

**BL O/0433/23**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATION NO. UK00003670127**

**BY NOISY VISUALS LTD TO REGISTER AS A TRADE MARK:**

**GARDENEO**

**IN CLASSES 6, 19 & 20**

**AND**

**IN THE MATTER OF OPPOSITION THERETO UNDER NO.**

**OP000428991 BY HUSQVARNA AKTIEBOLAG**

## BACKGROUND AND PLEADINGS

1. On 19 July 2021, Noisy Visuals Ltd (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. On 10 September 2021, the application was accepted and published in the Trade Marks Journal in respect of the following goods:

Class 6: *Garden sheds of metal*

Class 19: *Garden sheds of wood*

Class 20: *Garden furniture, rattan furniture*

2. On 10 December 2021, Husqvarna Aktiebolag (“the opponent”) filed a notice of opposition on the basis of section 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”).<sup>1</sup> The opposition is directed at the applicant’s mark in its entirety. The opponent relies on the following trade mark:

GARDENA

UK registration no. UK3569075

17 December 2020; date of entry in the register 25 June 2021

All of the opponent’s goods and services in its specification can be found in **Annex 1** of this decision.

The opponent relies on some of the goods and services in its specification, namely:

(“the opponent’s mark”)

*Class 6: Metal hardware; rain traps of metal; anchoring devices of metal; couplings of metal for tubing; fuel cans of metal; couplings and junctions of metal for water fittings and hoses; valves of metal for water pipes; handles and handle mounts of metal; posts of metal; metal poles; steel poles; rails of metal [non-mechanical] for storing cables;*

---

<sup>1</sup> In an email to the Registry dated 18 July 2022, the opponent elected not to file any evidence as part of the evidence rounds and requested that the claim under 5(3) be removed from the proceedings. As a result, on 16 August 2022, the Registry confirmed that the opposition will only continue on the 5(2)(b) ground and that the 5(3) ground will be struck out.

*metal hose fittings; hand operated metal garden hose reels; spring retracted metal hose reels; rain barrels of metal; got a ring of metal for the collection of rain-water; rainwater hoppers of metal; rainwater reservoirs of metal; metal landscape edgings; horticultural frames (structures) of metal; metal greenhouses; wind-driven bird-repelling devices made of metal; fences of metal; pallet racks of metal; rubbish containers (bins) of metal.*

*Class 19: Gypsum (building material); lime building materials; erosion control mats (construction); ponds (non-metallic structures); erosion control mats incorporating plant seeds; ornaments made of stone for ponds; ornaments made of marble for ponds; rainwater hoppers of non-metallic materials; guttering (non-metallic) for the collection of waste water; rainwater reservoirs (non-metallic); rainwater traps and covers (non-metallic); slope mats of textile; sand; stones; plant espaliers of non-metallic materials; flagpoles (structures) not of metal; posts, not of metal; poles of non-metallic materials; plastic fences; erosion control fabric (construction); modular greenhouses not of metal; roof coverings, not of metal.*

*Class 20: Hose hangers not of metal; wall mounted hose supports (non-metallic); non-mechanical, non-metallic reels for the storage of hose; winding spools not of metal, non-mechanical, for flexible hoses; non-mechanical reels of plastic materials for the storage of hose; valves, non-metallic; plastic fittings (clips) for attachment to tubing; statues, figurines, works of art and ornaments and decorations, made of materials such as wood, wax, plaster or plastic, included in the class; handles (not of metal) for hand-operated agricultural implements and garden equipment, gripping devices; non-metallic grab rails; handles and handle mounts of wood and plastic; cable grips of non-metallic materials; cable ties; support stands (furniture); furniture supports (non-metallic -); cushions; trolleys for hose winches; fuel cans (non-metallic); rain barrels, not of metal; ladders and movable steps, non-metallic; baskets, non-metallic; lounge furniture; pedestals; crates and pallets, non-metallic; containers made of plastic for compost; birdhouses; storage racks for firewood; wood planters; nesting boxes for animals; nesting boxes for insects; insect hotels; containers (non-metallic) in the form of bins; animal housing and beds; plant stands.*

*Class 24: Cloths; textiles and substitutes for textiles; throws; cushion covering materials; covers for cushions; fabrics for manufacturing garden furniture; loose covers for garden furniture; table covers; textile piece goods for making cushion covers.*

*Class 35: Retail services relating to equipment, implements, machines, clothing, tools and accessories for gardening, horticulture, parks and public garden areas.*

3. The opponent submits that there is a likelihood of confusion because the applicant's mark is similar to its own mark and the respective goods and services are identical or similar. The applicant filed a defence and counterstatement denying the claims made.

