

O/0714/26

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

**IN THE MATTER OF UK REGISTRATION NUMBERS 3572085 and 3570572
IN THE NAME OF CUPCLUB LIMITED
FOR THE TRADE MARKS:**



CLUBZERØ

CLUBZERØ



(AS A SERIES OF FOUR)

AND

CLUBZERØ

AND

**THE APPLICATIONS FOR DECLARATIONS OF INVALIDITY THERETO
UNDER NUMBERS 504389 AND 504390
BY ABEL & COLE LTD**

BACKGROUND AND PLEADINGS

1. Trade mark registration numbers UK00003572085 (“the stylised registration”) and UK00003570572 (“the word only registration”) – together “the contested marks” – for the marks shown on the cover page of this decision, stand registered in the name of Cupclub Limited (“the Proprietor”). The stylised registration was filed on 24 December 2020 and registered on 4 June 2021. The word only registration was filed on 21 December 2020 and registered on 28 May 2021. The contested marks are registered for services in Classes 35, 37, 39, 40 and 42; these are listed in the annex to this decision.

2. On 30 November 2021, Abel & Cole Ltd (“the Cancellation Applicant”) filed applications for declarations of invalidity of the contested marks in relation to some of the registered services – in Classes 35, 37 and 39.¹ These will be listed later in this decision. The applications are based upon sections 5(2)(b) and 5(4)(a),² under the provisions of section 47(2), of the Trade Marks Act 1994 (“the Act”).

3. Under section 5(2)(b), the Cancellation Applicant relies upon the following trade mark (“the earlier mark”):

UK trade mark number 3451809

Filing date: 16 December 2019

Registration date: 10 August 2020

Services relied upon: *Refilling services* in Class 40.

Representation: CLUB ZERO

4. Given its respective filing and registration dates, the Cancellation Applicant’s mark qualifies as an earlier mark under section 6(1)(a) of the Act but was not, at the filing dates of the contested marks, subject to the use provisions at sections 47 (2A) – (2F) of the Act. For the purposes of these proceedings, the Cancellation Applicant may rely

¹ The Cancellation Applicant originally objected also to services in Class 40; following an amendment to the Proprietor’s specification, the objection became redundant.

² The section 5(4)(a) grounds of invalidation were added to the proceedings in October 2023.

upon its earlier mark for the services listed in the previous paragraph without proving use.

5. Under section 5(2)(b), the Cancellation Applicant claims that there is a likelihood of confusion between the earlier mark and the contested marks, on the basis that the marks are highly similar and the respective services are identical or highly similar.

6. Under section 5(4)(a), the Cancellation Applicant relies upon the unregistered sign, CLUB ZERO, which it claims to have used throughout the UK since February 2020 in relation to *groceries; provision of groceries in refillable containers; refilling of food containers; collection and refilling of empty containers; collection and refilling of reusable containers*. The Cancellation Applicant claims to have generated goodwill in the sign and that use of the contested marks would constitute a misrepresentation to the public that would damage the Cancellation Applicant's goodwill. Therefore, use of the contested marks would be contrary to the law of passing off.

7. The Proprietor filed counterstatements to both invalidations, essentially denying all the Cancellation Applicant's claims and putting the Cancellation Applicant to proof of such claims.

8. The invalidity proceedings (under numbers 504389 and 504390) were subsequently consolidated.

9. The Cancellation Applicant is represented by WP Thompson and the Proprietor by Bird & Bird LLP. During the initial evidence rounds (prior to the section 5(4)(a) grounds being added), the Cancellation Applicant filed evidence and submissions and the Proprietor filed submissions, all going to the section 5(2)(b) grounds. After the addition of the 5(4)(a) grounds, the Cancellation Application filed evidence going to those grounds; the Proprietor filed neither evidence nor submissions in response to the section 5(4)(a) grounds. A hearing took place before me on 11 November 2024.

Evidence and submissions

10. In relation to section 5(2)(b), the Cancellation Applicant filed evidence in the form of the witness statement of Francesco Simone (“FS WS”) dated 20 May 2022 and its corresponding one exhibit (“FS1”). Francesco Simone is a Chartered Trade Mark Attorney at the Cancellation Applicant’s representative. The evidence is provided to demonstrate various dictionary definitions of the word “refill”. Filed with the evidence were written submissions dated 20 May 2022 regarding the merits of the case.

11. In response, the Proprietor filed written submissions dated 28 December 2022 regarding the merits of the case.

12. In relation to section 5(4)(a), the Cancellation Applicant filed evidence in the form of the witness statement of Hannah Haas (“HH WS”) dated 12 March 2024 and its corresponding 11 exhibits (“HH1 – HH11”). Hannah Haas is a director of the Cancellation Applicant. The evidence goes to the Cancellation Applicant’s claimed goodwill in the CLUB ZERO sign.

