

O/363/21

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3385469
IN THE NAME OF GS Yuasa International Ltd.
FOR THE TRADE MARK:**

HT Element X Alloy

IN CLASS 9

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 000417047
BY HT S.P.A.**

Background and pleadings

1. On 21 March 2019, GS Yuasa International Ltd. (“the applicant”) applied to register the trade mark

HT Element X Alloy

for the following goods:

Class 09: *Batteries; Rechargeable batteries; Batteries for vehicles; Batteries for off-grid electrical storage; Batteries for backup power; Accumulators (batteries); electric storage batteries.*

2. The application was published for opposition purposes on 03 May 2019.

3. The application is opposed by HT S.P.A. (“the opponent”). The opposition was filed on 19 July 2019 and is based upon Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all of the goods in the application. The opponent relies upon the following mark:¹



EU Registration No. 013752043²

EU Registration date: 14 September 2015

¹ The original TM7 filed relied on 2 earlier marks, however EU registration number 01279967 was withdrawn by the opponent on 12 September 2019. The opposition based on Section 5(4) was deemed withdrawn as no evidence or submissions were filed by the opponent to support these grounds. The opposition therefore proceeds under Section 5(2)(b) only.

² Although the UK has left the EU and the transition period has now expired, EUTMs and International Marks which have designated the EU for protection are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 – please see Tribunal Practice Notice 2/2020 for further information.

Registered in Classes 9, 11, 35, 37 and 42

Relying on all goods in Classes 9 and 11 only, as listed in the table at paragraph 19 of this decision.

4. The opponent submits that both marks are equally dominated by the two letter combination HT, present in both the earlier and later marks. It further submits that the goods for which the applicant seeks registration are either identical with, or confusingly similar to, the goods for which the earlier mark is registered, and to the extent that they are not identical, those goods are complementary in accordance with the tests set out in case law.

5. The applicant filed a counterstatement denying the claims. It denies that the marks are similar visually, aurally, or conceptually, or that their overall impressions are similar. Further, it denies that the goods applied for under the later mark are identical, similar or complementary to those relied on under the earlier mark; accordingly, it submits that there is no likelihood of confusion between the marks.

6. Only the applicant filed written submissions which will not be summarised, but will be referred to as and where appropriate during this decision. Only the applicant filed evidence which I will summarise to the extent that I consider necessary. Neither party requested a hearing, therefore this decision is taken following a careful perusal of the papers.

7. In these proceedings, the opponent is represented by Stevens Hewlett & Perkins, and the applicant is represented by Mewburn Ellis LLP.

Evidence

8. The applicant filed a witness statement in the name of Pollyanna Savva, a Technical Assistant and Part-Qualified Trade Mark Attorney employed by Mewburn Ellis LLP. It is dated 1 February 2021. The purpose of Ms Savva's witness statement was to explain how she obtained evidence pertaining to the meaning of "HT" and "Element X Alloy", and to adduce fourteen exhibits (labelled **Exhibit PS1** to **Exhibit PS14**) accordingly.

9. **Exhibits PS1 – PS6** are printouts of a selection of results retrieved following a Google search by Ms Savva on 27 January 2021 for the terms '*HT + battery*'; '*HT acronym*'; '*define high tension*'; '*high tension + electronics*'; '*ht + high tension*'; and '*high tension + abbreviation*'.

10. **Exhibits PS7 – PS11** are printouts of a selection of results retrieved following a Google search by Ms Savva on 24 November 2020 for the following terms: '*ht batteries*'; '*define HT battery*'; '*HT + battery*'; '*HT + high temperature battery*'; '*HT + high temperature + battery*'; and '*HT + high temperature battery*'.

11. **Exhibits PS12 – PS14** consist of printouts following a Google search by Ms Savva on 26 January 2021 for the terms '*periodic table*'; '*define element*'; and '*alloy*'; respectively.

DECISION

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

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

...

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

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

13. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark, international trade mark (UK), European Union 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,

...”

14. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As the trade mark had not been registered for more than five years at the date the application was filed, it is not subject to the proof of use provisions contained in section 6A of the Act. The opponent is, therefore, entitled to rely upon it in relation to all of the goods indicated without having to prove that genuine use has been made of them.

15. Although the UK has left the European Union, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. Therefore, this decision contains references to the trade mark case-law of the European courts.

