

BL O/0522/23

TRADE MARKS ACT 1994

IN THE MATTER OF

TRADE MARK APPLICATION No. WO0000001616873

BY

RAGBAG ApS

TO REGISTER THE TRADE MARK:

Ragbag

IN CLASSES 14 AND 26

-AND-

THE OPPOSITION THERETO UNDER No. 430930

BY

NICK STARSMORE AND JOSEPHINE STARSMORE

Background and pleadings

1. Ragbag ApS is the holder of an international trade mark registration ‘Ragbag’, which it has applied to protect in the UK. Details of the application are shown below. In this decision, I shall refer to Ragbag ApS as “**the Applicant**” (which is in line with the parties’ submissions).

Representation of the word only mark (“ the Contested Mark ”):	Ragbag
IR number:	1616873
Designation Date:	20 July 2021
Date of Publication in UK:	19 November 2021
Goods:	<u>Class 14</u> Precious metals and their alloys; jewellery, precious and semi-precious stones, horological and chronometric instruments; parts and fittings for jewellery; anchors [clock- and watchmaking]; brooches [jewellery]; decorative articles [trinkets or jewellery] for personal use; rings [jewellery]; hat jewellery; imitation pearls; imitation precious stones; jewelry boxes not of metal; articles of jewellery with ornamental stones; body jewellery; ornamental lapel pins; works of art of precious metal; chains [jewellery]; clasps for jewellery; meditation beads; paste jewellery; natural gem stones; natural pearls; trinkets of bronze; trinkets coated with precious metal; pearl; pearls [jewellery]; bead bracelets; jewellery of yellow amber; clothing ornaments of precious metals; tie clips; tie pins; jewellery,

	<p>including imitation jewellery and plastic jewellery, jewellery boxes; imitation pearls; synthetic precious stones; paste jewellery; jewel pendants.</p> <p><u>Class 26</u></p> <p>Decorative articles for the hair; waving pins for the hair; ribbons for the hair; hair barrettes; hair ornaments; spangles for decoration, not of precious metal; sequins; buckles of precious metal [clothing accessories]; buckles [clothing accessories].</p>
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2. On 10 February 2022, Nick Starsmore and Josephine Starsmore (whom together I shall refer to as “**the Opponent**”, again in line with the parties’ submissions) opposed the application under section 5(2)(b) of the Trade Marks Act 1994 (“**the Act**”). The opposition is directed at all the goods applied for.
3. The opposition is based on the Opponent’s comparable UK trade mark (EU),¹ shown below (“**the Earlier Mark**”). The Earlier Mark is a ‘stylised word’ mark (inasmuch as it is registered in a particular stylised form) and is registered for goods and services in Classes 14, 18, 25 and 35.

Representation of the Earlier Mark:	RAGYARD
Registration Number:	UK00913840616
Filing date:	16 March 2015

¹ Following the end of the transition period of the UK’s withdrawal from the EU, all EU trade marks (“EUTM”) registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (EU)’ retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives. Given the respective filing dates, the Opponent’s mark qualifies as an earlier trade mark in accordance with section 6 of the Act

Registration Date:	3 August 2015
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4. For the purposes of this opposition, the Opponent relies on all of its goods and services, namely:

Class 14:
Jewellery; rings [jewellery]; earrings; bracelets [jewellery]; wrist bands; charms [jewellery]; brooches [jewellery]; necklaces [jewellery]; watches; clocks; key rings [trinkets or fobs]; jewellery cases [caskets]; boxes of precious metal.
Class 18:
Handbags; clutch bags; travelling bags; bags (garment-) for travel; suitcases; backpacks; beach bags; shopping bags; sports (bags for-); vanity cases, not fitted; toiletry bags; cosmetic bags; purses; belts [leatherwear]; pocket wallets; key cases [leatherware]; umbrellas.
Class 25:
Clothing; footwear; headgear; coats; jackets [clothing]; raincoats; suits; dresses; sweaters; knitwear [clothing]; blouses; shirts; t-shirts; cardigans; trousers; skirts; jeans; shorts; swimwear; underwear; pants; bras; hosiery; tights; stockings; socks; vests; pyjamas; dressing gowns; hats; caps [headwear]; headbands [clothing]; berets; scarves; gloves [clothing]; mittens; belts [clothing]; shoes; boots.
Class 35:
Retail shop management; the bringing together for the benefit of others jewellery, rings, earrings, bracelets, wristbands, charms, brooches, necklaces, watches, clocks, key rings [trinkets or fobs], jewellery cases, boxes of precious metal, handbags, clutch bags, travelling bags, garment bags for travel, suitcases, backpacks, beach bags, shopping bags, sports bags, vanity cases, toiletry bags, cosmetic bags, laptop carrying cases, purses, belts, pocket wallets, key cases, umbrellas, clothing, footwear, headgear, enabling customers to conveniently view and purchase those goods from a retail store, from a catalogue, by mail order or by means of telecommunications or from an internet website; organisation, operation and

supervision of loyalty, bonus and incentive schemes; advisory, information and consultancy services relating to the aforesaid services.

5. The Opponent claims that the marks are visually, aurally and conceptually highly similar on the basis that they both share the same prefix 'RAG', and that its goods and services are identical with or similar to the applied-for goods, giving rise to a likelihood of confusion. The Opponent submits that *"both the Applicant's and the Opponent's marks cover jewellery and accessories, and as a result the end user is likely to draw an association between the two marks."*
6. As the Earlier Mark had been registered for more than five years at the filing date of the Contested Mark, the Opponent made a statement that it has used its mark in relation to all of the goods and services relied on.
7. The Applicant filed a counterstatement admitting that the respective Class 14 goods are similar, and that the respective marks share the same prefix 'RAG'. The Applicant denied all other claims made and put the Opponent to proof of use of the Earlier Mark in relation to all the goods and services relied on.
8. The Applicant submits that *"the word 'RAG' is widely used in the context of the fashion industry, and so has very low distinctiveness in the context of the goods and services concerned. For example, 'RAG TRADE' means "the clothing or fashion industry". Further, the Opponent's mark is highly stylised, using a font which could be described as 'rugged' or 'vintage'. This is clearly different to the minimal stylisation of the mark applied for. Given the common usage of the shared prefix 'RAG', consumers are likely to pay more attention to the differences between the respective marks. [...] It is well established in case law that the stylisation of the respective marks cannot be disregarded, especially given that the Opponent's mark is highly stylised."*
9. Both parties filed evidence, however only the Opponent elected to file submissions during the evidence rounds. The Opponent's evidence goes to 'proof of use'. The Applicant's evidence is said to support the definition of the term 'rag trade', and to show that *"there are a large number of third parties using the term 'RAG' in the clothing/fashion industry"*.

