

O/635/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003520243

**BY SAFETY-KLEEN UK (EUROPE) LIMITED TO REGISTER THE FOLLOWING
TRADE MARK**



IN CLASS 7

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 421845 BY SATA GmbH & Co KG

Background and Pleadings

1. On 7 August 2020, Safety-Kleen UK (Europe) Limited ('the Applicant') filed an application to register the trade mark shown on the cover page of this Decision, number UK00003520243. The application was published for opposition purposes in the *Trade Marks Journal* on 18 September 2020. Registration is sought in respect of:

Class 7	<i>Industrial cleaning machines; cleaning and degreasing machines and equipment; parts cleaning and degreasing machinery and equipment; parts and fittings for all the aforesaid goods.</i>
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2. On 23 October 2020, the application was opposed by SATA GmbH & Co KG ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). The opposition is directed against all of the goods in the application.
3. The Opponent relies on the following 2 earlier trade mark registrations for its section 5(2)(b) ground:

1) EUTM 006339915 ¹ jet 100 Filing date: 8 October 2007 Date of entry in register: 11 September 2008	Class 7: <i>Spray guns for paints</i>
2) EUTM 004702155	Class 7: <i>Spray guns for paints</i>

¹ Although the UK has left the EU and the transition period has now expired, EUTMs, and International Marks which have designated the EU for protection, are still relevant in these proceedings given the impact of the transitional provisions of The Trade Marks (Amendment etc.) (EU Exit) Regulations 2019 – please see Tribunal Practice Notice 2/2020 for further information.

jet 1000	
Filing date: 25 October 2005 Date of entry in register: 13 December 2006	

4. The Opponent claims that:

- the Applicant's mark is identical to the Opponent's mark 'jet 100' and 'extremely similar' to its mark 'jet 1000';
- the Applicant's goods 'are so similar to the goods covered by the opposition marks that there exists a likelihood of confusion'.

5. The Applicant filed a defence and counterstatement, denying the claim in its entirety.

6. In the evidence round, evidence and written submissions have been filed by the Opponent; the Applicant has filed written submissions only. Neither party has filed written submissions in lieu of a hearing.

7. The Opponent is represented by Baron Warren Redfern; the Applicant is represented by Ipona IP LLP.

Relevant dates

8. Section 6A of the Act provides that where the registration date of the earlier mark is more than 5 years prior to the application date of the applied-for mark, the opponent may be required to prove use of the earlier mark. In the instant case, although Section 6A is engaged², the Applicant has, in its Defence and Counterstatement, indicated that it does not require the Opponent to provide

² The registration dates of the two earlier marks, i.e. 11 September 2008 and 13 December 2006, are more than 5 years prior to the date of application for the contested mark.

proof of use. Therefore, the Opponent is entitled to rely upon its mark in respect of all of the goods identified in its statement of use.

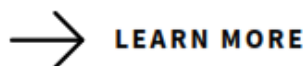
Opponent's evidence and submissions

9. The Opponent's evidence comes from Mr Jeremy Bridge-Butler, partner at Baron Warren Redfern, the Opponent's representative. Mr Bridge-Butler's Witness Statement is dated 8 May 2021. There are 5 exhibits: JBB1 – JBB5.

10. Exhibit JBB1

This exhibit comprises printouts of 5 pages from the website of 'SATA German Engineering', accessed 8 May 2021. Product listings of various spray guns i.e. for the application of paint, are featured. The fifth page shows that the company also sells cleaning devices and features a product described thus:

The SATA clean RCS is a compressed air operated cleaning system for the intermediate cleaning of...



11. Exhibit JBB2

This exhibit comprises printouts of 3 pages from the website of 'Carlisle Fluid Technologies', accessed 8 May 2021. Product listings for various spray guns are featured. The text at the header of the section on spray guns indicates that the products are intending to apply paint. The third page shows a product listing for a product named 'DeVilbiss Pro Clean' which cleans spray guns.