Section 5(2)(b) –

16. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (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:

(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 to mind the earlier mark, 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

17. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated 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”.³

18. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

“(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;

³ Paragraph 23

(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.”

19. The goods to be compared are:

Opponent's goods	Applicant's goods
<p><u>Class 09</u> <i>Electric apparatus and instruments, namely: potentiometers, programmers and regulators for flat linear guides, condensers, variable condensers, regulators, coils and coil bodies for electric and electronic circuits, ferrite and iron cores, diodes, transistors, thyristors and triacs, integrated circuits and logic circuits, photodiodes and light diodes, phototransistors, rectifiers, heat diffusers for electric, electronic and optoelectronic components, switches, feeler pins, relays, transformers, protective devices, holders for electric and electronic or optoelectronic components, plugs and bushings; Ballasts, including electronic ballasts, electro-magnetic ballasts, dimmable electro-magnetic ballasts; Resistances, electric; Devices and sensors for measurements in fused masses, in particular castings of metal and cryolite, in</i></p>	<p><u>Class 09</u> <i>Batteries; Rechargeable batteries; Batteries for vehicles; Batteries for off-grid electrical storage; Batteries for backup power; Accumulators (batteries); electric storage batteries.</i></p>

particular for measuring temperature; Resistance wires; Resistance boxes; Magnetic resistance sensors; Electrical resistance coils; Resistances, electric; Insulation resistance meters; Resistance measuring instruments; Resistance oscillator thermometers; Resistance temperature detectors; Resistance testing apparatus; Variable resistances; Resistances, electric; Inductive resistors; Ballasts for electrical lighting fittings; Force sensing resistors; electrical resistance materials, In particular in the form of wires, flat-rolled wires; Thermocouples, Thermocouple wires; Electric and electronic measuring, checking (supervision) and surveillance apparatus and instruments; Base material for electronic components, base material for electronic circuits; Parts for electrical and electronic apparatus, including element carriers, coil formers, connecting pieces, in particular ceramic parts therefor; Electronic components, namely substrates for technology with both thick and thin layers, substrates, metallised and non-metallised, ceramics, metallised; Housings for semi-conductors, chip-carriers, pin grid arrays, Sensor, Heat sinks; Piezoceramic components and construction elements for converting electrical energy into kinetic energy, and vice versa, and assemblies constructed therefrom, piezoelectric tone generators, sound and ultrasound generators, movement sensors, actuators, fuses,

sound transducers and motion converters; Components for laser installations, including laser resonators, resonator elements, longitudinal and transverse stabilisers, supports and other parts, in particular ceramic components therefor; Components for concentration metering cells, fuel cells; Base material for sensors, in particular ceramic base material therefor; Components for oxygen sensors and pressure sensors, in particular ceramic components therefor; Heat-resistant and chemical-resistant parts, including panels, housing parts for solar energy-generating installations and energy-converting installations (electricity), in particular ceramic parts therefor; Heat-resistant and chemical-resistant parts, including panels, housing parts for fuel cell parts, in particular ceramic parts therefor; PTC heaters, micro-tubular heaters, nozzle band heaters; Sintered bodies of metal, namely heating resistors; Resistors for thick film; Ceramic blocks for insulating electric resistors; Luminous indicators.

Class 11

Control and checking equipment for gas and oil burners; Installations for lighting, heating, steam generation, cooking, refrigerating, drying, ventilating, and water supply; Apparatus for steam generating, cooking, ventilating, namely cartridge heaters, domestic heating solutions; Straight and immersion cartridge heaters;

Strip, finned, anti-condensation, nozzle, flat plate, band, air process, infra-red, tape, tube, immersion and crank-case heaters; Heating lamps; Heating radiators; Heating mats; Thermoelectric coolers; Heat pump assemblies; Ventilating fans; Axial fans; Hot air circulation fans; Evaporators; Apparatus and parts therefor for heating, steam generating, cooking, refrigerating, drying and ventilating; Electric heating resistors, electric cookers; Electric ovens and Support stands; Radiating elements; Temperature controlling baths; Commercial, industrial, and process heaters and furnaces; Hot plates for the laboratory; Heating mantels; Soft metal heating pots; Radiators, electric; Bent tubular heaters and Etched heating elements; Thin plate immersion heaters; Ceramic radiant heating elements; Band heaters; Enclosure heaters; Flexible rope heaters, Strip, sheath strip, finned strip and seamless strip heaters; Ring heaters; Cartridge and sheath cartridge heaters; Electric stud heaters; Tubular, finned tubular and round tubular heaters; Immersion heaters; Pipe insert heaters; Circulation heaters; Nozzle heaters; Air duct heaters; Infrared panel heaters; Ceramic plate and ceramic ribbon heaters; Radiant ovens; Forced air unit heaters; Wall-mounted compressed air heaters, Ceiling forced air unit heaters; Convection heaters, wall mounted convection heaters; Portable forced air heaters; Portable radiant heaters; Blower

