O-276-14

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2644302
BY INTACO LIMITED TO REGISTER THE TRADE MARK

IN CLASS 11

AND IN THE MATTER OF OPPOSITION
THERETO UNDER NO 400093
BY ALTECNIC LIMITED

Background and pleadings

1) On 30 November 2012, Intaco Limited ("the applicant") applied to register the following mark:

2) It was accepted and published in the Trade Marks Journal on 18 January 2013 in respect of the following list of goods in Class 11:

> *Apparatus and installations for heating, water circulation, water supply and sanitary purposes; plumbing fixtures, fittings and components; heating components; valves, thermostatic mixing valves; radiator valves; shower valves; taps; mixer taps; chilled water installations and apparatus; central heating installations and apparatus; pressurisation units for maintaining the pressure within water systems; solar collectors; solar heating panels; solar powered heating apparatus and installations; parts and fittings for all the aforesaid goods.*

3) Altecnic Limited ("the opponent") opposes the mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). This is on the basis of the following earlier UK mark:

Mark and relevant dates	List of goods
2270699 INTABALL Filing date: 22 May 2001 Date of entry in register: 2 November 2001	**Class 11:** *Apparatus and installations for heating, water circulation, water supply and sanitary purposes; plumbing fixtures, fittings and components; heating components; valves, thermostatic mixing valves; radiator valves; chilled water installations and apparatus; central heating installations and apparatus; pressurisation units for maintaining the pressure within water systems.*

4) The opponent also opposes the mark on the basis of Section 5(4)(a) of the Act and relies on the signs INTA and INTABALL, claiming use since 31 May 1997 and 22 May 2001 respectively. This use is claimed in respect of the same list of goods as shown in paragraph 3, above.

5) The opponent argues that the respective goods are either identical or similar and the marks are similar.

6) The applicant filed a counterstatement denying the claims made and requesting that the opponent provides proof of use of its earlier mark relied upon. It also claims that because it is the registered proprietor of UK mark 2133161 INTA, which predates the opponent's registration, the opponent's mark "is not in fact an earlier mark relative to the opposed mark".

7) Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered appropriate. A hearing took place on 4 June 2014, with the opponent represented by Mr Kieron Taylor for Swindell and Pearson Ltd and the applicant by Mr Robert Swales, also for Swindell and Pearson. The submissions made during the Hearing have been fully considered in reaching this decision and will be referred to as and when appropriate during this decision.

Opponent's Evidence

8) This takes the form of two witness statements by Mr Alan Stephen Sherwin, Managing Director of the opponent. His first witness statement addresses the opponent's use of the INTABALL mark. I summarise the relevant points below:

- INTABALL products, that include ball valves of various kinds and sizes, are sold to distributers of heating and plumbing products and also to original equipment manufacturers;
- The mark has been used on valves continuously since July 2002 throughout the UK;
- INTABALL ball valves are displayed in the opponent's brochures, instruction manuals, publicity materials, pricelists, its website and, where possible, the goods themselves;
- A copy of a brochure, dated February 2012 is provided at Exhibit AS001. INTABALL lever ball valves appear on pages 41 and 42 of its 52 pages;
- Extracts from the opponent's website are provided at Exhibit AS002. These are dated 24 May 2013, but Mr Sherwin states that it is substantially unchanged from the date of publication of the applicant's mark. These show INTABALL ball valves with the mark appearing on the page itself and it is also visible on the lever handle of some of the products;
- The website has total unique visitor numbers of about 2000 to 2700 per month;
- At Exhibit AS004, Mr Sherwin provides further website extracts obtained from the Internet archive www.web.archive.org showing use of INTABALL during the years 2004 to 2011;
- Exhibit AS005 consists of a price list dated January 2010. INTABALL ball valves feature on four of the sixty-six pages;
- Exhibit AS006 consists of copies of web pages illustrating the sale of INTABALL ball valves by third parties such as *Wickes*, *Travis Perkins*, *Advanced Water Company Limited*. These were all printed in May 2013;
- Mr Sherwin provides six invoices at Exhibit AS007, two dated in 2006 and one each in 2007, 2008, 2009 and 2013. Whilst all but one appear to refer to ball valves, only two (from 2008 and 2009 respectively) actually refer to the mark INTABALL;

- Mr Sherwin states that annual turnover in the UK under the INTABALL mark between the years 2006 to 2012 ranged between £1.8 million and £2.6 million;
- Mr Sherwin does not know the market share of INTABALL products but expresses the opinion that they are the market leader with a significant market share, the opponent selling in the region of 400,000 units annually.

