

O/442/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003516333

BY ALISTAIR TROTMAN

TO REGISTER THE FOLLOWING MARK:

Trillion Trees

**IN CLASSES 11, 25, 32, 44
AND 45**

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600001507

BY RESTORE U.K

Background and pleadings

1. On 27 July 2020, Alistair Trotman (“the applicant”) applied to register the trade mark shown below and the application was published for opposition purposes on 4 September 2020.

Trillion Trees

2. Registration is sought for a variety of goods and services in classes 11, 25, 32, 44 and 45, which will be discussed in more detail later.
3. Restore U.K (“the opponent”) opposes the trade mark on the basis of Section 5(2)(a) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all of the goods and services in the application and is reliant on the mark set out below.
4. Trade mark UK00003242744, filed on 10 July 2017, registered on 20 October 2017.

TRILLION TREES

5. The mark is registered for the following services on which the opponent relies in its opposition:

Class 35 Developing and co-ordinating volunteer projects for charitable organisations; advertising and promotional services to promote public awareness of environmental issues and environmental conservation; advertising and promotional services relating to public awareness of environmental initiatives; information,

advisory and consultancy services relating to all of the
aforementioned services.

Class 36 Charitable collections; charitable fundraising; organisation of charitable collections; charitable and fundraising services; investment funds for charitable purposes; provision of charitable fundraising services in relation to carbon offsetting and other environmental issues; management of charitable funds; financial sponsorship; providing financial grants and assistance to organisations, community groups and individuals; financing of projects; providing funding for research; information, advisory and consultancy services relating to all of the aforementioned services.

Class 41 Education services relating to conservation; education services relating to conservation of the environment; educational services relating to the conservation of nature; education and training relating to nature and the environment; organisation of seminars, conferences, workshops and colloquiums; provision of electronic publications; publishing; organising fund raising events; organisation of exhibitions for cultural or educational purposes; publishing of books and other printed matter; information, advisory and consultancy services relating to all of the aforementioned services.

Class 42 Environmental conservation services; collection of environmental information; research relating to environmental protection and conservation; environmental consultancy services; consultancy and advisory services relating to nature conservation in the natural environment: advisory services relating to environmental protection; consultancy services relating to environmental planning; research in the area of environmental protection; consultancy services relating to

environmental planning; research in the area of environmental protection; consultancy services relating to research in the field of environmental protection; provision of information via electronic communication links; monitoring and analysing the effect of environmental change on agriculture and horticulture; monitoring and analysing the effect of agriculture on the environment; organisation of working parties for tackling problems in environmental conservation; information, advisory and consultancy services relating to all of the aforementioned services.

6. The opponent filed Form TM7F, a notice of “fast track” opposition, which can be used when the opposition is based on sections 5(1) and/or 5(2) of the Act. The opposition being based on a mark that had been registered for less than five years on the date that the applicant’s mark was filed, there was no requirement to prove use in accordance with section 6A of the Act.
7. In its Form TM7F, the opponent argues that the respective goods/services are identical or similar and that the marks are identical.
8. The applicant filed a Form TM8, a notice of defence and counterstatement, denying “any material possibility of confusion”.
9. Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”
10. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. The applicant sought leave to file evidence, but this request was refused. The applicant was offered the

opportunity to challenge this decision by requesting a Case Management Conference (CMC). It did not request a CMC. The opponent did not seek leave to file evidence.

11. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it, or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor was it considered necessary.

12. Both parties filed written submissions. Along with its written submission, the applicant provided a fall back specification.

13. The opponent's submission discusses what it considers to be the applicant's intentions in seeking registration for the trade mark. The applicant also discusses his intentions in his submission. However, I must consider the mark and the goods and services that are registered/applied for notionally, and simply decide whether there is a likelihood of confusion.

14. The applicant is representing himself and the opponent is represented by Dr Walther Wolff & Co.

DECISION

15. The opposition is based upon section 5(2)(a) of the Act which reads as follows:

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

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

(b)

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

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

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

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

...

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

17. Given their respective filing dates, the trade mark upon which the opponent relies qualifies as an earlier trade mark as defined in section 6(1) of the Act.

Case law

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

19. 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 to mind the earlier mark, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of the marks

20. The respective trade marks are shown below:

| Opponent's trade mark | Applicant's trade mark |
|------------------------------|-------------------------------|
| TRILLION TREES | Trillion Trees |

21. As it is a prerequisite of section 5(2)(a) that the marks be identical, I will begin by assessing whether they are identical within the meaning of the Act and case law.

22. In *S.A. Société LTJ Diffusion v Sadas Vertbaudet SA*, Case C-291/00, the Court of Justice of the European Union ('CJEU') held that:

"54 ... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer."