10. No hearing was requested, and neither party elected to file submissions in lieu of a hearing. I make this decision following a careful consideration of the papers.
11. The Opponent is represented by Serjeants LLP and the Applicant is represented by Barker Brettell LLP.
12. 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 upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

Preliminary Issues

'Stylisation' of the Contested Mark

13. The Opponent's submissions make several references to the 'stylisation' of the Contested Mark, for example: "*both marks are not traditional word marks and contain some minimal stylisation*"; "*both marks have the prefix RAG and minimal stylisation*". The Applicant itself also makes a similar reference, for example: "*the minimal stylisation of the mark applied for*".
14. I must clarify that the International Register of Trade Marks clearly stipulates that the Contested Mark is a word mark (i.e. it is not a figurative mark) and I shall proceed on that basis. The particular typeface of the Contested Mark which appears on the Register is not relevant.

Consent to use the Earlier Mark

15. The Opponent's evidence is provided in the Witness Statement of Nick Starsmore, dated 17 October 2022. Mr Starsmore is the Managing Director of a company called N16 Vintage Limited, a position he has held since 1 January 2018.² Mr Starsmore states that the trade mark relied on in this opposition is held in his name as Managing Director, however it is also used by the company N16

² I note this post-dates the filing date of the Earlier Mark.

Vintage Limited. He also states that the facts in his statement come from his personal knowledge or the records of his company.

16. Whilst the position could have been made clearer with regard to the consent N16 Vintage Limited has to use the Earlier Mark, I am happy to proceed on the basis that the Opponent has given consent to the company to use the Earlier Mark, and that use by the company shall be recognised as use of the trade mark for the purpose of maintaining the registration.

Opponent's evidence

17. The Opponent's Exhibit NS5, which is described as "*photos of [the Opponent's] products that are used for advertising, lookbooks and the website*" is undated, therefore I cannot determine whether it relates to the relevant proof of use period. As such, I shall not take it into consideration when determining whether genuine use of the Earlier Mark has been shown.
18. The Opponent's Exhibit NS6, which is described as "*a spreadsheet that details store and web sales to date for this year*", displays data from January 2022 to August 2022. This evidence is outside of the relevant period therefore I shall make no further reference to it.
19. In his witness statement Mr Starsmore informs me of the Opponent's website by providing a link to the website and stating that "*here customers can purchase products and also find out about the ethos of the company*". Evidence containing website links is not acceptable since the content of those links is not fixed at a particular point in time and what was at that link when the evidence was filed may not be what is there now – or what may have been there during the relevant period. Evidence from websites must be printed and shown to be from a relevant date. The tribunal does not access web links, and I cannot take this evidence into consideration.³

³ See the 'Manual of trade marks practice – Tribunal section' – paragraph 4.8.4 'Exhibits'.

Applicant's evidence, Exhibit CAW2

20. The Applicant's evidence is provided in the witness statement of Catherine Ann Wiseman, dated 11 October 2022. Ms Wiseman is a Chartered Trade Mark Attorney at Barker Brettell LLP (the legal representative of the Applicant in these proceedings). Attached to her witness statement are two exhibits identified as CAW1 and CAW2.
21. Ms Wiseman states, in relation to Exhibit CAW1, that she has "*provided internet screenshots of dictionary definitions for the terms 'RAG TRADE'*"; and in relation to Exhibit CAW2, that she has "*provided internet screenshots showing that there are a large number of third parties using the term 'RAG' in the clothing/fashion industry*". The Applicant made no submissions to accompany its evidence.
22. I am aware of the term 'rag trade' and that is an informal, colloquial term to refer to the clothing business/ industry. The Applicant's evidence, consisting of the dictionary definition of this term merely serves to confirm my understanding. Indeed, the dictionary definitions provided in evidence state that: "*the rag trade is the business and industry of making and selling clothes, especially women's clothes*";⁴ "*the clothes-making industry*";⁵ "*the business of designing, making and selling clothes: the fashion industry*";⁶ and "*the clothing industry*".⁷
23. I accept that the term 'rag trade' may have a bearing on the consumer's perception as to the distinctive nature of the word 'RAG' in relation to clothing, and I shall bear this in mind, however, I fail to see how this meaning could describe the jewellery industry or the industry for hair decorations and buckles.

Approach

24. In order to rely on its Earlier Mark in these proceedings, the Opponent must first establish that it has made genuine use of the mark for the goods and services on which it relies. Therefore, I shall first assess whether, and to what extent, the Opponent's evidence supports its statement that it has made genuine use of the

⁴ Collins English Dictionary

⁵ Cambridge Dictionary

⁶ The Britannica Dictionary

⁷ Macmillan Dictionary

Earlier Mark in relation to the goods and services relied on in this opposition. If no use is proven, then it follows that the opposition must fail at that first hurdle since the Opponent will not be able to rely on its mark.

LEGISLATION AND CASE LAW

Section 5(2)(b) of the Act

25. Section 5(2)(b) of the Act is 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”.

26. In considering a claim under section 5(2)(b) of the Act, 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 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 great degree of similarity between the marks, and vice versa;
 - (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
 - (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
 - (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
 - (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Proof of use

27. The relevant provisions of the Act are as follows:

Section 6A

- (1) This section applies where—
 - (a) an application for registration of a trade mark has been published,
 - (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
 - (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.
- (1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.
- (2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.
- (3) The use conditions are met if—
 - (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
 - (b) the earlier trade mark has not been so used, but there are proper reasons for non-use.
- (4) For these purposes—
 - (a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

- (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

[...]

- (6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.

Schedule 2A (7)

- (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.
- (2) Where the relevant period referred to in section 6A(3)(a) (the “five-year period”) has expired before IP completion day—⁸
 - (a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and
 - (b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.
- (3) Where IP completion day falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day—
 - (a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and
 - (b) the references in section 6A to the United Kingdom include the European Union.

Section 100

If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.

⁸ I note that ‘IP Completion Day’ (i.e. ‘Implementation Period’ Completion Day) is defined by section 39(1) of the European Union (Withdrawal Agreement) Act 2020, as meaning the 31 December 2020 at 11:00pm.

28. The law relating to genuine use of a registered trade mark was summarised by Arnold J (as he then was), in *Walton International Ltd & Anor v Verweij Fashion BV*.⁹ This summary includes, inter alia, that genuine use means actual use of the trade mark by the proprietor or a third party (with the authority to use the mark) and that such use must be by way of real commercial exploitation of the mark on the market, for the relevant goods or services, sufficient to create or maintain a market share for those goods or services.¹⁰ The use must be more than merely token although there is no *de minimis* rule in relation to genuine use, and it is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use. The use must be consistent with the essential function of a trade mark which includes for example, affixing the mark to the relevant goods in order to guarantee to the consumer that the goods come from a single undertaking which controls the manufacture of those goods, and which is responsible for their quality.
29. In determining whether there is real commercial exploitation of the mark, all the relevant facts and circumstances must be taken into account, which include: (1) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (2) the nature of the goods or services; (3) the characteristics of the market concerned; (4) the scale and frequency of use of the mark; (5) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (6) the evidence that the proprietor is able to provide; and (7) the territorial extent of the use.
30. The genuine use provision is not there to assess economic success or large-scale commercial use,¹¹ it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods and services.