9) Mr Sherwin's second witness statement addresses the issue of the opponent's use of the marks INTA and INTABALL to support the claim of goodwill relevant for the pleading based upon Section 5(4)(a) of the Act. For reasons of procedural economy, I do not intend to summarise this evidence here.

Applicant's Evidence

10) This takes the form of a witness statement by Ms Cynthia Kathleen Fisher, Director of the applicant. She also explains that she is Director of Intatec Limited, the original proprietor of the applied for mark. The mark was assigned from Intatec Limited to the applicant on 13 May 2013. She states that she and three others founded the opponent company in 1987. The applicant company was set up in 1991 (and originally called Altecnic (UK) Limited) to hold various assets for the opponent. Ms Fisher further states that the mark INTA and numerous other INTA- prefixed marks were adopted and registered and stand in the name of the applicant or Intatec Limited. The mark INTABALL is the only exception to this and remains in the name of the opponent. Ms Fisher remained a director of the opponent company until 2010.

11) Ms Fisher states that the INTA mark was registered in 1997 and therefore predates the opponent's INTABALL registration and that a range of other INTA-prefixed marks are also registered either by the applicant or an associated company. Whilst these marks are named, no further information is provided regarding their registrations except for a copy of the registration certificate for the mark INTA ECO and device (Exhibit CF001). Turnover and marketing figures in respect of its own INTA and INTA- prefixed marks are provided as are exhibits relating to the use of such marks by the applicant or associated companies.

12) Ms Fisher states: "I note from the first witness statement of Alan Stephen Sherwin ... that the mark INTABALL appears to only have been used on ball valves..."

13) Ms Fisher also provides the following evidence of the applied for mark in use to support her claim that it was first adopted in 2002 or 2003:

- Exhibit CF003 includes a copy of a blank invoice where the mark INTA features prominently at the top;
- Exhibits CF008, CF009 and CF010: photographs of the trade stand of a related company of the applicant at the Healthcare Estate 2009 Exhibition, Phex 2010 Exhibition and KBB 2010 Exhibition respectively. All show the applied for mark appearing prominently on the majority of the stands' display panels;

- Exhibits CF011 and CF012: copies of price list covers dated February 2004, March 2005 and August 2005 respectively. These all bear the applied for mark at the top of the each cover and also on what appears to be a shower mixer tap shown on the same pages;
- Exhibits CF012, CF014, CF015 and CF019: copies of newsletters produced by a related company of the applicant and dated May 2005, Spring and October 2006, Spring 2008 and Spring 2012 respectively. These prominently feature the applied for mark;
- Exhibit CF013 consists of copies of two brochures relating to shower products. These are dated April and October 2006 and, once again feature the applied for mark;
- Exhibit CF015: Further brochure cover, dated May 2007, featuring the applied for mark in respect of anti-scolding shower products;
- Exhibit CF017: Front cover of a brochure for shower hinges, dated Summer 2010 and prominently features the applied for mark;
- Exhibit CF018: front page of a shower collection brochure, dated Spring/Summer 2011 and, once again showing use of the applied for mark;

14) Ms Fisher disclosed marketing figures in respect of the INTA brand:

Year	Amount
2008	£175,839
2009	£309,490
2010	£346,639
2011	£157,171

15) Ms Fisher also provides turnover and marketing figures in respect of "products sold ... bear[ing] the trade mark INTA or a trade mark incorporating the word INTA", as follows:

Year	Turnover	Marketing
2008	£1,101,695	£31,734
2009	£3,526,578	£100,295
2010	£3,317,334	£106,035
2011	£3,118,275	£49,925

Opponent's Evidence-in-reply

16) The opponent did not file evidence in reply, but it did provide written submissions. I will not summarise these here, but I will take them into account and refer to them, as necessary, in the decision.

DECISION

Proof of Use

17) At the hearing, both sides accepted that use had been shown within the relevant period, of the mark INTABALL, in respect of the following goods:

> *Ball valves for use in plumbing and heating*

18) For the purposes of my consideration of the pleadings based upon Section 5(2)(b) of the Act, the opponent is entitled to rely upon this list of goods.