13. The Proprietor had the opportunity to file evidence and/or submissions in response to the Cancellation Applicant’s evidence for section 5(4)(a) but it chose to file neither.

14. I do not intend to summarise the evidence or submissions but have taken it into account and will refer to it throughout this decision, where relevant.

The Hearing

15. The Cancellation Applicant was represented by Jacqueline Reid of 11 South Square chambers, instructed by WP Thompson; the Proprietor was represented by Emma Green of Bird & Bird LLP.

16. Prior to the hearing, I noticed a discrepancy between the terms in Class 39 that were objected to under section 5(2)(b) versus 5(4)(a) – the potential result being that depending on the outcome of these proceedings, some terms objected to could remain on the register despite the intention of the Cancellation Applicant (as apparent from its

submissions throughout these proceedings, as well as the skeleton arguments) being to oppose the same terms in Class 39 under both grounds. This was seemingly a result of Class 39 being worded slightly differently in each of the contested marks' specifications; the Cancellation Applicant listed the specification being challenged identically in each form despite the minor differences apparent from the register: listing the services challenged under section 5(2)(b) as those in the specification of the stylised registration and those under section 5(4)(a) as those in the specification of the word only registration.

17. I heard the parties' arguments on the interpretation of the Cancellation Applicant's pleadings, whether a request to amend the same was necessary and any prejudice to the parties in allowing or refusing such amendments. At the conclusion of the hearing, I directed the parties to file written submissions within 14 days. In short, the Cancellation Applicant's submission is that it is open to me correct the irregularity in the proceedings by treating the pleadings as applying to the same terms in Class 39 in each of the contested marks' specifications, under both grounds, on the basis that there is no prejudice to the Proprietor in doing so. The Proprietor's submission is that the scope of the cancellation actions should not be broadened beyond what has been specifically defined in the pleadings and that any deviation from the pleadings would undermine the procedural certainty on which the Proprietor has relied and would represent an unjustified expansion of the Tribunal's role in adjudicating the present invalidity actions.

18. I have considered the parties' arguments and for reasons that will become apparent, I will proceed to determine the invalidity actions based on the original pleadings of the Cancellation Applicant, returning to address this issue later in my decision.

DECISION

Relevance of EU law

19. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the

European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Section 5(2)(b)

Statutory provisions

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

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

[...]

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

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

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

21. Section 5(2)(b) has application in invalidation proceedings by virtue of section 47 of the Act, the relevant parts of which state as follows:

“47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground –

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, [...]

(b) [...]

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

Relevant law

22. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25:

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 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; and

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

Comparison of services

23. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

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

24. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] RPC 281 for assessing similarity between goods/services also include an assessment of the users and channels of trade of the respective goods/services.

25. Further, in *Kurt Hesse v OHIM*,³ the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods/services. In *Boston Scientific Ltd v OHIM*,⁴ the General Court stated that “complementary” means:

³ Case C-50/15 P.

⁴ Case T-325/06.

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

26. I also bear in mind the judgment of Jacob J (as he then was) in *Avnet Incorporated v Isoact Limited*:⁵

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

27. Finally, section 60A of the Act is also relevant. It provides:

“(1) For the purpose of this Act goods and services –

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

28. The parties’ specifications are listed in the table below.

⁵ [1998] F.S.R. 16.

The Cancellation Applicant's specification	The Proprietor's specifications (as challenged)
Class 40: <i>Refilling services.</i>	<u>The stylised registration</u> Class 35: <i>Retail services in relation to reusable consumer packaging; development of concepts for circular economy.</i> Class 37: <i>Cleaning containers for reuse by consumers; washing and sanitisation service in respect of reusable packaging containers.</i> Class 39: <i>Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials; collection, management, distribution and transportation of bins for depositing reusable packaging; delivery and distribution of reusable containers; delivery and distribution of containers for household use; delivery and distribution of food and beverage containers; delivery and distribution of reusable containers for household use; delivery and distribution of reusable consumer packaging; packaging services; reusable container rental services; collecting containers for reuse by consumers.</i> <u>The word only registration</u> Class 35: <i>Retail services in relation to reusable consumer packaging; development of concepts for circular economy.</i>

	<i>Class 37: Cleaning of containers for reuse by consumers; washing and sanitisation services in the respect of the reusable packaging containers.</i> <i>Class 39: Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials; collection, management, distribution and transportation of bins for depositing reusable packaging.</i>
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29. Both parties made detailed submissions on the comparison of the services, with the Cancellation Applicant attesting to identity or high similarity and the Proprietor submitting they are entirely dissimilar. I have considered all the submissions in coming to the following conclusions.

