

O-177-19

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3279330 BY SHENZHEN TUORANTIAN
TECHNOLOGY CO., LTD TO REGISTER:**

OEEGOO

AS A TRADE MARK IN CLASS 11

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 412231
BY GOOEE LIMITED**

Background & Pleadings

1. On 27 December 2017, Shenzhen Tuorantian Technology Co., Ltd (“the applicant”) applied to register the above trade mark for the following goods in Class 11:

Torches for lighting; Diving lights; Lighting apparatus and installations; Coffee machines, electric; Coffee filters, electric; Electric fans for personal use; Thermostatic valves [parts of heating installations]; Taps [faucets]; Sprinklers [automatic installations] for watering flowers and plants; Mixer taps for water pipes; Bath installations; Showers; Lamp bulbs; Bath fittings; Filters for drinking water; Aquarium filtration apparatus; Radiators, electric; Ornaments for christmas trees [lights]; Coffee percolators, electric; Bicycle lights; LED mood lights; LED light strips; LED safety lamps; LED landscape lights; LED underwater lights; LED lighting fixtures; LED light bulbs; LED lighting installations; LED lights for automobiles; LED [light-emitting diode] luminaires; LED lighting assemblies for illuminated signs; LED [light-emitting diode] lighting fixtures; Light-emitting diodes [LED] lighting apparatus

The application was published for opposition purposes on 19 January 2018.

2. On 19 April 2018, the application was opposed in part by Gooee Limited (“the opponent”). The goods under opposition are laid out at paragraph 21 of this decision. The opposition is based upon section 5(2)(b)¹ of the Trade Marks Act 1994 (“the Act”), in relation to which the opponent relies upon the following trade mark:

European Union Trade Mark (“EUTM”) 12846184:

GOOEE

Filing date: 5 May 2014

Registration date: 12 September 2014

¹ Opposition was originally pleaded under sections 5(2)(b) and 5(4)(a) of the Act. Given that the opponent did not file evidence or submissions by the applicable deadline of 3 September 2018, an official letter of 5 October 2018 advised the opponent that, in the absence of such documentation, its claim under s.5(4)(a) would be struck out. The opponent was allowed fourteen days in which to dispute this course of action by way of written comments or a request for a hearing. As it did not respond to that invitation, s.5(4)(a) was struck from the proceedings.

The opponent indicates that it intends to rely upon all goods and services for which its mark is registered, namely:

Class 9: *Electronic components for lighting; solid state lighting components; LED light engine; LED Module; LED driver; MCPCB; lens for LED; LED chip; heat-sink; high voltage LED chip; dimming control systems; Wired Lighting control apparatus; Wireless Lighting control apparatus; wired lighting control interface; wireless lighting control interface; powerline lighting control apparatus; white colour tuning apparatus; white colour tuning interface; colour changing apparatus; colour changing interface; smart home control apparatus; smart home control gateway; smart home control interface; integrated circuit (IC) microchip; power supply; motion sensor; timed motion sensor; smoke detector; heat sensors; touch sensor; proximity sensor; ambient light sensor; protocol translation apparatus; connection block; electronic devices for environmental monitoring, control, and automation; computer software for use in environmental monitoring, control, and automation systems; electronic devices and computer software that allow users to remotely interact with environmental monitoring, control, and automation systems; electronic devices and computer software that allow the sharing and transmission of data and information between devices for the purposes of facilitating environmental monitoring, control, and automation; parts and fittings for all of the aforesaid goods.*

Class 11: *Luminaires; Lighting apparatus, lamps and instruments; solid state lighting apparatus; LED lamps; LED light modules; integrated LED downlights; trim for luminaire; LED spot lights; LED light panels; parts and fittings for all of the aforesaid goods.*

Class 42: *Computer services, namely, providing an internet site featuring technology for use in environmental monitoring, control, and automation systems; computer services, namely, providing an internet site featuring technology that allows users to remotely interact with environmental monitoring, control, and automation systems; platform as a service (PAAS) featuring computer software platforms for use with environmental monitoring, control, and automation systems; software as a service (SAAS) services featuring computer software for use with environmental monitoring, control, and automation systems.*

3. In its statement of grounds, the opponent submits that the visual, aural and conceptual similarities of the competing marks, when considered alongside the distinctiveness of the earlier mark and the relationship between the respective goods and/or services, gives rise to a likelihood of confusion.