23. The marks are both word marks consisting of two words "TRILLION TREES" / "Trillion Trees". The opponent's trade mark is fully capitalised, while the applicant capitalises the initial letter of each word. Considering that point, I refer to Mr Iain Purvis QC, sitting as the Appointed Person in *Groupement Des Cartes Bancaires v China Construction Bank Corporation*, case BL O/281/14:

"It is well established that a 'word mark' protects the word itself, not simply the word presented in the particular font or capitalization which appears in the Register of Trade Marks ... A word may therefore be presented in a different way (for example a different font, capitals as opposed to small letters, or handwriting as opposed to print) from that which appears in the Register whilst remaining 'identical' to the registered mark."

24. Bearing the above in mind, these two marks are identical. Even if this were wrong, the marks would still be identical under the guidance given in the *Sadas* case above.

Distinctive character of the earlier mark

25. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

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

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

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

27. The words “TRILLION TREES” are clearly suggestive of the services for which the mark is registered in relation to promoting awareness of the environment and environmental conservation. This is because a large

number of trees is something that is strongly associated with environmental benefit in that trees absorb carbon dioxide. The extent of suggestiveness is milder for charitable activities, including fundraising, but still sufficient for me find suggestiveness of those services given that the fundraising is likely to be for environmental purposes. Consequently, I find the mark to be inherently distinctive to a low degree for promoting awareness of the environment and environmental conservation, and for charitable activities, including fundraising. I do not find the mark to be suggestive of the opponent's educational and publishing services. However, the words are not highly distinctive in the way that they would be if they were invented words, so I find the mark to be of medium inherent distinctive character for those services.

Comparison of goods and services

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

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

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;

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

30. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

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

31. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment he set out the

following summary of the correct approach to interpreting broad and/or vague terms:

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

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

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

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

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

32. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

33. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut for Lernsysteme v OHIM – Educational Services* (ELS) [2002] ECR II-4301,

paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

34. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods (and by extension services). In *Boston Scientific Ltd v Office for Harmonization in the Internal Market* (Trade Marks and Designs) (OHIM), Case T-325/06, the GC stated that “complementary” means:

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

35. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

While on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

36. The opponent does not directly discuss the similarity of the goods and services at issue other than pointing out that similarity of goods and services can be a bar to registration for identical trade marks.

37. The applicant also does not directly analyse the similarity or otherwise of the respective goods and services. In his counterstatement, he notes that he avoided registering in any of the opponent’s classes to avoid the potential for confusion. However, I note that section 60A(1)(b) of the Act states that goods and services “are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.”

38. I also note that the applicant has submitted a fall back specification that could, “if need be”, constitute “an alternative basis for registration.” This is non-binding and I will compare the respective goods and services as they stand, only considering the applicant’s fall back specification should I deem it necessary.

39. I now consider the respective goods and services.

Class 11

40. When compared with the opponent’s Class 42 “environmental conservation services”, the applicant’s “Water-saving toilets” might share a very broad purpose in terms of conserving the environment, but water-saving toilets are physical goods and environmental conservation services are general services which differ in their core purposes, toilets being for the disposal of human waste. The method of use obviously differs, as do the trade channels. They are not in competition. Even if an argument were advanced that water-saving toilets, with their environmental conservation properties,

were of importance to environmental conservation services, the average consumer would not think it likely that the responsibility for the goods and services lay with the same undertaking. Overall, I find the respective goods and services to be dissimilar. The same finding applies to “Toilets”, “Toilets, portable”, “Water cisterns”, “Water closets”, “Apparatus and installations for sanitary purposes”, “Apparatus for sanitary purposes”, “Sanitary apparatus and installations”, “Sanitary installations”, “Sanitary installations and apparatus”, “Sanitary installations, water supply and sanitation equipment”, “Sanitary units” and “Single lavatories” where even an explicit environmental connection is absent from the terms.

41. “Sewage purification apparatus”, “Sewage purification installations”, “Sewage (Purification installations for -)” and “Sewage treatment [purification] installations” might share a very broad purpose with the opponent’s “environmental conservation services” in that minimizing the environmental impact of sewage is an important aspect of conserving the environment. However, sewage purification systems are physical goods and environmental conservation services are general services which differ in their core purposes, sewage systems being for the disposal of human waste. The method of use obviously differs, as do the trade channels. They are not in competition. Even if an argument were advanced that sewage purification systems were of importance to environmental conservation services, the average consumer would not think it likely that the responsibility for the goods and services lay with the same undertaking. Overall, I find the respective goods and services to be dissimilar. The same finding applies to “Sewerage installations” where even an explicit environmental connection is absent from the term.