30. Refilling services involve the service provider filling something, i.e. an object or container again after it has been emptied. The majority of the terms in the Proprietor's specifications can be compared in the same way for the same reasons and so I will group those together as follows.⁶

Cleaning containers for reuse by consumers; washing and sanitisation service in respect of reusable packaging containers; Cleaning of containers for reuse by consumers; washing and sanitisation services in the respect of the reusable packaging containers.

31. The purpose of these services clearly differs to that of the refilling services – the former cleans, washes or sanitises containers/packaging whereas the latter refills them. However, the users are likely to overlap on the basis that a consumer who

⁶ *Separode Trade Mark*, BL O-399-10.

requires a container to be refilled will also require that container to be cleaned. In my view, the cleaning of reusable containers is important to the refilling of containers to the extent that users will assume the responsibility for both services lies with the same undertaking. I therefore find that these services have a complementary relationship and are similar to a low degree.

Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials; delivery and distribution of reusable containers; delivery and distribution of containers for household use; delivery and distribution of food and beverage containers; delivery and distribution of reusable containers for household use; delivery and distribution of reusable consumer packaging; collecting containers for reuse by consumers.

32. All these services involve the collection, transport and delivery of containers/packaging. Similarly to my reasoning in the previous paragraph, whilst the purpose of these services differs to that of the refilling services, the users are likely to overlap with the same consumers requiring the collection/transport of the container/packaging prior to it being refilled and the transport/delivery of the container/packaging once it has been refilled. Again, as with the cleaning of the containers/packaging, the collection, transport and delivery are important to the refilling to the extent that consumers would expect all services to be provided by the same undertaking. I therefore find that these services have a complementary relationship and are similar to a low degree.

Collection, management, distribution and transportation of bins for depositing reusable packaging

33. These services are a step further removed from refilling services than the services discussed in the previous paragraph, which broadly encompass the collection, transport and delivery of containers/packaging. The services here relate to bins for disposing of, or collecting, the reusable packaging, which I consider to be different in nature, purpose and method of use to refilling services. It is unlikely that consumers will assume the undertaking responsible for the management of reusable packaging

bins is the same as the undertaking offering refilling services. There is no complementary relationship between these services and no meaningful overlap in any of the other relevant factors and so I find these services dissimilar.

Packaging services

34. Packaging services involve the packaging of goods: an essential service to the distribution of goods. This is a wide term, and I am conscious not to interpret it as covering an overly vast range of activities.⁷ Accordingly, while packaging services differ in nature, method of use and purpose to *refilling services*, the users will overlap to the extent that consumers who have their containers refilled and returned to them will require those containers to be packaged. I consider there to be a complementary relationship between these services on the basis that they are important for one another and consumers would assume the same undertaking has provided both the refilling and packaging services, despite those services having different core meanings. On the basis that complementarity can be the sole basis of similarity, I find these services similar to a low degree.

Reusable container rental services

35. The meaning of these services is apparent from the wording of the term: services which allow for the rental of reusable containers. In my view, it is entirely logical that a consumer would rent a reusable container and have that container refilled by the same undertaking. Where refilling services are provided online and/or via a postal service, consumers may be required to rent a container in order for it to be refilled, and the consumer will assume the responsibility for both services lies with the same undertaking. As such, I find the services to be complementary and similar to a low degree.

Retail services in relation to reusable consumer packaging

⁷ See *Avnet*, cited earlier.

36. These services involve the sale of reusable packaging to consumers. Whilst the Cancellation Applicant's refilling services may coincide with the sale of reusable packaging, the core meaning of each of these services differs, meaning their nature, purpose and method of use also differs. Whilst there may be a general overlap in user, the services are not in competition with one another and they are not complementary in the sense of the services being important to one another or consumers believing the same undertaking offers both. Unlike the rental of reusable containers discussed in the previous paragraph, it is not the packaging itself that consumers will have refilled and so these services are a step further removed. The fact that one business may offer both services simultaneously does not of itself create similarity in a trade mark sense: the services are simply coincidental to one another. I find no similarity between *retail services in relation to reusable consumer packaging* and *refilling services*.

Development of concepts for circular economy.

37. The circular economy is a model or system where materials and products are kept in circulation for as long as possible, in order to minimise waste. Whilst *refilling services* could be said to constitute a concept that promotes the circular economy, the service of developing such concepts is drastically different to the service of refilling, even though there may be a broad overlap in the end purpose of minimising waste. When considering the core meaning of each of these services, I find no meaningful similarity from a trade mark perspective.

The average consumer and the purchasing act

38. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose 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 or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

39. In *Iconix* (cited above), the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* EWCA Civ 262, where he pointed out that:

- (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
- (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
- (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
- (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;
- (e) The average consumer's level of attention varies according to the category of goods or services in question; and
- (f) The average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

40. The average consumer of the services at issue will be either a member of the general public or a business. Various factors will be taken into account during the selection process such as the variety of options for refilling, the speed of

delivery/collection as well as hygiene ratings/standards for applicable services. The services will vary in price, falling into neither the low-cost nor the prohibitively expensive categories. Taking all of this into consideration, I find it likely that a medium degree of attention will be paid during the purchase of the services.

