

O/307/13

**THE TRADE MARKS (INTERNATIONAL REGISTRATION) ORDER 2008 AND  
THE TRADE MARKS ACT 1994**

**IN THE MATTER OF INTERNATIONAL REGISTRATION NO.1080509  
IN THE NAME OF**

**EKE TEKSTIL KONFEKSIYON TURIZM SANAYI VE TICARET ANONIM SIRKETI**

**AND THE APPLICATION TO EXTEND PROTECTION IN THE UK TO**

**HYDROCOTTON**

**IN CLASSES 18, 22, 23, 24, 25, 26 and 27**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO.72385**

**BY**

**WELSPUN GLOBAL BRANDS LIMITED**

## BACKGROUND

1. Eke Tekstil Konfeksiyon Turizm Sanayi Ve Ticaret Anonim Sirketi (the applicant) is the holder of the international registration for the trade mark **HYDROCOTTON**. The United Kingdom was designated in respect of the international registration on 4 May 2011.

2. The international registration was published, for opposition purposes, on 2 December 2011 for goods and services in classes 18, 22, 23, 24, 25, 26 and 27 of the Nice Classification System<sup>1</sup>, as follows:

Class 18:

Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.

Class 22:

Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes); padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials.

Class 23:

Yarns and threads, for textile use.

Class 24:

Textiles and textile goods, not included in other classes; bed and table covers.

Class 25

Clothing, footwear, headgear.

Class 26

Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers.

Class 27

Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile).

3. Following acceptance and publication by the Registry, Welspun Global Brands Limited (the opponent) filed notice of opposition against the application.

4. The ground of opposition was brought under section 5(2)(b) of the Trade Marks Act 1994 (the Act).

5. The opposition is directed at all of the applicant's goods and services. The opponent relies upon the mark shown below.

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<sup>1</sup> *International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).*

<b>Mark details and relevant dates</b>	<b>Goods and services</b>
<b>CTM:</b> 8482341  <b>MARK:</b>  HYGROCOTTON  <b>Filing date:</b> 10 August 2009  <b>Registration date:</b> 22 March 2010	<b>Class 22</b>
	Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes); padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials.
	<b>Class 23</b>
	Yarns and threads, for textile use; cotton thread and yarn; linen thread and yarn; spun cotton; thread; spun wool; woollen thread and yarn.
	<b>Class 24</b>
	Textile and textile goods, not included in other classes; bed and table covers; bath linen, except clothing; bed blankets; bed clothes; bed covers; bed covers of paper; bed linen; bedspreads; bolting cloth; chenille fabric; cloth; cotton fabrics; furniture coverings of textile; coverlets [bedspreads]; covers for cushions; covers [loose] for furniture; curtains of textile or plastic; damask; door curtains; fabric; fabrics for textile use; face towels of textile; fibreglass fabrics for textile use; flannel [fabric]; sanitary flannel; frieze [cloth]; glass cloths [towels]; handkerchiefs of textile; household linen; jersey [fabric]; knitted fabric; linen cloth; diapered line; linings [textile]; napkins, of cloth, for removing make-up; marabouts [cloth]; mattress covers; table napkins of textile; non-woven textile fabrics; pillow shams; pillowcases; place mats, not of paper; quilts; travelling rugs [lap robes]; sheets [textile]; shower curtains of textile or plastic; silk [cloth]; silk fabrics for printing patterns; table linen, not of paper; table napkins of textile; tablecloths, not of paper; tablemats, not of paper; tissues of textile for removing make-up; towels of textile; velvet; woollen cloth and woolen fabric.
	<b>Class 25</b>
Clothing, footwear, headgear; bathrobes and waterproof clothing.	
<b>Class 26</b>	
Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; needle cushions and pin cushions.	
<b>Class 27</b>	

	Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile); artificial turf; automobile carpets; bath mats; floor coverings; mats of woven rope for ski slopes and non-slip mats.
	<p><b>Class 35</b></p> <p>Retail services connected with the sale of ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes), padding and stuffing materials (except of rubber or plastics), raw fibrous textile materials, yarns and threads, for textile use, cotton thread and yarn, linen thread and yarn, spun cotton, thread, spun wool, woollen thread and yarn, textile and textile goods, not included in other classes, bed and table covers, bath linen, except clothing, bed blankets, bed clothes, bed covers, bed covers of paper, bed linen, bedspreads, bolting cloth, chenille fabric, cloth, cotton fabrics, furniture coverings of textile, coverlets [bedspreads], covers for cushions, covers [loose] for furniture, curtains of textile or plastic, damask, door curtains, fabric, fabrics for textile use, face towels of textile, fibreglass fabrics for textile use, flannel [fabric], sanitary flannel, frieze [cloth], glass cloths [towels], handkerchiefs of textile, household linen, jersey [fabric], knitted fabric, linen cloth, diapered line, linings [textile], napkins, of cloth, for removing make-up, marabouts [cloth], mattress covers, table napkins of textile, non-woven textile fabrics, pillow shams, pillowcases, place mats, not of paper, quilts, travelling rugs [lap robes], sheets [textile], shower curtains of textile or plastic, silk [cloth], silk fabrics for printing patterns, table linen, not of paper, table napkins of textile, tablecloths, not of paper, tablemats, not of paper, tissues of textile for removing make-up, towels of textile, velvet, woollen cloth, woolen fabric, clothing, footwear, headgear, bathrobes, waterproof clothing, lace and embroidery, ribbons and braid, buttons, hooks and eyes, pins and needles, artificial flowers, needle cushions, pin cushions, carpets, rugs, mats and matting, linoleum and other materials for covering existing floors, wall hangings (non-textile), artificial turf, automobile carpets, bath mats, floor coverings, mats of woven rope for ski slopes and non-slip mats.</p>

6. In its statement of grounds the opponent states:

*“4. When comparing the trade mark applied for HYDROCOTTON with the earlier trade mark HYGROCOTTON, it is clear that both marks are both visually and aurally very similar...In respect of the goods applied for as opposed, they are identical or similar to those covered by the earlier registration.”*

7. On 8 June 2012 the applicant filed a counter statement in which it states:

*“3. The Applicant denies that its mark is visually, phonetically or conceptually similar to the Opponent’s Mark and in particular denies the marks are “both visually and aurally very similar”, as asserted by the Opponent. The Applicant also denies that the marks are “virtually phonetically indistinguishable” and that both third letters are dominated by the letters “RO” that follows them. On the contrary the different letters in the marks (D and G) serve to distinguish them, since they produce two different elements HYDRO and HYGRO which look and sound different and also mean very different things...”*

4. As to the goods applied for, the Applicant admits that its goods in classes 22, 23, 24, 25, 26 and 27 are identical and similar to those covered by the Opponent's Mark. However, the Applicant denies that its goods in class 18 are identical or similar to the goods covered by the Opponent's Mark...In any event, there is no likelihood of confusion (even for the identical or similar goods) because the marks themselves are dissimilar."

8. The opponent's mark is an earlier mark not subject to proof of use because, at the date of publication of the application, it had not been registered for five years.<sup>2</sup>

9. Both parties filed submissions during the period allowed for filing evidence and both filed submissions in lieu of attendance at a hearing. Neither party requested a hearing, both content for a decision to be made from the papers on file.

## DECISION

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

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

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

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

## Relevant case law

11. In his decision in *La Chemise Lacoste SA v Baker Street clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the CJEU cases mentioned) on the basis indicated below:

## The CJEU cases

*Sabel BV v Puma AG* [1998] RPC 199; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77; *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-6/01; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04; *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P.

## The principles

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

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<sup>2</sup> See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations 2004: SI 2004/946) which came into force on 5th May 2004.