4. The applicant filed a counterstatement denying the basis of the opposition. Specifically, it contends that the respective marks are not similar and, subsequently, that there is no likelihood of confusion, including a likelihood of association.

5. The applicant in these proceedings is represented by The Trade Marks Bureau and the opponent by Swindell & Pearson Ltd. No evidence was filed by either party. During the evidence rounds, the applicant filed written submissions. Neither party elected to request a hearing, though the opponent filed written submissions in lieu. This decision is taken following a careful reading of all the papers which I will refer to, as necessary.

Decision

6. 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.”

7. An earlier trade mark is defined in section 6 of the Act, which states:

“6. - (1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK), Community trade mark or international trade mark (EC) which has a date of application for registration

earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

8. Given its filing date, the opponent’s mark qualifies as an earlier trade mark under the provisions outlined above. In accordance with section 6A of the Act, as it had not completed its registration procedure more than five years prior to the publication date of the applicant’s mark, the opponent’s mark is not subject to the proof of use provisions. Consequently, the opponent is entitled to rely upon all goods and services identified in its Notice of Opposition.

Section 5(2)(b) - Case law

20. The following principles are gleaned from the decisions of the courts of the European Union 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 greater 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 and services

21. The competing specifications read as follows:

Opponent's goods	Applicant's (opposed) goods
<p><u>Class 9:</u> <i>Electronic components for lighting; solid state lighting components; LED light engine; LED Module; LED driver; MCPCB; lens for LED; LED chip; heat-sink; high voltage LED chip; dimming control systems; Wired Lighting control apparatus; Wireless Lighting control apparatus; wired lighting control interface; wireless lighting control interface; powerline lighting control apparatus; white colour tuning apparatus; white colour tuning interface; colour changing apparatus; colour changing interface; smart home control apparatus; smart home control gateway; smart home control interface; integrated circuit (IC) microchip; power supply; motion sensor; timed motion sensor; smoke detector; heat sensors; touch sensor; proximity sensor; ambient light sensor; protocol translation apparatus; connection block; electronic devices for environmental monitoring, control, and automation; computer software for use in environmental monitoring, control, and automation systems; electronic devices and computer software that allow users to remotely interact with environmental monitoring, control, and automation systems; electronic devices</i></p>	<p><u>Class 11:</u> <i>Torches for lighting; Diving lights; Lighting apparatus and installations; Lamp bulbs; Ornaments for christmas trees [lights]; Bicycle lights; LED mood lights; LED light strips; LED safety lamps; LED landscape lights; LED underwater lights; LED lighting fixtures; LED light bulbs; LED lighting installations; LED lights for automobiles; LED [light-emitting diode] luminaires; LED lighting assemblies for illuminated signs; LED [light-emitting diode] lighting fixtures; Light-emitting diodes [LED] lighting apparatus</i></p>

and computer software that allow the sharing and transmission of data and information between devices for the purposes of facilitating environmental monitoring, control, and automation; parts and fittings for all of the aforesaid goods.

Class 11: Luminaires; Lighting apparatus, lamps and instruments; solid state lighting apparatus; LED lamps; LED light modules; integrated LED downlights; trim for luminaire; LED spot lights; LED light panels; parts and fittings for all of the aforesaid goods.

Class 42: Computer services, namely, providing an internet site featuring technology for use in environmental monitoring, control, and automation systems; computer services, namely, providing an internet site featuring technology that allows users to remotely interact with environmental monitoring, control, and automation systems; platform as a service (PAAS) featuring computer software platforms for use with environmental monitoring, control, and automation systems; software as a service (SAAS) services featuring computer software for use with environmental monitoring, control, and automation systems.

22. In its written submissions, the applicant concedes that the opposed goods are 'identical and similar' to the Class 11 goods covered by the earlier mark². It does not provide an indication of specifically which goods it considers identical nor the degree of similarity it accepts.

23. 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 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".

24. The opponent's mark is registered for *lighting apparatus, lamps and instruments*, and is qualified by *parts and fittings for all of the aforesaid goods*. To my mind, all of the opposed goods for which the applicant seeks registration are captured within this ambit, 'apparatus' and 'instruments' allowing a relatively broad spectrum of protection. The competing goods are therefore identical on the basis of *Meric*.

The average consumer and the nature of the purchasing act

25. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

"60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well

² See paragraph 4 of the applicant's written submissions dated 4 January 2019

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.”

