

BL O/021/19

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION 3275124

BY

HAUZ 1929 LTD

TO REGISTER THE FOLLOWING TRADE MARK:

HAUZ
EST 1929

AND

OPPOSITION THERETO (NO. 412008)

BY

HOUZZ, INC

Background and pleadings

1. HAUZ 1929 LTD (the applicant) applied to register the trade mark:



in the UK on 05 December 2017. It was accepted and published in the Trade Marks Journal on 22 December 2017, in respect of the following goods:

Class 20: Furniture; Furniture and furnishings; Beds, bedding, mattresses, pillows and cushions.

Class 24: Fabrics; Textile goods, and substitutes for textile goods.

Class 27: Floor coverings and artificial ground coverings; Carpets, rugs and mats.

2. Houzz, Inc. (the opponent) opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (the Act). The opposition is raised against all of the goods applied for. The opposition is based on an earlier UK Trade Mark and an earlier European Trade Mark (EUTM), namely:
3. UK 3191907, filed on 18 October 2016 and registered on 31 March 2017, for the mark:

HOUZZ

In respect of:

Class 20: Furniture; wooden furniture; household furniture; bedroom furniture; fitted furniture; upholstered furniture; furniture for use in bars, clubs and

restaurants; office furniture; tables; chairs; cabinets; sofas; armchairs; coffee tables; footstools; chests; drawers; shelving; beds; bedside tables; wardrobes; kitchen units; kitchen furniture; dressers; cupboards; stools; racks; worktops; trays; boxes made of wood; dining tables; dining chairs; benches; dining cabinets; dining drawers; mirrors; picture frames; mattresses; box springs; pillows; slatted bed bases; mattress bases; divans; bedding; bolsters and cushions; goods of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother of pearl, meerschaum and substitutes for all these materials or of plastics; parts and fittings for all the aforementioned goods.

Class 35: Retail services connected with the sale of furniture, home furnishings, homewares, soft furnishings, textile goods, mirrors, picture frames, bed and table covers; operating an online marketplace for sellers and purchasers of consumer goods including home interior and exterior furnishings, products and accessories; promoting home design and decorating products of others by providing hypertext links to the web sites of others; promoting home design, decorating, and remodeling services of others by providing contact information and hypertext links to service provider's websites.

Class 40: Bespoke furniture.

4. EUTM 15938434, filed on 18 October 2016 and registered on 19 April 2017, for the mark:

HOUZZ

In respect of:

Class 11: Lighting, lighting apparatus and fixtures, decorative lighting, lanterns, lamps, lamp stands and shades, all of the aforesaid made of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials.

Class 20: Furniture; wooden furniture; bespoke furniture; household furniture; bedroom furniture; fitted furniture; upholstered furniture; furniture for use in bars, clubs and restaurants; office furniture; tables; chairs; cabinets; sofas; armchairs; coffee tables; footstools; chests; drawers; shelving; beds; bedside tables; wardrobes; kitchen units; kitchen furniture; dressers; cupboards; stools; racks; worktops; trays, not made of metal; boxes made of wood; dining tables; dining chairs; benches; dining cabinets; dining drawers; mirrors; picture frames; mattresses; box springs; pillows; slatted bed bases; mattress bases; divans; bedding; bolsters and cushions; goods of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother of pearl, meerschaum and substitutes for all these materials or of plastics, namely statues, figurines and works of art, ornaments and decorations, furniture and furnishings including beds, frames, mirrors, coat hangers, coat hooks and coat stands, baskets, barrels, casks, chairs, sofas, displays, stands and signage; parts and fittings for all the aforementioned goods.

5. The opponent relies on all of the goods under both earlier marks for the purposes of this action.
6. In its statement of grounds, the opponent claims that the marks are closely similar, the goods are identical or highly similar, and the applied for goods will also be associated with the services of the opponent's earlier marks. Therefore, there is a likelihood of confusion which includes a likelihood of association. It also claims that the word HAUZ in the later mark is the dominant element of that mark and as such the later mark is aurally and phonetically identical to the earlier HOUZZ marks.
7. In its counterstatement, the applicant rejects the claim of the opponent that the marks and goods/services are similar and that confusion would subsequently occur.
8. Both parties provided written submissions which will not be summarised here, but will be referred to later in this decision if necessary.