41. The services are likely to be selected following perusal of: signage on physical premises; printed or online advertisements; or webpages. Visual considerations are, therefore, likely to dominate the selection process. However, given that recommendations via word-of-mouth may take place and orders for the services may be placed via the telephone, I do not discount an aural component to the purchase.

Comparison of marks

42. It is clear from *Sabel* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo*, that:

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

43. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

44. The trade marks to be compared are as follows:

The earlier mark	The contested marks
CLUB ZERO	<u>The stylised registration (as a series of four)</u>  <u>The word only registration</u> CLUBZERØ

Overall impression

45. The earlier mark comprises two words: CLUB and ZERO, presented in upper case. In my view, as I will come to discuss in the conceptual comparison, CLUB qualifies ZERO and the words hang together. Accordingly, the overall impression of the mark lies in the two words with both having equal weight.

46. The stylised registration comprises the same textual element in each of the four marks in the series: CLUBZERØ. This element will be seen as the two ordinary words CLUB and ZERO conjoined, with the letter O in ZERO replaced by a slashed zero. The text is either presented: (i) in white against a yellow background; (ii) in yellow against a white background; (iii) in black against a white background; or (iv) in white on a black background. The colour yellow in the first and second marks in the series is described on the register as the colour ‘Yellow pantone reference 1235C’. In each

of the marks in the series, the overall impression lies predominantly in the textual element, with the varying text colours and backgrounds, as well as the slashed zero, holding less weight given they are basic and purely stylistic.

47. The word only registration comprises one element, being the same textual element as in the stylised registration: CLUBZERØ. Again, this element will be seen as the two ordinary words CLUB and ZERO conjoined, with the letter O in ZERO replaced by a slashed zero. The textual element dominates the overall impression of the mark, with the slashed zero holding less weight.

Visual comparison

The earlier mark v the stylised registration

48. The differences between the earlier mark and each mark in the series of the stylised registration are the space between the words CLUB and ZERO, the slashed zero and either the font colour or the background colour. Bearing in mind the overall impression of each of these marks, the differences are minor and I consider the marks to be visually similar to a high degree.

The earlier mark v the word only registration

49. The differences between these marks are solely the space between the words CLUB and ZERO and the slashed zero. Again, bearing in mind the overall impression, these differences are minor and I consider the marks to be visually similar to a very high degree.

Aural comparison

50. The earlier mark and the contested marks will be articulated in the same way, as the two ordinary words CLUB and ZERO, as three syllables. I do not consider that the slashed zero in the contested marks will alter the articulation given that ZERO is an ordinary dictionary word in the UK and so will be afforded its usual pronunciation. The earlier mark is aurally identical to each of the contested marks.

Conceptual comparison

51. Given the near-identical textual element in each mark, and my finding of aural identity, the concept of 'CLUB ZERO/CLUBZERØ' will be the same in each mark: in the context of the services at issue – those relating to refilling and reusable containers/packaging – that concept will be a club (or an association or organisation) dedicated to zero waste or zero packaging. The slashed zero and the font or background colours in the contested marks do not alter this concept. I find the earlier mark to be conceptually identical to each of the contested marks.

Distinctive character of the earlier mark

52. In *Lloyd Schuhfabrik Meyer* 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).”

53. 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/services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

54. I will assess the inherent position first. As discussed in the conceptual comparison of the marks, when considering the Cancellation Applicant's services, CLUB ZERO will be seen as a club dedicated to zero waste which, in relation to refilling services is allusive, though not descriptive. As such, I consider the earlier mark to be inherently distinctive to between a low and medium degree.

55. Turning to whether the distinctiveness of the earlier mark has been enhanced through use, I consider the Cancellation Applicant's evidence of use.

56. Whilst there is evidence of use of the earlier mark in relation to deliveries totalling a sales value of almost £83,000 between February and December 2020⁸ and with a wide geographical spread across the UK (from Andover to Doncaster to Mitcham, for example),⁹ such a short period of use does not demonstrate long-standing use. Further, despite the evidence demonstrating promotion during 2020 of 'CLUB ZERO' on the Cancellation Applicant's website,¹⁰ in emails,¹¹ in printed newsletters,¹² in the press,¹³ and on social media,¹⁴ the evidence does not include the amount invested in promoting the mark. Neither has the Cancellation Applicant provided details of the market share held by the mark. Whilst there has clearly been an attempt to create and maintain a market throughout 2020, given that account should be taken of the market share, promotional spend and intensity and duration of use,¹⁵ I am not satisfied that the level of use supports a finding of enhanced distinctiveness in the earlier mark.

