O/1110/25

CONSOLIDATED PROCEEDINGS

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NOS. UK00908749913, UK00915575996, UK00902965432 & UK00908571382 IN THE NAME OF ADMAR INTERNATIONAL, INC. FOR THE FOLLOWING TRADE MARKS:

NUBY

IN CLASS 3

NUBY

IN CLASS 20

NUBY

IN CLASSES 10, 21 & 28

NUBY NATURAL TOUCH

IN CLASS 5, 10, 11, 20 & 21

AND

APPLICATIONS TO REVOKE ON THE GROUNDS OF NON-USE UNDER NOS. 505625, 505626, 505632 & 505709 BY KAPPAHL SVERIGE AB

AND

IN THE MATTER OF APPLICATION NO. UK00003645197 BY KAPPAHL SVERIGE AB TO REGISTER:

NEWBIE

AS A TRADE MARK IN CLASSES 24, 27 & 35

AND

IN THE MATTER OF THE OPPOSITION THERETO UNDER NO. 429667 BY ADMAR INTERNATIONAL, INC.

BACKGROUND AND PLEADINGS

1. This decision involves proceedings wherein Admar International, Inc. ("Admar") and KappAhl Sverige AB ('KappAhl") brought actions against one another. I will summarise the relevant proceedings below, beginning with Admar's opposition, on the basis that it was brought first.

Admar's opposition

2. On 21 May 2021, KappAhl applied to register the trade mark 'NEWBIE' in the UK for the following goods and services:

Class 24: Textile goods and substitutes for textile goods; Bed linen and blankets; Textile tablecloths; Pillowcases; towels; Comforters; Bathing towels; Hooded towels; Coverings for furniture; Terry linen; interior textiles; Cot covers; Wall hangings; Textile wallhangings.

Class 27: Wallpaper; Wallpaper borders; Decorative wall hangings, not of textile; wall hangings [non-textile].

Class 35: Retail services in relation to clothing, headgear, footwear; Retail services in relation to Textile goods and substitutes for textile goods, Bed linen and blankets, Textile tablecloths, Pillowcases, towels, Comforters, Bathing towels, Hooded towels, Coverings for furniture, Terry linen, interior textiles, Cot covers, Wall hangings, Textile wall hangings; Retail services in relation to Wallpaper, Wallpaper borders, Decorative wall hangings, not of textile, wall hangings [non-textile]; Online retail services relating to clothing, headgear, footwear; Online retail services relating to Textile goods and substitutes for textile goods, Bed linen and blankets, Textile tablecloths, Pillowcases, towels, Comforters, Bathing towels, Hooded towels, Coverings for furniture, Terry linen,

interior textiles, Cot covers, Wall hangings, Textile wall hangings; Online retail services relating to Wallpaper, Wallpaper borders, Decorative wall hangings, not of textile, wall hangings [non-textile].

3. KappAhl's mark has a priority date of 2 December 2020, stemming from an earlier trade mark registered in Sweden under number 612535.

4. KappAhl's mark was published for opposition purposes on 24 September 2021 and, on 23 December 2021, it was opposed by Admar. The opposition was initially brought under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act"). However, the section 5(2)(b) ground was withdrawn by way of an amended Form TM7 filed by Admar.

5. The section 5(3) ground was initially reliant upon three earlier trade marks. However, one of those marks, being that under registration number 908749913 (which has a filing date 11 December 2009 and a registration date of 2 June 2010) was surrendered in full by Admar.[1] While the effective date of surrender post-dated the relevant date of these proceedings (being the priority date of KappAhl's mark), it was confirmed at the hearing in this matter, that this mark was no longer being relied upon in its opposition. As such, the opposition proceeds in respect of the following two marks:

NUBY
UK registration no. 915575996
Filing date 27 June 2016; registration date 17 October 2016
Relying on all goods, namely:

Class 20: High chairs for babies; playpens for babies; baby changing mats; baby changing tables; baby walkers; baby bouncers [seats]; pillows; furniture; cribs; non-metal safety gates for babies, children, and pets; portable baby bath seats for use in bath tubs.

[1] By way of a Form TM22 dated 24 July 2025.

("Admar's first mark"); and

NUBY
UK registration no. 902965432
Filing date 9 December 2002; registration date 7 September 2009
Relying on all goods, namely:[2]

Class 10: Dental apparatus; including pacifiers; baby bottles; caps adapted for feeding babies and children; teething articles; baby bottle accessories, namely, bottle nipples, nipple covers and hoods, nipple retaining rings and collars, bottle sealing disks, and bottle grippers; baby bottle racks and structured parts therefor; pacifier accessories; apparatus for attaching baby's pacifier to garment; health care products for babies and children, namely, thermometers; nasal aspirators; droppers and dispensers for dispensing liquid or medicine to babies.

Class 21: Household or kitchen utensils and containers (not of precious metal or coated therewith); combs and sponges; brushes (except paint brushes); articles for cleaning purposes; glassware, porcelain not included in other classes; including hair brushes; hair combs; grooming sets; food related and feeding related products for babies and children; cups, dishes and bowls for children; plastic valves for non-insulated drinking containers; valves for childrens' and babies' feeding cups; formula dispensers; potty trainers; bath tubs for babies (portable).

Class 28: Baby gyms; swings; activity mats; carrier toy bars.

("Admar's second mark").

[2] The goods under which this mark is protected were partially surrendered by Admar. While the effective date of surrender post-dated the relevant date in these proceedings, it was confirmed at the hearing that the surrender was to be adopted for the purposes of the goods relied upon under the opposition.

6. Admar claims that the marks at issue are similar and because of the reputation of the earlier marks in the UK, use of KappAhl's mark would, without due cause, take unfair advantage of, or be detrimental to the distinctive character or the repute of Admar's marks.

7. KappAhl filed a counterstatement wherein it denied the claims against it. It also requested Admar provide proof of use for its second mark in respect of all of the goods relied upon.

KappAhl's revocations

8. On 13 December 2022, KappAhl applied to have Admar's first and second marks revoked in full on the grounds of non-use under sections 46(1)(a) and 46(1)(b) of the Act. On the same date, KappAhl sought the revocation of trade mark registration 908749913, being that which was initially relied upon by Admar but withdrawn subsequent to the surrender of the same. On this point, I note that Admar confirmed that the defence of this mark was abandoned at the hearing. As a result, the revocation of this mark succeeds in full. I will deal with this point later on in this decision.

9. Further to the above, on 12 January 2023, KappAhl sought the revocation of an additional mark owned by Admar. This revocation was also brought on the grounds of non-use under sections 46(1)(a) and 46(1)(b) of the Act and is targeted against the following mark:

NUBY NATURAL TOUCH
UK registration no. 908571382
Filing date 24 September 2009; registration date 27 May 2010
Registered for the following goods:

Class 5: Plasters, materials for dressings; breast pads; nipple cream; nipple lanolin; stretch mark cream; nappy rash ointment and cream.

Class 10: Dental apparatus; feeding bottles; feeding bottles for babies; teethers; teething rings; pacifiers; apparatus for attaching baby's pacifier to garment; nipples for babies' bottles and pacifiers; feeders; infant feeders; breast pumps; breast shields; nipple shields; breast feeding assistant; inverted nipple assistant; breast milk storage cases; bottle bags; nipple brushes; clinical or fever thermometers; baby bottle racks; nasal aspirators.

Class 11: Apparatus for heating, steam generating, cooking, refrigerating, drying; sterilizers; bottle warmers.

Class 20: Plastic valves for non-insulated drinking containers.

Class 21: Household or kitchen utensils and containers; cups; cups for children and babies; plates, bowls and snack cups; plates bowls and snack cups for children and babies; kitchen utensils; valves for children's and babies' feeding cups.

