O/1212/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003881531
BY CC WELLNESS LLC
TO REGISTER:

VEAUTY

AS A TRADE MARK IN CLASSES 3, 5 & 10

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 441303 BY
REINHARD KRINKE

BACKGROUND AND PLEADINGS

1. On 23 February 2023, CC WELLNESS LLC ("the applicant") applied to register the trade mark on the cover page of this decision in the UK ("the applicant's mark"). The application was published for opposition purposes on 10 March 2023 and registration is sought for the following goods:

Class 3:	Vulva and vaginal washes for personal sanitary or deodorant purposes; Non-medicated serums and masks for vulva and vaginal use; Non-medicated vulva, vaginal and pubic hair care preparations, namely, mist, lotions, creams, balms, oils, gels, powders and conditioners for vulva and vaginal use; Wax, creams, gels and lotions for removing bikini line body hair; exfoliators for vulva and vaginal use, namely, non-medicated exfoliating preparations for vulva and vaginal use.
Class 5:	Vulva and vaginal moisturizers; Vaginal lubricants; Vulva and vaginal moisturizers in the form of vaginal suppositories.
Class 10:	Sex toys.

2. On 12 June 2023, the applicant's mark was opposed by Reinhard Krinke ("the opponent") under section 5(2)(b) of the Trade Marks Act 1994 ("the Act"), for some of its goods, namely, those above in classes 3 and 5 (other than *"vaginal lubricants"* in class 5). The opposition is reliant upon the following trade mark:

International registration no. WO0000001660652

Date of protection of the international registration in UK 27 October 2022

International registration date 17 March 2022; designation date 17 March 2022

Office of origin: Germany
Relying on its goods, namely:

Class 3: Non- medicated cosmetic preparations; face masks for cosmetic purposes; eye masks for cosmetic purposes; non- medicated lip care preparations.

("the opponent's mark")

3. The opponent claims that the marks are aurally and visually highly similar and conceptually similar. Further, the opponent claims that the marks cover identical and similar goods, such that there is a clear likelihood of confusion between them.

4. In filing its counterstatement, the applicant made a series of denials in respect of the claim against it.

5. The opponent is represented by Abel & Imray LLP and the applicant is represented by Browne Jacobson LLP.[1] Both parties filed evidence. The opponent did not file evidence in reply. No hearing was requested and both parties filed written submissions in lieu. This decision is taken following a careful consideration of the papers.

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

EVIDENCE

[1] The applicant was initially unrepresented, however, on 1 September 2023, the applicant filed a TM33 appointing Browne Jacobson LLP as its representative.

7. The opponent's evidence came in the form of the witness statement of Rebecca Atkins dated 20 November 2023. Ms Atkins is a Chartered Trade Mark Attorney at the opponent's representative. This statement is accompanied by 3 exhibits, being RA1 to RA3 and was adduced to demonstrate that a wide range of cosmetic products are sold in the same sections of websites.

8. The applicant's evidence came in the form of the witness statements of Bonita Angela Trimmer and Alice Georgia Elliot-Foster dated 17 January 2024. Ms Trimmer's witness statement is accompanied by 4 exhibits, being BAT1 to BAT4. Ms Trimmer is a Solicitor at the opponent's representative. Ms Elliot-Foster's witness statement is accompanied by 2 exhibits, being AGEF1 to AGEF2. Ms Elliot-Foster is a trainee solicitor at the opponent's representative. The evidence was adduced to demonstrate that the respective goods would be sold in different sections of a shop or under different tabs of a website.

9. I do not intend to summarise the parties' evidence or submissions in lieu 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.

DECISION

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

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

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

(a) […]

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

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

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

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

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

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

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

13. The opponent's mark qualifies as an earlier trade mark under the above provisions. As set out above, the opponent's mark had not completed its registration process more than five years before the filing date of the applicant's mark, therefore, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent may rely on the goods listed above.

14. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

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

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

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

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

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

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

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

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

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

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

Comparison of the goods

15. The competing goods are as follows:

The applicant's goods	The opponent's goods
Class 3 Vulva and vaginal washes for personal sanitary or deodorant purposes; Non-medicated serums and masks for vulva and vaginal use; Non-medicated vulva, vaginal and pubic hair care preparations, namely, mist, lotions, creams, balms, oils, gels, powders and conditioners for vulva and vaginal use; Wax, creams, gels and lotions for removing bikini line body hair; exfoliators for vulva and vaginal use, namely, non-medicated exfoliating preparations for vulva and vaginal use. Class 5	Class 3 Non- medicated cosmetic preparations; face masks for cosmetic purposes; eye masks for cosmetic purposes; non- medicated lip care preparations.

Vulva and vaginal moisturizers; Vulva and vaginal moisturizers in the form of vaginal suppositories.	

16. Section 60A of the Act sets out that goods or services are not to be considered similar simply because they appear in the same classes. Alternatively, section 60A also states that goods or services are not to be considered dissimilar simply because they appear in different classes.

17. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "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".

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

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

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

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

20. *In Boston Scientific Ltd v Office for Harmonization in the Internal Market (*Trade Marks and Designs) (OHIM)**,** Case T-325/06, the General Court 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."

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

> "… Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core,

> meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

22. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

> "…the applicable principles of interpretation are as follows:
>
> (1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.
>
> (2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.
>
> (3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.
>
> (4) A term which cannot be interpreted is to be disregarded."

<u>Class 3</u>

23. In relation to the class 3 goods, the opponent submits that all of the goods in the application are cosmetic products, as they are *"all for the purpose of improving the appearance or condition of the skin or hair, or removing hair"*. As such, it submits that they are all goods that are encompassed by *"non-medicated cosmetic*

preparations" and therefore, identical on the principle outlined in *Meric.* However, in the event that I find that the applicant is correct and the terms in the application do not fall within *"non-medicated cosmetics*" they submit that the goods are identical or highly similar. This is on the basis that they share the same purpose, trade channels, nature, users and uses.

24. On the contrary, the applicant submits that the goods are either dissimilar or have a low degree of similarity. In relation to the comparisons made between the goods in the opponent's submissions, the applicant submits that the definition of cosmetics should not be interpreted as widely as has been done by the opponent. Whilst the applicant admits that there is a wide regulatory definition associated with 'cosmetics' it submits it is of the view that it is artificial to describe the opposed goods as *'cosmetic preparations'.* In support of this, the applicant drew my attention to *Youview TV Ltd v Total Ltd* [2], quoted above at paragraph 21, and submitted that the specification of the opponent's mark should not be extended beyond its ordinary and natural meaning.

25. In support of their differing views, the parties have provided different definitions of cosmetics, with the applicant submitting a definition of cosmetics from dictionary.com being *" a powder, lotion, lipstick, rouge, or other preparation for beautifying the face, skin, hair, nails, etc".* Whereas the opponent provides a definition from the Cambridge dictionary that defines cosmetics as *"substances that you put on your face or body that are intended to improve your appearance".* From these definitions, it is clear that both parties more or less agree upon the same definition. They agree that cosmetics are intended to beautify or to improve the user's appearance and can be presented in a range of different substance forms. The main point of difference is the applicant's view that the definition limits the goods to be applied to the face, skin, hair and nails. However, I do not consider that this view applies to the definition provided by the applicant itself. Specifically, the applicant's definition of *"a powder, lotion, lipstick, rouge, or other preparation for beautifying the face, skin, hair, nails, etc"* through the presence of the word 'etc' suggests the definition is wider than the body parts listed. Therefore, I agree with

[2] [2012] EWHC 3158 (Ch) at 12

the opponent that the definition provided by the applicant is wider than the *'face, skin, hair or nails'* that it makes reference to.