⁹ [2018] EWHC 1608 (Ch), paragraphs 114 and 115 detail the summary in full.

¹⁰ That is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark.

¹¹ *MFE Marienfelde GmbH v OHIM*, Case T-334/01.

31. The onus is on the Opponent to have filed evidence of genuine use of its mark. I must consider what the evidential picture as a whole shows me, not whether each piece of evidence shows use by itself.¹²
32. Whilst there is no requirement for the Opponent to produce any specific form of evidence, in *Awareness Limited v Plymouth City Council*,¹³ the Appointed Person stated that:

22. [...] if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.

[...]

28. [...] Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered [...].”

33. I also note Mr Alexander’s comments in *Guccio Gucci SPA v Gerry Weber International AG*.¹⁴ He stated:

“The Registrar says that it is important that a party puts its best case up front – with the emphasis both on “best case” (properly backed up with credible

¹² *New Yorker SHK Jeans GmbH & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-415/09, paragraph 53.

¹³ Case BL O/236/13, paragraph 22 and 28.

¹⁴ Case BL O/424/14. Although the case concerned revocation proceedings, the principle is the same for proof of use in opposition proceedings.

exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it – and file the best evidence first time round – or lose it”.

Relevant period and territorial scope

34. The Applicant has put the Opponent to proof of use of the goods and services relied on in this opposition.
35. The relevant ‘proof of use’ period is 21 July 2016 to 20 July 2021, being the period of five years ending on the designation date of the application.
36. Given that the Earlier Mark is a comparable mark (EU) and that part of the relevant five-year period for genuine use falls before IP Completion Day, the Opponent may rely on evidence of use in the EU (including the UK) dated between 21 July 2016 and 31 December 2020; and from the 1 January 2021 to 20 July 2021 on evidence relating solely to use in the UK.¹⁵
37. As regards the territorial scope of the use of an EUTM, I note the observations of the Court of Justice of the European Union in *Leno Merken BV v Hagelkruis Beheer BV*,¹⁶ in particular, that use of an EUTM in the territory of a single member state of the EU, might (potentially at least) satisfy the use conditions for genuine use of an EUTM.¹⁷

EVIDENCE

38. The evidence filed by the Opponent comes in the form of the Witness Statement of Nick Starsmore, dated 17 October 2022, which has six supporting exhibits labelled NS1 – NS6.
39. Mr Starsmore states that *“the RAGYARD mark has been used since 2016 [and] the RAGYARD brand is available in a number of different countries as well as*

¹⁵ See Tribunal Practice Notice 2/2020, paragraph 4.

¹⁶ Case C-149/11, paragraphs 36, 50 and 55.

¹⁷ See words to that effect, *Ibid.* paragraph 50.

throughout the UK through a number of suppliers”. He describes the exhibits attached to his Witness Statement as follows:¹⁸

NS1 - a spreadsheet detailing the UK suppliers of the RAGYARD products;

NS2 - a spreadsheets containing details of the Opponent’s wholesale sales in the UK dating back to 2018 (*“the spreadsheet includes the order date and the wholesale price of each order”*);

NS3 – screenshots of the Opponent’s website; and

NS4 – screenshots from the Opponent’s ‘Facebook’ and ‘Instagram’ pages.

40. The names of 35 ‘customers’ are listed in Exhibit NS1. Included in the list are ‘Harvey Nichols’, ‘Selfridges’ and ‘Ragyard e commerce’, ‘Ragyard Retail’, ‘Ragyard Retail Brighton’, ‘Ragyard Retail Portobello’, ‘Ragyard Retail Truman’, and ‘Ragyard Thrift Store.’¹⁹ The currency listed for all customer accounts is GBP, with the exception of one, which is in Euros.

41. Exhibit NS2 consists of numerous pages of spreadsheet evidence that comprise of four different spreadsheets. The headings for each spreadsheet and some lines of the data contained therein is set out below (for ease of reference I have named the spreadsheets):

Spreadsheet 1²⁰

PP_Season	Order Type	Order Nun	Order Date	Approved	Locked	Closed	Complete	Order Owr	Order Prio	Order Tag
RY DEVELOPMENT 18.4 ONWARDS	WHOLESALE	SO-07558	02/09/2019	TRUE	FALSE	TRUE	TRUE	RAGPD1		CLOSED
RY PRODUCTION 18.4	WHOLESALE	SO-03470	12/06/2018	TRUE	FALSE	TRUE	FALSE	IWSKB30		NEW
RY PRODUCTION 18.4	WHOLESALE	SO-03519	26/06/2018	TRUE	FALSE	TRUE	FALSE	IWSKB30		NEW
RY PRODUCTION 18.4	WHOLESALE	SO-03531	28/06/2018	TRUE	FALSE	TRUE	FALSE	IWSKB30		NEW
RY PRODUCTION 18.4	WHOLESALE	SO-03758	08/08/2018	TRUE	FALSE	TRUE	FALSE	IWSKB30		NEW
RY PRODUCTION 18.4	WHOLESALE	SO-03759	08/08/2018	TRUE	FALSE	TRUE	FALSE	IWSKB30		NEW
RY PRODUCTION 19.1	WHOLESALE	SO-03882	11/09/2018	TRUE	FALSE	TRUE	TRUE	IWSKB30		NEW
RY PRODUCTION 18.4	WHOLESALE	SO-03887	14/09/2018	TRUE	FALSE	TRUE	FALSE	S3		NEW

¹⁸ I have not listed Exhibits NS5 and NS6 since I am not taking them into consideration – the ‘Preliminary Issues’ section to this decision.

¹⁹ Exhibit NS1.

²⁰ Exhibit NS2, pages 2 – 10.