⁸ HH WS at [17].

⁹ HH WS at [16].

¹⁰ HH WS at [5] and HH1.

¹¹ HH WS at [6]-[7] and HH2-3.

¹² HH WS at [8] and HH4.

¹³ HH WS at [9]-[10] and HH5-7.

¹⁴ HH WS at [11] and HH8.

¹⁵ As per *Lloyd Schuhfabrik Meyer*, cited above.

Likelihood of confusion

57. 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 consumers realises the marks are not the same but puts the similarity that exists between the marks and the services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the 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 he/her has retained in his/her mind.

58. I have found the earlier mark to be visually similar to a high degree to the stylised registration and a very high degree to the word only registration. I have found the contested marks aurally and conceptually identical to the earlier mark. I have found the services to be similar to a low degree. I have found the earlier mark to possess a low to medium degree of inherent distinctive character. I have identified the average consumer to be a member of the general public or a business, who would pay a medium degree of attention to the purchase of the services and selects them predominantly by visual means, though I do not entirely discount the aural consideration.

59. The textual elements are the dominant elements of both marks and differ only in the space between CLUB and ZERO in the earlier mark and the slashed zero in the contested marks, as well as the font/background colours in the stylised registrations. On the basis that I have found these differences to be minor, I consider that they will be overlooked by the average consumer, who will remember each mark simply as CLUB ZERO. As a result, I find there to be a likelihood of direct confusion between the

earlier mark and the contested marks, even though the services are similar to only a low degree, on account of the interdependency principle.

60. For completeness, I will also consider indirect confusion, which was described in the following terms by Iain Purvis KC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc.*¹⁶

“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’.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand

¹⁶ BL O/375/10.

or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI”, etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

61. The examples given by Mr Purvis are not exhaustive. Rather, they were intended to be illustrative of the general approach.¹⁷

62. I consider it likely that, if consumers notice the differences between the marks – the space between CLUB and ZERO in the earlier mark, the slashed zero in the contested marks and the font/background colours in the stylised registration – they will put those down to either a rebranding or alternative versions of the same mark used for different purposes. This is on account of the differences only playing a minor/stylistic role in the respective marks. The average consumer will assume the earlier mark and the contested marks to be ‘CLUB ZERO’ marks originating from the same or related undertakings. There is, therefore, a likelihood of indirect confusion even for lowly similar services.

Outcome

63. The Cancellation Applicant’s claim under section 5(2)(b) succeeds in relation to the following services:

The stylised registration

Class 37: Cleaning containers for reuse by consumers; washing and sanitisation service in respect of reusable packaging containers.

Class 39: Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of

¹⁷ See *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17 at [81] to [82].

reusable consumer packaging materials; delivery and distribution of reusable containers; delivery and distribution of containers for household use; delivery and distribution of food and beverage containers; delivery and distribution of reusable containers for household use; delivery and distribution of reusable consumer packaging; packaging services; reusable container rental services; collecting containers for reuse by consumers.

The word only registration

Class 37: Cleaning of containers for reuse by consumers; washing and sanitisation services in the respect of the reusable packaging containers.

Class 39: Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials.

64. In accordance with *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, if there is no similarity between services, there is no likelihood of confusion to be considered under section 5(2)(b). Consequently, the opposition under this ground has failed in relation to the following services:

The stylised registration

Class 35: Retail services in relation to reusable consumer packaging; development of concepts for circular economy.

Class 39: Collection, management, distribution and transportation of bins for depositing reusable packaging.

The word only registration

Class 35: Retail services in relation to reusable consumer packaging; development of concepts for circular economy.

Class 39: *Collection, management, distribution and transportation of bins for depositing reusable packaging.*

Section 5(4)(a)

Statutory provisions

65. Section 5(4)(a) of the Act states as follows:

“5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

[...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark.”

66. Section 5(4)(a) has application in invalidation proceedings by virtue of section 47 of the Act, the relevant parts of which state as follows:

“47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground –

[...]

(b) that there is an earlier right in relation to which the condition set out in section 5(4) is satisfied,

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

[...]

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

Relevant law

67. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a Deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the Jif Lemon case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

Relevant dates

68. In *Advanced Perimeter System Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander KC, as the Appointed Person, endorsed the Registrar's assessment of the relevant date for the purposes of section 5(4)(a) of the Act, as follows:

"43. In *SWORDERS TM* O-212-06 Mr [Allan] James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

'Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.'

69. The Proprietor has not provided any evidence of use and, therefore, the relevant dates for the section 5(4)(a) assessment are the filing dates of the contested marks: 21 December 2020 for the word only registration and 24 December 2020 for the stylised registration.

