O/1075/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3860045

IN THE NAME OF
SUZHOU BYTEWATT TECHNOLOGY CO., LTD.

TO REGISTER THE FOLLOWING TRADE MARK:

Neovolt

IN CLASS 42

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 440316
BY NYOBOLT LIMITED

Background and pleadings

1. On 16 December 2022, Suzhou bytewatt technology Co., Ltd. ("the Applicant") applied to register the trade mark shown on the front page of this decision in the UK under application number 3860045. The application was published for opposition purposes on 20 January 2023 and registration is sought for the following services:

> *Class 42: Scientific research in the field of renewable energy; technological research; computer system analysis; scientific research in the field of energy; information technology [IT] consultancy; cloud computing; conversion of computer programs and data, other than physical conversion; data security consultancy; computer software design; platform as a service [PaaS]; development and design of mobile applications; scientific laboratory services; energy auditing; conducting technical project studies; quality control; research and development of new products for others; scientific research; programming of energy management software; consultancy in the field of energy-saving; computer programming for the energy industry; advisory services relating to energy efficiency; development of energy and power management systems; design and development of energy management software; design and development of energy distribution networks; engineering services relating to energy supply systems; engineering services in the field of energy technology; providing technical advice relating to energy-saving measures; design and development of regenerative energy generation systems; technological consultancy in the fields of energy production and use; technological consulting services in the field of alternative energy generation; Energy-saving (Consultancy in the field of -); technological analysis relating to energy and power needs of others; consultancy relating to technological services in the field of power and energy supply; conducting research and technical project studies relating to the use of natural energy; design and development of software for control, regulation and monitoring of solar energy systems; provision of information concerning research and technical project studies relating to the use of natural energy.*

2. On 18 April 2023, Nyobolt Limited ("the Opponent") filed a notice of opposition against the application. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The Opponent relies upon the following trade mark:

NYOVOLT

UKTM no. 3616432
Filing date 25 March 2021; registration date 27 August 2021.
Relying on all goods and services, namely:

Class 1: Chemicals for use in industry and science; chemical substances, chemical materials and chemical preparations, and natural elements; chemical substances and chemical materials for use as ingredients in the course of manufacture; chemical substances and chemical materials for use as ingredients in the course of manufacture of batteries; battery electrolytes.

Class 9: Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling the distribution or use of electricity; apparatus and instruments for storing electricity; uninterruptible power supply apparatus [battery]; regulated power supply apparatus; electric power supply units; batteries; battery terminals; battery packs; battery cases; battery jars; battery boxes; battery cables and leads; battery chargers; battery charging equipment; battery charge devices; battery testing apparatus; battery testers; parts, fittings, and accessories for all the aforesaid.

Class 40: Treatment of materials for the manufacture of batteries; custom manufacturing of batteries, energy storage systems, and power supply apparatus; information, advisory, and consultancy services relating to all the aforesaid.

Class 42: Scientific and technological services and research and design relating thereto; industrial analysis, industrial research and industrial design

services; quality control and authentication services; design and development of batteries, energy storage systems, and power supply apparatus; information, advisory, and consultancy services relating to all the aforesaid.

3. By virtue of its earlier filing date, the Opponent's mark constitutes an earlier mark within the meaning of section 6 of the Act. As the mark had not completed its registration process more than five years before the relevant date (the filing date of the mark in issue), it is not subject to proof of use pursuant to section 6A of the Act. The Opponent can, therefore, rely upon all of the goods and services it has identified.

4. The Opponent submits that there is a likelihood of confusion because the Applicant's mark is highly similar to the Opponent's and the respective goods and services are similar, giving rise to a likelihood of confusion.

5. The Applicant filed a counterstatement denying the claims made.

6. In these proceedings, the Opponent is represented by Mewburn Ellis LLP and the Applicant is represented by Paweł Wowra. Neither party filed evidence in these proceedings. Neither party requested a hearing and only the Opponent filed submissions in lieu of a hearing. This decision is taken following careful consideration of all the papers before me.

Submissions

7. The Opponent's submissions in lieu of a hearing were filed on 06 March 2024.

8. I have taken the submissions into account in reaching this decision and will refer to them to the extent I consider necessary in the course of this decision.

RELEVANCE OF EU LAW

9. 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.