42. “Water desalinating apparatus”, “Water desalinating apparatus utilizing reverse osmosis”, “Water disinfection apparatus”, “Water filtering apparatus”, “Water filtering apparatus for domestic use”, “Water filtering apparatus for industrial use”, “Water filtering installations”, “Water filtering units”, “Water filters”, “Apparatus and installations for water supply”, “Apparatus for

disinfecting water”, “Apparatus for filtering drinking water”, “Apparatus for filtering water”, “Apparatus for purifying water”, “Apparatus for waste water purification”, “Apparatus for water filtering”, “Apparatus for water purification”, “Automatic watering installations”, “Automatic watering installations for plants”, “Automatic watering installations for use in agriculture” and “Automatic watering installations for use in gardening” might share a very broad purpose with the opponent’s “environmental conservation services” in that managing water effectively is a key part of environmental conservation. However, water management systems are physical goods and environmental conservation services are general services which differ in their core purposes. The method of use differs, as do the trade channels. They are not in competition. Even if an argument were advanced that water management systems were of importance to environmental conservation services, the average consumer would not think it likely that the responsibility for the goods and services lay with the same undertaking. Overall, I find the respective goods and services to be dissimilar.

43. Of the remaining Class 11 goods, the same arguments apply as above to “Wood burning stoves, “Wood stoves”, “Apparatus and installations for drying”, “Apparatus and installations for heating”, “Apparatus and installations for refrigerating”, “Apparatus and installations for steam generating”, “Apparatus and installations for ventilating”, “Apparatus for cooking out of doors”, “Apparatus for lighting”, “Baking ovens”, “Shower apparatus” and “Showers for sale in kit form”, none of which have explicit environmental connections as terms. Consequently, in respect of the opponent’s “environmental conservation services” and, indeed, its other services - promoting awareness of the environment, charitable activities including fundraising and educational activities and publishing, there is no apparent common ground as to the physical nature of the goods or acts of service, their intended purpose and their method of use, or the trade channels. The goods and services are not in competition, nor is there complementarity. I find the respective goods and services to be dissimilar.

44. In reaching all of the findings I have made under this class, I have kept in mind the *Sanco* case mentioned above and that goods and service can be complementary even if the nature and purpose of them are quite different. However, in this case the relationship is insufficient to reach a finding of similarity.

Class 25 and Class 32

45. The opponent's services, which are aimed at promoting awareness of the environment, charitable activities including fundraising, educational activities and publishing, and environmental conservation services are dissimilar to the applicant's Class 25 clothing and Class 32 beverages. Generally, I can see no common ground as to the physical nature of the goods or acts of service, their intended purposes and their methods of use, or the trade channels. The goods and services are not in competition, nor is there complementarity. The only aspect of the comparison which might warrant further analysis would be where the applicant's clothing or beverages were used as a vehicle for the opponent's charitable fundraising, but, overall, the respective goods are not indispensable or important to each other and so I do not find complementarity even when taking that scenario into account.

Class 44

46. The applicant's "Agricultural services relating to environmental conservation", "Agriculture, horticulture and forestry services relating to the recultivation of industrial wastelands", "Reforestation services", "The planting of trees for carbon offsetting purposes" and "Tree planting for carbon offsetting purposes" are all services which have the explicit objective of conserving the environment and are therefore *Merit* identical to the opponent's "environmental conservation services". The services designated by the trade mark application are included in a more general category designated by the earlier mark. If I am wrong, the services are highly similar.

47. "Agricultural services" and "Agriculture services" encompass the applicant's "Agricultural services relating to environmental conservation". His fall back specification is of no assistance here because he has made no proposed modifications to any of the Class 44 terms in his specification. I therefore deem these services also to be identical, or, as above, if I am wrong, highly similar.
48. "Agriculture, aquaculture, horticulture and forestry services", "Agriculture, horticulture and forestry services", "Consultancy and advisory services relating to agriculture, horticulture and forestry" and "Consultancy relating to agriculture, horticulture and forestry", encompass the applicant's "Agriculture, horticulture and forestry services relating to the recultivation of industrial wastelands". His fall back specification being of no assistance, I deem these services also to be identical or highly similar (and, by extension, apply the same logic to the applicant's "Aquaculture services").
49. "Forestry services" encompass the applicant's "Reforestation services". His fall back specification being of no assistance, I deem these services also to be identical or highly similar.
50. "Consultancy relating to tree planting", "Planting of trees", "Planting of flora" (in the sense of flora and fauna), "Tree nursery services", "Tree nurseryman services" and "Tree Planting" encompass the applicant's "The planting of trees for carbon offsetting purposes" and "Tree planting for carbon offsetting purposes". His fall back specification being of no assistance, I deem these services also to be identical or highly similar.
51. "Providing information about agriculture, horticulture, and forestry services" and "Providing online information about agriculture, horticulture, and forestry services" are potentially similar to the opponent's "collection of environmental information". Both are information services. The trade channels would overlap. Where the provision of information on agriculture, horticulture and forestry included environmental information, the services would be in competition. In respect of complementarity, each could be important to the

other and it is likely that the average consumer may think the responsibility for the services lies with the same undertaking. Overall, I find the respective services to be highly similar.