Goodwill

70. Goodwill was described in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (HOL) in the following terms:

"What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing

which distinguishes an old-established business from a new business at its first start.”

71. Before discussing the evidence, I note that whilst the Proprietor’s skeleton argument contained criticisms of the Cancellation Applicant’s evidence for this ground, which were expanded upon at the hearing, the Proprietor chose not to file evidence or submissions in response to this evidence during the evidence rounds. Accordingly, the following evidence was unchallenged by the Proprietor and the Cancellation Applicant therefore not given an opportunity to respond, by way of further evidence or submissions, to any of the Proprietor’s subsequent criticisms. As the Proprietor points out, some of the Cancellation Applicant’s exhibits are undated. However, Ms Haas explained the specific dates pertaining to those exhibits in her witness statement, which, again, went unchallenged by the Proprietor during the evidence rounds.

72. As discussed in my enhanced distinctiveness assessment earlier in this decision, Ms Haas gives evidence that sales under the CLUB ZERO sign began in February 2020, paused in April 2020 due to the global pandemic and reconvened in October 2020, with a total number of deliveries of 10,512 generating almost £83,000 in sales between February and December 2020, the vast majority of which would have fallen before the relevant dates of 21 and 24 December 2020. Those sales originated from nine of the Cancellation Applicant’s depots across the country (Andover, Ashby, Cambridge, Doncaster, Kent, Mitcham, Ongar, Sharpness and Warrington) demonstrating a wide geographical spread across the UK. Again, as noted in the enhanced distinctiveness assessment, there are numerous examples of promotional activities in evidence for the period February to December 2020. The sign shown in all of this evidence is either that relied upon, “CLUB ZERO”, or presented in title case and a standard font.

73. Whilst it falls after the relevant dates, I note that the Cancellation Applicant won the “Best of Organic Sustainable Packaging Award” at the Soil Association’s Boom Awards in March 2021¹⁸ and that evidence from after the relevant date can cast light

¹⁸ HH WS at [12] and HH9.

backwards.¹⁹ This indicates the increasing success of the Cancellation Applicant's CLUB ZERO services in the months following the relevant dates. Whilst the exhibit itself does not refer to 'CLUB ZERO' the judge's comments referring to the Cancellation Applicant's use of sustainable packaging to eliminate single use packaging, together with the remaining evidence, leads me to conclude that the award relates to its CLUB ZERO refilling service. Further, whilst sales after December 2020 do not show the picture as at the relevant dates, they are evidence of the continued success; CLUB ZERO sales continued to show an increase between January 2021 and January 2024 with sales figures peaking at over £200,000 in November 2023.²⁰

74. Clearly, trade had not been particularly longstanding at the relevant dates. That being said, the use had generated a reasonable turnover between February and December 2020 and there has evidently been a reasonable effort made to advertise the CLUB ZERO services. I bear in mind that even small businesses can generate a protectable goodwill.²¹ Taking all of this into account, I am satisfied that the Cancellation Applicant has a modest, but protectable, goodwill at the relevant dates.

75. In terms of which goods/services the goodwill extends to, I remind myself that the Cancellation Applicant claims goodwill in relation to: *groceries; provision of groceries in refillable containers; refilling of food containers; collection and refilling of empty containers; collection and refilling of reusable containers*. Bearing in mind the narrative evidence describing the purchasing process,²² the Cancellation Applicant's services extend to refilling containers with the consumers' chosen groceries and the subsequent collection of those containers. I therefore find that the Cancellation Applicant's goodwill extends to:

Provision of groceries in refillable containers; refilling of food containers; collection and refilling of empty containers; collection and refilling of reusable containers.

¹⁹ *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited* and others, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

²⁰ HH WS at [18].

²¹ *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590

²² HH WS at [15], supported by HH10, page 3.

Misrepresentation and damage

76. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt LJ stated that:

“There is no dispute as to what the correct legal principle is. As stated by Lord Oliver of Aylmerton in *Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] R.P.C. 341 at page 407 the question on the issue of deception or confusion is

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants' [product] in the belief that it is the respondents' [product]”

The same proposition is stated in Halsbury's Laws of England 4th Edition Vol.48 para 148 . The necessity for a substantial number is brought out also in *Saville Perfumery Ltd. v. June Perfect Ltd.* (1941) 58 R.P.C. 147 at page 175 ; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

And later in the same judgment:

“[...] for my part, I think that references, in this context, to “more than *de minimis*” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993) . It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

77. *Halsbury's Laws of England* Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

“Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant’s use of a name, mark or other indicium which is the same or sufficiently similar that the defendant’s goods or business are from the same source or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon;
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attached importance to the question whether the defendant can be shown to have acted with a fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action.”