Section 5(2)(b)

19) Section 5(2)(b) reads:

> "(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 of association with the earlier trade mark."

20) In reaching my decision under this ground I bear in mind that the CJEU has issued a number of judgments which provide guiding principles relevant to this ground. In *La Chemise Lacoste SA v Baker Street Clothing Ltd* (O/330/10), Mr Geoffrey Hobbs QC, sitting as the Appointed Person, quoted with approval the following summary of the principles which are established by these cases:

> "(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion."

Comparison of goods

21) In assessing the similarity of goods, it is necessary to apply the approach advocated by case law and all relevant factors relating to the respective goods and services should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v.Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23:

> '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.'

22) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281).

23) For ease of reference the parties' respective goods (all in Class 11) are:

Opponent's goods	Applicant's goods
Ball valves for use in plumbing and heating	*Apparatus and installations for heating, water circulation, water supply and sanitary purposes; plumbing fixtures, fittings and components; heating components; valves, thermostatic mixing valves; radiator valves; chilled water installations and apparatus; central heating installations and apparatus; pressurisation units for maintaining the pressure within water systems.*

24) At the hearing, Mr Taylor directed me to an earlier decision of the Registry relating to another dispute between the parties. This is decision O-086-14 INTASOL. He points out that all of the applicant's goods in the current proceedings were included in the challenged application in that case and that the Hearing Officer found that all these goods were identical to *ball valves for use in plumbing and heating*. I reproduce the relevant part of that decision below:

> 35. Earlier in this decision I referred to the case of *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM).* The court commented that:
>
> > "...goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application..."
>
> I also note the findings in Case T-420/03 – *El Corte Inglés v OHIM- Abril Sanchez and Ricote Sauger* (Boomerang TV) where the General Court (GC) commented:
>
> > "96…..Goods or services which are complementary are those where 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 that the responsibility for the production of those goods or provision of those services lies with the same undertaking (Case T14169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60, and judgment of 15 March 2006 in Case T-31/04 *Eurodrive Services and Distribution v OHIM – Gomez Frias* (euroMASTER), not published in the ECR, paragraph 35)."
>
> 36. I consider the following of the applicant's goods to be identical to the opponent's goods on the basis outlined in *Meric*:
>
> > Apparatus and installations for heating, water circulation, water supply and sanitary purposes; plumbing fixtures, fittings and components; heating components; valves, thermostatic mixing valves; radiator valves; shower valves; chilled water installations and apparatus; central heating installations and apparatus; pressurisation units for maintaining

the pressure within water systems; solar powered heating apparatus and installations; parts and fittings for all the aforesaid goods

25) I generally concur with these findings insofar as the applicant's goods relate to plumbing and heating. Here, the opponent's *ball valves* are covered by the explicit term valves and are therefore identical, or they are a component of the goods covered by the broader terms of the applicant's specification. Component parts share a good deal of similarity with the goods that they are components for because the parts are complementary. In this sense, the General Court has provided guidance on what "complementary" means. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)***,** Case T-325/06 (and also the *El Corte Inglés* case referred to by the hearing officer in the earlier case) it commented that goods are complementary where "...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 that the responsibility for those goods lies with the same undertaking". Components are indispensable for the use of the complete product and vice-versa.

26) With respect to goods related to water supply or chilled water installations, whilst the goods may not be identical, these systems will also incorporate or comprise valves serving the same general purpose. Accordingly, there is a good deal of similarity with the opponent's *ball valves*.

Average consumer and the purchasing act

27) Matters must be judged through the eyes of the average consumer (*Sabel BV v.Puma AG*, paragraph 23), who is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V*., paragraph 27). The degree of care and attention the average consumer uses when selecting goods and services can, however, vary depending on what is involved (see, for example, the judgment of the GC in *Inter-Ikea Systems B.V. v. OHIM*, Case T-112/06).

28) The evidence indicates that the goods in question are sold to professionals and sometimes to manufacturers as component parts. In addition, it is stated by the opponent that its goods are also sold through DIY retailers such as *Wickes* and *Travis Perkins*. Therefore, the goods are sold to both professionals and members of the public. There may be a different level of attention paid by these differing average consumers. Professor Annand, sitting as the Appointed Person in *Adelphoi Limited v DC Comics (a general partnership)*, BL O-440-13 stated that where there are both professional and general public consumers of particular goods or services then likelihood of confusion should be assessed from the perspective of the consumer whose attention is lower.

