

BLO/704/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK3562736

BY THE SCENT COVEN. LTD

TO REGISTER THE TRADE MARK:

THE SCENT COVEN

IN CLASSES 3 & 4

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600001690

BY DRACO DISTRIBUTION LTD

Background and pleadings

1. On 1 December 2020, The Scent Coven. LTD (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 5 February 2021. The applicant seeks registration for the following goods:

Class 3: Reed diffusers; Room scenting sprays; Scented wax melts.

Class 4: Scented candles; Beeswax for use in the manufacture of candles; Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp oils; Lamp wicks; Paraffin wax; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Vegetable wax; Votive candles; Wax for lighting; Wax for making candles; Waxes being raw materials; Wicks for candles for lighting; Wicks for oil lamps.

2. The application was opposed by Draco Distribution Ltd (“the opponent”) on 15 April 2021. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies on the following trade mark:

COVEN

International Registration (IR) 1343030

Filing date: 9 September 2016

Registration date: 6 October 2017

Relying upon all of the goods and services for which the earlier mark is registered, namely:

Class 3: Cosmetics; toiletries; eye make-up, eye shadows, eye powders, eye creams, mascaras, eye liners, eye pencils, eyebrow pencils, face make-up, primers, foundations, concealers, powders, pressed powders, loose powders, cream and powder blushers, bronzers, lip sticks, lip glosses, lip liners, lip balms; nail varnish, nail polish, nail lacquer; nail polish remover; cosmetic preparations for skincare; haircare preparations; nailcare preparations; cosmetic creams,

milks, lotions, gels and powders for hands; moisturisers, toners, cleansers, make-up removers; face masks, face packs; shampoos, conditioners, hair conditioning masks, hair sprays, hair gels, hair lotions, hair serums, hair mousses; depilatories; deodorants; anti-perspirants; body sprays; preparations, creams, gels, serums, lotions, sprays and mousses for tanning or for protection against the sun; after-sun preparations, creams, gels, serums, lotions, sprays and mousses; talcum powder; bath bombs, bath salts, bath gel, shower gel; perfumery, perfumes, liquid and solid perfumes, eau-de-cologne, toilet water, fragrances and fragrance products; soaps; false eyelashes, false nails; tissues and wipes impregnated with cosmetic preparations and cleansers.

Class 35: Retail services, mail order retail services and electronic or online retail services all connected with the sale of cosmetics and toiletries; retail services, mail order retail services and electronic or online retail services all connected with the sale of eye make-up, eye shadows, eye powders, eye creams, mascaras, eye liners, eye pencils, eyebrow pencils, face make-up, primers, foundations, concealers, powders, pressed powders, loose powders, cream and powder blushers, bronzers, lip sticks, lip glosses, lip liners and lip balms; retail services, mail order retail services and electronic or online retail services all connected with the sale of nail varnish, nail polish, nail lacquer, nail polish remover and emery boards; retail services, mail order retail services and electronic or online retail services all connected with the sale of skincare products, haircare products, nailcare products, handcare products, moisturisers, toners, cleansers, make-up removers, face masks, face packs, shampoos, conditioners, hair conditioning masks, hair sprays, hair gels, hair lotions, hair serums and hair mousses; retail services, mail order retail services and electronic or online retail services all connected with the sale of depilatories, deodorants, anti-perspirants, body sprays and preparations, creams, gels, serums, lotions, sprays and mousses for tanning or for protection against the sun; retail services, mail order retail services and electronic or online retail services all connected with the sale of after-sun preparations, creams, gels, serums, lotions, sprays and mousses; retail services, mail order retail services and electronic or online retail services all connected with the sale of talcum powder, soaps, bath bombs, bath salts, bath gel, shower gel,

perfumery, perfumes, liquid and solid perfumes, eau-de-cologne, toilet water, fragrances and fragrance products; retail services, mail order retail services and electronic or online retail services all connected with the sale of false eyelashes, false nails, tissues and wipes impregnated with cosmetic preparations and cleansers.

3. The opponent claims that there is a likelihood of confusion because its mark is similar to the applicant's mark and claims the dominant element from the applicant's mark (which they state is 'Coven') is identical to their mark. They state that toiletry products and household products feature perfume/fragrance and so the goods are similar. The opponent is opposing all goods for which the applicant seeks protection.

