

O/0860/25

TRADE MARKS ACT 1994

**IN THE MATTER OF THE TWO APPLICATIONS NOS. 3687200 & 3687204
IN THE NAME OF NATALS, INC., DOING BUSINESS AS RITUAL
IN RESPECT OF THE TRADE MARKS**

RITUAL

AND



IN CLASS 5

AND

**THE CONSOLIDATED OPPOSITIONS THERETO UNDER NOS. 429785 & 429789
BY RITUALS INTERNATIONAL TRADEMARKS B.V.**

Background and pleadings

1. On 27 August 2021, Natals, Inc., doing business as Ritual (“the applicant”) applied to register the trade mark no. 3687200 for the mark RITUAL in the UK. It was accepted and published in the Trade Marks Journal on 1 October 2021 in respect of the following goods:

Class 5: Vitamins, multi-vitamins, pre-natal vitamins, vitamin preparations, vitamin supplements, mineral supplements, dietary supplements, nutritional supplements, protein supplements, probiotic supplements, synbiotic supplements, and immunity supplements; powdered nutritional supplement drink mix containing protein and dietary fiber; powdered nutritional supplement drink mix; dietary supplement drink mixes.

2. On 31 December 2021, Rituals International Trademarks B.V. (“the opponent”) opposed the trade mark on the basis of section 5(2)(b) and section 5(3) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier Trade Mark set out below:

Under section 5(2)(b) and 5(3)

UK comparable¹ trade mark no. 801195700 (the opponent’s “first earlier mark”)
For the mark:

RITUALS...

Filing date: 4 September 2013

Registration date: 9 April 2015

Relying on goods in class 3, those being:

¹ On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 56 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all right holders with an existing International Registration designating the EU. As a result of the opponent’s International Registration designating the EU being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK trade mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and retains its original priority date.

Class 3: Perfumery, essential oils, cosmetics, eau de Cologne, eau de toilette, perfumed body sprays; cosmetic oils, creams and lotions for skin care; toiletries for bathing and showering; massage preparations (non medicated).

Under section 5(2)(b) only

International trade mark registration no. 1636040 (the opponent's "second earlier mark")

For the mark:



Priority date: 28 May 2021

Date protection was granted in the UK: 9 June 2022

Relying on all goods as registered, those being:

Class 5: Vitamins and vitamin preparations; minerals and mineral preparations; homeopathic products and preparations; natural medicines; medicinal herbs and herbal preparations for medical purposes; food supplements and food additives not for medical purposes; dietary supplements not for medical purposes; food supplements made from herbs, not for medical purposes.

International trade mark registration no. 1615272 (the opponent's "third earlier mark")

For the mark:

HOUSE OF RITUALS

Priority date: 2 February 2022

Date protection was granted in the UK: 5 April 2022

Relying on all goods in class 5, those being:

Class 5: Vitamins and vitamin preparations; minerals and mineral preparations; homeopathic products and preparations; natural medicines; medicinal herbs

and herbal preparations for medical purposes; food supplements and food additives not for medical purposes; dietary supplements not for medical purposes; food supplements made from herbs, not for medical purposes.

UK comparable trade mark no. 918196759 (the opponent's "fourth earlier mark")

For the mark:



HOUSE OF RITUALS

Priority date: 3 September 2019

Registration date: 23 December 2020

Relying on some goods in classes 3, 5 and some services in class 44, as follows:

Class 03: Perfumery, essential oils, cosmetics, hair lotions; Cosmetic preparations for skin care; Cosmetic creams.

Class 05: Dietetic substances adapted for medical use; Food for babies; Mineral waters for medical purposes;

Class 44: Medical clinic services; Dietary and nutritional guidance; Services of a beauty parlour; Spa lounge services.

3. By virtue of their priority dates and/or filing dates, the above marks constitute earlier marks in accordance with section 6 of the Act. As the opponent's first earlier mark had been registered for a period of over five years at the date on which the application was filed, it is subject to the use provisions set out under section 6A of the Act. The opponent must therefore prove use of its first earlier mark in respect of all of the goods relied upon. As the additional earlier marks had not yet been registered for a period of five years when the application was filed, the opponent is not required to prove use for these marks.

4. The opponent argues that the respective goods and services are identical or similar and that the marks are similar. As such, it argues there is a likelihood of confusion under section 5(2)(b) of the Act.

5. The opponent also argues that it holds a reputation for its first earlier mark, and that use of the mark applied for would cause consumers to believe that there was an economic link between the same, resulting in an unfair advantage for the applicant and detriment to the distinctive character and reputation of the earlier mark. As such, the opponent submits the application should also be refused under section 5(3) of the Act.

6. Also on the 27 August 2021, the applicant applied to register the trade mark no. 3687204, for the second mark shown on the cover page of this decision, in the UK. This was accepted and also published in the Trade Marks Journal on 1 October 2021 in respect of the same goods covered by the applicant's first mark as set out in paragraph 1.

7. Also on 31 December 2021, the opponent filed an opposition against this second mark, on the basis of section 5(2)(b) and section 5(3) of the Act . The opponent relies on the same earlier marks in each ground as in the opposition above, and these marks also constitute earlier marks in accordance with section 6 of the Act in relation to the same. It again pleads its case under each ground as I have set out previously at paragraphs 4 and 5. As with the other opposition, only the opponent's first mark relied upon is subject to proof of use in these proceedings.

8. The applicant filed a TM8 and detailed counterstatement in respect of each opposition filed. The applicant's pleadings in respect of both oppositions are very similar. These are as follows:

- The applicant requests proof of use in respect of the opponent's first earlier mark in both oppositions;
- The applicant admits that there is a degree of aural, visual and conceptual similarity between its marks and the opponent's first mark. However, it is denied that the goods are similar. It is also claimed the opponent's first

earlier mark is of limited distinctiveness. As such, it denies there will be a likelihood of confusion between these marks;

- It is not admitted that the opponent has a reputation for its first mark, and in any case the applicant denies that use of the applicant's marks would take advantage of, or be detrimental to, the distinctive character or reputation of this earlier mark.
- It denies there is a high level of similarity between its marks and the opponent's second mark. It admits some of the goods are identical. However, where the goods are not considered by the applicant to be identical, it denies they are similar. The applicant denies that there is a likelihood of confusion between the marks;
- In respect of the opponent's third earlier mark, the applicant denies there is a high level of similarity between this and its marks. Again, it admits some goods are identical but denies others are similar. It denies that there exists a likelihood of confusion between the marks;
- In respect of the opponent's fourth earlier mark, the applicant denies the marks are similar, or that the goods and services are similar. It denies that there will be a likelihood of confusion between the marks.

9. On 19 November 2023, the Tribunal wrote to the parties to direct that the proceedings be consolidated in accordance with Rule 62(1)(g) of the Trade Mark Rules 2008. From that point forward, these two oppositions continued as one set of consolidated proceedings.²

10. Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary. A hearing took place before me via video conference on 12 February 2025. The submissions made at this hearing will not be summarised but have been taken into account and will be referred to where appropriate within this decision. The opponent is represented in these proceedings by Novagraaf UK and was represented at the hearing by Aaron Wood of the same. The applicant is represented in these proceedings Stevens & Bolton LLP. The applicant

² Initially, four sets of proceedings were consolidated. However, the two opposed application nos. 3719060 and 3719604 subject to opposition nos. 431485 and 431487 were withdrawn by the applicant, terminating these parts of the consolidated proceedings.

elected counsel for the hearing and was represented by Jamie Muir Wood of Hogarth Chambers.

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

Evidence

12. The opponent filed its evidence in chief the form of two witness statements. The first witness statement is in the name of Raymond Cloosterman, founder and CEO of the opponent. The statement introduces eleven exhibits, namely Exhibit RC-1 to Exhibit RC-11. The statement is dated 16 January 2024 and goes to use of the earlier marks.

13. The second witness statement is in the name of Luke David Portnow, a Chartered Trade Mark Attorney at the opponent's representative firm. The statement is dated 17 January 2024 and introduces two previous UK IPO decisions as Exhibit LP-1 and Exhibit LP-2.

14. The applicant filed its evidence in the form of a witness statement in the name of Elizabeth Reifsnyder, President of the applicant. The statement introduces 21 exhibits, namely Exhibit ER1 to Exhibit ER21. It is dated 19 March 2024. The statement goes to use of the applicant's mark, as well as use of the opponent's marks.

15. The opponent opted to file evidence in reply in the form of a further statement from Mr Portnow. This statement introduces a further six exhibits, labelled Exhibit WS2-LP1 to Exhibit WS2-LP6. These exhibits provide two further UK IPO decisions, alongside evidence going to the relationship between cosmetic goods and beauty and health supplements.

Preliminary issues

16. I note at this stage, that the applicant has filed use of its own marks within these proceedings. Little was made of this evidence in the skeleton arguments or at the hearing. However, I have nonetheless considered this. Firstly, I note that many of the articles and documents provided relating to the use of the applicant's marks are dated after the date the contested applications were filed. Further, there is nothing to indicate that the majority of the evidence provided is specifically targeted at consumers UK consumer, although I do note the pages provided displaying prices for the goods in GBP dating from after the relevant date. In addition, within her witness statement, Ms Reifsnnyder makes no reference to the extent of the applicant's presence in the UK prior to the relevant date. Whilst the purpose of this evidence is not entirely clear, if it is to show a peaceful coexistence in the UK is possible between the parties, it has failed to do so for these reasons.

17. I note also that the witness statement provided by Ms Reifsnnyder focuses on the differences between the opponent's business in practice, and the applicant's business in practice. In particular, it is emphasised that the opponent does not appear to be selling vitamins or supplements. This is, for the most part, irrelevant. The marks relied upon by the opponent covering the goods mentioned by the applicant are not subject to proof of use, and as such the opponent may rely on all of the goods protected by these earlier registrations for the purpose of its oppositions based on section 5(2)(b) of the Act. I am required to conduct a notional assessment between the marks on this basis. Whilst I note the actual use made of the opponent's second, third and fourth mark (and of course, its first mark) will need to be considered in relation to my assessment of distinctive character, where the marks are not subject to proof of use I am fundamentally comparing the marks as applied for with those relied upon by the opponent.

18. Overall, I do not consider the evidence filed by the applicant to be of much relevance to these proceedings, and whilst I have considered this in full, I will make little mention of this throughout this decision.

Proof of use

19. The relevant statutory provisions are as follows:

Section 6A:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

- (a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

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

(5)-(5A) [Repealed]

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

20. As the opponent’s first earlier mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

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

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

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

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

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

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

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

21. Section 100 of the Act states that:

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

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

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

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

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

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

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

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

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

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

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

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

23. The relevant period within which the opponent must prove use in these proceedings is the five years directly preceding and ending with the date the applications were filed, that being 28 August 2016 – 27 August 2021 in both. The opponent must show that genuine use has been made of its first earlier mark relied upon, within the relevant territory and in respect of the goods relied upon, during the relevant period.