52. I compare “Consultancy in the field of viticulture” (the practice of wine growing – the cultivation and harvesting of grapes) to the opponent’s “environmental consultancy services”. Both are forms of consultancy, so they have the same characteristics and they would be used in the same manner. However, the trade channels are different as are their core purposes. Complementarity is not present, nor is meaningful competition. Overall, I find the respective services to be dissimilar.
53. I compare the applicant’s “Tree surgeons’ services” and “Tree surgery” with the opponent’s “environmental conservation services”. For the former, there is a very specific user group – the owners of trees, set against the latter – anyone who requires environmental services. The former has specific characteristics involving the skill of tree surgery, the latter involves the wide-ranging activities of environmental conservation. The trade channels would differ. The services are not in competition. Tree surgery might have a role to play in environmental conservation, but I do not think it likely that the average consumer may think the responsibility for the services lies with the same undertaking. I consider the respective services to be dissimilar.
54. “Consultancy relating to the cultivation of plants”, “Cultivation of plants”, “Plant care services [horticultural services]”, “Plant nurseries” and “Plant nursery services” are all horticulture-related and I compare these to the opponent’s “monitoring and analysing the effect of environmental change on ... horticulture”. While the respective services would have some users in common, the opponent’s service would also be used by environmental researchers. The trade channels would differ. The services are not in competition. There is a degree of complementarity in that providers of horticultural services would be important to those offering a service that monitored and analysed their environmental impacts. However, I do not think it likely that the average consumer may think the responsibility for the

services lies with the same undertaking. Overall, I consider the respective services to be dissimilar. In reaching this finding, I have considered all of the opponent's services and found that that they place it in no stronger a position. For example, the broader term "environmental conservation services" has less in common with the applicant's services in this case, it not even having the common factor of horticulture on which to base an argument for complementarity.

55. I also compare "Consultancy relating to landscape design", "Design of gardens and landscapes" and "Planning [design] of gardens" with the opponent's "monitoring and analysing the effect of environmental change on ... horticulture". Again, while the users of the applicant's services would be end consumers – the owners of gardens and grounds, the users of the opponent's service would be those who provide horticultural services, and also environmental researchers. Furthermore, the respective services are very different in nature – the application of specific design skills to landscapes and gardens, versus the research skills brought to bear in monitoring and analysing environmental effects. The trade channels would differ. The services are not in competition, nor is there complementarity. I consider the respective services to be dissimilar. In reaching this finding, I have considered all of the opponent's services and found that that they place it in no stronger a position. For example, considering the broader term "environmental conservation services" leads me to the same finding.

56. "Destruction of parasites for agriculture, horticulture and forestry", "Vermin exterminating for agriculture, horticulture or forestry, and providing information relating thereto" and "Weed killing for agriculture, horticulture and forestry", when compared with "environmental conservation services" differ in their nature and core purposes. While the applicant's services have an environmental impact, the trade channels are dissimilar. The services are not dependent upon each other, so complementarity is not present. They would only be in competition where a consumer was seeking a less

destructive way of dealing with parasites, vermin and weeds. Overall, I find the respective services to be dissimilar.

57. The remaining Class 44 services are “Alternative medicine services”, “Barber shop services”, “Beauty care for human beings”, “Beauty salon services”, “Body art services”, “Chiropractic services”, “Chiropractitioner services”, “Consultancy in the field of body and beauty care”, “Consultancy in the field of nutrition”, “Consultancy provided via the Internet in the field of body and beauty care”, “Consultancy relating to cosmetics”, “Consultancy relating to nutrition”, “Consultation services in the field of make-up”, “Deep tissue massage”, “Dental clinic services”, “Dentist services”, “Dentistry”, “Dentistry services”, “Dog-clipping”, “Hair cutting”, “Hair cutting services”, “Manicuring services”, “Massage services”, “Massages”, “Physiotherapy services” and “Private hospital services”. Looking at the opponent’s services - promoting awareness of the environment, charitable activities including fundraising, educational activities and publishing, and environmental conservation, there is no apparent common ground. This is the case as to the physical nature of the acts of service, their intended purpose and their method of use, the users or the trade channels. The services are not in competition, nor is there complementarity. I find the respective services to be dissimilar.

