

O-099-18

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3230446

BY ALEXANDER SEATON

TO REGISTER IN CLASS 30 THE FOLLOWING TRADE MARK:

Alexander Chocolate


AND IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 60000690

BY ALEXANDER NUT GROUP HOLDING GMBH

Background and pleadings

1. On 11 May 2017, Alexander Seaton applied to register the trade

mark  for a range of goods in class 30. The specification has been limited in the course of proceedings and now reads:

Class 30 Liqueur chocolates; Milk chocolates; Chocolates with mint flavoured centres; Filled chocolates; Marshmallow filled chocolates; Chocolates in the form of pralines; Chocolates; Chocolate bars; Chocolate chips; Chocolate candies; Chocolate confectionery products; Chocolate confections; Chocolate sweets; Chocolate confectionary; Chocolate with alcohol; Chocolates with mint flavoured centres; Chocolate confectionery having a praline flavour; Chocolate eggs; Chocolate; Dairy-free chocolate; Chocolates presented in an advent calendar; Chocolate with Japanese horseradish; Confectionery items coated with chocolate; Chocolate shells; Chocolate bars; Chocolate chips; Chocolate food beverages not being dairy-based or vegetable based; Milk chocolates; Dairy chocolate; Milk chocolate; Chocolate candies; Chocolate confectionery products; Chocolate confections; Confectionery items formed from chocolate; Chocolate confectionery; Confectionery chocolate products; Chocolate sweets; Chocolate confectionary; Chocolate decorations for confectionery items; Chocolate with alcohol; Chocolates with mint flavoured centres; Filled chocolate; Filled chocolates; Chocolate confectionery having a praline flavour; Marshmallow filled chocolates; Milk chocolate bars; Chocolate eggs; Chocolate vermicelli; Chocolate; Chocolate fudge; Liqueur chocolates; Chocolates; Aerated chocolate; Foodstuffs containing chocolate [as the main constituent]; Chocolate truffles; Chocolate creams.

2. The application was published for opposition purposes on 9 June 2017. It is opposed by Alexander Nut Group Holding GmbH (“the opponent”) under the fast-track opposition

procedure. The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all of the goods in the application.

3. The opponent relies upon its EU trade mark registration number 15540751 for the following trade mark:



4. The opponent's trade mark was applied for on 14 June 2016 and its date of entry in the register is 18 October 2016. The opponent relies upon all of the goods and services in its registration, namely:

Class 29 Extruded potato products for food (other than potato flour), included in class 29, potato crisps, potato sticks; Raisins, hazelnut, peanut, cashew nut and pistachio nut kernels, and almonds, dried, roasted, salted and/or spiced; Nut-based snack foods; Roasted nuts, Prepared nuts, Spiced nuts, Mixed nuts; Dried fruit, fruit snacks.

Class 30 Cereal-based snack food, Rice-based snack food, Savoury biscuits, Salt licks, Pretzels, Coated nuts.

Class 35 Advertising; Business management; Business administration; Office functions; Business consultancy and advisory services; Wholesaling and retailing of extruded potato products for food (other than potato flour), potato crisps, potato sticks, raisins, hazelnuts, peanuts, cashew nuts, pistachio nuts and almonds, dried, roasted, salted and/or spiced, nut-based snack food, roasted nuts, processed nuts, spiced nuts, nut mixtures, dried fruits, fruit-based snack food, cereal-based snack food,

rice-based snack food, savoury biscuits, pretzel sticks, pretzels, coated nuts.

5. Given its date of filing, the opponent's mark qualifies as an earlier trade mark under the provisions in s. 6(1) of the Act. As the earlier mark had not been registered for five years or more at the publication date of the opposed application, it is not subject to the proof of use provisions contained in section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods and services it has identified.

6. The opponent claims that the goods are identical or highly similar. It states that the marks share the same word, "Alexander", which is the first part of the mark applied for and is the dominant element of the earlier mark. As a consequence, it claims that there is a likelihood of confusion.