12. Exhibit JBB3

This exhibit comprises printouts of 2 pages from the website of 'Anest Iwata', accessed 8 May 2021. The first page features product listings for various spray guns intended to apply paint. The second page features a listing for a 'Spray Gun Washer'.

13. Exhibit JBB4

This exhibit comprises printouts of 2 pages from the website of 'Finixa', undated. One page features a product listing for a mini spray gun; the other, a listing for an 'automatic gun cleaner'.

14. Exhibit JBB5

This exhibit comprises printouts of 2 pages from the website of 'Hamach Dutch Engineering', undated. One page features listings of spray guns for painting; the other lists products for cleaning spray guns.

15. Submissions

The Opponent's submissions can be briefly summarised as follows:

- that the Applicant's mark is highly visually, phonetically and conceptually similar to the Opponent's 'jet 100' mark, the 'spray gun' device element of the Applicant's mark being descriptive;
- that the respective goods are not 'sufficiently different to avoid the likelihood of confusion';
- that 'manufacturers of paint spray guns also sell cleaning equipment and machines'; therefore, that the respective goods are complementary.

Applicant's submissions

16. The Applicant has simply repeated the substance of its counterstatement i.e. that the respective marks are similar to a low degree; the respective goods are dissimilar; and that, therefore, there is no likelihood of confusion.

17. The following Decision has been made after careful consideration of the papers before me.

Decision

Section 5(2)(b) of the Act and related case law

18. Section 5(2)(b) of the Act states:

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

(a) ...

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

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

19. The following principles are derived from the decisions of the CJEU 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 C120/04; *Shake di L. Laudato & C. Sas v OHIM*, Case C-334/05P; and *Bimbo SA v OHIM*, Case C-591/12P

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has

kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

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

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

Comparison of goods

20. Similarity of goods and services – Nice Classification

Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the ‘Nice Classification’ means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

21. I must therefore be mindful of the fact that the appearance of respective goods in the same class is not a sufficient condition for similarity between those goods or services.

22. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties' goods and services must be taken into account:

"[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".

23. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281³, identified the following factors for assessing similarity of the respective goods and services:

- (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.

³ *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

24. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.⁴

25. 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 [or services]. In *Boston Scientific Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court 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”.

26. The goods to be compared are as follows:

Opponent's mark ⁵ :	Applied-for mark:
Class 7: <i>Spray guns for paints</i>	Class 7: <i>Industrial cleaning machines; cleaning and degreasing machines and equipment; parts cleaning and degreasing machinery and equipment; parts and fittings for all the aforesaid goods.</i>

27. The Applicant's term *cleaning and degreasing machines and equipment* is a broad term under which all of the remaining terms within the specification will fall.

28. I therefore compare *cleaning and degreasing machines and equipment* against the Opponent's goods. *Cleaning and degreasing machines and equipment* will

⁴ *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

⁵ The goods specification is identical for the Opponent's two marks.

cover a wide range of machines designed to clean various articles, e.g. pressure washers, which clean by way of a jet of high-pressure water. The Opponent's *spray guns for paints* differ in purpose to the extent that they are intended to apply paint, rather than cleaning agents, to surfaces. The methods of use of pressure washers and *spray guns for paints* will overlap; both involve directing paint/cleaning agent from a nozzle onto the surface to be painted/cleaned. The physical nature of the respective goods will be similar; both pressure washers (and other cleaning machines that operate in a similar way) and *spray guns for paints* are items of apparatus whose components will comprise some sort of nozzle, a reservoir for the paint/cleaning agent and a mechanism for drawing the liquid from the reservoir and ejecting it from the nozzle.

29. I consider trade channels to overlap; in my view, some cleaning machines will often be found in the same shops/sold via the same websites as the Opponent's goods. This is borne out by the Opponent's evidence of a number of retailers selling apparatus for cleaning *spray guns for paints* alongside the spray guns themselves. The respective goods will, in my view, be self-selected to the extent that the average consumer will 'click' on the goods online; items in physical shops will be selected from shelves (where the goods are small enough). Where a piece of industrial cleaning apparatus is very large, there will likely be one example of the item on display in the shop for the consumer to enquire about with retail staff. To my mind, *spray guns for paint* will likely be found in the same section as paints and varnishes, whereas cleaning machines in general will likely be found in a section focused on cleaning, polishing, sanding etc. However, it is possible that cleaning machines whose specific purpose is to clean *spray guns for paints* may in some instances be found on near or the same shelves as the Opponent's goods.