("Admar's third mark").

10. In respect of each of Admar's marks, the periods during which KappAhl alleges non-use under both section 46(1)(a) and 46(1)(b), along with the dates on which revocation is sought are set out below.

	Admar's first mark	Admar's second mark	Admar's third mark
Relevant period under s.46(1)(a):	18/10/2016 to 17/10/2021	08/09/2009 to 07/09/2014	28/05/2010 to 27/05/2015
Revocation date sought:	18/10/2021	08/09/2014	28/5/2015
Relevant period(s) under s.46(1)(b):	13/12/2017 to 12/12/2022	01/12/2015 to 30/11/2022	01/12/2015 to 30/11/2022
		13/12/2017 to 12/12/2022	12/01/2018 to 11/01/2023

Revocation date sought:	13/12/2022	01/12/2020	01/12/2020
		13/12/2022	12/01/2023

11. Admar filed counterstatements in response to the applications wherein it initially sought to defend its marks for all goods for which they are registered. However, Admar's second and third marks have since been partially surrendered. Despite the surrender having effect from after the relevant dates for the respective revocation actions, Admar no longer seeks to defend those surrendered goods.[3]

12. Upon the filing of the counterstatement in respect of the revocation against Admar's third mark, the Tribunal consolidated the proceedings under the power given to it under Rule 62(1)(g) of the Trade Marks Rules 2008. This was communicated to the parties by way of written correspondence dated 3 May 2023.

13. Both parties filed evidence in chief with KappAhl also filing submissions alongside its evidence. A hearing took place before me on 30 July 2025, by video conference. KappAhl was represented by Mr Henry Edwards of 8 New Square, as instructed by Zacco UK Ltd, who have represented KappAhl throughout these proceedings. Admar was represented by Ms Georgina Messenger of 3 New Square, as instructed by Bird & Bird LLP, who has represented Admar in these proceedings since 24 July 2025.

14. 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.

[3] See Annex C of Admar's skeleton argument which focused on the defended goods, being those that remain in the relevant specifications after the partial surrenders.

EVIDENCE

15. Admar's evidence came in the form of the witness statement of Jamie Reed dated 25 January 2024. Jamie Reed is the Head of Product at Nuby UK LLP, a role they have held since 2009. It is explained that while Admar is the owner of all Nuby UK marks, Nuby UK LLP is licenced to use them. Jamie Reed's evidence is accompanied by 14 exhibits, being JR01 to JR14 and was adduced (1) in order to demonstrate use of Admar's marks and (2) to prove that they enjoy a reputation in the relevant territory. In respect of the exhibits filed, I note that three of them, being JR03, JR08 and JR09, are subject to a confidentiality order.

16. KappAhl's evidence came in the form of the witness statement of Anne-Charlotte Lindquist dated 16 April 2024. Ms Lindquist is the Assortment Manager of KappAhl, a position she has held since June 2023. Prior to that, Ms Lindquist held various roles within KappAhl since 2012. Ms Lindquist's evidence is accompanied by 37 exhibits, being ACL1 to ACL37, and was adduced in order to elaborate on the business activities of KappAhl and its 'NEWBIE' brand in order to prove that a conflict between the brands is unlikely, that there is no confusion between the marks and that KappAhl is not taking advantage of the alleged reputation of Admar.

17. I do not intend to summarise the parties' evidence in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

MY APPROACH

18. I will begin my decision by assessing the KappAhl's revocation actions. I do so because if the revocation against Admar's second mark succeeds to any degree in respect of the earliest revocation date sought, it will directly impact upon the opposition reliant upon the same. For example, if Admar's second mark is partially revoked for some goods with effect from 8 September 2014, it will no longer be able to rely on those for the purpose of the opposition. That being said, I note that the earliest date sought for the revocation of Admar's first mark is after the relevant date for the opposition. As such, regardless of the degree of success (if any)

against Admar's first mark, Admar will be able to rely on it in full for the purpose of the opposition. Even so, I still consider it appropriate to begin my decision by considering the revocation actions.

19. Before proceeding, I remind myself that Admar confirmed that it no longer sought to defend its marks in respect of the goods subject to its partial surrender. I do not intend to go over this in any detail in the body of my decision but, for the avoidance of doubt, will incorporate this into the conclusion of my decision.

DECISION

KAPPAHL'S REVOCATIONS

20. Section 46 of the Act states:

> "46. - (1) The registration of a trade mark may be revoked on any of the following grounds-
>
> (a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;
>
> (b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;
>
> (c) […]
>
> (d) […]
>
> (2) For the purpose of subsection (1) 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 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as in referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

> Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) […]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date".

21. Given that Admar's marks are comparable marks, paragraph 8 of part 1, schedule 2A is relevant. It reads:

“8.— Non-use as defence in infringement proceedings and revocation of registration of a comparable trade mark (EU)

(1) Sections 11A and 46 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the period of five years referred to in sections 11A(3)(a) and 46(1)(a) or (b) (the "five-year period") has expired before [IP completion day]—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 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 sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark, are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union”.

22. Section 100 is also relevant, which reads:

“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.”

23. 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 Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].
>
> 106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:
>
> (1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].
>
> (2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].
>
> (3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or

services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

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

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

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

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

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

24. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real" because the use would not be "viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services protected by the mark"[4] is not, therefore, genuine use.

25. I have set out the relevant periods above when discussing the basis of the revocation actions. I do not intend to reproduce those in full here but, broadly speaking, I remind myself that the periods in respect of Admar's first and second marks (being the 'NUBY' marks) run from 9 September 2009 and 12 December 2022 whereas broad periods for the third mark (being the 'NUBY NATURAL TOUCH' mark) run from 28 May 2010 to 11 January 2023. While this may be the case, as I will come to discuss below, Admar's evidence of actual sales focuses mainly on the period of January 2016 to January 2023 (which significantly overlaps with the relevant periods for the section 46(1)(b) grounds of revocation).[5] In accordance with section 46(3) of the Act, if I find that there exists genuine use for this period, Admar's marks will survive the revocations regardless of any lack of

[4] *Jumpman*, Case BL O/222/16

[5] I appreciate that there are some vague references in the narrative evidence to goods being sold during all of the relevant periods. However, no sufficiently solid evidence has been provided in support of such claims and, in the circumstances, I consider it reasonable to suggest that in order to maintain a claim as to use for the earlier relevant periods, it was for Admar to provide evidence of actual sales during the years prior to 2016.

use during the earlier relevant periods (being those under the section 46(1)(a) grounds of revocation).

Form of the mark

26. As I will come to discuss below, there is a broad range of goods for which KappAhl has conceded use. That being said, I still consider it necessary (1) assess the form of the marks and (2) conduct a review of Admar's evidence.

27. For the most part, the evidence shows use of the following sign:[6]

28. Admar's first and second marks are the word only marks 'NUBY'. As word only marks, they are covered for use in any standard typeface and in any colour. I consider that the above example is in line with the fair and notional use of a word only mark. While the above example of use includes an accent over the 'U', I consider that it is still use of the mark as registered as consumers in the UK are likely to overlook this. Even if they do not, I do not consider that the presence of an accent above the letter 'U' would alter the distinctive character to any degree.[7] As such, it is an acceptable variant of Admar's first and second marks.

29. I turn now to consider the use of 'NUBY NATURAL TOUCH'. In the evidence, products under this line appear to be branded as follows:[8]

[6] While this image is taken from the invoice evidence at JR05, it is the clearest example of how the mark is displayed on goods.
[7] See the principles for acceptable variants of marks as set out by Professor Phillip Johnson in the case of *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22
[8] See the images shown at paragraph 11 of Jamie Reed's witness statement.

