

O-510-16

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3120825

BY FB BEAUTY LIMITED

TO REGISTER:

SKIN DEFINE

AS A TRADE MARK IN CLASS 3

AND

THE OPPOSITION THERETO UNDER NO. 405787

BY NEXT RETAIL LIMITED

BACKGROUND

1. On 4 August 2015 FB Beauty Limited (“the applicant”) applied to register the mark SKIN DEFINE. It was accepted and published in the Trade Mark Journal on 2 October 2015 in respect of the following goods:

Class 3: Cosmetics; eye makeup; facial makeup; eyeshadow; mascara; eyeliner pencils; foundation; lip tints; lip gloss; lip stain; lipstick; eyelash tint; cosmetics for eyelashes; nail polish; nail varnish; nail glitter; skin highlighting powder; blusher; bronzer; concealer; skin primer; false nails; false eyelashes; adhesives for fixing false nails and eyelashes; makeup fixer; makeup remover; nail polish and nail varnish remover; glue remover.

2. Next Retail Limited (“the opponent”) opposes the application on the basis of Sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). Under each ground, the opposition is directed against all of the goods in the application. For its opposition under Section 5(2)(b), the opponent relies upon its UK trade mark registration no. 2427838 for the mark DEFINE applied for on 21 July 2006 and registered on 15 February 2008. The opponent relies upon some of the goods in its registration, namely:

Class 3: Perfumery; perfumes; eau de toilette; shower gels; cosmetics.

3. The opponent contends that the respective goods are identical or similar, that the dominant and distinctive element of the applied for mark is the word DEFINE and that the likelihood of confusion is increased on account of its mark having enhanced distinctiveness through use. The opponent also made a number of comments as to the size of its business and to diversification practices in the clothing and fashion retail industry. I will return to this later, if it is necessary and relevant to do so.

4. In respect of the objection under Section 5(4)(a), the opponent claims that it has used the mark DEFINE since at least 2010 in relation to perfumery, perfume, eau de toilette, shower gels, skin lotions and cosmetics and that it has built a substantial

reputation and goodwill in the mark. Use of the mark applied for would therefore be a misrepresentation to the public and result in damage to the aforementioned goodwill.

5. The applicant filed a counterstatement denying the claims made. It put the opponent to proof of use in respect of the mark relied upon under Section 5(2)(b) and it also put the opponent to proof on its claim as to possession of a reputation/goodwill.

6. The opponent filed evidence and the applicant filed submissions during the evidence rounds. I have read all the papers carefully but I will only summarise the evidence to the extent that I consider necessary. Neither party asked to be heard but the opponent filed written submissions in lieu of attendance at a hearing. I will bear both parties' comments in mind and refer to them as necessary below.

DECISION

7. The opposition is brought under Sections 5(2)(b) and 5(4)(a) of the Act. I shall begin with section 5(2)(b).

8. Section 5(2)(b) of the Act reads:

“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.”

9. An earlier trade mark is defined in Section 6(1) of the Act, which states:

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

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

10. In these proceedings, the opponent is relying upon the mark shown in paragraph 2, which qualifies as an earlier mark in accordance with Section 6 of the Act. As this mark completed its registration process more than five years before the publication date of the applied for mark, it is subject to the proof of use provisions. The relevant period for the opponent to prove use of its mark is the five-year period ending with the date of the publication of the applied for mark, i.e. 3 October 2010 - 2 October 2015.

11. The relevant sections of the Act read as follows:

“Raising of relative grounds in opposition proceedings in case of non-use

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), (b) 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 period of five years ending with the date of publication.

(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 period of five years ending with the date of publication of the application 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 differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, 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.”

The opponent's evidence

12. This consists of a witness statement from Sarah Louise Waterland with eight exhibits (SLW1-SLW8). Ms Waterland is a company solicitor of the opponent, a position she has held since 1998. She has unrestricted access to the opponent's records relating to the registration and use of its trade marks. She explains that the opponent is a wholly owned subsidiary of Next Group Plc, which is in turn a subsidiary of Next Plc. Next Group Plc was first incorporated in the UK in 1981 under

the name J. Hepworth and Son and opened its first UK store under the name NEXT in 1982. It changed its name to Next Plc in 1986 and to Next Group Plc in 2002. Next Plc is an additional holding company and it is the parent company of Next Group Plc. This group of companies is collectively referred to as “NEXT”.

