even allowing for the possibility that price lists with the relevant marks may be on

view, verbal considerations will predominate in the purchasing process and the average transaction will require a low level of attention.

75. While electric batteries are highly functional items, the average consumer will give some consideration to questions of quality and cost during the purchasing process. Whether purchasing at an electrical shop or online, the consumer will be looking for reliability. Visual considerations will predominate. The consumer will pay a medium level of attention.

76. Intercommunication apparatus would be purchased by a member of the public for DIY installation or a professional installer of intercom systems. When bracketing it with the opponent's portable satellite radios, the average consumer is a member of the public carrying out a purchase of electronic equipment in a shop or online, with visual considerations predominating. Electronic equipment can vary in price and complexity, but on average it would require a medium level of attention on the consumer's part.

Likelihood of confusion

77. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and 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 goods and services and the nature of the purchasing process. In doing so, I must be

alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

78. I have found the parties' marks to be of low similarity visually and very low similarity aurally, and to be conceptually different. I consider the marks not to be similar overall and, thus, there can be no likelihood of confusion. However, if I am wrong, I continue with my analysis and would consider the overall similarity between the marks to be very low. I have found the earlier mark to be of low inherent distinctive character. I consider that there is a sufficient difference between the marks to avoid them being mistakenly recalled as each other. The earlier mark's word is noticeably longer, consisting of seven letters, to the applicant's three, four of which are not present in the applicant's mark. The whole words in the marks are pronounced differently, and the beginning parts of each of the words form different sounds. As well as the obvious visual and aural differences, one mark has a conceptual hook not shared by the other. Finally, the opponent's mark is given emphasis through its stylisation, while the applicant's mark is a plain word mark. I have found that the degree of attention required by the average consumer during the purchasing act ranges from low to medium. In respect of smoking-related goods, verbal considerations will predominate. While not discounting verbal factors when looking at the remaining goods, visual considerations will predominate. I do not find a likelihood of direct confusion even in relation to those items within the applicant's goods which I have found to be highly similar to the opponent's goods, which I have assessed as requiring a medium degree of attention. This would also be the case for goods of medium similarity requiring a low level of attention. There is clearly no prospect of the remaining goods of medium, low, or very low similarity (and self-evidently of those where I have found no similarity) leading to a finding of a likelihood of direct confusion.

79. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as

the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

80. The average consumer would recognise the respective marks as different. While they have some similarity, I have assessed that as low similarity visually and very low similarity aurally. The question remains whether the average consumer would consider the later mark to be another brand of the owner (or related undertaking) of the earlier mark. The respective words are conceptually different and the first part of each of the words is pronounced differently. I do not consider that the average consumer would see these differences as symptomatic of a brand variation or any other instinctive reaction that would lead them to conclude that any of the respective goods come from the same or economically linked undertaking. It is not even as though “SUP” is a known abbreviation for “Supreme”. I conclude that there is no likelihood of indirect confusion.

81. My findings as to the likelihood of confusion would stand even if I am wrong not to have considered the evidence originally filed in support of the

opponent's application to register Opposition Mark 1 and even if this had established an enhanced level of distinctiveness.

CONCLUSION

82. The opposition has failed. The application will proceed to registration, subject to appeal.

COSTS

83. The applicant has succeeded. In line with Annex A of Tribunal Practice Notice 2 of 2016, I award costs to the applicant as below.

Considering the opposition and preparing the counterstatement:	£400
Total:	£400

84. I order Chapter 4 Corp d.b.a. Supreme to pay Ningbo Aiyou Holdings Co., Ltd. £400. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 4th day of March 2021

JOHN WILLIAMS
For the Registrar