DECISION

Section 5(2)(b)

10. 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".

11. Section 5A states:

> "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."

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

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.

Comparison of goods and services

13. In *Canon*, the Court of Justice of the European Union ("CJEU") stated at paragraph 23 of its judgment:

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

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

a) The respective users of the respective goods or services;

b) The physical nature of the goods or acts of services;

c) The respective trade channels through which the goods or services reach the market;

d) 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;

e) 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.

15. 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 "complementary" means:

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

16. The General Court ("GC") confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

"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".

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

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

Whilst on the other hand:

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

18. For the purposes of considering the issue of similarity of goods or services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

19. The competing goods and services are as follows:

Opponent's goods and services	Applicant's services
Class 1: Chemicals for use in industry and science; chemical substances, chemical materials and chemical preparations, and natural elements; chemical substances and chemical materials for use as ingredients in the	**Class 42:** Scientific research in the field of renewable energy; technological research; computer system analysis; scientific research in the field of energy; information technology [IT] consultancy; cloud computing; conversion of

course of manufacture; chemical substances and chemical materials for use as ingredients in the course of manufacture of batteries; battery electrolytes. **Class 9:** Apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling the distribution or use of electricity; apparatus and instruments for storing electricity; uninterruptible power supply apparatus [battery]; regulated power supply apparatus; electric power supply units; batteries; battery terminals; battery packs; battery cases; battery jars; battery boxes; battery cables and leads; battery chargers; battery charging equipment; battery charge devices; battery testing apparatus; battery testers; parts, fittings, and accessories for all the aforesaid. **Class 40:** Treatment of materials for the manufacture of batteries; custom manufacturing of batteries, energy storage systems, and power supply apparatus; information, advisory, and consultancy services relating to all the aforesaid. **Class 42:** Scientific and technological services and research and design relating thereto; industrial analysis,	computer programs and data, other than physical conversion; data security consultancy; computer software design; platform as a service [PaaS]; development and design of mobile applications; scientific laboratory services; energy auditing; conducting technical project studies; quality control; research and development of new products for others; scientific research; programming of energy management software; consultancy in the field of energy-saving; computer programming for the energy industry; advisory services relating to energy efficiency; development of energy and power management systems; design and development of energy management software; design and development of energy distribution networks; engineering services relating to energy supply systems; engineering services in the field of energy technology; providing technical advice relating to energy-saving measures; design and development of regenerative energy generation systems; technological consultancy in the fields of energy production and use; technological consulting services in the field of alternative energy generation; Energy-saving (Consultancy in the field of -); technological analysis relating to energy

industrial research and industrial design services; quality control and authentication services; design and development of batteries, energy storage systems, and power supply apparatus; information, advisory, and consultancy services relating to all the aforesaid.	and power needs of others; consultancy relating to technological services in the field of power and energy supply; conducting research and technical project studies relating to the use of natural energy; design and development of software for control, regulation and monitoring of solar energy systems; provision of information concerning research and technical project studies relating to the use of natural energy.

20. Both parties have provided me with submissions regarding the comparison of the goods and services which I have considered and will refer to as necessary. The Opponent provided their best case within their submissions and therefore my comparison has been guided by that.

Quality control.

21. The above service appears in the specification of both the Applicant and the Opponent and as such is identical.

Scientific research in the field of renewable energy; technological research; scientific research in the field of energy; scientific laboratory services; conducting technical project studies; scientific research; technological analysis relating to energy and power needs of others; conducting research and technical project studies relating to the use of natural energy; provision of information concerning research and technical project studies relating to the use of natural energy.

22. The above services are all related to or are involved in the provision of scientific and technological research services. I note that within their counterstatement the

Applicant acknowledges a broad overlap in the services and argues that the specifics of the services differ significantly; with the Applicants services largely focusing on renewable energy and related IT and energy efficiency services. However, it is my view that these services would be encompassed by the Opponent's broader term *Scientific and technological services and research and design relating thereto […] information, advisory, and consultancy services relating to all the aforesaid*. Therefore, I find the services to be identical in line with the principle set out in *Meric.*

Design and development of energy distribution networks.