13. According to Ms Waterland, Next Plc has been listed for many years as one of the top 100 companies on the London Stock exchange. Its annual turnover rose from £3.4b in 2010 to £4b in 2015. Reference is made to Exhibits SLW1 and SLW2 in support, which consists of NEXT Annual Reports for 2011 and 2015. I note from this evidence that NEXT’s core business products are described as clothing, footwear, accessories and home products. Advertising expenditures grew from approximately £47m in 2010 to approximately £61m in 2013. None of these figures are broken down into type of products.

14. According to Ms Waterland the opponent began trading under the mark DEFINE in the UK in 2010. The mark has been used on “perfumery, perfume, eau de toilette, shower gels and cosmetics”. Such goods have been sold through a selection of outlets “owned or controlled by Next Group Plc”, the website www.next.co.uk and the opponent’s mail order catalogue (which is called NEXT DIRECTORY). The mark is still used today in respect of the registered goods.

15. Exhibit SLW3 provides a list of the opponent’s European and UK outlets; the latter are said to amount to 500. However, there is no indication of where DEFINE branded products were stocked and when. Exhibit SLW4 contains a number of print-outs from eBay, providing samples of packaging stated to show how the DEFINE mark has been used in stores during the relevant period. The copies are undated save for the printing dates which post-date the relevant period. The rest of Exhibit SLW4 comprises a selection of extracts from NEXT DIRECTORY from 2012, 2013, 2014 and 2015 which show corresponding DEFINE branded goods offered for sale. This was exhibited to confirm when the goods were marketed in store and via catalogue.

16. SLW7 contains a selection of pages from the Christmas 2010, Spring/Autumn/Christmas 2011, Spring/Summer 2012, Autumn/Winter and Christmas 2013, Winter

and Christmas 2014 and Spring 2015 NEXT DIRECTORY catalogues. According to Ms Waterland NEXT DIRECTORY was launched in 1988 and “is one of the Opponent’s primary means of marketing and selling its goods”. The pages show DEFINE branded goods offered for sale. Most of the goods are eau de parfum and eau de toilette, either sold alone or in “fragrance collections” including other sub-brands, i.e. Just Pink, Cashmere, Diamonds. There is also some evidence of use in relation to “fragrance gift sets” including eau de parfum or eau de toilette sold in combination with other perfumed goods, namely body cream, body wash, body lotions, body scrubs, bath caviar and solid fragrances. The mark DEFINE in plain capital letters or in an unremarkable font is applied on both the aforementioned goods and their packaging and is included in the product description (which comprises the corresponding product code and the cost in sterling). The mark features either alone or together with the housename NEXT; it also appears in conjunction with a ® symbol, indicating trade mark registration. Ms Waterland also provides annual circulation figures for NEXT DIRECTORY, NEXT DIRECTORY HOME catalogues and other marketing material for the period 2010-March 2014 showing distribution to around 3m customers per annum. However, it is not clear what proportion of the figures provided refers to the UK distribution of NEXT DIRECTORY. SLW8 contains copies of invoices, dated within the relevant period, for the supply of 1.6m copies of NEXT DIRECTORY to the opponent.

17. Ms Waterland gives only representative figures for UK sales of DEFINE branded products as, she explains, proper records which could be used to give a more detailed estimate were not available. The quantities given are reproduced below:

Item	Edition	Item No.	2010	2011	2012	2013	2014	2015	2016	Total
Gift set containing Eau de Toilette and Eau de Parfum	Christmas 2010	491649	12,164	210	-	-	-	-	-	12,374
Eau de Parfum	Christmas 2010	720931	11,863	-	-	-	-	-	-	11,863
Eau de Toilette	Spring/Summer 2011	386785	21,702	17,504	-	-	-	-	-	39,206
Eau de Toilette	Autumn/Winter 2011, Christmas 2011, Spring/Summer 2012	476039	-	33,077	33,239	36	-	-	-	66,352
Gift set containing Eau de Parfum and body lotion	Christmas 2013	874105	-	-	-	14,866	42	-	-	14,908
Gift set containing Eau de Toilette, Eau de Parfum and solid fragrance	Autumn/Winter 2013, Christmas 2013	139656	-	-	-	9,301	100	-	-	9,401
Eau de Parfum	Autumn/Winter 2013, Christmas 2013	463324	-	-	-	37,550 (this product was sold under this item no. over 2013 – 2014)		-	-	37,550
Gift set containing Eau de Parfum, body wash, body lotion and bath caviar	Christmas 2013	889832	-	-	-	7,461	180	-	-	7,641
Gift set containing Eau de Parfum, body lotion, body wash and body scrub	Christmas 2013	882186	-	-	-	7,385	40	-	-	7,425
Gift set containing Eau de Parfum and body lotion	Winter & Christmas 2014	869789	-	-	-	-	331,465 (this product was sold under this item no. over 2014 – 2015)		-	331,465
Eau de Parfum	Spring 2015	942245	-	-	-	-	268,072 (this product was sold under this item no. over 2014 – 2015)		-	268,072
Total										806,257

18. The opponent has subsequently clarified that the figures provided should be read as indicating the amount in pounds sterling. Further, I note that the product codes tally with the evidence provided in other exhibits, i.e. SLW7.

