

O/0912/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004049332
BY GUANGZHOU CHUHE INTERNATIONAL TRADING CO., LTD
TO REGISTER:

BEASTIE

IN CLASSES 20 & 21

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. OP600003409 BY
PET SUPPLIES BEHEER B.V.

Background and pleadings

1. On 9 May 2024, Guangzhou Chuhe International Trading Co., Ltd (“the applicant”) applied to register in the UK the trade mark shown on the cover page of this decision (“the applicants mark”). The application was accepted and published for opposition purposes on 24 May 2024 and registration is sought for the following goods:

Class 20: Pet crates; Pet furniture; Pet houses; Pet cushions; Cushions (Pet -); Pet grooming tables; Kennels for household pets; Dog kennels; Inflatable pet beds; Grooming tables for pets; Barrels (Non-metallic -) for the identification of pet animals; Dog houses [kennels]; Beds for pets; Beds for household pets; Beds for animals; Dog beds; Beds for birds; Cat beds; Portable beds for pets; Animal housing and beds; Animal carriers in the form of boxes; Hutches for animals; Kennels; Portable kennels; Playhouses for pets; Cushions for lining pet crates; Dog baskets; Nesting boxes for household pets; Household pets (Nesting boxes for -); Nesting boxes for pets; Cat trees; Cat baskets; Animal claws; Dog tags, not of metal.

Class 21: Bird cages for domestic birds; Bird cages; Rings for identifying birds.

2. On 12 August 2024, Pet Supplies Beheer B.V. (“the opponent”) filed an opposition opposing the application in full under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following mark:

BEEZTEES

UK registration no.UK00801195237

Filing date 5 December 2013; registration date 15 January 2015

Relying on some goods, being the following:

Class 20: Beds; beehives; animal bone, unworked or semi-worked; stuffed animals; display stands; boxes of wood or plastic; portable kennels; portable beds for pets; photograph frames; plaques of bone, ivory, plastic, wax or wood; animal

hooves; kennels for household pets; fodder racks; identification bracelets, not of metal, other than jewelry; identity plates, not of metal; cupboards; scratching posts for cats; pet crates; pet cushions; baskets, not of metal; mattresses; furniture; nesting boxes for household pets; nesting boxes; meat chests, not of metal; tanks, not of metal nor of masonry; shells; tortoiseshell, unworked or semi-worked; beds for household pets; playhouses for pets; mirrors (looking glasses); straw mattresses; animal teeth; barrels of wood; safety gates of metal for babies, children, and pets (furniture); fishing baskets; straw plaits; stuffed birds; goods, not included in other classes, of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics; water tanks of plastic for household purposes; sea shells; meerschaum, unworked or semi-worked; cushions; indoor window blinds (shades) (furniture).

Class 21: Earthenware; trash cans; indoor aquaria; aquarium hoods; statues or porcelain, ceramic, earthenware or glass; cups of paper or plastic; brushes; non-electric portable coldboxes; drinking troughs; mugs; table plates; electric devices for attracting and killing insects; electric combs; toothbrushes, electric; buckets; watering cans; gloves for household purposes; insect traps; combs for animals; litter boxes (trays) for pets; cookie jars; isothermic bags; bowls (basins); cages for household pets; cups; baskets for domestic use; mouse traps; horse brushes; pots; rat traps; cloths for cleaning; cleaning instruments, hand-operated; poultry rings; feeding troughs; saucers; dusting apparatus, non-electric; toothbrushes; indoor terrariums (vivariums); indoor terrariums (plant cultivation); insulating flasks; toilet utensils; urns; mangers for animals; animal activated pet feeders; bird baths; birdcages; rings for birds.

3. The opponent's mark is a comparable mark based on an earlier International Registration designating the EU ("IR"). On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing IR's. These comparable marks enjoy the same filing and registration dates as their European counterparts.

4. By virtue of relying on section 5(2)(b) of the Act, the opponent's case is that the marks at issue are similar and that the goods of the parties are either identical or similar, resulting in a likelihood of confusion.
5. The applicant filed a counterstatement denying the claims made against it. It is noted that the applicant also elected to request proof of use from the opponent.
6. The opponent is represented by Trademark Tonic Limited. The applicant is represented by Irene Zheng (ukgf rma). Only the opponent filed evidence in chief. No hearing was requested. Both the opponent and applicant filed written submissions in lieu of the same. This decision is taken following a careful perusal of the papers.
7. 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.

PRELIMINARY ISSUE

8. The opponent initially filed opposition proceedings under the fast track procedure. However, the criteria for the fast track procedure were not met upon the filing of the opponent's Form TM7F and the Tribunal gave a preliminary view that the opposition would proceed on the basis that it was a conventional opposition. This was not opposed and upon the receipt of an amended Form TM7F, the Tribunal confirmed in correspondence dated 14 August 2024 that the fast track opposition would be converted to a standard opposition with the normal evidence rounds.