4. The applicant filed a counterstatement denying the similarity of the marks. It states that its mark contains additional elements that distinguish it from the opponent's mark, and that the beginnings of marks are more important given that users of the English language read left to right. It claims that the marks are phonetically different and the emphasis would be on 'Scent' within their mark. It comments that the concepts of the two marks differ.

5. 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.”

6. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No leave was sought to file any evidence in respect of these proceedings.

7. 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 considered necessary; neither party filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

9. The applicant is represented by Humphreys & Co and the opponent is represented by jtTM Consultancy Limited.

10. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied 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.

Section 5(2)(b)

11. Section 5(2)(b) reads as follows:

“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.”

12. 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) or Community trade mark or international trade mark (EC) which has a date of IR 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.”

13. The trade mark upon which the opponent relies qualifies as an earlier trade mark because it was applied for at an earlier date than the applicant’s mark pursuant to section 6 of the Act. The opponent’s mark is not subject to the proof of use requirements pursuant to section 6A of the Act. This is because the earlier mark had not been registered for more than 5 years at the filing date of the application in issue. The opponent can, therefore, rely upon all of the goods and services which it has identified.

Section 5(2)(b) case law

14. 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 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 and services

15. When making the comparison, all relevant factors relating to the goods and services in the specification 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”.

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

- (a) The respective 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.

17. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Merici')*, Case T-133/05, the General Court ("the 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 für 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".

18. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

19. 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. 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 that the responsibility for those goods lies with the same undertaking".

20. 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.”

21. The parties’ respective specifications are:

Applicant’s goods	Opponent’s goods and services
Class 3: Reed diffusers; Room scenting sprays; Scented wax melts.	Class 3: Cosmetics; toiletries; eye make-up, eye shadows, eye powders, eye creams, mascaras, eye liners, eye pencils, eyebrow pencils, face make-up, primers, foundations, concealers, powders, pressed powders, loose powders, cream and powder blushers, bronzers, lip sticks, lip glosses, lip liners, lip balms; nail varnish, nail polish, nail lacquer; nail polish remover; cosmetic preparations for skincare; haircare preparations; nailcare preparations; cosmetic creams, milks, lotions, gels and powders for hands; moisturisers, toners, cleansers, make-up removers; face masks, face packs; shampoos, conditioners, hair conditioning masks, hair sprays, hair gels, hair lotions, hair serums, hair mousses; depilatories; deodorants; anti-perspirants; body sprays; preparations, creams, gels, serums, lotions, sprays and mousses for tanning or for protection against the sun; after-sun preparations, creams, gels, serums, lotions, sprays and mousses; talcum powder; bath bombs, bath salts, bath gel, shower gel; perfumery, perfumes, liquid and solid perfumes, eau-de-cologne, toilet water, fragrances and fragrance products; soaps; false eyelashes, false nails; tissues and wipes impregnated with cosmetic preparations and cleansers.
Class 4: Scented candles; Beeswax for use in the manufacture of candles; Candles and wicks for lighting; Candles	Class 35: Retail services, mail order retail services and electronic or online retail services all connected with the sale

containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp oils; Lamp wicks; Paraffin wax; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Vegetable wax; Votive candles; Wax for lighting; Wax for making candles; Waxes being raw materials; Wicks for candles for lighting; Wicks for oil lamps.

of cosmetics and toiletries; retail services, mail order retail services and electronic or online retail services all connected with the sale of eye make-up, eye shadows, eye powders, eye creams, mascaras, eye liners, eye pencils, eyebrow pencils, face make-up, primers, foundations, concealers, powders, pressed powders, loose powders, cream and powder blushers, bronzers, lip sticks, lip glosses, lip liners and lip balms; retail services, mail order retail services and electronic or online retail services all connected with the sale of nail varnish, nail polish, nail lacquer, nail polish remover and emery boards; retail services, mail order retail services and electronic or online retail services all connected with the sale of skincare products, haircare products, nailcare products, handcare products, moisturisers, toners, cleansers, make-up removers, face masks, face packs, shampoos, conditioners, hair conditioning masks, hair sprays, hair gels, hair lotions, hair serums and hair mousses; retail services, mail order retail services and electronic or online retail services all connected with the sale of depilatories, deodorants, anti-perspirants, body sprays and preparations, creams, gels, serums, lotions, sprays and mousses for tanning or for protection against the sun; retail services, mail order retail services and electronic or online retail services all connected with the sale of after-sun preparations, creams, gels, serums, lotions, sprays and mousses; retail services, mail order retail services and electronic or online retail services all connected with the sale of talcum powder, soaps, bath bombs, bath salts,