4. The opponent is represented by Sipara Limited; the applicant represents itself. Neither party filed evidence or submissions. No hearing was requested. Only the opponent filed submissions in lieu of a hearing. This decision is taken following a careful consideration of the papers. I do not intend to summarise the submissions in lieu. However, I have taken them into consideration in reaching my decision and will refer to them below, where necessary.

5. Although the UK has left the EU, 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. This is why this decision continues to make reference to the trade mark case-law of EU courts.

### **Section 5(2)(b): legislation and case law**

6. Section 5(2)(b) of the Act reads as follows:

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

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

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

7. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

8. 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) or 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.”

9. Given its filing date, the opponent’s mark qualifies as an earlier trade mark under the above provisions. The opponent’s mark did not complete its registration process five years before the filing date of the applicant’s mark. The conditions of use, therefore, do not apply to the opponent’s mark. The opponent can rely on all its goods and services relied on in the opposition.

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

(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 impression 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 THE GOODS AND SERVICES

11. The goods and services to be compared are as follows:

The applicant's goods	The opponent's goods and services
<p><u>Class 6</u> <i>Garden sheds of metal.</i></p> <p><u>Class 19</u> <i>Garden sheds of wood.</i></p> <p><u>Class 20</u> <i>Garden furniture, rattan furniture.</i></p>	<p><u>Class 6</u> <i>Metal hardware; rain traps of metal; anchoring devices of metal; couplings of metal for tubing; fuel cans of metal; couplings and junctions of metal for water fittings and hoses; valves of metal for water pipes; handles and handle mounts of metal; posts of metal; metal poles; steel poles; rails of metal [non-mechanical] for storing cables; metal hose fittings; hand operated metal garden hose reels; spring retracted metal hose reels; rain barrels of metal; got a ring of metal for the collection of rain-water; rainwater hoppers of metal; rainwater reservoirs of metal; metal landscape edgings; horticultural frames (structures) of metal; metal greenhouses; wind-driven bird-</i></p>

*repelling devices made of metal; fences of metal; pallet racks of metal; rubbish containers (bins) of metal.*

Class 19

*Gypsum (building material); lime building materials; erosion control mats (construction); ponds (non-metallic structures); erosion control mats incorporating plant seeds; ornaments made of stone for ponds; ornaments made of marble for ponds; rainwater hoppers of non-metallic materials; guttering (non-metallic) for the collection of waste water; rainwater reservoirs (non-metallic); rainwater traps and covers (non-metallic); slope mats of textile; sand; stones; plant espaliers of non-metallic materials; flagpoles (structures) not of metal; posts, not of metal; poles of non-metallic materials; plastic fences; erosion control fabric (construction); modular greenhouses not of metal; roof coverings, not of metal.*

Class 20

*Hose hangers not of metal; wall mounted hose supports (non-metallic); non-mechanical, non-metallic reels for the storage of hose; winding spools not of metal, non-mechanical, for flexible hoses; non-mechanical reels of plastic materials for the storage of hose; valves, non-metallic; plastic fittings (clips) for attachment to tubing; statues, figurines, works of art and ornaments and decorations, made of materials such as wood, wax, plaster or*

*plastic, included in the class; handles (not of metal) for hand-operated agricultural implements and garden equipment, gripping devices; non-metallic grab rails; handles and handle mounts of wood and plastic; cable grips of non-metallic materials; cable ties; support stands (furniture); furniture supports (non-metallic -); cushions; trolleys for hose winches; fuel cans (non-metallic); rain barrels, not of metal; ladders and movable steps, non-metallic; baskets, non-metallic; lounge furniture; pedestals; crates and pallets, non-metallic; containers made of plastic for compost; birdhouses; storage racks for firewood; wood planters; nesting boxes for animals; nesting boxes for insects; insect hotels; containers (non-metallic) in the form of bins; animal housing and beds; plant stands.*

Class 24

*Cloths; textiles and substitutes for textiles; throws; cushion covering materials; covers for cushions; fabrics for manufacturing garden furniture; loose covers for garden furniture; table covers; textile piece goods for making cushion covers.*

Class 35

*Retail services relating to equipment, implements, machines, clothing, tools and accessories for gardening, horticulture, parks and public garden areas.*

12. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

13. Guidance on this issue has also come from Jacob J. (as he was then) 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;

(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.”

14. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OOHIM*, Case T-325/06, the GC stated that "complementary" means:

"... there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think the responsibility for those goods lies with the same undertaking."

