

**O-326-19**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF THE APPLICATION UNDER NO. 3278253  
BY BEYOND RETAIL LIMITED  
TO REGISTER AS A UK TRADE MARK:**

**DRENCH**

**IN CLASSES 11, 20 AND 35**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO UNDER NO. 412310  
BY DRENCH EUROPE LIMITED**

## BACKGROUND AND PLEADINGS

1. On 19 December 2017 Beyond Retail Limited (“**the Applicant**”) applied to register as a UK trade mark the word “DRENCH” in respect of the following goods and services:

Class	The Applicant’s goods and services
11	Toilets; hand basins; shower mixers, shower valves, shower hoses, shower taps, shower heads; shower fittings; electric showers; baths; taps; bath taps; basin taps; mixer taps; radiators; heated towel rails; bath plugs; sink plugs
20	Bathroom furniture; shower seats; shower curtain rings; shower curtain rods.
35	The bringing together, for the benefit of others, of furniture, mirrors, tiles, towel hooks and rails, apparatus for water supply and sanitary purposes, shower pumps, baths, basins, sink and shower installations, bidets, sinks, spa baths, whirlpools, shower controls, shower spray heads, brackets for supporting shower spray heads, shower mixing valves, taps, mixers and faucets, plugs and chains for basins, radiators, radiator valves, isolating valves, pipes, hoses and connectors, heaters, space heaters, water heaters, towel heaters, heated towel rail accessories, water tanks, lids for water tanks, fans, extractor fans, ventilation ducting, toilets, toilet suites, toilet seats, toilet bowls, cisterns, toilet utensils, toilet roll holders, regulating and safety apparatus for water or gas apparatus and pipes, vanity units, light fittings, light switches, light pulls, thermostats, bath mats, non-slip mats, mirror tiles, mirrors [looking glasses], and parts and fittings for the aforesaid goods, enabling customers to conveniently view and purchase those goods in a wholesale and/or retail outlet, by mail order, through a catalogue, or via a website.

2. The application was published for opposition purposes in the Trade Marks Journal on 26 January 2018 and is opposed by Drench Europe Limited (“**the Opponent**”). The opposition is based on section 5(2)(a) of the Trade Marks Act 1994 (“**the Act**”) and is directed against all of the goods and services in the application.
3. These proceedings involved an interlocutory hearing to resolve the position in relation to the extent of the opposition. The notice of opposition originally filed had indicated that the Opponent’s claim was that only some of the goods and services in the application – namely Class 11: shower fittings - are identical or similar to the goods covered by its earlier mark. In response, the Applicant’s legal representatives wrote to the Registry requesting to remove that term from its specification and that the application proceed to registration for all remaining goods and services. However, the Opponent promptly responded that it had

misunderstood matters and wished to oppose the whole of the application. The Registry gave its preliminary view that amendment of the notice of opposition should be allowed to include all goods and services of the application. The Applicant challenged that preliminary view, but following an interlocutory hearing on 28 August 2018 the preliminary view was upheld and the extent of the opposition was duly extended. I note that during the process the Applicant filed a Form TM21B to amend its application by removing the term “shower fittings” from its Class 11 goods. However, since that step appears to have been in response to the original limited scope of the opposition, I shall allow in this decision for the possibility that the term remains part of the Applicant’s specification.

4. The Opponent relies in these proceedings on its ownership of a UK trade mark registration (No. 3215463) for the word mark “DRENCH”, which is registered in respect of the following goods:

Class	The Opponent’s goods
11	Shower Enclosures, Shower Screens, Shower Doors, Bath Screens and Shower Cubicles

5. The Opponent applied for its trade mark on 27 February 2017; therefore, in relation to the opposed mark, the Opponent’s is an “**earlier mark**” as defined in section 6 of the Act. The earlier mark completed its registration process on 28 July 2017, so had not been registered long enough to engage the proof of use provisions under section 6A of the Act; the Opponent is therefore able to rely on its earlier mark in these proceedings in respect of all of its registered goods.
6. The notice of opposition included reference to the parties’ respective websites and to allegations of real-world instances of customer confusion. That information plays no part in this decision, not only because the Opponent filed no evidence under a statement of truth, but because, as will be seen, these proceedings essentially focus on whether the Applicant’s mark is identical to the earlier mark and particularly on the extent to which, applying the principles from case law, the goods and services specified in the application are identical or similar to the Opponent’s goods, such that there is a likelihood of confusion and that the application should therefore not proceed to registration.