30. I consider that the above use is either use of Admar's first and second marks as registered in accordance with *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12 because it is use of the first and second marks (or an acceptable variant of the same) as part of another mark, with 'NUBY' remaining an indicator of the origin of the goods.

31. As for Admar's third mark, clearly use of the example shown in paragraph 29 above is acceptable use of the same. In respect of this mark, however, I do not consider that use of 'NUBY' solus (either in word only format or in line with the stylisation shown at paragraph 27 above) is acceptable use of the same. I appreciate that the omission of non-distinctive elements may, in accordance with paragraph 15 of *Lactalis McLelland* (referenced at footnote 6), be less likely to change the distinctive character of a mark. However, in the present case, while I accept that 'NATURAL TOUCH' may be less distinctive than 'NUBY', they are not wholly non-distinctive and still contribute to the distinctiveness of the mark as a whole. As such, I find that their omission would alter the distinctive character of Admar's third mark. Therefore, use of 'NUBY' is not acceptable use of 'NUBY NATURAL TOUCH'.

Evidence of use

32. As set out above, I note that KappAhl has accepted that Admar's evidence is sufficient to demonstrate genuine use for some of the goods for which its marks are registered. However, it has contested that there is no use for some goods or that, even if there is, said goods should be limited. Therefore, while the concession for the majority of the goods is noted, an assessment of the evidence remains

necessary as it will be relevant to the issue a fair specification. Further, it will be relevant to undertake an assessment of the evidence when considering the issue of reputation under Admar's opposition.

33. While the evidence comes from a representative of Nuby UK LLP, the narrative evidence confirms that this entity is licensed by Admar to use the marks in the UK. Use with the consent of the proprietor of a mark is sufficient for the purposes of establishing genuine use. As a result, any reference to use in the evidence by Nuby UK LLP (which is all of it) is to be taken as use by Admar and I will refer to it as such.

34. Admar began using the 'NUBY' mark in 2003. The evidence confirms that it has been selling goods in the UK consistently since then. In respect of the use of the 'NUBY' mark, Admar has provided a number of images of products that feature the 'NUBY' mark on their surface. I do not intend to reproduce these here but note that they include baby bottles, sippy cups, teethers, plates and baby baths. While all these images are undated, the narrative evidence confirms that the same (or highly similar) products were on sale in the UK during the relevant periods. Having considered these images, I note that they all include Admar's NUBY branding. In addition, Admar has provided images of how the NUBY branding appears on its packaging. Again, these images are not dated but it is confirmed that the same (or highly similar) goods were sold during the relevant periods. These goods include thermometers, soother clips, bowls, activity mats and baby walkers. Additional representative images are provided in evidence of the packaging for certain NUBY branded products sold between 2009 and 2021.[9]

35. The evidence also discusses how Admar sometimes uses the NUBY brand in combination with other marks such as NATURAL TOUCH and GARDEN FRESH. Images of those goods are provided in the body of the narrative evidence and, again, they are not dated but it is confirmed in the narrative evidence that the same (or highly similar) goods were sold during the relevant periods. These goods include breast pumps, breast pads and baby soothers.

[9] JR01

36. In respect of how the goods reach the consumer, I note that the evidence sets out that the goods are sold online via the NUBY website and via third party retailers such as Amazon. Further, Admar sells (or has sold) goods via physical stores including Asda, Aldi, Babies R Us, Morrisons, Sainsburys, Tesco, Waitrose, Boots, Superdrug, Wilkinson and Mothercare. Images are provided of the various NUBY branded goods shown on shelves in various UK stores. The narrative evidence confirms that these stores include Asda, Boots, Tesco, Mothercare, Babies R Us, Morrisons and Superdrug. It also confirms that the photographs were taken between 2015 and 2019. The photographs show NUBY NATURAL TOUCH branded breast pads, baby bottles, bottle teats, breast pumps, sterilisers, bottle warmers and breastmilk storage bags. As for NUBY branded goods, these are confirmed as showing teethers, soothers, nasal aspirators, baby bottles, bottle teats, cups and bowls.

37. In terms of sales of Admar's goods, I note that Admar has provided a breakdown of unit sales made in the UK under both the NUBY and NUBY NATURAL TOUCH brands.[10] This evidence covers unit sales broken down by product type for the period of January 2018 and January 2023.[11] The goods listed cover the following:

NUBY NATURAL TOUCH

Breast pads, baby bottles, bottle teats, soothers, breast pumps, breastmilk storage bags, sterilisers and bottle warmers.

NUBY

Baby bottles, soothers, soother clips, soother cases, bottle sealing discs, bottle to cup handles, feeders, teethers, digital thermometers, nasal aspirators, changing mats, baby bouncer, booster seats/sit up floor seat, pillows, cribs, brushes (bottle, teat and straw cleaning), cups, cup valves, plates and bowls, snack pots, kitchen utensils,[12] kitchen containers, formula dispenser, potty trainers, baby baths/baby

[10] Confidential Exhibit JR03

[11] While the spreadsheet generally covers this period, it is noted that some goods listed show no sales data for some of the years.

[12] In respect of this category of goods, I note that Admar has provided printouts from its website at JR04 of what products fall within this category. I note that these goods include a steam n' mash freezer set, a mash n' feed pot, lolly pop moulds, an ice freezer tray, a nibbler and a weaning feeder.

bath supports, nail care set, baby walkers, baby gyms, activity mats and baby swing seat.

38. I do not intend to reproduce the breakdown in full here but note that, generally speaking, the unit sales associated with the above goods run in the [redacted].

39. In terms of overall UK sales, Admar's evidence sets out that it achieved the following turnover in the UK for 1 February 2016 to 31 December 2022:

Year Ending:	**Turnover (£):**
31 January 2017:	9,818,236
31 January 2018:	11,530,719
31 January 2019:	13,025,324
31 January 2020:	14,169,287
31 January 2021:	15,415,847
31 January 2022:	14,798,435
31 December 2022: (11 month period)	11,441,749
Total:	**90,199,597**

40. In support of its sales, Admar has provided a range of sample invoices of goods sold to Amazon and Boots between 2015 and 2023.[13] There are over 120 pages of invoices and while I will not seek to calculate their total value, I note that Ms Messenger, at the hearing, sought to take me to some of them in order to demonstrate use for certain categories of goods. I will address this further below where necessary.

[13] JR05

41. Lastly, in respect of marketing, Admar's evidence sets out that between 2016 and 2022, it spent a total of [redacted] on marketing.[14] Further, its evidence sets out its market share for the different categories of goods it sells for the years 2018 to 2020.[15] I do not intend to discuss this in full but note that as at 26 December 2020, Admar enjoys a market share of [redacted].

42. There is additional evidence provided in respect of social media, awards and press coverage. I do not consider it necessary to discuss such evidence in any detail as not only has use been conceded for a majority of the goods at issue but the evidence I have already discussed above is clearly indicative of the fact that Admar operates a large business with a significant presence in the UK.

Fair specification

43. In considering the issue of a fair specification, I refer to the case of *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited,* BL O/345/10, wherein 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."

44. In addition, I refer to the Court of Appeal decision in *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 wherein the proper approach to partial revocation was set out as follows:

[14] JR08
[15] JR09

“245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. […] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered.”

45. Lastly, in *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch) at [47], the late Carr J pointed out that 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.

46. As set out above, KappAhl has conceded that there has been use for many of the goods at issue. Therefore, I will only seek to focus on those goods for which use is not accepted or where it is claimed that the use is only sufficient to demonstrate use of more limited terms than those in Admar's specifications. I will approach this by focusing on the specifications in Admar's marks separately, beginning with its first mark.