#### Class 6

15. I note that the opponent submits that the applicant's "*garden sheds of metal*" and "*metal hardware, horticultural frames (structures) of metal*" and "*metal greenhouses*" in the opponent's specification are either identical or, in the alternative, highly similar. This is on the basis that the goods share the same nature, purpose, end user, method of use and trade channels. In the absence of any evidence or submissions to the contrary, it is my view that "*metal hardware, horticultural frames (structures) of metal*" refers to structures such as metal arches, arbours, porticoes and the like, rather than metal sheds and will be understood as such by the average consumer. Therefore, I will compare "*garden sheds of metal*" in the applicant's specification to the closest goods I can identify in the opponent's specification, being "*metal greenhouses*", which I consider to be similar. The goods differ in nature, primary purpose and method of use as one good is used for storage (shed) and the other is used for growing plants (greenhouse). However, there may be a degree of crossover as some sheds have large windows and shelving which allows for growing plants and some greenhouses have a storage area for tools, pots, and so on. The goods may share the same producer and may share the same distribution and trade channels. The goods will also coincide in end users as gardeners may wish to have a greenhouse to grow their plants and a shed to store their tools etc. It is not my view that the goods are in competition, nor are they complementary, even in relation to the context mentioned above concerning gardeners, whilst the average consumer may be of the view that the goods lie with the same undertaking, it is not my view that they are important or indispensable to one another. Taking all the above into account, I find the goods to be similar to a medium degree.

#### Class 19

16. I note that the opponent submits that “*garden sheds of wood*” in the applicant’s specification and “*modular greenhouses not of metal*” in the opponent’s specification are identical or at least highly similar. This is on the basis that the opponent submits the goods have the same/similar purpose, the same nature, trade channels, end users and are sold by the same undertaking. Applying the same reasoning above in paragraph 15, it is my view that the goods are similar to a medium degree.

#### Class 20

17. I note that the opponent submits that “*garden furniture, rattan furniture*” in the applicant’s specification is identical or in the alternative highly similar to “*lounge furniture*” in the opponent’s specification. The opponent makes this submission on the basis that the goods have an identical nature, purpose, method of use, end users and are sold by the same undertaking. Whilst I agree that the goods share the same general purpose, in that they are to furnish/decorate a space, the specific purpose of the goods differ in that garden furniture is to be used in the garden and lounge furniture within the home. Further, it is my view that the nature of the goods is likely to be different, this is on the basis that lounge furniture will be padded with foams and fabrics such as leather, cotton or velvet which are not suitable for outside use. In addition, they are likely to be heavier as they are permanent pieces of furniture which do not need to be moved or stored. Whereas garden furniture will be made of weatherproof materials such as wood, metal or plastic and are likely to be stackable and light enough to be moved for storage in the winter. I also agree that the goods share the same end users eg, those who want to furnish and decorate their homes and their gardens. In addition, I agree that the goods can be produced by the same undertaking, it is also my view that the goods may share the same trade channels as they may be found in the same points of sale i.e. furniture stores. However, it is not my view that the goods are in competition nor are they complementary. Taking all the above into account, I find the goods to be similar to a medium degree.

#### **THE AVERAGE CONSUMER**

18. As the law above indicates, it is necessary for me to determine who the average customer is for the parties’ goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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 then was) described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

19. In respect of the goods at issue, I find that the average consumer will be members of the public at large, business users and horticultural professionals. The goods at issue will be available via physical retail outlets or by browsing online. In physical retail premises (be that specialist or general), the goods at issue will be displayed on shelves or the premise’s show floor, where they will be self-selected by the customers. A similar process will apply to websites and catalogues where the consumers will select the goods having viewed images displayed on a webpage or catalogue. The selection of all the goods at issue in classes 6, 19 and 20 will be primarily visual, although I do not discount an aural component playing a part, particularly when it comes to sales advice in respect of the goods.

20. The price of the goods will vary dependent on factors such as the quality of the material used to produce the goods, its sustainability and, in relation to greenhouses and sheds the storage/growing capacity of the goods. The goods will not be purchased frequently. Even when the goods are of a lower cost, a number of factors will be considered by the average consumer during the purchasing process. For example, when selecting the goods the average consumer is likely to consider reviews, price, aesthetics and suitability.

21. I find that the general public will therefore pay a medium degree of attention in respect of all the goods at issue. This will also be the case for professionals and business users who will be more familiar with the products.

## **DISTINCTIVE CHARACTER OF THE EARLIER MARK**

22. 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-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant Section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

23. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with a high inherent distinctive character, such as invented words which have no allusive qualities.

24. The opponent has not pleaded that its mark has acquired enhanced distinctive character through use and has not filed evidence to support such a claim. I have, therefore, only the inherent position of the earlier mark to consider.

25. The earlier mark consists of the word ‘GARDENA’. GARDENA is not an ordinary dictionary word and invented words usually have the highest degree of inherent distinctive character. I am of the view that the mark will be perceived as an invented word that includes

the word 'GARDEN', although the average consumer may, or may not single the word 'GARDEN' out. For those consumers that single out the word 'GARDEN' in the mark, the word may be seen as being allusive, especially in relation to gardening goods, as a result, the mark will be inherently distinctive to a medium to high degree; the marks as a whole is still perceived as an invented word. However, for those average consumers that do not single out the word 'GARDEN', it is my view that the inherent distinctive character of the mark will be to a high degree.