78. In *Marks and Spencer PLC v Interflora* [2012] EWCA (Civ) 1501, Lewison LJ cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that “a *substantial number*” of the relevant public are deceived, which might not mean that the average consumer is confused. However, considering the Court of Appeal’s later judgment in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes.²³ This is because they are both normative tests intended to exclude the particularly careless or careful, rather than quantitative assessments.

79. I have already found that there is a likelihood of confusion between the earlier mark and the contested marks. The sign relied upon under this ground is identical to the earlier mark relied upon under section 5(2)(b). All other factors being equal, I find that a substantial number of members of the public will be deceived into believing that the services provided under the contested marks and the Proprietor’s CLUB ZERO sign are offered by the same or connected undertakings. Therefore, misrepresentation is made out. This first applies to the services for which I found similarity under section 5(2)(b). The services I found dissimilar under that ground were:

Class 35: Retail services in relation to reusable consumer packaging; development of concepts for circular economy.

Class 39: Collection, management, distribution and transportation of bins for depositing reusable packaging.

²³ Although this was an infringement case, the principles are equally applicable to section 5(2) of the Act: *Soulcycle Inc v Matalan Ltd* [2017] EWHC 496 (Ch).

80. In *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA), Millet LJ said at [714]-[715] that it is not necessary for the parties to operate in a common field of activity. He went on:

“The absence of a common field of activity, therefore, is not fatal; but it is not irrelevant either. In deciding whether there is a likelihood of confusion, it is an important and highly relevant consideration: ‘[...] whether there is any kind of association, or could be in the minds of the public any kind of association, between the field of activities of the plaintiff and the field of activities of the defendant’: *Annabel’s (Berkely Square) Ltd. v G. Schock (trading as Annabel’s Escort Agency)* [1971] R.P.C 838 at page 844 per Russell LJ.

In the *Lego* case Falconer J likewise held that the proximity of the defendant’s field of activity to that of the plaintiff was a factor to be taken into account when deciding whether the defendant’s conduct would cause the necessary confusion.

[...]”

81. The Cancellation Applicant’s *provision of groceries in refillable containers; refilling of food containers; collection and refilling of empty containers; collection and refilling of reusable containers* and the Proprietor’s *retail services in relation to reusable consumer packaging; development of concepts for circular economy; collection, management, distribution and transportation of bins for depositing reusable packaging* are within the same field of activity, or at least fields of activity in close proximity: they are all services aimed at reducing waste. Despite these services not being sufficiently similar in a trade mark sense under section 5(2)(b), in my view, consumers would reasonably expect one undertaking to provide all the above services. Even accounting for only a modest goodwill, a protectable goodwill combined with a high or very high degree of similarity between the marks and the close fields of activity leads me to conclude that my earlier finding of misrepresentation extends to the dissimilar services. In such circumstances, I consider that damage through diversion of sales is entirely foreseeable.

Outcome

82. The Cancellation Applicant's claim under section 5(4)(a) succeeds in relation to the following services:

The stylised registration (UK00003572085)

Class 35: Retail services in relation to reusable consumer packaging; development of concepts for circular economy.

Class 37: Cleaning containers for reuse by consumers; washing and sanitisation service in respect of reusable packaging containers.

Class 39: Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials; collection, management, distribution and transportation of bins for depositing reusable packaging; delivery and distribution of reusable containers; delivery and distribution of containers for household use; delivery and distribution of food and beverage containers; delivery and distribution of reusable containers for household use; delivery and distribution of reusable consumer packaging; packaging services; reusable container rental services; collecting containers for reuse by consumers.

The word only registration (UK00003570572)

Class 35: Retail services in relation to reusable consumer packaging; development of concepts for circular economy.

Class 37: Cleaning of containers for reuse by consumers; washing and sanitisation services in the respect of the reusable packaging containers.

Class 39: Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials; collection, management, distribution and transportation of bins for depositing reusable packaging.

CONCLUSION

83. The applications for declarations of invalidity under numbers 504389 and 504390 have succeeded and, subject to any successful appeal against this decision, the contested marks are invalid for the services listed in the previous paragraph.

FINAL REMARKS

84. The Cancellation Applicant's objections have been successful under either section 5(2)(b) or 5(4)(a) and so there is no requirement for me to consider the matter of the pleaded case as discussed at paragraphs 16 to 18, above. This is because each of the terms intended to be challenged by the Cancellation Applicant have been successfully challenged in line with the forms that were filed at the commencement of each set of proceedings.