Admar's first mark

47. This mark is registered only for goods in class 20. KappAhl has set out that while there is use for "pillows", the use relates only to tummy pillows and, as such, this term should be limited to "tummy pillows for babies". Further, KappAhl disputes that there has been any use in respect of the following goods:

> *High chairs for babies; playpens for babies; non-metal safety gates for babies, children, and pets; baby changing tables; furniture.*

48. As for the remaining terms, KappAhl admits that there has been use in respect of the same meaning that Admar's first mark may remain registered for the following:

> *Baby changing mats; baby walkers; Cribs; Baby bouncers [seats]; Portable baby bath seats for use in bath tubs.*

49. In respect of the contested terms, I will address these in turn below.

High chairs for babies; playpens for babies; non-metal safety gates for babies, children, and pets; baby changing tables.

50. The evidence does not appear to cover unit sales for the above goods. Ms Messenger has sought to argue that use of other goods similar to the above (such as baby gyms and activity mats, being goods that KappAhl has conceded use for) is sufficient to allow for the above goods to be deemed as being genuinely used. The basis for such an argument is that consumers would consider playpens, for example, to fall into one of the above categories such that they should be included as part of a fair specification for the same. Such an argument is, in my view, wholly unsupportable. Simply put, use of an activity mat is not use of a playpen and while they may be similarly categorised goods, use of one is not genuine use of the other.

51. As a result, I am not willing to find that Admar has provided sufficient evidence in order to demonstrate that it has genuinely used any of the above goods. The above goods will, therefore, be revoked.

Furniture.

52. While the evidence covers booster seats and sit up floor seats, I do not consider that consumers will consider that they are items of furniture. As such, the evidence of sales regarding such goods is of no assistance here. That being said, the evidence does include use of cribs which would be considered an item of furniture. However, as this is the only good shown in evidence that falls within the above category of goods, I am of the view that any finding in respect of genuine use for 'furniture' is such that it would be limited to 'cribs'. Given that use has already been accepted for such a term, I see no merit in granting it use of the same a second time. As such, I will proceed with revoking the above term.

Pillows.

53. I agree with KappAhl in that 'pillows' is a broad category on the basis that it can cover any type of pillow. This evidence only covers two types of pillows, being tummy time and nursing pillows and, in light of this, I do not consider that Admar

should be permitted to rely on pillows at large. So while I agree that the above term should be limited to cover tummy time pillows for babies, I am of the view that it should also include reference to nursing pillows. As such, I hereby limit the above term to "pillows, namely tummy time pillows for babies and nursing pillows".

Admar's second mark

Class 10

54. In its skeleton argument filed prior to the hearing, KappAhl conceded that there was use for the following goods in class 10 of Admar's second mark:

> *"Teething articles; baby bottles; baby bottle accessories, namely, bottle nipples, nipple covers and hoods, nipple retaining rings and collars, bottle sealing disks, and bottle grippers; baby bottle racks and structured parts therefor; caps adapted for feeding babies and children; pacifier accessories; apparatus for attaching baby's pacifier to garment; nasal aspirators; droppers and dispensers for dispensing liquid or medicine to babies; pacifiers."*

55. This leaves just the terms "dental apparatus" and "health care products for babies and children, namely, thermometers". I will assess these below.

Dental apparatus.

56. In my view, the above term is one that covers actual apparatus used by a dentist such as dental scrapers and drills, for example. It does not, therefore, cover goods such as toothbrushes and those sort of goods used by members of the general public at home.[16] I say this because I do not envisage any scenario wherein members of the public would categorise toothbrushes or dental floss as a dental apparatus. In respect of the above goods, Ms Messenger took me to some invoices at the hearing that show the sale of 'oral care sets'. She did so in support of a claim that Admar has used the above goods. While this is noted, I have no images of

[16] If I am wrong on this point, it may cover toothbrushes or water jet flossers, neither of which are covered in the evidence in any event.

these goods or any explanation as to what is included within them. As such, it is not entirely clear to me what a 'oral care set' includes and it may very well be the case that it includes items that are not types of dental apparatus but merely a collection of items such as toothpaste or mouthwash, for example (neither of which are types of dental apparatus). Therefore, such use is of no assistance here.

57. I note that the evidence includes sufficient use of 'teethers' but, as above, I am of the view that this is not a form of dental apparatus so use of the same is of no assistance here. On this point, I note that KappAhl has conceded use for "teething articles" and "pacifiers" so use for such goods has already been permitted in these proceedings. As a result, the above term will be revoked as there is no genuine use for the same.

Health care products for babies and children, namely, thermometers.

58. KappAhl's position is that the inclusion of the word 'namely', essentially limits the above term to just 'thermometers'. I agree. In respect of the use for thermometers, KappAhl sets out that the use for these goods is acceptable for the purpose of the revocation but not for genuine use for the opposition. While I am presently focusing on the revocation action, I consider it necessary to point out at this stage that I agree with KappAhl on this point. I say this because the relevant period for the opposition concluded on 2 December 2020 and the evidence sets out that prior to 16 January 2021, Admar only sold [redacted] thermometers and, on this point, I note that the sales period for such goods covers over a month worth of sales from after the relevant period in the opposition. At the hearing, Ms Messenger sought to argue that Admar's reference to bath thermometers in its invoice evidence was sufficient for use of the above term so the use extends beyond that covered by the spreadsheet provided. While this argument is noted, I disagree that a thermometer for the temperature of a bath is a 'health care product'. Upon the plain reading of the above term, it covers a thermometer for taking the temperature of a baby/child for the purposes of their health. I appreciate that a thermometer for a bath involves the safety of a child (so as not to scald them in a hot bath) but it does not pertain to healthcare. As such, this use is of no assistance here.

59. Overall, the total sales of [redacted] thermometers, bearing in mind the issue with regard to the relevant period for the opposition, is a very low and imprecise level of use. Further, it is not particularly longstanding. As such, I find that there is no genuine use for such goods in respect of the opposition. For clarity, this term does survive the revocation action as per KappAhl's concession on the subject.

Class 21

60. KappAhl has conceded use in respect of the following goods:

> *Food related and feeding related products for babies and children; cups, dishes and bowls for children; plastic valves for non-insulated drinking containers; valves for childrens' and babies' feeding cups; formula dispensers; potty trainers; bath tubs for babies (portable).*

61. In respect of the following goods, KappAhl accepts that there is some use of the same, however, it claims that the terms should be subject to a limitation (which I will discuss in further detail below):

> *Household or kitchen utensils and containers (not of precious metal or coated therewith); articles for cleaning purposes; brushes (except paint brushes).*

62. Lastly, KappAhl's position is that there is no evidence of use for the following goods:

> *Combs and sponges; grooming sets; glassware, porcelain not included in other classes; hair brushes; hair combs.*

63. I will deal with the contested terms in turn below.

Glassware, porcelain not included in other classes;

64. The evidence does not speak to the material used in respect of Admar's bottles or cups. However, given that they are bottles and cups for babies and children, I

consider it reasonable to infer that they are not made of glass or porcelain. However, if it was the case that they were, I consider it reasonable to suggest that the evidence should have expressly confirmed as such. Therefore, I am not willing to infer that Admar's use of its various receptacle goods are made of such materials. The above term is, therefore, to be revoked.

Combs and sponges; hair brushes; hair combs.

65. In respect of the above, I note that at the hearing, Ms Messenger argued that use of its various other types of goods meant that use of the above should be covered as part of a fair specification. For example, Ms Messenger argued that the use of Admar's bath tubs was such that average consumers would consider that sponges belonged to the same category of goods and should be included as part of a fair specification. Such an argument is, in my view, wholly unsupportable. Clearly, use of bath tubs cannot be said to cover the genuine use of sponges and to suggest otherwise is non-sensical. The same outcome applies to the non-sponge goods above and, as a result, the above terms are, therefore, revoked.