## COMPARISON OF THE MARKS

26. The marks to be compared are as follows:

<b>The applicant's mark</b>	<b>The opponent's mark</b>
GARDENEO	GARDENA

27. 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 trade marks must be assessed by reference to all the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated, at paragraph 34 of its judgment in *Case C-591/12P, Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

28. 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.

29. The opponent's mark consists of the word 'GARDENA'. The opponent's mark is presented in standard typeface and upper case. There are no other elements that contribute to the overall impression of the mark. The applicant's mark consists of the word 'GARDENEO' which is presented in standard typeface and upper case. There are no other elements that contribute to the overall impression of the mark.

30. Visually, the marks coincide in that marks share the first six letters 'GARDEN'. The marks differ in the presence of the suffixes 'EO' and 'A' respectively. Whilst these elements sit at the end of the marks, they are still important parts of the marks and, therefore, a point of difference. I consider that the marks are similar to a medium to high degree.

31. Aurally, the applicant's mark will be pronounced as GAA-DEN-EE-OH and the opponent's mark will be pronounced as GAA-DEN-AH. I note that the marks share the pronunciation of 'GAA-DEN. However, the suffixes of 'EE-OH' and 'AH' have no counterpart in the respective other parties' mark. Taking the above into account, I am of the view that the marks are similar to a medium to high degree.

32. Conceptually, the marks 'GARDENEO' and 'GARDENA' are not ordinary dictionary words. Whilst I am conscious that even though the average consumers do not artificially dissect marks, it is my view that they would see the words 'GARDENEO' and 'GARDENA' as invented words, and may or may not notice that they both contain the word 'GARDEN' at the beginning of the mark. For those consumers that notice that the words contain 'GARDEN' at the beginning of the marks, the marks will share the same conceptual hook, the addition of the letters 'EO' and 'A' will create a point of conceptual difference in that they will be seen as creating a novel word that will be attributed no obvious meaning (outside of its reference to 'Garden'). In this scenario, I find that the average consumers that notice that the marks contain the word 'GARDEN' results in the marks being conceptually similar to a medium degree.

33. However, in the event that a significant proportion of consumers will not notice that the invented words both contain the word 'GARDEN' at the beginning of the marks, I consider the conceptual position to be neutral.

### **Likelihood of confusion**

34. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises

the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 similarity between the respective goods or vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be mindful to the fact 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 that he has retained in his mind.

35. I have found the marks to be visually and aurally similar to a medium to high degree. In relation to the consumers who perceive the marks as invented words and do not identify the word 'GARDEN', I found the marks to be conceptually neutral. For consumers who notice the word 'GARDEN' in the marks I found the marks to be conceptually similar to a medium degree. I have found the average consumer to be a horticultural professional, business user or member of the public at large, who will select the goods at issue via a visual means (although I do not discount an aural component). I have found the average consumers' degree of attention to be medium when selecting the goods. I have found the goods at issue to be similar to a medium degree. I have found the opponent's mark to be inherently distinctive to a medium to high degree for the average consumer that notices the word 'GARDEN' in the opponent's mark. In relation to the average consumer who does not notice the word 'Garden' in the mark, I have found the opponent's mark has a high degree of inherent distinctiveness.

36. Whilst I note that the parties' mark differ in the presence/absence of 'EO' and 'A' in the marks respectively, I consider that the differences between the marks are insufficient to avoid confusion, even when the principle of imperfect recollection is considered. I am of the view that the average consumer will overlook or misremember the differences between the marks. This is particularly the case given that the marks share the first letters 'GARDEN', at the beginning of the marks where the average consumer tends to focus its attention,<sup>2</sup> meaning that, in the presence circumstances, the focus will be aimed towards the beginning of the marks, which are identical. Further, I have found the opponent's mark to be inherently distinctive to a medium to high degree (for the average consumers who notice the word 'GARDEN' or to a high degree (for the average consumers who do not notice the word

---

<sup>2</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

'GARDEN') and aurally/visually similar to a medium to high degree. Consequently, it is my view that it is likely that the marks will be misremembered or mistakenly recalled as each other. Therefore, I find that there is a likelihood of direct confusion between the marks.

