

O-796-21

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NO. 3585279
BY HOMES & GIFTS LIMITED
TO REGISTER THE TRADE MARK:

Sloungers

IN CLASS 25
AND
IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 600001678 BY
SIMON BREEDS A PARTNER IN SLOUNGIES AND ASHLEY LAYTON

Background and pleadings

1. On 27 January 2021, Homes & Gifts Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision.

2. The application was published on 26 March 2021 for the following goods:

Class 25: Footwear; gloves; headgear; headgear; loungewear; nightwear; mules; clothing; slipper socks; slippers; socks; soles [Inner]; shoes; baby layettes for clothing; baby shoes.

3. Simon Breeds a partner in Sloungies and Ashley Layton (“the opponents”) filed a notice of opposition under the fast-track opposition procedure on 9 April 2021. The opposition, which is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all the goods in the application. The opponent relies upon the following United Kingdom (“UK”) trade mark:

Mark:

The logo for 'sloungies' features the word in a bold, lowercase, sans-serif font. The letter 'o' is replaced by a stylized orange flame icon.

Registration number: 3455134

Filing date: 2 January 2020

Registration date: 27 March 2020

4. Given its date of filing, the trade mark upon which the opponent rely qualifies as an earlier trade mark in accordance with section 6 of the Act.

5. The opponent argues that there is a likelihood of confusion because the respective marks and goods are similar.

6. The applicant filed a counterstatement denying the claims made. As these are the only submissions from the applicant, the relevant paragraphs from the counterstatement are reproduced below:

“The term Sloungers is a modern, urban style word and many similar words now exist that perhaps were unlikely to exist e.g. 10 years ago. Unlike the

sloungies figurative mark that is highly colourful I believe it has sufficiently different sound. The main difference being “ers” and not “ies”. Sloungers is a unique word entirely and no other business or brand is using this word at all. I feel the brand names are sufficiently different to co-exist with the figurative mark relying on a visual expression and ours is a different word mark with no visual likeness. SloungERS and SloungIES sound different and give different impression of the style. Although both words are made-up words, both lend themselves somewhat to the word “lounge”. I do not see how the two businesses would therefore be detrimental to each other. The internet search of Sloungers does not in any way find the brand Sloungies.”

7. The fast-track proceedings do not involve the filing of evidence except where proof of use is necessary, and a decision is usually made from the papers filed. However, where a party considers it necessary to file evidence, a request for leave to file such evidence should be submitted.¹ On 8 August 2021, the opponent requested leave to file evidence. However, as the Registry was satisfied that the evidence sought to be filed were irrelevant to the issues under consideration, the request was refused.
8. Both parties are unrepresented. Neither party filed written submissions in these proceedings. This decision is taken following a careful perusal of the papers.

DECISION

Section 5(2)(b)

9. Section 5(2)(b) of the Act read as follows:

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

¹ Tribunal Practice Notice (2/2013)

(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 of the part of the public, which includes the likelihood of association with the earlier trade mark”.

Section 5(2)(b) – case law

10. The following principles are gleaned from the judgments 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 C3/03, *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.

The principles:

(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 the 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 goods

11. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

“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”.

12. Guidance on this issue has also come from Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Ltd* (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.

13. 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 General Court (“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”.

14. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, the General Court held that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application - and vice versa.²

15. The competing goods are as follows:

Opponent's goods	Applicant's goods
<p><u>Class 25</u> Sweatpants, Pajama bottoms, jogging bottoms, slippers, socks, slipper socks, thermal layers, thermal tops, thermal bottoms, thermal bottoms with feet built in, sweatpants with feet built in, head wear, gloves, hats, scarfs, t-shirts, jumpers, hoodies, hoodies with</p>	<p><u>Class 25</u> Footwear; Gloves; Headgear; Headgear; Loungewear; Nightwear; Mules; Clothing; Slipper socks; Slippers; Socks; Soles [Inner]; Shoes; Baby layettes for clothing; Baby shoes.</p>