Class 45

58. I compare the opponent’s “management of charitable funds” with the applicant’s legal services in the form of “Advisory services relating to consumers rights [legal advice]”, “Advisory services relating to regulatory affairs”, “Advisory services relating to the law”, “Advisory services relating to the preparation of standards”, “Arbitration, mediation and dispute resolution services”, “Arbitration services”, “Arranging for the provision of legal services”, “Attorney services [legal services]”, “Barrister services”, “Conveyancing services [legal services]”, “Dispute resolution services”, “Legal advice”, “Legal advice and representation”, “Legal advice in responding to calls for tenders”, “Legal advice in responding to requests for

proposals [RFPs]”, “Legal advocacy services”, “Legal assistance in the drawing up of contracts”, “Legal compliance auditing”, “Legal consultancy services”, “Legal consultation in the field of taxation”, “Legal consultation services”, “Legal document preparation services”, “Legal information research services”, “Legal information services”, “Legal investigation services”, “Legal mediation services”, “Legal research”, “Legal research services”, “Legal services”, “Legal services in the field of immigration”, “Legal services relating to business”, “Litigation advice”, “Litigation consultancy”, “Litigation services”, “Providing information in the field of law”, “Providing information relating to legal affairs”, “Provision of legal information”, “Provision of legal research” and “Solicitors' services”. While the management of charitable funds may require legal advice to make sure that it is carried out on a sound footing, the services differ as to their nature, purpose, method of use and trade channels. The services are not in competition. There would only be complementarity in that the services could be important to the charitable activity, but, even where importance is established, I do not think it likely that the average consumer may think the responsibility for the services lies with the same undertaking. In reaching this finding, I have considered all of the opponent’s services and found that that they place it in no stronger a position.

59. Intellectual property could be of some importance to the opponent’s “publishing” service and I therefore compare this to the applicant’s “Advisory services relating to copyright”, “Advisory services relating to intellectual property licensing”, “Advisory services relating to intellectual property protection”, “Advisory services relating to intellectual property rights”, “Advisory services relating to patents”, “Agencies for copyright licensing”, “Consultancy (Intellectual property -)”, “Consultancy relating to intellectual property management”, “Consultancy relating to patent protection”, “Consultancy relating to the licensing of intellectual property”, “Consultancy relating to the management of intellectual property and copyright”, “Consultancy relating to trademark licensing”, “Consultancy relating to trademark protection”, “Consultancy services relating to the legal aspects of

franchising”, “Copyright and industrial property rights management”, “Film, television and video licensing”, “Legal advice relating to franchising”, “Legal and judicial research services in the field of intellectual property”, “Legal consultancy relating to intellectual property rights”, “Legal consultancy relating to patent mapping”, “Legal services relating to the exploitation of ancillary rights relating to film, television, video and music productions”, “Legal services relating to the exploitation of broadcasting rights”, “Legal services relating to the exploitation of film copyright”, “Legal services relating to the exploitation of patents”, “Licensing of intellectual property”, “Providing information in the field of intellectual property” and “Enforcement of trade mark rights”. While published material might be in need of copyright protection and so on, it does not follow that the services are similar. They have very little in common as to the physical nature of the acts of service, their intended purpose and their method of use, the users, or the trade channels. The services are not in competition. There would only be complementarity in that the services could be important to the activity of publishing which, in any event would rule out “Advisory services relating to patents”, “Consultancy relating to patent protection”, “Legal consultancy relating to patent mapping” and “Legal services relating to the exploitation of patents”, but, even where importance was established, I do not think it likely that the average consumer may think the responsibility for the services lies with the same undertaking. I find the respective services to be dissimilar. In reaching this finding, I have considered all of the opponent’s services and found that that they place it in no stronger a position.

60. The remaining Class 45 services are, “Agency services (Dating -)”, “Agency services for arranging personal introductions”, “Computer dating services”, “Consulting in the field of personal relationships”, “Dating agency services”, “Dating services”, “Dating services provided through social networking”, “Escort agencies [social]”, “Internet based dating, matchmaking and personal introduction services”, “Internet based matchmaking services”, “Internet based personal introduction services”, “Internet dating services”, “Internet-based social networking services”, “Online social networking services”, “On-

line social networking services”, “Online social networking services accessible by means of downloadable mobile applications”, “Social introduction agencies”, “Escort agencies [social]”, “Escort services” and “Escorting in society [chaperoning]”. Looking at the opponent’s services - promoting awareness of the environment, charitable activities including fundraising, educational activities and publishing, and environmental conservation, there is no apparent common ground. This is the case as to the physical nature of the acts of service, their intended purpose and their method of use, the users or the trade channels. The services are not in competition, nor is there complementarity. I find the respective services to be dissimilar.

61. As some degree of similarity between the goods and services is required for there to be a likelihood of confusion¹, the opposition must fail in respect of those goods and services that I have found to be dissimilar.

The average consumer and the nature of the purchasing act

62. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J 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.

¹ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

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

63. When considering agriculture, horticulture and forestry services in conflict with environmental conservation, consultancy, information, monitoring and analysis services, the average consumer will be a farmer, a landowner, or an amateur or professional gardener. In each case, they will pay a reasonable amount of attention to the services that are being offered in relation to cost, quality and complexity, and, where environmental impact is a factor, will scrutinise the environmental credentials and nature of the services being offered. Given that there will be circumstances in which the cost and level of complexity warrants a high degree of attention, I find the level of attention paid to be medium to high.