EVIDENCE

9. The opponent's evidence in chief came in the form of the witness statement of Job Johannes Hubertus van Riel dated 6 January 2025. Mr Riel is a Managing Director of the opponent, a position he has held since 2013. Mr Riel's statement is

accompanied by 5 exhibits being JR1 – JR5, and was adduced in order to demonstrate genuine use of the opponent’s mark.

10. I do not intend to summarise the evidence in full here (or the submissions of the opponent or the applicant, for that matter). However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

DECISION

Proof of use

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

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

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

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired.

[...]

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

12. Section 6A is also relevant. It reads:

“(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.”

13. Section 100 of the Act is also relevant. It reads:

“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.”

14. As the opponent’s 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”.

15. Given its earlier filing date, the opponent’s mark qualifies as an earlier trade mark under the above provisions. The opponent’s mark completed its registration process over five years prior to the filing date of the applicant’s mark. As set out above, the applicant requested that the opponent provide proof of use in respect of its mark. As a result, the opponent’s mark is subject to the proof of use assessment.

16. 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 Marken 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].”

17. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander QC (as he then was) as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use. [...] However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

18. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs QC (as he then was) as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors.

The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.'

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not 'show' (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use."

19. What I take from this case law is that there is no requirement to produce any specific form of evidence, but that I must consider what the evidence as a whole shows me and whether on this basis I can reasonably be satisfied on the balance of probabilities that there has been genuine use of the mark.

20. Section 6A of the Act (cited above) confirms that the relevant period for the present assessment is the five-year period prior to the filing date of the applicant's mark, being 9 May 2024. The relevant period is, therefore, 10 May 2019 to 9 May 2024 ("the relevant period").

21. As the opponent's mark is a comparable mark, use of the same in the EU prior to IP Completion Day (being 31 December 2020) is relevant to the present

assessment.¹ As the relevant period falls partially prior to IP Completion Day, the EU is the relevant territory from 10 May 2019 to 31 December 2020 and the UK is the relevant territory from 1 January 2021 to 9 May 2024. On this point, I refer to the case of *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, wherein the Court of Justice for the European Union (“CJEU”) noted that:

“It should, however, be observed that ... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

22. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real”² because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the mark for the goods or services protected by the mark” is, therefore, not genuine use.

¹ See paragraph 4 of Tribunal Practice Notice 2/2020

² *Jumpman* BL O/222/16

Form of the mark

23. The opponent's mark is a word only mark for the word 'BEEZTEES'. The mark actually used throughout the evidence is as follows:



24. The way in which the word 'BEEZTEES' is presented in the above example is in line with fair and notional use of a word only mark. As for the addition of the device element in the above example, I remind myself of the case of *Colloseum Holdings AG v Levi Strauss & Co.*,³ wherein the CJEU set out that use of a mark generally encompasses both its independent use and its use as part of another mark taken as a whole so long as the registered mark continues to be perceived as indicative of the origin of the goods at issue. In the present case, I consider that 'BEEZTEES' remains the indicator of origin of the above example of use and, therefore, I consider that it constitutes use of the mark as registered.

Evidence of use

25. The evidence begins with screenshots of the opponent's website (<https://www.beeztees.com/>) showing examples of products that it claims to sell into EU countries including the UK.⁴ The opponent's mark does not appear visible on any of the products shown. However, the mark is displayed at the top of each page of the three screenshots of the website. Whilst I have been provided with photos of the opponent's goods being sold on their website, I note that these screenshots are stated to be from 10 December 2024, which falls after (and thus outside) the relevant period.

³ Case C-12/12

⁴ JR1

26. The opponent goes on to list example products it has sold to its UK customers from 2013 onwards.⁵ There is no breakdown as to the date of sale of each product so it is not possible to decipher what products were sold within the relevant period. Given the relevant period was a 5 year period within the 11 year period of 2013 – 2024, it is possible to infer that some of these goods were not sold within the relevant period at all. For example, some goods may have been sold between 2013 and 2018 only, meaning that they are of no assistance here. Additionally, having considered the list in detail, it has not been possible to determine what some products are. No headings have been provided for the columns. However, it appears that the first column is a numerical product code, the second column appears to state the product description in a language other than English, the third column appears to translate the product description to English, the fourth column states a numerical figure in euros and the fifth column appears to contain a photograph of the product. I have been able to determine what some goods cover, such as “BZ MELA DOG BOWL RIMPU WHITE 14” and “BZ PLUSH CAT BED LEVISA BEIGE 43X43X”, being a dog bowl and a cat bed, respectively. That being said, for some products, there is no description of the product in English and no photo provided, such as “BZ KERAM+SIL EETB NUF HOND BLW 15,5”. Additionally, some of the translated descriptions are not particularly helpful as it is not clear what is actually being described and no photo has been provided, such as “BZ REISTAS PRUE BGE 40x20x29”. In either of these instances, it is not possible to decipher what the product is.

27. Turnover figures are provided for UK customers from 2019-2024 of beeztees branded pet products totalling 565,890.75 euros.⁶ I note that the figures cover the entirety of the years 2019 and 2024 meaning that a proportion of the same is likely to fall outside of the relevant period, on the basis that the relevant period begins and ends in the May of those years. I have no way to determine precisely how much but this is something I will bear in mind when making my overall assessment of the evidence before me.