² case T-133/05

gloves attached, jogging bottoms with feet attached, shorts, shirts, casual clothing, Smart clothing, socks, thermal headwear, nightwear, tracksuit bottoms, tracksuits, underwear, jackets, snoods, onesies, blankets; Adhesive bras; Adhesive brassieres; After ski boots; Aikido suits; Aikido uniforms; Albs; Aloha shirts; American football bibs; American football pants; American football shirts; American football shorts; American football socks; Anglers' shoes; Ankle boots; Ankle socks; Anklets [socks]; Anoraks; Anoraks [parkas]; Anti-perspirant socks; Anti-sweat underclothing; Anti-sweat underwear; Après-ski boots; Apres-ski shoes; Aprons; Aprons [clothing]; Aqua shoes; Arm warmers [clothing]; Army boots; Articles of clothing; Articles of clothing for theatrical use; Articles of clothing made of hides; Articles of clothing made of leather; Articles of outer clothing; Articles of sports clothing; Articles of underclothing; Ascots; Ascots (ties); Athletic clothing; Athletic footwear; Athletic shoes; Athletic tights; Athletic uniforms; Athletics

footwear; Athletics hose; Athletics shoes; Athletics vests; Babies' clothing; Babies' outerclothing; Babies' pants [clothing]; Babies' pants [underwear]; Babies' undergarments; Babushkas; Baby bibs [not of paper]; Baby bodysuits; Baby boots; Baby bottoms; Baby clothes; Baby doll pyjamas; Baby layettes for clothing; Baby pants; Baby sandals; Baby tops; Balaclavas; Ball gowns; Ballet shoes; Ballet slippers; Ballet suits; Ballroom dancing shoes; Bandanas; Bandanas [neckerchiefs]; Bandannas; Bandeaux [clothing]; Barber smocks; Baseball caps; Baseball caps and hats; Baseball hats; Baseball shoes; Baseball uniforms; Baselayer bottoms; Baselayer tops; Basic upper garment of Korean traditional clothes [Jeogori]; Basketball shoes; Basketball sneakers; Bath robes; Bath sandals; Bath slippers; Bathing caps; Bathing costumes; Bathing costumes for women; Bathing drawers; Bathing suit cover-ups; Bathing suits; Bathing suits for men; Bathing trunks; Bathrobes; Beach clothes; Beach clothing; Beach cover-ups;

Beach footwear; Beach hats;
 Beach robes; Beach shoes;
 Beach wraps; Beachwear; Beanie
 hats; Beanies; Bed jackets; Bed
 socks; Belts [clothing]; Belts for
 clothing; Belts made from imitation
 leather; Belts made of leather;
 Belts made out of cloth; Belts
 (Money -) [clothing]; Belts of
 textile; Berets; Bermuda shorts;
 Bib overalls for hunting; Bib
 shorts; Bib tights; Bibs, not of
 paper; Bibs, sleeved, not of paper;
 Bikinis; Blazers; Bloomers;
 Blouses; Blouson jackets;
 Blousons; Blue jeans; Board
 shorts; Boardshorts; Boas; Boas
 [clothing]; Boas [necklets];
 Boaters; Bobble hats; Bodices;
 Bodices [lingerie]; Bodies
 [clothing]; Bodies [underclothing];
 Body linen [garments]; Body
 stockings; Body suits; Body
 warmers; Bodysuits; Boiler suits;
 Boleros; Bolo ties; Bolo ties with
 precious metal tips; Bomber
 jackets; Bonnets; Bonnets
 [headwear]; Boot cuffs; Boot
 uppers; Bootees (woollen baby
 shoes); Booties; Boots; Boots for
 motorcycling; Boots for sport;
 Boots for sports; Boots (Ski -);
 Bottoms [clothing]; Bow ties;

<p>Bowling shoes; Bowties; Boxer briefs; Boxer shorts; Boxing shoes; Boxing shorts; Boy shorts [underwear]; Boys' clothing; Bra straps; Bra straps [parts of clothing]; Braces as suspenders; Braces for clothing; Braces for clothing [suspenders]; Braces [suspenders]; Bralettes; Bras; Brassieres; Breeches; Breeches for wear; Bridal garters; Bridal gowns; Bridesmaid dresses; Bridesmaids wear; Briefs; Briefs [underwear]; Bucket caps; Bucket hats; Burkas; Burnouses; Bushjackets; Bustiers; Bustle holder bands for obi (obiage); Bustles for obi-knots (obiage-shin); Button down shirts; Button-front aloha shirts; Cagoules.</p>	
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16. I consider that all of the applicant's goods are either identical or highly similar to the opponent's goods for the following reasons:
17. The terms gloves, headwear, headgear, nightwear, slipper socks, slippers, socks and baby layettes for clothing are identically contained in both specifications.
18. The terms footwear, loungewear, mules, clothing, shoes and baby shoes in the application are identical to either casual clothing, boots, booties or slippers in the opponent's specification under the *Meric* principle.

19. Soles [Inner] in the application is similar to a medium degree to boots in the earlier mark. This is because the goods share channels of trade and users. The goods are complimentary as one is important for the use of the other and the average consumer is likely to think that the same producer is responsible for the goods.

The average consumer and the nature of the purchasing act

20. It is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which these goods are likely to be selected by the average consumer.