64. While there might be a verbal element in the preliminary dialogue about recommended suppliers of the goods and services that are in conflict, visual inspection of websites and marketing literature will be to the fore and will become even more important as agreements are drawn up and entered into. Consequently, visual considerations will predominate.

Likelihood of confusion

65. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process.

66. The marks in this case are identical. Taking account of my findings in relation to the degree of distinctiveness of the earlier mark in the context of

the services it is registered for, and considering the level of attention paid by the average consumer (even where it ranges to a high level of attention), I find that, for those services that are identical or highly similar, there is a likelihood of confusion. I do not extend this finding to the goods and services that I consider to be dissimilar and, even where I am wrong on this point, the similarity must be very low at best and would not be sufficient to engage likelihood of confusion.

CONCLUSION

67. The opposition has succeeded in relation to the following services, for which the application is refused:

Class 44 Agricultural services; Agricultural services relating to environmental conservation; Agriculture, aquaculture, horticulture and forestry services; Agriculture, horticulture and forestry services; Agriculture, horticulture and forestry services relating to the recultivation of industrial wastelands; Agriculture services; Consultancy and advisory services relating to agriculture, horticulture and forestry; Consultancy relating to agriculture, horticulture and forestry; Consultancy relating to tree planting; Forestry services; Planting of flora; Planting of trees; Providing information about agriculture, horticulture, and forestry services; Providing online information about agriculture, horticulture, and forestry services; Reforestation services; The planting of trees for carbon offsetting purposes; Tree nursery services; Tree nurseryman services; Tree planting; Tree planting for carbon offsetting purposes.

68. The application will proceed to registration, subject to appeal, in respect of the following goods and services:

Class 11 Toilets; Toilets, portable; Water cisterns; Water closets; Water desalinating apparatus; Water desalinating apparatus utilizing

reverse osmosis; Water disinfection apparatus; Water filtering apparatus; Water filtering apparatus for domestic use; Water filtering apparatus for industrial use; Water filtering installations; Water filtering units; Water filters; Water-saving toilets; Wood burning stoves; Wood stoves; Apparatus and installations for drying; Apparatus and installations for heating; Apparatus and installations for refrigerating; Apparatus and installations for sanitary purposes; Apparatus and installations for steam generating; Apparatus and installations for ventilating; Apparatus and installations for water supply; Apparatus for cooking out of doors; Apparatus for disinfecting water; Apparatus for filtering drinking water; Apparatus for filtering water; Apparatus for lighting; Apparatus for purifying water; Apparatus for sanitary purposes; Apparatus for waste water purification; Apparatus for water filtering; Apparatus for water purification; Automatic watering installations; Automatic watering installations for plants; Automatic watering installations for use in agriculture; Automatic watering installations for use in gardening; Baking ovens; Sanitary apparatus and installations; Sanitary installations; Sanitary installations and apparatus; Sanitary installations, water supply and sanitation equipment; Sanitary units; Sewage purification apparatus; Sewage purification installations; Sewage (Purification installations for -); Sewage treatment [purification] installations; Sewerage installations; Shower apparatus; Showers for sale in kit form; Single lavatories.

Class 25 Baseball caps and hats; Basketball shoes; Basketball sneakers; Bathing costumes; Beach clothing; Beach footwear; Beach hats; Caps; Caps being headwear; Caps [headwear]; Casual jackets; Casual shirts; Casual trousers; Casual wear; Casualwear; Childrens' clothing; Children's footwear; Children's headwear; Children's outerclothing; Children's wear; Clothes; Clothes for

sport; Clothes for sports; Clothing; Clothing for babies; Clothing for children; Clothing for cycling; Clothing for cyclists; Clothing for fishermen; Clothing for gymnastics; Clothing for horse-riding [other than riding hats]; Clothing for infants; Clothing for leisure wear; Clothing for men, women and children; Clothing for skiing; Clothing for sports; Coats; Coats for men; Coats for women; Coats made of cotton; Coats of denim; Fishing clothing; Fleece; Gloves [clothing]; Gloves for apparel; Gloves for cyclists; Gym shorts; Gymshoes; Gymwear; Head wear; Headgear; Heavy coats; Heavy jackets; Hooded sweat shirts; Hooded sweatshirts; Hooded tops; Hoodies; Horse-riding pants; Infant clothing; Infant wear; Jackets; Jackets being sports clothing; Jackets [clothing]; Jeans; Jerseys; Jerseys [clothing]; Jogging bottoms; Jogging bottoms [clothing]; Jogging outfits; Jogging pants; Jogging shoes; Jumpers; Jumpers [pullovers]; Jumpers [sweaters]; Leather jackets; Leisure footwear; Leisure shoes; Linen clothing; Lingerie; Men's and women's jackets, coats, trousers, vests; Men's clothing; Men's sandals; Men's socks; Men's underwear; Menswear; Motorcycle jackets; Negligees; Pajamas; Pantyhose; Pyjamas; Rugby jerseys; Rugby shirts; Rugby shorts; Rugby tops; Running shoes; Safari jackets; Shirts; Shoes; Shoes for casual wear; Short petticoats; Shorts; Singlets; Sleep masks; Sleeping garments; Sleepwear; Slippers; Slips [underclothing]; Sneakers; Snow boarding suits; Sports garments; Sports jackets; Sports jerseys; Sports singlets; Surfwear; Suspenders; Sweat shirts; Sweat suits; Sweaters; Sweatshirts; Swim wear for children; Swim wear for gentlemen and ladies; Swimming costumes; Teddies [undergarments]; Tee-shirts; Tennis dresses; Thermal socks; Thermal underwear; Thermally insulated clothing; Thong sandals; Thongs; Tops [clothing]; Track pants; Tracksuit bottoms; Tracksuit tops; Tracksuits; Trainers [footwear]; Training shoes; Trousers; T-shirts; Underclothes;