## **CONCLUSION**

37. Given my findings above, the opposition succeeds in its entirety. As a result, the application will be refused.

## **COSTS**

38. The opponent has been successful and is entitled to a contribution towards its costs. The award of costs are governed by Tribunal Practice Notice 2/2016. In the circumstances, I award the sum of £450 as a contribution towards its costs. The sum is calculated as follows:

Preparing a statement, considering the other side's statement and	
drafting submissions	£350
Official fee	£100
<b>Total</b>	<b>£450</b>

39. I, therefore, order Noisy Visuals Ltd to pay Husqvarna Aktiebolag the sum of £450 as a contribution towards his costs. 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 9<sup>th</sup> day of May 2023**

**A Klass**

**For the registrar**

**The Comptroller General**

## Annex 1

*Class 1: Growing media, fertilizers and chemicals for use in agriculture, horticulture and forestry; water treatment preparations; filtering materials [chemical, mineral, vegetable and other unprocessed materials]; adhesives for use in industry; bacterial cultures for wastewater treatment; brickwork and masonry preservatives (not paints and oils); preservatives for buildings (except paints and oils); natural fertilizers; artificial manures; potting soil.*

*Class 3: Soap; cleaning and fragrancng preparations.*

*Class 4: Industrial oils and greases, lubricants; oils for use with machine tools; lubricants; dust absorbing, wetting and binding compositions; fuels and illuminants; candles and wicks for lighting.*

*Class 5: Fungicides for domestic use; biological herbicides; pest control preparations and articles; disinfectants; antifungal preparations.*

*Class 6: Metal hardware; rain traps of metal; anchoring devices of metal; couplings of metal for tubing; fuel cans of metal; couplings and junctions of metal for water fittings and hoses; valves of metal for water pipes; handles and handle mounts of metal; posts of metal; metal poles; steel poles; reels of metal [non-mechanical] for storing cables; metal hose fittings; hand operated metal garden hose reels; spring retracted metal hose reels; rain barrels of metal; guttering of metal for the collection of rain-water; rainwater hoppers of metal; rainwater reservoirs of metal; metal landscape edgings; horticultural frames (structures) of metal; metal greenhouses; wind-driven bird-repelling devices made of metal; fences of metal; pallet racks of metal; rubbish containers (bins) of metal.*

*Class 7: Machines for gardening, horticulture, parks and public garden areas and parts and fittings for such machines; agricultural implements, other than hand operated hand tools; horticultural implements (machines); gardening machines (powered); driving devices for machines; compressors; mechanical soil and lawn cultivation apparatus; lawn raking machines; power supply apparatus [generators]; roller chains being parts of machines; saw chains; motors,*

*motorparts and engines for outdoor power products; machines and machine tools for treatment of materials and for manufacturing; cutting, drilling, abrading, sharpening and surface treatment machines and apparatus; chopping machines; pumps (machines); mechanical care and cleaning apparatus; filters (parts of machines or engines); tillers (machines); grinders (machines); reels, mechanical, for flexible hoses; motor hoes [machines]; sowers (machines); weeding machines; saws; chainsaws; power saws; hand saws (electrically operated); portable saw mills; saw benches (parts of machines); saw blades (parts of machines); trimming machines; clearing saws [machines]; hedge cutters (machines); hedge trimmers (machines); clippers (machines); chains and bars for chainsaws; chain saw bar covers; brush cutters [machines]; scissors, electric; lawnmowers [machines]; robotic lawnmowers; lawn mowing attachments for vehicles; lawn mowers; walk behind lawn mowers; zero turn lawn mowers; commercial front mowers; seated (ride on) lawn mowers; garden tractors for mowing lawns; lawn aerators (machines); power operated dethatchers; power operated cultivators; power operated lawn edgers; attachments for ride on lawn mowers, garden tractors for mowing lawns and zero turn lawn mowers, including dump carts, dozer blades, front scoops, brush guards, lawn mower covers, seat covers, loading ramps, canopies; attachments for robotic lawn mowers, including replacement bodies, heavy front and rear wheels, wheel brushes; protective housings and wall hangers for lawn mowers, including robotic lawn mowers; housings for machines; electric lawn trimmers; electric grass shears; line trimmers for garden use; trimmer heads; lawn and garden string trimmer spools; rotary trimming lines; trimming machines for gardening, park, forestry and parts and fittings therefore; string trimmers [power lawn and garden tools]; grass trimmer string; blowing machines; garden vacuums, collectors; vacuum cleaners; snow throwers; power ice augers; electric high pressure cleaners; suction machines for scavenging purposes; suction machines for industrial purposes; high pressure cleaners; sprayers (knapsack-) [electric] for carrying on the back; sprayers [machines] for garden use in spraying weedkillers; sprayers [machines] for garden use in spraying insecticide; sprinkling devices [machines]; parts and components to the aforementioned goods.*

*Class 8: Agricultural, gardening and landscaping tools; garden tools, hand operated; hand tools and implements (hand-operated); edge tools (hand tools); scissors; gardening scissors; lawn clippers (hand instruments); mechanical lawn clippers; mechanical shears; loppers (hand tools); pruning scissors; secateurs; tree pruners (hand tools); top scissors; tongs; shovels (hand tools); scrapers; ice scrapers; snow brushes; snow shovels; hand-operated pond maintenance and cleaning apparatus and grabs; shears; blades (hand-tools); saws (hand-tools); swords; axes; rakes; moss aerators; tool belts; collectors; wire brushes (hand operated tools); fertiliser spreaders (hand-operated); sprayers (knapsack-) [non-electric] for carrying on the back; sprayers [hand-operated tool] for garden use in spraying weedkillers; syringes for spraying insecticides;*