26. Taking the above into account, I consider that both parties agree that cosmetics are preparations (that exist in various forms) that are used to improve the user's appearance following use on the face or body. Applying this definition, I consider that *"non-medicated cosmetic preparations",* as they are to be used on the skin and body, will also include use on intimate body parts. Therefore, I consider that the opponent's aforementioned goods encompass "*non-medicated serums and masks for vulva and vaginal use", "non-medicated vulva, vaginal and pubic hair preparations, namely, mist, lotions, creams, balms, oils, gels, powders, conditioners for vulva and vaginal use", "wax, creams, gels and lotions for removing bikini line body hair" and "exfoliators for vulva and vaginal use, namely, non-medicated exfoliating preparations for vulva and vaginal use".* I have considered the case of *Youview* and taken into account the principle of interpretation of terms outlined in *Skykick* and am of the view that interpreting the opponent's term to include the applicant's goods is not *"such a liberal interpretation that their limits become fuzzy and imprecise".* Therefore, I consider the goods to be identical on the principle outlined in *Meric.*

27. However, if I am mistaken in this interpretation, I consider the goods to be similar to a high degree. This is on the basis that they will share the same purpose which is to improve the appearance of the user. In addition, I consider that the goods will share the same nature as they can all be provided in the same physical forms e.g. lotions or other preparations. I consider that there will be an overlap in users and method of use. I consider that the goods will be in competition, however, I do not consider that they are complementary. From both parties' evidence I am able to determine that the products will be sold within the same stores, however, I note that the opponent's evidence has shown that the goods may be sold on the same sections of websites,[3] but the applicant's evidence suggests that it may not share the same shelf stand within the store.[4] Taking this into account, I consider that

[3] Exhibit RA1 of the Witness Statement of Rebecca Atkins
[4] Exhibit BAT1 of the Witness Statement on Bonita Angela Trimmer

there will be a level of overlap in trade channels. Consequently, I consider the goods to be highly similar.

28. In relation to *"vulva and vaginal washes for personal sanitary or deodorant purposes"*, I consider that there is a level of similarity with *"non-medicated cosmetic preparations".* I am not of the view that the goods will share purpose as the applicant's goods are for personal sanitary purposes whereas the opponent's goods are to improve the user's appearance. However, I do consider that there may be an overlap in the physical nature of the goods provided as they may be provided in the form of e.g. gels or balms etc. In addition, I consider that there will be an overlap in method of use and users. In my view, the goods are not in competition because the average consumer seeking to beautify oneself would not select a personal sanitary product over a beautification product. In addition, I do not consider that the goods are complementary. Taking the above into account, I consider the goods to be similar to a low to medium degree.

Class 5

29. The opponent submits that the class 5 goods in the applicant's specification are similar to the opponent's goods, however, it does not specify to what degree it deems them to be similar. In particular, the opponent submits that the class 5 goods against which the opposition is directed are all dermatological products for moisturising the skin. Further it submits that *"one of the purposes of these products will be to improve the appearance/condition of the skin around the vagina and vulva".* The opponent goes onto submit that the *"opponent's class 3 goods ("cosmetic preparations") include moisturising creams for any part of the body […] and the applicant's medicated products may be used instead of or in conjunction with the class 3 goods covered by the earlier mark"*. The opponent draws my attention to the decision of *Rosegold BL O/0640/23*, where the Hearing Officer held that there was similarity between *"moisturising creams [pharmaceutical]"* and *"moisturising creams*" in class 3. I am not bound by the previous decisions of Hearing Officers and note that the comparison provided is not between these goods before me now. To the contrary, the applicant submits that the goods are either dissimilar or have a low degree of similarity.

30. Applying the definition of cosmetics above, I agree with the opponent that the opponent's *"non-medicated cosmetic preparations*" (in class 3) will include moisturising creams. However, the comparison is between *"non-medicated cosmetic preparations"* and the applicant's goods not *"moisturising creams"* and the applicant's goods. I consider that there will be similarity between the "*vulva and vaginal moisturizers*" in the applicant's specification (in class 5) and the opponent's "*non-medicated cosmetic preparations"* (in class 3). I agree with the opponent that there will be an overlap in nature, method of use and users. In addition, I consider that there will be some overlap in purpose as the applicant's goods may also be used to improve the appearance of intimate areas. However, I do recognise that the applicant's goods specific purpose will be for medical purposes, such as for addressing the user's vaginal dryness and discomfort. In relation to trade channels, given that medicated vulva and vaginal moisturisers may be sold over the counter, they will share the same trade channels: this is supported by evidence in exhibit RA1 of the witness statement of Rebecca Atkins. In addition, I do not consider that the goods are complementary, but they may be in competition, to some extent, as the user may select one of the goods over the other. Therefore, taking the above into consideration, I find the goods to be similar to a medium degree.