24. In this instance, the mark subject to proof of use is a comparable mark, meaning that in accordance with schedule 2A of the Act, use in the EU will be relevant up until 31 December 2020. Following this, only UK use will be relevant. However, as the evidence is said to focus on UK use (whilst also referencing use in the EU), and as the territory of the UK is considered a significant part of the EU during the period for which the EU use is relevant, I intend to also focus my assessment primarily on that UK use, whilst keeping in mind at all times the relevance of the use shown across the EU, and referencing this where appropriate.

25. In his witness statement, Mr Cloosterman explains that the Rituals brand was launched on 1 January 2000, and that the earlier marks have been used in the EU and the UK since this date, in respect of the goods listed on the TM7 (i.e. those relied upon under the earlier marks). He explains the opponent’s first standalone store was

opened in Amsterdam in 2000, and by 2018 it had opened 600 stores across 27 countries, including those in Europe and the UK. Mr Cloosterman explains that by the date the application was filed, this number had gone up to 800 stores and 2000 “shop-in-shops” such as department store concessions, across 33 countries.

26. In the UK specifically, Mr Cloosterman explains the opponent opened its first store in 2016, and it had over 50 stores in the UK by the date the applications were filed. He confirms that the opponent’s first earlier mark is extensively featured on the external storefronts of its retail stores and has been the main banner of the UK website homepage throughout the relevant period.

27. Photographs that Mr Cloosterman explains show the opening of what he describes as the opponent’s “flagship” store in Covent Garden, London are provided at Exhibit RC-2, and show the first mark in use across its storefront (as below). Mr Cloosterman confirms the images were taken on 2 September 2016:



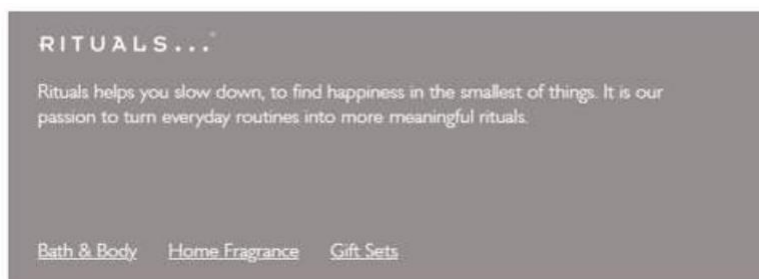
28. A further article referring to the opening of the opponent’s first store outside of London is also provided at Exhibit RC-2. This again shows the opponent’s first earlier mark on the front of a store, with the article reading (my emphasis):

“Premium cosmetics and home brand Rituals has opened its first store outside of London at Birmingham's Grand Central shopping centre.

The decision to open the new 1620sq ft shop, which sells Rituals' range of bath, body and home products, was based on Birmingham's position as the UK's second city and Grand Central's reputation as one of the region's leading retail destinations.”

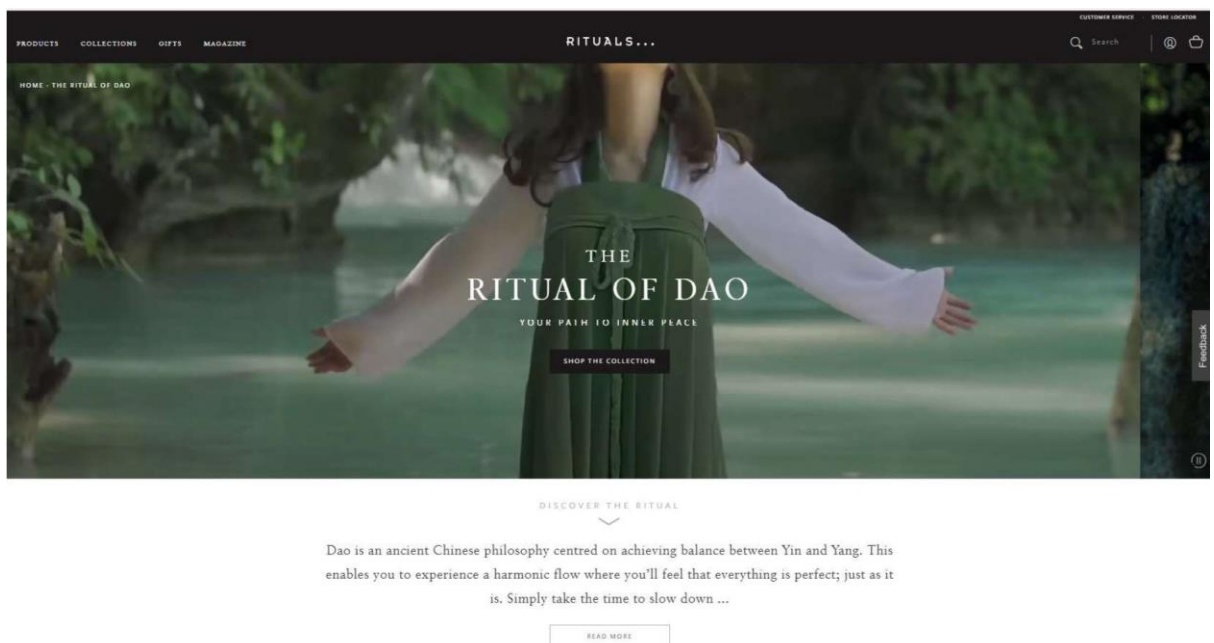
29. Also provided at this exhibit are pages from the opponent's website showing its first and second mark, both at the top of the page and on products themselves. Whilst the domain and the prices in GBP both indicate that these pages are targeted at UK consumers, I note that the pages themselves appear to either be undated, or dated after the relevant date. However, Mr Cloosterman reiterates in his statement that the opponent's marks shown (the first and second marks) have both been used on the website in conjunction with the packaging and advertising for sale of Ritual products throughout the relevant period. Further webpages from the opponent's website are also provided at Exhibit RC-3 and these will be discussed shortly.

30. Provided at Exhibit RC-3 are pages from the John Lewis website, taken from the web archiving site the Wayback Machine, which show the opponent's goods being sold on the site. At the top of the pages, the opponent's first mark is shown as follows:



31. The goods offered on the website below this header include body scrub, aftershave gel, shave cream, fragrance sticks, body lotion, shower gel, face scrub, face cream, candles, face cleanser and gift sets. Prices are in GBP and it seems that the pages are targeted at the UK consumer. Many of the goods appear to feature the opponent's second earlier mark. Only one candle obviously displays the opponent's first earlier mark. The pages date from 15 July 2019.

32. Also provided at Exhibit RC-3 are further pages from the opponent's website. I note these show the opponent's first earlier mark on a wider range of products, including those such as perfume, makeup remover, shampoo and conditioner, handwash, body cream etc. However, most of these pages date from 15 October 2021, shortly after the relevant period. I note there are also some undated pages, which Mr Cloosterman confirms in his statement date from September 2018. However, it is more difficult to locate products under the first earlier mark on these pages beyond a candle. The opponent's second earlier mark is frequently shown across a range of face and body goods, prices are given in GBP and the pages show /en-gb in the domain name. They appear, therefore, to be aimed at the UK consumer. The opponent's first earlier mark is featured as the header across the webpage itself, as below:



33. Also at this exhibit, are three articles discussing the opponent's various products. The first article is dated 8 July 2019. This shows makeup items, including a lipstick, and an eye pencil featuring the opponent's first earlier mark, as well as a nail varnish displaying the same. From the details at the bottom of the page, it appears these articles are available on a page aimed at consumers from the Netherlands.

34. Sales reports are provided at Exhibit RC-2, RC-4 and RC-5. These provide details of the opponent's turnover, and in particular, UK figures are provided at Exhibit RC-5. Mr Cloosterman has summarised these in his witness statement as follows:³

- a. Full accounts made up to 31 December 2020 showing UK turnover of £26,323,000 for 2019 and £27,530,000 for 2020.
- b. Full accounts made up to 31 December 2018 showing UK turnover of £17,065,000 for 2018 and £9,367,000 for 2017.
- c. Again, I can confirm even during 2017-2018 that at least 55% of this this turnover was for the Rituals Products.
- d. The individual retail price of the Rituals Products during the Relevant Period will have ranged from €10 - €60 or approx. £8.50 to £55. Based on the sales figures set out above, it is clear that significant volumes of the Rituals Products bearing the Earlier Registrations (either on the product itself and/or the label and/or packaging) were sold during the Relevant Period.

35. Exhibit RC-6 includes pages from what Mr Cloosterman explains is the Rituals winter edition magazine, 2017. He states these were downloadable from UK website or available to pick up in UK stores. Within this, there are advertisements displaying perfumes, candles and fragrance sticks under the opponent's first earlier mark, as well as goods such as hand soaps and hand balms under the second. Pages from this magazine in 2018 are also provided. These again show a candle bearing the mark, in addition to further goods including face oil or "essence" and face serums displaying the same. Again, a number of the products shown in this magazine display the opponent's second earlier mark.

36. This exhibit also provides an article from "COSMETICS BUSINESS" dated 13 December 2019. This discusses the opponent's pop-up shop at Kings Cross station in London. It describes the opponent as a "wellbeing-inspired beauty and skin care brand" and shows an image of the pop-up shop with the opponent's first mark displayed across it is provided.

37. Also at this exhibit is a further article from the Mirror which discusses the launch of a limited edition box in collaboration with the brand LookFantastic. The article dates from 7 August 2020 and displays the price in GBP. The opponent is described as

³ Mr Cloosterman previously confirmed that at least 55% of its 2018, 2019 & 2020 UK and Ireland turnover was also in respect of Rituals products.

“Home and Body brand Rituals”. The collaboration offers Rituals products contained within a box for a discounted price from the LookFantastic website. Of the products themselves there is one, a candle, displaying the first earlier mark. The rest of the goods include hand lotion, shower oil, pillow mist, body cream and body scrub. These all display the opponent’s second earlier mark. However, the box these goods come in features both the opponent’s first earlier mark, in addition to the LookFantastic mark, as shown below:



38. Further at this exhibit are what Mr Cloosterman describes as a compilation of 2019 – 2021 press clippings. Mr Cloosterman explains these feature the RITUALS trade mark within the EU territory, and he provides circulation nos. and “media value”. A number of recognisable magazines are referenced in this section, including those targeted specifically at the UK. However, the images are too small to make out the details other than where the opponent’s second earlier mark, which is easier to make out on such small images, is featured on the same.

39. Exhibit RC-7 provides a list of the opponent’s stores, including concessions, throughout the UK. Mr Cloosterman explains in his witness statement that these feature on a printout from the opponent’s website dated 17 September 2018. These pages provide 26 different locations where these stores or concessions can be found, mainly across London but also as widespread as Aberdeen, Abergavenny, and Belfast. Also provided is a list of airports where the opponent has stores or concessions in the UK and EU, which Mr Cloosterman explains is from 2018. This list is long, and includes seven different UK airports including London Gatwick, Glasgow and Manchester amongst others.