30. I do not find the respective goods to be in a competitive relationship. I do, however, find complementarity between the goods: machines specifically for cleaning spray guns are useful for the maintenance of the Opponent's goods and, in my view, a significant proportion of average consumers would presume the respective goods to originate from the same undertaking.

31. Consequently, I find the Applicant's goods to be similar to the Opponent's goods to a medium degree.

Average consumer and the purchasing act

32. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

33. In *Hearst Holdings Inc*⁶ Birss J. (as he then was) described the average consumer thus:

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

34. I consider the average consumer, of both parties' goods, to be members of both the professional and general public. Many purchasers will be businesses, including e.g. manufacturers or businesses in the automotive trade. A number of purchases will also be made by members of the general public, e.g. for DIY or craft projects.


35. In my view, *Spray guns for paints* will, in most cases, be self-selected from shelves or by clicking on the product online. The purchasing act will therefore be primarily visual in nature. I appreciate that there will be an aural aspect to the

⁶ *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).

purchasing act in instances where, e.g. the purchaser consults a member of retail staff for advice before completing the purchase, or purchases are made after word-of-mouth recommendation. In my view, the average consumer will display a medium-high level of attention when purchasing these goods. Factors considered will include, *inter alia*: the suitability of the spray gun for the purchaser's needs e.g. how robust the product is; the product's efficiency in terms of paint use.

36. The Applicant's goods will, in many cases, also be self-selected. I acknowledge, however, that the Applicant's specification will also include very large and complex machines for industrial use which will be purchased after consultation with the retailer. The purchasing act will, in most cases, be primarily visual; many average consumers will have been exposed to the Applicant's mark upon visiting the product listing on a website or inspecting the goods in a physical shop. There will be an aural aspect to the purchasing act where the average consumer chooses the goods upon recommendation or is directed to the goods after enquiring with retail staff. I consider the average consumer to pay a medium-high level of attention when purchasing the Applicant's goods. Factors considered will include, *inter alia*: business needs and the size of the machine.

Comparison of the marks

Opponent's (earlier) marks	Applicant's (contested) mark
<p>i) jet 100</p> <p>ii) jet 1000</p>	

37. 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 the marks, bearing in mind their distinctive and dominant

components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

38. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks, and to give due weight to any other features which are not negligible and, therefore, contribute to the overall impressions created by the marks.

39. The Opponent's marks:

i) jet 100 – this mark comprises two elements; a word element 'jet' and a numerical element '100', rendered in a plain font, all characters being of uniform size with the word element in lower case. Each element occupies an equal amount of space in the mark. The overall impression of the mark resides in its entirety, with each element playing an equal role visually.

ii) jet 1000 – the only difference between this mark and the above mark is the presence of an additional '0' in the numerical element '1000'. This addition results in the numerical element occupying noticeably more space than the word element. The overall impression of the mark resides in its entirety, with the numerical element playing a slightly greater role visually owing to its relative size.

40. The Applicant's mark comprises three elements: a word element; a device and a numerical element. The device is composed of what appears to be an atomiser or spray gun presented upside-down. The nozzle of the spray gun is emitting what appear to be three jets of water. What appears to be a lever to operate the spray protrudes from the 'trunk' of the spray gun. The inverted orientation of the device

creates a lower case 'j' configuration enabling it to be incorporated into the word element 'jet'. The word element, incorporating the spray gun device, is coloured turquoise, the letters 'et' in a plain uniform font in lower case. The numerical element '100' appears in a plain uniform font in black. The 'jet' and '100' elements are coalesced as if to form one 'word', however the difference in colour creates a measure of separation between them. The overall impression of the mark resides in its entirety. In my view, the way in which the spray gun device has been designed i.e. to represent the letter 'j' in the word 'jet', incorporates it into the mark rather than setting it apart as a separate element. The dominant element of the mark is 'jet100'.