19. Exhibit SLW6 contains print-outs from the website www.next.co.uk dated December 2010 to December 2014 and obtained from the web archive Waybackmachine, showing DEFINE branded products offered for sale. All the goods but one, i.e. a gift set, are eau de toilette and eau de parfum. SLW5 provides hit figures purporting to show that Next website received between 24m and 28m visits per month over the period 2013-2016.

Proof of use

20. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. summarised the case law on genuine use of marks. He stated:

“I would now summarise the principles for the assessment of whether there has been genuine use of a trade mark established by the case law of the Court of Justice, which also includes Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223 and Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR 7, as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, 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: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) 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; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

21. The applicant does not accept that the opponent has shown genuine use. In the alternative, it accepts that based on the use shown, the scope of the earlier mark

should be limited to eau de parfum, eau de toilette or perfumery. The applicant has criticised the probative value of the evidence on a number of counts, however, as a preliminary matter, I intend to address the applicant's main criticisms that the proven use is disqualified from being genuine because (i) it was use without consent and (ii) it was use in relation to free gifts.

Use with consent

22. The applicant contends that the opponent has failed to prove its relationship to Next Plc or Next Group Plc, hence there is no confirmation that use of the mark by these entities has occurred under its control. The evidence is that the opponent is part of the group of companies which make up Next Plc¹. By being part of that group, the opponent has marketed and sold DEFINE branded goods through a number of NEXT distribution channels. The applicant contends that the owner of the website www.next.co.uk is Next Plc and that Ms Waterland refers to "outlets owned or controlled by Next Group plc". Leaving aside the fact that Ms Waterland also refers to NEXT stores as the opponent's own stores (paragraph 13), the ownership of the distribution channels through which the goods have been marketed and sold is beside the point. There is no requirement under UK trade mark law for the owner of a mark to exercise any (quality) control over the use of its mark by a third party in order for that use to be deemed use by the owner² (and the applicant does not refer to any specific provision or case law which may indicate otherwise). The only requirement is that the mark is used with the owner's consent; further, consent can be inferred from the facts of the case³. Whilst the evidence is not explicit on the point, it is a fair reading of Ms Waterland's evidence, in particular of her statement that the opponent has used the mark on a range of goods "sold through outlets owned or controlled by Next Group Plc" and "through the website www.next.co.uk"

¹ As to the applicant's criticism that no evidence has been provided of the parent-subsidary relationship with Next Plc and Next Group Plc, SLW2 confirm at page 119 this company structure. In any event, this evidence has not been formally challenged and I have no reason to disbelieve it. See *Extreme Trade Mark*, BL O-161-07

² In *Einstein Trade Mark*, [2007] RPC 23, Mr Geoffrey Hobbs Q.C. as the Appointed Person found that use with the consent of the proprietor did not require the proprietor to have effective control of the use in question.

³ *Makro Zelfbedieningsgroothandel CV and others v Diesel SpA*, Case C324/08 and *INoTheScore Trade Mark*, BL-O/276/09

that where the mark has been used by a parent company, the opponent did consent to such use⁴.

Use in relation to gift sets

23. The applicant submits that the sale of DEFINE branded body wash or body lotion as part of gift sets is comparable to the offering of free gifts and that, pursuant to the *Silberquelle* decision, such use cannot count toward proving genuine use. In *Silberquelle*, the Court of Justice of the European Union (CJEU) held that where the proprietor of a mark affixes that mark to items that it gives, free of charge (i.e. drinks in class 32), to purchasers of its goods (i.e. clothes in class 25), it does not make genuine use of that mark in respect of the class covering those items because the promotional items are not distributed with the aim of penetrating the market for goods in the same class (i.e. drinks in class 32). However, as the opponent correctly points out, the body wash and body lotion are not promotional items offered as reward. Rather, they are included in the price of the fragrance sets as demonstrated by the fact that the gift sets are more expensive than the fragrances alone⁵. Here the goods are not offered free of charge and are goods for which the mark is registered. Accordingly, the use shown on goods that form part of gift sets can be considered for the purpose of genuine use.