40. Also at this exhibit are a number of images taken from websites or social media showing some of the opponent's shop fronts in the UK. These all display the opponent's first earlier mark on the shopfront itself. The dates are shown on some of the articles, those being December 2017 and November 2021, and where the date is not shown, Mr Cloosterman has confirmed in his statement these are all from within the relevant period.

41. Within his witness statement, Mr Cloosterman lists a number of awards the opponent won for its products in the UK. I note one of these relates to the 2019 "Pure Beauty Global Awards: The Ritual of Namaste Glow Mask – highly commended". Mr Cloosterman confirms that this relates to its first earlier registration, in the categories of *cosmetic oils, creams, and lotions for skin care and toiletries for the bath and shower use*. I do not have corroborating evidence of this, but I also have no reason to doubt Mr Cloosterman's statement.

42. Exhibit RC-11 provides the opponent's social media pages. Mr Cloosterman explains these are the UK specific media channels dating from September 2018. I note the Twitter page appears to show mascara, eye shadow, nail varnish, nail care treatment, lip gloss and foundation all featuring the opponent's first earlier mark. Other products such as body cream and shower oil feature the opponent's second earlier mark, and this is the mark shown as its Twitter icon. The Instagram page provided also displays further products showing the first and second earlier marks; goods that appear to be serums display the first earlier mark, and again, there are a number of goods displaying the second earlier mark, including those that appear to be bath and shower products.⁴

43. I have not summarised the evidence in full above. As an example, I note references to the awards won by the opponent in the EU, which I do not feel the need to go over in detail, but these have been fully considered.

44. At the hearing, Mr Muir Wood criticised the evidence filed for the purpose of showing use of the opponent's first earlier mark. He stated that the applicant fully

⁴ Some of these products appear to be those present in images shown at Exhibit RC-6 pages 15 and 16.

accepted that the opponent is a “very successful company” and that it has a substantial turnover. However, Mr Muir Wood submits that the witness statement provided by Mr Cloosterman does little to distinguish between the marks, and that the majority of the goods in question bear the opponent’s second earlier mark. Whilst he accepts between his skeleton arguments and submissions at the hearing that the opponent has shown some use of its first mark in relation to some nail varnish, lip gloss, mascara and possibly candles, he submits that most of the use of the opponent’s first earlier mark is in relation to the shopfront, which indicates use for retail services and not specific products. At the hearing, Mr Muir Wood elaborated on this point, submitting that even where the opponent’s first earlier mark can be seen as in use on the John Lewis and Partners web page, that this is use of the mark for the Rituals shop at John Lewis, and not use of this mark in relation to the goods.

45. I accept to an extent some of the criticisms raised by Mr Muir Wood. Particularly, I note the evidence does appear to show that it is more common for the opponent to use its second earlier mark on its goods specifically, as opposed to its first earlier mark, and I have no doubt the evidence provided in respect of the first earlier mark could have been clearer and more specific, and likely more substantial.

42. In respect of the criticisms based on the use of the opponent’s first earlier mark on the opponent’s shopfronts, and I can see the point Mr Muir Wood is making that this may constitute use in relation to retail services. However, I note this does not necessarily mean that the use cannot also be considered as use in relation to the goods sold within the same. I consider carefully the case law relating to this point. In *Aegon UK Property Fund Limited v The Light Aparthotel LLP*, BL O/472/11, Mr Daniel Alexander Q.C. (as he then was) as the Appointed Person stated that:

“17. unless it is obvious, the proprietor must prove that the use was in relation to the particular goods or services for which the registration is sought to be maintained.

18. In *Céline SARL v. Céline SA*, Case C-17/06 (*Céline*), the Court of Justice gave guidance as to the meaning of “use in relation to” goods for the purpose of the infringement provisions in Article 5(1) of the Directive. Considering a

situation where the mark is not physically affixed to the goods, the court said at [23]:

“...even where the sign is not affixed, there is use “in relation to goods or services” within the meaning of that provision where the third party uses that sign in such a way that a link is established between the sign which constitutes the company, trade or shop name of the third party and the goods marketed or the services provided by the third party.”

19. The General Court has, on more than one occasion, proceeded on the basis that a similar approach applies to the non-use provisions in what is now Article 42 of the European Union Trade Mark Regulation. For example, in *Strategi Group*, Case T-92/091, the General Court said:

“23. In that regard, the Court of Justice has stated, with regard to Article 5(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989, L 40, p. 1), that the purpose of a company, trade or shop name is not, of itself, to distinguish goods or services. The purpose of a company name is to identify a company, whereas the purpose of a trade name or a shop name is to designate a business which is being carried on. Accordingly, where the use of a company name, trade name or shop name is limited to identifying a company or designating a business which is being carried on, such use cannot be considered as being ‘in relation to goods or services’ (*Céline*, paragraph 21).

24. Conversely, there is use ‘in relation to goods’ where a third party affixes the sign constituting his company name, trade name or shop name to the goods which he markets. In addition, even where the sign is not affixed, there is use ‘in relation to goods or services’ within the meaning of that provision where the third party uses that sign in such a way that a link is established between the sign which constitutes the company, trade or shop name of the third party and the goods marketed

or the services provided by the third party (see *Céline*, paragraphs 22 and 23).

20. Those passages must be read together with the general requirements of proof of use in *Ansul* at [43] that there is genuine use of a trade mark where the mark is used in accordance with its essential function namely to guarantee the identity of the origin of the goods or services for which it is registered, in order to create or preserve an outlet for those goods or services.

46. In *Euromarket Designs Inc. v Peters* [2001] F.S.R. Jacob J. (as he then was) stated that:

“56. That is not all on the question of non-use. If one looks at the advertisements they are essentially for the shops. True it is that some of the goods mentioned in the advertisements fall within the specification, but I doubt whether the reader would regard the use of the shop name as really being “in relation” to the goods. I think this is an issue worthy of trial in itself. The argument is that there is an insufficient nexus between “Crate & Barrel” and the goods; that only a trade mark obsessed lawyer would contend that the use of “Crate & Barrel” was in relation to the goods shown in the advertisement.

57. In this connection it should be borne in mind that the Directive does not include an all-bracing definition of “use”, still less of “use in relation to goods”. There is a list of what may *inter alia* be specified as infringement (Article 5(3), corresponding to section 10(4)) and a different list of what may, *inter alia*, constitute use of a trade mark for the purpose of defeating a non-use attack (Article 10(2), equivalent to section 46(2)). It may well be that the concept of “use in relation to goods” is different for different purposes. Much may turn on the public conception of the use. For instance, if you buy Kodak film in Boots and it is put into a bag labelled “Boots”, only a trade mark lawyer might say that that Boots is being used as a trade mark for film. Mere physical proximity between sign and goods may not make the use of the sign “in relation to” the goods. Perception matters too. That is yet another reason why, in this case, the fact that some goods were sent from the Crate & Barrel United States shops to

the United Kingdom in Crate & Barrel packaging is at least arguably not use of the mark in relation to the goods inside the packaging. And all the more so if, as I expect, the actual goods bear their own trade mark. The perception as to the effect of use in this sort of ambiguous case may well call for evidence.”

47. In *Cactus SA v OHIM*, Case T-24/13, EU:T:2015:494, the General Court held that the owner of what was then a CTM (now an EUTM) who used the mark only as the name of a shop had used the mark “in relation to” the natural plants, flowers and grains sold in the shop (as well as in relation to retail services for those goods). This is because it had demonstrated that the public would link the (otherwise unbranded) goods to the mark used for the shop and regard the user of that mark as being responsible for the quality of the goods. The court stated that:

“69 Accordingly, in view of the context of the present case, as described in paragraphs 66 to 68 above, and, in particular, the applicant’s specific expertise in the plants and flowers sector, which it publicises, it must be considered that the documents submitted by the applicant which show the earlier marks establish to the requisite standard that there is a link between those marks and plants, flowers and seeds which bear no mark. Those documents show that the applicant offers for sale or sells those goods with the earlier marks as the only indication of a trade mark, with the result that those marks are the only signs that provide an indication of the commercial origin of the goods in question.

70 That conclusion is not affected by the consideration referred to by the Board of Appeal and OHIM that, in the light of the registration of the earlier marks in relation to retail services in Class 35, the earlier marks must be regarded as designating the applicant’s stores which retail plants, flowers and seeds, not those goods themselves. Although the earlier marks are also registered to designate retail services in respect of the sale of plants, flowers and seeds, as is apparent from paragraphs 31 to 39 above, that does not mean, given the context of the present case described in paragraphs 66 to 68 above, that those same marks may not also designate plants, flowers and

seeds which bear no mark and which are offered for sale in shops operated by the applicant.

71 In those circumstances, it must be concluded that the Board of Appeal erred in deciding that the applicant had not proved genuine use of the earlier marks in relation to 'natural flowers and plants, grains' in Class 31."

48. I note this case does not follow exactly any of the examples set out in the case law above. This situation is not consistent with that set out within *Cactus SA v OHIM*, where the products inside the store were unbranded. In this instance, the goods inside those stores are branded, sometimes with the same mark as that shown on the shopfront, but often with an alternative Ritual mark. However, the evidence of the opponent's first earlier marks on shopfronts, its website banner, and on the header of the John Lewis webpage are in my view, also clearly not consistent with the example of Kodak film being sold in a Boots department store, for example. In my view from the evidence provided, it will be apparent that the entity designated by the mark used on the shopfronts is the same entity that is responsible for the goods inside the store, even where these are offered under the alternative Ritual marks. This is exacerbated by the fact that the opponent does, in fact, use the mark displayed on the shopfronts for some of its products shown, and I further note the consistent references to the opponent "Rituals" in various publications, as being a "home and body brand" (or variations of such), and not a "home and body retailer" as could be the case. In some instances, for example in relation to the pop-up shop in Kings Cross, this sort of reference is made directly next to an image displaying the opponent's first earlier mark. This in my view, points towards how the public would perceive the opponent and the connection between the marks shown on the storefront, web banner and John Lewis website, and the goods sold under the same. I consider, therefore, whether the use on the shopfronts, website banner, and on the John Lewis website in this instance is such that establishes a sufficient link between the mark and the goods marketed within the stores, or on the website. It seems to me that there would be such a link, and that the use on the storefronts and web banners would likely be viewed as use of a house brand under which goods bearing a range of alternative marks from the same entity are sold, rather than a mark simply used to reference a retail service offered only. I

therefore consider the use in these scenarios from within the relevant period, to contribute towards the picture of genuine use in relation to the goods themselves.