Spreadsheet 2²¹

Customer	Account Code	Account M On Hold St	Customer	Customer	Customer	Customer	Order Ref
ELISA GAITO			0.00%	RAGYARD ' ELISA GAIT WW	SS20	! WW	SS20
TTLG FASHIONS	PALLADIO			RAGYARD ' RY PALLAD	NOVEMBE		NOVEMBE
CANOPY	PALLADIO		0.00%	RAGYARD ' RY PALLAD	CANOY - P		NOVEMBE
HARVEY NICHOLS	REG NO:0001774537		5.00%	RAGYARD ' N16 VINTA	NOVEMBE		NOVEMBE
RAGYARD E COMMERCE	RAGYARD E COMMERCE		100.00%	RAGYARD ' RY E COM	NOVEMBE		NOVEMBE
RAGYARD RETAIL	RAGYARD RETAIL			RAGYARD ' RY RETAIL	NOVEMBE		NOVEMBE
BOUDOIR BOUTIQUE RETAIL LTD	PALLADIO		0.00%	RAGYARD ' RY PALLAD	JAN-MARC		JAN-MARC
RAGYARD RETAIL	RAGYARD RETAIL			RAGYARD ' RY RETAIL	BRAVADO		BRAVADO
THE SNOOTY FOX BOUTIQUE	HOUSE ACCOUNT			RAGYARD ' N16 VINTAGE	HOUSE		NOVEMBE
RAGYARD RETAIL	RAGYARD RETAIL			RAGYARD ' RY RETAIL	LOVE WILL		LOVE WILL
BOUDOIR BOUTIQUE RETAIL LTD	PALLADIO		0.00%	RAGYARD ' RY PALLAD	OCTOBER		OCTOBER
HARVEY NICHOLS	REG NO:0001774537		5.00%	RAGYARD ' N16 VINTA	JAN-MARC		JAN-MARC
RAGYARD E COMMERCE	RAGYARD E COMMERCE		100.00%	RAGYARD ' RY E COM	EVERGREE		EVERGREE
RAGYARD RETAIL PORTOBELLO	RAGYARD RETAIL PORTO		100.00%	RAGYARD ' RY RETAIL	EVERGREE		EVERGREE
MCB ENERGY			0.00%	RAGYARD ' N16 VINTA	RY EVERGF		EVERGF
MCB ENERGY			0.00%	RAGYARD ' N16 VINTA	EVERGREE		EVERGREE
MCB ENERGY			0.00%	RAGYARD ' N16 VINTA	EVERGREE		EVERGREE
MCB ENERGY			0.00%	RAGYARD ' N16 VINTA	EVERGREE		EVERGREE
N16 WEB VINTAGE SUPPLY			100.00%	VINTAGE S N16 VINTA	RAGYARD		RAGYARD
RAGYARD RETAIL BRIGHTON	RAGYARD RETAIL BRIGH		100.00%	RAGYARD ' RY RETAIL	RAGYARD		RAGYARD
RAGYARD RETAIL PORTOBELLO	RAGYARD RETAIL PORTO		100.00%	RAGYARD ' RY RETAIL	RAGYARD		RAGYARD
LICENSING SAMPLES				HOUSE OF N16 VINTA	RAG PEAN		RAG PEAN
RAGYARD RETAIL BRIGHTON	RAGYARD RETAIL BRIGH		100.00%	RAGYARD ' RY RETAIL	JAN REPLE		JAN REPLE
RAGYARD RETAIL PORTOBELLO	RAGYARD RETAIL PORTO		100.00%	RAGYARD ' RY RETAIL	JAN REPLE		JAN REPLE
RAGYARD E COMMERCE	RAGYARD E COMMERCE		100.00%	RAGYARD ' RY E COM	JAN REPLE		JAN REPLE
MCB ENERGY			0.00%	RAGYARD ' N16 VINTA	EVERGREE		EVERGREE

Spreadsheet 3²²

Customer	Country	Town	Store Num	Store Full	Delivery Fr	Accounts F	Contact	Delivery P	Delivery Start	Delivery Cancel
UNITED KINGDOM			ELISA GAIT	ELISA GAIT	ELISA GAITO	VIA MAR	SEPTEMBE	02/09/2019	30/09/2019	
UNITED KINGDOM	MANCHESTER		TTLG FASH	TTLG FASH	TTLG FASH	07891078	NOVEMBE	01/11/2018	01/12/2018	
UNITED KINGDOM	DERBY		CANOPY 7	JAMES 7 S	JAMES 7 S	JAMES HUI	NOVEMBE	01/11/2018	30/11/2018	
UNITED KINGDOM			HARVEY NICHOLS	UNITED KINGDOM			NOVEMBE	01/11/2018	30/11/2018	
UNITED KINGDOM	LONDON		RAGYARD I	MARIA CIRILLO	BOUN MARIA	CIR	NOVEMBE	01/11/2018	30/11/2018	
UNITED KINGDOM	LONDON		RAGYARD RETAIL	115	115 PORTC	IQBAL MAI	NOVEMBE	01/11/2018	30/11/2018	
UNITED KINGDOM	LIVERPOOL		BOUDOIR 114	CAVERP 14	CAVERP	BELINDA O	JAN-MARC	01/01/2019	31/03/2019	
UNITED KINGDOM	LONDON		RAGYARD RETAIL	115	115 PORTC	IQBAL MAI	MID OCT-E	15/10/2018	05/11/2018	
NORTHERN IRELAND	DUNGANNON		THE SNOO	56 SCOTCH STREET	CC SARAH	INF	NOVEMBE	01/11/2018	30/11/2018	

Spreadsheet 4²³

Sales Order	Quantity	No. Stock Items Sold	No. Products Sold	Order Ccy	Duty Ccy	Value Wholesale Price (GBP)
	41	41	41	ZALANDO EURO	ZALANDO EURO	2072.77
	41	19	10	GBP	GBP	1516.06
	34	15	7	GBP	GBP	882.12
	356	37	13	GBP	GBP	10746.48
	492	236	50	GBP	GBP	15391.2
	492	236	50	GBP	GBP	15391.2
	24	8	4	GBP	GBP	407.16
	0	0	4	GBP	GBP	0
	21	18	5	GBP	GBP	687.81
	153	16	4	GBP	GBP	3004.92
	8	3	2	GBP	GBP	253.58
	212	44	11	GBP	GBP	5749.88
	302	20	5	GBP	GBP	5817.58

²¹ Exhibit NS2, pages 11 – 19.

²² Exhibit NS2, pages 20 – 28.

²³ Exhibit NS2, pages 29 – 37.

42. Spreadsheets 2 and 4 do not contain any dates. The dates in Spreadsheets 1 and 3 range from 2018 to 2022 therefore some dates are outside of the relevant period and there is nothing dated before 2018.
43. Spreadsheets 1, 2 and 3 do not contain any financial information. The financial information, which is undated, is contained in Spreadsheet 4. Spreadsheet 4 contains information about sales order quantities, the number of stock items sold and the value wholesale price in GBP. I have inserted a sample of some of the highest 'value wholesale prices' in the table below:

Sales Order Quantity	No. of Stock Items Sold	Value Wholesale Price
166	8	£11,675.48
635	167	£13,795.60
492	236	£15,391.20
462	206	£17,801.26
882	98	£19,091.02
612	244	£21,036.71

44. Spreadsheet 3 contains columns with 'delivery start' and 'delivery cancel' dates and a column for 'town'. The majority of the 'town' column relates to London, of which several entries refer to 'Harvey Nichols' in London and the lion's share of the London delivery entries refer to 'Ragyard' / 'Ragyard Retail'. The spreadsheet shows that for delivery entries between 2018 and 2021, the following 'towns' are listed: Manchester, Derby, Liverpool, Dungannon (NI), Middlesborough, Bath and in May 2021, Chesterfield.
45. In the same rows as the 'Harvey Nichols' entries, in Spreadsheet 2, the partial wording 'N16 Vinta' is included under the 'Customer' column. Spreadsheet 2 also contains 'Customers' such as: 'Ragyard E Commerce'; 'MCB Energy' – alongside which is the partial wording 'N16 Vinta' as the customer; and 'Licensing Samples' - alongside which is the partial wording 'House of N16 Vinta'.