Grooming sets.

66. The unit sales evidence covers the sale of nail care sets which could be argued to be a set for grooming the nails of a user. The sales associated with these goods sit at just under [redacted] units sold between January 2020 and 14 January 2023. I appreciate that this is not at a high level but I am of the view that it is sufficient to demonstrate that Admar has made a genuine attempt to create or preserve a market share in respect of the same. While that may be the case, this is just one example of use for the broader range of goods and given that grooming sets may cover goods used to groom the hair, I consider it appropriate to limit this term to "nail care sets". All other terms above are to be revoked.

67. As was the case with Admar's thermometer evidence, the use before me for the relevant period for the opposition covers just [redacted] units sold prior to 16 January 2021. This is a very low level of use and following similar reasons as those set out at paragraph 58 when discussing the thermometer evidence, I find that the use for

these goods is insufficient to demonstrate genuine use for the purposes of the opposition. So while Admar's second mark may remain registered for "nail care sets", it is not permitted to rely on this term for the purpose of the opposition.

Household or kitchen utensils and containers (not of precious metal or coated therewith).

68. KappAhl's position is that the above terms are already covered by the terms "food related and feeding related products for babies and children" and "cups, dishes and bowls for children". Admar disputes this and, in doing so, relies on the evidence of its freezer trays, ice pop moulds and the 'mash n' feed' sets. At the hearing, Ms Messenger took me to this evidence in order to demonstrate that these goods may all be used as containers. On this point, Admar's goods all have lids and are shown as being able to double up as containers. In addition to this, I note that the spreadsheet showing unit sales for Admar's various goods shows figures that cover the sale of [redacted] of goods within the categories of "kitchen utensils" and "kitchen containers". While these are broad categories, I have no reason to doubt that the sales associated with the same cover a range of goods and, as such, I am content to conclude that Admar has duly demonstrated use for these broad category of goods.

Articles for cleaning purposes; brushes (except paint brushes).

69. KappAhl's position is that any use of the above should be revoked down to "brushes for cleaning baby bottles and other baby feeding equipment". On this point, Admar's evidence in respect of the above term only covers reference to just brushes for cleaning bottles, tears and straws. Further, as rightly set out by KappAhl, the evidence does show a silicon brush for cleaning bottles, teat cups and toddle tableware. Despite submissions to the contrary at the hearing, I am of the view that use of such a limited range of goods is not sufficient to give rise to there being genuine use for the above broad terms. I say this because, if it were, then Admar would remain protected for goods such as toilet brushes, sweeping brushes and other goods for which, clearly, no use is demonstrated. Therefore, I am of the view that this term should be limited accordingly and while I agree with

KappAhl to some extent, I consider it more appropriate to limit the above goods to "brushes for cleaning baby bottles and baby feeding equipment."

Class 28

70. This class of goods cover just four terms, being "baby gyms", "swings", "activity mats" and "carrier toy bars". KappAhl accepts that there has been use for all of these goods save for "swings", which it submits should be revoked down to "baby swing seats". This is on the basis that Admar's evidence only shows sales of these specific types of goods. At the hearing, Ms Messenger agreed that this was the only type of good used but that Admar should be protected for 'swings' at large, in any event. I see no reason for this as 'swings' is broad enough to cover many different types of swings which are not covered by the evidence whatsoever. Therefore, I see no reason why Admar should be protected for larger swing sets for use in the garden, for example, when they have only used the term for baby swing seats. As a result, I consider it appropriate to limit the term "swings" to "baby swing seats".

Admar's third mark

71. KappAhl has conceded that the evidence demonstrates use for the following goods:

Class 5

Breast pads.

Class 10

Feeding bottles; feeding bottles for babies; nipples for babies' bottles and pacifiers; breast pumps; breast milk storage cases; pacifiers; teethers; teething rings; apparatus for attaching baby's pacifier to garment; feeders; infant feeders; breast shields; nipple shields; breast feeding assistant; inverted nipple assistant.

Class 11

Sterilizers; bottle warmers.

72. KappAhl contests that there is either no use for the remaining terms under the NUBY NATURAL TOUCH branding or that any use related to the same (being apparatus for heating steam generating, cooking, refrigerating, drying" and "dental apparatus") is already covered by the conceded goods (being "sterilizers" and "teethers", respectively). In considering the evidence, I agree that there is either no evidence whatsoever in respect of the remaining goods or that the evidence demonstrates just one category of goods that is suitably covered by goods for which use has already been found/conceded. Therefore, the following goods are to be revoked from Admar's third mark:

Class 5

Plasters, materials for dressings; nipple cream; nipple lanolin; stretch mark cream; nappy rash ointment and cream.

Class 10

Dental apparatus; bottle bags; nipple brushes; clinical or fever thermometers; baby bottle racks; nasal aspirators.

Class 11

Apparatus for heating, steam generating, cooking, refrigerating, drying.

Class 20

Plastic valves for non-insulated drinking containers.

Class 21

Household or kitchen utensils and containers; cups; cups for children and babies; plates, bowls and snack cups; plates bowls and snack cups for children and babies; kitchen utensils; valves for children's and babies' feeding cups.

Conclusion in respect of the revocation actions

73. Trade mark registered under number 908749913, which stood registered in the name of Admar was, as above, subject to a revocation action (under number

505625) but was subsequently surrendered in full. As also set out above, Admar did not seek to defend the revocation of this mark post-surrender of the same. As such, that mark is hereby revoked in full, with effect from 3 June 2015, being the earliest sought revocation date.

74. Admar's first mark may remain registered for the following goods:

Class 20: Baby changing mats; baby walkers; cribs; baby bouncers [seats]; portable baby bath seats for use in bath tubs; pillows, namely tummy time pillows for babies and nursing pillows.

75. However, Admar's first mark is revoked with effect from 18 October 2021 for the following goods:

Class 20: High chairs for babies; playpens for babies; non-metal safety gates for babies, children, and pets; baby changing tables; furniture.

76. Admar's second mark may remain registered for the following goods:

Class 10: Teething articles; pacifiers; baby bottles; baby bottle accessories, namely, bottle nipples, nipple covers and hoods, nipple retaining rings and collars, bottle sealing disks, and bottle grippers; baby bottle racks and structured parts therefor; caps adapted for feeding babies and children; pacifier accessories; apparatus for attaching baby's pacifier to garment; nasal aspirators; droppers and dispensers for dispensing liquid or medicine to babies; health care products for babies and children, namely, thermometers.

Class 21: Food related and feeding related products for babies and children; cups, dishes and bowls for children; plastic valves for non-insulated drinking containers; valves for childrens' and babies' feeding cups; formula dispensers; potty trainers; bath tubs for babies (portable); brushes for cleaning baby bottles and baby

feeding equipment; nail care sets; household or kitchen utensils and containers (not of precious metal or coated therewith).

Class 28: Baby gyms; baby swing seats; activity mats; carrier toy bars.

77. However, Admar's second mark is revoked with effect from 8 September 2014 for the following goods:[17]

Class 10: Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopedic articles; suture materials.

Class 21: Combs and sponges; grooming sets; glassware, porcelain and earthenware not included in other classes; hair brushes; hair combs; brush making materials; steelwool; unworked or semi-worked glass (except glass used in building).

Class 28: Swings.

78. Admar's third mark may remain registered for the following goods:

Class 5: Breast pads.