9. No hearing was requested and so this decision is taken following a careful perusal of the papers.
10. Throughout the proceedings the opponent has been represented by Cooley (UK) LLP. The applicant has been represented by Cubism Law, but only during the final stages of these proceedings.

Decision

Section 5(2)(b) of the Act

11. 5(2)(b) of the Act states:

“(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 of association with the earlier trade mark.”

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

The principles

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

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

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

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

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

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

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

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

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

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

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

Comparison of goods and services

13. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

14. 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.

15. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Merici')*, 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”.

16. The parties' respective specifications are:

Earlier marks	Application
<p><u>UK 3191907:</u></p> <p>Class 20: Furniture; wooden furniture; household furniture; bedroom furniture; fitted furniture; upholstered furniture; furniture for use in bars, clubs and restaurants; office furniture; tables; chairs; cabinets; sofas; armchairs; coffee tables; footstools; chests; drawers; shelving; beds; bedside tables;</p>	<p>Class 20: Furniture; Furniture and furnishings; Beds, bedding, mattresses, pillows and cushions.</p> <p>Class 24: Fabrics; Textile goods, and substitutes for textile goods.</p> <p>Class 27: Floor coverings and artificial ground coverings; Carpets, rugs and mats.</p>

wardrobes; kitchen units; kitchen furniture; dressers; cupboards; stools; racks; worktops; trays; boxes made of wood; dining tables; dining chairs; benches; dining cabinets; dining drawers; mirrors; picture frames; mattresses; box springs; pillows; slatted bed bases; mattress bases; divans; bedding; bolsters and cushions; goods of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother of pearl, meerschaum and substitutes for all these materials or of plastics; parts and fittings for all the aforementioned goods.

Class 35: Retail services connected with the sale of furniture, home furnishings, homewares, soft furnishings, textile goods, mirrors, picture frames, bed and table covers; operating an online marketplace for sellers and purchasers of consumer goods including home interior and exterior furnishings, products and accessories; promoting home design and decorating products of others by providing hypertext links to the web sites of others; promoting

home design, decorating, and remodeling services of others by providing contact information and hypertext links to service provider's websites.

Class 40: Bespoke furniture.

EUTM 15938434:

Class 11: Lighting, lighting apparatus and fixtures, decorative lighting, lanterns, lamps, lamp stands and shades, all of the aforesaid made of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother-of-pearl, meerschaum and substitutes for all these materials.

Class 20: Furniture; wooden furniture; bespoke furniture; household furniture; bedroom furniture; fitted furniture; upholstered furniture; furniture for use in bars, clubs and restaurants; office furniture; tables; chairs; cabinets; sofas; armchairs; coffee tables; footstools; chests; drawers; shelving; beds; bedside tables; wardrobes; kitchen units; kitchen furniture; dressers; cupboards; stools; racks; worktops; trays, not made of metal; boxes made of

<p>wood; dining tables; dining chairs; benches; dining cabinets; dining drawers; mirrors; picture frames; mattresses; box springs; pillows; slatted bed bases; mattress bases; divans; bedding; bolsters and cushions; goods of wood, cork, reed, cane, wicker, horn, bone, ivory, whalebone, shell, amber, mother of pearl, meerschaum and substitutes for all these materials or of plastics, namely statues, figurines and works of art, ornaments and decorations, furniture and furnishings including beds, frames, mirrors, coat hangers, coat hooks and coat stands, baskets, barrels, casks, chairs, sofas, displays, stands and signage; parts and fittings for all the aforementioned goods.</p>	
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17. In Class 20, the applied for goods '*furniture, beds, bedding, mattresses, pillows and cushions*' are entirely replicated within the opponent's earlier UK mark 3191907. The applied for '*furnishings*' in class 20 are also included within the earlier EUTM 15938434. All of the applied for goods in class 20 are therefore identical.

18. The applied for goods '*fabrics; textile goods, and substitutes for textile goods*' in class 24 and '*floor coverings and artificial ground coverings; carpets, rugs and mats*' in class 27 are all goods which may be used in the decoration of the interior and exterior of a home or residential dwelling. The opponent's earlier UK TM 3191907 includes in class 35, the following services:

'retail services connected with the sale of home furnishings, soft furnishings, textile goods, bed and table covers; operating an online marketplace for sellers and purchasers of consumer goods including home interior and exterior furnishings, products and accessories'.