<p><i>heaters; Flexible heaters; Silicone rubber fiberglass insulated heaters; Insulated heaters; Heating tapes; Drum heaters; Bench top muffle furnaces; Hot plates for the laboratory; High vacuum substrate heaters; Soft metal heating pots; Components for combustion chambers, in particular ceramic components therefor; elements (heating-); Heat-resistant and chemical-resistant parts, including panels, housing parts for heat energy-generating installations and heat energy-converting installations, in particular ceramic parts therefor; Heat-resistant and chemical-resistant parts, including panels, housing parts for combustion chamber parts, in particular ceramic parts therefor.</i></p>	
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20. In its Statement of Grounds, the opponent submits that the goods for which the applicant seeks registration are either identical with or confusingly similar to the goods for which the earlier mark is registered. It further submits that to the extent that they are not identical, the goods are complementary and otherwise similar in accordance with the tests set out in *Canon*. However, the opponent provides no further submissions on how the applicant's goods compare to those of the earlier mark. I note that in *RALEIGH INTERNATIONAL Trade Mark* [2001] RPC 11, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, observed that when goods or services are not identical or self-evidently similar, the opposition should be supported by evidence as to their similarity.⁴

21. In its written submissions, the applicant asserts that the goods covered in Class 9 of the earlier mark are generally highly specialised and technical apparatus and components which may form part of electronic circuits or complex electronic systems.

⁴ Paragraph 20

In contrast, the “*batteries*” of the later mark are finished articles whose purpose is to store electricity. It submits that its goods have different natures and functions which are usually manufactured by specialist battery manufacturers. It further submits that while some of the opponent’s Class 11 goods may contain batteries, they have different natures, commercial purposes, methods of use, end users and distribution channels and that the goods are not similar to batteries.

22. In making my comparison, I am guided by the following case law. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”⁵

23. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“...the applicable principles of interpretation are as follows:

⁵ Paragraph 12

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

24. In *Les Éditions Albert René v OHIM*, Case T-336/03, the GC found that:

“... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”⁶

25. In *Sanco SA v OHIM*, Case T-249/11, the General Court (“GC”) stated that:

“...the complementarity between the goods and services in the context of a likelihood of confusion does not rely on the existence of a connection between the goods and services at issue in the mind of the relevant public from the point of view of their nature, their method of use and their distribution channels but on the close connection between those goods and services, in the sense that one is indispensable or important for the use of the other in such a way that the public might think that the responsibility for the production of those goods or provision of those services lies with the same undertaking.”⁷

⁶ Paragraph 61

⁷ Paragraph 36.

26. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where appropriate. In *Separode Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”⁸

27. The applicant’s goods comprise a range of different types of batteries, a battery being used as a source of electric current. While they share the common purpose of providing power to electrical items, the exact use of the assorted types of battery will vary depending on its individual specification and nature.

28. “*Batteries; Rechargeable batteries*”. As I have already noted, batteries in the most general sense provide power to electrical items including, *inter alia*, torches, toys and control units. Many batteries are disposable, being fully charged on supply and then discarded following use; rechargeable batteries are designed to be used again and again following each recharge. While there may be an overlap in both users and the channels of trade of the opponent’s “*Electric and electronic measuring, checking (supervision) and surveillance apparatus and instruments*” in Class 9, the uses and physical nature of the goods differ, and they are not in competition. Although the goods may be used together, and for some goods, batteries will be indispensable to the function of those goods, in regard to the meaning of the word ‘complementarity’ in relation to trade mark law, I am guided by the GC in *Sanco*. It is my view that the average consumer of the competing goods will not believe that the responsibility for both lie with the same or economically-linked undertakings. In my view, the goods are dissimilar. However, if I am wrong in this, and there is any similarity, it will be at a very low level based on the overlap in users and trade channels I have identified above.