Class 10: Feeding bottles; feeding bottles for babies; nipples for babies' bottles and pacifiers; breast pumps; breast milk storage cases; pacifiers; teethers; teething rings; apparatus for attaching baby's pacifier to garment; feeders; infant feeders; breast shields; nipple shields; breast feeding assistant; inverted nipple assistant.

Class 11: Sterilizers; bottle warmers.

[17] For the avoidance of doubt, the goods listed here include those that were subject to Admar's partial surrender of this mark.

79. However, Admar's third mark is revoked with effect from 28 May 2015 for the following goods:[18]

Class 3: Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, cosmetics, hair lotions; dentifrices; deodorants for personal use; baby wipes; laundry detergents; household detergents; non-medicated dental gel; non-medicated nipple cream; non-medicated nipple lanolin; non-medicated stretch mark cream; body butter; firming butter; belly butter; shampoos; hair conditioner; de-tangle spray; baby oil; baby lotion; bubble bath; hair and body wash; non-medicated nappy rash ointment and cream; oil gel; powder; liquid powder; bedtime gel.

Class 5: Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants; preparations for destroying vermin; fungicides, herbicides; foods and beverages which are adapted for medical purposes; air deodorising preparations; dental gel; nipple cream; nipple lanolin; stretch mark cream; nappy rash ointment and cream.

Class 8: Hand tools and hand operated implements; cutlery; side arms; razors; electric razors and hair cutters; feeding utensils; cutlery; cutlery for children and babies.

Class 10: Surgical, medical, dental and veterinary apparatus and instruments, artificial limbs, eyes and teeth; orthopaedic articles; suture materials; sex aids; massage apparatus; supportive bandages; furniture adapted for medical use; bottle bags; nipple

[18] As was the case with Admar's second mark, the goods listed here include those that were subject to Admar's partial surrender of this mark.

brushes; clinical or fever thermometers; baby bottle racks; nasal aspirators.

Class 11: Apparatus for lighting, heating, steam generating, cooking, refrigerating, drying, ventilating, water supply and sanitary purposes; air conditioning apparatus; electric kettles; gas and electric cookers; vehicle lights and vehicle air conditioning units; air humidifiers.

Class 16: Paper, cardboard and goods made from these materials; printed matter; book binding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters packaging materials; printers' type; printing blocks; disposable nappies of paper for babies; printed publications; paint boxes for children; cheque book holders; nappy bags for the disposal of nappies and sacks.

Class 18: Nappy bags for the carrying of nappies.

Class 20: Plastic valves for non-insulated drinking containers.

Class 21: Household or kitchen utensils and containers; combs and sponges; brushes; brush-making materials; articles for cleaning purposes; steel wool; articles made of ceramics, glass, porcelain or earthenware which are not included in other classes; electric and non-electric toothbrushes; cups; cups for children and babies; plates, bowls and snack cups; plates bowls and snack cups for children and babies; kitchen utensils; hairbrushes; hair combs; formula dispensers; potty trainers; portable bathtubs for babies; valves for children's and babies' feeding cups; bottle brushes; droppers and dispensers for dispensing liquid or medicine to babies.

Class 28: Games and playthings; playing cards; gymnastic and sporting articles; decorations for christmas trees; childrens' toy bicycles; toys; plush toys; teething toys; rattles; baby gyms; baby swings; baby activity mats; baby carrier toy bars.

80. I will now proceed to consider Admar's opposition.

ADMAR'S OPPOSITION

Section 5(3)

81. Section 5(3) of the Act states:

> "5(3) A trade mark which –
>
> is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark."

82. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors,* Case 252/07, *Intel,* Case C-408/01, *Adidas-Salomon,* Case C-487/07, *L'Oreal v Bellure,* Case C-323/09, *Marks and Spencer v Interflora,* Case C383/12P, *Environmental Manufacturing LLP v OHIM.* The law appears to be as follows:

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

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

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

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

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

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; Intel, paragraphs 76 and 77 and Environmental Manufacturing, paragraph 34.

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

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs

particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; L'Oreal v Bellure NV, paragraph 40.

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

83. Under the present ground, Admar relies on its first and second marks. These qualify as earlier trade marks under the above provisions. Admar's first mark did not complete its registration process more than five years before filing of KappAhl's mark so it is not subject to the use provisions. On this point, I note that while it has since been subject to partial revocation, Admar is permitted to rely on all goods for which it was registered as the relevant date for the opposition predates the effective date of revocation for this mark. That being said, in its skeleton argument filed prior to the hearing, Admar set out that its best case was in respect of only some of its goods. While it did not formally withdraw its reliance upon them, it set out that it the opposition did not succeed in respect of the same then its case was no stronger in respect of the others. As such, I will proceed with this opposition on the basis of those goods it highlighted at Annex B of its skeleton argument.

84. As for Admar's second mark, this was registered more than five years prior to the filing date of KappAhl's mark. As such, it is subject to the use provisions and, as set out above, KappAhl did request proof of use for the same. However, this mark was also subject to a revocation based on a claim of non-use. On this point, I note that the concessions set out in the Annex to KappAhl's skeleton argument that if

has admitted use under section 6A of the Act for all bar one of the goods that it conceded use for under the revocation action. The one term not accepted is “health care products for babies and children, namely thermometers”. I have discussed above that I did not consider the use of such goods to be sufficient for the purposes of the opposition. In addition, I remind myself that “nail care sets” was a term that I accepted genuine use for in respect of the revocations but not the opposition. As a result, save for these two terms, Admar’s opposition may proceed in reliance upon the same goods which survived the revocation action. That being said, as was the case with its first mark, Admar expressed that its best case lay in only some goods, being those set out at Annex B of its skeleton argument.

85. In light of the above, the relevant goods relied upon under the present ground are as follows:

Admar’s first mark

Class 20: Baby changing mats; baby changing tables; baby walkers; baby bouncers [seats]; pillows; furniture; cribs; portable baby bath seats for use in bath tubs.

Admar’s second mark

Class 10: Teething articles; pacifiers; baby bottles; baby bottle accessories, namely, bottle nipples, nipple covers and hoods, nipple retaining rings and collars, bottle sealing disks, and bottle grippers; caps adapted for feeding babies and children; pacifier accessories; apparatus for attaching baby's pacifier to garment; nasal aspirators.

Class 21: Food related and feeding related products for babies and children; cups, dishes and bowls for children; plastic valves for non-insulated drinking containers; valves for childrens' and babies' feeding cups; formula dispensers; potty trainers; bath tubs for babies (portable); brushes for cleaning baby bottles and baby

feeding equipment; household or kitchen utensils and containers (not of precious metal or coated therewith).

Class 28: Baby gyms; baby swing seats; activity mats.

86. The conditions of section 5(3) are cumulative. Firstly, Admar must show that the marks at issue are similar. Secondly, Admar must show that its marks have achieved a level of knowledge/reputation amongst a significant part of the public throughout the relevant territory. Thirdly, it must be established that the level of reputation and the similarities between the parties' marks will cause the public to make a link between them. Finally, assuming the first three conditions have been met, section 5(3) requires that one or more of the types of damage will occur. It is unnecessary for the purposes of section 5(3) that the goods or services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

Reputation

87. KappAhl accepts that Admar's evidence is sufficient to demonstrate a reputation for 'baby bottles' and 'teethers' in Class 10 of its second mark. That being said, Admar maintains is position that it enjoys a reputation in all of the goods listed at paragraph 85 above.