21. 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”.

22. The average consumer of the respective parties' goods is a member of the general public.

23. In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined cases T-117/03 to T-119/03 and T-171/03, the General Court (“GC”) commented upon the manner in which articles of clothing are selected. It stated:

“50. The applicant has not mentioned any particular conditions under which the goods are marketed. Generally, in clothes shops customers can themselves either choose the clothes they wish to buy or be assisted by the sales staff. Whilst oral communication in respect of the product and the trade mark is not excluded, the choice of the item of clothing is generally made visually. Therefore, the visual perception of the marks in question will generally take place prior to purchase. Accordingly, the visual aspect plays a greater role in the global assessment of the likelihood of confusion.”

24. I consider that similar considerations discussed above apply equally to the respective parties' goods that are not articles of clothing. The average consumer is likely to purchase the competing goods fairly frequently. The goods are most likely to be the subject of self-selection from retail outlets, websites or catalogues. Visual considerations are, therefore, likely to dominate the selection process. However, I do not discount an aural element to the purchase, particularly when advice is sought from a sales representative or a purchase is made further to a word-of-mouth recommendation. When making a purchase, factors such as size, material, colour and cost (which will vary according to the item) may be considered. These factors suggest that the average consumer will pay a medium level of attention when making their selection.


Comparison of marks

25. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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.”

26. It would be wrong, therefore, artificially to 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.

27. The trade marks to be compared are as follows:

Opponent’s trade mark	Applicant’s trade mark
	<p data-bbox="1018 1126 1174 1160" style="text-align: center;">Sloungers</p>

28. The opponent’s trade mark is a figurative mark. The representation of the word in the mark is likely to appear in more than one way. It may be perceived as the word “sloungies” with a heavily stylised letter “u”. I note that the proprietor also intended it to be the word “sloungies” and it is how the applicant has referred to the opponent’s mark in its counterstatement.³ I am of the view that the perception of the applicant and the opponent of the word “sloungies” in the earlier mark reflects how a significant proportion of the average consumers are likely to see that word. I also acknowledge that there are likely to be another group of average consumers who, due to the stylisation, may not perceive the letter “u” in the mark. Instead, they would see it as a mere decorative device or

³ See the certificate of filing dated 27 January 2021.

perhaps a stylised letter “o”. For those group of average consumers, the word appearing in the mark is likely to be “slongies/sloongies”. In either situation, the stylised letter /device element is in orange while the remaining letters are in red. The letter “e” is capitalised, and remaining letters are represented in an unremarkable font. Although the combination of the colours and the stylisation will not be ignored, it is the word that dominate the overall impression of the mark.

29. The applicant’s mark is a word only mark for “sloungers”. The overall impression and the distinctiveness of the mark lies in this word.

30. On a visual comparison, I find that the marks share the same level of similarity regardless of how the average consumer reads the mark. The competing marks coincide in eight/seven out of nine letters they are comprised of; the first six/five letters appear in the same order. In my view, it is to those letters the average consumer’s eye is likely to be drawn first. Although notional and fair use of the applicant’s mark would include the use in red or orange, I note that the earlier mark consists of a combination of colours, which adds to a certain degree of visual difference. The stylization/capitalization of the individual letter(s) or a device element is absent from the applicant’s mark. However, bearing in mind my assessment of the overall impression, and the fact that the applicant’s word mark may be used in a variety of standard fonts and with or without capital letters, none of these differences is strong point. Although I agree with the applicant that the marks differ in the letters “ies” and “ers”, these differences are only at the end of the marks. Weighing up the similarities and differences, I find that the marks are similar to a high degree.

31. In an aural comparison, the opponent’s mark is likely to be pronounced as sloun-gies, slon-gies or sloongies. The applicant’s mark will be pronounced as sloun-gers. Where the opponent’s mark is pronounced as sloungies, the competing marks coincide in the pronunciation of the first syllable and the pronunciation of the letters “g” and “s” in the second syllable. Considering these factors, I find that the marks are aurally similar to a high degree. Where the

opponent's mark is pronounced in any other alternative ways discussed, the similarity in the pronunciation of the first syllable and the extent of similarity in the pronunciation of the second syllable would render the marks aurally similar to a low to medium degree.

32. I now turn to the conceptual similarity. Both marks appear to be comprised of made-up words with no meaning. While the terms "sloungers/sloungies" when used in relation to loungewear, is likely to be slightly evocative, I do not consider that that evocative characteristic is immediately perceivable by the average consumer.⁴ On that basis, I find that the marks are conceptually neutral.