49. However, if I am wrong on this point, I note in any case, it is largely academic at this stage of the decision, at least for the purpose of the oppositions based on section 5(2)(b) of the Act. This is because there are, as mentioned, examples shown in the evidence of the opponent's first earlier mark displayed on a number of goods within the relevant period. I have noted in my assessment of the evidence that this mark is used on the following goods (as a minimum) within this period:

perfumes, candles and fragrance sticks, skin serums, mascara, eye shadow, nail varnish, nail care treatment, lip gloss and foundation

50. Further, the collaboration with LookFantastic shows the box of goods under the opponent's first earlier mark as including:⁵

hand lotion, shower oil, pillow mist, body cream and body scrub

51. However, I do note the reference to the LookFantastic box being limited edition, and so I take this into account when considering genuine use under the first earlier mark.

52. I understand and I accept that the examples of this use of the opponent's first earlier mark in the evidence are not extensive, and the evidence of the use of this first earlier mark on the goods themselves could have been more heavily featured within the evidence provided. Whilst the evidence does not explain why this first mark is used in relation to some ranges of goods and not others, I do not consider the use shown to be token, and I consider the evidence shows this first earlier mark in use on the above goods at various points throughout the relevant period. I accept the evidence in relation to the second earlier mark on the opponent's goods within the relevant period

⁵ This is, in my view, clearly use in relation to the goods inside the box. The offering of goods inside a box bearing the mark is not intrinsically a retail service, and this differs from the example set out in the case law of *Euromarket Designs Inc. v Peters* [2001] F.S.R. set out above which refers to the use of the mark used on generic packaging used to ship the goods. The box used for these goods is part of the product itself.

is stronger, and as such a large portion of the considerable turnover figures in the UK will relate to goods bearing this second mark, and not featuring the first earlier mark on the same. However, from the sum of the evidence provided, it is nonetheless my view that it is reasonable to assume that a portion of the UK sales figures will also be attributable to goods bearing the first earlier mark within the relevant period. Whilst the evidence is not perfect, and whilst I keep in mind that the burden is on the opponent to prove the same,⁶ it is my view that the sum of the evidence paints a sufficient picture of genuine use of the opponent's first mark in relation to the first set of goods listed above, even without considering use on its shopfronts or as its website banner as use in relation to the goods sold in store or on the website. However, if I am correct in my assessment that this use will also be use in relation to the goods sold in those stores and on the website, this paints a considerably stronger picture of genuine use in this instance.

53. The opponent has claimed use in respect of the following categories of goods:

Class 3: Perfumery, essential oils, cosmetics, eau de Cologne, eau de toilette, perfumed body sprays; cosmetic oils, creams and lotions for skin care; toiletries for bathing and showering; massage preparations (non medicated).

54. It is my view that it has shown genuine use of goods at least in respect of those within the following categories above:

Class 3: Perfumery; cosmetics; cosmetic oils for skin care.

55. Whilst this list may be slightly broader should use on the shopfronts and on the web banner be considered as use in relation to the goods, to include goods such as *creams and lotions for skin care* and *toiletries for bathing and showering* for example, for reasons I will set out further later in this decision, I do not consider this to alter the opponent's position within these proceedings overall, and as such I intend to proceed with the 5(2)(b) ground based on the narrower scope of protection provided.

⁶ I acknowledge the applicant's reference to *Awareness Limited v Plymouth City Council*, Case BL O/236/13 on this point.

56. In respect of a fair specification, I note that the category of *cosmetics* in particular is capable of being broken down into various subcategories. However, considering the range of various makeup, nail varnish and nail care lotions, and cosmetic oils and serums shown bearing the first mark in the evidence, it is my view that, having regard to the perception of the average consumer and the purpose and intended use of the products, this is how the goods under the mark will be fairly described.⁷ The rest of the goods are, to my mind, sufficiently narrow to offer fair a protection for the goods shown in the evidence without alteration.

Section 5(2)(b)

57. 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”.

58. Section 5A of the Act is as follows:

“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.”

The Principles

59. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case

⁷ See *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834

C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

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

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

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

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

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

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

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

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

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

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

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

Approach to section 5(2)(b)

60. In both oppositions, the opponent has relied upon four earlier marks under section 5(2)(b) of the Act. I see no benefit to the opponent of me assessing its fourth earlier mark against the applications at this stage. The opponent already relies on the word only elements of this mark under its third earlier mark. The device element included in the fourth earlier mark does not bring it any closer to the contested marks than the third earlier mark, and the goods and services covered are less similar than those covered by the third earlier word only version relied on. Further, I have considered the evidence, and do not consider the opponent's fourth mark to be featured particularly in the same. I will therefore proceed on the basis of the opponent's first three earlier marks only at this stage. However, should the opponent be unsuccessful based on its first three earlier marks, I will revert to further consider if there is any basis on which its position could be improved by the reliance on the fourth earlier mark in more detail, for completeness.

61. For efficiency, I intend to deal with the opposition against each of the contested marks in tandem below. However, I will keep in mind that these are two different oppositions, capable of producing two different results.

Comparison of goods

62. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

63. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance

whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

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

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

66. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the GC stated that:

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

where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

67. With this in mind, the goods for comparison are as follows:

Earlier goods	Contested goods
<p>Under the first earlier mark <i>Class 3: Perfumery, cosmetics; cosmetic oils for skin care.</i></p>	<p>Contested goods under application no. 3687200 & 3687204 <i>Class 5: Vitamins, multi-vitamins, pre-natal vitamins, vitamin preparations,</i></p>
<p>Under the second earlier mark <i>Class 5: Vitamins and vitamin preparations; minerals and mineral preparations; homeopathic products and preparations; natural medicines; medicinal herbs and herbal preparations for medical purposes; food supplements and food additives not for medical purposes; dietary supplements not for medical purposes; food supplements made from herbs, not for medical purposes.</i></p>	<p><i>vitamin supplements, mineral supplements, dietary supplements, nutritional supplements, protein supplements, probiotic supplements, synbiotic supplements, and immunity supplements; powdered nutritional supplement drink mix containing protein and dietary fiber; powdered nutritional supplement drink mix; dietary supplement drink mixes.</i></p>
<p>Under the third earlier mark <i>Class 5: Vitamins and vitamin preparations; minerals and mineral preparations; homeopathic products and preparations; natural medicines; medicinal herbs and herbal preparations for medical purposes; food supplements and food additives not for medical purposes; dietary supplements not for medical purposes; food supplements made from herbs, not for medical purposes.</i></p>	

The first earlier mark

68. I will firstly conduct the comparison based on the goods relied upon under the first earlier mark. The earlier goods include cosmetics, as well as specific goods included in that category such as *cosmetic oils for skincare*. In its evidence in reply, the opponent has provided evidence at Exhibit LP3 – LP5 to Mr Portnow’s second witness statement, in the form of internet printouts showing UK stores and brands selling various beauty supplements, as well as articles discussing the same. The evidence is consistent with my own understanding that various vitamin, mineral, dietary and collagen supplements specifically offering beauty benefits, such as the prevention or reduction in wrinkles, firming or improved texture of the skin, or thicker hair and stronger nails, are commonplace in the UK market, and will have been at the relevant dates. I also note benefits such as the prevention or reduction of wrinkles or an improvement in skin firmness and texture for example, are benefits that will also consistently be offered by the opponent’s goods such as the *cosmetic oils for skincare*.

69. I note, for completeness, the opponent has also provided two previous UK IPO decisions in which goods such as cosmetic and skin care items were found similar to goods such as dietary, vitamin and mineral supplements to either a low to medium or a medium degree. Whilst these are noted, I reach my conclusion based on the particulars of this case only.

70. I therefore consider the opponent’s earlier *cosmetics* and *cosmetic oils for skin care* (which will be encompassed by the term *cosmetics*) against the following contested goods:

Vitamins, multi-vitamins, vitamin preparations, vitamin supplements, mineral supplements, dietary supplements, nutritional supplements, powdered nutritional supplement drink mix; dietary supplement drink mixes

71. The above goods are all general categories of vitamin, mineral, dietary and nutritional supplements. It is my view these categories will all include supplements offering cosmetic and beauty benefits, for example, a smoother, healthier looking

complexion, and/or a reduction in wrinkles. On this basis, there will be an overlap in purpose with the opponent's *cosmetic oils for skincare*, particularly in relation to those goods designed to offer the same benefits. Considering the overlap in purpose, it is possible there may be an element of competition between the goods, with the consumer choosing between a face oil or supplement boasting similar ingredients and benefits. Users will be shared, and there will likely be an overlap in trade channels. Whilst the goods may be offered or used together, it seems unlikely they will be important or essential to one another, and so I do not consider them to be complementary, and the method of use will clearly differ. Whilst there may be an overlap in the key ingredients in the goods, it seems likely the size, shape and consistency of the goods will differ, meaning the nature of the goods will ultimately differ. Overall, I consider these goods to be similar to a medium degree.

72. Next, I consider the opponent's earlier *cosmetics* and *cosmetic oils for skincare* (encompassed in the term *cosmetics*) against the following contested goods:

protein supplements, powdered nutritional supplement drink mix containing protein and dietary fiber.

73. The contested goods above are all supplements containing protein. I understand that collagen is a protein, and as such the contested categories of goods will include those including or comprising collagen. It is my understanding that supplements containing collagen will be used to replenish this protein in the body including the face, for the purpose of improving the complexion and offering an improvement in skin firmness and a reduction of wrinkles. I consider that cosmetic oils for skincare will also include those containing collagen which promote the same benefits, and there will be an overlap in purpose on that basis. Again, there may be an element of competition between the goods, considering the overlap in purpose, with consumers choosing between a collagen oil or supplement offering the same benefits. The method of use will differ, and again I do not consider the goods important or essential to one another, and so there no complementarity between the same. Users will likely be shared, as will trade channels. Again, whilst there may be an overlap in the key ingredients in the goods, it seems likely the size, shape and consistency of the goods will differ, meaning

the nature of the goods will ultimately differ. Overall, I consider the goods to be similar to a medium degree.

74. The contested goods also include the following:

probiotic supplements, synbiotic supplements, and immunity supplements

75. It is my view that the supplements above are primarily those designed for the purpose of promoting gut health or benefits for the immune system. I do not consider that the ordinary and natural meaning of these terms will include supplements designed for beauty or cosmetic benefits. I do not consider these goods to share any similarity with the opponent's earlier goods. They will not share a nature, purpose, or method of use. They will not be in competition or complementary, and whilst I note they may both be sold in the same stores, such as health and beauty stores, it is my view they will likely be in different sections in the same. Whilst users may be shared, this will only be to the extent that both sets of goods may be used by the general public. Overall, I consider the above goods to be dissimilar to the opponent's earlier goods covered by its first earlier mark.