46. Mr Starsmore provides six screenshots of 'Wayback Machine' archived website pages for the website 'ragyard.com' dated 17 October 2016, 9 July 2017, 25 May 2018, 13 May 2020 and 25 January 2021.²⁴ 'RAGYARD' is visible on these pages, for example:



Dated: 9 July 2017

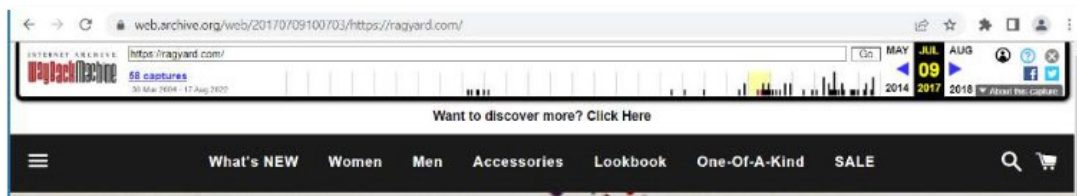
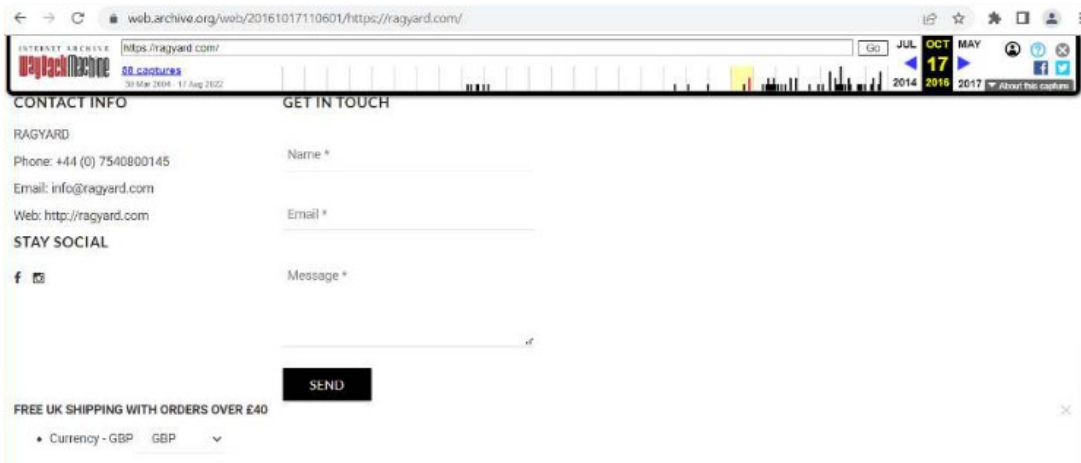


Dated: 13 May 2020

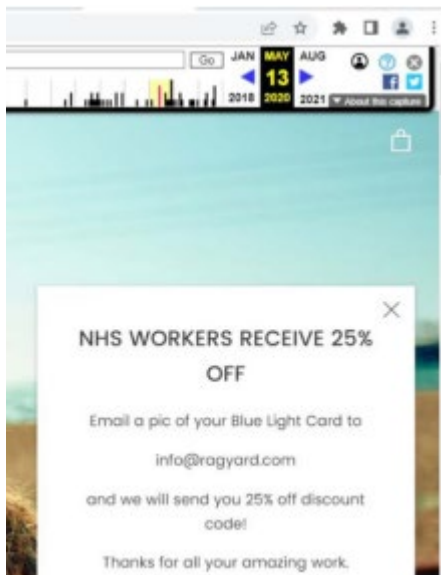


Dated: 25 January 2021

47. Extracts from the website are as follows:



²⁴ Exhibit NS3.



48. Mr Starsmore provides screenshots of the Opponent's social media accounts for 'Facebook' and 'Instagram'. Some of the social media posts are undated, or are dated outside of the relevant period,²⁵ otherwise they are dated between 22 March 2016 and 23 May 2021. The Opponent's 'Facebook' page shows that at the time of filing the evidence, it had 3,502 followers and that its 'Instagram' page had 23,000 followers.

²⁵ For example, see Exhibit NS4, pages 3 and 10.

49. The website and social media contain images of models or images of clothing.
For example:



50. The social media evidence shows that the 'RAGYARD' sign is displayed in the profile image for the accounts in the following way:



51. The Opponent's social media 'Instagram' account provides the following information about 'RAGYARD':²⁶



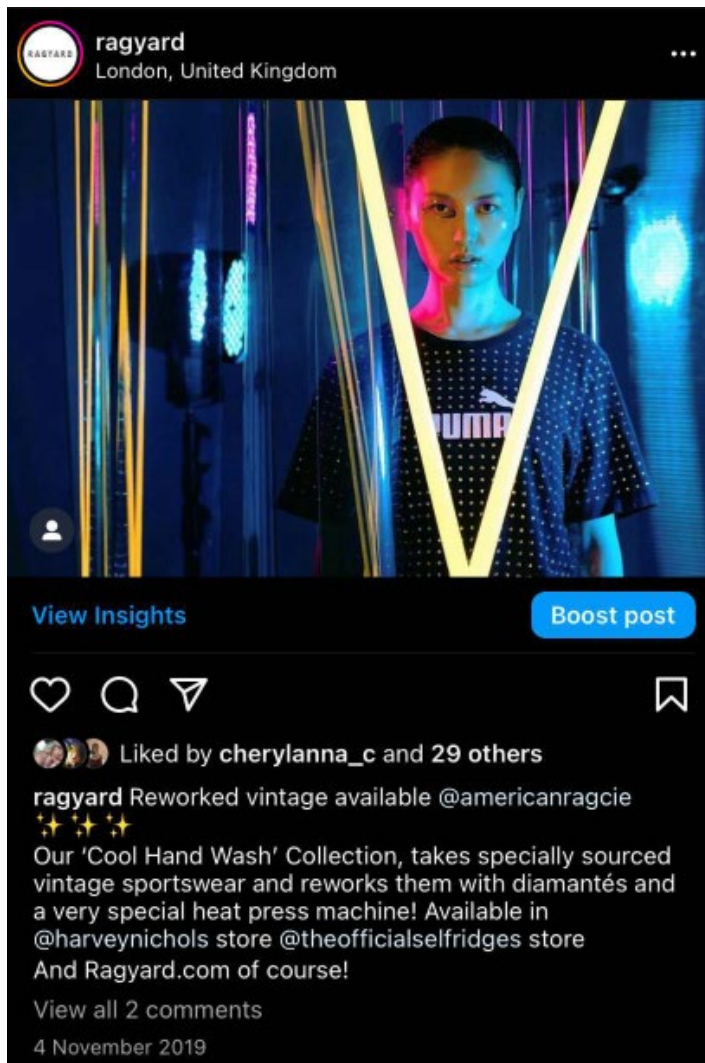
52. There are several references to the terms 'vintage', 'reworked' and 'reworked vintage' throughout the Opponent's website and social media evidence,²⁷ such

²⁶ Exhibit NS4, page 3.