7. Mr Seaton filed a counterstatement denying the grounds of opposition. As I have no other submissions from Mr Seaton, his comments are reproduced in full and as written:

"Alexander Chocolate (AC) is a handmade luxury chocolate producer. It sells its products to the public. This is distinctly different to Alexander Nut Group who source and package nut snack products.

On my marks application is stated that part chocolate and covered nuts are to be covered by the mark. This was an issue to Alexander Nut Group as they felt it was in breach of their mark. I did not feel this to be the case but as a sign of good will have remove all nut services from my marks application, so there can be no confusion between the distinctly different brands.

Having no services offered by both companies there can no longer be a breach or conflict. I ask that the opposition is now removed as there is no possible breach.

I further state, to show that I desire to resolve this matter, that at no time will AC package or sell nut snack products”.

8. Rules 20(1)-(3) of the Trade Marks Rules (“TMR”) (the provisions which provide for the filing of evidence) do not apply to fast track oppositions but Rule 20(4) does. It reads:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit”.

9. The effect of the above is to require parties to seek leave in order to file evidence (other than the proof of use evidence which is filed with the notice of opposition) in fast track oppositions. On 17 November 2017, the opponent requested leave to file evidence. On 28 November 2017, the tribunal issued a preliminary view that the opponent’s request should be refused. As the opponent did not challenge the refusal, the preliminary view was automatically confirmed.

10. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary. Only the opponent filed written submissions, which I will bear in mind. This decision is taken following a careful reading of the papers.

11. Mr Seaton is a litigant in person. The opponent has been represented throughout by KSB INTAX.

Section 5(2)(b)

12. The opposition is based upon section 5(2)(b) of the Act, which reads as follows:

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

[...]

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

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

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

(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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

14. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In *Canon*, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

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

15. Guidance on this issue has also come from Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Ltd*, [1996] R.P.C. 281 (the *Treat* case), where he identified the factors for assessing similarity as:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance

whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

17. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the GC explained 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”.

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

19. Mr Seaton has made a number of comments in his counterstatement regarding the products which are sold by the parties and the goods he will produce in the future. However, when considering the competing marks and their respective specifications, the assessment must be carried out based on the notional use of both the registered and applied-for marks. That notional assessment means that, irrespective of how the parties may have used, or intend to use, their marks, I must compare the full specifications and only take account of any differences which are apparent from the registered and applied-for specifications.¹

20. The opponent states that:

“Identity] exists between the claimed goods of both trademarks [sic] in that chocolate usually also contains nuts. In addition, both pralines and chocolate are products that are consumed in a similar way to nut products and are sold in shops near to each other. Further, it must be kept in mind that pralines often contain various nuts”.

Chocolate confectionery products; Chocolate confections; Chocolate confectionary; Confectionery items coated with chocolate; Chocolate confectionery; Confectionery chocolate products

21. This term covers goods such as chocolate-coated nuts, which are included within the opponent’s “coated nuts”. The goods are identical on the principle outlined in *Meric*.

¹ See *Compass Publishing BV v Compass Logistics Ltd* ([2004] RPC 41) at [22]; *Roger Maier v ASOS* ([2015] EWCA Civ 220 at [78] and [84]; and *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited* (Case C-533/06) at [66].

Chocolate bars; Chocolate; Dairy-free chocolate; Chocolate with Japanese horseradish; Dairy chocolate; Milk chocolate; Confectionery items formed from chocolate; Milk chocolate bars; Foodstuffs containing chocolate [as the main constituent]

22. All of these goods are or encompass chocolate bars and blocks. In the earlier specification is the term “cereal-based snack food” (both savoury and sweet would be covered by the term). The goods are all snack foods and share the same purpose. As the goods may all be small, individual snacks, and as the opponent’s term would include goods such as chocolate-covered flapjacks, there is an overlap in their nature. The users and method of use are identical, whilst the channels of trade are also likely to be shared. The goods are not complementary in the sense defined in the case law but there is a competitive relationship, given that one could be purchased as an alternative to the other. They are similar to a high degree.