(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

### **The average consumer and the nature of the purchasing act**

12. In accordance with the above cited case law, I must determine who the average consumer is and consider the nature of the purchasing process. The average consumer is reasonably well informed and reasonably circumspect and observant, but with a level of attention likely to vary according to the category of goods at issue. The attention paid is likely to vary depending on price and, to some extent, the nature of the goods and the frequency of the purchase.

13. The respective parties' goods and services cover a range of products, the majority of which are textiles and fabrics (including the yarns and fibres from which they are made) and their resulting finished products. The average consumer of these goods and retail services may be a member of the general public purchasing, inter alia, a tent, a pillowcase,

an item of clothing or a rug, or they may be a person sourcing raw materials for the production of textiles (either in a professional or amateur capacity). The goods cover a range of products which vary in price and frequency of purchase. Consequently, the level of attention is likely to vary: a large tent will be a fairly expensive, infrequent purchase which will demand a higher level of attention to be paid than, for example, buying a pillow case or t-shirt. Similarly, someone buying a cushion cover or tablecloth for their home is unlikely to pay the same degree of attention to the purchase as a weaver or carpet maker sourcing raw materials.

14. Specifically, in respect of the goods in class 25, in considering the level of attention that will be paid to such a purchase and the nature of the purchasing act, I am mindful of the decision of the General Court (GC) in *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined cases T-117/03 to T-119/03 and T-171/03, in which it commented:

"43. It should be noted in this regard that the average consumer's level of attention may vary according to the category of goods or services in question (see, by analogy, Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 26). As OHIM rightly pointed out, an applicant cannot simply assert that in a particular sector the consumer is particularly attentive to trademarks without supporting that claim with facts or evidence. As regards the clothing sector, the Court finds that it comprises goods which vary widely in quality and price. Whilst it is possible that the consumer is more attentive to the choice of mark where he or she buys a particularly expensive item of clothing, such an approach on the part of the consumer cannot be presumed without evidence with regard to all goods in that sector. It follows that that argument must be rejected." ...

53. Generally in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly the visual aspect plays a greater role in the global assessment of the likelihood of confusion."

15. In the case of all of these goods (which may be bought by a member of the general public) the purchase is likely to be primarily visual, the product being selected from a shelf or website, largely based on the appearance of the goods which are either to be worn or used in the home in such a way that aesthetic considerations will form part of the selection process. The professional consumer buying materials for the production of textiles is likely to make a more considered purchase as they will want to ensure the finished textile goods, inter alia, looks as they should and are of sufficient quality. The purchase is likely to be primarily visual as it is likely to be made directly from a shelf, catalogue or from a website.

### **Comparison of goods and services**

16. The goods and services to be compared are as follows:

<b>Opponent's goods and services</b>	<b>Applicant's goods and services</b>
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	<p><b>Class 18:</b> Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery.</p>
<p><b>Class 22:</b> Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes); padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials.</p>	<p><b>Class 22:</b> Ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes); padding and stuffing materials (except of rubber or plastics); raw fibrous textile materials.</p>
<p><b>Class 23:</b> Yarns and threads, for textile use; cotton thread and yarn; linen thread and yarn; spun cotton; thread; spun wool; woollen thread and yarn.</p>	<p><b>Class 23:</b> Yarns and threads, for textile use.</p>
<p><b>Class 24:</b> Textile and textile goods, not included in other classes; bed and table covers; bath linen, except clothing; bed blankets; bed clothes; bed covers; bed covers of paper; bed linen; bedspreads; bolting cloth; chenille fabric; cloth; cotton fabrics; furniture coverings of textile; coverlets [bedspreads]; covers for cushions; covers [loose] for furniture; curtains of textile or plastic; damask; door curtains; fabric; fabrics for textile use; face towels of textile; fibreglass fabrics for textile use; flannel [fabric]; sanitary flannel; frieze [cloth]; glass cloths [towels]; handkerchiefs of textile; household linen; jersey [fabric]; knitted fabric; linen cloth; diapered line; linings [textile]; napkins, of cloth, for removing make-up; marabouts [cloth]; mattress covers; table napkins of textile; non-woven textile fabrics; pillow shams; pillowcases; place mats, not of paper; quilts; travelling rugs [lap robes]; sheets [textile]; shower curtains of textile or plastic; silk [cloth]; silk fabrics for printing patterns; table linen, not of paper; table napkins of textile; tablecloths, not of paper; tablemats, not of paper; tissues of textile for removing make-up; towels of textile; velvet; woollen cloth and woolen fabric.</p>	<p><b>Class 24:</b> Textiles and textile goods, not included in other classes; bed and table covers.</p>
<p><b>Class 25:</b> Clothing, footwear, headgear; bathrobes and waterproof clothing.</p>	<p><b>Class 25</b> Clothing, footwear, headgear.</p>