31. I consider that there is similarity between *"non-medicated cosmetic preparations"* (in class 3) in the opponent's specification and *"vulva and vaginal moisturizers in the form of vaginal suppositories"* (in class 5) in the applicant's specification. I agree with the opponent that the goods will coincide in nature, as the goods may be presented in the same physical form e.g., solid forms. However, I do not consider that the user of the goods will be the same. I do not consider that the method of use will be the same, as the opponent's goods use to improve the appearance will be used externally whereas the applicant's goods will be applied internally. I do not consider that the goods will coincide in purpose, as the opponent's goods will improve the appearance of the user whereas the applicant's goods are used to alleviate friction and dryness. I consider that the goods will be sold by the same retail outlets and the evidence provided by the applicant

demonstrates that the goods will be sold in the same part of the store.[5] I do not consider that the goods will be in competition, as I am not of the view that someone looking to improve their appearance will select a vaginal suppository. In addition, I do not consider that there is any complementarity between the goods. Therefore, I consider the goods to be similar to a low degree.

The average consumer and the nature of the purchasing act

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

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

33. The opponent submits that the average consumer will be the general public, who will select the goods frequently. In addition, it submits that the costs are likely to vary but on balance it is likely to be relatively low (as shown by the evidence submitted by the parties). The opponent submits that the average consumer will consider factors such as cost, aesthetic, scent and suitability whilst selecting the goods and the visual considerations will be more important. The opponent also submitted that the average consumer would pay a medium degree of attention when selecting goods. In contrast, the applicant submits that the average consumer *"is a consumer of sexual wellbeing products designed to be applied to*

[5] Exhibit BAT 1 of the Witness Statement of Bonita Angela Trimmer, pgs 4-6

or inserted in the vulva or vagina in close proximity to these intimate areas". The applicant submits that the level of attention paid by the average consumer will be high due to the *"sensitivity of such body parts".*

34. I agree with the opponent, that the average consumer will be the general public at large. I consider that the members of the general public will select the goods via general retailers and their online equivalents. In physical stores, the goods will be displayed on shelves where they will be self-selected by the consumer. When the purchase takes place online, the goods will be selected after viewing an image on a webpage. I note the opponent's submissions that the visual considerations are the most important aspect and I agree. Clearly, the visual component will dominate the selection process, although I do not discount the aural component entirely as suggestions may come via word-of-mouth recommendations or advice from sales assistants.

35. I consider that the goods are likely to be selected on a fairly frequent basis and at a varying cost (although I do not consider that this extends to highly expensive goods). When selecting the goods, I recognise that the average consumer may consider the factors outlined by the opponent, being cost, aesthetic, scent and suitability. In addition, I consider factors such as the ingredients and whether the goods have been tested on animals will also be considered.

36. I note the applicant's submissions that the degree of attention paid by the average consumer will be high *"because of the notorious sensitivity of the skin of such body parts. The average consumer is also likely to care about the appearance of such body parts and will therefore want to avoid bikini rash and other similar uncomfortable and unsightly common and well-known skin reactions in this area".* I acknowledge that some of the goods will be used in and around the most intimate and sensitive parts of the body. That being said, I find that the average consumer will be careful to ensure that the products chosen are precisely what they require and are safe and fit for purpose. Consequently, I find that the average consumer will pay at least a medium degree of attention during the selection of such goods.