23. I understand the above to be services to be intended to assist entities with the creation of networks for the distribution of energy. Within their written submissions the Opponent has identified these services as being identical to the Opponent's *Scientific and technological services and research and design relating thereto […] information, advisory, and consultancy services relating to all the aforesaid.* It is my view that these services would be encompassed by the Opponent's *scientific and technological design services*, as such I find the services to be identical in line with the principle set out in *Meric.*

Technological consultancy in the fields of energy production and use; consultancy relating to technological services in the field of power and energy supply.

24. I understand the above services provide technological consultancy in energy related fields and consultancy relating to technological services. Within their written submissions the Opponent states that these services are identical to *Scientific and technological services and research and design relating thereto […] information, advisory, and consultancy services relating to all the aforesaid* contained within their specification. I agree with the Opponent as it is my view that these services would be encompassed by the consultancy relating to technological services contained within the Opponent's specification. I therefore find the services to be identical in line with the principle set out in *Meric*.

Technological consulting services in the field of alternative energy generation.

25. I understand the above services to be intended to provide technological consultancy in energy related fields. It is my view that these services would be encompassed by *Scientific and technological services and research and design relating thereto […] information, advisory, and consultancy services relating to all the aforesaid* contained within the Opponent's specification. I therefore find the services to be identical in line with the principle set out in *Meric*.

Research and development of new products for others.

26. The above services assist entities in the creation of new products. It is my view that these services are included in the Opponent's broader term *industrial research and industrial design* services which I understand to be services which assist entities in the design and creation of new products and processes or the improvement of existing products and processes. Therefore, the services are identical in line with the principle set out in *Meric*.

Information technology [IT] consultancy.

27. I understand these services advise companies or organisations on how best to use and implement IT systems. It is my view that these services would be encompassed by the Opponent's broader term *Scientific and technological services and research and design relating thereto; […] information, advisory, and consultancy services relating to all the aforesaid.* Therefore, I find the services to be identical in line with the principle set out in *Meric*.

Energy auditing.

28. I understand the above service to be the carrying out of an assessment of the energy use of a building in order to identify ways to reduce energy consumption. Within

their written submissions the Opponent identifies this term as being identical to the Opponent's *quality control and authentication services.* These services are concerned with the monitoring and assessment of all factors involved in the production of a business's products or the offering of its services in order to maintain or improve standards. While I am of the view that there is some overlap in the nature of these services; with both being for the purpose of monitoring and improving of outputs, the purpose of the services differs; with the Applicant's services being for the improvement of energy efficiency and the Opponent's for ensuring a consistent level of quality in the good or service offered by a company. It is possible that there would be a broad overlap in the user of the respective services, with both being sought by businesses or producers of goods. The respective services are not competitive nor are they complementary. Overall, I find these services to be similar to a low degree.

Consultancy in the field of energy-saving; advisory services relating to energy efficiency; providing technical advice relating to energy-saving measures; Energy-saving (Consultancy in the field of -).

29. I understand these services provide advice and consultancy for the purpose of improving their energy efficiency and implementing energy saving measures. Within their submissions the Opponent claims that these services are highly similar to the goods and services in classes 1, 9, 40 and 42 including *design and development of batteries, energy storage systems, and power supply apparatus; information, advisory, and consultancy services relating to all the aforesaid* in class 42. I understand these services assist individuals or companies with the design and development of energy and power solutions and the provision of consultancy and advisory services in relation to this. When compared to the Applicant's services above, while both include consultancy services, there is a clear difference in purpose. It is possible that there would be an overlap in the user of the respective services, with both being sought by individuals or businesses seeking power and energy solutions. The respective services will likely be offered through the similar trade channels; with both parties service being consultancy related to power and energy. I am not of the view that the services are competitive, nor are they complementary. Overall, I find these services to be similar to a medium degree.

Computer system analysis; cloud computing; conversion of computer programs and data, other than physical conversion; data security consultancy; computer software design; platform as a service [PaaS]; development and design of mobile applications.