41. I will compare each of the Opponent's marks in turn against the Applicant's mark

42. Visual comparison

i) Opponent's mark 'jet 100'

The text 'jet 100' is wholly incorporated into the Applicant's mark. Both marks (with the exception of the device in the Applicant's mark) are rendered in a plain font, with all characters being of uniform size.

The points of difference are:

- the presence of the 'spray gun' device in the Applicant's mark, absent in the Opponent's mark;
- the coalescence of 'jet' with the numerical element, i.e. '100', of the Applicant's mark, whereas the elements are separated by a space in the Opponent's mark;

and

- the turquoise colouring of the 'jet' element in the Applicant's mark as compared to the Opponent's all-black mark.

Consequently, I find the respective marks to be highly visually similar.

i) Opponent's mark 'jet 1000'

All characters but the final '0' are wholly incorporated into the Applicant's mark.

The points of difference are those noted above, plus the fact that the numerical element in the Opponent's mark has an additional '0' to form the number '1000' which is absent in the Applicant's mark.

Consequently, I find the respective marks to be visually similar to a medium degree.

43. Aural comparison

i) Opponent's mark 'jet 100'

I consider both parties' marks to be articulated as 'jet-one-hun-dred', with the emphasis on the third syllable. I therefore find the respective marks to be aurally identical.

ii) Opponent's mark 'jet 1000'

The Opponent's mark will be articulated as 'jet-one-thou-sand', with the emphasis on the third syllable. The respective marks comprise four syllables, the first two of which are identical. The marks share a rhythm; in both marks, the emphasis is on the third syllable. The aural difference lies in the second half of each mark; 'hundred' in the Applicant's mark as compared to 'thous-sand' in the Opponent's mark. I therefore find the marks to be aurally similar to a medium degree.

44. Conceptual comparison

i) Opponent's mark 'jet 100'

'Jet' would be recognised by the average consumer as a word in the English language. The dictionary⁷ provides several senses of the word:

- As a noun:
 - An aircraft with a 'jet' engine that is able to fly very fast;
 - A thin stream of something, such as water or gas, that is forced out of a small hole;

7. <https://dictionary.cambridge.org/dictionary/english/jet> accessed 20 August, 15:28.

A small hole in a piece of equipment through which gas or another fuel is forced before it is burned;

A hard black stone used to make jewellery and other decorative objects.

- As a verb:

To travel somewhere by plane;

To move or progress by or as if by jet propulsion⁸.

The '100' element will be understood by the average consumer as simply referring to the number 100. For the average consumer, 'jet 100' as a mark for the Opponent's goods, i.e. *spray guns for paints*, will invoke the idea of a jet of paint emitting from a spray gun. In my view, the '100' element might be perceived as denoting a particular model or series of spray gun. I consider that the 'jet' element of the Applicant's mark, given the goods in respect of which registration is sought, will be understood as a jet of water or cleaning agent emitting from some sort of cleaning apparatus. The spray gun device fashioned into the 'j' of 'jet' will reinforce the concept of a spray gun. The '100' element might be perceived as denoting a particular model or series of cleaning machine. Consequently, I find that the respective marks are conceptually similar to a high degree.

ii) Opponent's mark 'jet 1000'

The only difference between this mark and the Opponent's 'jet 100' mark is the additional '0'. The '1000' element of this mark will be understood by the average consumer as referring to the number 1000. This element might be perceived as denoting a particular model or series of spray gun. I find that the Applicant's mark and the Opponent's 'jet 1000' mark are conceptually similar to a medium degree.

Distinctive character of the earlier marks

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

⁸ <https://www.merriam-webster.com/dictionary/jet> accessed 20 August, 15:54.