⁴ For the sake of completeness I should say that having raised the point, the applicant subsequently states: "The Opponent is Next Retail Limited. The Opponent has failed to adduce any evidence of the relationship of the Opponent to Next plc or Next Group and hence no confirmation that any use of the Earlier Mark has occurred under its control. The Opponent's submissions will proceed on the basis that any evidence of use supplied is by the proprietor or with its consent, but stresses that the Opponent has not proven that point." I believe that the second word in the last sentence is a mistake and should be read as "Applicant". However, as the applicant's position (as to whether it accepted or not that the use shown is use with consent) is not clear, I have explicitly rejected the submission.

⁵ In this connection, I note, for example that DEFINE eau de toilette 75ml is priced at £10 and DEFINE Fragrance gift sets including 30 ml (which is considerably less than 75 ml) eau de toilette, 100ml body wash and 100 ml body lotion is also priced at £10.

Genuine use

24. The correct approach to assessing the evidence is to view the picture as a whole, including whether individual exhibits corroborate each other⁶. The evidence establishes that DEFINE branded goods have been offered for sale through NEXT trade channels during the relevant period. The applicant identifies a number of shortcomings in the opponent's evidence, namely that there is no evidence of in-store sales and that the turnover, marketing, circulation and hits figures provided relate to NEXT business rather than to DEFINE branded products. Nevertheless, it accepts that the evidence showing use of the mark on catalogues and website (SLW4 and SLW6) is "objective product evidence" and that the sale figures provided must be taken to represent the total volume of sales for the relevant period. This means that the opponent has sold, at least, over £ 800,000 worth of goods under the earlier mark during the relevant period. The applicant contends that such a level of sale is minimal and cannot satisfy the requirements of genuine use. Even allowing for the huge size of the perfumery market and taking into account the nature of the goods, this volume of sale, in my view, is not insignificant. This combined with the consistency over a number of years of the use in various catalogues and on the website, leads me to conclude that the use shown is sufficient to constitute genuine use of the earlier mark in the relevant period.

Goods which can be relied upon and fair specification

25. I must now determine the goods on which use has been shown. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

"In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of

⁶ *Brandconcern BV v Scooters India Limited* ("Lambretta") BL O/065/14.

the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

26. In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. (with whom Underhill L.J. agreed) set out the correct approach for devising a fair specification where the mark has not been used for all the goods/services for which it is registered. He stated:

“63. The task of the court is to arrive, in the end, at a fair specification and this in turn involves ascertaining how the average consumer would describe the goods or services in relation to which the mark has been used, and considering the purpose and intended use of those goods or services. This I understand to be the approach adopted by this court in the earlier cases of *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2002] EWCA Civ 1828, [2003] RPC 32; and in *West v Fuller Smith & Turner plc* [2003] EWCA Civ 48, [2003] FSR 44. To my mind a very helpful exposition was provided by Jacob J (as he then was) in *ANIMAL Trade Mark* [2003] EWHC 1589 (Ch); [2004] FSR 19. He said at paragraph [20]:

“... I do not think there is anything technical about this: the consumer is not expected to think in a pernicky way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. ... Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods – are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to

the appropriate specification having regard to the use which has been made.”

64. Importantly, Jacob J there explained and I would respectfully agree that the court must form a value judgment as to the appropriate specification having regard to the use which has been made. But I would add that, in doing so, regard must also be had to the guidance given by the General Court in the later cases to which I have referred. Accordingly I believe the approach to be adopted is, in essence, a relatively simple one. The court must identify the goods or services in relation to which the mark has been used in the relevant period and consider how the average consumer would fairly describe them. In carrying out that exercise the court must have regard to the categories of goods or services for which the mark is registered and the extent to which those categories are described in general terms. If those categories are described in terms which are sufficiently broad so as to allow the identification within them of various sub-categories which are capable of being viewed independently then proof of use in relation to only one or more of those sub-categories will not constitute use of the mark in relation to all the other sub-categories.

65. It follows that protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider belong to the same group or category as those for which the mark has been used and which are not in substance different from them. But conversely, if the average consumer would consider that the goods or services for which the mark has been used form a series of coherent categories or sub-categories then the registration must be limited accordingly. In my judgment it also follows that a proprietor cannot derive any real assistance from the, at times, broad terminology of the Nice Classification or from the fact that he may have secured a registration for a wide range of goods or services which are described in general terms. To the contrary, the purpose of the provision is to ensure that protection is only afforded to marks

which have actually been used or, put another way, that marks are actually used for the goods or services for which they are registered.”