85. For the avoidance of doubt, and in case any of my findings are successfully appealed, I would have allowed for the amendment of the Cancellation Applicant's pleadings to include the terms that were erroneously excluded. This is for the following reasons: (i) the differences between the terms at issue are so minor that it would have made no material difference to my findings; (ii) given that both parties had the opportunity to make submissions on the point at the hearing and in subsequent written submissions, there is no prejudice to the Proprietor in considering the missing terms as being included in the relevant grounds of invalidity; (iii) declining to include a small group of terms in these consolidated proceedings may prejudice the Cancellation Applicant in that there is no further recourse available to them, i.e. bringing further invalidity proceedings to challenge only the missing terms under the same grounds would likely be prevented by virtue of the principle of cause of action estoppel;²⁴ and

²⁴ *Virgin Atlantic Airways Ltd v Premium Aircraft Interiors UK Ltd*, [2013] UKSC 46.

(iv) even if the Cancellation Applicant was not estopped, the further proceedings would cause unnecessary time and cost for the parties and the Tribunal, contradicting the overriding objective of the Tribunal to deal with cases within a reasonable time and avoiding unnecessary expense.

COSTS

86. The Cancellation Applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016.²⁵ I award the following:

Official fees in two invalidations:	£400
Preparing two statements and considering the counterstatements:	£500
Preparing evidence:	£600
Preparing for and attending a hearing:	£600
Total:	£2100

87. I therefore order Cupclub Limited to pay Abel & Cole Ltd the sum of £2100. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the final determination of the appeal proceedings.

Dated this 11th day of August 2026

E FISHER

For the Registrar

²⁵ The proceedings commenced prior to 1 February 2023.

Annex

The stylised registration

Class 35: *Retail services in relation to computer software in matters relating to reusable packaging; retail services in relation to reusable consumer packaging; assistance in product commercialization, within the framework of a distribution arrangement contract; development of concepts for circular economy; business management of logistics for others in matters relating to the environment and waste and matters relating to a circular economy; business and consultancy services in matters relating to the environment and waste and matters relating to a circular economy; business and consultancy services in matters relating to sustainability.*

Class 37: *Cleaning containers for reuse by consumers; washing and sanitisation service in respect of reusable packaging containers.*

Class 39: *Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials; collection, management, distribution and transportation of bins for depositing reusable packaging; delivery and distribution of reusable containers; delivery and distribution of containers for household use; delivery and distribution of food and beverage containers; delivery and distribution of reusable containers for household use; delivery and distribution of reusable consumer packaging; rental, hire and leasing of transportation vehicles; packaging services; reusable container rental services; collecting containers for reuse by consumers.*

Class 40: *Recycling services; waste recycling services.*

Class 42: *Platforms for artificial intelligence as software as a service (SaaS) in the field of green innovations; software as a service (SaaS) in the field of tracking technology; software as a service (SaaS) in the field of tracking technology using digital identification tags; software as a service (SaaS) in the field of Radio Frequency Identification (RFID) and QR code technology; cloud computing services in matters relating to the environment and waste and matters relating to a circular economy;*

design and development of computer software for logistics, supply chain management and e-business portals, in matters relating to the environment and waste and matters relating to a circular economy; design and development of technological information about environmentally-conscious and green innovations; certification company services; testing, analysis and evaluation of goods other than for certification purposes, namely in the field of reusable consumer packaging, household containers, household waste and retail consumer waste.

The word only registration

Class 35: Retail services in relation to computer software in matters relating to reusable packaging; retail services in relation to reusable consumer packaging; assistance in product commercialization, within the framework of a distribution arrangement contract; development of concepts for circular economy; business management of logistics for others in matters relating to the environment and waste and matters relating to a circular economy; business and consultancy services in matters relating to the environment and waste and matters relating to a circular economy; business and consultancy services in matters relating to sustainability.

Class 37: Cleaning of containers for reuse by consumers; washing and sanitisation services in the respect of the reusable packaging containers.

Class 39: Collection and transport of recyclable consumer packaging; collection and transportation of reusable consumer packaging; collection and transportation of reusable consumer packaging materials; Collection, management, distribution and transportation of bins for depositing reusable packaging; delivery and distribution of beverage containers; delivery and distribution of household containers; delivery and distribution of reusable consumer packaging; rental, hire and leasing of transportation vehicles; packaging services; collecting containers for reuse by consumers.

Class 40: Recycling services; waste recycling services.

Class 42: Platforms for artificial intelligence as software as a service (SaaS) in the field of green innovations; software as a service (SaaS) in the field of tracking technology;

software as a service (SaaS) in the field of tracking technology using digital identification tags; software as a service (SaaS) in the field of Radio Frequency Identification (RFID) and QR code technology; cloud computing services in matters relating to the environment and waste and matters relating to a circular economy; design and development of computer software for logistics, supply chain management and e-business portals, in matters relating to the environment and waste and matters relating to a circular economy; design and development of technological information about environmentally-conscious and green innovations; certification company services; testing, analysis and evaluation of goods other than for certification purposes, namely in the field of reusable consumer packaging, household containers, household waste and retail consumer waste.