*hand-pumped sprayers; fruit pickers (hand tools); budding knives; hoes (hand tools); pickaxes; spades; forks; parts and components to the aforementioned goods.*

*Class 9: Electrical switch timers; electronic motion sensitive switches; wireless switches; optical switches; fuses; transformers (electricity); current plugs; electric connectors; electrical power extension cords; solenoid valves (electromagnetic switches); chargers; electrical controls for irrigation sprinkler systems; photovoltaic installations for generating electricity [photovoltaic power plants]; system and system support software, and firmware; programs for computers; sound recording apparatus; display devices, television receivers and film and video devices; audio/visual and photographic devices; remote controls; television apparatus; magnetic data carriers bearing recorded software; application software; mobile apps; video films; downloadable movies; sound recordings; downloadable sound recordings; computer programs for plant libraries; mobile apps for plant libraries; computer programs for advice online regarding gardening, garden care, care of plants; mobile apps for advice online regarding gardening, garden care, care of plants; scheduling software; batteries; batteries, electric; rechargeable batteries; battery chargers; electronic docking stations; charging stations for electric vehicles; power cables; connections for electric cables; plugs, sockets and other contacts (electric connections); couplings, electric; electrical adapters; electrical circuits and circuit boards; junctions (electrical); electrical controls; fuse boxes; galvanic batteries; chargers for electric batteries; photovoltaic cells; accumulators; accumulators (electric); protective work clothing (for protection against accident or injury); clothes for protection against injury; clothing for protection against accidents, irradiation and fire; safety gloves for protection against accident or injury; gloves for protection against accidents; gloves for protection against accidents, irradiation and fire; jackets for protection against accidents, irradiation and fire; trousers for protection against accidents, irradiation and fire; socks for protection against accidents, irradiation and fire; protective footwear for the prevention of accident or injury; footwear for protection against accidents, irradiation and fire; boots (protective footwear); shoes (protective); head protection; headgear being protective helmets; knee pads for workers; protective and safety equipment; visors for helmets; spectacles; sunglasses; goggles; safety harnesses; safety restraints other than for vehicle seats and sports equipment; measuring instruments; signalling apparatus; measuring, counting, alignment and calibrating instruments; controllers (regulators); apparatus and instruments for conducting electricity; apparatus and instruments for switching the use of electricity; apparatus and instruments for regulating electricity; rain gauges; electronic rain gauges; electrical switch timers; switches, electric; cables, electric; connections for electric lines; connection boards (electric); electrical circuit boards; control panels (electricity); apparatus and instruments for controlling the distribution of electricity; electric control panels; electric fuse boxes; repeaters; ethernet repeaters; intelligent gateways for communication; signal amplifiers; GPS transmitters; GPS receivers; GPS communication devices for robotic lawn mowers; apparatus*

*and instruments for controlling garden and water facilities; electric and electronic irrigation control devices; electronic tracking apparatus and instruments; sensors and detectors; electric sensors; motion sensors; light sensors; dewing sensors; occupancy sensors; radio-frequency identification (RFID) tags; radio-frequency identification (RFID) readers; electronic tags; receivers of electronic signals; wireless controllers to remotely monitor and control the function and status of other electrical, electronic and mechanical devices or systems; data loggers and recorders; cameras (photography); wireless communication devices; alarms and warning equipment; anti-theft warning apparatus; remote alarms other than anti-theft for vehicles; electronic publications (downloadable); publications in electronic format; instruction manuals in electronic format; teaching materials in electronic format; user guides in electronic format; logs, measuring instruments; pressure measuring apparatus; pressure regulators; cable splices for electric cables; parts and components to the aforementioned goods.*

Class 10: *Hearing protection devices.*

Class 11: *Water conduits installations; sprinkler installations (automatic) for horticultural purposes; sprinkler machines for horticultural irrigation; watering installations, automatic; lighting installations; lamps; incandescent light bulbs; decorative fountains, sprinkler and irrigation systems; fountains; filters for industrial and household use; water conditioning apparatus; dust filters; electronic watering facilities; water sprinklers and water nozzles constituting parts for watering installations; irrigation apparatus for horticultural use; showers; water spray devices; water shower apparatus; drip sprinklers; irrigation spray nozzles; lighting apparatus; lighting apparatus for gardens, including ponds; pressure water tanks; water control valves; apparatus for controlling water supply; taps; sprinkler systems for irrigation; headlights; headlights for electric lawn mowers; garden sprinklers (automatic); gas grills; electric grills; gas fired broilers; solar lights; solar lamps; solar powered lamps; led lamps; flaming torches; fireplaces; parts and components to the aforementioned goods.*

