

O/0676/25

TRADE MARKS ACT 1994

**IN THE MATTER OF THE REQUEST FOR PROTECTION
IN THE UK OF INTERNATIONAL REGISTRATION
NO. WO0000001759841
BY DR. SQUATCH, LLC
FOR THE TRADE MARK:**

ALWAYS THE CLEAN VERSION

IN CLASSES 3 & 21

AND

**OPPOSITION THERETO
UNDER NO. 446036 BY
THE PROCTER & GAMBLE COMPANY**

BACKGROUND & PLEADINGS

1. Dr. Squatch, LLC (“**the applicant**”) is the holder of the International Registration (“contested mark”) WO0000001759841 in respect of the mark shown on the front page of this decision with a UK designation date of 9 October 2023. The contested mark was accepted and published in the Trade Marks Journal for opposition purposes on 24 November 2023 for the following goods:

Class 3: Bar soap; bath bombs; non-medicated bath soap; body lotions; body sprays used as personal deodorants and fragrances; cologne; deodorants for personal use; facial cream; facial scrubs; hair shampoos and conditioners; non-medicated hand soap; lip balm; shower gel; sunscreen creams; toothpaste.

Class 21: Soap dishes.

2. On 26 February 2024, The Procter & Gamble Company (“**the opponent**”) opposed the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”)¹. In conjunction with the Section 5(2)(b) ground, this opposition was also initially based on Section 5(3) of the Act and an additional mark, namely UK00003846649. On 12 July 2024, the Registry confirmed that the opponent wished to file no evidence in support of its Section 5(3) ground, limiting the scope of the opposition to reliance on UK00003945147 mark only and in respect of the Section 5(2)(b) ground. Therefore, the opponent is relying only on the following word mark:

¹ Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon 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.

Trade Mark no.	UK00003945147 ('147)
Trade Mark	ALWAYS
Goods for which the mark is registered	Classes 3, 5 & 25.
Filing date	14 August 2023
Date of entry in register	10 November 2023
Priority details	Priority date: 08 May 2023 Priority country: European Union Intellectual Property Office (EUIPO) TM from which priority claimed: 018871712

3. For the purposes of this opposition, the opponent relies on Class 3 and 5 goods as covered by its earlier mark set out in paragraph 10 of this decision.
4. Under Section 6(1) of the Act, the opponent's trade mark clearly qualifies as an earlier trade mark. Further, as protection of the opponent's earlier mark was completed less than five years before the designation date of the contested mark, proof of use is not relevant in these proceedings as per Section 6A of the Act.
5. The opponent claims that the contested mark is highly similar to the opponent's '147 mark for identical or similar goods, and there exists a likelihood of confusion.
6. The applicant filed a defence and counterstatement denying the opponent's claims.
7. The matter came to be heard by me via video conference on 7 April 2025. The applicant was represented by Mr Stefano Braschi of Counsel, instructed by JA Kemp LLP. The opponent, who is represented by D Young & Co LLP, did not attend the hearing but filed written submissions in lieu of attendance at a hearing ("submissions"). I shall not summarise these but will refer to them where appropriate during the course of my decision.

DECISION

8. Section 5(2)(b) of the Act is as follows:

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

[...]

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

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

9. The principles, considered in this opposition, stem from the decisions of the European 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 BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

- 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 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 Goods

10. The competing goods are as follows:

Opponent's goods
<p>Class 3: Body wash; shower gels; cleaning preparations for personal use including soaps and toiletries; non-medicated preparations for personal use and for care of intimate parts of the body; non-medicated cleansers for intimate personal hygiene; moisturizing preparations; feminine washes; cosmetics for intimate personal hygiene; intimate hygiene soaps; preparations, soaps, gels, creams, lotions, moisturizers and foaming gels and creams for intimate personal hygiene; foam cleaning preparations; washing gels; douching preparations for personal sanitary purposes.</p> <p>Class 5: Absorbent sanitary preparations; feminine hygiene products; menstruation pants; menstruation pads; sanitary briefs; sanitary napkins; sanitary pads; sanitary pants; sanitary panty liners; tampons; sanitary tampons; sanitary towels; sanitary knickers; slips for use as menstruation or incontinence protection; disposable menstruation underwear; incontinence diapers; incontinence napkins; pants, absorbent, for incontinence; underpants for sanitary purposes; babies' diapers of textile; preparations and hygienic articles.</p>
Applicant's goods
<p>Class 3: Bar soap; bath bombs; non-medicated bath soap; body lotions; body sprays used as personal deodorants and fragrances; cologne; deodorants for personal use; facial cream; facial scrubs; hair shampoos and conditioners; non-medicated hand soap; lip balm; shower gel; sunscreen creams; toothpaste.</p> <p>Class 21: Soap dishes.</p>