76. Finally, the contested marks seek protection for the goods *pre-natal vitamins*. These are vitamins designed to improve the health of a pregnant person and their unborn child during pregnancy. Again, I do not consider that the ordinary and natural meaning of these goods will include supplements design for beauty or cosmetic benefits, and for the same reasons set out in relation to the probiotic supplements above, I consider these goods to be dissimilar to those protected by the opponent's first earlier mark.

77. I note at this stage, that even if I had considered the opponent to have shown proof of use in relation to a broader specification (or indeed its full specification) of goods under its first earlier mark, I do not consider any of the additional goods relied upon in these proceedings to be more similar to those outlined above, and this would therefore not have improved its position in respect of this first earlier mark.

The second and third earlier mark

78. The opponent's second and third earlier marks cover the same goods. These include *vitamins and vitamin preparations; minerals and mineral preparations*. These are clearly identical to the following contested goods, either self-evidently, or in accordance with the principles set out in *Meric*:

Vitamins, multi-vitamins, pre-natal vitamins, vitamin preparations, vitamin supplements, mineral supplements.

79. These earlier marks also have protection for *food supplements [...] not for medical purposes* as well as *dietary supplements not for medical purposes*. I consider these identical to the following contested goods, in accordance with the principles set out in *Meric*:⁸

dietary supplements, nutritional supplements, protein supplements, probiotic supplements, synbiotic supplements, and immunity supplements; powdered nutritional supplement drink mix containing protein and dietary fiber; powdered nutritional supplement drink mix; dietary supplement drink mixes.

Comparison of marks

80. 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

⁸ I note the parties also appeared to agree on the identity of these goods at the hearing.

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.”

81. 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 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.

82. The respective trade marks are shown below:

Earlier trade marks	Contested trade marks
<p>RITUALS...</p>	<p>RITUAL</p>
	
<p>HOUSE OF RITUALS</p>	

83. The first earlier mark comprises the word RITUALS followed by an ellipsis. The overall impression of the mark is dominated by the word itself, whilst the ellipsis plays only a small role within the same. The slightly stylised font also plays only a very small role in the overall impression of the mark.

84. The second earlier mark comprises the word RITUALS set out in a stacked formation in three rows set inside a square. In the background of the square is a highly decorative pattern. The square and pattern is in black and grey with the text in white making it stand out, and it is my view that the word RITUALS plays the greatest role in the overall impression, with the stylisation, including the formation of the letters and the background decoration, playing a secondary role. Again, the ellipsis plays only a small role, and the slightly stylised font plays only a very small role overall.

85. The third earlier mark comprises the three words HOUSE OF RITUALS, and it is in this wording and the mark as a whole that the overall impression resides.

86. The first contested mark comprises the single word RITUAL. It is in this word that the overall impression of the mark resides.

87. The second contested mark comprises the word RITUAL, with a bold horizontal line and large solid black circle above the same. Whilst I note the size of the circular element makes it a dominant feature in the mark, considering the eye tends to be drawn to word elements,⁹ and considering the word RITUAL is not particularly small and is, in my view, the most distinctive element, I consider this to play the largest role in the overall impression of the mark, followed by the circle and then the line. The choice of font is very basic and plays a minimal role at most in the overall impression.

Comparison with the first contested mark

Visual comparison

88. The first contested mark coincides with the first earlier mark visually through the use of the same 6 letters, making the word RITUAL. Whilst I note the first earlier mark has an “S...” on the end, this acts as only a small point of visual difference at the end of the mark, where it has less impact than if it were at the beginning.¹⁰ The first contested mark is filed as a word mark, which protects the words contained in the mark, whatever form, colour or typeface are used: see *LA Superquímica v EUIPO*, Case T-24/17, paragraph 39. The slight stylisation used in the text of the first earlier mark therefore makes little difference visually. Overall, I consider these marks to be visually similar to a high degree.

89. The first contested mark coincides visually with the second earlier mark as they share the same six letters and word RITUAL. However, whilst the first contested mark

⁹ See *Wassen International Ltd v OHIM*, Case T-312/03

¹⁰ See *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 which stated, generally, the beginning of marks tend to have more impact aurally and visually than the end.

is filed as a word mark, the stacked form in which this element is presented in the second earlier mark is, in my view, outside of the normal and fair use of the same, and does contribute to the visual differences between the marks, along with the use of the “S...” in the earlier mark, and the decorative square background. Overall, I consider the marks to be visually similar to a medium degree.

90. In respect of the third earlier mark, this coincides with the first contested mark visually by way of the six letters and word RITUAL. However, they differ as the third earlier mark includes an “S” on the end of this word, in addition to the two further words “HOUSE OF” preceding the same. The main differences are at the beginning of the marks, where they tend to make more impact, and I consider these marks to be visually similar to between a low and medium degree.

Aural comparison

91. The only aural element of the first and second earlier mark is the word RITUALS, which will be pronounced in the normal way. I do not consider that ellipses are typically vocalised in the English language. The first contested mark is the plural version of the same word, and the only difference will comprise an “ss” sound at the end of the word. The marks are aurally similar to a high degree.

92. The third earlier mark comprises the three words HOUSE OF RITUALS, which will be pronounced in the normal way. This coincides with the contested mark to the extent that they both include the three syllable word RITUAL, although again there will be an additional “ss” sound at the end of this element in the earlier mark. The earlier mark also includes the two words and two syllables, which are not present in the contested mark, and which are placed at the beginning of the third earlier mark where they tend to have more impact. Overall, I consider these marks to be aurally similar to between a low and medium degree.

Conceptual comparison

93. At the hearing, Mr Muir Wood for the applicant submitted:

“Conceptually, we accept that Ritual and Rituals are reasonably similar. When it comes to House of Rituals, however, that, as I have put in my skeleton, points more to a venue for a ritual, rather than the ritual itself, which alters the conceptual similarity. It does not make them conceptually dissimilar, but it lowers the conceptual similarity between them. Those are all factors that you are going to have to weigh in when you come to the likelihood of confusion.”

94. The word RITUAL will, in my view, convey the concept of a series of actions carried out in the same order and same way each time. This may often have a slightly religious or spiritual connotation, but is in my view also used colloquially to refer to a series of actions undertaken by a person regularly and consistently. For example, a person may refer to the consumption of one cup of camomile tea prior to going to bed each night as part of a “nightly ritual”. This is the only concept conveyed by the first contested mark, and it will be the plural version of this concept (relating to more than one ritual) that is conveyed by the first and second earlier mark. These concepts are clearly highly similar.

95. The third earlier mark comprises the three words, HOUSE OF RITUALS. At the hearing, Mr Wood for the opponent submitted that the addition of HOUSE OF makes little difference to the marks conceptually. On the contrary, Mr Muir Wood submits as set out above, that this mark would indicate a venue where rituals take place. In its pleadings, the applicant submitted that the wording THE HOUSE OF¹¹ is common to see used in relation to consumer goods to denote origin, although I note no evidence was filed showing how common this actually is.

96. I accept that HOUSE OF is a term used, for example in fashion, to identify an overarching business falling under the name that follows, that being a “fashion house”. However, how common its usage is in respect of general consumer goods is unclear. Further, when used in a context outside of the fashion industry, i.e. on tubs of vitamins, it is not obvious to me that the wording HOUSE OF will necessarily be construed by the consumer to mean an overarching business, especially in a case such as this one, where there is an obvious alternative concept conveyed by the mark, that being the

¹¹ I consider the applicant is making this point also in relation to the wording HOUSE OF only.

one put forward by the applicant. It is my view that the third earlier mark will, for the vast majority of consumers, convey the concept of a venue where rituals take place. The use of RITUALS/RITUAL in each mark acts as a point on conceptual similarity, and I find the marks conceptually similar to a medium degree.

Comparison with the second contested mark

Visual comparison

97. Visually, the second contested mark overlaps with the first earlier mark by way of the word RITUAL. In the first earlier mark however, this ends with an “S...”, which is not present in the second earlier mark and acts as a point of visual difference. The slightly different fonts make a minimal difference. The second contested mark also contains a large circular device with a bold line underneath, which is also not present in the contested mark, and makes a significant visual impact. Overall, I consider the marks visually similar to a medium degree.

98. In respect of the second earlier mark, this again overlaps with the second contested mark as they both contain the word RITUAL. However, again, in the second earlier mark this ends with “S...”. Further, the stylisation present in the second earlier mark by way of the decorative square and the circle and line device present in the second contested mark all add to the visual differences between them. Overall, I consider the marks to be visually similar to between a low and medium degree.

99. In respect of the third earlier mark, again, the point of visual overlap resides is the use of the word RITUAL, which is followed by an “S” in the earlier mark. There are again further points of visual difference, by way of the additional wording HOUSE OF in the third earlier mark, and the circle and line device that is present in the second contested mark. Overall, I consider these marks to be similar to a low degree.

Aural comparison

100. As with the first contested mark, the only verbal element of the second contested mark is the word RITUAL. The aural comparison in respect of the second contested

mark will therefore produce the same results as that for the first contested mark. It is aurally highly similar to the first and second earlier mark, and aurally similar to between a low and medium degree to the third earlier mark.

Conceptual comparison

101. I do not find that the circle and line element of the second contested mark will convey any immediately graspable concept to the consumer. The only element that may be conceptualised in the second contested mark is the word RITUAL. The conceptual comparison with this second contested mark is therefore identical to that with the first earlier mark. It will be conceptually highly similar to the first and second earlier mark, and conceptually similar to a medium degree to the third earlier mark.

Average consumer and the purchasing act

102. 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.

103. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

104. It is my view the average consumer of the earlier goods in class 3, including cosmetic skin care goods, in addition to the class 5 goods, will primarily comprise members of the general public, although there will also be professionals such as dieticians and beauticians, who may also purchase the goods for use in their jobs or on behalf of others. In respect of skin care oils in class 3, I consider that the general public will consider factors such as, for example, ingredients, benefits, and quality of the goods, in addition to suitability of the goods for use with their skin type. In respect of the supplements in class 5, the consumer will consider factors such as the ingredients, the types of benefits offered vs their own requirements, in addition to the quality of the goods. For the most part, a medium degree of attention will be paid by the general public in respect of both the class 3 and the class 5 goods. However, I find that the professional consumer will pay a higher level of attention, that being slightly above medium, due to the liability and responsibility involved with using the goods on, or offering the goods to, customers and clients.

105. The goods will likely be primarily purchased visually, either in physical or online stores. However, the goods may be subject to verbal recommendations, and verbal assistance from retail staff may be sought. Further, in the case of professional consumers, orders may be placed over the phone. I therefore cannot completely disregard the aural comparison.

Distinctive character of the earlier trade mark

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

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

The first earlier mark

107. The first earlier mark comprises the very slightly stylised word RITUALS followed by an ellipsis. Considering its meaning, I do find it slightly alludes to the products offered under this mark being for use frequently and consistently, i.e. as part of a ritual of sorts. However, I do not consider this word to be directly descriptive of the goods, and it is only mildly allusive of the context in which the goods may be used. Overall, I consider the mark to be inherently distinctive to just below a medium degree.