29) As I have already discussed, the respective goods include both complete heating, and sanitary systems as well as their component parts. There will be a corresponding range of prices from the low cost to the reasonably expensive. For example a central heating system may cost many thousands of pounds. The level of attention during the purchasing process (even on the part of a non-professional) will be reasonable high. Component parts must be selected with care to ensure compatibility with the system for which they are a component. Heating systems etc,

are selected with reasonable care because of their cost and the need to ensure that they are the most suitable for the desired use. Because these goods are generally sold through specialists, the purchasing act is likely to be often visual in nature, but I recognise that such goods may be requested aurally. Also, some goods, such as central heating systems may be recommended by word of mouth. Therefore aural considerations will also play a part.

Comparison of marks

30) The respective marks are shown below:

Opponent's mark	Applicant's mark
INTABALL	

31) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details . The visual, aural and conceptual similarities of the marks must, therefore, be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components; in relation to this the CJEU in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* Case C-342/97 stated:

> "27. In order to assess the degree of similarity between the marks concerned, the national court must determine the degree of visual, aural or conceptual similarity between them and, where appropriate, evaluate the importance to be attached to those different elements, taking account of the category of goods or services in question and the circumstances in which they are marketed."

32) There cannot be an artificial dissection of the marks, although it is necessary to take into account any distinctive and dominant components. The average consumer rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of the them and is deemed to be reasonably well informed and reasonably circumspect and observant . The assessment of the similarity of the marks must be made by reference to the perception of the relevant public.

33) The applicant's mark is not readily divided into separate components. The opponent's mark, does readily divide into INTA and the word BALL. This is because the word BALL is an easily identifiable dictionary word having a meaning relevant to the goods, namely, ball valves. Consequently, the INTA element of the applicant's mark is the dominant and distinctive element of the mark when viewed as a whole.

34) With the applicant's mark consisting of the letters INTA and the opponent's mark consists of an eight letter word beginning with INTA, there is obvious visual and aural

similarity. However, I also recognise that the applicant's mark is very mildly stylised particularly the dot above the letter "i". Further, I also note that the word BALL is absent in the applicant's mark providing an element of visual and aural difference. Taking all of this into account, I conclude that the respective marks share a reasonable degree of both visual and aural similarity.

35) Conceptually, neither mark has a clear meaning but I recognise that the word BALL creates an allusion that will be perceived by the consumer.

Distinctive character of the earlier trade mark

36) I must consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use the greater the likelihood of confusion (*Sabel BV v Puma AG* [1998] RPC 199). The distinctive character of the earlier trade mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public (*Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91).

37) I also keep in mind the guidance in *KURT GEIGER* [2013 WL 617249] regarding the issue of 'distinctive character':

> '38. The Hearing Officer cited Sabel v Puma at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in Sabel. However, it is a far from complete statement which can lead to error if applied simplistically.
>
> 39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.'

38) In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask 'in what does the distinctive character of the earlier mark lie?'. Only after that has been done can a proper assessment of the likelihood of confusion be carried out. In this case, I have already found that the dominant and distinctive element of the mark is INTA. The word BALL will be perceived as an allusion to the goods (being ball valves). Therefore, it is the distinctive and dominant element of the mark that is the main element of the opponent's mark. However, I must consider the mark as a whole and also consider the impact of the allusive BALL element. Taking this into account, I conclude that the mark, as a whole, is endowed with a moderately high level of distinctive character.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

39) I must adopt the global approach advocated by case law and take into account that marks are rarely recalled perfectly with the consumer relying instead on the

imperfect picture of them he has in kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). I must take into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the marks and that of the goods or services designated (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*).

40) The factors I must consider include the level of similarity of the goods and the marks, the distinctive character of the earlier mark and the identity of the average consumer of the goods concerned and the nature of the purchasing act. At the hearing, Mr Sales also submitted that I must also consider the applicant's use of the mark over a long period of time prior to the date of the application. I agree, but I will discuss this as a separate issue under the heading of "concurrent use".