11. With his skeleton argument, Mr Braschi admitted that the contested terms “*Bar soap; bath bombs; non-medicated bath soap; body lotions; body sprays used as personal deodorants and fragrances; cologne; deodorants for personal use; facial cream; facial scrubs; hair shampoos and conditioners; non-medicated hand soap; lip balm; sunscreen creams; toothpaste; Soap dishes*” are similar to the opponent’s goods, including “*body wash; shower gels; cleaning preparations for personal use including soaps and toiletries; foam cleaning preparations; washing gels*”, to an average (or medium) degree.²
12. At the hearing, Mr Braschi submitted that, following the filing of his skeleton argument, he received further instructions from the applicant to concede that the contested term “*shower gel*” is indeed identical to the opponent’s “*shower gels*”. I agree that the competing terms are self-evidently identical.
13. Given the above admissions and for reasons of procedural economy, I will not at this stage undertake a full comparison of the goods. The examination of the opposition will proceed on the basis that some contested goods are identical and some similar against the earlier mark’s specification. I shall carry out a full comparison later, if necessary.

Average Consumer and the Purchasing Act

14. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods and services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), at paragraph 70, Birss J (as he then was) described the average consumer in these terms:

² During the hearing, I also sought clarifications regarding the table included with Mr Braschi’s skeleton argument, which outlines the terms that the applicant admits are similar between the competing specifications. See pages 4-5 of the transcript in this regard.

“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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”

15. The parties agree that the average consumer for the goods in question is the general public. Although they also agree that the degree of attention paid for some goods will be higher, namely “*cologne*”, they disagree as to the attention paid for everyday items, such as soaps and deodorants. In his skeleton argument, Mr Braschi directed me to *Paul Hartmann AG v OHIM*, Case T-504/11; [2013] E.T.M.R. 26, where the General Court ruled that the “*level of attentiveness is particularly high*” for incontinence products. He, therefore, submitted that “*consumers of other intimate hygiene products, including menstrual products and/or products for infants, will for the same reasons (and because of the delicate manner in which such Goods are used) also have a high level of attention*”.³ However, the opponent in its submissions asserts that a low degree of attention will be paid for such low cost items bought on a regular basis.
16. The average consumer of the goods at issue will be a member of the general public. The purchase of the goods will be primarily visual, such as in retail or online stores, where they will be viewed and self-selected by the consumers. However, I do not discount an aural element where word of mouth plays a part, such as verbal recommendation and or advice from sales staff. I note that some goods, such as soaps, shower gels, and hair shampoos and conditioners, are goods bought with a certain regularity and are not considered to be expensive. However, I note that some of the goods may be purchased less frequently than others, and only as and

³ See page 13 of skeleton argument.

when the need arises. Consumers may likely consider factors, such as ingredients, allergens, cleaning properties, suitability for skin type, and scents. In terms of “*soap dishes*”, the average consumer will still wish to ensure that the goods meet their requirements as to type, size or design. These considerations will apply even where the goods are of low cost. Consequently, I consider that a medium degree of attention is likely to be paid during the purchasing process for the goods. As the parties are in agreement that “*cologne*” attracts a higher than medium level of attention, I will proceed on that basis.

Comparison of Trade Marks

17. 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.”

18. 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.
19. The marks to be compared are:

Opponent's Mark	Applicant's Mark
ALWAYS	ALWAYS THE CLEAN VERSION

Overall Impression

20. There is disagreement between the parties as to the overall impression of the competing marks. On the one hand, the opponent submits that:

“[...] The additional elements of the Application, “THE CLEAN VERSION”, will be seen as descriptive of the Contested Goods. [...]