⁸ Paragraph 5

29. “*Batteries for off-grid electrical storage; electric storage batteries*”. These are types of electrical batteries which can be charged, discharged and recharged, and allow surplus electricity to be stored for later, often commercial, use. I acknowledge that they may be used in conjunction with the “*Installations for lighting, heating, steam generation, cooking, refrigerating, drying, ventilating, and water supply*” included in Class 11 of the opponent’s registration, and as such there may be an overlap in users. However, the goods have different natures, purposes and methods of use. The batteries are likely to be produced by specialised manufacturers, and to my mind, the average consumer will not expect the respective goods to come from the same trade source. There will be a difference in distribution channels, and the goods are not in competition. Therefore I find the goods to be dissimilar.

30. “*Batteries for backup power*”. These provide an uninterruptible power supply which are most often used in relation to, for example, burglar alarms, computers and telephony, as well as for use in aircraft and in hospitals to keep essential instruments and devices running in the event of power failure. They may, therefore, be used alongside “*Installations for lighting, heating, steam generation, cooking, refrigerating, drying, ventilating, and water supply*”, resulting in an overlap in users. However, the manufacture of these batteries will be specialised and they have different natures, purposes and methods of use to the opponent’s goods. Neither are the goods in competition with each other. To my mind, “*Batteries for backup power*” are dissimilar to the opponent’s goods.

31. “*Accumulators (batteries)*”. An accumulator is defined as “a rechargeable device for storing electrical energy in the form of chemical energy, consisting of one or more separate secondary cells”.⁹ Also known as a storage battery, they serve the same purpose as the applicant’s “*electric storage batteries*”. Therefore, for the same reasons as given in paragraph 27, I find the goods to be dissimilar to the earlier “*Installations for lighting, heating, steam generation, cooking, refrigerating, drying, ventilating, and water supply*”.

⁹ Source: <https://www.collinsdictionary.com/dictionary/english/accumulator>

32. “*Batteries for vehicles*”. These types of battery are usually in the form of a rectangular box containing acid, such as those found in a car (or other vehicle) engine for the purpose of providing the electricity needed to start the vehicle. As such, the nature and use of these goods are very specific. While vehicles comprise various “*Parts for electrical and electronic apparatus, including element carriers, coil formers, connecting pieces, in particular ceramic parts therefor*”, the nature, intended purpose and the customers for those goods are different, and they are not in competition. Therefore, following the GC in *Les Éditions Albert René*, I find the goods to be dissimilar.

33. As I have found that all the goods are dissimilar, the opposition fails. However, in case I am wrong in my assessment that *Batteries* and *Rechargeable batteries* are dissimilar to *Electric and electronic measuring, checking (supervision) and surveillance apparatus and instruments*, I shall consider the position based on a very low degree of similarity between these goods.

The average consumer and the nature of the purchasing act

34. 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. (as he was then) described the average consumer in these terms:

“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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.¹⁰

¹⁰ Paragraph 60

35. 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*.

36. In its written submissions, the applicant submits that, as the parties' goods are specialised and highly technical, the average consumer will be particularly knowledgeable and have a high level of expertise, and will be drawn from a specialised and professional public. They further submit that such goods are not everyday purchases and may involve large sums. Therefore the average consumer will pay a high degree of attention.

37. The opponent has made no reference to the average consumer in its Notice of Opposition.

38. The average consumer of the applicant's goods is a member of the general public for the batteries and rechargeable batteries which are used in everyday devices such as toys and remote control units. The goods may be ordered from an online retailer or bought off the shelf in a bricks and mortar store. In both cases, the visual element will be the most significant, although I do not discount oral recommendations. While it will be necessary to choose the correct size and voltage appropriate to the device they are to be used with, for these semi-frequent purchases it is my view that the level of attention is likely to be low, commensurate with the purpose and low price tag of the goods.

39. For the "*Electric and electronic measuring, checking (supervision) and surveillance apparatus and instruments*" in the opponent's specification, the average consumer may be a member of the general public or a specialised and/or professional purchaser. I consider that the goods will be procured on an infrequent basis with the cost of the goods likely to vary depending on their exact nature. Bearing in mind various factors, including functionality, performance, cost, quality and the reputation of the brand, the goods will be chosen by predominantly visual means, although word of mouth recommendations or verbal advice from sales staff may also apply. I consider that the consumer will pay a medium to high level of attention to the selection of these goods.


Comparison of marks

40. 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 in *Bimbo SA v OHIM* Case C-591/12P, 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.”¹¹

41. 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.

42. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
	HT Element X Alloy

¹¹ Paragraph 34

43. The opponent submits that the dominant distinctive element of the earlier mark is the two letter combination HT. They further submit that the applicant's mark is dominated equally by the same two letter combination, being the only inherently distinctive component in the sign.

44. The applicant has provided exhibits to support its assertions that the letters 'HT' have a known meaning that is descriptive or at least allusive of the parties' goods.

Overall impression

45. The opponent's mark consists of three vertical stripes in the colours red, orange and yellow respectively, preceding the letters "HT" which are in a standard grey font, all of which are of equal size and are set at an angle which slants from left to right. Underneath are the words "ADVANCED HEATING SOLUTIONS", also presented at the same angle and in the same grey font as the letters "HT", but in a much smaller typeface. The combination of the stripes and letters "HT" is the dominant and distinctive element and plays the greater role in the overall impression of the mark. The words "ADVANCED HEATING SOLUTIONS" are likely to be seen as describing or alluding to the goods being provided and as such, alongside their position and reduced size, make a much lesser contribution to the overall impression of the mark.

46. The applicant's mark comprises the words "HT Element X Alloy", presented in a standard black font. The word "Element X Alloy" may be perceived as alluding to a particular, but non-disclosed chemical element or alloy found within the batteries being provided. In my view, the letters HT, situated at the start of the mark, make a slightly greater contribution to the overall impression of the mark, with the remaining combination of words making a lesser contribution.

Visual comparison

47. Both marks contain the same two letter combination "HT", but that is where the similarity ends. Given its size and position, it is the combination of three stripes and letters "HT" which has the most visual impact in the earlier composite mark. The letters "HT" appear in capitals at the start of the applicant's mark, and make a slightly greater

visual impact to the mark in its totality, although I do not consider that they overly dominate the combination. Considering the marks as a whole, I find there to be a low degree of visual similarity between them.

Aural comparison

48. The common element in both marks are the letters “HT”, which would be pronounced identically in both marks. I consider it unlikely that the words “ADVANCED HEATING SOLUTIONS” in the earlier mark would be voiced. Some consumers will only refer to the later mark as “HT”, resulting in a high degree of aural similarity between the marks. However, I consider it more likely that a significant proportion of consumers will voice the entire phrase “HT Element X Alloy”, and to those consumers there will be a low degree of aural similarity between them. Even if “ADVANCED HEATING SOLUTIONS” were to be pronounced in the opponent’s mark, I do not consider that it would augment the aural similarity between the marks, rather, it would serve to strengthen the aural differences between the two.

Conceptual comparison

49. While acronyms and abbreviations may provide different meanings depending on the context in which they are used, the combined letters “HT” *solus* have no singular clear significance for the average UK consumer. The applicant makes reference to a list of possible definitions as shown in its Exhibits PS3 and PS4. Exhibit PS3 shows some 107 possible definitions of the collective letters “HT”, the results having been redirected from the question “*How is High Tension abbreviated?*”. “High Tension” appears as number 21 in the list of possible definitions and is qualified “*as in electric transmission*”. “HT” meaning “High Temperature” appears as number 4 on the list. Exhibit PS4 answers the question “*What is the abbreviation for High Tension?*”, which it further defines as “*having a relatively high voltage*”. Exhibit PS11 pertains to HT as meaning “*high-temperature*” in relation to Li-ion batteries. The applicant asserts that the average consumer of the parties’ goods will be specialists or professionals, and will be aware of these meanings of the letters “HT”. To those consumers who are aware of any such meanings which they attribute identically to both the earlier and later marks, the marks will be conceptually similar to at least a medium degree, the

additional elements in each of the respective marks notwithstanding. However, I consider it more likely that a significant proportion of consumers will not attach any particular meaning to the letters “HT” in either of the marks, and to those consumers there will be no conceptual identity.

Distinctive character of the earlier mark

50. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

51. 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).”

52. The opponent submits that the dominant distinctive element of the earlier trade mark is the two letter combination “HT”.

53. The applicant submits that the distinctiveness in the earlier mark primarily resides in the prominent and large stripes, with the letters “HT” and the words “advanced heating solutions” understood to describe the goods covered by the earlier mark, resulting in an average overall level of distinctiveness.