⁵ JR2

⁶ JR3

28. Exhibit JR5 lists articles sold by the opponent between 2019 and 2024 into the UK market by article and then by the UK retailer. This list is over 40 pages in length, with each page consisting of approximately 60 entries. It is not possible to discuss each one but I note that the list includes goods that are clearly identifiable, such as pet toys, brushes, clippers and dog bowls as well as a range of animal foods and snacks ('BZ DRIED SUPER BEEF KNUCKLE BONE FOIL', for example). That being said, I note that similar issues arise here as was applicable to Exhibit JR2 discussed above, namely that it is unclear what some of the goods are meant to cover. For example, 'BZ WECKPOT' and 'BZ HSP DIAMOND RING'.⁷

29. A range of example invoices are provided showing sales to UK customers/retailers from the opponent in euros.⁸ The heading of exhibit JR4 states that the example invoices are dated within the relevant period and show sales of pet products under the BEEZTEES trade mark in the UK. However, 4 out of the 22 invoices are outside of the relevant period and no invoices have been provided for 2021. The invoices show sales to customers in Northampton, Cheshire, Watford and Exeter. For some invoices dated 2022 – 2024, they are billed to a party in the UK but shipped to the European party in Germany. It is not clear whether the latter group of invoices covered goods that were eventually sold in the UK. As such, and given the shipping address, it is possible that they were sold in Germany. If so, the sales would have taken place after IP Completion Day so would be of no assistance here.

Assessment of evidence

30. I will now consider an assessment of the evidence. This is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.⁹

31. As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as "warranted in the economic

⁷ Being just two entries on page 14 of JR5

⁸ JR4

⁹ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.

32. Having considered all of the evidence before me whilst bearing in mind section 100 of the Act and the aforementioned comments of Mr Alexander Q.C. in *Plymouth Life*, I note the opponent has a total turnover of 565,890.75 euros throughout the relevant territory. While it may appear as though this is a sizeable figure, I must consider it in the context of the market within which the opponent operates. On this point, I have no evidence for the size of the markets for the goods at issue, however I am of the view that the market for animal and pet goods is a relatively sizeable one. As such, I do not consider that the turnover provided is necessarily significant when compared to the market at issue.
33. While the turnover is noted, it has not been possible to accurately determine what proportion of the turnover applies to goods that are relevant and what proportion does not. A substantial amount of the evidence refers to animal foodstuffs and snacks, or toys for pets (that are outside of the category of stuffed animals) which are not goods in the opponent’s specification. This causes significant problems for the opponent as (1) the turnover is not particularly large and (2) I have no way to determine with any degree of accuracy how the turnover can be said to apply to the actual goods in the opponent’s mark’s specification.
34. Taking all of the evidence into account, I am of the view that it is inconsistent, ‘piece meal’ in nature and insufficiently solid to give rise to a finding that the opponent has used the mark at a sufficient level in respect of the relevant goods. As above, the nature of the opponent’s evidence calls into question the specific turnover figure for the opponent’s goods. As this is something that could reasonably have been provided, I am entitled to be sceptical of the evidence provided by the opponent.
35. Taking all of the above into account, my primary view is that I have been unable to find that the opponent’s evidence is sufficiently solid to enable me to find genuine use. The consequence of this is that the opponent is not able to rely on its mark meaning that the opposition falls away. While it would be appropriate for me to bring the decision to a close at this point, I am of the view that even if there were

genuine use of the opponent's mark, the opposition would still fail. In order to demonstrate this point, I will proceed with the remainder of my decision in the scenario that genuine use has been adequately proven.

Fair specification

36. If proceeding that there is genuine use, the next step is for me to consider whether, or the extent to which, the evidence shows use of the goods relied upon. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

37. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average

consumer would do. For example, in *Pan World Brands v Tripp Ltd (Extreme Trade Mark)* [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

38. Given what I have said above regarding the nature of the opponent's evidence, it has been left to me to attempt to decipher what has been shown to have genuine use from a long list of goods that are sometimes indecipherable. As such, the assessment has been rendered difficult but, having considered it in detail, I have come to the conclusion that in the event genuine use is shown, the following terms reflect a fair specification of the goods:

Class 20: Stuffed animals; boxes of wood or plastic namely cat litter pans and pet carry cases; portable kennels; scratching posts for cats; pet crates; pet cushions; baskets, not of metal; beds for household pets; playhouses for pets; stuffed birds.

Class 21: brushes; drinking troughs; combs for animals; litter boxes (trays) for pets; bowls (basins); cages for household pets; gloves for household purposes; cloths

for cleaning; cleaning instruments, hand-operated; dusting apparatus, non-electric; feeding troughs; bird baths; rings for birds.