88. I have summarised the evidence filed at paragraphs 32 to 42 above. I do not intend to reproduce it here but remind myself that Admar's turnover between 1 February 2016 and 31 December 2022 was £90 million between 1 February 2016 and 31 December 2022. However, the relevant date for the present assessment is 2 December 2020 meaning that the entirety of this amount is not relevant here. In considering the figures provided, the yearly figure expires on 31 January of each respective year. For 1 February 2016 to 31 January 2021, Admar's total turnover stood at £63,959,413. While noted, this turnover will include around two months' worth of figures that are not relevant to the opposition. While I have no breakdown to enable me to determine the actual turnover as at 2 December 2020, I will

proceed in line with the aforementioned figure but will bear in mind the issue with regard to the relevant date.

89. A turnover in the region of £63 million over five years is clearly a significant turnover and while there are some goods that a reputation vests in (such as Admar's soothers, which sold in the [redacted] of units per year and its cups that sold in the [redacted] of units per year), I do not consider that it applies to all goods. For example, the sale for Admar's "cribs" cover just [redacted] sales prior to 16 January 2021 and given that the relevant date for the opposition is 2 December 2020, I do not consider this use to be at a level sufficient for genuine use. Further, even if I was wrong to have found no genuine use for Admar's thermometer or nail grooming goods, the level of use associated with them prior to the relevant date is so low that they would not attract a reputation amongst the relevant public in any event. Lastly, I appreciate that the opposition has proceeded in reliance upon "pillows" at large. However, I am of the view that the same reasoning reached when discussing this under the revocations above is applicable here. Therefore, any reputation associated wit this term vests in "pillows, namely tummy time pillows for babies and nursing pillows".

90. I see no merit in going through all of Admar's goods in order to determine which goods enjoy a reputation and which do not. What I will do, however, is simply take a broad brush approach and proceed on the basis that Admar's marks enjoy a strong reputation in the following goods:

Admar's first mark

Class 20: Baby changing mats; baby walkers; baby bouncers [seats]; pillows, namely tummy time pillows for babies and nursing pillows; portable baby bath seats for use in bath tubs.

Admar's second mark

Class 10: Teething articles; pacifiers; baby bottles; baby bottle accessories, namely, bottle nipples, nipple covers and hoods, nipple retaining

rings and collars, bottle sealing disks, and bottle grippers; caps adapted for feeding babies and children; pacifier accessories; apparatus for attaching baby's pacifier to garment; nasal aspirators.

Class 21: Food related and feeding related products for babies and children; cups, dishes and bowls for children; plastic valves for non-insulated drinking containers; valves for childrens' and babies' feeding cups; formula dispensers; potty trainers; bath tubs for babies (portable); brushes for cleaning baby bottles and baby feeding equipment; household or kitchen utensils and containers (not of precious metal or coated therewith).

Class 28: Baby gyms; baby swing seats; activity mats.

91. However, given the low level of sales figures associated with the remaining goods or the lack of specific evidence in respect of the same, I do not consider that Admar's reputation extends to the same.

Link

92. As noted above, my assessment of whether the public will make the required mental 'link' between the marks must take account of all relevant factors. The factors identified in *Intel* are:

<u>The degree of similarity between the conflicting marks.</u>

93. KappAhl's mark is a word only mark consisting solely of the word 'NEWBIE'. Admar's marks are both word only marks that consist of the word 'NUBY'. There are no other elements that contribute to either parties' marks meaning that their overall impressions lie in the word themselves. In comparing the marks, I note that, visually, they all start with the letter 'N' and contain the letter 'B' within them. This is where any similarity ends. The marks differ in the presence of the letters 'U' and 'Y' in Admar's marks and 'E', 'W', 'I' and 'E' in KappAhl's mark. I appreciate that

the beginnings of marks tend to have more impact on consumers[19] but, in the present case, I do not consider that this is necessarily that helpful. I say this because the shared use of one just letter at the start of both parties' marks is not sufficient to lead to a conclusion that the beginnings of these marks are the same. Further, save for the shared use of the letter 'B' in different locations (the third letter of Admar's marks and the fourth letter of KappAhl's mark), the marks differ entirely. In my view, the marks are visually similar to a low degree.

94. Aurally, Admar's position is that the marks are identical. Conversely, KappAhl's position is that the marks are only aurally similar to between a low and moderate degree. KappAhl's claim is made on the basis that Admar's marks will be pronounced as 'NUBBI'. While some consumers may pronounce the mark in this way, I am of the view that a significant proportion of consumers will pronounce it as 'NOO-BEE'. KappAhl's mark, on the other hand, will be pronounced 'NEW-BEE', with an emphasis placed on the W, as opposed to Admar's 'NOO'. I say this because I consider that consumers in the UK would ordinarily pronounce 'NEW' in such a way and not as 'NOO'. That being said, the pronunciation of 'NOO-BEE' and 'NEW-BEE' is still highly similar.

95. Turning to the concept of the marks, I note that Admar's position is that the marks are conceptually identical because 'NUBY' would be read and vocalised as the word 'NEWBIE'. I disagree. While I appreciate the aural similarity of the marks, I am of the view that 'NUBY' will be viewed as a made up word with no obvious meaning. 'NEWBIE' will be understood as an informal reference to a newcomer. As a result, I find that because Admar's marks have no concept whereas KappAhl's does, the marks are conceptually neutral.

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

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

96. In considering KappAhl's specification, I note that it includes "pillowcases". Such goods are similar to Admar's reputed "pillows, namely tummy time pillows for babies and nursing pillows". I say this because, having considered the factors set out in the case of *Treat*,[20] I am of the view that such goods share an overlap in trade channels and user. While their natures, method of use and purpose differ, I consider that they are complementary to one another on the basis that they a pillowcase is important to Admar's pillow goods and, as such, consumers will believe that they are the responsibility of the same undertaking.[21] As such, I find that these goods are similar to a medium degree. Further. I note that KappAhl's specification includes the "retail services in relation to […] pillowcase" and "online retail services relating to […] pillowcases". Following the guidance set out in Oakley and *Oakley, Inc v OHIM*, Case T-116/06 and *Tony Van Gulck v Wasabi Frog Ltd,* Case BL O/391/14, I find that these goods and services are similar to a low degree on the basis that they overlap in trade channels and user.

97. As for the remaining goods, I find that these are all dissimilar. In making this finding, I remind myself of the case of *Unicorn Studio Inc v Veronese* [2024] EWHC 1098 (Ch) wherein Mr Iain Purvis K.C., sitting as deputy High Court judge, set out at paragraph 24 of his judgement that:

> "[A]ny finding of similarity in the end requires the exercise of common sense and requires the hearing officer to stand back and consider the overall question. It strikes me that here the hearing officer was engaging essentially in a box-ticking exercise, asking how many of the factors identified in *TREAT* or in *Canon* could be said to have been satisfied. Had the hearing officer stood back and considered the overall question of similarity, I believe she would have considered and certainly ought to have considered that the idea that figurines and works of art were similar to electric lamps, chandeliers or mirrors was nonsensical and it hardly needed a careful consideration of the *Canon* or *TREAT* factors to come to that conclusion. I therefore agree with the appellant

[20][1996] R.P.C. 281
[21] *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)***,** Case T-325/06

that this category of goods should have been found dissimilar, and certainly it could not have reasonably been found similar to more than 'a very low degree'."

98. While the above case involved a comparison of entirely different goods than those that are at issue here, I am of the view that the same principle applies. For example, the user of Admar's reputed goods may buy textiles, wallpaper, comforters and other types of bedding for their child's bedroom. Further, those users may seek such goods from the same undertakings in that large retailers or specific childcare or babycare stores will likely sell all of these types of goods. However, such overlaps are rather fleeting on the basis that (1) the user base for both parties' goods and services is very broad and (2) large retailers or child/babycare stores will sell a variety of goods relating to children or babies. As such, in light of this and the case law I have reproduced above, I am of the view that upon taking a step back and considering the actual goods and services, it is clear that a finding of similarity between such goods is nonsensical. On this point, I am of the view that a finding of similarity for such goods simply because they are used for babies/children would offer far too broad a scope of protection for the same.