	bath gel, shower gel, perfumery, perfumes, liquid and solid perfumes, eau-de-cologne, toilet water, fragrances and fragrance products; retail services, mail order retail services and electronic or online retail services all connected with the sale of false eyelashes, false nails, tissues and wipes impregnated with cosmetic preparations and cleansers.
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22. The contested class 3 goods are ‘Reed diffusers; Room scenting sprays; Scented wax melts’. Reed diffusers comprise containers holding a scented liquid in which reeds are placed in order to disperse the scent into the room. Scented wax melts are scented pieces of wax which are placed into warmers so that the wax melts and releases scent into the air. Room scenting sprays are scented liquids placed into a spray bottle so that they can be released into the air.

23. The opponent has ‘fragrances and fragrance products’ registered in class 3. Fragrance is defined as a pleasant or sweet smell.¹ I would consider that fragrances generally will include room fragrances. The applicant’s ‘Reed diffusers; Room scenting sprays; Scented wax melts’ would be considered types of room fragrances and are certainly products whose primary function is to impart fragrance. Therefore, following the principles in *Meric*, I find the applicant’s ‘Reed diffusers; Room scenting sprays; Scented wax melts’ to be identical to the opponent’s ‘fragrances and fragrance products’.

24. The applicant’s specification also includes scented candles and lamp oils in class 4. I consider scented candles to be very similar to scented wax melts. The wax in both is scented which is released by way of melting that wax except melts are placed in a warmer whereas candles have their own wick which is lit and causes the wax to melt. I also consider the possibility that there are lamps that have a fragranced oil inserted in order to emit a scent in the room by heating. I would again consider that both goods are a type of room fragrance and would therefore be identical under the principles of *Meric*. If I am found to be wrong in this then I would consider that ‘scented candles’

¹ <https://www.collinsdictionary.com/dictionary/english/fragrance>

and 'fragrances and fragrance products' would be similar to a very high degree. Their purpose is the same as they are intended to provide a pleasant smell. There is perhaps the additional purpose of a candle providing a light source but I would consider that the main purpose of a scented candle in particular is related to its smell. The users would be the same, people who are intending to make a room or area smell nicely. The nature of the goods is that they contain or emit a fragrance in order to make something smell pleasant.

25. Next I will consider the applicant's 'Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Special occasion candles; Table candles; Tealight candles; Votive candles'. Once again, I will compare these to 'fragrance and fragrance products' from the applicant's specification. I consider that these goods in the applicant's specification are different types of candles which are used for lighting or creating atmosphere and for decorative purposes. The purpose of fragrance and fragrance products, as above, is to create or emit a pleasant scent. I think there may be an overlap in trade channels, given fragrance and fragrance products will include home fragrances, as explained above. Given the nature of the products and the potentially shared trade channels, offset by a difference in use, user and purpose, I find these goods to be similar to a low degree.

26. The applicant has also applied for 'Beeswax for use in the manufacture of candles; Lamp wicks; Tapers for lighting; Paraffin wax; Vegetable wax; Wax for lighting; Wax for making candles; Waxes being raw materials; Wicks for candles for lighting; Wicks for oil lamps'. I find that these items would be used in the production of candles and lamps and this would take them further away from the fragrance and fragrance products in the opponent's registration. I therefore find that the nature, use, users and trade channels would differ between these goods and the opponent's 'fragrances and fragrance products' as these would be the finished products ready to use and their usage would ultimately be different, again the opponent's goods would be for providing a pleasant scent compared to the applicant goods of making candles or wicks for lamps. I therefore find these goods to be dissimilar.