[...] the overall impression is that when considered in relation to the Goods in question, ALWAYS THE CLEAN VERSION immediately calls the Opponent's Earlier Mark to the mind of the consumer. The average consumer is likely to see, focus on, and recall the first and prominent ALWAYS element of the Application, which is identical to the Opponent's Earlier Mark. [...]

21. On the other, Mr Braschi pointed out the findings of the General Court in *Matratzen Concord GmbH v OHIM*, Case T-6/01, arguing that the word “ALWAYS” cannot be considered the dominant word, as the contested mark consists of four words that each have an ordinary meaning. He also posited that the word “CLEAN” is not descriptive of the goods, but it may be allusive to the use of the goods. In this respect, he pointed me to *BOOST ON THE GO Trade Mark*, O/409/19, a case that the opponent relies on, wherein the word “BOOST” was found to be allusive and not directly descriptive. Mr Braschi highlighted that “*even though the element “CLEAN” may be allusive, the word “VERSION” clearly is not*”, while pointing out that “*there is nothing about the phrase “THE CLEAN*

VERSION" in isolation that is any less distinctive than the entire phrase "ALWAYS THE CLEAN VERSION"."⁴

22. The earlier word mark consists of the single word "ALWAYS". Registration of a word mark protects the word itself.⁵ Therefore, the overall impression resides in the word itself.
23. The contested mark consists of the word elements "ALWAYS THE CLEAN VERSION" in upper case and standard typeface. I disagree with the opponent's submissions and note that the word "ALWAYS" qualifies the words "THE CLEAN VERSION". Therefore, the words of the contested mark create a phrase which will be perceived as a unit, and it would be an artificial dissecting of the mark to say that the average consumer would focus only on the word "ALWAYS" and the rest of the words play no role in the overall impression of the mark as a whole.⁶ I will return to this point in the conceptual comparison, but where the elements hang together to form a unit, it is not appropriate for me to determine that "ALWAYS" solus is the dominant element of the mark. Consequently, the overall impression of the mark lies in the combination of these words.

Visual Comparison

24. The competing marks vary in length, with the earlier mark being a single word of six letters, as opposed to the contested mark, which has four words totalling 21 letters. Bearing in mind, as a rule of thumb, that the beginnings of marks tend to have more impact than the ends,⁷ the competing marks share the common word "ALWAYS", appearing at the beginning of the contested mark. However, the competing marks differ in the presence/absence of the word elements "THE CLEAN VERSION".

⁴ See transcript page 10.

⁵ See *LA Superquímica v EUIPO*, T-24/17, para 39; and *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17, paragraph 16.

⁶ See *The Stockroom (Kent) Ltd v Purity Wellness Group Ltd*, O/115/22.

⁷ See *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, where the General Court observed that the attention of the consumer is usually directed to the beginning of a mark.

Considering all the factors, I find them to be visually similar to between a low and medium degree.

Aural Comparison

25. The marks will be pronounced in the ordinary way. There are differences in the length and syllables of the marks. The earlier mark is two syllables long, whereas the contested mark is six. The competing marks only share the first two syllables from the common verbal element “AL-WAYS” but differ in the others. Taking into account the above factors and the overall impressions, I consider that the marks are aurally similar to between a low and medium degree.

Conceptual Comparison

26. The opponent in its submissions states the following:

“According to the Cambridge English Dictionary, the word “ALWAYS” is an adverb, which means “every time or all the time”. An extract from the Cambridge English Dictionary is at **Annex 1**. Conceptually the word “ALWAYS” has the same meaning in both marks. The additional words of the Application “THE CLEAN VERSION” will be seen as referring to a version of something that is free from dirt and therefore taking into context the Contested Goods, it will be understood to be a descriptive statement. As a result, there is a high degree of conceptual similarity between the marks.