<p><b>Class 26</b> Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers; needle cushions and pin cushions.</p>	<p><b>Class 26</b> Lace and embroidery, ribbons and braid; buttons, hooks and eyes, pins and needles; artificial flowers.</p>
<p><b>Class 27</b> Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile); artificial turf; automobile carpets; bath mats; floor coverings; mats of woven rope for ski slopes and non-slip mats.</p>	<p><b>Class 27</b> Carpets, rugs, mats and matting, linoleum and other materials for covering existing floors; wall hangings (non-textile).</p>
<p><b>Class 35</b> Retail services connected with the sale of ropes, string, nets, tents, awnings, tarpaulins, sails, sacks and bags (not included in other classes), padding and stuffing materials (except of rubber or plastics), raw fibrous textile materials, yarns and threads, for textile use, cotton thread and yarn, linen thread and yarn, spun cotton, thread, spun wool, woollen thread and yarn, textile and textile goods, not included in other classes, bed and table covers, bath linen, except clothing, bed blankets, bed clothes, bed covers, bed covers of paper, bed linen, bedspreads, bolting cloth, chenille fabric, cloth, cotton fabrics, furniture coverings of textile, coverlets [bedspreads], covers for cushions, covers [loose] for furniture, curtains of textile or plastic, damask, door curtains, fabric, fabrics for textile use, face towels of textile, fibreglass fabrics for textile use, flannel [fabric], sanitary flannel, frieze [cloth], glass cloths [towels], handkerchiefs of textile, household linen, jersey [fabric], knitted fabric, linen cloth, diapered line, linings [textile], napkins, of cloth, for removing make-up, marabouts [cloth], mattress covers, table napkins of textile, non-woven textile fabrics, pillow shams, pillowcases, place mats, not of paper, quilts, travelling rugs [lap robes], sheets [textile], shower curtains of textile or plastic, silk [cloth], silk fabrics for printing patterns, table linen, not of paper, table napkins of textile, tablecloths, not of paper, tablemats, not of paper, tissues of textile for removing make-up, towels of textile, velvet, woollen cloth, woolen fabric, clothing, footwear, headgear, bathrobes, waterproof clothing, lace and embroidery, ribbons and braid, buttons, hooks and eyes, pins and needles, artificial flowers, needle cushions, pin cushions, carpets, rugs, mats and matting, linoleum and other materials for covering existing floors, wall hangings (non-textile), artificial turf, automobile carpets, bath mats, floor coverings, mats of woven rope for ski slopes and non-slip mats.</p>	

17. In comparing the goods and services, I bear in mind the following guidance provided by the General Court (GC) in *Gérard Meric v OHIM*, Case T-133/05:

“29. ...goods can be considered identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

18. Other factors which may be considered include the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 (hereafter *Treat*) for assessing similarity between goods and services:

- (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 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, taking into account how goods/services are classified in trade.