“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 ‘jet’ appears in the English dictionary. I consider it to be somewhat allusive of the goods in respect of which the marks are registered i.e. *spray guns for paints*, because, as a verb, it describes the way in which the paint exits the spray gun (i.e. by ‘jetting’ out of the spray gun) and, as a noun, it describes a ‘jet’ of paint. The numerical elements ‘100’ and ‘1000’ neither describe nor allude to the goods; though they might be perceived as referring to a particular model or series. I therefore find that both earlier marks have a fairly low level of distinctiveness.

Likelihood of confusion

47. Confusion can be direct or indirect. Mr Iain Purvis Q. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*⁹. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*¹⁰, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that he has in his mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark before him but mistakenly matches it to the imperfect image of the earlier mark in his ‘mind’s eye’. Indirect confusion occurs when the average consumer recognises that the later mark is indeed different from the earlier mark, but, concludes that the later mark is economically linked to the earlier mark by way of being a ‘sub brand’, for instance.

48. Before arriving at my decision, I must make a global assessment taking into account all of the relevant factors, including the principles a) – k) set out above at [19].

49. When considering all relevant factors ‘in the round’, I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

50. I have found that the Applicant’s goods are similar to the Opponent’s goods to a medium degree.

51. My comparisons of the respective marks have found that:

i) Opponent’s mark ‘jet 100’

- The marks are highly visually similar;
- The marks are aurally identical;
- The marks are conceptually similar to a high degree.

⁹ Case BL O/375/10 at [16].

¹⁰ *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

ii) Opponent's mark 'jet 1000'

- The marks are visually similar to a medium degree;
- The marks are aurally similar to a medium degree;
- The marks are conceptually similar to a medium degree.

52. I have found the earlier mark to be inherently distinctive to a low degree. The CJEU held in *Sabel*¹¹ that:

"24. The more distinctive the earlier mark, the greater will be the likelihood of confusion."¹²

53. My consideration of whether there is a likelihood of confusion will focus only on the Opponent's earlier mark 'jet 100' because comparison of this mark with the Applicant's mark has yielded the highest levels of similarity.

54. I find that a significant proportion of average consumers would confuse the marks. The marks are highly visually and conceptually similar and aurally identical. The presence of the 'spray gun' device in the Applicant's mark, absent from the Opponent's mark, reinforces the idea of a jet of liquid. The design of the device is such that it is fashioned into the 'j' of 'jet' rather than appearing as a separable element of the mark. This visual difference does not, in my view, disturb the high level of conceptual similarity between the respective marks. In these circumstances, it is my conclusion that when the average consumer encounters the Opponent's mark, they may well mistake it for the Applicant's mark because the mind's eye has failed to register the visual differences (i.e. the

¹¹ *Sabel BV v Puma AG* (C-251/95), [1998] E. T. M. R. 1 (1997) at [24].

¹² This principle was given an important qualification by Mr Iain Purvis Q.C, as the Appointed Person, in the decision of *Kurt Geiger v A-List Corporate Limited* BL O-075-13:

"39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything, it will reduce it."

device and use of colour in the Applicant's mark, absent from the earlier mark; and the space between the word and numerical elements in the earlier mark, absent from the Applicant's mark) between the marks. Even though I have found the Opponent's mark to have only a fairly low level of inherent distinctive character, the 'jet100' element is dominant and distinctive in both marks. There is a likelihood of confusion. I find this to be the case even though the average consumer will pay a medium-high level of attention when purchasing the goods.

Final Remarks

55. The Opposition has succeeded and the Application is refused.

COSTS

56. I award the Opponent the sum of **£900** as contribution towards its costs, calculated as follows¹³:

Preparation of statement and consideration of the Applicant's statement:	£300
Official fee for 5(2)(b) only:	£100
Preparation of evidence and submissions:	£500
Total:	£900

57. I therefore order Safety-Kleen UK (Europe) Limited to pay to SATA GmbH & Co KG **the sum of £900**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

¹³ Based upon the scale published in Tribunal Practice Notice 2/2016.

Dated this 25th day of August 2021

Mx N. R. Morris

For the Registrar,

the Comptroller-General