²⁷ Exhibits NS3 and NS4.

as social media hashtags “reworkedvintage” and “vintagefashion”, and references to a ‘Rolling Stones Vintage Bleach Denim Shirt’ on sale on the website as another example. Some extracts from the Opponent’s ‘Instagram’ account referencing vintage clothing and ‘reworked vintage’ are as follows:

ragyard One of our most recent additions to our in store treasure troves ✨ Gorgeous velvet robe hand crafted from reworked vintage religious blankets ⚡ Head to store to try!
View all 2 comments
15 July 2021



53. The social media posts show a few examples of the sign ‘RAGYARD’ on coat hangers, one example on a clothing swing tag, one example on a shopping bag

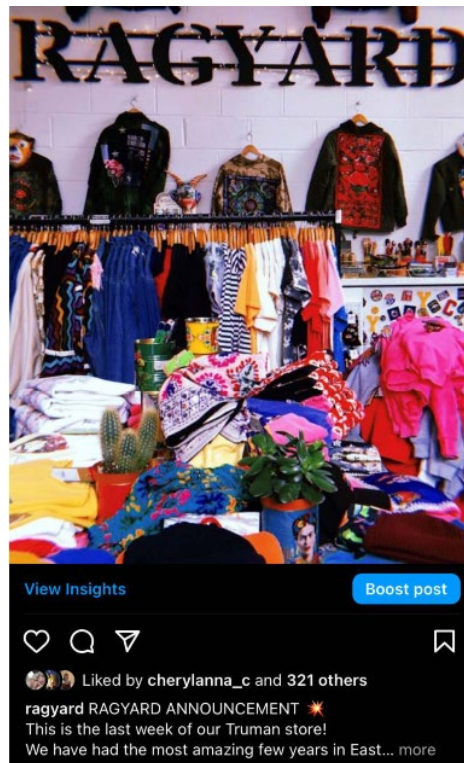
and one example on shop signage, as follows:



Dated: 26 March 2018



Dated: 26 November 2017



Dated: 16 September 2019



Dated: 23 May 2021



Dated: 15 July 2021

54. The evidence shows one, somewhat clear example of the 'RAGYARD' sign on the inside label of a garment (and one not so clear), and one example of the sign embellishing a garment as follows (I have circled the relevant parts):



Dated: 22 March 2016



Dated: 28 January 2021

Form of the mark

55. The evidence shows that the 'RAGYARD' sign appears, as registered, in pieces of evidence dated between March 2016 and September 2019, namely:

RAGYARD

and there is no evidence beyond 2019 showing the above sign in the font in which it is registered.

56. In the pieces of evidence dated:

(1) between 13 May 2020 and 15 July 2021, the sign is used in the following way:



(2) 28 January 2021, it is used in this form:



these examples differ from the registered mark.

57. Since the second variant listed above derives from only one piece of evidence, towards the end of the relevant period, I shall disregard it and focus instead on the Opponent's use of the first variant which the evidence shows was in use from at least May 2020 and right up to the end of the relevant period (being present on its website, its social media, its hangers and on a clothing swing tag).

58. I note that the Opponent may rely on use of a mark "*in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered*".²⁸ Put plainly, if the form in which it is used alters the distinctive character of the mark, then that form is not a 'variant form' and use of such sign cannot be relied on to establish genuine use of the registered trade mark.

59. The purpose of this provision is to avoid imposing strict conformity between the used form of the trade mark and the form in which the mark was registered, and

²⁸ Section 6A(4)(a) of the Act.

therefore to allow its proprietor, on the occasion of its commercial exploitation, to make variations in the sign, which, without altering its distinctive character, enables it to be better adapted to the marketing and promotion requirements of the goods or services concerned. Where the sign used in trade differs from the form in which it was registered only in negligible elements, so that the two signs can be regarded as broadly equivalent, the abovementioned provision envisages that the obligation to use the trade mark registered may be fulfilled by furnishing proof of use of the sign which constitutes the form in which it is used in trade.²⁹

60. The correct approach in assessing whether a mark has been used in a ‘variant form’ requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences).³⁰
61. The Appointed Person in *Nirvana Trade Mark*,³¹ summarised the approach to the test in relation to whether a sign has been used in a ‘variant form’ as follows:

“33. [...] The first question is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period [...]

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all.”

²⁹ See the General Court ruling in T-194/03 *Il Ponte Finanziaria* [2006] ECR II-445 at paragraph 50 (not overturned by the Court of Justice C-234/06 *Il Ponte Finanziaria* [2007] ECR I-7333).

³⁰ See *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, paragraph 13.

³¹ BL O/262/06

62. The distinctive character of the Earlier Mark derives from the word 'RAGYARD'. The differences between the mark registered and the Opponent's latter sign rests in the font.
63. The font of the Opponent's sign shown in the evidence as indicated at my paragraph 56(1) above, appears engraved or else like three-dimensional signage, whereas the font used for the Earlier Mark appears as though it has been stamped. Although neither font resembles the other, both are shown in upper-case letters, and neither are overly stylised to the extent that the word 'RAGYARD' is not clearly discernible.
64. The stylisation of the font plays a lesser role in the Earlier Mark and it is the word element in which the overall impression of the mark lies. Whilst the differences in font change the stylised component of the Earlier Mark, I do not think that the stylisation used in the latter sign alters the inherent distinctive character of the Earlier Mark since the distinctive element of the mark, i.e. the word 'RAGYARD' remains unaltered. As such I consider the sign shown in use to be an acceptable variant form of the registered mark therefore the Opponent can rely on its use of that variant form of the mark.
65. If I am wrong in this, then the most recent evidence in which the Earlier Mark can be seen is on clothing hangers and on the website header in 2018, and on shop signage in 2019.

Conclusions on the evidence

66. The limited evidence shows that the Opponent's area of activity is in relation to vintage clothing and that it reworks/ embellishes vintage clothing. The evidence shows that its reworked vintage clothing retains the indication of origin of the original manufacturer, which I have discerned from the 'PUMA' t-shirt shown in evidence for example.
67. My understanding of the term 'vintage' in relation to clothing, is that it is a reference to clothing made in another time period and generally refers to pre-owned/second-hand clothing; and that the trade in vintage clothing/ fashion items involves the sale of items made by a plethora of different manufacturers. In an

'Instagram' post from 2016, there is reference to 'Levi 501's' for example, and the Opponent's website references a vintage 'Rolling Stones' bleach denim shirt for sale.