19. I also bear in mind the decision in *El Corte Inglés v OHIM* Case T-420/03, in which the court commented:

“96...goods or services which are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (Case T-169/03 *Sergio Rossi v OHIM-Sissi Rossi* [2005] ECR II-685)”

20. I also take note of the case of *Les Éditions Albert René V Office for Harmonisation in the Internal Market (Trade Marks & Designs)* (OHIM) T-336/03, where it was held:

“The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”

## The applicant's class 18 goods

21. The applicant's specification includes the following in class 18: Leather and imitations of leather, and goods made of these materials and not included in other classes; animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery. The opponent does not have any goods in class 18, its closest goods being those in class 25: clothing, footwear and headgear, bathrobes and waterproof clothing.

22. In making a comparison between the parties' goods in these classes I note *El Corte Inglés SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case T-443/05) in which the GC considered the clash between goods in classes 18 and 25. The court said:

“42. First, the goods in class 25 and those in class 18 are often made of the same raw material, namely leather or imitation leather. That fact may be taken into account when assessing the similarity between the goods. However, given the wide variety of goods which can be made of leather or imitation leather, that factor alone is not sufficient to establish that the goods are similar (see, to that effect, Case T-169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 55).

43. Second, it is apparent that the distribution channels of some of the goods at issue are identical. However, a distinction must be made according to whether the goods in class 25 are compared to one or other of the groups of goods in class 18 identified by OHIM.

44. On the one hand, as regards the second group of goods in class 18 (leather and imitations of leather, animal skins, hides; trunks and travelling bags; umbrellas, parasols and walking sticks; whips, harness and saddlery), the Board of Appeal rightly held that the distribution channels were different from those used for the distribution of goods in class 25. The fact that those two categories of goods may be sold in the same commercial establishments, such as department stores or supermarkets, is not particularly significant since very different kinds of goods may be found in such shops, without consumers automatically believing that they have the same origin (see, to that effect, Case T-8/03 *El Corte Inglés v OHIM – Pucci (EMILIO PUCCI)* [2004] ECR II-4297, paragraph 43).

45. On the other hand, as regards the first group of goods in class 18, namely leather and imitation leather goods not included in other classes such as, for example, handbags, purses or wallets, it should be noted that those goods are often sold with goods in class 25 at points of sale in both major retail establishments and more specialised shops. That is a factor which must be taken into account in assessing the similarity of those goods.

46. It must be recalled that the Court has also confirmed the existence of a slight similarity between 'ladies' bags' and 'ladies' shoes' (SISSI ROSSI, paragraph 42 above, paragraph 68). That finding must be extended to the relationships between all the goods in class 25

designated by the mark applied for and the leather and imitation leather goods not included in other classes, in class 18, designated by the earlier mark.

47. In light of the foregoing, it must be held that there is a slight similarity between the goods in class 25 and the first group of goods in class 18. Consequently, the Board of Appeal could not conclude that there was no likelihood of confusion on the part of the relevant public solely on the basis of a comparison of the goods concerned.

48. As to whether clothing, footwear and headgear in class 25 are complementary to 'leather and imitations of leather, and goods made of these materials and not included in other classes' in class 18, it must be recalled that, according to the case-law, goods are complementary if 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 the production of those goods lies with the same undertaking (SISSI ROSSI, paragraph 42 above, paragraph 60).

49. Goods such as shoes, clothing, hats or handbags may, in addition to their basic function, have a common aesthetic function by jointly contributing to the external image ('look') of the consumer concerned.

50. The perception of the connections between them must therefore be assessed by taking account of any attempt at coordinating presentation of that look, that is to say coordination of its various components at the design stage or when they are purchased. That coordination may exist in particular between clothing, footwear and headgear in class 25 and the various clothing accessories which complement them such as handbags in class 18. Any such coordination depends on the consumer concerned, the type of activity for which that look is put together (work, sport or leisure in particular), or the marketing strategies of the businesses in the sector. Furthermore, the fact that the goods are often sold in the same specialist sales outlets is likely to facilitate the perception by the relevant consumer of the close connections between them and strengthen the perception that the same undertaking is responsible for the production of those goods.