Liqueur chocolates; Milk chocolates; Chocolates with mint flavoured centres; Filled chocolates; Marshmallow filled chocolates; Chocolates in the form of pralines; Chocolates; Chocolate candies; Chocolate sweets; Chocolate with alcohol; Chocolates with mint flavoured centres; Chocolate confectionery having a praline flavour; Chocolate eggs; Chocolates presented in an advent calendar; Chocolate shells; Chocolate candies; Chocolate sweets; Chocolate with alcohol; Filled chocolate; Chocolate fudge; Chocolates; Aerated chocolate; Chocolate truffles; Chocolate creams.

23. All of these terms strike me as referring to individual chocolates, rather than chocolate bars. The opponent’s term “coated nuts” includes goods such as sugared almonds and chocolate-coated nuts. There is some potential similarity in nature between these goods and they have the same purpose, users and method of use. The goods listed above are unlikely to be found on the same shelves as the opponent’s goods but they are likely to be in close proximity in supermarkets and there may still be a competitive relationship. They are not complementary. I consider that these goods are similar to a reasonably high degree.

Chocolate chips; Chocolate decorations for confectionery items; Chocolate vermicelli

24. These goods may all be used as cake/confectionery decorations. “Prepared nuts” in class 29 of the earlier specification includes candied nuts, which may be used for the same purpose. The nature of the goods is different but there is some overlap in their users and method of use. Given that they are all ingredients in home baking, they may be sold in close proximity in supermarkets. They are not complementary, though there may be a degree of competition. They are similar to a medium degree.

Chocolate food beverages not being dairy-based or vegetable based

25. It is not entirely clear to me what a “food beverage” is and the parties have provided no submissions to assist me. It seems to me that the term must include goods such as chocolate protein shakes. Given that the opponent’s “cereal-based snack food” would include protein bars, the goods have some similarity of purpose and are in competition. They will share users and there may be an overlap in channels of trade. However, their nature and method of use are different and they are not complementary. They are similar to a medium degree.

The average consumer and the nature of the purchasing act

26. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik*. 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”.

27. The parties have not commented on the average consumer, nor on the purchasing process.

28. The goods at issue are foodstuffs and non-alcoholic beverages. The average consumer for these goods will be a member of the general public. The goods are most likely to be self-selected from the shelves of retail premises, primarily supermarkets, and from their online equivalents. The purchase is, therefore, predominantly visual. Although there may be some variation in the level of attention paid to the purchase, the goods are relatively inexpensive and, if not everyday, reasonably frequent purchases which are likely to be bought with a fairly low level of attention.

Comparison of trade marks



29. It is clear from *Sabel* (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. 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”.

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

31. The trade marks to be compared are as follows:

Opponent’s trade mark	Mr Seaton’s trade mark
	

32. The opponent claims that “[in] both trademarks [sic] the word “Alexander” and the first letter “A” is shown prominent” and that the average consumer “will pay less attention” to the words “nut group” and “Chocolate” in the respective marks, as they are descriptive of the goods.² Mr Seaton has not made any specific comments regarding the similarity between the marks.

33. The earlier mark consists of a black-and-white device which resembles a lower-case letter “a”. The letter itself is in white, in a plain bold font on a black background. The background is an incomplete circle and, where the circle is incomplete, the right-hand part of the letter “a” is missing. Underneath the device is the word “alexander”, all in lower case in an unremarkable bold font, and below that, the words “nut group” the same typeface but smaller and not in bold. The overall impression is dominated by the

² Written submissions, p. 2.

word “alexander”. Although the device is at the top of the mark, it is fairly simplistic and, though it is a distinctive element, it is subordinate to the word “alexander”. The words “nut group”, as the opponent suggests, are likely to be viewed as having little or no distinctiveness in relation to the goods at issue and will, as a consequence, have low relative weight in the overall impression of the mark.

34. Mr Seaton’s mark consists of the words “Alexander Chocolate” in a slightly stylised italic script. The words are presented in title case. However, the initial letter “A” of “Alexander” has an extended tail, which surrounds the letter in an almost complete circle. The word “Chocolate” is non-distinctive in relation to Mr Seaton’s goods and plays a weak role in the overall impression. I consider that the overall impression is dominated by the word “Alexander” but that the stylised letter “A” also makes a significant contribution, if marginally less than the word “Alexander” as a whole.