108. The opponent has filed evidence in these proceedings, and as such I must also consider whether the distinctiveness of the earlier mark has been enhanced through use. Whilst I note, as highlighted by the applicant,¹² that this was not pleaded, I consider the UK Intellectual Property Office decision issued by Mr Oliver Morris in the opposition against the trade mark NEXT LEVEL¹³ in which Mr Morris stated as follows:

“In my view, and whilst I accept the general point that pleadings should be as full as possible so as to set out the scope of the dispute, the absence of any specific reference in the pleadings to enhanced distinctiveness is not fatal to the opponent’s case. This is because the assessment of distinctiveness is one

¹² I note this line of argument was not pursued at the hearing.

¹³ Case BL O/379/19

of the fundamental factors that needs to be assessed in every case and, as is clear from the case-law, this can come from either the inherent nature of the mark, its use, or indeed a combination of both. Therefore, if evidence has been filed, which it has in the case before me, it is incumbent upon me to factor that evidence into the assessment to decide upon the overall distinctiveness of the earlier mark. It would be perverse to do otherwise, as it would require a pretence as to the true level of distinctiveness on the part of the average consumer, based on a technicality.”

109. Whilst I am not bound by decisions issued by other Hearing Officers in UK opposition proceedings, I agree fully with the reasoning set out by Mr Morris above, and I find this to be the correct approach to take in instances where enhanced distinctive character is not specifically pleaded but evidence is filed. For this reason, I will consider the possible enhanced distinctiveness of the opponent’s marks with consideration to the use made of the same at this stage, as shown in the evidence. When considering whether the distinctiveness of a mark has been enhanced, it is the perception of the UK consumer at the relevant date, that being the filing date of the contested applications, that is key. In this instance, that is the same date of 27 August 2021 for each contested mark.

110. I have set out the evidence filed in these proceedings when assessing proof of use in relation to this mark, at paragraphs 25 to 55 of this decision. I noted at that stage, that it is my initial view that the use of the opponent’s first earlier mark on its shopfront and as the banner of its website will be linked by the consumer to the sale of the goods inside/on the website. I note that between 2016 and the relevant date, the opponent opened over 50 stores in the UK and that it is confirmed the opponent’s first earlier mark is extensively featured on the external storefronts and as the main banner of the UK website homepage throughout the relevant period. I also note the relatively high turnover figures provided for that time, of which it seems reasonable to assume at least a considerable portion came from the sale of the goods in store or on the website, both of which bear the first earlier mark. Further, I note the range of the opponent’s goods shown to be available in the UK during that time. Whilst I have considered the examples of invoices relating to promotional spend, I note these are limited and do not contribute considerably to the overall picture. Considering the

evidence as a whole, it is my view that should use of the first earlier mark be considered use in relation to the goods shown, the evidence is sufficient to show that the distinctiveness of the same has been enhanced to an above medium degree in respect of the goods shown in the evidence, including the *cosmetics* and *cosmetic oils for skincare* relied upon within the comparison of goods in this decision.

111. However, if I am wrong on this point, I agree with the applicant that the use of the opponent's first earlier mark specifically on the goods themselves is not sufficient to show that the distinctiveness of the same will have been enhanced through use. Whilst the turnover figures are high, it is clear that a considerable portion of those attributable to the sale of Ritual goods would have been in relation to goods bearing the opponent's other marks, with only a smaller portion attributable to goods under its first earlier mark. In these circumstances, I consider the distinctiveness of the opponent's first earlier mark will not have been enhanced in relation to the goods relied upon.

The second earlier mark

112. The second earlier mark again comprises the word RITUALS followed by an ellipsis. It is displayed on a decorative square and presented in a stacked formation. Again, it is my view that the word RITUALS in the mark has a slightly below medium level of distinctive character. The presentation of this mark raises this slightly, to a medium degree of inherent distinctive character overall.

113. I do not see any use of this mark in the evidence in respect of the goods relied upon within this opposition. The use of the mark shown in evidence does not, therefore, raise the level of distinctive character in the earlier mark.

The third earlier mark

114. As previously set out, the third earlier mark conveys the concept of a location where Rituals take place. As a whole, I consider the mark to hold a medium degree of distinctive character, with the element RITUALS holding a slightly below medium degree of distinctive character when considered in isolation.

115. There is no use of this mark shown in the evidence filed in respect of the goods relied upon within this opposition. The use of the mark shown in evidence does not, therefore, raise the level of distinctive character of the earlier mark.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

116. Prior to reaching a decision under section 5(2), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 59 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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 they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held by the earlier mark will have an impact on the likelihood of confusion. I must remember that the distinctiveness of the common elements is key.¹⁴ I must keep in mind that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that how the goods are obtained may have a bearing on how likely the consumer is to be confused.

117. In respect of section 5(2)(b) of the Act, there are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.¹⁵

¹⁴ See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. 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.

¹⁵ *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

118. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), 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.

The first contested mark vs the first earlier mark

119. In respect of these marks, I found the goods to range from similar to a medium degree, to dissimilar. Where the goods are dissimilar, there can be no likelihood of confusion between the marks. The opposition against the first contested mark based on the opponent's first earlier mark therefore fails in respect of the following goods:

probiotic supplements, synbiotic supplements, and immunity supplements, pre-natal vitamins.

120. In respect of the remaining goods, I found the marks to be visually, aurally and conceptually similar to a high degree. I found the earlier mark to be inherently distinctive to just below a medium degree. I found the average consumers would primarily comprise members of the general public paying a medium degree of attention to the goods, but there may also be some professionals paying a slightly higher level of attention.

121. Firstly, I consider the position based on the factors above, without consideration to any enhanced degree of distinctive character of the earlier mark. It is my view that based on the factors above alone, there will be a likelihood of direct confusion between the marks. Considering the consumer's imperfect recollection and the closeness of the marks themselves, it is my view it is very likely in the circumstances that the consumer will not notice, or will fail to recall, the differences between the marks themselves. Further, should I be correct to find that the distinctive character of this mark has been enhanced in relation to some of the goods, this only serves to increase this likelihood.

122. I therefore find opposition no. 429785 relying on the opponent's first earlier mark succeeds based on section 5(2)(b) of the Act against the following goods:

Class 5: Vitamins, multi-vitamins, vitamin preparations, vitamin supplements, mineral supplements, dietary supplements, nutritional supplements, protein supplements, powdered nutritional supplement drink mix containing protein and dietary fiber; powdered nutritional supplement drink mix; dietary supplement drink mixes.

123. The opponent has succeeded in full (where the goods are similar) based on a likelihood of direct confusion, and so I see no reason to consider at length the likelihood of indirect confusion based on this earlier mark. However, I note for completeness, that in my view if the consumer were to notice and recollect the differences between these marks, particularly the use of the “S” in the earlier mark and the omission of this in the contested mark, this is not a difference that lends itself to a logical brand extension or sub brand, and on this basis, I would not find a likelihood of indirect confusion between the marks.

The first contested mark vs the second earlier mark

124. I will now consider the likelihood of confusion based on the opponent’s second earlier mark. I note in this case, I found all of the goods to be identical. I found the marks to be visually similar to a medium degree, and aurally and conceptually similar to a high degree. I found the coinciding elements of the marks, that being the word RITUAL/RITUALS to be inherently distinctive to just below a medium degree and that this has not been enhanced through use in relation to the goods relied upon. I also found this element to be the most distinctive and dominant element of the marks overall. I found the average consumer would primarily comprise the general public who would pay a medium degree of attention to the goods, but there may be professionals who play a slightly higher degree of attention. Considering the visual differences between the marks, and its overall presentation which I consider to be outside of the normal and fair use of the word mark itself, it is my view that these are unlikely to go unnoticed or be forgotten entirely by the consumer, and there is therefore no likelihood of direct confusion between these marks. I therefore go on to consider the likelihood of indirect confusion in this instance.

125. In *L.A. Sugar* (cited above) Mr Iain Purvis Q.C. (as he then was), as the Appointed Person set out three examples of when indirect confusion may occur as below:

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 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).”

126. I note that the examples above were intended to be illustrative and are not exhaustive. I also keep in mind *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, in which Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

127. I consider again all of the factors relevant to the comparison between these two marks. I note this example does not fit neatly into one of the categories set out in *L.A. Sugar*, but I remind myself that these are not exhaustive. I note again that the RITUALS/RITUAL element is, in my view, the most dominant and distinctive element

in each mark. I consider it would be easy for this element to be misremembered by the consumer, with the addition or omission of the “S” and the ellipsis being the subject of imperfect recollection. I therefore consider it would be easy for the consumers to see these marks both as a RITUAL or RITUALS mark, one with the additional decorative square and stylisation. Considering the identical goods, it is my view it would be likely on this basis that consumers would make the assumption that the marks derive from the same economic entity, with one mark simply being a more stylised/decorative version of the other. On this basis, I consider there to be a likelihood of indirect confusion between the marks in respect of all of the goods applied for.

The first contested mark vs the third earlier mark

128. As the opposition based on section 5(2)(b) against the applicant’s first contested mark has been entirely successful based on the opponent’s second earlier mark (as well as partially successful based on its first earlier mark), I intend to address the opposition based on the opponent’s third earlier mark only briefly. Firstly, in respect of direct confusion, it is my view that the difference between the marks, particularly the inclusion of the wording HOUSE OF, is too great to be forgotten entirely or to go unnoticed, despite the identical goods. I therefore find no likelihood of direct confusion between the same.

129. When it comes to indirect confusion, I consider again all of the factors relevant to the comparison between these two marks. I note particularly the identical goods, and the conceptual similarities between the marks. However, whilst noting these elements, it does not appear to me that there is a proper basis for the consumer to be indirectly confused between these marks. I find no logical basis for an entity to add HOUSE OF at the beginning of an earlier mark in these circumstances, particularly as I did not find it had been shown that HOUSE OF is commonly used or understood to indicate an overarching business in respect of the relevant goods, and further, it is my view RITUALS does not play an independent role within the earlier mark. It is my view that should the similarities between the marks be noticed, they are more likely to be put down to coincidence in this instance. I therefore find no likelihood of indirect confusion between these marks.

The second contested mark against the first earlier mark

130. Again, I found the goods covered by the second contested mark to range from dissimilar to those covered by the first earlier mark, to similar to a medium degree. Where the goods were found to be dissimilar, the opposition based on section 5(2)(b) relying on this earlier mark cannot succeed. The opposition against this contested mark based on the opponent's first earlier mark therefore fails in respect of the following goods:

probiotic supplements, synbiotic supplements, and immunity supplements, pre-natal vitamins.

131. I found the marks visually similar to a medium degree, and aurally and conceptually similar to a high degree. I found the coinciding element of the earlier mark, that being the word RITUAL, to have a slightly below medium level of distinctive character, and that the general public, which make up the majority of average consumers, would pay a medium level of attention to the goods, which will primarily be purchased visually.