39. In my view, no evidence or not enough evidence has been provided in respect of the remaining goods (or those goods are broader terms that are suitably covered by the terms listed above) so the opposition is not permitted to proceed in respect of the same:

Class 20: Beds; beehives; animal bone, unworked or semi-worked; display stands; portable beds for pets; photograph frames; plaques of bone, ivory, plastic, wax or wood; animal hooves; kennels for household pets; identification bracelets, not of metal, other than jewelry; identity plates, not of metal; cupboards; mattresses; meat chests, not of metal; tanks, not of metal nor of masonry; shells; tortoiseshell, unworked or semi-worked; mirrors (looking glasses); straw mattresses; animal teeth; barrels of wood; safety gates of metal for babies, children, and pets (furniture); fishing baskets; straw plaits; goods, not included in other classes, of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials, or of plastics; water tanks of plastic for household purposes; sea shells; meerschaum, unworked or semi-worked; cushions; indoor window blinds (shades) (furniture); fodder racks; furniture; nesting boxes for household pets; nesting boxes.

Class 21: Earthenware; trash cans; indoor aquaria; aquarium hoods; statues or porcelain, ceramic, earthenware or glass; cups of paper or plastic; non-electric portable coldboxes; mugs; table plates; electric devices for attracting and killing insects; electric combs; toothbrushes, electric; buckets; watering cans; insect traps; cookie jars; isothermic bags; cups; mouse traps; pots; rat traps; poultry rings; toothbrushes; indoor terrariums (vivariums); indoor terrariums (plant cultivation); insulating flasks; toilet utensils; urns; birdcages; baskets for domestic use; horse brushes; saucers; mangers for animals; animal activated pet feeders.

Section 5(2)(b): legislation and case law

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

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

(a) ...

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

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

41. Section 5A of the Act states as follows:

“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.”

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

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to

make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a 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.

Comparison of goods

43. The competing goods are as follows:

The opponent's goods	The applicant's goods
<p>Class 20: Stuffed animals; boxes of wood or plastic namely cat litter pans and pet carry cases; portable kennels; scratching posts for cats; pet crates; pet cushions; baskets, not of metal; beds for household pets; playhouses for pets; stuffed birds.</p> <p>Class 21: brushes; drinking troughs; gloves for household purposes; combs for animals; litter boxes (trays) for pets; bowls (basins); cages for household pets; cloths for cleaning; cleaning instruments, hand-operated; feeding troughs; dusting apparatus, non-electric; bird baths; rings for birds.</p>	<p>Class 20: Pet crates; Pet furniture; Pet houses; Pet cushions; Cushions (Pet -); Pet grooming tables; Kennels for household pets; Dog kennels; Inflatable pet beds; Grooming tables for pets; Barrels (Non-metallic -) for the identification of pet animals; Dog houses [kennels]; Beds for pets; Beds for household pets; Beds for animals; Dog beds; Beds for birds; Cat beds; Portable beds for pets; Animal housing and beds; Animal carriers in the form of boxes; Hutches for animals; Kennels; Portable kennels; Playhouses for pets; Cushions for lining pet crates; Dog baskets; Nesting boxes for household pets; Household pets (Nesting boxes for -); Nesting boxes for pets; Cat trees; Cat baskets; Animal claws; Dog tags, not of metal.</p>

	Class 21: Bird cages for domestic birds; Bird cages; Rings for identifying birds.
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44. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account, as per *Canon*, where the CJEU stated at paragraph 23 of its judgement:

“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.”

45. 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.

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut 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.”

47. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), paragraph 12, Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

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

48. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode Trade Mark*.¹⁰

¹⁰ BL O-399-10 (AP)

49. The opponent's position is that the applicant's goods and the opponent's goods are identical or at least closely similar. I have submissions in respect of the goods comparison from the opponent. The applicant acknowledges that there is some overlap in the goods covered by the respective marks in class 20. However, the applicant states that this overlap alone is insufficient to establish a likelihood of confusion, particularly given the distinctiveness of the marks themselves.

50. I do not intend to summarise the remaining comments of the parties in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent deemed necessary below.

Class 20

Beds for pets; beds for household pets; beds for animals; dog beds; beds for birds; cat beds; inflatable pet beds; animal beds.

51. The above terms of the applicant are self-evidently identical or identical under the principle of *Meric* with "beds for household pets" in the opponent's specification. Regardless the goods are identical.

Pet cushions; cushions (Pet -); cushions for lining pet crates.

52. Regardless of how the above terms of the applicant are worded, I find that they are self-evidently identical or identical under the principle of *Meric* with "pet cushions" in the opponent's specification.

Pet crates; Portable kennels; Playhouses for pets.

53. The above terms of the applicant all appear in the opponent's specification. These goods are, therefore, self-evidently identical.

Kennels for household pets; Dog kennels; Dog houses [kennels]; Kennels.

54. As the above terms are not limited in any way, they can include “portable kennels”, being a term that sits within the opponent’s specification. As a result, I find these goods to be identical under the principle in *Meric*.

Pet grooming tables; Grooming tables for pets.