27. The remainder of the opponent's Class 3 goods, namely 'Cosmetics; toiletries; eye make-up, eye shadows, eye powders, eye creams, mascaras, eye liners, eye pencils, eyebrow pencils, face make-up, primers, foundations, concealers, powders, pressed powders, loose powders, cream and powder blushers, bronzers, lip sticks, lip glosses, lip liners, lip balms; nail varnish, nail polish, nail lacquer; nail polish remover; cosmetic preparations for skincare; haircare preparations; nailcare preparations; cosmetic creams, milks, lotions, gels and powders for hands; moisturisers, toners, cleansers, make-up removers; face masks, face packs; shampoos, conditioners, hair conditioning masks, hair sprays, hair gels, hair lotions, hair serums, hair mousses; depilatories; deodorants; anti-perspirants; body sprays; preparations, creams, gels, serums, lotions, sprays and mousses for tanning or for protection against the sun; after-sun preparations, creams, gels, serums, lotions, sprays and mousses; talcum powder; bath bombs, bath salts, bath gel, shower gel; perfumery, perfumes, liquid and solid perfumes, eau-de-cologne, toilet water, soaps; false eyelashes, false nails; tissues and wipes impregnated with cosmetic preparations and cleansers' I would consider are types of cosmetics and toiletries. Cosmetics are defined as being beauty preparations and make up² and toiletries are defined as things that you use when washing or taking care of your body³. I find that these items have a far more personal usage than 'Beeswax for use in the manufacture of candles; Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp wicks; Paraffin wax; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Vegetable wax; Votive candles; Wax for lighting; Wax for making candles; Waxes being raw materials; Wicks for candles for lighting; Wicks for oil lamps' from the applicant's specification. The opponent's goods mentioned above are for personal hygiene or beauty opposed to lighting a room or decoration of a room. The trade channels will differ and the goods will be found in different places within a store. The nature and purpose of the goods differs as do the users and uses. I therefore find these goods to be dissimilar.

² <https://www.collinsdictionary.com/dictionary/english/cosmetics>

³ <https://www.collinsdictionary.com/dictionary/english/toiletries>

28. Finally, the opponent also relies on its services in class 35 which cover: 'Retail services, mail order retail services and electronic or online retail services all connected with the sale of cosmetics and toiletries; retail services, mail order retail services and electronic or online retail services all connected with the sale of eye make-up, eye shadows, eye powders, eye creams, mascaras, eye liners, eye pencils, eyebrow pencils, face make-up, primers, foundations, concealers, powders, pressed powders, loose powders, cream and powder blushers, bronzers, lip sticks, lip glosses, lip liners and lip balms; retail services, mail order retail services and electronic or online retail services all connected with the sale of nail varnish, nail polish, nail lacquer, nail polish remover and emery boards; retail services, mail order retail services and electronic or online retail services all connected with the sale of skincare products, haircare products, nailcare products, handcare products, moisturisers, toners, cleansers, make-up removers, face masks, face packs, shampoos, conditioners, hair conditioning masks, hair sprays, hair gels, hair lotions, hair serums and hair mousses; retail services, mail order retail services and electronic or online retail services all connected with the sale of depilatories, deodorants, anti-perspirants, body sprays and preparations, creams, gels, serums, lotions, sprays and mousses for tanning or for protection against the sun; retail services, mail order retail services and electronic or online retail services all connected with the sale of after-sun preparations, creams, gels, serums, lotions, sprays and mousses; retail services, mail order retail services and electronic or online retail services all connected with the sale of talcum powder, soaps, bath bombs, bath salts, bath gel, shower gel, perfumery, perfumes, liquid and solid perfumes, eau-de-cologne, toilet water, fragrances and fragrance products; retail services, mail order retail services and electronic or online retail services all connected with the sale of false eyelashes, false nails, tissues and wipes impregnated with cosmetic preparations and cleansers'.

29. We know from *Oakley, Inc v OHIM*, Case T-116/06 that the General Court held that retail services are different in nature, purpose and method of use to goods but that retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree. In this instance however, the goods within the applicant's class 4 specification are 'Beeswax for use in the manufacture of candles; Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the

decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp wicks; Paraffin wax; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Vegetable wax; Votive candles; Wax for lighting; Wax for making candles; Waxes being raw materials; Wicks for candles for lighting; Wicks for oil lamps' and are not similar or identical to the goods being retailed in the class 35 registration of the opponent. I therefore find these goods and services to be dissimilar.

30. Therefore, the opposition is dismissed in relation to the following Class 4 goods of the applicant: 'Beeswax for use in the manufacture of candles; Lamp wicks; Paraffin wax; Vegetable wax; Wax for lighting; Wax for making candles; Waxes being raw materials; Wicks for candles for lighting; Wicks for oil lamps'.

31. My assessment of this matter will therefore continue only in respect of those contested goods that I have found to be similar or identical to the opponent's goods, namely all of the applicant's class 3 goods and the following goods in class 4: 'Scented candles; Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp oils; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Votive candles'.

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, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

"60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well

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

34. The average consumer of reed diffusers, room scenting sprays, scented wax melts, candles and fragrances or fragrance products will predominantly be the general public but may also be a professional public buying on behalf of others.