7. The Applicant submitted a Form TM8 notice of defence, including a counterstatement denying the grounds and explaining at some length its estimation of the extent to which there is or is not any similarity between the parties' goods and services.

### **Papers filed, representation and hearing**

8. The Applicant is represented by Baron Warren Redfern. The Opponent is without legal representatives in these proceedings. Neither party filed evidence or submissions and neither party requested an oral hearing, so I make this decision on the basis of the papers filed taking into account and referring to the parties' points so far as relevant.

### **DECISION**

9. Section 5(2)(a) of the Act, reads as follows:

“5. – [...]

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

- (a) it is identical with an earlier trade mark and is to be registered for goods or services 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”.

10. Determination of matters under this ground must be made in light of principles gleaned from decisions of the EU courts in cases such as *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, and *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97. Salient principles include the following:

- (a) likelihood of confusion must be assessed globally, taking account of all relevant factors;
- (b) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks;
- (c) 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;
- (d) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (e) 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 the marks

11. The mark both of the Applicant and the Opponent is the word “DRENCH”. The marks are admitted to be identical<sup>1</sup>.

## Distinctiveness of the earlier mark

12. The distinctive character of the earlier mark must be assessed, as the more distinctive the earlier mark, either inherently or through use, the greater the likelihood of confusion<sup>2</sup>. An appraisal of the distinctive character of a trade mark must be by reference both to the goods/services under the registration and to the way it is perceived by the relevant public<sup>3</sup>. In *Lloyd Schuhfabrik*, the Court of Justice of the European Union (“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 ....

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).”

13. The Opponent has filed no evidence, so I have no information on use, market share and so on, and there has been no claim of enhanced distinctiveness; I can assess the Opponent’s mark only on its inherent characteristics. The word “drench” does not describe the goods, but nor is it an invented word. It is a familiar word in the English language that the average

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<sup>1</sup> Counterstatement , paragraph 4.2

<sup>2</sup> *Sabel* at [24]

<sup>3</sup> *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91

consumer would understand to mean something like “make very wet”. In the context of the Opponent’s shower and bath goods the mark is clearly allusive, but I find that the mark remains well capable of identifying those goods as originating from a particular undertaking and thus enjoys an average degree of distinctive character.

### **The average consumer and the purchasing process**

14. In *Hearst Holdings Inc*,<sup>4</sup> Birss J. explained that “... *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 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 word “average” denotes that the person is typical ...*”. It must also be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question<sup>5</sup>.
15. The average consumer for the respective goods and services at issue is drawn from the general public, and may include business users. The contested goods may run a spectrum of prices, but are generally neither especially cheap nor expensive, and will be bought only periodically, typically when a person is renovating a bathroom or shower room. The attention level in selecting and buying them will likely be average. The goods will be bought in shops or via the internet or catalogue. The consumer will see the marks used on the goods as labelling or branding or in advertising, where a consumer will peruse shelves or a display exhibit, or browse the internet or promotional publications to select the goods. Therefore, I consider the purchase to be a primarily visual one<sup>6</sup>, but aural considerations may also play a part, such as on the basis of word of mouth recommendations, so I also take into account the aural impact of the marks in the assessment.

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

16. The respective goods and services are as follows:

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<sup>4</sup> *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), at paragraph 60.

<sup>5</sup> *Lloyd Schuhfabrik*

<sup>6</sup> See paragraphs 49 and 50 of the judgment of the General Court in *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03.