55. The above terms are tables used to raise pets to a convenient height to be groomed. There are no comparable terms in the opponent’s specification. Therefore, I find that there is no degree of similarity between these contested goods and the opponent’s goods. I find them to be dissimilar.

Nesting boxes for household pets; Household pets (Nesting boxes for -); Nesting boxes for pets.

56. The above applicant’s terms are boxes that offer shelter and a place to sleep for many pets. The closest comparable term in the opponent’s specification is “cages for household pets” in the opponent’s class 21 specification. The users and trade channel will be the same. The purpose will be similar as the nesting boxes provide a place of shelter, comfort and safety for pets whereas cages provide a place of safety and shelter either when stationery or on the move. Taking all of this into consideration, I find these goods to be similar to a medium degree.

Animal claws.

57. I have no submissions from the applicant as to what the above term means. Irrespective of this, there are no comparable terms in the opponent’s specification. Therefore, I find that there is no degree of similarity between these contested goods and the opponent’s goods. I find them to be dissimilar.

Dog baskets; Cat baskets.

58. The above terms are baskets usually made of fabric or plastic that dogs or cats use to sleep in. As a result, I find that these goods are identical under the principle outlined in *Meric* with “beds for household pets” in the opponent’s specification. However, if I am wrong to make this finding, I find the goods to be similar to a high degree as the goods overlap in users, trade channels, method of use and purpose.

Pet houses; Animal housing; Hutches for animals.

59. The above terms are all forms of housing for animals and pets. The closest comparable term in the opponent’s specification is “portable kennels”. The user, purpose and trade channels are all identical. Further, there is nothing suggest that the applicant’s goods cannot also be portable meaning that the nature and method of use of the goods may also overlap. Taking all of these factors into consideration, I find the goods to be similar to a high degree.

Cat trees.

60. The above applicant’s term is a tower with platforms and scratching posts for cats to play and relax. The closest comparable term in the opponent’s specification is “scratching posts for cats”. The users, use and trade channels will be the same. The purpose will be similar as the cat tree provides a place for cats to play and rest, whereas the scratching posts provide only a place for the cats to play. The goods may also differ in size and composition with no platforms on the scratching post. Overall, I find these goods to be similar to a high degree.

Pet furniture.

61. The above applicant’s term is furniture designed for use by animals. This can include “beds for household pets”, being a term in the opponent’s specification. Therefore, I find these goods to be identical under the principle in *Meric*.

Portable beds for pets.

62. The above term is a bed for pets that is easily transportable. The closest comparable term in the opponent's specification is "beds for household pets". As the opponent's good is not limited it can include portable beds for household pets. Taking this into account, I find these goods to be identical under the principle in *Meric*.

Animal carriers in the form of boxes.

63. The above term is a carrier used to transport animals. The closest comparable term in the opponent's specification is "portable kennels". Despite not being expressly stated as a kennel, I understand the applicant's good above is broad enough to cover a portable kennel which, itself, is an animal carrier commonly in the form of a box. Given this, I find these goods to be identical under the principle in *Meric*. If this finding is incorrect, I find the goods to be similar to a high degree as both have the same purpose of transporting animals from one place to another, the goods are likely to be displayed in close proximity and the users and trade channels are likely to be the same.

Barrels (Non-metallic -) for the identification of pet animals; Dog tags, not of metal.

64. The above goods are identification tags not made of metal for pets or dogs specifically. The closest comparable term in the opponent's specification is "rings for birds". Whilst both the applicant's and the opponent's goods may be found in pet shops, they are likely to be displayed in different sections. Additionally, the opponent's goods are likely to be placed around the leg of the bird whereas the applicant's goods are likely to be placed on a collar around the neck of the pet. I accept that there will be an overlap in trade channels for the goods at hand, such as for the likes of pet stores which offer an extensive range of goods in many different departments. While the goods may be used by the same user, this is at a very general level given the broad nature of the user base for the parties goods. Additionally, any overlaps in provider of the goods are likely to be from large undertakings such as large pet stores. The above overlaps being said, I am guided

by the judgment in *Unicorn Studios Inc v Veronese*,¹¹ most notably paragraph 24 wherein Mr Purvis K.C. (sitting as a deputy High Court judge) set out that goods comparison is not simply a box-ticking exercise in respect of the *Treat* or *Canon* factors but requires the Hearing Officer to take a step back and consider the overall question of similarity. Following this guidance and in adopting a ‘common sense approach’ overall, I consider the goods above to be dissimilar to those of the opponent.

Class 21

Bird cages for domestic birds; Bird cages.

65. The above terms of the applicant are identical under the principle of *Meric* with “cages for household pets” in the opponent’s specification. However, if the goods are not capable of identity due to their different classes, I find them to be highly similar given the user, purpose and trade channels are identical.

Rings for identifying birds.

66. The above term is self-evidently identical or identical under the principle of *Meric* with “rings for birds” in the opponent’s specification.