35. The selection of such goods is largely a visual process, as the average consumer (general public) will wish to physically handle the goods, usually to check the scent of the products, whilst simultaneously appraising the overall aesthetic impact.

36. A professional consumer will likely take more care over the visual appraisal of these goods as they will often be buying in much larger quantities and will need to assess the quality, aesthetics and construction etc to a higher degree.

37. I do not, however, ignore the potential for the marks to be spoken, for example, by sales assistants in a retail establishment or when making a purchase from a catalogue, over the telephone. However, in those circumstances, the consumer will have had an opportunity to view the goods, perhaps electronically via an online catalogue or website, or on paper in the traditional sense of catalogue shopping.

38. I consider that the price range for these types of products can vary greatly from low price items that can be purchased relatively frequently to much higher priced items that will likely be purchased far more infrequently. Therefore, I believe the average consumer will be paying a medium degree of attention.

Comparison of the marks

39. 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

Court of Justice of the European Union 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.”

40. 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.

41. The respective trade marks are shown below:

The Scent Coven	COVEN
Contested trade mark	Earlier trade mark

42. The contested mark contains three ordinary dictionary words. The mark begins with ‘The’ as the definitive article. The word ‘Scent’ could be said to be allusive of the goods provided by the applicant as the application is for goods such as scented candles and room scenting sprays. Therefore, ‘Scent’ could be said to play a lesser role in the distinctiveness of the mark due to it being allusive. I do not believe however, that the word ‘Scent’ will go unnoticed and will be considered by the average consumer due to its positioning at the beginning of the mark. The word ‘Coven’ may be said to be the more distinctive element within the contested mark having no obvious link with the goods on offer. As no single element can be said to dominate the contested mark, I believe that the overall impression lies in the mark as a whole.

43. The earlier mark comprises a single ordinary dictionary word and therefore the overall impression of the mark lies in that word.

44. Visually, both marks are plain words presented in a standard font. The contested mark comprises three words. The opponent's mark is one word, 'Coven' which is wholly contained within the contested mark. The contested mark also contains the words 'The Scent' at the beginning of the mark which have no counterpart in the opponent's mark. These represent approximately two thirds of the mark. I therefore consider the marks to be visually similar to a medium degree.

46. The contested mark is aurally similar to the extent that the common word 'Coven' will be pronounced identically to the opponent's earlier mark. Given that the additional words in the applicant's mark 'The Scent' form the beginning of the mark, I believe that these elements will both be articulated by the average consumer. It is possible that the word 'The' might not be articulated by the average consumer. For the part of the public who would not articulate 'The' in the contested mark the marks are similar to a medium degree as approximately half of the mark is identical. Given the applicant's mark wholly encompasses the opponent's mark but that the shared element follows two additional words which will be articulated, I find the marks to be aurally similar to at least a low degree.

47. Both marks contain the word 'Coven' which by its ordinary dictionary meaning refers to a group of witches.⁴ The word 'Scent' in the contested mark refers to a distinctive smell, especially a pleasant one.⁵ When read all together 'The Scent Coven' could be said to refer to a group of witches with a specific interest or focus on scents/perfumes. Therefore, there is the similarity in the reference to the group of witches but the additional concept added by 'Scent' cannot be ignored. I find the marks to be conceptually similar to a medium degree.

⁴ <https://www.collinsdictionary.com/dictionary/english/coven>

⁵ <https://www.collinsdictionary.com/dictionary/english/scent>

Distinctive character of the earlier trade mark

48. 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).”

49. The opponent has not provided any evidence that the earlier mark has acquired an enhanced degree of distinctive character and no claim was made to that effect. I must therefore assess the mark purely on its inherent distinctive character.

50. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C., sitting as the Appointed Person, observed that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

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

51. The earlier mark is comprised of one word ‘Coven’ which is an ordinary dictionary word. The mark is not descriptive of the opponent’s goods or services and I consider that it would be unusual and fanciful for this word to be used in association with the goods and services registered by the opponent. However, the word is not invented which would usually provide the highest degree of distinctive character. I therefore find that the earlier mark has at least a medium degree of inherent distinctive character.

Likelihood of Confusion

52. There are two types of confusion that I must consider. Firstly, direct confusion i.e. one mark is mistaken for the other. The second is indirect confusion which is where the consumer appreciates that the marks are different, but the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or a related source.

53. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental

process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

54. I have found that the applicant’s goods under Class 3 are identical under *Meric* to the Class 3 goods of the opponent. The remaining contested class 4 goods are also similar to between a low and high degree to the opponent’s class 3 goods. I have found the marks to be visually similar to a medium degree given that the opponent’s mark is wholly contained within the applicant’s mark. I have concluded that for the proportion of the average consumer that would not articulate the word ‘The’ in the applicant’s mark the marks are aurally similar to a medium degree and for those that do articulate the word ‘The’ then the marks are aurally similar to a low degree. Conceptually, I have concluded that the marks are similar to a medium degree. I have found the opponent’s mark to be inherently distinctive to at least a medium degree and that the average consumer would pay a medium degree of attention when selecting the goods at issue.

55. I have found the element ‘Scent’ of the contested mark to be suggestive of the goods applied for and therefore it plays a slightly lesser role in the mark. However, the conceptual impact of the contested mark will be that of a group of witches with a focus on scents/perfumes/fragrances and therefore, this is a more specific concept than found with the opponent’s mark. Based on the above conclusions, I am not convinced that the average consumer would mistake one of these marks for the other in this instance. There are two additional words in the applicant’s mark. Even in the event the average consumer does not articulate the word ‘The’ in the contested mark, the word ‘Scent’ will be seen and spoken by the average consumer. The word ‘Scent’ is at the beginning of the mark and conveys a clear conceptual message which will not go unnoticed. Therefore, I do not find there to be a likelihood of direct confusion.

56. I therefore need to consider indirect likelihood of confusion. Mr Iain Purvis Q.C. said further in *L.A. Sugar Limited v By Back Beat Inc*:

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

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

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

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

58. These examples are not exhaustive but provide helpful focus.

59. Having found that the word ‘Scent’ in the contested mark conveys a message relating to the smells of products that word can be said to be suggestive or allusive in the relevant sector of reed diffusers, room scenting sprays, scented wax melts and scented candles. The word ‘Coven’ has been found to be the more distinctive aspect of that mark as it has no obvious link or association with the goods at issue. The applicant has argued that the beginning of the marks are the most important however, the GC in the case of *Bristol Global Co Ltd v EUIPO*, T-194/14 held that common elements at the end of marks may be sufficient to create a likelihood of confusion.

60. Having carefully considered all of the aforesaid, I find that the average consumer of the goods at issue, who is aware of the opponent’s ‘Coven’ brand will, when faced with the contested ‘The Scent Coven’ mark, assume that that mark is simply a brand extension or evolution of the applicant’s fragranced range of ‘Coven’ products.

61. I do consider that in respect of the contested: 'Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp oils; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Votive candles', the word 'Scent' may not necessarily be suggestive. However, as expressed earlier, I consider the word 'Coven' to be of such a level of inherent distinctiveness in relation to the goods in question that it would be reasonable for the average consumer to believe that those goods come from the same undertaking.

62. Whilst I accept that indirect confusion should not be reached merely because the marks share a common element, and that what is required by the average consumer is an instinctive reaction that leads them to the conclusion that the good or services come from the same (or related) trade origin, I find that that instinctive reaction is present in this case.

63. I find therefore, that indirect confusion will occur between the opponent's mark and the contested application for all class 3 goods and the following goods in class 4: 'Scented candles; Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp oils; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Votive candles'.

Conclusion

64. The opposition has been successful in relation to the applicant's class 3 goods and the following goods from class 4: 'Scented candles; Candles and wicks for lighting; Candles containing insect repellent; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Lamp oils; Special occasion candles; Table candles; Tapers for lighting; Tealight candles; Votive candles'.

65. The opposition fails in respect of the following goods in class 4: 'Beeswax for use in the manufacture of candles; Lamp wicks; Paraffin wax; Vegetable wax; Wax for

lighting; Wax for making candles; Waxes being raw materials; Wicks for candles for lighting; Wicks for oil lamps’.

Costs

66. The opponent has been largely successful and is entitled to a contribution towards its costs. Award of costs in proceedings are based upon the scale set out in Tribunal Practice Notice (TPN) 2/2016. After due consideration, I believe that an award of costs to the applicant is appropriate as follows:

Official fee	£100
Preparing the Notice of Opposition and considering the Counter Statement	£250
TOTAL	£350

75. I therefore order The Scent Coven. Ltd to pay Draco Distribution the sum of £350. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 24th day of September 2021

L Nicholas
For the Registrar