35. There is some visual similarity between the marks, due to the presence in both of the word “alexander”/“Alexander” as a dominant component. There are, however, differences because of the separate device and words “nut group” in the earlier mark, as against the stylised letter “A” and the word “Chocolate” in the application. Bearing in mind my assessment of the overall impression, there is a medium degree of visual similarity.

36. The device elements in the marks will not be vocalised. The earlier mark is likely to be verbalised as “alexander”. The words “nut group” are unlikely to be articulated, given that they are both weakly distinctive and in a less prominent position. As for the application, “Chocolate” is not distinctive and it is unlikely that it will be articulated, with the average consumer verbalising the mark as “Alexander”. In this scenario, the marks would be aurally identical. Even if, because of its size and position, the word “Chocolate” was articulated, the common word “Alexander” would be vocalised first and the marks would still be similar to a medium degree.

37. So far as the conceptual position is concerned, the word “alexander”/“Alexander” in each mark will be perceived as a male forename or a surname. Whichever meaning is given to the name in one mark is likely to be given to the name in the other. The device elements in the marks do not introduce any other concepts (the “a” in the earlier mark being simply the first letter of “alexander”) and whilst the words “nut group” and “Chocolate” do introduce a difference, these elements have little or no distinctive character. As a consequence, the marks are conceptually similar at least to a high degree.

Distinctive character of the earlier trade mark

38. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. 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 and services for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings: *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In *Lloyd Schuhfabrik*, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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)".

39. Mr Seaton has made no comments regarding the distinctiveness of the earlier mark. The opponent states that the mark "innately has average distinctiveness".

40. As the opponent has not claimed an enhanced level of distinctive character, I have only the inherent position to consider. Invented words usually have the highest level of inherent distinctiveness; words which are allusive of the goods usually have the lowest. The mark is comprised of a device and three dictionary words. The device and dominant word, "alexander", are neither descriptive nor allusive, though I bear in mind that "Alexander" is not a particularly unusual name. I agree with the opponent that the earlier mark is possessed of an average degree of inherent distinctive character.

Likelihood of confusion

41. The factors considered above have a degree of interdependency (*Canon* at [17]), so that a higher degree of similarity between the goods may be offset by a lower degree of similarity between the marks, and vice versa. I must make a global assessment of the competing factors (*Sabel* at [22]), considering them from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely

upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

42. Confusion can be direct or indirect. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., sitting as the Appointed Person, explained these types of confusion as follows:

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

43. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made simply because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

44. In determining whether there is a likelihood of confusion, I will proceed on the basis most favourable to Mr Seaton, i.e. that the goods are similar to a medium degree and that the marks are aurally similar to a medium degree (although I have found that the similarity between the goods varies and includes identical goods, and that the marks may be aurally identical). The less similarity there is between the goods and the marks,

the less likely it is that there will be confusion. I remind myself that, while the marks are conceptually similar to a high degree, they have only a medium degree of visual similarity. That is important because the purchase of the goods will be primarily visual, and so the visual similarity carries particular weight in the overall assessment. Nonetheless, I consider that the similarities between the marks, both of which are dominated by the identical word “alexander”/“Alexander”, when combined with the fairly low level of attention which will be paid to the purchase, outweigh any differences between the goods. I find that there is a likelihood that the differences between the marks will be misremembered and that one mark will be directly confused for the other. Even if I am wrong in that regard and the average consumer does recall the differences between the marks s/he is likely to perceive the application as a variant brand originating from the opponent, leading to indirect confusion.

Conclusion

45. The opposition has been successful and, subject to appeal, the application will be refused.

Costs

46. The opponent has been successful and is entitled to a contribution towards its costs. Awards of costs in fast-track proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. This being a fast-track opposition, TPN 2/2015 also applies. I award costs to the opponent on the following basis:

Official fees	£100
Preparing the notice of opposition and considering the counterstatement	£200

Written submissions £200

Total: £500

47. I order Alexander Seaton to pay Alexander Nut Group Holding GmbH the sum of **£500**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 14th day of February 2018

Heather Harrison

For the Registrar

The Comptroller-General