41) In her witness statement, Ms Fisher states that the applicant has an INTA mark and a range of other INTA- prefixed marks in its name or the name of a linked company and submitted that these predate the opponent's mark. The existence of these has no effect upon these proceedings. The opponent's mark is not been subject to attack based upon these alleged earlier rights. Registration is *prima facie* evidence of validity (Section 72 of the Act) and in the absence of any attack to bring this *prima facie* evidence into doubt, then I must accept it as a valid earlier mark (see *PepsiCo, Inc., v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* T-269/02).

42) Whilst I accept that it is not a hard rule, normally the first element of the mark is important when considering the similarity of marks and the likelihood of confusion (see for example *El Corte Inglés, SA v OHIM* (GC), T-183/02 and T-184/02). Further, non-distinctive matter is given less weight when comparing marks (see for example *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* – C-342/97 (CJEU) at paragraphs 22-23). The first part of the opponent's mark consists of the letters INTA, being the same as the applicant's mark. There is some stylisation of the applicant's mark, but I disagree with Mr Sales that this assists in a conclusion that there is very little similarity. The stylisation in only light, and may even go unnoticed during the purchasing process. Rather, I have found that the marks share a reasonable degree of both visual and aural similarity. Neither mark has an obvious concept and as a result does not influence the level of similarity. Taking all of this into account, together with my finding that the respective goods are identical or share a good deal of similarity, that the earlier mark has a moderately high level of distinctive character, this all points to a finding of a likelihood of confusion. Whilst I accept that the average consumer would select the respective goods with reasonable care (and consequently would be more aware of differences between marks), this is insufficient to disrupt this finding. The confusion is likely to be in the form of indirect confusion where the average consumer is aware of differences between the marks, but believes the goods bearing the marks originate from the same of linked undertaking.

43) Therefore, I find that there is a likelihood of confusion in respect of all of the goods claimed by the applicant.

Concurrent Use

44) Having found that a *prima facie* likelihood of confusion exists, the only factor that can save the application is the existence and effect of concurrent use. In considering this, I am mindful that I must be satisfied that the parties have traded in circumstances that suggest consumers have been exposed to both marks and have been able to differentiate between them without confusion as to trade origin (see to that effect the Court of Appeal in *The European Ltd v The Economist Newspaper Ltd* [1998] FSR 283 at page 291, Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at 809 and the Court of Appeal in *Phones 4U Ltd v Phone 4u. co. uk Internet Ltd* [2007] RPC 5 at paragraphs 42 to 45 and Alan Steinfield QC, sitting as a deputy judge of the High Court, in *Fiorelli Trade Mark* [2007] RPC 18)

45) Therefore, for concurrent use to be of assistance to an applicant I must be satisfied that the effect of concurrent trading has been that the relevant public has shown itself able in fact to distinguish between services bearing the marks in question i.e. without confusing them as to trade origin. That implies that both parties are targeting an approximately similar, or at least overlapping, audience and that the use by the parties in nature, extent and duration of trade has been sufficient to satisfy me that any apparent capacity for confusion has been adequately tested and found not to exist. In the current case, I concluded earlier that there is an overlapping audience by virtue of the identity or similarity between the respective goods.

46) The applicant's evidence does not illustrate the full range of goods that it claims to use its mark upon. It has provided only front covers of brochures and other exhibits are also undated. However, I am content that the applicant has shown that use has been made in respect of the following goods:

- Shower mixer tapes (as shown in Exhibit CF011; front covers of price lists dated February 2004, March 2006, August 2005: Exhibit CF015; front cover of brochure dated May 2007);
- Pillar taps (Exhibit CF012; promotional newsletter dated May 2005);
- Taps for baths and hand basins (Exhibit CF013; front covers of brochures dated April 2006 and October 2006);
- Anti-scold valves (Exhibit CF014; promotional newsletters dated "Spring 2006 and October 2006);
- Anti-scold taps (Exhibit CF016, promotional newsletter dated Spring 2008);
- Shower hinges (Exhibit CF017, brochure cover dated Summer 2010 and entitled "Shower Hinges from inta");
- Exhibit CF018 consists of a Spring/Summer 2011 brochure cover entitled "The shower collection from inta", but without further information, I am unable to conclude that this brochure related to anything other than the items already identified in this paragraph.

47) These exhibits appear to accord with Ms Fisher's statement at paragraph 6 of her witness statement that Intatec Limited was set up in 2002 to supply, "in particular taps, shower fittings and the like". Other exhibits are undated and/or fail to specify any goods and consequently, they add little to the evidence I summarised above.