26. Given that the majority of (if not all) goods at issue in these proceedings are generally utilised in a domestic setting, the average consumer is likely to be a member of the general public or a tradesperson acting in an intermediary capacity (intending to fit the goods for a third party). Either way, the goods are often the subject of self-selection from traditional high street retail outlets, catalogues and websites. For that reason, visual considerations are likely to play the largest role in the selection process. I do not, however, discount aural considerations as, in my experience, it would not be unusual for consumers to seek advice from sales assistants to ensure compatibility (for example) who will, in turn, provide oral recommendations or advice directly to the consumer.

27. When considering the average consumer and the nature of the purchasing process, the applicant submits that the goods in play can be very complex, resulting in the average consumer taking time in their selection whilst paying a high degree of attention³. In contrast, the opponent argues that consumers are unlikely to agonise over the selection of the relevant goods, describing them as low value consumables which are purchased routinely, sometimes on whim⁴. Though cost will inevitably be variable, in my experience, and in the absence of any evidence to the contrary, the goods in dispute are, generally, not particularly costly and are purchased reasonably frequently. Consumer considerations are likely to fluctuate according to the specific good they are selecting; I would imagine that the purchase of *diving lamps* required a greater degree of thought than *ornaments for Christmas trees [lights]*, for example. That said, in each case the consumer will want to ensure that the selected good meets the required purpose and, to a degree, will be conscious of the product’s quality and

³ See paragraph 5 of the applicant’s written submissions dated 4 January 2019

⁴ See paragraph 10 of the opponent’s written submissions in lieu dated 11 February 2019

alleged longevity. Weighing all factors, I find it likely that consumers will apply an average degree of attention to the purchasing process.

Comparison of trade marks

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

“34. ...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 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 they create. I bear in mind each party’s submissions regarding the marks’ similarity and will refer to them, only where necessary.

30. The trade marks to be compared are displayed in the table below:

Opponent’s trade mark	Applicant’s trade mark
GOOEE	OEEGOO

31. The overall impression of the opponent's mark lies solely in the word GOOEE, having no additional components to rely upon.

32. The overall impression of the applicant's mark lies solely in the word OEEGOO, this being its only element.

Visual comparison

33. Visually, the opponent's mark and the applicant's mark are composed exclusively of five and six letters respectively. Strings of letters G-O-O and O-E-E can be found in both marks, albeit in different orders, and the applicant's mark incorporates an additional letter O which is positioned at the beginning. On balance, and keeping in mind that the beginning of marks generally have more impact upon consumers, I consider the visual similarity to be of a low to medium degree.

Aural comparison

34. When it comes to the articulation of the competing marks, I find it likely that the opponent's will be articulated in two syllables, namely GOO-EE. The applicant's mark is likely to invite a number of consumer articulations, the most likely of which, in my view, is OH-EE-GOO. On that basis, the two syllables which represent the opponent's mark in its entirety are wholly reproduced within the applicant's. That said, there is a sequential difference in the order the syllables are presented and the third syllable (OH) in the applicant's mark meets no counterpart in its competitor. Weighing all factors, I find the aural similarity between the marks to be of a fairly low degree.

Conceptual comparison

35. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

36. To my knowledge, neither of the words of which the respective marks are comprised are ordinary, dictionary words which possess a clearly attainable concept. Nevertheless, I find it likely that the average consumer will find the word GOOEE, of the opponent's mark, highly reminiscent of the widely known colloquial adjective 'goeey', notwithstanding the digression in spelling, which is used to describe a sticky or malleable texture. When it comes to the applicant's mark, I find it likely that consumers will fail to attach any conceptual significance, viewing it more so as a meaningless composition of letters. In doing so, consumers are likely to assume that OEEGOO is an invented word with no recognisable concept. On the basis that one mark is likely to evoke a recognisable concept and the other is not, there is no conceptual similarity between the two. I find that the marks are conceptually different.

37. If I am incorrect in my finding regarding the opponent's mark (i.e. that it will resonate with consumers as the word 'goeey'), both competing marks are likely to be viewed as invented words with no clear meaning. On that basis, it remains so that the marks are not conceptually similar; the conceptual position would be neutral.

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. 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).”