132. Having considered all of the relevant factors, and particularly noting the circle and line device present in the second mark which I found to make a significant impact visually, it is my view that this element will not go unnoticed or be forgotten entirely by the consumers when making a visual purchase. For this reason, I do not believe that consumers will directly mistake one mark for the other, and there is therefore no likelihood of direct confusion between the same.

133. I therefore go on to consider the likelihood of indirect confusion. I have set out some relevant case law on this above, but I remind myself that the examples given in *L.A. Sugar* are not exhaustive. Further, I also consider *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), in which Arnold J. (as he then was) considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. The judge said:

“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.

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.”

134. I consider that, in respect of the second contested mark, the word element RITUAL plays an independent distinctive role within the same. It is the only word

element in the second contested mark, and will, in my view, be considered by the consumer as an independent indicator of economic origin within the mark. Further, it is my view that, as with the other marks, the addition or omission of “S...” in the marks at the end of the coinciding element, and the slight difference in font, will easily go unnoticed or be misremembered. It is therefore my view that the consumer will likely believe the second contested mark to be the earlier contested mark complete with the addition of a device on top of the same, and the marks will therefore simply be considered as the use of the same mark with or without an additional logo. Considering all the factors, including the medium level of similarity between the goods, it is my view that the consumer is therefore likely to believe the marks derive from the same economic origin, and there is a likelihood of indirect confusion between the marks on this basis, for all goods found to be similar.

135. Again, I note for completeness that my findings have been based on the inherent distinctiveness of the first earlier mark only. If I am found to be correct that this has been enhanced through use, it is my view that this only serves to strengthen my findings above.

The second contested mark against the second earlier mark

136. Next, I consider the second earlier mark against the second contested mark. I note in this instance, I found the goods to be identical. I also found the marks to be visually similar to between a low and medium degree, and aurally and conceptually similar to a high degree. Again, I found the distinctiveness of the coinciding element of the earlier mark to be at just below a medium degree inherently, and that this had not been enhanced through use. I found that average consumers primarily comprise the general public that tend to pay a medium degree of attention. I found the goods will primarily be purchased visually, but that I cannot completely disregard the aural considerations.

137. In this instance, considering the significant visual differences between the marks, it is my view there will be no likelihood of direct confusion between the same. I find it unlikely the consumer will directly mistake one for the other, and entirely misremember

the differences in the layout and the additional features in each. I will therefore go on to consider if there is a likelihood of indirect confusion between the marks.

138. I have previously set out the relevant case law relating to indirect confusion. I keep this in mind as I make my assessment, and although I note this case does not fit directly into one of the categories set out in *L.A. Sugar*, I remind myself again that they are not exhaustive. Again, it is my view that, with respect to the coinciding elements, those being RITUAL/RITUALS, the consumer would easily forget the addition or omission of the “S” (and the ellipsis that follows in the earlier mark) and would consider these coinciding elements to comprise the same word. I found this element to hold just below a medium degree of distinctive character inherently, but also to be the most dominant and distinctive element in each mark. I also remind myself in this instance that the goods are identical. Considering all of these factors, it is my view that should the consumer of vitamins for example, having purchased these under the contested mark, go back to make a repeat purchase and come across these goods under the second earlier mark, it would be likely in the circumstances for the consumer to be primarily relying on the coinciding elements RITUAL/RITUALS for the purpose of identifying the economic origin of the goods. Upon seeing the contested mark for those identical goods, I find it would be perfectly logical, and indeed likely, that the consumer would assume this was simply a slight rebrand of the mark using an alternative stylisation. I consider this to be the more likely outcome in this scenario, than one where the average consumer puts the corresponding element down to coincidence, and relies solely on the additional decorative/device elements to differentiate between the economic entity responsible for the two sets of goods. I also find it just as likely this scenario would be the same should the consumer come across the contested mark prior to the earlier mark. Overall, I find there to be a likelihood of indirect confusion between these marks, in respect of all of the goods applied for.

The second contested mark against the opponent’s third earlier mark

139. Again, as the opposition based on section 5(2)(b) against the applicant’s second contested mark has been entirely successful based on its second earlier mark (as well as partially successful based on its first earlier mark), I intend to again address the opposition based on the opponent’s third earlier mark only briefly. In respect of direct

confusion, it is my view that the difference between the marks, particularly the inclusion of the wording HOUSE OF in the earlier mark and the device in the contested mark, are too great to be forgotten entirely or to go unnoticed, despite the identical goods. I therefore find no likelihood of direct confusion between the same.

140. When it comes to indirect confusion I consider again all of the factors relevant to the comparison between these two marks. I note particularly the identical goods and similarities in concept. However, again I find there to be no proper basis on which to find a likelihood of indirect confusion. I therefore find no likelihood of indirect confusion between these marks.

The opponent's fourth earlier mark

141. I have noted previously that the opponent's fourth earlier mark is less similar to the contested marks and the contested goods than those marks above, including its third earlier mark. As I have found no likelihood of confusion based on the opponent's third earlier mark, it is my view that there can be no likelihood of confusion based on this fourth earlier mark. Further, and in any case, as the opponent has already succeeded in its oppositions against the contested marks in their entirety under this ground, its position cannot be improved by its reliance on additional marks. I therefore do not intend to consider this mark further.

Conclusion on section 5(2)(b) of the Act

142. Opposition no. 429785 has succeeded in its entirety based on section 5(2)(b) of the Act.

143. Opposition no. 429789 has also succeeded in its entirety based on section 5(2)(b) of the Act.

Section 5(3)

144. Although both oppositions have already been entirely successful based on section 5(2)(b) of the Act alone, I will, for completeness, also consider each opposition

based on section 5(3) of the Act as pleaded. Again, I intend to do so in tandem, whilst keeping in mind these are two separate oppositions that may produce different results. Both oppositions rely on the opponent's first earlier mark only under this ground.

145. The relevant statutory provisions are as follows:

Section 5(3) states:

“(3) A trade mark which-

is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark”.

146. As the earlier mark relied upon is a comparable mark, paragraph 10 of Schedule 2A, is also relevant, which reads:

Reputation of a comparable trade mark (EU)

10(1) Sections 5 and 10 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the reputation of a comparable trade mark (EU) falls to be considered in respect of any time before IP completion day, references in sections 5(3) and 10(3) to—

- (a) the reputation of the mark are to be treated as references to the reputation of the corresponding EUTM; and
- (b) the United Kingdom include the European Union.

147. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case C-252/07, *Intel*, Case C-408/01, *Adidas-Salomon*,

Case C-487/07, *L’Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora* and Case C-383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows:

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark’s reputation and distinctiveness; *Intel*, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) the more immediately and strongly the earlier mark is brought to mind by the later mark, the greater the likelihood that use of the latter will take unfair advantage of, or will be detrimental to, the distinctive character or the repute of the earlier mark; *L’Oreal v Bellure NV*, paragraph 44.

(g) Detriment to the distinctive character of the earlier mark occurs when the mark’s ability to identify the goods/services for which it is registered is

weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel*, paragraphs 76 and 77 and *Environmental Manufacturing*, paragraph 34.

(h) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel*, paragraph 74.

(i) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV*, paragraph 40. The stronger the reputation of the earlier mark, the easier it will be to prove that detriment has been caused to it; *L'Oreal v Bellure NV*, paragraph 44.

(j) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

148. An opposition based on section 5(3) of the Act can only be successful via the establishment of several individual elements. To be successful on this ground, the opponent must prove it holds a reputation for the earlier mark relied upon amongst a

significant portion of the public. It must also be established that the marks are similar. If it is found both that the marks are similar and that the earlier mark holds a qualifying reputation it must then be shown that this reputation, combined with the similarity between the marks, will result in the relevant public establishing a link between the marks. A link may be found on the basis that the later mark brings the earlier mark to mind. Importantly, if all three of these elements have been established, it must then be shown that the link made by the public will result in, or will be likely to result in, one of the pleaded types of damage.

149. The relevant date for consideration under section 5(3) of the Act is the filing date of the contested applications, that being 27 August 2021 in both instances. The opponent claims to hold a reputation for its first earlier mark only. Whilst the earlier mark is a comparable mark, meaning paragraph 10 of Schedule 2A of the Act is relevant, the opponent has only claimed a reputation in the UK, and it is this reputation that I consider below.

Reputation

150. In *General Motors*, Case C-375/97, the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

151. I have previously set out the bulk of the opponent's evidence in this opposition in my summary of proof of use. I note at this stage that should I be wrong in my finding that the use of the opponent's earlier mark on storefronts and on its website creates a sufficient link to the goods relied upon, then an opposition based on this ground must fail. Whilst I found the evidence the opponent provided relating to its first earlier mark satisfies the requirements of proof of use to the extent outlined previously, I do not consider it sufficient to demonstrate that the opponent holds a reputation for its earlier mark on this basis.

152. However, I consider the opponent's reputation under the mark, if I am correct in my primary view that the use of the same on its shopfronts and on the banner of the website throughout the relevant period will be considered use in relation to the goods sold inside those stores and on its website. I note that the applicant's primary position is that this is not use in respect of the goods, but I also note that at the hearing, Mr Muir Wood for the applicant stated:

"We fully accept that the Opponent is a very successful company, it clearly has made a substantial turnover, but whether that is in respect of use of the 700 mark or not is, at this stage, very unclear."

153. Whilst I understand that the applicant has not conceded that the opponent holds a reputation under its first earlier mark for any goods or services per se, it is my view that where I find use of this mark to be use in relation to the goods, a reputation is apparent. Mr Cloosterman confirmed the mark was used as the banner of the opponent's websites and on its shopfronts throughout the relevant period. He also confirmed there were over 50 UK stores open by the relevant date, and as Mr Muir Wood has stated above, the opponent had a substantial turnover throughout this

time.¹⁶ I note its shops and concessions were widespread across the UK, and it also had stores in major UK airports during the relevant period. I do note however, that there is only a small amount of evidence relating to the UK promotion of the business under the marks, and I consider that the size of the relevant market is undoubtedly very large. However, overall, I accept that the opponent holds a reasonable reputation under its mark in the UK in respect of the following goods relied upon under its first earlier mark:

Perfumery, cosmetics; cosmetic oils, creams and lotions for skin care; toiletries for bathing and showering

Link

154. I will now move on to consider if I find there will be a link made between the marks, with consideration to the relevant factors as set out in *Intel*.

The degree of similarity between the conflicting marks

155. In respect of the first contested mark, I found it to be similar to the opponent's earlier mark visually, aurally and conceptually to a high degree.

156. In respect of the second contested mark, I found it to be similar the opponent's earlier mark visually to a medium degree, and aurally and conceptually to a high degree.