Conclusion on the goods comparison

67. Where there is no similarity of goods, there can be no likelihood of confusion in respect of oppositions brought under s5(2)(b) grounds.¹² As a result, my findings above mean that the opposition fails in respect of the following goods, being those that I have found dissimilar:

Class 20: Pet grooming tables; Grooming tables for pets; Animal claws; Barrels (Non-metallic -) for the identification of pet animals; Dog tags, not of metal.

¹¹ [2024] EWHC 1098 (Ch)

¹² *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

The average consumer and the nature of the purchasing act

68. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

69. The opponent submits that the average consumer is likely to be composed of both the wider public, particularly the public that are interested in pet products and also specialist individuals from pet trade businesses and organisations, pet shops, wholesalers connected to/involved with supplies of pet products. The opponent states that the level of attention shall be considered to vary from average (for the public at large) to above-average (for specialists from pet shops, trade business organisations and wholesalers, connected to / involved with the supply of pet products).

70. The applicant agrees with the opponent's characterisation of the relevant consumer as including both the general public and pet specialists. However, the applicant submits that the general public can easily distinguish the two marks. The applicant states that pet owners and specialists are even more likely to be discerning and attentive when purchasing products for their pets, particularly for items such as pet furniture, crates and cages and this higher level of attention further reduces the risk of confusion between the marks.

71. I agree with the position of the parties and find that the average consumer will be both members of the general public and pet trade business users.

72. The goods will, for the most part, be available via retailers, being both general retailers and more specialist ones, and their online or catalogue equivalents. At the retailers' physical premises, the goods will be displayed on shelves and self-selected by the consumer. A similar process will apply when the goods are selected online or via catalogues, in that a consumer will select them after seeing an image, be that on a webpage or in a catalogue. In my view, the visual component will dominate all methods of sale, although I do not discount an aural component playing a part in the form of word of mouth recommendations and advice from sales assistants.

73. Given the wide range of goods at issue, the price and frequency of purchase will vary. For example, some goods may be inexpensive and bought frequently (such as rings for birds in the opponent's specification) but some may be considerably more expensive and bought infrequently (such as portable kennels and playhouses for pets, for example). As for the level of attention paid, I am of the view that, for some goods, such as a pet crates, consumers will consider factors such as the durability, size and material. Even for the cheaper goods such as rings for birds, the consumer will consider factors such as material and durability as it will need to be sufficient to be able to be secured on a bird and stay in place. As a result, I find that the degree of attention paid for the goods at issue will be medium.

Comparison of marks

74. 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.

75. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

76. 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.

77. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
BEEZTEES	BEASTIE

78. Both parties have made comments as to the similarity of the marks at issue. I do not intend to discuss these comments in full but note that, in short, the opponent argues that the marks are similar as they share the letters “BE-” at the beginning of the marks and the letters “T-E-S” within the marks, with the marks being visually similar and aurally closely similar.

79. As for the applicant, it submits that its mark is not similar to the opponent's mark as they have different meanings, different spellings, different pronunciations and as the visual, auditory and the meaning of the applicant mark is completely different to the opponent's mark it will not cause any confusion to the relevant public.

Overall impression

80. Both parties' marks are word only marks. The applicant's mark consists of the word “BEASTIE” whereas the opponent's consists of the word ‘BEEZTEES’. There are

no other elements that contribute to the overall impression of the marks, which lies in the words themselves.

Visual comparison

81. Visually, the opponent's mark and the applicant's mark overlap through the use of the letters "BE" at the beginning of each mark and the shared use of the letters "S", "T" and "E". While noted, the letters 'S', 'T' and 'E' appear at different places within the marks, the latter of which appears four times in the opponent's mark but only twice in the applicant's. Further, the marks differ in the presence of the letters 'A' and 'I' in the applicant's mark and 'Z' in the opponent's. Overall, while the marks do share some letters and even bearing in mind that consumers tend to focus on the beginnings of marks,¹³ the different letters will be noticed. As a result, I find that the marks are visually similar to a medium degree.

Aural comparison

82. The opponent's mark consists of two syllables and will be pronounced as "BEEZ-TEEZ". The applicant's mark also consists of two syllables and will be pronounced as "BEEST-EE". While there are similarities in these syllables (for example, the sound of 'S' and 'Z' in the first syllables is similar), they are not identical. In comparing the marks, I am of the view that they are, aurally, short marks (both being two syllables in length). While there is no special test for 'short marks',¹⁴ I consider that the shortness of the marks at issue means that the average consumer is more likely to notice the differences. As a result, I do not consider that the marks are highly similar but, instead I find that the aural similarity lies somewhere between a medium to high degree.