Class 12: *Hose carts; tractors; garden tractors and parts and fittings therefor; attachments for garden tractors, including dump carts, dozer blades, front scoops, brush guards, garden tractor covers, seat covers, loading ramps, canopies; two-, and four wheeled motorcycles; four wheel all-terrain vehicles, utility vehicles; bicycles and parts therefore, namely frames, brakes, chains, pumps, saddles; alarms for vehicles; anti-theft alarms for vehicles; remote alarms for land*

*vehicles; wheel barrows; human-powered trolleys and carts; sledges for transportation; parts and components to the aforementioned goods.*

*Class 14: Jewellery; clocks; watches; cuff links; tie pins; pins (ornamental-); brooches [jewellery]; key rings; precious metals and their alloys; precious and semi-precious stones; horological articles; jewellery fashioned from non-precious metals; jewellery made of semi-precious materials; precious jewellery; wristwatches; watch cases (parts of watches); parts and components to the aforementioned goods.*

*Class 16: Printed matter; printed manuals; printed publications; educational equipment; log books; calendars; catalogues; coupon books; informational sheets; manuals for instructional purposes; magazines (periodicals); newsletters; printed calendars; printed coupons; paper bags; bags of plastics for lining refuse bins; garbage bags of paper or of plastics; food waste bags of paper for household use; hygienic hand towels of paper; coasters of cardboard; coasters of paper; kitchen rolls (paper); napkin paper; tablecloths of paper; table napkins of paper; place mats of paper; manuals (handbooks); bags for packaging made of biodegradable plastic; bags for packaging made of biodegradable paper; books.*

*Class 17: Flexible plumbing pipes of plastic; plastic plumbing hoses; seals, sealants and fillers; connectors (non-metallic) for hoses; clutch and brake linings; plastics materials in the form of sheets (semi-finished products); synthetic padding to be used for filtration in filters; fibreglass webs for insulating purposes; watering hose; couplings pieces and connectors, mainly not of metal, for connecting hoses to watering apparatus; fittings for pipes and hoses, mainly not of metal; valves of rubber; articles of rubber for use in connecting pipes; flexible pipes, tubes, hoses and fittings therefor (including valves), and fittings for rigid pipes, all non-metallic; garden hoses; irrigation hoses; hoses of textile material; flexible hoses, not of metal; expandable watering hoses; non-metal couplings for use with hoses; hose connectors (non-metallic -); hose fittings (non-metallic -).*

*Class 18: Luggage, bags, wallets and other carriers; carrying cases; patio umbrellas.*

*Class 19: Gypsum (building material); lime building materials; erosion control mats (construction); ponds (non-metallic structures); erosion control mats incorporating plant seeds; ornaments made*

*of stone for ponds; ornaments made of marble for ponds; rainwater hoppers of non-metallic materials; guttering (non-metallic) for the collection of waste water; rainwater reservoirs (non-metallic); rainwater traps and covers (non-metallic); slope mats of textile; sand; stones; plant espaliers of non-metallic materials; flagpoles (structures) not of metal; posts, not of metal; poles of non-metallic materials; plastic fences; erosion control fabric (construction); modular greenhouses not of metal; roof coverings, not of metal.*

*Class 20: Hose hangers not of metal; wall mounted hose supports (non-metallic); non-mechanical, non-metallic reels for the storage of hose; winding spools not of metal, non-mechanical, for flexible hoses; non-mechanical reels of plastic materials for the storage of hose; valves, non-metallic; plastic fittings (clips) for attachment to tubing; statues, figurines, works of art and ornaments and decorations, made of materials such as wood, wax, plaster or plastic, included in the class; handles (not of metal) for hand-operated agricultural implements and garden equipment, gripping devices; non-metallic grab rails; handles and handle mounts of wood and plastic; cable grips of non-metallic materials; cable ties; support stands (furniture); furniture supports (non-metallic -); cushions; trolleys for hose winches; fuel cans (non-metallic); rain barrels, not of metal; ladders and movable steps, non-metallic; baskets, non-metallic; lounge furniture; pedestals; crates and pallets, non-metallic; containers made of plastic for compost; birdhouses; storage racks for firewood; wood planters; nesting boxes for animals; nesting boxes for insects; insect hotels; containers (non-metallic) in the form of bins; animal housing and beds; plant stands.*