<b>Class</b>	<b>The Opponent's goods</b>
11	Shower Enclosures, Shower Screens, Shower Doors, Bath Screens and Shower Cubicles
<b>Class</b>	<b>The Applicant's goods</b>
11	Toilets; hand basins; shower mixers, shower valves, shower hoses, shower taps, shower heads; shower fittings; electric showers; baths; taps; bath taps; basin taps; mixer taps; radiators; heated towel rails; bath plugs; sink plugs
20	Bathroom furniture; shower seats; shower curtain rings; shower curtain rods.
<b>Class</b>	<b>The Applicant's services</b>
35	The bringing together, for the benefit of others, of furniture, mirrors, tiles, towel hooks and rails, apparatus for water supply and sanitary purposes, shower pumps, baths, basins, sink and shower installations, bidets, sinks, spa baths, whirlpools, shower controls, shower spray heads, brackets for supporting shower spray heads, shower mixing valves, taps, mixers and faucets, plugs and chains for basins, radiators, radiator valves, isolating valves, pipes, hoses and connectors, heaters, space heaters, water heaters, towel heaters, heated towel rail accessories, water tanks, lids for water tanks, fans, extractor fans, ventilation ducting, toilets, toilet suites, toilet seats, toilet bowls, cisterns, toilet utensils, toilet roll holders, regulating and safety apparatus for water or gas apparatus and pipes, vanity units, light fittings, light switches, light pulls, thermostats, bath mats, non-slip mats, mirror tiles, mirrors [looking glasses], and parts and fittings for the aforesaid goods, enabling customers to conveniently view and purchase those goods in a wholesale and/or retail outlet, by mail order, through a catalogue, or via a website.

17. The Applicant argued that the ground of opposition is insufficient and should be dismissed on the basis that the Opponent has made no submissions in relation to the similarity of the goods and services. I reject that contention, which has not been pursued as an interlocutory matter, and the specifications are anyway not so extensive, nor are the goods and services so disparate or unfamiliar, as to make an assessment of similarity unreasonably difficult. The Opponent's claim is plainly that the parties' goods and services are similar or identical and that taken with the identity of the marks, there is a risk of confusion, and I proceed to compare the goods and services in this decision in the usual way.
18. In considering the extent to which there may be similarity between goods and services, I take account of the factors identified by the CJEU in *Canon*<sup>7</sup> where it stated that:

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<sup>7</sup> Case C-39/97, at paragraph 23.

*“In assessing the similarity of the goods ... all the relevant factors relating to those goods .. 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”*.<sup>8</sup>

19. In *Boston Scientific*<sup>9</sup>, the General Court described goods as “complementary” in circumstances where “... *there is a close connection between [the goods], 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*”. I also take note that in *Kurt Hesse v OHIM*<sup>10</sup>, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods.
20. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case<sup>11</sup> 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.
21. Broadly, the Applicant denied similarity between any of the goods and services that would lead to a likelihood of confusion. In its defence, the Applicant identified points of difference in the goods and services, variously referring to aspects of the criteria arising from case law such as difference in nature, intended purpose and method of use. I shall not fully reproduce

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<sup>8</sup> The essence of case law points on similarity made in relation to goods applies correspondingly to services.

<sup>9</sup> *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

<sup>10</sup> *Case C-50/15 P*

<sup>11</sup> *British Sugar PLC v James Robertson & Sons Ltd* [1996] R.P.C. 281

the points submitted in the Applicant's counterstatement, but I have read them all and make some reference to them as appropriate.