39. The opponent claims that its earlier mark possesses an enhanced level of distinctiveness on account of the use made of it in the course of trade⁵. However, given that no evidence was filed by the opponent to support such a claim, I have only the mark’s inherent distinctiveness to consider. It is widely accepted, though only a guideline, that words which are invented often possess the highest degree of distinctive character, whilst words which are suggestive or allusive of the goods and/or services relied upon generally possess the lowest. Though the opponent’s mark is unlikely to be viewed as an ordinary, dictionary word, I have found it likely that consumers may be able to attribute some meaning to it on the basis of its similarity with the word ‘gooey’. Whilst this suggests that the mark is not endowed with the highest level of distinctiveness, the opponent has adopted an unusual spelling and the word with which its mark may be associated (gooey) has no relationship with any of the goods (or services) for which its mark is registered. Weighing all considerations, I find the earlier mark to possess an inherent distinctiveness of a reasonably high degree.

Likelihood of confusion

40. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of

⁵ See paragraph 14 of the opponent’s written submissions in lieu dated 11 February 2019

similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion.

41. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

42. Earlier in this decision I reached the following conclusions:

- The competing goods are identical;
- The average consumer is a member of the general public or a tradesperson; Visual considerations are likely to dominate the selection process, though aural considerations are also relevant;
- An average degree of attention is likely to be paid to the selection of goods;
- There is a low to medium degree of visual similarity between the marks and a fairly low degree of aural similarity;
- The marks are conceptually different;
- The opponent's trade mark is inherently distinctive to a reasonably high degree.

43. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where he explained that:

“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.”

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

44. To make the assessment, I must adopt the global approach advocated by the case law, whilst taking account of each of the above conclusions. I will also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and must, instead, rely upon the imperfect picture of them retained in its mind.

45. When it comes to the relevance of conceptual differences, in *The Picasso Estate v OHIM*, Case C-361/04 P, the CJEU found that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences

observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

46. However, in *Nokia Oyj v OHIM*, Case T 460/07, the General Court stated that:

“Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98).”

47. The preceding case law reinforces the significance that conceptual similarity (or a lack thereof) can hold in a likelihood of confusion assessment. In the current case, I have concluded that one mark would be likely to convey a retrievable concept and the other would likely to be viewed as conceptually meaningless. On reflection, keeping in mind the nature of the purchase, I am satisfied that this will allow consumers to differentiate between the marks. They will likely recall their retrieval of a concept from the earlier mark and, equally, will recognise their failure to do so upon encountering the latter. Of course, if it transpires that consumers fail to attribute a conceptual meaning to either mark, a likelihood of confusion cannot be ruled out on the same basis alone. Still, keeping in mind that visual considerations are likely to dominate the purchasing process, and notwithstanding the effects of imperfect recollection, I remain of the view that consumers will readily distinguish between the marks on the basis of their visual differences, particularly in their beginnings (O-E-E and G-O-O), which consumers are likely to acknowledge. In short, if the conceptual disparity between the marks is not sufficient to preclude an engagement of direct confusion, the preclusion will be maintained on account of the marks’ visual differences. Either way, I find it unlikely that consumers will mistake one mark for the other.

48. I move now to consider the opportunity for indirect confusion. I do not find the differences between the marks in the current case consistent with any of the examples given by Mr Purvis in *L.A. Sugar* (paragraph 44 refers). Whilst I recognise that the list of examples is non-exhaustive, I cannot foresee any scenario whereby consumers will

feasibly conclude that the changes in the mark are representative of an evolutionary marketing strategy or brand development, for example. I accept that consumers may notice the coincidence of some of the marks' letters and the common elements 'G-O-O' and 'O-E-E' but this would not, in my view, result in confusion. It may mean that one mark reminds consumers of the other, but their thought process is unlikely to progress any further. In *Duebros Limited v Heirler Cenovis GmbH*⁶, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely 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, and I find this the most likely outcome here.

Conclusion

49. The opposition has failed and, subject to any successful appeal, the application will be refused.

Costs

50. As the applicant has been successful, it is entitled to a contribution toward its costs. Cost awards in proceedings are governed by Annex A of Tribunal Practice Notice ("TPN") 2 of 2016. Applying the guidance in that TPN, I award costs to the opponent on the following basis:

Reviewing the Notice of Opposition and preparing a counterstatement:	£200
Preparing written submissions:	£250
Total:	£450

⁶ BL O/547/17

51. I order Gooee Limited to pay Shenzhen Tuorantian Technology Co., Ltd the sum of £450. 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.

3rd April 2019

**Laura Stephens
For the Registrar**