51. It is clear that some consumers may perceive a close connection between clothing, footwear and headgear in class 25 and certain 'leather and imitations of leather, and goods made of these materials and not included in other classes' in class 18 which are clothing accessories, and that they may therefore be led to believe that the same undertaking is responsible for the production of those goods. Therefore, the goods designated by the mark applied for in class 25 show a degree of similarity with the clothing accessories included in 'leather and imitations of leather, and goods made of these materials and not included in other classes' in class 18 which cannot be classified as slight."

23. Applying the logic in *El Corte Inglés* to these specifications, there is a degree of similarity between the opponent's "(Articles of) clothing, footwear and headgear" in class

25 and “Leather and imitations of leather, and goods made of these materials and not included in other classes, travelling bags” in the application (insofar as they may be clothing accessories and form part of a coordinated look).

24. As to the remaining goods in class 18 of the application (except umbrellas, which I will consider separately, below), namely, “animal skins, hides, trunks, parasols and walking sticks, whips, harness and saddlery”, while the users of the respective goods may be the same, and while some of the goods may be made from the same raw material as the opponent’s goods in class 25 (leather for example), and while some of the competing goods will inevitably be sold in the same retail stores or on the same websites, these factors alone are not sufficient to establish that the goods are similar. Given what I consider to be the very different intended purposes and methods of use of the goods which remain and the opponent’s goods in class 25, combined with the fact that they are not, in my view, either in competition with nor are they complementary to the opponent’s goods in class 25, I am led to conclude that the remaining goods are not similar to the opponent’s goods in class 25 nor to its goods in class 35 insofar as they relate to the retailing of clothing.

25. Turning to the umbrellas in the application, I will consider these separately on the basis that the opponent’s class 25 specification includes ‘waterproof clothing’ which at a high level has a similar intended purpose, namely, to keep the user dry. The users of both may be a member of the general public or, in the case of waterproof clothing, may include specialist use by motorcyclists, anglers, hikers and so on. The intended purpose of both is similar in that both are intended to keep the user dry, though in the case of an umbrella this will be confined to keeping off rain whereas waterproof clothing may have any number of specialist uses including use at sea, in rivers and so on. The nature of the goods is different, an umbrella being a peripheral whereas waterproof clothing is worn by the user and will necessitate considerations such as fabric, size, fit etc. The goods are not in competition, nor are they complementary. Trade channels are likely to be different other than in large department stores which may sell waterproof jackets and umbrellas, though these would not be in the same area of the store.

26. Taking all of these factors into consideration I find the applicant’s umbrellas in class 18 to be dissimilar to the opponent’s waterproof clothing in class 25.

#### The applicant’s goods in classes 22-27

27. As I have stated at paragraph 6 above, the applicant accepts that its goods in classes 22, 23, 24, 25, 26 and 27 are ‘identical and similar’ to the opponent’s goods. They are in fact identical as all of the terms in the applicant’s specification in these classes are also contained within the opponent’s specification.

28. To conclude, I found the following in respect of the comparison of goods:

#### **Class 18 of the application**

29. Similar goods: Leather and imitations of leather, and goods made of these materials and not included in other classes, traveling bags.

30. Dissimilar goods: animal skins, hides, trunks, parasols and walking sticks, whips, harness and saddlery, umbrellas.

## Classes 22-27 of the application

31. Identical to the goods in the same classes in the opponent's specification.

### Comparison of marks

The opponent's mark	The applicant's mark
HYGROCOTTON	<b>HYDROCOTTON</b>

32. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components,<sup>3</sup> but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details. In addition, s/he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them s/he has kept in his or her mind.

33. The opponent's mark consists of the single word 'HYGROCOTTON' the applicant's consists of the single word 'HYDROCOTTON'. Both are presented in plain block capitals. No part of either word is stylised or emphasised in any way. Consequently, the marks do not possess any distinctive or dominant elements, the distinctiveness of each mark lies in the mark as a whole.