Distinctiveness of the earlier mark

33. The distinctive character of the earlier mark must be considered. The more distinctive it is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the Court of Justice of the European Union ("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)."

34. Invented words usually have the highest degree of distinctive character, while words that are allusive of the goods have the lowest. Distinctiveness can also be enhanced through use of the mark. The opponent has not filed any evidence of use of the mark. Therefore, I have only the inherent position to consider.

⁴ See Case C-361/04 P *Ruiz-Picasso and Others v OHIM* [2006] ECR I-00643; [2006] E.T.M.R. 29.

35. I have already mentioned that the earlier mark is likely to be read in more than one way and I have also found that those words would be perceived as invented. The figurative representation of the mark in the combination of two colours and the stylisation of the letter/the device element in the mark contributes to a certain degree of distinctive character. Considering the mark as a whole, I find that the mark is inherently distinctive to a high degree.

Likelihood of confusion

36. A likelihood of confusion is made on a global assessment of all factors relevant to the circumstances of the case (*Sabel* at [22]). It is necessary for me to factor in the distinctive character of the earlier trade mark, as the more distinctive this trade mark is the greater the likelihood of confusion (*Sabel* at [24]). I must also have regard to 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 and vice versa (*Canon* at [17]). I must also keep in mind the average consumer of the goods, the nature of the purchase process and that the average consumer rarely has an opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

37. Confusion can be direct (which occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods/services down to the responsible undertaking being the same or related).

38. The difference between direct and indirect confusion was explained in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, by Iain Purvis Q.C., sitting as the Appointed Person, where he 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”.

39. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, James Mellor Q.C., sitting as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls another mark to mind. This is mere association not indirect confusion.

40. Earlier in this decision, I concluded the competing marks are either visually similar to a high degree, aurally similar to either a high degree or low to medium degree, depending on how the verbal element in the earlier mark is articulated. I have also concluded that the marks are conceptually neutral. I found that visual considerations are likely to dominate the purchasing process (though aural considerations are also relevant), and the average consumer is likely to pay a medium degree of attention to the goods' selection. I also concluded that the earlier mark is inherently distinctive to a high degree and the competing goods are either identical or similar to a medium degree.

41. I will first consider the position where the earlier mark is read and articulated as “sloungies”. Bearing in mind my view that the overall impression of the earlier mark is dominated by the word sloungies, and given the high degree of similarity between the respective marks, I think that the average consumer paying a medium degree of attention to the purchase of identical goods is likely

to misremember the differences. They are likely to mistake one mark for the other leading to a likelihood of direct confusion. Confusion is still likely where the goods are similar to a medium degree.

42. Alternatively, even if the average consumers recognise that the marks are different, there is a likelihood of indirect confusion. The consumer rarely has a chance to compare the marks side-by-side. Due to the high degree of similarity between the marks that arise from the shared common letters, the average consumer is likely to ignore the minor differences at the marks' end and put the differences arising from the combination of colours and the stylisation/device element down to brand variation.

43.. In *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation*,⁵ Kitchin L.J. considered the relationship between the average consumer and the likelihood of confusion. He concluded that:

“if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant portion of the relevant public is likely to be confused such as to warrant the intervention of the court, then it may properly find infringement.”

44. Although this was in the context of infringement, the same approach is appropriate under s.5(2).⁶

45. It is not, therefore, necessary for me to find that the majority of average consumers will be confused. The question is whether there is a likelihood of confusion amongst a significant proportion of the relevant public displaying the characteristics attributed to an average consumer of such goods. Although I acknowledged that the average consumers is likely to perceive the earlier mark in more than one way, following my findings at paragraph 28, I am of the view that a significant proportion of the average consumers are likely to see and read

⁵ [2016] EWCA Civ 41, at paragraph 349(v)

⁶ See *Soulcycle Inc v Matalan Ltd*, [2017] EWHC 498 (Ch), Mann J.

the earlier mark as “sloungies”. The fact that a significant proportion of the relevant public is likely to be confused is sufficient to the required assessment of likelihood of confusion.

Conclusion

46. The opposition has succeeded in full. The application will be refused.

Costs

47. The opponent has been successful and is entitled to an award of costs. Awards of costs in fast-track proceedings are governed by Tribunal Practice Notice (“TPN”) 2/2015. I award costs to the opponent on the following basis:

Official fee:	£100
Preparing the notice of opposition and considering the counterstatement:	£200
Total:	£300

48. I order Homes & Gifts Limited to pay Simon Breeds a partner in Sloungies and Ashley Layton the sum of £300. 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.

Dated this 25th day of October 2021

Karol Thomas
For the Registrar
The Comptroller-General