Underclothing; Underwear; Underwear for women; Vests;
Walking boots; Walking shorts; Wellington boots; Wind coats;
Wind jackets; Womens' outerclothing; Women's shoes;
Womens' underclothing; Womens' undergarments; Women's
underwear; Woolly hats; Work clothes; Work overalls.

Class 32 Alcohol free cider; Alcohol free wine; Alcohol-free beers; Ale;
Ales; Apple juice drinks; Beer; Beer and brewery products; Beer
wort; Beers enriched with minerals; Beverages consisting of a
blend of fruit and vegetable juices; Beverages consisting
principally of fruit juices; Beverages containing vitamins; Black
beer [toasted-malt beer]; Bottled water; Carbonated mineral
water; Cider, non-alcoholic; Coconut water; Coconut water as a
beverage; Coconut water as beverage; Coconut-based
beverages; Coffee-flavored ale; Cola; Concentrates for making
fruit drinks; Concentrates for making fruit juices; Cordials;
Drinking mineral water; Drinking spring water; Drinking waters;
Energy drinks; Energy drinks containing caffeine; Energy
drinks [not for medical purposes]; Essences for making
beverages; Essences for making flavoured mineral water [not in
the nature of essential oils]; Flavor enhanced water; Flavored
beer; Flavored beers; Flavored waters; Flavoured beers;
Flavoured mineral water; Flavoured waters; Fruit drinks; Fruit
flavored drinks; Fruit flavored soft drinks; Fruit flavoured
carbonated drinks; Fruit flavoured drinks; Fruit juice drinks; Fruit
juice for use as beverages; Fruit juices; Fruit nectars; Ginger
ale; Ginger beer; Ginger juice beverages; Grape juice
beverages; Grape must, unfermented ;Grapefruit juice; Green
vegetable juice beverages; Guava juice; Honey-based
beverages (Non-alcoholic -); Hop extracts for manufacturing
beer; Hop extracts for use in the preparation of beverages;
Hops (Extracts of -) for making beer; Imitation beer; India pale
ales (IPAs); IPA (Indian Pale Ale); Juices; Lager; Lagers;

Lemon barley water; Lemon juice for use in the preparation of beverages; Lemon squash; Lemonade; Lemonades; Lime juice cordial; Lime juice for use in the preparation of beverages; Low alcohol beer; Low calorie soft drinks; Low-alcohol beer; Low-calorie soft drinks; Malt beer; Malt syrup for beverages; Malt wort; Mango juice; Melon juice; Mineral and aerated waters; Mineral water; Mineral water [beverages]; Mineral waters; Non-alcoholic beer; Non-alcoholic beer flavored beverages; Non-alcoholic beers; Non-alcoholic beverages; Non-alcoholic beverages containing fruit juices; Non-alcoholic beverages containing vegetable juices; Non-alcoholic beverages flavored with coffee; Non-alcoholic beverages flavored with tea; Non-alcoholic beverages flavoured with coffee; Non-alcoholic beverages flavoured with tea; Non-alcoholic cocktail bases; Non-alcoholic cocktail mixes; Non-alcoholic cocktails; Non-alcoholic cordials; Non-alcoholic dried fruit beverages; Non-alcoholic drinks; Non-alcoholic drinks enriched with vitamins and mineral salts; Non-alcoholic essences for making beverages; Non-alcoholic essences for making non-alcoholic beverages, not in the nature of essential oils; Non-alcoholic flavored carbonated beverages; Non-alcoholic fruit cocktails; Non-alcoholic fruit drinks; Non-alcoholic grape juice beverages; Non-alcoholic malt beverages; Non-alcoholic malt drinks; Non-alcoholic malt free beverages [other than for medical use]; Non-alcoholic syrups for making beverages; Non-alcoholic vegetable juice drinks; Non-alcoholic wine; Non-alcoholic wines; Non-carbonated soft drinks; Orange juice; Orange juice beverages; Orange juice drinks; Orange squash; Organic fruit juice; Pale ale; Pastilles for effervescing beverages; Pineapple juice beverages; Porter; Powders for the preparation of beverages; Preparation for making non-alcoholic beverages; Protein drinks; Shandy; Soda water; Soft drinks; Sparkling water; Sports drinks; Sports drinks containing electrolytes; Spring water;