48) In her witness statement, Ms Fisher disclosed marketing figures in respect of the INTA brand varying between £175,839 and £346,639 a year (2008 to 2011 inclusive) and turnover in respect of the mark INTA and INTA- prefixed marks as being between £31,734 and £106,035 (in the same period). It is not clear what proportion of the turnover figures refer to the applied for mark INTA and, therefore, they are of more limited value in assessing the scale of the applicant's use of the applied for mark. I keep this in mind.

49) At the hearing, Mr Taylor submitted that, at best, the applicant's evidence only illustrates use on a narrow range of goods such as taps, shower taps and anti-scold devices. Whilst this does not completely accord with my findings in paragraph 46, I concur with his general criticisms of the applicant's evidence, and it does not illustrate use of a wider range of goods.

50) Mr Taylor also submitted that the turnover and marketing figures provided by Ms Fisher do not appear to be in relation to just one mark, but rather the family of INTA-prefixed marks listed in her witness statement. This is true, but all the indications in the evidence are that the INTA- prefixed marks are used under the more general banner of the INTA mark (see the exhibited brochures and price lists).

51) Taking all of the above into account, I conclude that there has been concurrent use since 2002 and that at least since 2008 the use has been such to demonstrate that the parties have traded in circumstances that suggest consumers have been exposed to both marks and have been able to differentiate between them without confusion as to trade origin. Consequently, my *prima facie* finding regarding likelihood of confusion does not apply in respect of the following list of goods (based on my findings in paragraph 46, above):

> *Plumbing fixtures, fittings and components, namely shower mixer tapes, pillar taps, taps for baths and hand basins, anti-scold valves and anti-scold taps*

52) Whilst Mr Taylor appeared to concede, at the hearing, that the applicant's evidence showed it using the INTA mark in respect of shower hinges, such goods are not proper to Class 11 and are not covered by the application that covers goods in Class 11 only.

53) The consequence of this finding is that the application survives in respect of the goods identified in paragraph 51, above. However, my finding that there is a likelihood of confusion is maintained against all other goods applied for.

Section 5(4)(a)

54) There is no evidence that the opponent has used the mark INTA alone and therefore I dismiss the claim insofar as it is based upon this mark.

55) I comment only briefly of the claim based upon the mark INTABALL. The evidence submitted by the opponent is sufficient to demonstrate the requisite goodwill required for a case based upon a claim of passing off. However, the concurrent use made by the applicant that led to the application surviving for a

limited list of goods also demonstrates a concurrent goodwill. In summary, the outcome under Section 5(4)(a) will not improve upon the opponent's level of success it achieved under Section 5(2)(b). Therefore, I will not consider the grounds further.

COSTS

56) The opposition has been successful in respect of the majority of the applicant's goods. In *Wm Morrison Supermarkets Plc v Nisa-Today's (Holdings) Limited*, BL O/197/11, Ms Amanda Michaels, sitting as the Appointed Person, said in a case where one party was largely, but not wholly, successful:

> "22. The starting point for the exercise of the discretion, as set out in CPR 44.3 and reflected in Johnsey, is that costs should follow the event. As CPR 44.3(2)(a) puts it "the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party". Nevertheless, as CPR 44.3(4) indicates, the judge "must have regard to all the circumstances" which may include "whether a party has succeeded on part of his case, even if he is not be wholly successful." The court may therefore make different orders for the costs incurred in relation to discrete issues and should consider doing so where a party has been successful on one issue but unsuccessful on another."

57) With this in mind and with the opponent being successful in respect of most, but not all the applicant's goods, I find it is appropriate to award a contribution towards the opponent's costs but reduced by 20% to reflect the applicant's partial success in defending its application. Taking this into account, I award costs on the following basis:

Official fee	£200
Preparing Notice of Opposition and considering statement	
Statement of case in reply	£300
Preparing and filing evidence & considering other side's evidence	£500
Preparing for and attending hearing	£600
Discount for partial success (20%)	(£320)
TOTAL	£1280

58) I, therefore, order Intaco Limited to pay Altecnic Limited the sum of £1280. The above sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 18th day of June 2014

Mark Bryant
For the Registrar,
The Comptroller-General