30. The above services all broadly relate to IT, computing and computer software. Within their submissions the Opponent states that these terms are so broad that they could include services which focus on energy storage systems and power supply apparatus. I do not concur with the Opponent. When compared to the Opponent's goods and services relating to energy storage systems and power supply apparatus there is a clear difference in the nature and purpose of the Applicant's services; with the Opponents being involved with the design and development of energy storage systems and power supply apparatus and the Applicant's being the provision of services relating to IT and computing. Although it is possible that the opponent's services could relate to energy storage systems and power supply apparatus, this is not sufficient to consider there to be an overlap in use or user. The Applicant's services will likely be used by business users and members of the public for a variety of IT related purposes while the Opponent's will be used primarily by professionals and businesses seeking energy and power solutions. Furthermore, the competing goods and services are not in competition. nor are they complementary as they are not indispensable or important for one another to the extent that users would believe that they are derived from the same undertaking. Accordingly, I find the services to be dissimilar. For the sake of completeness, I do not consider the above terms to be similar to any of the other Opponent's goods or services.

Programming of energy management software; computer programming for the energy industry; design and development of energy management software; design and development of software for control, regulation and monitoring of solar energy systems.

31. Where above I have found that the Applicant's IT related services are dissimilar to the goods and services contained in the Opponent's specification this is not the

case for the above services which; while still being IT related, are specifically limited to the design, development or programming of software relating to energy management. I compare the services to the Opponent's *design and development of batteries, energy storage systems, and power supply apparatus.* The nature and purpose of the competing services differs; with Applicant's services being for the creation of software or programs for the management of energy systems and for use in the energy industry and the Opponent's being services intended to assist companies in the design and development of energy related goods and systems. Given the differing purposes of the services the method of use will also differ. However, I am of the view that there will be an overlap in the users of the respective services, with both being sought by primarily business users seeking energy solutions. The services are likely to be offered through the same or similar trade channels and it is likely that the competing services could be offered by the same undertaking. There is also some degree of complementarity between the services, as, for example, the design and development of energy storage systems may not be possible without the Applicant's computer programming for the energy industry and users may believe that they are derived from the same undertaking. As such I find the parties' services to have a low to medium level of similarity.

Development of energy and power management systems; engineering services relating to energy supply systems; engineering services in the field of energy technology; design and development of regenerative energy generation systems.

32. I understand the above services assist companies in the design, development and implementation of energy systems. Within their written submissions the Opponent states that these services are identical to *design and development of batteries, energy storage systems, and power supply apparatus; information, advisory, and consultancy services relating to all the aforesaid* contained in class 42 of the Opponent's specification. While I do not agree with the Opponent that the services are identical, I am of the view that they are highly similar. The services share a similar purpose with both parties' services being related to the design and creation of systems and goods involving power and energy. The respective services will likely have a significant overlap in user; that being businesses or individuals seeking power and energy

solutions. The services will likely be offered through the same trade channels and consumers would expect them to be offered by the same entity. There may also be a degree of competition between the respective services as consumers may choose between them to fulfil their needs in regard to energy management. Accordingly, I find these services to be similar to a high degree.

33. As some degree of similarity between the services is necessary to engage the test for the likelihood of confusion, my findings above mean that the opposition aimed against those services I have found to be dissimilar will fail [1]. For ease of reference, the opposition fails against the following class 42 services in the Applicant's specification:

> *Computer system analysis; cloud computing; conversion of computer programs and data, other than physical conversion; data security consultancy; computer software design; platform as a service [PaaS]; development and design of mobile applications.*

34. The opposition will continue in respect of the following class 42 services:

> *Scientific research in the field of renewable energy; technological research; scientific research in the field of energy; information technology [IT] consultancy; scientific laboratory services; energy auditing; conducting technical project studies; quality control; research and development of new products for others; scientific research; programming of energy management software; consultancy in the field of energy-saving; computer programming for the energy industry; advisory services relating to energy efficiency; development of energy and power management systems; design and development of energy management software; design and development of energy distribution networks; engineering services relating to energy supply systems; engineering services in the field of energy technology; providing technical advice relating to energy-saving measures; design and development of regenerative energy generation systems; technological consultancy in the*

[1] eSure Insurance v Direct Line Insurance, [2008] ETMR 77 CA, paragraph 49

fields of energy production and use; technological consulting services in the field of alternative energy generation; Energy-saving (Consultancy in the field of -); technological analysis relating to energy and power needs of others; consultancy relating to technological services in the field of power and energy supply; conducting research and technical project studies relating to the use of natural energy; design and development of software for control, regulation and monitoring of solar energy systems; provision of information concerning research and technical project studies relating to the use of natural energy

The average consumer and the nature of the purchasing act

35. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' services. I must then determine the manner in which the services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited,* [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

> "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."