¹³ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

¹⁴ See paragraph 44 of *BOSCO*, BL O/301/20

Conceptual comparison

83. Conceptually, the opponent submits that the marks are conceptually similar. The opponent states their mark evokes a playful and imaginative connection to animals, using an invented coined term with no dictionary defined meaning whereas the applicant's mark refers directly to a beast which is a straightforward term associated with animals. The opponent submits that both marks have a clear conceptual meaning, both refer to animals and while the approaches differ with the opponent's mark being whimsical and coined and the applicant's mark being literal, the concepts overlap significantly as they both evoke ideas of pets and animals.
84. The applicant disagrees with the opponent's argument and states that the marks have distinct conceptual meanings as the applicant's mark refers to a "beast" which is a term commonly associated with animals, but with a playful and endearing connotation, whereas the opponent's mark is a coined term with no direct dictionary meaning, relying on its whimsical and invented nature for distinctiveness. The applicant also states that their mark combines "BEAST" and "IE", expressing a meaning of a cute little monster and the opponent's mark does not have a similar meaning or any meaning at all. The applicant submits that these conceptual differences further reduce the likelihood of confusion.
85. I agree that the opponent's mark is an invented term with no dictionary defined meaning. However, some consumers could see the opponent's mark as the conjoining of two terms "BEEZ" and "TEEZ" with both being a play on words of "bees" and "tees" and relating to t-shirts with a bee logo or colours. While I do not consider that 'BEEZTEES' necessarily evokes the concept of an animal, I note that both parties state that the applicant's term is associated with animals. As such, I must give the appropriate weight to this argument. However, I also consider that the average consumer would believe "beast" to also evoke the concept of a monstrous animal. In comparing the marks at issue, the only point of conceptual similarity is the marks evoking ideas of animals which, in my view, is not a

particularly compelling point of similarity, especially given the nature of the goods at issue.¹⁵ Given this, I find the marks conceptually similar to a low degree.

86. If I am wrong in my finding in the preceding paragraph and “BEEZTEEZ” does not evoke the concept of an animal, I find the marks conceptually neutral.

Distinctive character of the opponent’s mark

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

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

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

¹⁵ While I appreciate that, as per the case of *EMILIANA* (Case BL O/054/22), conceptual comparisons are usually done without reference to the goods or services at issue. However, in the present case, I am of the view that the connect to animals in respect of goods relating to animals cannot be ignored.

88. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of marks can be enhanced through use, and I note that the opponent has filed evidence to that effect. I will, therefore, consider whether this evidence is sufficient to give rise to a finding that the distinctiveness of the opponent's mark has been enhanced through use. Before doing so, I will consider the inherent position.

89. The opponent's mark is a word only mark, being "BEEZTEES". The opponent submits that this mark is inherently distinctive particularly for pet-related goods and does not come from an ordinary dictionary word but rather an invented coined term which strengthens its distinctiveness.

90. While the above argument is noted, I remind myself that under the conceptual comparison of the marks, the opponent states that its mark evokes a playful and imaginative connection to animals and as the goods at issue relate to animals, the opponent's mark is somewhat allusive of the goods. I do not consider that this submission is consistent with a claim that the distinctiveness is 'strengthened'. Instead, I consider that any such connection on this basis means that the opponent's mark sits on the lower end of the scale for distinctiveness. I do not consider that this sits at an outright low level, however, I am of the view that it is somewhere between a low and medium degree.

91. Following my finding in paragraph 86 above, if "BEEZTEES" does not evoke the concept of an animal and the marks are conceptually neutral, I find that the opponent's mark will be distinctive to a higher degree on the basis that it would be viewed as a made-up word with no obvious meaning.

92. I turn now to consider the position in respect of an enhanced degree of distinctive character. In considering this issue, I refer to the evidential summary I have prepared at paragraphs 25 to 35 above and rely on the same here. While I have proceeded to this point of my decision on the basis that the evidence is sufficient to demonstrate genuine use, I remind myself that the requirement for a finding of

an enhanced distinctive character is considerably more onerous than that of genuine use. I say this on the basis that use need not be quantitatively significant in order for it to be genuine, whereas distinctive character is a measure of how strongly the mark identifies the goods/services of a single undertaking. It follows that a finding of an enhanced degree of distinctive character requires use at such a level that is capable of pointing to the fact that a proportion of consumers would identify the goods as originating from a particular undertaking.

93. I do not intend to repeat the evidence discussed above but note that it only shows a turnover of 565,890.75 euros between 2019 and 2024. I remind myself that I took issue with the opponent's turnover evidence in that the use before me also covered a range of goods not at issue in these proceedings. Even ignoring this issue, I do not consider that a total turnover of €565,890.75 prior to the relevant date is sufficient to warrant a finding of an enhanced distinctive character. I say this particularly given that the opponent has not provided anything further in support of a finding that the opponent's mark has become known to consumers (such as evidence of an advertising spend or a marketing campaign, for example).

94. As a result, I find that the opponent's mark does not benefit from an enhanced degree of distinctive character. Therefore, I find that the inherent position applies.