The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

157. I have previously considered the similarity between the goods for which the opponent holds a reputation and the goods under the two contested marks. I found

¹⁶ I keep in mind the comments in Mr Cloosterman's statement that at least approximately 55% of the turnover figures relate to sale of Rituals goods.

these to include those which are similar to a medium degree (with shared consumers by way of the general public). The exception to this is in respect of the following goods which I found to be dissimilar:

probiotic supplements, synbiotic supplements, and immunity supplements, pre-natal vitamins.

158. In respect of above goods, whilst they are not wildly apart in the way that, for example, vitamins and motorcars might be, they are also not similar. Consumers will be shared only on the general basis that they might both be purchased by the general public. However, I do consider that the goods may be purchased in the same health and beauty stores, or pharmacies for example.

The strength of the earlier mark's reputation

159. Considering the evidence provided, I have found the opponent to have a reasonable reputation under its earlier mark.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

160. I found the earlier mark to hold just below a medium degree of distinctive character inherently for the goods. I also found on the basis that the use on shopfronts and as the banner of the website throughout the relevant period is use in relation to the goods, that the distinctiveness of this earlier mark will have been enhanced to an above medium degree. This applies in respect of all of the goods for which I have found the opponent to have a reputation under this mark.

Whether there is a likelihood of confusion

161. I have already found a likelihood of confusion between these marks under section 5(2)(b) in respect of all of the similar goods.

162. It is possible under section 5(3) for the reputation of an earlier mark to be such that the relevant consumer is likely to believe that the use of a contested mark in relation to similar or *dissimilar* goods or services will be use of the same or a similar mark deriving from the same or a connected economic entity. A finding of this nature would result in a conclusion that there is a likelihood that the consumer will be confused as to the origin of the marks either directly or indirectly under this ground. However, considering all of the factors in this case, noting that neither the distinctiveness of the earlier mark nor the reputation for the same fall at the very highest level, and considering the differences between the goods, it is my view that there is unlikely to be a likelihood of confusion present in respect of the goods which I have found to be dissimilar in this instance.

163. I remind myself at this stage that finding similarity between the goods, or indeed a likelihood of confusion, is not required in order to find a link would be made between the marks, although the closeness of the goods is one factor to take into account when considering if the use of the later mark would bring the earlier mark to mind. In this instance, I consider particularly the closeness of the marks and the near identical dominant and distinctive element of each, the reasonable reputation of the opponent and the above-medium degree of distinctiveness of this element. Further, I consider the possibility for shared trade channels of the goods by way of, for example, pharmacies and health and beauty stores. Overall, it is my view that for at least a significant portion of consumers, the opponent's earlier mark may be brought to mind by the use of the contested marks, even where it is not believed the goods derive from the same entity.

Damage

164. I will now move on to consider the likelihood of damage, in accordance with the opponent's pleaded case.

Unfair advantage

165. The opponent has pleaded that use of the applicant's contested marks will result in an unfair advantage on the following basis:

“[...] Consumers and potential consumers would be confused into believing that the Opposed Goods are the Goods of the Opponent, or that there is an association or other economic link between the Opponent and the Applicant. There is a risk that use of the trade mark the subject of the Application by the Applicant would lead the Opponent's customers or potential customers to believe that the goods of the Applicant come from the Opponent or that the goods are from an entity which is economically linked. This could lead to an unfair advantage to the Applicant, who would benefit from increased sales without the need to invest in the same amount of marketing and would therefore be riding on the coat-tails of the Opponent's reputation.”

166. Where there is a likelihood of confusion between the marks, I agree with the opponent that there will undoubtedly be an unfair advantage for the applicant, with consumers potentially purchasing goods based on the opponent's reputation and without any investment required from the applicant. However, I note in this case, the opponent has based its pleading of unfair advantage entirely on the basis of a belief by the consumer that there is an economic connection between the entities responsible for the marks. Therefore, this head of damage must fail where I did not find this will be the case.

Detriment to reputation

167. Again, I note the opponent has pleaded there will be the potential for detriment to its reputation only on the basis that the consumer will believe there to be an economic connection between the marks. In the box asking for further information on how this would occur, it pleads:

“The above could potentially result in damage to the Opponent's business. For example, confusion as to the origin of the goods could lead to a loss of sales for the Opponent as customers may buy goods from the Applicant mistakenly believing they are buying the Opponent's Goods. In the event of any variation of quality of the goods provided by the Applicant, there will be a detriment to the Opponent's reputation and a loss of sales for the Opponent's business.”

168. On this point, I note in *Unite The Union v The Unite Group Plc*, Case BL O/219/13, Ms Anna Carboni as the Appointed Person considered whether a link between an earlier mark with a reputation and a later mark with the mere potential to create a negative association because of the identity of the applicant or the potential quality of its goods/services was sufficient to found an opposition based on detriment to reputation. She said:

“46. Indeed, having reviewed these and other opposition cases, I have not found any in which the identity or activities of the trade mark applicant have been considered in coming to a conclusion on the existence of detriment to repute of an earlier trade mark. I can understand how these matters would form part of the relevant context in an infringement case, but I have difficulty with the notion that it should do so in an opposition. After all, many, if not most, trade mark applications are for trade marks which have not yet been used by the proprietor; some are applied for by a person or entity that intends to license them to a third party rather than use them him/itself; and others are applied for by an entity that has only just come into existence.

47. I do not exclude the possibility that, where an established trading entity applies to register a mark that it has already been using for the goods or services to be covered by the mark, in such a way that the mark and thus the trader have already acquired some associated negative reputation, perhaps for poor quality goods or services, this fact might be taken into account as relevant “context” in assessing the risk of detriment to repute of an earlier trade mark. Another scenario might be if, for example, a trade mark applicant who was a known Fascist had advertised the fact prior to the application that he was launching a new line of Nazi memorabilia under his name: I can see how that might be relevant context on which the opponent could rely if the goods and services covered by the application appeared to match the advertised activities. But I would hesitate to decide an opposition on that basis without having had confirmation from a higher tribunal that it would be correct to take such matters into account.”

169. Considering the comments above, it seems to me that in this case, where I note there is no evidence of the applicant actually offering an inferior product, it is difficult to see the basis on which the opponent wishes me to reach a conclusion that there exists a likelihood of detriment to the reputation of its earlier mark. I do not find for the opponent on this basis. Further, and in any case, I note this type of damage is once again pleaded on the basis that the consumer will believe there to be an economic link between the entities, and as such it cannot take the opponent any further than I have already found above based on an unfair advantage.

Detriment to distinctive character of the earlier mark

170. Finally, I note the opponent has pleaded that the use of the applicant's mark will result in detriment to the distinctive character of its earlier mark on the following basis:

“The above would also inevitably erode the distinctive character of the Opponent's earlier rights, diminishing the ability of the Earlier Mark to act as a clear indicator of trade origin.”

171. In *Environmental Manufacturing LLP v OHIM*, Case C-383/12P, the CJEU stated that:

“34. According to the Court's case-law, proof that the use of the later mark is, or would be, detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered, consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future (*Intel Corporation*, paragraphs 77 and 81, and also paragraph 6 of the operative part of the judgment).”

172. And further that:

“42. Admittedly, Regulation No 207/2009 and the Court's case-law do not require evidence to be adduced of actual detriment, but also admit the serious risk of such detriment, allowing the use of logical deductions.

43. None the less, such deductions must not be the result of mere suppositions but, as the General Court itself noted at paragraph 52 of the judgment under appeal, in citing an earlier judgment of the General Court, must be founded on ‘an analysis of the probabilities and by taking account of the normal practice in the relevant commercial sector as well as all the other circumstances of the case’.”

173. The opponent has not taken this point beyond its pleaded case in its submissions made. I am not convinced from the case put before me that the fact all of the marks contain the word RITUAL would present a serious risk of a change in the economic behaviour of the opponent’s customers. The case law above establishes that the applicant’s claim of detriment to distinctive character would require evidence of a change in the economic behaviour of the average consumer of the goods for which the opponent’s earlier mark is registered, or of a real likelihood of the same. The opponent has not filed any evidence that shows either a change in the economic behaviour of its customers or that there is a serious likelihood of such a change. Whilst I note there is no specific requirement to supply evidence of actual detriment, in this case I have little more to consider than mere supposition, on which I cannot base my finding. Again, this head of damage cannot take the opponent any further on this ground.

174. The oppositions based on section 5(3) of the Act therefore succeed against both marks in respect of the following goods:

Class 5: Vitamins, multi-vitamins, vitamin preparations, vitamin supplements, mineral supplements, dietary supplements, nutritional supplements, protein supplements, powdered nutritional supplement drink mix containing protein and dietary fiber; powdered nutritional supplement drink mix; dietary supplement drink mixes.

175. The oppositions fail on this ground in respect of the remaining goods, those being:

“probiotic supplements, synbiotic supplements, and immunity supplements, pre-natal vitamins.”

Final Remarks

176. Whilst the oppositions based on section 5(3) of the Act have only been partially successful, the oppositions based on section 5(2)(b) of the Act were entirely successful against both contested applications. Subject to any successful appeal, both contested applications will therefore be refused in their entirety.

COSTS

177. The opponent has been successful and is entitled to a contribution towards its costs. At the hearing, Mr Wood for the opponent asked me to consider costs off the scale. The submissions as to why Mr Wood felt this would be appropriate were not entirely clear, however, I note his following submission made at the hearing:

“On costs. Yes, unless you make a finding - it seems to be that it seems to us that it would be on the scale unless you reach a conclusion that the evidence is so overwhelming that they should have conceded the points once they received the evidence. I suspect, whatever we may feel about it, my friend has put up a very reasoned effort today to try and suggest why they have contested that point. I think it is going to be difficult, unless you conclude that it was so overwhelmingly obvious that there was repute and genuine use, that they were wrong to take it forward. But we have our views that it is clear, but you will have to reach your own conclusion on that particular point, so yes.”

178. It is my view that the evidence filed in this case relating to proof and use and reputation was far from, as Mr Wood has put it, *“...so overwhelming that [the applicant] should have conceded the points once they received the evidence.”* I do not intend to dwell further on this point, in which, whilst he asked me to consider it, it seems from the submission above that even Mr Wood had little confidence in. For completeness, I note here that I find the applicant’s conduct in these proceedings to have been

perfectly reasonable. I therefore award costs on the scale, in accordance with Tribunal Practice Notice 2/2016.

179. In the circumstances I award the opponent the sum of £2900 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Prior to consolidation

Official fees	£400
Preparing/filing the TM7s and considering the counterstatements	£700

After consolidation

Preparing and filing the evidence	£900
Preparing for and attending the hearing	£900
Total	£2900

180. I therefore order Natsals, Inc., doing business as Ritual to pay Rituals International Trademarks B.V. the sum of £2900. 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 18th day of September 2025

R. Le Breton
For the Registrar