Spring waters; Squashes [non-alcoholic beverages]; Stout; Stouts; Syrup for making beverages; Syrup for making lemonade; Table waters; Tomato juice [beverage]; Tonic water; Vegetable drinks; Vegetable juice; Vegetable juices [beverage]; Vitamin enriched sparkling water [beverages]; Water; Watermelon juice; Waters; Waters [beverages]; Wheat beer.

Class 44 Alternative medicine services; Barber shop services; Beauty care for human beings; Beauty salon services; Body art services; Chiropractic services; Chiropractitioner services; Consultancy in the field of body and beauty care; Consultancy in the field of nutrition; Consultancy in the field of viticulture; Consultancy provided via the Internet in the field of body and beauty care; Consultancy relating to cosmetics; Consultancy relating to landscape design; Consultancy relating to nutrition; Consultancy relating to the cultivation of plants; Consultation services in the field of make-up; Cultivation of plants; Deep tissue massage; Dental clinic services; Dentist services; Dentistry; Dentistry services; Design of gardens and landscapes; Destruction of parasites for agriculture, horticulture and forestry; Dog-clipping; Hair cutting; Hair cutting services; Manicuring services; Massage services; Massages; Physiotherapy services; Planning [design] of gardens; Plant care services [horticultural services]; Plant nurseries; Plant nursery services; Private hospital services; Tree surgeons' services; Tree surgery; Vermin exterminating for agriculture, horticulture or forestry, and providing information relating thereto; Weed killing for agriculture, horticulture and forestry.

Class 45 Advisory services relating to consumers rights [legal advice]; Advisory services relating to copyright; Advisory services relating to intellectual property licensing; Advisory services relating to intellectual property protection; Advisory services

relating to intellectual property rights; Advisory services relating to patents; Advisory services relating to regulatory affairs; Advisory services relating to the law; Advisory services relating to the preparation of standards; Agencies for copyright licensing; Agency services (Dating -); Agency services for arranging personal introductions; Arbitration; Arbitration, mediation and dispute resolution services; Arbitration services; Arranging for the provision of legal services; Attorney services [legal services]; Barrister services; Computer dating services; Consultancy (Intellectual property -); Consultancy relating to intellectual property management; Consultancy relating to patent protection; Consultancy relating to the licensing of intellectual property; Consultancy relating to the management of intellectual property and copyright; Consultancy relating to trademark licensing; Consultancy relating to trademark protection; Consultancy services relating to the legal aspects of franchising; Consulting in the field of personal relationships; Conveyancing services [legal services]; Copyright and industrial property rights management; Dating agency services; Dating services; Dating services provided through social networking; Dispute resolution services; Escort agencies [social]; Film, television and video licensing; Internet based dating, matchmaking and personal introduction services; Internet based matchmaking services; Internet based personal introduction services; Internet dating services; Internet-based social networking services; Legal advice; Legal advice and representation; Legal advice in responding to calls for tenders; Legal advice in responding to requests for proposals [RFPs]; Legal advice relating to franchising; Legal advocacy services; Legal and judicial research services in the field of intellectual property; Legal assistance in the drawing up of contracts; Legal compliance auditing; Legal consultancy relating to intellectual property rights; Legal consultancy relating

to patent mapping; Legal consultancy services; Legal consultation in the field of taxation; Legal consultation services; Legal document preparation services; Legal information research services; Legal information services; Legal investigation services; Legal mediation services; Legal research; Legal research services; Legal services; Legal services in the field of immigration; Legal services relating to business; Legal services relating to the exploitation of ancillary rights relating to film, television, video and music productions; Legal services relating to the exploitation of broadcasting rights; Legal services relating to the exploitation of film copyright; Legal services relating to the exploitation of patents; Licensing of intellectual property; Litigation advice; Litigation consultancy; Litigation services; Online social networking services; On-line social networking services; Online social networking services accessible by means of downloadable mobile applications; Providing information in the field of intellectual property; Providing information in the field of law; Providing information relating to legal affairs; Provision of legal information; Provision of legal research; Social introduction agencies; Solicitors' services; Enforcement of trade mark rights; Escort agencies [social]; Escort services; Escorting in society [chaperoning].

69. The applicant has been largely successful. I would award costs to the applicant, but reflect the fact that the applicant was not wholly successful. However, as an unrepresented party, I would require a completed Cost Pro Forma. It not being received, and no official fees being incurred by the applicant, no costs award is made.

Dated this 14th day of June 2021

JOHN WILLIAMS
For the Registrar