22. The Opponent's goods are not wide-ranging. I find that the closest point of similarity in the respective goods or services arises from the Applicant's "**shower fittings**" in Class 11 - which I recognise may well no longer even be part of its specification. I consider that "shower fittings" could encompass a wide range of goods installed in connection with shower units, including, for example, "shower screens". Since shower screens designated by the earlier mark are included in a more general category (shower fittings), designated by the trade mark application, such goods may be considered identical<sup>12</sup>. I find shower fittings are at least highly similar to shower enclosures, shower screens, shower doors, and shower cubicles, as they are all fitted features in a shower, given their central overlap in nature, users and complementarity.
23. As to the Applicant's other goods and services, there is less similarity, which diminishes, broadly expressed (and self-evidently), the less closely connected such goods and services may be with the shower and bath goods of the Opponent. I consider the Applicant's goods and services below, grouped for convenience of analysis.
24. Class 11: **Toilets; hand basins; taps; bath taps; basin taps; mixer taps; bath plugs; sink plugs** - I accept that these goods differ in nature, purpose and method of use from "shower enclosures, shower screens, shower doors, bath screens and shower cubicles", and that they do not compete and are not complementary in the sense described in *Boston Scientific*. However, in common with the Opponent's goods, such goods are often integral features of a bathroom or shower room and will be sold from the same kinds of general bathroom showrooms or sections of larger DIY stores. In my experience as an average consumer such products are often displayed together in retail situations to show potential set-ups for a bathroom or shower suite targeting consumers seeking to make changes to their own bath or shower rooms. I find these goods therefore have a low degree of similarity with the Opponent's goods, particularly on the basis of shared users and trade channels.
25. Class 11: **shower mixers, shower valves, shower hoses, shower taps, shower heads; electric showers** - The Applicant distinguishes these goods as all relating to the actual

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<sup>12</sup> See paragraph 29 of the ruling of the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, EU:T:2006:247.

shower itself, and in particular the supply and dispensing of water and that as such, they have a different nature, purpose and method of use from the Opponent's goods, which function to enclose a shower or bath and prevent the escape of water. I largely accept those points of difference and that there is no competition between these goods. However, in common with the Opponent's goods, these are all shower-related products, and again share users and trade channels. Although it is possible to use these goods without the Opponent's goods, I find that they closely interact and may be considered complementary. I find these goods are similar to the Opponent's goods to (at least) a low degree.

26. Class 11: **baths** - There are clear differences in nature, purpose and method of use from the Opponent's shower screens, but there are also points of commonality in that one may use a bath as the means for bodily ablution, or one may opt to use a screened or cubicled shower for the same purpose. To that extent there is also a degree of competition in the goods. There is very clear complementarity between the Opponent's "bath screens" and baths and the Opponent's goods also share users and trade channels with "baths". I find these goods similar to (at least) a low degree.
27. Class 11: **radiators** - These goods differ in nature, purpose and method of use from the Opponent's goods, they do not compete and are not complementary. I find no similarity between the Opponent's goods and radiators at large. (This contrasts with heated towel rails, which I recognised are a room-specific form of radiator.)
28. Class 11: **heated towel rails** - These goods differ in nature, purpose and method of use from the Opponent's goods, they do not compete and are not complementary. However, heated towel rails are often integral features of a bathroom or shower room and will be sold from the same kinds of general bathroom showrooms or sections of larger DIY stores. In my experience as an average consumer such products are often displayed together in retail situations to show potential set-ups for a bathroom or shower suite targeting a consumer seeking to make changes to their own bath or shower rooms. I find these goods therefore have a low degree of similarity with the Opponent's goods, particularly on the basis of shared users and trade channels.
29. Class 20: **Bathroom furniture** – The scope and implication of this term is not entirely clear to me. Consulting oxforddictionaries.com, the definition offered for "furniture" is "the movable articles that are used to make a room or building suitable for living or working in,

such as tables, chairs, or desks.” However, the same source offers synonyms that place less emphasis on the criterion of moveability: “furnishings, house fittings, fittings, fitments, movables, fixtures, appointments, appliances, effects, chattels, amenities, units, equipment”. I thus consider “bathroom furniture” could encompass goods such as vanity units, mirrors, shelves, bins, stools and could also include the Opponent’s goods since they are fixtures or fittings that will make a bathroom suitable for its function. As with other furniture, selection of screens will involve aesthetic as well as functional considerations, for example taking account of co-ordination with the wider bathroom suite and dressings. On the basis of the inclusion principle, goods such as bath screens and shower screens could be considered identical to bathroom furniture. At any rate there is a degree of broad overlap in nature and purpose and some overlap in sellers and users. I find there is at least a low degree of similarity between the Opponent’s shower screens and bath screens and the Applicant’s “bathroom furniture” at large.