[...] Given that “THE CLEAN VERSION” is descriptive, the distinctive elements of the mark remain conceptually identical.” (original emphasis)

27. At the hearing, Mr Braschi agreed with the opponent’s submissions that the term “ALWAYS” is an adverb and will be given its ordinary meaning. However, he emphasised that when the common element is read or spoken in the contested mark, it will be part of a whole phrase that obtains a new meaning. He further noted that grammatically, the word “ALWAYS”

acts as an adverb that qualifies the rest of the words. In this regard, Mr Braschi also referred me to *ALWAYS SAKURA Trade Mark*, O/685/19, where it was found that the word “ALWAYS” qualified the word “SAKURA” for the group of consumers who were familiar with the latter word. While referring to the *BOOST ON THE GO* case, he also added that “*the dominant noun is “VERSION”, described by the adjective “CLEAN”. Those, taken together, are merely qualified by the common element, “ALWAYS”, so it is the reverse situation. Unlike in BOOST, the common element “ALWAYS” will not be perceived independently, there is no conceptual similarity [...].*”⁸ Mr Braschi concluded by positing that the marks are conceptually dissimilar.

28. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] ECR I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.
29. I note that the marks in question have a shared element, namely the word “ALWAYS”, which is a well-known dictionary word, and consumers will perceive it to mean ‘all the time and on every occasion’. Both parties made contentions as to the meaning of the contested mark. However, I agree with the applicant’s submissions and consider that the contested mark as a whole will naturally form a cohesive unit. From a grammatical standpoint, the adverb “ALWAYS” will qualify the noun phrase “THE CLEAN VERSION”, with the word “CLEAN” modifying the dominant noun “VERSION”. Even though the verb is absent, I consider that the phrase in its entirety will be viewed as a statement of preference, evoking the idea of using/selecting a specific version of a product. Given this context, I find that the contested mark could be seen as mildly allusive to the use of the contested goods (associated with cleanliness and personal hygiene), except for “*cologne*” and “*soap dishes*”. Taking into account all of the

⁸ See transcript page 19.

above, including the overall impressions, I find that the degree of conceptual similarity falls between low and medium based on the use of the common element “ALWAYS”.

DISTINCTIVE CHARACTER OF THE EARLIER TRADE MARK

30. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 22 and 23, the CJEU stated that:

“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).

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).”

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

qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it.

32. Mr Braschi submitted that the earlier word mark is weakly inherently distinctive. As explained at the hearing and in his skeleton argument, he asserted this is due to the fact that the earlier mark alludes to the nature and intended use of the registered goods “*which are all products designed to be used and/or worn on the body, and to provide protection and peace of mind, “always”*.”⁹
33. The opponent has not shown use of its mark and, thus, it cannot benefit from any enhanced distinctiveness. In this respect, I have only the inherent distinctiveness of the earlier mark to consider. The earlier mark consists of the ordinary and well-known word “ALWAYS”, conveying the meaning described earlier in this decision. It is my view that the word “ALWAYS” may be seen as mildly allusive/laudatory for some of the goods, drawing on the reliability and longevity qualities associated with it. Thus, I find that the earlier mark is inherently distinctive to a medium degree (at best).

LIKELIHOOD OF CONFUSION

34. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred above in this decision. Such a global assessment is not a mechanical exercise. I must also have regard to the interdependency principle, that 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.¹⁰ It is essential to keep in mind the distinctive character of the opponent’s trade mark since the more distinctive the trade mark, the greater may be the likelihood of confusion. I must also keep in mind that the average consumer rarely has the

⁹ Paragraph 29 of the skeleton argument.

¹⁰ See *Canon Kabushiki Kaisha*, paragraph 17.

opportunity to make direct comparisons between trade marks and must instead rely upon imperfect recollection.¹¹

35. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking.
36. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. (as he then was) considered the impact of the CJEU's judgment in *Bimbo*, on the court's earlier judgment in *Medion v Thomson*. He stated:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

¹¹ See *Lloyd Schuhfabrik Meyer*, paragraph 27.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).”

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

Arnold J. (as he then was) found that there was no likelihood of confusion between the marks ‘ORIGIN’ and ‘JURA ORIGIN’ (both of which were for alcoholic beverages). Despite the similarity in the use of the word ORIGIN, it was found that that word was inherently descriptive and had low distinctiveness for wine and whisky. Consequently, the case law set out in *Medion v Thomson* did not apply.

37. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis QC, as the Appointed Person, pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

38. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, James Mellor QC, sitting as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

39. In *Liverpool Gin Distillery Ltd and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, the Court of Appeal dismissed an appeal against a ruling of the High Court that trade marks for the words EAGLE RARE registered for whisky and bourbon whiskey were infringed by the launch of a bourbon whiskey under the sign “American Eagle”. In his decision, Lord Justice Arnold stated that:

“13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Mr Mellor went on to say that, if there is no likelihood of direct confusion, “one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion”. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion.”

40. Earlier in this decision I have concluded that:

- the goods at issue are identical and similar to a medium degree;
- the average consumer for the relevant goods will be a member of the general public, the level of attention for “*cologne*” will be higher than medium, and for the remaining goods will be no more than medium. The selection process is predominantly visual without discounting aural considerations;
- the competing marks are visually, aurally, and conceptually similar to between a low and medium degree;
- the earlier mark is inherently distinctive to a medium degree (at best).

41. I note that the parties refer me to earlier decisions of the Tribunal, *inter alia* *SKINSURE* (BL O/0001/23) and *BOOST ON THE GO* (BL O/409/19), where the Hearing Officers had considered the facts before them. Decisions by fellow Hearing Officers were, of course, determined on their own facts and merits and are not binding, or strong precedent, for other cases before the Tribunal. Whilst I have noted both parties’ submissions seeking to draw parallels with these earlier decisions, I will consider the pertinent facts of this case to conduct the global assessment to determine whether there is a likelihood of confusion in this present case.

42. The opponent submits that there is a likelihood of direct and indirect confusion in the following terms:

“The Opponent submits that the overall impression is that when considered in relation to the Goods in question, ALWAYS THE CLEAN VERSION immediately calls the Opponent’s Earlier Mark to the mind of the consumer. The average consumer is likely to see, focus on, and recall the first and prominent ALWAYS element of the Application, which is identical to the Opponent’s Earlier Mark. Additionally, THE CLEAN VERSION could be perceived as a sub-brand (or “version”) of ALWAYS.

According to the principle set down in *Lloyd Schufabrik*, the average consumer does not often have the opportunity to compare marks side by side but instead, must rely upon the imperfect recollection s/he has kept of the trade marks in her/his mind. When considering the trade marks in question, imperfect recollection is such that consumers could purchase the Applicant's goods in Classes 3 and 21, either believing they are offered by the Opponent or, at the very least, that there is some connection between the respective companies when there is not. It is therefore possible that consumers would easily assume that the Contested Goods are provided by, or in connection with, the Opponent.

Even if the Office considers that direct confusion does not exist in this case, it is clear that there is a high risk of indirect confusion. Consumers will notice the common element between the marks, ALWAYS and conclude that ALWAYS THE CLEAN VERSION is another brand of the Opponent. [...]

In the event that the Office does not find that direct confusion exists in this case, it is clear that a finding of indirect confusion is inevitable taking into consideration the above. [...]

[...] If, therefore, it is found that the trade marks are not as similar as the Opponent believes, the principle of interdependence must be taken into account in reaching the conclusion that there is a risk of confusion.

On the basis of all the above, the Opponent submits that there is a direct (as well as an indirect) likelihood of confusion such that the Application should be refused in its entirety, under the provisions of Section 5(2)(b) of the Act."

43. At the hearing, Mr Braschi contended that the shared element "ALWAYS" does not play an independent distinctive role in the contested mark, which is composed of a single, continuous and coherent phrase. In this regard, Mr Braschi explained that based on *Whyte and Mackay*, the average

consumer “*will perceive the contested mark as a unit with a new meaning, distinct from its separate components, distinct from just the word “ALWAYS”.*”¹² In addition, Mr Braschi stressed that the opponent’s submissions appear to be conflating the analysis between the likelihood of indirect confusion and direct confusion and nothing further is put forward in terms of direct confusion. He then moved on to address whether there is a likelihood of indirect confusion, drawing on the categories provided by Mr Iain Purvis QC in *LA Sugar*. In doing so, Mr Braschi argued that examples (a) and (c) in *LA Sugar* do not apply to this case. He contended that based on the opponent’s submissions, it might have referred to (b), where the average consumer is going to perceive the contested mark as a sub-brand or brand extension of the earlier mark. However, Mr Braschi maintained that this case does not fall under that category, as the common word element “ALWAYS” does not retain an independent distinctive role in the contested mark as the emphasis is placed on the additional elements and not on the common element.