Comparison of the marks

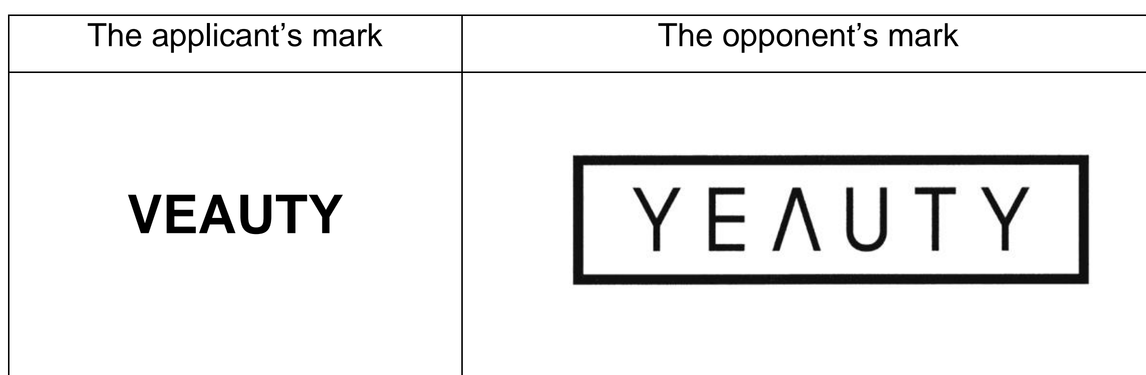
37. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

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

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

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

40. The respective trade marks are shown below:



The applicant's mark	The opponent's mark
VEAUTY	YEΛUTY

41. For the avoidance of doubt, this is a notional assessment and I will confirm here that marks registered as word only marks (such as the applicant's) are capable of being used in any standard typeface and in either upper case, lower case or any customary combination of the two. Further, marks registered, or sought to be registered, in black and white (being both parties' marks) are capable of being used in any colour.

42. I note the opponent submits that the marks are visually and aurally highly similar. In addition, the opponent submits that both marks allude to the word 'beauty' and are conceptually similar. As for the applicant, I note that it has made submissions as to the similarity of the marks, namely that they are not similar and, in the alternative (to the extent that any similarity is found), that they should be viewed as having no more than a very low degree of similarity. I will discuss the remainder of the applicant's submissions below.

<u>Overall impression</u>

43. The applicant's mark is a word mark that consists of 'VEAUTY', presented in a standard typeface. Both parties submitted that the mark is allusive of the word 'Beauty' and, therefore, I consider it to be allusive of the applicant's goods in class 3. There are no other elements to the mark; the overall impression of the mark lies in the word itself. This is a plain word mark, so it is protected in whichever form, colour and typeface it is used in.[6]

44. The opponent's mark consists of 'YEΛUTY' presented in bold black typeface, surrounded by a black rectangular border. Both parties submitted that the mark is allusive of the word beauty and, therefore, I consider it to be allusive of the opponent's goods at issue. I recognise that the parties consider that the 'Λ' used in place of an 'A' will be perceived differently. On one hand the opponent submitted that the stylisation is minimal and the difference could go unnoticed. On the other hand the applicant submits that this element is *"eye-catching, far from negligible […] and play an important part in the overall assessment of similarity"* and that the

[6] *La Superquimica v EUIPO,* Case T-24/17, paragraph 39.

average consumer will *"recognise that this is not a character used in the English language".* In my view, I consider that a significant proportion of consumers will not notice the 'Λ' being used in place of an 'A'. The greater role in the overall impression will be paid to the word 'YEΛUTY', with the border playing a lesser role.

Visual comparison

45. Visually, the marks share the letters 'E'-'U'-'T'-'Y'. The marks differ in the 'Λ' that is used in place of an 'A' in the opponent's mark, I have found that this will be seen as the letter 'A'. As such, the only point of visual difference comes in the letters 'Y' and 'V' that appear at the beginning of the parties' marks respectively, the rectangular border and in the presentation. Whilst these points of difference play lesser roles in the overall impression of the mark, they are still points of visual difference. Taking all of this into account, I am of the view that the marks are visually similar to a high degree.