68. I again note that the use must be consistent with the essential function of a trade mark which includes affixing the mark to the relevant goods in order to guarantee to the consumer that the goods come from a single undertaking which controls the manufacture of those goods, and which is responsible for their quality.
69. There is some evidence that the Opponent affixes 'RAGYARD' branded labels to the inside of clothing, such as the 'floral patch military jacket' shown in evidence; and there is one piece of evidence that it affixed 'RAGYARD' to a clothing swing tag label. However, the Opponent has not set out clearly which goods and services it uses its mark on and the examples of it affixing its mark to clothing itself are extremely limited.
70. Whilst its website evidence lists categories such as 'Men's', 'Women's' and 'Accessories', there is no indication in any of the evidence of what 'accessories' it sells and whether those accessories are sold bearing the Earlier Mark. There is evidence of one image of a bag and a hat from 2016, but no indication that these were made by the Opponent bearing the Opponent's mark. In any event, 'accessories' is not a category of goods that can be classified in any one class of the Nice Classification system, since it could relate to goods that span many classes and therefore the term is in any event imprecise. Without sufficiently solid evidence, I cannot determine what goods are sold as 'accessories' by the Opponent.
71. I find that there are numerous other deficiencies within the Opponent's evidence provided which I have set out in the following paragraphs.
72. No prices for any goods are shown in the evidence, and although I can deduce that the Opponent has an e-commerce platform, the Applicant has not shown images of any of its products for sale on this platform and there is no information provided as to the number of visits made to the Opponent's website.

73. Other than its social media accounts, I have not been provided with any other evidence of marketing or promotion of the mark.
74. The evidence refers to sales in a “*number of different countries*”, but other than the UK evidence, there is no evidence of what those countries are, the level of sales or what was sold when and where. There are some references to Euros in the evidence, but it is impossible to determine from where in the EU it relates to. However, the evidence is UK-centric and is at least to that extent concerned with the relevant territory.
75. I have not been presented with any revenue figures for the relevant period. The relevant part of the spreadsheet evidence with any financial information (which is not described to me as revenue information) is undated. Mr Starsmore states that Exhibit NS2 is a spreadsheet containing details of the Opponent’s wholesale sales in the UK dating back to 2018 and that the spreadsheet includes the order date and the wholesale price of each order; however, the information in that exhibit was not clear to me.
76. The most recent dates in the spreadsheets are from 2022, and whilst there are date ranges that fall within the relevant period (at least from 2018 to 2021), those dates are not displayed against any of the financial information, therefore I cannot say what period the figures relate to.
77. What’s more, it is completely unclear whether the value of the wholesale items is the value of the total quantity ordered or the value of the ‘stock items sold’. To illustrate my point, in one entry in the undated ‘spreadsheet 4’, the ‘sales order quantity’ is 882 with a ‘value wholesale price’ of £19,091.02, and the data informs me that 98 ‘stock items sold’ – it is unclear whether the £19,091.02 is the value of the 882 items ordered or whether it is the value of the 98 sold. It seems more plausible that it would be the total value of the 882 items, but it is not made clear to me in the evidence and it is in any event a moot point as the figures are undated.
78. Even if the figures were dated, there is no breakdown provided to indicate what goods were sold and to whom they were supplied to. An overwhelming majority of the wholesale delivery addresses in one of the spreadsheets shows that

deliveries were made to 'Ragyard' stores, and where they were sent to 'Harvey Nichols' for instance, 'N16 Vintage' (the Opponent's company) is listed as the customer (this could potentially indicate that they were delivered to a concession that the Opponent has in 'Harvey Nichols', although this is not made out in the evidence). Therefore, aside from there being no indication as to what goods were supplied wholesale, it appears that a great deal would have been supplied to the Opponent's own stores, although again, information on the Opponent's stores is largely absent (though I note the reference to the "*last week*" of the Opponent's "*Truman store*" and the statement that "*we have had the most amazing few years*", which is contained in a social media post, dated 16 September 2019).

79. What's more, it is not possible to determine whether any of those figures relate to reworked vintage clothing and if it does, whether that vintage clothing bore the Opponent's mark; or whether it is vintage clothing (reworked or not) that had the original manufacturer's label on it. The issue with having just bare figures with a 'value wholesale price' is that (despite the fact that they are undated) it merely tells me the value of the stock, not that the stock had the Opponent's mark on it. If the stock relates to vintage clothing, then it is not outside the realms of possibility that it would have a third-party manufacturer's original label of origin on it in and not the Opponent's.
80. Absent any submissions or further statements from the Opponent to assist me in clarifying the evidence contained in the spreadsheets, I find that this evidence is indecipherable and inconclusive. I also note that I have been provided with no financial figures whatsoever from 2016 and 2017. Clear, unambiguous information as to revenue should have been readily available to the Opponent, but has not been provided.
81. Whilst the Opponent has provided a list of its customers (of which multiple 'Ragyard' names are listed), the Opponent has not provided me with any examples of invoices for any sales, nor has it provided me with any indication as to its revenue derived from its own retail sales. This again is information that should have been readily available to the Opponent.

82. Although the Opponent's 'Facebook' followers aren't remarkable, the 'Instagram' followers are not insignificant and there is evidence to support that the Opponent uses its 'Instagram' account as a means of marketing. However, the number of social media followers does not equal number of sales and the social media evidence is not sufficient (alone) to clearly establish the extent to which the mark has been used commercially.
83. Whilst I am satisfied that the evidence relates to the relevant territory, this is not evidence that the mark has been commercially exploited with the purpose of maintaining a market share.
84. In summary, the Opponent's evidence has failed to show the scale and frequency of its use of its mark, and has failed to adequately particularise details of any revenue from the sale of any goods or the provision of any services on which it relies. The sum of its use of the sign as registered relates to a few items of clothing and nothing else, and if I am wrong on it being able to rely on its use of the variant form of its mark, then much of that evidence cannot be relied on.
85. The onus is on the Opponent to have filed evidence of genuine use of the Earlier Mark in respect of the goods and services registered under the mark, throughout the relevant period. Such evidence must be 'sufficiently solid to enable the evaluation of the scope of protection'. My primary view is that the Opponent has fallen short in this task.
86. If I am wrong in my primary finding, and I were to overlook the various significant deficiencies that I have indicated, the best construction of the evidence is that it shows use in relation to *clothing* and the *retail of clothing* (given that there is some evidence to suggest it sells vintage clothing). I will therefore proceed to consider the opposition based on those goods and services as a notional fair specification.

Comparison of goods and services

87. Although my primary finding is that the Opponent has not proven genuine use of the Earlier Mark, if I proceed based on the alternative fair specification, my conclusion would have nonetheless been that the respective goods and services

are not similar. Since some similarity between the goods and services is required for the purposes of a section 5(2)(b) claim, even putting the Opponent's best case forward, the opposition must fail for lack of similarity between the respective goods and services.