Likelihood of confusion

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

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

96. Whilst conducting a global assessment of the likelihood of confusion I must be aware of the fact that not all aspects of the respective marks will necessarily have the same impact. For example, the importance of the respective visual, aural and conceptual aspects will be dependent on factors such as the way the goods at issue are marketed, and in which type of store/platform they are made available.
97. Throughout the course of this decision, I have found that the respective goods range from being identical to similar to a medium degree. The average consumers are both members of the general public and pet trade business users who will select the goods via primarily visual means, although I do not discount an aural component. I have concluded that the average consumer will pay a medium degree of attention during the selection process. I have found the marks to be visually similar to a medium degree, aurally similar to a medium to high degree and conceptually similar to a low degree (or conceptually neutral, depending on how 'BEEZTEEZ' is understood). I have found the opponent's mark to possess either a low to medium or high degree of inherent distinctive character (again, depending on how 'BEEZTEEZ' is understood).
98. Taking all of the above factors into account and even bearing in mind the principle of imperfect recollection, I do not consider that the marks at issue will be misremembered or inaccurately recalled for one another. While the shared use of the beginning two letters "BE-" may be noticed, neither the different letters within the mark nor the different pronunciations will be ignored. As such, I am of the view that when seeking to remember the marks, consumers will pin their recollection of the marks on the entirety of the verbal element of each mark not just the first two letters. The goods at issue are ordinary consumer goods that will be selected via predominantly visual means. This means that the mark will be seen and so the visual element of the mark will be the most significant.¹⁶ While there is a degree

¹⁶ *New Look Limited v OHIM*, Joined cases T-117/03 to T-119/03 and T-171/03, paragraph 50

of visual similarity, this is not at a high degree. This, together with a low level of conceptual similarity and the low to medium degree of inherent distinctive character of the opponent's mark further assists the conclusion that the marks will not be directly confused. Consequently, I do not consider that there exists a likelihood of direct confusion between the marks, even when considered on identical goods or in scenarios where the consumer pays a lesser degree of attention.

99. While on the topic of direct confusion, I consider it necessary to discuss the fact that if I was wrong to have found 'BEEZTEEZ' to be connected to animals, it would mean that the opponent's mark is highly distinctive. While that may be the case, the consequence of this finding is that the marks are conceptually neutral. As such, the marks share no conceptual hook and despite the higher degree of distinctiveness of the opponent's mark in this scenario, the lack of conceptual hook is sufficient to offset this. As a result, I find that regardless of how 'BEEZTEEZ' is perceived, the consumer would not be directly confused.

100. I will now proceed to consider indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

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

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

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

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

101. The types of examples of indirect confusion as set out in *L.A. Sugar* (cited above) are not exhaustive. However, they are the most usual circumstances where indirect confusion may arise.

102. Further, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein 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 paragraph 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.

103. While the common element of the letters "BE-" at the start of the marks will be noticed, I do not consider that it is so strikingly distinctive, even on identical or similar goods, that average consumers would believe that only one undertaking would use it. On this point, I do not consider that the shared use of the letters "T",

“E” and “S” will, if noticed, affect this outcome. I say this regardless of how distinctive the opponent’s mark is as, even if it is high, the distinctiveness lies in the words as a whole and not the shared elements.

104. In considering the two marks, I do not consider that the applicant’s mark can be said to be one that simply adds a non-distinctive element to the earlier mark. Therefore, I do not consider that the scenario set out in category (b) of *L.A. Sugar* (cited above), is applicable here. Moving to the last category of confusion set out by Mr Purvis Q.C., I see no reason why consumers would consider it logical for an undertaking that uses the mark ‘BEEZTEES’ to change the letters to the word ‘BEASTIES’. This change would alter the concept of the mark significantly and while I have found that there is some conceptual similarity between the marks, the level of similarity is low so it does not make sense as to why an undertaking would make this change. Additionally, the shared concept relates to a concept of animals and, on the goods at issue, this will hardly be seen as surprising so is a concept that consumers would consider coincidental in respect of the goods at issue. Alternatively, if the opponent’s mark is not viewed in this way, then it does not assist the issue of indirect confusion as I am of the view that it would be even more illogical for an undertaking with a distinctive mark of unknown meaning to change it to be a more direct reference to an animal (albeit a monstrous one). Lastly, I will say that while consumers may call to mind the opponent’s mark when viewing the applicant’s, and vice versa, this is mere association and is insufficient to result in indirect confusion.¹⁷

105. While I have set out above that the categories in *L.A. Sugar* are not exhaustive, the opponent has not provided any additional arguments in respect of the instances where indirect confusion would occur and, without such, I am not willing to formulate the opponent’s argument on its behalf. Instead, I will simply say that if any additional scenarios existed then it was for the opponent to argue as such. Taking all of this into account, I find that there exists no likelihood of indirect confusion, even when the marks are considered on identical goods.

¹⁷ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

CONCLUSION

106. The opposition fails in its entirety and, subject to any successful appeal of my decision, the applicant's mark may proceed to registration for all of the goods and services applied for.

COSTS

107. The applicant has succeeded in full and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicant the sum of £1,200 as a contribution towards its costs. The sum is calculated as follows:

Considering a notice of opposition and preparing the counterstatement:	£250
Considering the opponent's evidence:	£600
Filing written submissions in lieu:	£350
Total:	£1,200

108. I hereby order Pet Supplies Beheer B.V. to pay Guangzhou Chuhe International Trading Co., Ltd the sum of £1,200. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 29th day of September 2025

**N Barratt
For the Registrar**