30. Class 20: **shower seats; shower curtain rings; shower curtain rods** - These goods differ in nature, purpose and method of use from the Opponent’s goods, but they are all united by their being shower-related products, and again share trade channels. There is some interaction of the goods in that a shower seat may be used in a shower cubicle for example, and there is an overlap in users. Moreover, when seeking to contain the water from a shower, one may choose a shower curtain arrangement in preference to a shower screen or cubicle, and there is thus an element of competition with “shower curtain rings; shower curtain rods.” I find that shower seats; shower curtain rings; shower curtain rods are similar to the Opponent’s goods to (at least) a low degree.
31. **Services in Class 35:** The Applicant’s services are the bringing together, for the benefit of others, of various goods (and their parts and fittings), enabling customers to conveniently view and purchase those goods in a wholesale and/or retail outlet, by mail order, through a catalogue, or via a website.
32. The Applicant’s counterstatement referred to guidance published by the EUIPO as to similarity between goods and retail services.<sup>13</sup> On consulting that source, I note that it elucidates the wording of these Class 35 services as follows: “it should be noted that the sale of goods is not a service within the meaning of the Nice Classification. Therefore, the

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<sup>13</sup> EU IPO Guidelines for Examination in the Office, Part C, Opposition

activity of retail in goods as a service for which protection of an EUTM can be obtained does not consist of the mere act of selling the goods, but in the services rendered around the actual sale of the goods, which are defined in the explanatory note to Class 35 of the Nice Classification by the terms ‘the bringing together, for the benefit of others, of a variety of goods (excluding the transport thereof), enabling customers to conveniently view and purchase those goods’.” The same source also states<sup>14</sup> that the principles on retail services “apply to services rendered in connection with different forms exclusively consisting of activities around the actual sale of goods, such as retail store services, wholesale services, internet shopping, catalogue or mail order services, etc. (to the extent that these fall into Class 35).”

33. The Applicant’s counterstatement quoted sections 7.2 and 7.3 from the EUIPO guidance as follows:

**“7.2 Retail services of specific goods versus same specific goods: similar to a low degree**

Retail services concerning the sale of particular goods are similar (to a low degree) to these particular goods (judgment of 05/10/2011, T-421/10, Rosalia de Castro, EU:T:2011:565, § 33). Although the nature, purpose and method of use of these goods and services are not the same, it should be noted that they display similarities, having regard to the fact that they are complementary and that those services are generally offered in the same places as those where the goods are offered for sale. Furthermore, they are directed at the same public.

The goods covered by the retail services and the specific goods covered by the other mark have to be identical in order to find a similarity, that is to say, they must either be exactly the same goods or fall under the natural and usual meaning of the category (e.g. retail of sunglasses v sunglasses and retail of optical apparatus v sunglasses).

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<sup>14</sup> Section 7.6

### 7.3 Retail services of specific goods versus different or similar specific goods: dissimilar

Retail services relating to the sale of particular goods and other goods are not similar. It should be remembered that in principle goods are not similar to services. Too broad a protection would be given to retail services if similarity is found where the goods sold at retail are only highly similar or similar to the goods covered by the other mark.”

34. Although I recognise that trade mark law is essentially harmonised in the EU, the above commentary from the EUIPO guidance is not binding on the UK trade mark tribunal. I do, however, have regard to the relevant case law, as indicated below, that considers issues of similarity between goods and the retailing of goods and which raises a question in relation to the categorical distinction made in paragraph 7.3 of the EUIPO guidance.
35. 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 from 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. I do not overlook that in *Oakley* the goods covered by the earlier mark, found to be complementary, were identical to those to which the applicant’s services related, but I also note the following points from that case:
- at paragraph 49, “the fact that the retail services are provided at the same sales points as the goods is a relevant criterion for the purposes of the examination of the similarity between the services and goods concerned”;
  - at paragraph 50, “manufacturers of the goods in question often have their own sales outlets for their goods or resort to distribution agreements which authorise the provider of the retail services to use the same mark as that affixed to the goods sold”.
36. In the *MissBoo* case<sup>15</sup>, Geoffrey Hobbs Q.C. as the Appointed Person commented that “the criteria for determining whether, when and to what degree services are ‘similar’ to goods are not clear cut.” Mr Hobbs reviewed the law concerning goods as against retail services and, on the basis of the European courts’ judgments in *Sanco SA v OHIM*<sup>16</sup> and *Assembled*