Aural comparison

46. I note that the applicant submits that the 'Λ' in the opponent's mark makes it difficult to know how the mark will be pronounced. The opponent submits that the marks will be pronounced in the same way as the word 'BEAUTY' with 'View' and 'Yew' being pronounced at the beginning of the respective marks. As I have mentioned above, I consider a significant proportion of average consumers will see the 'Λ' as an 'A'. I agree with the opponent's submission on how the marks will be pronounced. The marks will differ in the pronunciation of 'View' and 'Yew' but will share the remainder of the pronunciation. Taking this into account, I consider that the marks are aurally similar to a high degree.

Conceptual comparison

47. The opponent submits that both marks allude to the word 'Beauty' and are therefore, conceptually similar. The applicant admits that the average consumer may see the marks as an allusion to beauty but argues that the consumer will immediately recognise the 'V' in the application as an "*abbreviated playful*

reference to vagina or vulva". Further, it submits that where the goods are expressly restricted to *"vulva or vaginal use […] this conceptual meaning is still clearly implied by proximity".* The applicant submits that the 'Y' in the opponent's mark has no conceptual meaning in respect of the goods protected.

48. The applicant draws my attention *to Whyte and Mackay v Origin, Easygroup Ltd v Easy live (Services) Ltd & Ors* and *Nicoventures v The London Vape Company* to demonstrate that *"if marks overlap exclusively in an element that is non-distinctive for the relevant goods (as here) and both contain other distinctive element(s) capable of differentiating between them (as here), they should be considered dissimilar*". The applicant claims that due to a lack of distinctiveness in the word 'Beauty', in relation to the goods at issue, the marks only overlap in relation to the non-distinctive element. However, firstly I remind myself that Arnold J (as he was then) in *Whyte and Mackay* stated that *"the first is that the assessment of the likelihood of confusion must be made by considering and comparing the respective marks – visually, aurally and conceptually-as a whole".* Whilst the applicant states that the conceptual meaning of the marks should first be compared, its suggested comparison is not that of the marks as a whole. Rather it is suggesting that the marks should be artificially dissected and then compared. In considering the approach I should take when considering any dissection of the mark, I remind myself that in *Whyte and Mackay* Arnold J goes on to say:

> "19. […] In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.
>
> 20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate

components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors."

49. I do not consider that any of the above examples apply in this instance and therefore, it is clear that the marks should be compared as a whole and not of 'V'/'Y' and then separately as an allusion to the word 'Beauty' as has been suggested by the applicant.

50. I am not of the view that the opponent's border and stylisation will convey a concept. Therefore, any concept is to be derived solely from the word 'VEAUTY'. I appreciate that, as per the case of EMILIANA,[7] conceptual comparisons are usually done without reference to the goods at issue. However, I am of the view that, in the present case, the consumer will look to the goods at issue to inform the meaning of the mark. As such, I find that, as submitted by both parties, 'VEAUTY' and 'YEAUTY' will be understood as a play on the word 'Beauty'. As such, I find that the conceptual impact of the applicant's mark will be that as associated with the opponent's. The marks are, therefore, conceptually identical. Whilst my primary position is that the marks are conceptually identical, I recognise that if the marks are both seen as a play on the word 'beauty' but different plays on the word, the finding may differ. In the alternative, I find that the marks are conceptually similar to a high degree.

Distinctive character of the opponent's mark

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[7] Case BL O/052/22

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

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51)."

52. 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, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has not filed any evidence of use to that effect and, therefore, I have only the inherent position to consider.

53. I note that the applicant in its submissions accepts, for the purposes of the opposition, that the opponent's mark is not devoid of distinctive character and submits that the mark has only *"'needlepoint' or 'eggshell'"* inherent distinctiveness. I interpret this to mean a submission of a low inherent distinctive character. On the

other hand, the opponent submits that as the opponent’s mark is an invented word it has a high degree of distinctiveness. Further, they submit that *“it may allude to BEAUTY but does so in a highly particularised way”.*

54. As set out above, ‘YEΛUTY’ will be understood as a play on the word ‘Beauty’. I consider this to be strongly allusive. As a result, I am of the view that the inherent distinctiveness of the opponent’s mark sits on the lower end of the scale. That being said, the mark is not directly descriptive and, in my view, the presence of the letter ‘Y’ at the beginning of the mark and the ‘Λ’ does impart on the mark some distinctive character. As a result, I am of the view that the opponent’s mark is inherently distinctive to between a low to medium degree.