### Visual similarities

34. In its submissions filed during the period allowed for filing evidence, the opponent states:

*"7. When comparing the Contested Mark **HYDROCOTTON** with the Earlier Trade Mark **HYGROCOTTON**, it is clear that the marks are visually very similar. Ten out of eleven letters are identical and are in the same order. The only difference is the third letter, the letter G in the earlier mark which has been replaced by the letter [D]."*

35. In its submissions filed during the period allowed for filing evidence, the applicant states:

*"4. The Applicant denies that the marks are visually similar. It is submitted that consumers would recognise and remember the differences between the marks as a result of the appearance of the different letters D and G within the respective marks such that the marks can be visually distinguished from one another."*

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<sup>3</sup> *Sabel v Puma AG*, para. 23.

36. The only point of difference between the two marks is the third letter which is a 'D' in the applicant's mark and a 'G' in the opponent's mark. In marks of this length, where the first two letters and the final eight letters are identical, the change from a G to a D of the third letter of an eleven letter word is a minor point of difference. I find these marks to be highly visually similar.

### **Aural similarities**

37. The opponent states:

*"8. The marks are phonetically very similar as the letter D of the Contested Mark **HYDROCOTTON** and the letter G of the Earlier Trade [Mark] **HYGROCOTTON** are both plosives and both dominated in the second syllable by the letters "ro" that follow. The Opponent therefore contends that the two words are phonetically indistinguishable."*

38. The applicant states:

*"5. The Applicant denies that the mark is phonetically very similar, and/or phonetically indistinguishable to the Opponent's Mark. The differences between the different elements HYDRO and HYGRO...means that the marks can be phonetically distinguished from one another."*

39. The parties' marks will be pronounced HIGH-DRO-COT-ON and HIGH-GRO-COT-ON. Both are four syllables long, the first, third and fourth being identical, with the only minor point of difference being the second syllable. On careful enunciation it is possible to distinguish the two but in ordinary use, and in the context of the marks as wholes, the differences are minor. I find these marks to be aurally highly similar.

### **Conceptual similarities**

40. The opponent submits:

*"9. The marks are also conceptually identical if not very similar, the words **HYDRO** and **HYGRO** having the same meaning as shown in Exhibit A<sup>4</sup>. **HYDRO** indicating "water" and **HYGRO** indicating "moisture". Since there is no other matter within the Contested Mark to distinguish it conceptually from the mark of the Opponent as a result of which the marks are conceptually similar"*

41. Attached to the opponent's submissions are several pages printed from [www.dictionary.reference.com](http://www.dictionary.reference.com) on 4 July 2012. The first of these is a definition of 'hygro', as follows:

*"a combining form meaning 'wet', 'moist', 'moisture', used in the formation of compound words."*

42. The second of the pages is a definition of hydro', as follows:

*"a combining form meaning 'water', used in the formation of compound words"*

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<sup>4</sup> Submissions made during the period allowed for filing evidence are not in evidential form and no witness statement has been filed. 'Exhibit A' is an internet print attached to the opponent's submissions dated 3 September 2012.

43. The applicant submits:

*“6. The Applicant denies that the marks are conceptually similar, the respective words HYDRO and HYGRO are different and so overall the marks are conceptually dissimilar.”*

44. I agree that there is a degree of similarity in the combining forms ‘HYGRO’ and ‘HYDRO’. However, the average consumer cannot be assumed to know the meaning of everything. In the *Cherokee* case (BL O-048-08), Anna Carboni, sitting as the Appointed Person, stated in relation to the word CHEROKEE:

“36. ...By accepting this as fact, without evidence, the Hearing Officer was effectively taking judicial notice of the position. Judicial notice may be taken of facts that are too notorious to be the subject of serious dispute. But care has to be taken not to assume that one’s own personal experience, knowledge and assumptions are more widespread than they are.