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<sup>15</sup> *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14; see paragraph 9 of that ruling.

<sup>16</sup> Case C-411/13P

*Investments (Proprietary) Ltd v. OHIM*<sup>17</sup>, upheld on appeal in *Waterford Wedgwood Plc v. Assembled Investments (Proprietary) Ltd*<sup>18</sup>, his conclusions included that:

- i) It is not permissible to treat a mark registered for ‘retail services for goods X’ as though the mark was registered for goods X;
- ii) 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;
- iii) 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;
- 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)<sup>19</sup>.

37. In this context, I note the following extracts from Mr Hobbs’ appeal decision in *MissBoo*:

- “3. Both as between marks and as between goods and services, the evaluation of ‘*similarity*’ is a means to an end. It serves as a way of enabling the decision taker to gauge whether there is ‘*similarity*’ of a kind and to a degree which is liable to give rise to perceptions of relatedness in the mind of the average consumer of the goods or services concerned. This calls for a realistic appraisal of the net effect of the similarities and differences between the marks and the goods or services in issue, giving the similarities and differences as much or as little significance as the relevant average consumer (who is taken to be reasonably well-informed and reasonably observant and circumspect) would have attached to them at the relevant point in time.

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<sup>17</sup> Case T-105/05, at paragraphs [30] to [35] of the judgment

<sup>18</sup> Case C-398/07P

<sup>19</sup> See paragraph 24 of *MissBoo* decision

4. [...] The relatedness or otherwise of the trading activities involved in the comparison is ultimately a matter of consumer perception.
25. In evaluating whether and, if so, to what degree retail services across the spectrum covered by the Listed Services were ‘*similar*’ to ‘*handbags*’ in Class 18 and ‘*shoes for women*’ in Class 25, it was necessary, in keeping with the principle of proportionality, to consider the greater or lesser likelihood that a single economic undertaking would naturally be regarded as responsible for providing not only goods of that kind, but also retail services of the kind in question. The degree to which retail services within the spectrum were found on evaluation to be ‘*similar*’ to such goods would be a co-variable with the degree of ‘*similarity*’ between the signs in the overall assessment of the existence or otherwise of a likelihood of confusion.”
38. It seems clear, therefore, that as part of the overall assessment of ‘similarity’ it is necessary to consider whether there is ‘complementarity’ between the goods and services in issue – i.e. whether the goods and services in issue are closely connected in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the same undertaking is responsible for manufacturing those goods or providing those services. I bear in mind the principle of proportionality and I note too that the Applicant’s services do not relate to goods that are identical to the limited goods specified by the Opponent (with the possible exception of ‘shower installations’); I also note that ‘complementarity’ does not always or necessarily equal ‘similarity’. However, taking into account all of the relevant case law, I find that there is in this case a low degree of similarity between the Opponent’s goods in Class 11: Shower Enclosures, Shower Screens, Shower Doors, Bath Screens and Shower Cubicles and some of the retail services specified by the Applicant in Class 35. I find similarity only in respect of those services that are specified to be in relation to what I consider in these circumstances to be sufficiently closely connected to shower or bath goods as indicated below, and excluding all those scored through. Such similarity as I find is based on complementarity, shared trade channels and shared users.