27. The opponent accepts that it has only used the mark in relation to “eau de parfum, body wash, body cream, body lotion, eau de toilette and bath caviar”, but it contends that these products fall within the scope of the goods relied upon, i.e. perfumery, perfume, eau de toilette, shower gels, cosmetics, and therefore, it has fulfilled the burden of proof in this regard. However, this is not the correct approach. Applying the above case-law, I find the mark has been used in relation to eau de toilette. It has also been used in relation to eau de parfum, which the average consumer, in my view, would regard as an alternative description of perfume. I therefore consider that it would be overly pedantic to distinguish between perfume and eau de perfume for the purposes of determining the goods for which the earlier mark is entitled to protection.

28. Insofar as the use in relation to the goods included in the “fragranced gift sets” are concerned, most of the sales are in respect of eau de toilette, eau de parfum and gift sets containing body lotions. I note that sales in respect of some of the remaining goods included in the gift sets are only in the region of a few thousands of pounds. Nonetheless, given the (relatively inexpensive) cost of the goods, the consistency of the marketing efforts and the fact that the gift sets seem to be mainly seasonal products aimed at the Christmas market, I am prepared to accept that the level of sales is sufficient to find that there was genuine use during the relevant period in relation to the aforementioned products.

29. In terms of devising a fair specification, “body lotion” is defined by the Oxford English Dictionary as meaning “a moisturizing lotion for the body”; a “moisturizer” is, in turn, defined as “a cosmetic preparation used to prevent dryness in the skin”. My understanding is that a “body cream” is similar to a “body lotion” but of somewhat thicker consistency. In my view, the average consumer would describe the goods as “perfumed body moisturisers” and would regard them as exemplifying a sub-category of “cosmetics”. The Oxford English Dictionary defines the term “cosmetic” as meaning “a preparation applied to the body, especially the face, to improve its appearance”. Whilst use has been shown in relation to the aforementioned types of

cosmetics, it does not justify the opponent retaining the broad term “cosmetics” for the purpose of this opposition. There is no definition for “body wash”, but I understand the terms to indicate, a liquid soap used to wash the body. The goods will be regarded, in my view, as an alternative description of “shower gel” (but perfumed). Likewise, I understand “bath caviar” to be a substance that dissolves in the bath water to perfume it. In my view the average consumer would describe the goods as “perfumed bath preparations” and regard them as examples of “perfumery”.

30. I find that the use shown is sufficient to justify protection of the earlier mark in relation to “eau de toilette; perfumes; cosmetics in the form of perfumed body moisturisers; perfumed shower gels; perfumery in the form of perfumed bath preparations.”

Section 5(2)(b) - case-law

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

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings 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.

Comparison of goods

32. In comparing the respective specifications, all the relevant factors should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the Court 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”.

33. The respective goods are shown below:

Applicant's goods	Opponent's goods
Class 3 Cosmetics; eye makeup; facial makeup; eyeshadow; mascara; eyeliner pencils; foundation; lip tints; lip gloss; lip stain; lipstick; eyelash tint; cosmetics for eyelashes; nail polish; nail varnish; nail glitter; skin highlighting powder; blusher; bronzer; concealer; skin primer; false nails; false eyelashes; adhesives for fixing false nails and eyelashes; makeup fixer; makeup remover; nail polish and nail varnish remover; glue remover.	Class 3 Eau de toilette; perfumes; cosmetics in the form of perfumed body moisturisers; perfumed shower gels; perfumery in the form of perfumed bath preparations

34. As per the judgement of the General Court (GC) in *Gérard Meric v OHIM*, case T-133/05, goods can be considered identical when the goods of the earlier mark are included in a more general category, included in the specification of the application and vice versa.

35. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) In the case of self serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

36. I also bear in mind the decision in *Boston Scientific Ltd v OHIM*, Case T-325/06, where the GC stated that “complementary” means:

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

37. As the opponent’s “cosmetics in the form of perfumed body moisturisers” represents its greatest prospect of success, I will limit the comparison to these goods.

Cosmetics

38. The contested “cosmetics” encompasses the opponent’s “cosmetics in the form of body moisturisers”. Applying the principle in *Meric*, goods are identical.

Facial makeup; foundation; skin highlighting powder; blusher; bronzer; concealer; skin primer; makeup fixer

39. The above goods are all make-up goods (which are subsets of cosmetics) and are applied to the face to enhance or alter its appearance. The purpose of the respective goods is similar as they are used for beautification of the person (albeit for the face and the body respectively). The goods are directed to an identical category of consumers and would be sold in the same shops in reasonably close proximity. However, there is little similarity in terms of nature and methods of use. Whilst some of the above goods may be available in a liquid form, i.e. foundation, make-up products are commonly applied with a brush and not directly on the skin like a body moisturiser (perfumed or otherwise). The goods are not in direct competition with one another and there is no complementarity in the true sense. I find that the degree of similarity is medium.