37. I have no problem with the idea that judicial notice should be taken of the fact that the Cherokee Nation is a native American tribe. This is a matter that can easily be established from an encyclopaedia or internet reference sites to which it is proper to refer. But I do not think that it is right to take judicial notice of the fact that the average consumer of clothing in the United Kingdom would be aware of this. I am far from satisfied that this is the case. No doubt, some people are aware that CHEROKEE is the name of a native American tribe (the Hearing Officer and myself included), but that is not sufficient to impute such knowledge to the average consumer of clothing (or casual clothing in the case of UK TM no. 1270418). The Cherokee Nation is not a common subject of news items; it is not, as far as I am aware, a common topic of study in schools in the United Kingdom; and I would need evidence to convince me, contrary to my own experience, that films and television shows about native Americans (which would have to mention the Cherokee by name to be relevant) have been the staple diet of either children or adults during the last couple of decades.”

45. Similarly in this case, in the absence of any evidence from the parties, I am not able to take judicial notice of the fact that the average consumer for the goods and services at issue, would know that the combining elements ‘HYGRO’ and ‘HYDRO’ mean water or wet.

46. Both parties’ marks contain the word ‘COTTON’ as part of a longer word. It is clearly visible within the mark and in my view, would not escape the notice of the average consumer. However, in combination with the combining elements ‘HYGRO’ and ‘HYDRO’ it is more likely that while recognising that the word ‘COTTON’ is included within the mark, the average consumer would consider both marks to be invented words.

47. Consequently, I find the marks to be conceptually neutral.



## **Distinctive character of the earlier mark**

48. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been used as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber* and *Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

49. The earlier mark is the plain word 'HYGROCOTTON'. The mark is used in relation to a wide range of goods and retail services which are for the most part, textiles and their constituent parts. In the context of the goods the 'COTTON' element of the mark is not particularly distinctive. However, the mark as a whole has the appearance of an invented word and as such results in the earlier mark possessing a high level of inherent distinctive character.

## **Likelihood of confusion**

50. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.<sup>5</sup> I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa.

51. I have found that the marks share a high degree of visual and aural similarity and are conceptually neutral. I have found a high level level of inherent distinctive character in the earlier mark. I have found the applicant's goods to be identical to those of the opponent in classes 22, 23, 24, 25, 26 and 27. In class 18 I have found 'leather and imitations of leather, and goods made of these materials and not included in other classes and traveling bags' to be similar to the opponent's goods in class 25. I have found the remaining goods in class 18 to be dissimilar to the opponent's specification, namely, 'animal skins, hides, trunks, parasols and walking sticks, whips, harness and saddlery, umbrellas'.

52. I have identified the average consumer, namely a member of the general public or a professional sourcing materials for the production of finished textile goods and have concluded that the level of attention paid to the purchases of these goods is likely to vary considerably through the range of goods. I have also concluded that the purchase will be a primarily visual one.

53. In respect of the goods where I have found a degree of similarity, the similarity of the marks is such that there will, in my view, be direct confusion (where one mark is mistaken for the other). Even if I am wrong in this, there will be indirect confusion (where the average consumer believes the respective goods originate from the same or a linked undertaking).

## **CONCLUSION**

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<sup>5</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

**54. The opposition succeeds in respect of classes 22, 23, 24, 25, 26, 27 and ‘leather and imitations of leather, and goods made of these materials and not included in other classes and traveling bags’ in class 18.**

**55. The opposition fails in respect of ‘animal skins, hides, trunks, parasols and walking sticks, whips, harness and saddlery, umbrellas’ in class 18.**

### **Costs**

56. The opposition having succeeded, the opponent is entitled to a contribution towards its costs. I have taken into account that the applicant has retained some of its goods in class 18 and that no hearing has taken place. I make the award on the following basis:

Preparing a statement and considering the other side’s statement:	£200
Written submissions	£200
Official fee:	£200
Total	£600

57. I order EKE TEKSTIL KONFEKSIYON TURIZM SANAYI VE TICARET ANONIM SIRKETI to pay Welspun Global Brands Limited the sum of £600. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 2 day of August 2013**

**Ms Al Skilton  
For the Registrar,  
The Comptroller General**