*Class 21: Garden syringes; plant syringes; watering cans; cleaning instruments, hand operated; brooms; brushes; hand-held sweeping tools; hand-operated watering apparatus including nozzles; dust filters for household purposes; strainers; plant baskets; decorative articles being garden pond accessories, namely animal figures, reproductions of plants, mythical creatures, regular geometric bodies; pre-formed reproductions of rocks, of plastic; gloves for household purposes; gardening gloves; nozzles for watering hose; Statues, figurines, plaques and works of art, made of materials such as porcelain, terra-cotta or glass, included in the class; dusting cloths; dusters; skillets (non-electric); lawn sprinklers; sprinklers for watering, flowers and plants; buckets; bird feeders; garden gnomes of glass; garden gnomes of porcelain; garden gnomes of earthenware; window-boxes; pots; traps for rodents; traps for vermin; bird baths; empty spray bottles; holders for flowers and plants (flower arranging); bowls; plant holders; containers for flowers; bins (dust-); terrariums; terrariums for insects; insect hotels.*

*Class 22: Nets; bags and sacks for packaging, storage and transport; textile bags for containing earth; hammocks; sacks; nets for birds.*

*Class 23: Jute thread and yarn; garden string; garden twine.*

*Class 24: Cloths; textiles and substitutes for textiles; household linen; curtains of textile or plastic; tissues being textile piece goods; throws; textile materials for use in the manufacture of blinds; cushion covering materials; covers for cushions; fabrics for manufacturing garden furniture; loose covers for garden furniture; curtains; table covers; textile piece goods for making cushion covers; filtering materials of textile; planting mats.*

*Class 25: Clothing; headgear; headwear; footwear; men's and women's jackets, coats, trousers, vests; pants; trousers; capri trousers; jackets [clothing]; socks; underwear; t-shirts; vests; fleeces; fleece jackets; fleece shorts; bottoms [clothing]; fleece bottoms; gloves; ponchos; rain ponchos; rainproof jackets; rain trousers; rain boots; shoes; leisure shoes; aprons [clothing].*

*Class 27: Kneeling pads; kneeling pads for protective use; kneeling pads for protective use for gardening; knee cushions; artificial turf.*

*Class 28: Toys, games, playthings and novelty items [toys]; sporting articles and equipment; electronic games; toy models; scale model kits (toys); christmas tree stands for outdoor use; christmas tree stands; toys for sandpits; snow sledges [playthings].*

*Class 31: Seeds, bulbs and seedlings for plant breeding; unprocessed horticultural products; raw horticultural products; natural plants and flowers; natural turf; natural turf for roof covering; natural seeds; crop seeds; seeds, bulbs and seedlings for plant breeding; bulbs for planting.*

*Class 35: Advertising; window dressing and display arrangement services; business consultancy and advisory services relating to dealerships; retail services relating to equipment, implements, machines, clothing, tools and accessories for gardening, horticulture, parks and public garden areas; compilation of directories for publishing on global computer networks or the internet.*

*Class 36: Insurance underwriting; financing services; bank card services; financing of floor- and exhibition stands; hire purchase financing, insurance, credit leasing and financing of equipment, implements, machines, tools and accessories for horticulture, horticulture and park management.*

*Class 37: Installation, maintenance and repair of equipment, implements, machines, apparatus, tools and accessories for gardening, horticulture, parks and public garden areas; installation, maintenance and repair of roofs.*

*Class 38: Telecommunication gateway services; communication of information by electronic means; data communication services; electronic transmission of data; providing access to and leasing time to computer databases; providing access to platforms and portals on the internet; provision of access to data via the internet; providing online forums.*

*Class 41: Conducting courses, seminars and workshops in gardening, horticulture, park management and public garden areas; organisation of conferences, exhibitions and competitions; training and educational services in gardening, horticulture, park management and public garden areas; training and educational services in construction works relating to gardening, horticulture, park management and public garden areas; training and educational services in tools, machines, implements and components for gardening, horticulture and park management; online training and online education in gardening, horticulture, park management and public garden areas; online training and online education in construction works related to gardening, horticulture, park management and public garden areas; online training and online education in tools, machines, implements and components for gardening, horticulture and park management and public garden areas; entertainment; cultural and sporting activities; fan clubs; fan club services; publishing of books.*

*Class 42: Development of computer programs; software design and development; development of computer software application solutions; design and development of software in the field of mobile applications; computer rental; rental of computer software; rental of application software; installation, maintenance and updating of computer software; research and consultancy services relating to computer software; technical project planning; technical planning of gardens and*

*ponds; conducting of quality control tests; consultancy services relating to quality control; design and testing for new product development.*

*Class 44: Gardening, horticulture, park management and public garden area services; horticulture, gardening and landscaping; tree planting; rental and leasing in connection with all the aforesaid services; rental of lawnmowers; rental of tools, machines, apparatus, implements and accessories for gardening, horticulture, park management and public garden areas; insect farming services; weed control; landscape gardening in relation to the design and implementation of ready-to-lay green roof kits; laying of turf; planting of flora; garden maintenance; advisory, consulting and information services relating to all the aforesaid services.*