36. I consider that the average consumer of the services at issue will likely be a business or professional user, although I do not exclude members of the general public. In my view, the purchasing act will be predominantly visual in nature, with the average consumer likely to have encountered the service provider through a website, directory of services or advertisement. However, I recognise that there will also be an aural aspect to the purchasing process in many cases; e.g. the purchase of 'scientific research' services for a business will likely be carefully considered and may be made

only after advice or consultation with the service provider. The frequency and cost of purchase of the services at issue will likely vary; with some being relatively high, and consumers are likely to be alive to considerations such as the reputation of the service provider, business compatibility and the suitability of the service to their needs. Given the more specialist nature of the services in play, especially those selected by business users, I consider that the average consumer will pay a slightly higher than average degree of attention during the purchasing process.

Comparison of marks

37. 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 relevant weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

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

39. The marks to be compared are as follows:

Opponent's Mark	Applicant's Mark
NYOVOLT	**Neovolt**

40. The Opponent's mark is a word only mark, which is made up of solely of the word "NYOVOLT". As there are no other additional elements, the overall impression of the mark resides in the word itself.

41. The Applicant's mark is a word only mark consisting of the word "Neovolt". The overall impression lies solely in the word itself.

Visual comparison

42. Both the earlier and the contested Mark are comprised of seven letters. The respective Marks share the same first letter 'N' and end in the letter sequence "OVOLT". The marks differ only in their second letter; with the earlier marks being "Y" and the Contested Marks "E". Within their counterstatement the Applicant has commented on this, stating that 'this difference is significant as consumers generally pay more attention to the initial part of words'. Whilst I take into account the general rule that the beginnings of words tend to have more visual and aural impact than the ends[2] , this is no more than a general rule of thumb and does not apply in all cases. In the instant case, the fact that the second letters of the respective marks differ is tempered by the fact that preceding letter and the following five letters in the marks are identical. Overall, I consider the marks to be visually similar to a high degree.

Aural comparison

43. Aurally, the Opponent's mark consists of three syllables that will likely be pronounced NY-O-VOLT. Turning to the Applicant's mark, it consist of three syllables that will be pronounced NEE-O-VOLT. Within their counterstatement the Applicant submitted that "NEOVOLT has a softer, closed vowel sound, while the "Y" in

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

NYOVOLT results in a sharper, open sound, leading to an audible distinction". [3] I agree with the Applicant that the differing first syllable does create an aural distinction in the pronunciation of the marks. However, I also acknowledge that the first syllables overlap in the beginning 'N' element and the following two syllables are identical. Thus, overall, I find the marks to be aurally similar to between a medium and a high degree.

Conceptual comparison

44. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] ECR I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

45. Within their counterstatement the Applicant has submitted that their mark can be associated with the prefix "Neo" meaning new and "Volt" a unit of electrical energy while stating that the earlier mark lacks a clear conceptual meaning.[4]

46. While the Applicants mark is an invented term, I share the Applicant's view that consumers will recognise the prefix "Neo" contained within the mark to mean new and will recognise the word "Volt" within the mark. The word "Volt" is defined as "the standard unit used to measure how strongly an electrical current is sent around an electrical system" [5]. It is my view that a significant proportion of consumers will be aware of the word "Volt" and will recognise it as a term related to electricity, even if they are not aware of the exact definition. I however disagree with the Applicant with regard to the earlier mark. I am of the view that consumers while the earlier mark contains the first 3 letters "NYO"; which hold no meaning in the English language; consumers will again recognise the ordinary dictionary term "Volt" within the mark. Given that the word "Volt" is contained within the mark of both the Opponent and the Applicant, I find the marks to be conceptually similar to at least a medium (but not the highest) degree.

[3] Form TM8 and Counterstatement dated 28 June 2023
[4] Form TM8 and Counterstatement dated 28 June 2023
[5] https://dictionary.cambridge.org/dictionary/english/volt

Distinctive character of the earlier mark

47. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which it is registered and, secondly, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik*, 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)."

48. 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 and services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. The Opponent has not pleaded that its mark has obtained an enhanced level of

distinctiveness through the use made of it, nor has it filed any evidence of use. Therefore, I have only the inherent distinctiveness of the mark to consider.