Eye makeup; eyeshadow; mascara; eyeliner pencils; lip tints; lip gloss; lip stain; lipstick; eyelash tint; cosmetics for eyelashes;

40. The above make-up goods are applied on the eyelids, eyelashes and lips in order to make them look more attractive. Here the goods are one step removed from these of the opponent as they are not applied directly on the skin. I find that the degree of similarity is low to medium.

Nail polish; nail varnish; nail glitter

41. The above goods are for application to the nails in order to beautify them. There is less similarity here with the opponent’s goods in term of nature and methods of use. I find that the degree of similarity is low.

False nails; false eyelashes; adhesives for fixing false nails and eyelashes; makeup remover; nail polish and nail varnish remover; glue remover

42. The above goods are particular items of beautification paraphernalia used to remove make-up and nail polish/nail varnish or to fix and remove false nail and false eyelashes. The nature and methods of use are different and the goods are unlikely to be sold in a close proximity to any of the opponent's goods. The best that can be said is that these goods form part of a person's beautification paraphernalia and to this extent, share the same beautification purpose of the opponent's goods. Any similarity must therefore be pitched at a very low degree.

The average consumer and the nature of the purchasing act

43. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue; I must then determine the manner in which these goods will be selected in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

44. The respective goods include perfumery and cosmetic type products. The average consumer is a member of the general public. The goods are not specialised and are purchased reasonably frequently. Although the cost of the goods will vary (e.g. some perfumes may be expensive) they are not, generally speaking, high cost items. The goods may be inspected to ensure that the required product is obtained and, perhaps, inspected for what they smell like. The average consumer's level of

attention will be, at least, average and it will be sufficient to ensure that the correct scent or colour is selected or that the goods suit a particular skin type. The goods are likely to be self-selected from a shelf or from a website, but, equally, they may also be requested orally – for example, perfumes are usually kept behind a counter. Consequently, the selection process is likely to consist of a mixture of visual and aural considerations.

Distinctive character of earlier mark

45. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*²⁶, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

46. The word DEFINE is a common word and although it does not directly describe the goods it is neither fanciful nor invented. Further, in the context of the relevant

goods, which are perfumed, there is an association with the concept of a perfume/scent having its own unique identity which defines the wearer. In my view, the opponent's mark is, inherently, moderately distinctive for the goods at issue.

47. In term of use made of the mark, the extent of use shown is regular but not intensive. The scale of use is not clear and the evidence lacks the context of market impact and share. I am willing to infer from the evidence that the use made of the mark may have had some impact upon its distinctiveness, but not materially so. The opponent's refers to its company being a substantial company with international business and reputation however, it is clear that NEXT does not have the same level of reputation for perfumes and/or cosmetics and that the goods sold under the mark DEFINE are only a small part of that business. The net effect is that the mark is averagely distinctive in relation to the goods for which I found that there is genuine use.

Comparison of marks

48. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Case C-591/12P, Bimbo SA v OHIM*, that:

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

49. It would be wrong therefore artificially to dissect the marks, although it is necessary to take into account their distinctive and dominant components and to

give due weight to any other features, (which are not negligible) and therefore contribute to the overall impressions created by them. The respective marks are shown below:

Applicant's Mark	Opponent's Mark
SKIN DEFINE	DEFINE

Overall impression

50. The opponent's mark consists of the single word DEFINE presented in upper case. The overall impression it will convey and its distinctiveness lies in the word itself.

51. The applicant's mark consists of the phrase SKIN DEFINE presented in upper case. The opponent submits that the word SKIN, "is descriptive and lacks distinctive character in respect of the goods applied for since some of the products are applied to the skin" and that the distinctive and dominant element of the mark is the word DEFINE. The applicant contends that neither the word SKIN nor the word DEFINE are highly distinctive in the context of the goods, as they evoke the concept of skin definition, and that due to its positioning, the word SKIN is the dominant component of the mark. I do not consider that the word SKIN or DEFINE dominates the other. Neither word is give greater prominence in the overall impression of the mark. In my view, the words SKIN and DEFINE merge to create a phrase and the overall impression the mark will convey rests in its totality.

Visual and aural similarity

52. The fact that both marks contain the word DEFINE results in a medium degree of visual and aural similarity between them.

Conceptual similarity

53. In its submission the applicant states:

“DEFINE [...] is somewhat vague or opaque for the goods at issue. It may be seen as intimating that a particular scent can “define” you, the user.