**Services in Class 35:** The bringing together, for the benefit of others, of ~~furniture, mirrors, tiles, towel hooks and rails,~~ apparatus for water supply and sanitary purposes, shower pumps, baths, ~~basins, sink and~~ shower installations, ~~bidets, sinks,~~ spa baths, whirlpools, shower controls, shower spray heads, brackets for supporting shower spray heads, shower mixing valves, taps, mixers and faucets, ~~plugs and chains for basins, radiators, radiator~~

~~valves, isolating valves, pipes, hoses and connectors, heaters, space heaters, water heaters, towel heaters, heated towel rail accessories, water tanks, lids for water tanks, fans, extractor fans, ventilation ducting, toilets, toilet suites, toilet seats, toilet bowls, cisterns, toilet utensils, toilet roll holders, regulating and safety apparatus for water or gas apparatus and pipes, vanity units, light fittings, light switches, light pulls, thermostats, bath mats, non-slip mats, mirror tiles, mirrors [looking glasses], and parts and fittings for the aforesaid goods, enabling customers to conveniently view and purchase those goods in a wholesale and/or retail outlet, by mail order, through a catalogue, or via a website.~~

### **Likelihood of confusion**

39. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of taking account of my findings set out in the foregoing sections of this decision and the authorities and principles I have set out, in particular at paragraph 10 above. The factors have a degree of interdependency and must be weighed against one another in a global assessment<sup>20</sup>. They must be considered from the perspective of the average consumer and a determination made as to whether the average consumer is likely to be confused.
40. In comparing the limited range of goods relied on by the Opponent with the goods and services applied for, I have found that only in respect of 'shower fittings' is there at least a high degree of similarity. For most of the Applicant's goods I have found a low degree of similarity (sometimes 'at least low'); only for 'radiators' (at large) have I found no similarity. I have also found low similarity in relation to a portion of the Applicant's services – and no similarity for the other portion.
41. The mark benefits from an average degree of inherent distinctiveness and I find that the identity between the parties' marks offsets a lesser degree of similarity between the goods and services. I find that on encountering the identical marks, there is a clear risk that where there is even a low degree of similarity between the goods and services, the average consumer in this case, paying an average degree of attention will wrongly believe that the respective goods or services come from the same or economically-linked undertakings. There is therefore a likelihood of confusion. The opposition therefore succeeds to the limited extent summarised in the outcome below.

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<sup>20</sup> *Canon* at [17]; *Sabel* at [22].

## OUTCOME

42. The opposition **succeeds** in relation to the goods and services that are **not scored through**. Those opposition **fails** in relation to the goods and services that are **scored-through**.

Class	The Applicant's goods
11	Toilets; hand basins; shower mixers, shower valves, shower hoses, shower taps, shower heads; shower fittings; electric showers; baths; taps; bath taps; basin taps; mixer taps; radiators; heated towel rails; bath plugs; sink plugs
20	Bathroom furniture; shower seats; shower curtain rings; shower curtain rods.
Class	The Applicant's services
35	The bringing together, for the benefit of others, of furniture, mirrors, tiles, towel hooks and rails, apparatus for water supply and sanitary purposes, shower pumps, baths, basins, sink and shower installations, bidets, sinks, spa baths, whirlpools, shower controls, shower spray heads, brackets for supporting shower spray heads, shower mixing valves, taps, mixers and faucets, plugs and chains for basins, radiators, radiator valves, isolating valves, pipes, hoses and connectors, heaters, space heaters, water heaters, towel heaters, heated towel rail accessories, water tanks, lids for water tanks, fans, extractor fans, ventilation ducting, toilets, toilet suites, toilet seats, toilet bowls, cisterns, toilet utensils, toilet roll holders, regulating and safety apparatus for water or gas apparatus and pipes, vanity units, light fittings, light switches, light pulls, thermostats, bath mats, non-slip mats, mirror tiles, mirrors [looking glasses], and parts and fittings for the aforesaid goods, enabling customers to conveniently view and purchase those goods in a wholesale and/or retail outlet, by mail order, through a catalogue, or via a website.

## COSTS

43. The opposition has succeeded only partially, each party has therefore achieved a measure of success, and should bear their own costs.

**Dated this 10th day of June 2019**

**Matthew Williams**  
**For the Registrar**

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