19. These services wholly encapsulate the retailing of the applied for goods in classes 24 and 27.

20. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the General Court held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services against goods. He said (at paragraph 9 of his judgment) that:

“9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are *'similar'* to goods are not clear cut.”

However, on the basis of the European courts' judgments in *Sanco SA v OHIM*¹, and *Assembled Investments (Proprietary) Ltd v. OHIM*², upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd*³, Mr Hobbs concluded that:

- i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;
- ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;
- iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;
- iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

In *Frag Comercio Internacional, SL, v OHIM*, Case T-162/08, the General Court held that a registration for 'retail services', which did not identify the kinds of goods covered by the services, was too vague to permit a proper comparison to be made between those services and the goods covered by the later mark. It was not therefore possible to determine that the respective services and goods were similar.

¹ Case C-411/13P

² Case T-105/05, at paragraphs [30] to [35] of the judgment

³ Case C-398/07P

21. In this instance it is quite clear that the retail services offered by the opponent are focussed in the same business sector that the applicant's goods lie, namely home furnishings, soft furnishings, textiles and floor coverings, and home interior and exterior furnishings, products and accessories. As per *Oakley*, although the retail services are different in nature, purpose and method of use to the applicant's goods, the retailing services are for those particular goods. They are therefore complementary, and share the same trade channels.
22. That being the case, I find there to be an average degree of similarity between the goods applied for in classes 24 and 27 and the retail services covered under the opponent's earlier UK mark.

Average consumer and the purchasing act

23. 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 or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.
24. 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.”

25. To my mind, the average consumer of the parties' goods will be a member of the general public.

26. The average consumer will purchase the goods and services at issue in the traditional manner from retail outlets such as supermarkets, furniture and carpet retail specialist outlets and high street shops, or online using retail websites. The nature of these goods is predominantly aesthetic, with consumers choosing e.g. furniture, rugs, furnishings, bedding, cushions etc, largely on their appearance. As such, the selection of these goods and services will generally be a visual process.

27. As the goods and services at issue are day to day purchases, notwithstanding the fact that some of the goods, e.g. beds and sofas, are only occasional purchases which will be more expensive than e.g. bedding or cushions, the level of attention paid by the average consumer will be no more than normal.



Comparison of marks

28. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Case C-591/12P, Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their 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.”

29. 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.

30. The respective trade marks are shown below:

Earlier marks	Contested trade mark
	

31. The opponent's marks are both comprised solely of the plain word 'HOUZZ' in standard capital lettering. The overall impression of these marks lies in the totality of that single word.

32. The applicant's mark is comprised of the word 'HAUZ' in heavy block capital lettering, with the cross beam in the letter 'A' of that word presented in a stylised grey effect, combined with the elements 'EST 1929' that are presented in smaller grey lettering immediately below the larger element 'HAUZ'. Due its dominant size in the mark, the overall impression of the applied for mark lies in the word 'HAUZ'.

Visual similarity

33. Visually, the respective marks are similar insomuch as they all share the letters 'H', 'U' and 'Z' presented in fairly standard, black capital lettering. They differ visually in the letter 'O' of the earlier marks, which has no counterpart in the later mark, and in the second letter 'Z' of the earlier marks. The marks also differ visually in respect of the letter 'A' of the later mark, which is stylised, and in the element 'EST 1929' of the later mark, which is presented in quite small lettering at the base of that mark. Due to the dominance of the word 'HAUZ' in the later mark, the shared first letter in each of the marks and the highly similar endings of each, namely 'UZ' and 'UZZ', the marks are considered to be visually similar to a higher than average degree.

Aural similarity

34. Aurally, the earlier marks will be enunciated either as /HOWZ/ or /WHOSE/. The dominant element 'HAUZ' in the applied for mark will be articulated as /HOWZ/. The element 'EST 1929' in the later mark is presented in much smaller lettering at the base of the mark and will likely not be articulated by the relevant public due to its conceptual impact, as set out below. In circumstances where the element 'EST 1929' is not articulated, for that part of the relevant public who would pronounce the earlier marks as /HOWZ/ the marks are aurally identical. For that part of the relevant public who would pronounce the earlier marks as /WHOSE/ the marks can be said to be aurally similar to high degree. For that part of the public which would articulate all of the verbal elements in the later mark, as the dominant element 'HAUZ' will also be the first element to be articulated, the marks can said to be aurally similar to a medium degree.