49. The Opponent's mark "Nyovolt" has no dictionary meaning but it is my view, that consumers will recognise the word "Volt" within the mark. While this is not descriptive of the goods and services relied upon, it does allude to the fact that many of the goods and services relate to energy and power. I am therefore of the view that there is some degree of allusiveness to the mark. Given that the consumer will recognise the mark as an invented word which, possesses allusive qualities, I am of the view that the mark is distinctive to a medium degree.

Likelihood of confusion

50. There is no simple formula for determining whether there is a likelihood of confusion. I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them i.e. that 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 (*Canon* at [17]) and considering the various factors from the perspective of the average consumer. In making my assessment, I must bear in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

51. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and the goods and services down to the responsible undertakings being the same or related.

52. Earlier in this decision I concluded that:

- The remaining competing services range from identical to dissimilar;

- The average consumer will primarily comprise professional and business users who will demonstrate a slightly higher than average degree of attention during the selection process;
- The purchasing process will be predominantly visual in nature, though aural considerations will not be discounted;
- The Opponent's earlier mark holds a medium degree of inherent distinctiveness;
- The Opponent's mark is visually similar to the Applicant's mark to a high degree;
- The Opponent's mark is aurally similar to the Applicant's mark to between a medium and a high degree;
- The Opponent's mark is conceptually similar to the Applicant's mark to at least a medium (but not the highest) degree;

53. I first remind myself that the respective marks share six out of seven letters and differ only in their second letter; that being "E" in the Applicant's mark and "Y" in the Opponent's. It is my view that this difference between the marks may be unnoticed, overlooked or forgotten by consumers, even when paying a slightly higher than average degree of attention. Bearing in mind the principle of imperfect recollection I consider that they are likely to be mistakenly recalled or misremembered as each other. Although I found some of the respective services to be similar to a low degree, the interdependency principle as set out in *Canon* states that a higher degree of similarity between the marks may offset a lower degree of similarity between the services. Taking this into account, where they are used on identical or similar services, I find that there exists a likelihood of direct confusion between the marks such that the average consumer will be confused as to the origin of the respective goods.

Conclusion

54. The opposition under section 5(2)(b) of the Act is successful in respect of the following services, Subject to any successful appeal against my decision:

Class 42: *Scientific research in the field of renewable energy; technological research; scientific research in the field of energy; information technology [IT] consultancy; scientific laboratory services; energy auditing; conducting technical project studies; quality control; research and development of new products for others; scientific research; programming of energy management software; consultancy in the field of energy-saving; computer programming for the energy industry; advisory services relating to energy efficiency; development of energy and power management systems; design and development of energy management software; design and development of energy distribution networks; engineering services relating to energy supply systems; engineering services in the field of energy technology; providing technical advice relating to energy-saving measures; design and development of regenerative energy generation systems; technological consultancy in the fields of energy production and use; technological consulting services in the field of alternative energy generation; Energy-saving (Consultancy in the field of -); technological analysis relating to energy and power needs of others; consultancy relating to technological services in the field of power and energy supply; conducting research and technical project studies relating to the use of natural energy; design and development of software for control, regulation and monitoring of solar energy systems; provision of information concerning research and technical project studies relating to the use of natural energy.*

55. The Applicant's mark may proceed to registration for the following services for which the opposition was unsuccessful:

Class 42: *Computer system analysis; cloud computing; conversion of computer programs and data, other than physical conversion; data security consultancy; computer software design; platform as a service [PaaS]; development and design of mobile applications.*

COSTS

56. As the Opponent has enjoyed the greater degree of success it is entitled to a contribution towards its costs. Awards of costs in proceedings commenced on or after 1 February 2023 are governed by Annex A of Tribunal Practice Notice ('TPN') 1 of 2023. I have made the appropriate reduction for only a partial success. Taking account of that scale, I award the Opponent the sum of £650, calculated as follows:

Official fee:	£100
Preparing a statement and considering the other side's statement:	£200
Filing submissions:	£350
Total:	**£650**

57. I therefore order Suzhou bytewatt technology Co., Ltd. to pay the sum of £650 to Nyobolt Limited. 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 13th day of November 2024

Jacob Robinson
For the Registrar