88. The goods and services being compared would be, on the one hand, "*clothing*" in Class 25 and "*retail services connected with the sale of clothing*" in Class 35 in respect of the Earlier Mark, and the applied-for goods on the other hand, which can be categorised as jewellery, including "*clothing ornaments of precious metals*", trinkets and jewellery boxes in Class 14; and "*decorative articles for the hair*" and buckles for clothing in Class 26. I have set out my reasoning below, in relation to why I do not consider the respective goods and services to be similar.³²
89. Comparing the goods, firstly, I do not consider that "clothing" is similar to the Applicant's Class 26 goods, since the nature, intended purpose and method of use of hair decorations is different to clothing, neither are those goods in competition with each other, nor interchangeable and they are not complementary since the one is not indispensable for the use of the other.
90. The same can be said of buckles for clothing. These are items of haberdashery and whilst some garments may have buckles, and the respective goods may even be sold in adjacent markets, the nature and intended purpose of a buckle is different to that of clothing - for example, a person cannot clothe themselves with a buckle.
91. For these reasons, I consider the Applicant's Class 26 goods to be **dissimilar** to "clothing".

³² By taking into account: (1) the provisions of section 60A of the Act (and the provisions therein in relation to a comparison of goods and services in different classes); (2) the relevant factors relating to the goods and services as set out in *Canon*, Case C-39/97, paragraph 23, and *British Sugar PLC v James Robertson & Sons Ltd.*, [1996] R.P.C. 281 – the "*Treat*" case; (3) the provisions on complementarity as set out in *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82; (4) the principle on identity set out in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05; and (5) the principles of interpretation set out in: *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), paragraphs 11 – 12; *Pathway IP Sarl (formerly Regus No. 2 Sarl) v Easygroup Ltd (formerly Easygroup IP Licensing Limited)*, [2018] EWHC 3608 (Ch), paragraph 94; and *Sky v Skykick* [2020] EWHC 990 (Ch), paragraph 56 (wherein Lord Justice Arnold, in the course of his judgment, set out a summary of the correct approach to interpreting broad and/or vague terms).

92. In respect of a comparison between “clothing” and the Applicant’s Class 14 goods, I consider these goods to be **dissimilar** since they differ in the nature, intended purpose, method of use and neither are those goods in competition with each other, nor interchangeable and they are not complementary.
93. In that regard, to illustrate my point, I refer to the decision of the General Court in *Compagnie des montres Longines, Francillon SA v OHIM*,³³ in which the Court rejected the argument that jewellery is similar to clothing. Although this related to goods in the ‘luxury’ sector of the clothing market, the reasoning nonetheless applies to non-luxury items as well as the vintage clothing sector.
- (1) In essence, the Court found that notwithstanding “*in the luxury items sector, goods like [...] jewellery [...] are also sold under the famous trade marks of renowned designers and manufacturers and that clothing manufacturers are therefore turning towards the market for those goods [and as such] there was a certain proximity between the goods at issue*”, the respective goods were nonetheless held to be dissimilar.
- (2) In reaching this conclusion, the Court considered that clothing and jewellery differed in their nature, their intended purpose and their method of use. That the raw materials from which they are manufactured are different, and that clothing is manufactured to cover, conceal, protect and adorn the human body whereas jewellery has a purely ornamental function. The Court pointed out that as the nature, intended purpose and method of use of the goods are different, they are neither in competition with each other nor interchangeable.
- (3) The Court rejected the argument that the goods were interchangeable on the basis that it was not proven that it is typical for a consumer who intends to buy themselves jewellery to suddenly decide to buy themselves clothing instead and vice versa; and that to accept that they are interchangeable “*is manifestly contrary to the principle of speciality of marks [...] and would improperly extend the area of protection of trade marks. [...] For the same reasons, it is necessary to reject as irrelevant the [...] claim that the goods*

³³ Case T-505/12, paragraphs 46 – 60.

are interchangeable inasmuch as each of them may be given as a gift and the consumer impulsively chooses one or other of them. To accept such a vague connection would lead to holding that goods which are manifestly different in their nature and intended purpose are similar.

- (4) The Court acknowledged case law regarding “*aesthetic complementarity between goods*” which may give rise to a degree of similarity. In that regard it stated that “*such aesthetic complementarity must involve a genuine aesthetic necessity, in the sense that one product is indispensable or important for the use of the other and consumers consider it ordinary and natural to use those products together. [...] However, it is important to point out that the mere existence of aesthetic complementarity between the goods is not sufficient to conclude that there is a similarity between them.*”

94. In respect of a comparison between the retail of clothing and the applied-for goods, since there is no similarity between the goods themselves, there is an even further divide between the applied-for goods and the retail services, since the comparison is between services on the one hand (for the retail of goods which I have found to be dissimilar to the applied-for goods) and goods on the other. The retail services are therefore **dissimilar** to the Applicant’s goods.

Final remarks

95. For the sake of completeness, I note that had I found similarity between the goods and services (in respect of the notional fair specification), I would have nonetheless found the marks to be dissimilar. The visual, aural and conceptual differences arising from the different suffixes are significant. The average consumer would not overlook the striking differences of ‘BAG’ and ‘YARD’, which offset the similarity arising from the identical first three letters,³⁴ therefore the average consumer would not be directly confused.

³⁴ In this regard I note the findings of the General Court in *CureVac GmbH v OHIM*, T-80/08, paragraph 41, where, in reference to the comparison between the signs ‘RNAActive’ and ‘RNAiFect’ the Court stated that: “*even assuming that, as the applicant claims, the signs were both written in upper case or lower case letters, it must be pointed out that, in any event, the visual similarity would not be more pronounced, since the difference owing to the positioning of the last five letters would always offset the similarity owing to the identity of the first three letters.*”

96. The term 'RAGBAG' hangs together such that neither could the average consumer be indirectly confused. 'RAGBAG' does not appear to be any type of logical or obvious sub-brand nor brand extension of 'RAGYARD'. For instance, the average consumer would not consider 'RAG' to be a house brand and for 'YARD' and 'BAG' to be sub-brands of 'RAG', because the respective terms have different concepts and 'RAG' does not form a distinctive and dominant component of either mark. What's more, as indicated earlier, 'RAG' in the Earlier Mark, is not particularly distinctive in relation to clothing goods and the retail and trade in clothing, whereas 'RAGBAG' in relation to jewellery and hair decorations is unusual and not related to clothing at all.
97. Furthermore, in making this assessment I have not overlooked that the Earlier Mark is a figurative mark, however, I base my conclusions on the overall impression of the mark, which lies in the word 'RAGYARD' – the font performs a merely decorative role in the mark and even if the Contested Mark were used in the same font as the Earlier Mark, the differences in the words avoid similarity and certainly preclude any likelihood of confusion.

OUTCOME

98. The opposition fails under section 5(2)(b) of the Act. Subject to any appeal, the Contested Mark, trade mark application number WO0000001616873, shall proceed to registration for all the goods applied for in Classes 14 and 26.

COSTS

99. The Applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the Applicant the sum of £300 as a contribution towards the cost of the proceedings (covering the preparation of the Notice of Defence and Counterstatement, consideration of the other side's evidence and filing its own evidence).
100. I therefore order Nick Starsmore and Josephine Starsmore to pay Ragbag ApS, the sum of **£300**. This 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 5th day of June 2023

Daniela Ferrari

For the Registrar