Conceptual similarity

35. The earlier marks consist of the word 'HOUZZ' which is an invented term in the English language, but one which may be perceived as relating to the word 'house' due to the sharing of the first three letters of those words and in the aural similarities between the two. The later mark contains the word 'HAUZ' and the element 'EST 1929'. The element 'EST 1929' will be perceived as referring to the year of establishment or commencement of trade of the undertaking providing the goods at issue. This element has been presented in the mark, as is fairly typical of such elements, in much smaller lettering and in a secondary or deferential position in the mark, so as not to take attention away from the primary element of the mark. As such it is likely that the relevant public will give this element no weight at all. At most it will simply indicate to the average consumer that this particular undertaking has been trading since the year 1929. The dominant element of the later mark is the word 'HAUZ' which, whilst presented in a heavy bold typeface with some minor stylised aspects to it, is clearly readable as such. This word is also an invented term in English, although it may be perceived to be the German word for 'house' which is 'Haus'. Where the average consumer does not perceive a link or reference to the word English word 'house' in one or both of the marks at issue, there can be no

conceptual similarity between the marks at issue. For that part of the relevant public which does perceive a reference to the word 'house' in the marks at issue, the marks can be said to be conceptually identical.

36. In conclusion, the marks are found to be visually similar to a higher than average degree; aurally identical or similar to a high or medium degree, and conceptually identical or dissimilar.

Distinctive character of the earlier trade marks

37. 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).”

38. The opponent has made no claim that its earlier marks have acquired an enhanced degree of distinctive character. I must therefore assess the marks purely on their inherent distinctive character.

39. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C., sitting as the Appointed Person, observed that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything, it will reduce it.”

40. In this instance, the element 'HOUZZ' is an invented term and as such can be said to be inherently distinctive to a higher than normal degree. It is possible however, that the mark may be perceived to relate to the word 'house' due to the visual and aural impacts of the word. Where this is the case, the earlier marks can be found to have a link to the goods and services at issue, where those goods and services are directed at the furnishing or design/decoration of a house. That said, the spelling of the word 'HOUZZ' is unusual and serves to endow those marks with at least a normal degree of inherent distinctiveness, even where a link can be made with the goods and services on offer.

Likelihood of Confusion

41. The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.
42. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same, but puts the similarity that exists between the marks/services down to the responsible undertakings being the same or related).
43. The marks have been found to be visually similar to a higher than average degree, aurally identical or similar to a high or medium degree, and conceptually identical or dissimilar.
44. The goods applied for in class 20 have been found to be identical to the opponent's goods. The goods applied for in classes 24 and 27 have been found to be similar to at least an average degree to the opponent's retail services.
45. As the goods concerned are day to day products, the level of attention being paid by the consumer during the selection process will be no higher than normal. During the selection process the visual impact of the marks will carry most weight, as the goods at issue are, by their nature, selected largely based on their design and appearance. It is worth noting that generally marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture he has kept in his mind⁴.

⁴ *Lloyd Schuhfabrik Meyer*, paragraph 27.

46. Due to the high degree of visual and aural similarity between the marks at issue, combined with a potentially identical conceptual impact and the identity or similarity between the goods and services at hand, I am satisfied that direct confusion will occur i.e. the relevant public will mistake the earlier 'HOUZZ' marks for the later mark, or vice-versa. Even for that part of the relevant public which would not perceive the concept of 'House' in either or both of the marks, the remaining similarities between the marks and the goods/services are sufficient to conclude that the average consumer would directly confuse the marks to hand.

Conclusion

47. The opposition is successful. Subject to appeal, the application is refused for all of the applied for goods.

Costs

48. The opponent has been successful and is entitled to a contribution towards its costs.

49. I bear in mind that the relevant scale is contained in Tribunal Practice Notice ("TPN") 2/2016. I award costs to the opponent as follows:

Official opposition fee	£100
Preparing the statement of case and Considering the counterstatement	£300
Preparing submissions	£300
<u>Total</u>	<u>£700</u>

50. I therefore order HAUZ 1929 LTD to pay Houzz, Inc. the sum of £700. The above sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated this 11th day of January 2019

**Andrew Feldon
For the Registrar
The Comptroller-General**