Likelihood of confusion

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

56. I have found the goods to vary in similarity from identical to similar to a low degree. The average consumer base is formed of members of the general public who will select the goods primarily via visual means (although I do not discount an aural component). Members of the general public will select the goods after having paid

a medium degree of attention. I have found the marks at issue to be visually and aurally similar to a high degree. I have found the marks to be conceptually identical, or in the alternative, if the marks are seen as a play on the word 'beauty' but different plays on the word, conceptually similar to a high degree. I have found the opponent's mark to enjoy a low to medium degree of inherent distinctive character.

57. The applicant draws my attention to the case of *Mundicor v Mundicolour*[8] to demonstrate that more attention is given to the beginning of marks and state that there should be no likelihood of confusion found, due to the different beginnings of the parties' marks in this instance. I note that the marks share a common ending, this is often deemed not as persuasive in a finding of a likelihood of confusion as a shared common beginning. This is on the basis that it is believed that consumers place more emphasis on pronouncing the initial elements[9] and that the latter elements will be noticed less by consumers.[10] This is to the benefit of the applicant's submission of no likelihood of confusion. However, I recognise that this does not preclude a finding of a likelihood of confusion.

58. Taking all of the above factors into account and particularly bearing in mind the principle of imperfect recollection, I consider that the parties' marks will be misremembered or inaccurately recalled for one another. As previously mentioned, I consider that the average consumer will not notice the 'Λ' being used in place of an 'A' in the opponent's mark. In addition, I consider that the average consumer will overlook the stylisation in the marks and the border around the outside of the opponent's mark, which I have found to play lesser roles in the overall impression of the mark. Whilst I recognise that the marks differ in the first letter, being 'Y' and 'V' respectively, I consider that the first letters are highly similar in appearance; with the stem at the base on the 'Y' being the point of difference. Further, the last letters 'EAUTY' in the mark are identical. I consider that the differences between the marks will be overlooked or misremembered, and the conceptual identity/high similarity and high visual/aural similarity of the marks will add to this. Therefore, I

[8] T-183/02
[9] *El Corte Ingles v OHMI (MUNICOR)* (n114), [83].
[10] *Proctor & Gamble v OHMI* (n, 137), [49]

consider that there is a likelihood of direct confusion between the marks. This finding extends to all of the goods for which I found similarity, including the goods that I found to be similar to a low degree.

CONCLUSION

59. The opposition succeeds in its partial opposition and the applicant's mark is, subject to any successful appeal of my decision, refused registration for the following goods:

Class 3: Vulva and vaginal washes for personal sanitary or deodorant purposes; Non-medicated serums and masks for vulva and vaginal use; Non-medicated vulva, vaginal and pubic hair care preparations, namely, mist, lotions, creams, balms, oils, gels, powders and conditioners for vulva and vaginal use; Wax, creams, gels and lotions for removing bikini line body hair; exfoliators for vulva and vaginal use, namely, non-medicated exfoliating preparations for vulva and vaginal use.

Class 5: Vulva and vaginal moisturizers; Vulva and vaginal moisturizers in the form of vaginal suppositories.

60. The following goods will proceed to registration:

Class 5: Vaginal lubricants

Class 10: Sex toys

COSTS

61. The opponent has succeeded and, therefore, is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023.

62. In the circumstances, I hereby award the opponent the sum of £1,250 as a contribution towards its costs. The sum is calculated as follows:

Preparing the notice of opposition and considering the counterstatement:	£250
Considering the applicant's evidence and filing its evidence:	£600
Written submissions in lieu:	£300
Official fees:	£100
Total:	**£1,250**

63. I hereby order CC Wellness LLC to pay Reinhard Krinke the sum of £1,250. 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 20th day of December 2024

AKLASS
For the Registrar