54. I do not consider that the evidence produced by the applicant is sufficient to attribute any one particular meaning to the letters “HT” in the opponent’s earlier mark. A two-letter combination is not strikingly distinctive, neither is it particularly weak in cases where there is no proven connection between those letters and the goods for which the mark is registered. While I agree with the applicant that the words “ADVANCED HEATING SOLUTIONS” are at least allusive of the goods, the distinctiveness of the earlier mark lies in the combination of the three coloured vertical stripes juxtaposed with the letters “HT”, for which I consider there to be a medium level of inherent distinctive character.

Likelihood of confusion

55. There is no simple formula for determining whether there is a likelihood of confusion. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind.

56. It is clear then that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa (*Canon* at [17]). In making my assessment, I must consider the various factors from the perspective of the average consumer, bearing in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

57. There are two types of possible confusion: direct, where 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/goods down to the responsible undertakings being the same or related. The distinction between these was explained by Mr Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

“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).”

58. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

59. Earlier in this decision, I found that:

- All the contested goods were dissimilar to the opponent’s goods;
- If this finding were wrong, *Batteries; Rechargeable batteries*” were similar to the opponent’s goods to a very low degree;
- The average consumer of the opponent’s “*Electric and electronic measuring, checking (supervision) and surveillance apparatus and instruments*” may be a member of the general public or a specialised and/or professional purchaser who will pay between a medium to high degree of attention to the selection process;
- For the average consumer of batteries and rechargeable batteries which may be used in everyday devices, the level of attention is likely to be low;
- For all goods, whilst not ignoring aural considerations, the consumer will select the goods at issue by predominantly visual means;
- The competing trade marks are visually similar to a low degree;
- For a significant proportion of consumers who voice the applicant’s mark in its entirety as “HT Element X Alloy”, there will be a low degree of aural similarity between the marks;
- To those consumers who attribute identically any descriptive meaning of the letters “HT” to both the earlier and later marks, the marks will be

conceptually similar to at least a medium degree; while to those consumers who do not attach any particular meaning to the letters “HT” in either of the marks, there will be no conceptual identity;

- The earlier mark is inherently distinctive to a medium degree.

60. A degree of similarity between the goods is essential for there to be a finding of likelihood of confusion. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

“49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.”

61. I therefore find there to be no likelihood of confusion for those goods which I found to be dissimilar, being “*Batteries for vehicles; Batteries for off-grid electrical storage; Batteries for backup power; Accumulators (batteries); electric storage batteries*”, as outlined in paragraphs 29 - 32 of this decision.

62. On the basis that “*Batteries; Rechargeable batteries*” are similar to the opponent’s goods, I take into account the guidance of Mr Iain Purvis Q.C. on likelihood of confusion. Bearing in mind that the average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind, I consider it unlikely that they would mistake one mark for the other. Any possible conceptual identity based upon the letters “HT” will not be strong enough to displace the low degree of visual and aural similarity between the marks. In my view, the average consumer will immediately notice the differences between the marks. I therefore find that there is no likelihood of direct confusion.

63. Having found no likelihood of direct confusion between the marks, I will now consider whether there might be a likelihood of indirect confusion. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., sitting 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.

64. Keeping in mind the global assessment of the competing factors in my decision, and in particular the very low degree of similarity between the goods, as well as the low visual and aural similarities between the marks, it is my view that it is unlikely that the average consumer would assume that there is an economic connection between the parties. I acknowledge that the categories listed by Mr Iain Purvis Q.C. in *L.A. Sugar* are not exhaustive, but I do not see anything which would lead the average consumer into believing that one mark is a brand extension of the other. I consider this to be the case even where the average consumer attaches the same conceptual identity to the “HT” element present in both marks. Consequently, I find that there is no likelihood of indirect confusion.

65. The opposition under section 5(2)(b) fails.

Conclusion

66. The opposition has failed. Subject to any successful appeal, the application by GS Yuasa International Ltd. may proceed to registration.

Costs

67. The applicant has been successful, and is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice (“TPN”) 2/2016. Applying the guidance in that TPN, I award the applicant the sum of £1000, which is calculated as follows:

Considering the notice of opposition and preparing a counterstatement:	£200
Preparing evidence:	£500
Preparing written submissions in lieu of a hearing:	£300
Total:	£1000

68. I therefore order HT S.P.A. to pay GS Yuasa International Ltd. the sum of £1000. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 13th day of May 2021

Suzanne Hitchings
For the Registrar,
the Comptroller-General