99. Regardless of the dissimilarity of the majority of the parties' goods, I find that they would be sought by overlapping sections of the relevant public. As such, I find that there exists a degree of closeness between the consumer of the relevant goods and services.

<u>The strength of the earlier mark's reputation.</u>

100. Admar's marks enjoy a strong reputation.

<u>The degree of the earlier mark's distinctive character, whether inherent or acquired through use.</u>

101. Admar's marks consist of a made-up word, being 'NUBY'. This is not descriptive or allusive to the goods relied upon and, as such, I find that they are inherently distinctive to a high degree. In terms of an enhanced degree of distinctive character, I am of the view that while the evidence is sufficient to demonstrate a

strong reputation, the inherent position is already high and I do not consider the evidence is at a high enough level to warrant an enhancing of the distinctive character to a very high degree.

Whether there is a likelihood of confusion

102. It is possible under section 5(3) grounds for the reputation of an earlier mark to be so strong that the relevant consumer may be confused even if they are confronted by the marks on dissimilar goods/services. So while a finding of confusion would fail under section 5(2)(b) grounds due to dissimilar goods/services,[22] that is not necessarily the case here.

103. The above being said, I do not consider that Admar's reputation is so strong that it would overcome the differences between the parties' marks. On this point, I appreciate that while the marks are aurally similar to a high degree, I am of the view that consumers would notice their visual differences. On this point, I refer to the case of *New Look Limited v OHIM,* joined cases T-117/03 to T-119/03 and T-171/03 which set out that where the visual component dominates the selection process for goods and services, it is permissible to give more weight to the visual comparison when considering the issue of confusion. In the present case, I appreciate that verbal considerations will apply to some degree (via word of mouth recommendations, for example), the visual component will dominate and, as such, the lower degree of visual similarity is an important consideration. Further, I am of the view that the consumer would readily identify the lack of a shared concept between them, further distinguishing the marks from one another. I say this particularly given the fact that one mark will have a known meaning but the other will not. As such, even considering a scenario where the marks are viewed on similar goods or services, there exists no likelihood of direct confusion between them.

104. In addition to the above, I see no reason why consumers would, upon noticing the differences between the marks, believe them to be those that originate from

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

the same or economically connected undertakings. While the shared use of the letter 'N' at the beginning and the letter 'B' in the body of the marks may be noticed, the marks, as wholes, will be understood as two distinct words. Despite their aural similarities, NUBY will be viewed as a made up word whereas NEWBIE will be understood as an informal English language word. As such, I consider it likely that consumers will be able to identity that the marks at issue originate from different and economically unconnected undertakings. In short, I see no reason why consumers would, upon seeing the marks (even on similar goods and knowing of Admar's reputation), believe that the differences were logical indicators consistent with either a brand extension or a sub-brand.[23] For example, it is illogical to me to suggest that consumers who know of the reputed 'NUBY' marks would believe that the undertaking responsible for that mark would change this distinct word so that it read as an informal reference to a newcomer. In addition, I see no alternative scenario wherein indirect confusion would occur.

Conclusion on link

105. In considering the issue of a link, I remind myself that Admar's pleading in respect of the present ground is:

> "The Application offends section 5(3) of the Act and should not be registered. Due to the visual, aural and conceptual similarity between the NEWBIE mark and the Opponent's NUBY marks. The Earlier Trade Marks also have a reputation in the United Kingdom and use of the NEWBIE mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the Opponent's NUBY marks."

106. I raise this here because the pleading is silent on the issue of a link. On this point, I turn to question three of section B of Admar's notice of opposition, which poses the question of whether the similarity of the marks is such that the relevant public will believe that they are used by the same undertaking or think that there is

[23] See paragraphs 16 and 17 of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10 wherein Mr Iain Purvis Q.C., set out the usual categories wherein indirect confusion would occur. While the examples given in that case are not exhaustive, Admar has not provided any indication of any alternative category of confusion.

an economic connection between them. Admar answered yes to this question and, in furnishing further details, referred to the continuation sheet, which contained only the wording I have reproduced above. As a result, Admar's case can only be read as relying on a claim that the relevant public would believe that the marks were used by the same or economically connected undertakings. Admar's pleaded case does not, therefore, make any specific reference to the relevant public being caused to wonder whether the marks were linked or whether they would call to mind one party's mark when viewing the other. This is a problem for Admar as the burden of proving a link on the basis of an economic connection is more onerous than if there was a claim that the relevant public was simply caused to wonder if the marks were linked or if they simply called the other to mind. In the present case, despite the strong reputation and high level of distinctiveness associated with Admar's marks, I fail to see how the relevant public would believe that KappAhl's mark was from the same undertaking, or an economically connected one, as the one responsible for Admar's marks. My reasoning for this is the same as when considering the issue of confusion above.

107. Even if Admar were to have pleaded that the relevant public would call to mind its own marks when confronted with KappAhl's marks, I still see no reason why there would be a link. I appreciate that the strong reputation, distinctiveness of Admar's marks and the high aural similarity between the marks are in Admar's favour. However, I consider that these are counteracted by the fact that the marks are only visually similar to a low degree, are conceptually neutral and the relative distance between the goods and services at issue. In respect of the latter point, even where there is a degree of similarity between some goods, this would not, in my view, cause the relevant public to call to mind 'NUBY' by virtue of the use of the mark 'NEWBIE'. Again, I find that this applies even where those consumers are aware of the strong reputation of 'NUBY'. As a result, I find that there would have existed no link between the parties' marks even if the present ground was pleaded accordingly. Further, and for the avoidance of doubt, I am of the view that even if any link was made, this would be fleeting and, as such, would be insufficient to give rise to the existence of any damage.

108. As a result of the above, the present ground fails in its entirety. As this ground was the only ground at issue in Admar's opposition, I find that said opposition fails.

CONCLUSION

109. Subject to any successful appeal of my decision, KappAhl's revocations have succeeded to some degree and, in respect of the same, I refer to the findings between paragraphs 73 to 79 above. Therefore, Admar's marks are revoked (either fully or partially) with effect from the dates set out at paragraphs 75, 77 and 79 above. As for Admar's opposition, this has failed it is entirely and, again subject to any successful appeal against my decision, KappAhl's mark is permitted to proceed to registered for all of the goods and services sought.

COSTS

110. On balance, I consider that KappAhl has enjoyed the greater degree of success. I say this because it has (1) succeeded in revoking all three of Admar's marks to some extent and (2) successfully defended the opposition against its mark. As such, I am of the view that KappAhl is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016.[24] That being said, I consider it appropriate to reduce the award costs to some degree in order to reflect the degree of success achieved by Admar is defending some of its goods from revocation. Further in respect of costs, I note that while KappAhl did file evidence, it was of no assistance to these proceedings. However, I am of the view that costs should still be awarded for the evidential task as KappAhl was still required to consider Admar's evidence.

111. In the circumstances, I award KappAhl the sum of £2,250 as a contribution towards its costs. The sum is calculated as follows:

Considering Admar's notice of opposition and responding to the same:	£200

[24] On the basis that these proceedings were brought prior to 1 February 2023

Preparing three revocation applications and considering Admar's response to the same:	£400
Considering Admar's evidence:	£700
Preparation for and attendance at a hearing:	£800
Sub-total:	£2,100
Reduction:	-£500
Official fees (x3) (not subject to reduction):	£600
Total:	**£2,200**

112. I hereby order Admar International, Inc to pay KappAhl Sverige AB the sum of £2,200. 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 27th day of November 2025

A COOPER
For the Registrar