44. Taking into account my findings earlier in this decision, I find that there is no likelihood of direct confusion for identical goods. Despite imperfect recollection, it is my view that the average consumer will remember that the earlier mark, “ALWAYS”, is a single word mark compared to the applicant’s four-worded mark, “ALWAYS THE CLEAN VERSION”, that forms a distinctive unit. Although the marks have common beginnings, they differ visually, aurally, and conceptually. I do not find it likely that consumers would entirely forget three out of four words in the contested mark. Given that direct confusion involves no process of reasoning, I consider that the average consumer will not overlook the differences between the competing marks, and, thus, it is unlikely to mistake one mark for the other.
45. Even if the average consumer recalls the points of similarity between the marks, such as that they contain the word “ALWAYS”, I still consider the

¹² Page 15 of the transcript.

marks would not be indirectly confused. Sitting as the Appointed Person in *Eden Chocolat*,¹³ James Mellor QC stated:

“81.4 [...] I think it is important to stress that a finding of indirect confusion should not be made merely because the two marks share a common element. When Mr Purvis was explaining¹⁴ in more formal terms the sort of mental process involved at the end of his [16], he made it clear that the mental process did not depend on the common element alone: ‘Taking account of the common element in the context of the later mark as a whole.’” (Emphasis added)

I also bear in mind the comments of Professor Ruth Annand, sitting as the Appointed Person in *BARKERS BREW*, O/476/14, where she stated:

“26. On the contrary, the CJEU makes clear in *Bimbo* that “hanging together” is not the determinative criteria in assessing a composite mark: the decisive question being whether the composite mark forms a unit having a different meaning as compared to its components taken separately (*Bimbo*, para. 25).

27. Mr. Malynicz referred me to 2 earlier decisions of Mr. Geoffrey Hobbs Q.C. sitting as the Appointed Person in *CARDINAL PLACE* Trade Mark, BL O/339/04³ [fn³ *CARDINAL PLACE* geographical whereas *CARDINAL* religious] and *CANTO* Trade Mark, BL O/021/06, as similarly expressing the same point that marks must be compared as wholes, considering the blend of meaning given by the composite mark against the single term.”

46. In my view, there is no clear basis for a finding of indirect confusion. In accordance with the rationales cited above, the word elements of the contested mark, “ALWAYS THE CLEAN VERSION”, form a cohesive whole. That blend of meaning emanating from the combination of the said

¹³ Case BL O/547/17 *Duebros Limited v Heirler Cenovis GmbH* (27 October 2017).

¹⁴ In *L.A. Sugar*.

words will convey the concept of a statement of preference that goes beyond the meaning of the shared word “ALWAYS” alone. I note here that the overall impression lies within the unit of these words. As a result, the word “ALWAYS” does not retain an independent distinctive role within the contested mark. To my mind, the coincidence of the “ALWAYS” element in both marks is not likely to lead the consumer to believe there is a trade connection. It is not so strikingly distinctive that consumers would assume only one undertaking uses it, and the additional elements in the contested mark are not consistent with a brand extension, rebranding, or sub-brand. Furthermore, if the opponent’s mark is brought to mind, this will be a mere association, not confusion.¹⁵ I see no other reason why a common origin or an economic connection would be assumed and so I find that, even where the goods are identical, there is no likelihood of indirect confusion.

47. Based on my findings above, the opponent’s case will not be helped by a full comparison of the goods, and my findings extend to the goods having any degree of similarity.

OUTCOME

48. The opposition has been unsuccessful. **There is no likelihood of confusion. The opposition on the basis of the claim under Section 5(2)(b) fails.** Therefore, subject to any successful appeal, the application can proceed to registration.

COSTS

49. The applicant has been successful and is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. The sum is calculated as follows:

¹⁵ See *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81

Considering the other side's statement and preparing a counterstatement	£300
Preparing for and attending the hearing	£900
Total	£1,200

50. I, therefore, order The Procter & Gamble Company to pay to Dr. Squatch, LLC the sum of £1,200. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 22nd day of July 2025

Dr Stylianos Alexandridis
For the Registrar,
The Comptroller General