In contrast SKIN DEFINE, particularly when used in conjunction with the Opposed Goods most of which are for use on the skin, immediately evokes a far more concrete concept of skin definition, i.e. improving the aesthetics look of the user’s skin.”

54. The opponent replies:

“The Applicant states that the word ‘DEFINE’ is somewhat vague or opaque for the goods at issue and that the word ‘SKIN DEFINE’ immediately evokes a far more concrete concept of skin definition. Whilst the words SKIN DEFINE may have a meaning in respect of some of the goods covered by the application, such as cosmetics and facial make-up products which is applied to the skin, the same cannot be said for other goods such as nail glitter and eyelash tint which are not applied to the skin. As such, the Opponent believes that consumers will adopt a similar understanding of the marks due to the shared element DEFINE and the similarities of the goods.”

55. The Oxford English Dictionary contains the following definition:

1. Define: state or describe exactly the nature, scope, or meaning of:
 - make up or establish the character or essence of: *for some, the football club defines their identity.*
2. mark out the boundary or limits of: (as *adj.* defined) *clearly defined boundaries.*
 - make clear the outline of; delineate: *she defined her eyes by applying eyeshadow to her eyelids.*

56. These definitions provide support for the applicant’s proposition that the word DEFINE in the context of the opponent’s goods may be understood as an allusion to the positive aspects of the goods, namely that the scent defines (the identity of) the wearer. In the applicant’s mark the word SKIN qualifies the word DEFINE. The

meaning of the individual words will be well understood by the average consumer and although the combination is syntactically unusual, I agree with the applicant (and the opponent seems also to be in agreement) that the phrase is likely to convey the conceptual message of skin definition. This, in my view, would be associated in the context of most of the goods, with the idea of aesthetically improving facial skin tone/contour or enhancing facial features through make-up. Consequently, in the context of the applicant's facial make-up products, the phrase SKIN DEFINE is likely to be understood as describing the cosmetic effects of the goods. In relation to the remaining goods, this concept will be less immediate. To the extent that both marks share the word DEFINE there is, at least, a moderate degree of conceptual similarity.

Likelihood of confusion

57. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective goods and vice versa. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has retained in his mind.

58. Confusion can be either direct or indirect. In term of direct confusion, it is where the marks are effectively mistaken for one other. In the circumstances of the case the presence in the applied for mark of the word SKIN as the first element of the mark will clearly be appreciated when at least an average degree of attention is deployed and, even where identical goods are involved and bearing in mind the principle of imperfect recollection, the average consumer will not be directly confused. **There is no likelihood of direct confusion.**

59. As to whether there is, nevertheless, a likelihood of indirect confusion, it is helpful to consider the comments of Mr Iain Purvis Q.C. sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, case BL-O/375/10 where he stated:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

60. The crux of the issue is, in my view, how the average consumer will understand the word DEFINE in the context of the relevant goods.

61. In relation to cosmetics, I found that the term includes identical goods. Having considered all the relevant factors, it is my view that, in relation to identical goods, the differences between the marks will not be sufficient to off-set their similarities. This is because, in the context of goods which are applied to the body rather than the face, the combination SKIN DEFINE does not create a clear conceptual relationship. In those circumstances, the average consumer is likely to separate out the two components of the applied for mark and attribute a descriptive significance to the word SKIN. Accordingly, I find that the average consumer encountering the respective marks on identical goods is likely to believe that they come from the same or economically linked undertakings. I consider therefore that **there is a likelihood of confusion in respect of cosmetics.**

62. Insofar as facial makeup; foundation; skin highlighting powder; blusher; bronzer; concealer; skin primer; makeup fixer are concerned, I bear in mind that the DEFINE mark has not been used in relation to make-up goods. In this connection I note the comment of the Appointed Person in BL O-016-2010:

“18. It seems to me that any increase in the likelihood of confusion as a result of enhanced distinctiveness through reputation inevitably diminishes as one moves away from the core products in relation to which the mark has been used. Particularly with marks which are not fanciful or invented words, the “trigger” which creates an association in the mind of the public between a mark and its proprietor is not simply familiarity with the mark, but familiarity with the mark in a particular context. Here the public have become used to seeing the word DOVE as a trade mark in the particular context of soap, deodorants and shampoos ect.- what Mr Malinicz calls “fast moving consumer products”-not in the context of perfumes. Inherently, therefore, they are much less likely to see a connection with the DOVE mark when they see a similar mark being used as the name of a perfume than when they see it being used as the name of (for example) a bar of soap.”

63. Accordingly, confusion is less likely in relation the above goods for which the DEFINE mark has never been used. This combined with the lower degree of similarity of the respective goods and the fact that the combination SKIN DEFINE

creates, in the context of the goods, a clear conceptual relationship that is absent in the opponent's mark, leads me to conclude that **there is no likelihood of confusion in respect of these goods.**

64. The above finding also extend to eye makeup; eyeshadow; mascara; eyeliner pencils; lip tints; lip gloss; lip stain; lipstick; eyelash tint; cosmetics for eyelashes. Here the position is even stronger given the lesser degree of similarity between the respective goods. Further, as the contested goods are not applied on the skin, the word SKIN is distinctive and when the marks are considered as a whole, I find that the average consumer is unlikely to believe that the goods originate from the same or economically linked undertakings. **There is no likelihood of confusion in respect of these goods.**

65. In relation to nail polish; nail varnish; nail glitter; false nails; false eyelashes; adhesives for fixing false nails and eyelashes, makeup remover, nail polish and nail varnish remover; glue remover, I have found only a minimal degree of conflict with the opponent's goods and come to the same view expressed in the previous paragraph. **There is no likelihood of confusion in respect of these goods.**

66. In reaching the above conclusions, I have not overlooked the opponent's submission that "clothing and fashion retailers often extend successful product lines to include additional goods and services." However, as there is no evidence of diversification (or evidence to show the state of public's mind on the issue), the submission does not assist the opponent.

The passing off right claim

67. Section 5(4)(a) of the Act states that a trade mark shall not be registered:

".....if, or to the extent that, its use in the United Kingdom is liable to be prevented:

a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade".

68. I will only consider this ground to the extent that the opponent has been unsuccessful so far.

69. The necessary requirements to establish passing off rights are well established and are, essentially: (1) goodwill in a business identified by a sign; (2) a misrepresentation by the defendant through use of a sign similar enough to the claimant's sign to deceive a substantial number of the claimant's consumers or potential consumers, and (3) damage to the claimant's goodwill caused by the defendant's misrepresentation.

70. The sign relied upon under section 5(4)(a) is the same sign as the earlier mark and the evidence relied on for the purpose of genuine use and enhanced distinctiveness under section 5(2)(b) is relied on to demonstrate goodwill, the similarity between the marks and the goods is relied on to have created a misrepresentation and consequently to cause damage. Misrepresentation depends upon confusion and deception brought about by the use of a sign adopted by a defendant (in this case, applicant). I have already considered the likelihood of confusion in my findings under Section 5(2)(b). The opponents are in no better position under Section 5(4)(a) and cannot succeed to a greater extent.

71. The one possible difference between the position under trade mark law and the position under passing off law is that Lewinson L.J. in the Court of Appeal in *Marks and Spencer PLC v Interflora* [2012] EWCA (Civ) 1501, cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that "a substantial number" of the relevant public are deceived, which might not mean that the average consumer is confused. As both tests are intended to be partly qualitative measures intended to exclude those who are unusually careful or careless, it is doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes. However, for the avoidance of doubt, applying the appropriate test for misrepresentation, I find that it is unlikely that a substantial number of persons will believe that the applicant's goods marketed under the mark SKIN DEFINE are connected with the business which uses the mark DEFINE.

72. **The passing off right claim in relation to the remaining goods therefore fails.**

CONCLUSIONS

73. Given my findings, the opposition succeeds in relation to:

Class 3: Cosmetics

74. The opposition fails in relation to:

Class 3: Eye makeup; facial makeup; eyeshadow; mascara; eyeliner pencils; foundation; lip tints; lip gloss; lip stain; lipstick; eyelash tint; cosmetics for eyelashes; nail polish; nail varnish; nail glitter; skin highlighting powder; blusher; bronzer; concealer; skin primer; false nails; false eyelashes; adhesives for fixing false nails and eyelashes; makeup fixer; makeup remover; nail polish and nail varnish remover; glue remover.

75. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Although the opponent has been successful in relation to the term “cosmetics” of the application, the applicant has succeeded in retaining a far greater degree of success. As a consequence, the applicant is entitled to a contribution towards its costs, albeit reduced on a “rough-and-ready basis” to reflect the measure of the opponent’s success. Using TPN 4/2007 as a guide, I award costs to the applicant on the following basis:

Preparing a statement and considering the opponent’s statement: £200

Considering the opponent’s evidence & written submissions: £500

Total: £700

76. I order Next Retail Limited to pay to FB Beauty Limited the sum of £700. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 1st day of November 2016

Teresa Perks

For the Registrar

The Comptroller – General