

O/0183/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003728551

**BY LOVE HOME BRITAIN LIMITED TO REGISTER THE FOLLOWING TRADE
MARK:**



IN CLASSES 9, 11, 12, 14, 18, 20, 24, 25, 27 AND 28

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 431826 BY TER MOLST INTERNATIONAL NV**

Background and Pleadings

1. On 2 December 2021, Love Home Britain Limited ('the Applicant'), filed an application to register the following trade mark:



2. The application was published for opposition purposes in the *Trade Marks Journal* on 17 December 2021. Registration is sought in respect of goods in classes 9, 11, 12, 14, 18, 20, 24, 25, 27 and 28.
3. On 14 March 2022, the application was opposed by Ter Molst International NV ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The Opposition is directed against the Applicant's goods in class 24 only:

Bed skirts; Blankets (Bed -); Bed spreads; Bed linen; Bed quilts; Bed coverings; Bed throws; Bed valances; Bed blankets; Linen (Bed -); Bed clothes; Bed covers; Comforters (bedding); Silk bed blankets; Flat bed sheets; Canopies (bed linen); Valanced bed sheets; Valances for beds; Valanced bed covers; Comforters for beds; Fitted bed sheets; Infants' bed linen; Quilt bedding mats; Bed warmer covers; Fabric bed valances; Quilted blankets [bedding]; Linen for the bed; Bed clothes and blankets; Bed linen and blankets; Cot bumpers [bed linen]; Bed sheets of paper; Crib bumpers [bed linen]; Bed blankets made of cotton; Bed linen and table linen; Runners (Table -); Table linen; Table cloths; Table covers; Table runners; Billiard table baize; Fabric table toppers; Fabric table runners; Plastic table cloths; Coasters [table linen]; Duvets; Duvet covers; Textile covers for duvets; Duvets filled with goose down; Covers for eiderdown

and duvets; Duvets filled with goose feathers; Sofa covers; Sofa blankets; Throws; Throws (furniture coverings); Cot sheets; Cot blankets; Cot covers.

4. The Opponent relies on the following earlier registration:

UK00916691974



LOVE HOME FABRICS

Filing date: 9 May 2017

Date of entry in register: 31 August 2017

Mark Description/Limitation:

Colour claimed: White; Shades of Purple; Different shades of orange.

Relying on all of its class 24 goods:

Textile material; Coated textiles; Woven fabrics; Mattress fabrics; Upholstery fabrics; Curtain fabric; Bath linen; Rubberized textile fabrics.

5. The Opponent claims that:

- the parties' marks 'are visually, aurally and conceptually similar or even highly similar;
- the Applicant's goods 'fall within the general categories of the goods in the trademark of the Opponent';
- the average consumer of the relevant goods is the general public and that the level of attention paid 'may vary from average to low';
- the earlier mark has a 'normal' level of distinctive character; and
- that there is likelihood of confusion between the parties' marks.

6. The Applicant filed a Defence and Counterstatement in which it:

- claims that the parties' marks are visually, conceptually and phonetically different, or, in the alternative, that there is a low level of similarity between the marks;
- denies that the parties' goods are similar;
- argues that the average consumer of the Opponent's goods is a business consumer and that a higher level of attention would be paid during the purchasing act;
- concedes that the earlier mark has a 'normal' level of distinctive character; and
- denies that there is likelihood of confusion between the parties' marks.

7. The Opponent is represented by KOB nv; the Applicant is represented by Tidman Legal Limited.

8. The Applicant has filed evidence and the Opponent has filed written submissions in the evidence round. A hearing was neither requested nor thought necessary. Only the Applicant has filed written submissions in lieu of a hearing.

9. The following decision has been made after careful consideration of the papers before me.

Applicant's evidence

10. The Applicant's evidence comes from Oliver James Andrew Tidman, solicitor and founder of Tidman Legal Limited, the Applicant's legal representative. Mr Tidman's Witness Statement is dated 26 September 2022. There are three Exhibits: OJT1 – OJT3.

11. Exhibits OJT1 and OJT2 comprise, respectively, copies of the parties' marks and a table setting out the Applicant's contested goods alongside the Opponent's goods. These items are not evidence, but information that the decision taker will necessarily already have.

12. Exhibit OJT3 comprises web pages from a number of companies providing homewares and home furnishings in the UK whose branding includes the words

'love' or 'love homes'.¹ Included are the following web pages: www.fabriclove.co.uk, www.jrosenthal.co.uk, www.love-your-home.co.uk, www.eBay.co.uk, www.lovehomeliving.co.uk, www.lovehome.online, and www.idealhome.co.uk. The Applicant has adduced this evidence to seek to demonstrate that the average consumer in the UK would be accustomed to seeing the words 'love' or 'love homes' in relation to homewares.

Decision

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

13. 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.”

14. In accordance with section 6 of the Act, the Opponent's mark is an earlier mark by virtue of its earlier filing date (9 May 2017) which falls before the filing date of the applied-for mark on 2 December 2021.

15. Section 6A of the Act provides that where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the application date (or priority date) of the applied-for mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged because the Opponent's mark had been registered for less than 5 years

¹ Witness Statement of Oliver James Andrew Tidman, paragraph [6].

on the date on which the Applicant filed its application. The Opponent is therefore entitled to rely upon all of the goods that it seeks to rely upon.

16. The following principles are derived from the decisions of the Court of Justice of the European Union² (“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

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 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

² Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

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

17. 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.”

18. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to a parties’ goods 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”.

19. 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:

- (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;

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

(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.

20. 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 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”.

21. Goods may be grouped together for the purposes of assessment:

Separode Trade Mark BL O-399-10 (AP):

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

22. In making an assessment between the competing goods, I bear in mind the decision of the General Court (‘GC’) in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05:

“29. ... 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 fur 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”.

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

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49].

Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

24. The goods to be compared are as follows:

Opponent's goods:	Applicant's goods:
Class 24: <i>Textile material; Coated textiles; Woven fabrics; Mattress fabrics;</i>	Class 24: <i>Bed skirts; Blankets (Bed -); Bed spreads; Bed linen; Bed quilts; Bed coverings; Bed throws; Bed valances;</i>

<p><i>Upholstery fabrics; Curtain fabric; Bath linen; Rubberized textile fabrics.</i></p>	<p><i>Bed blankets; Linen (Bed -); Bed clothes; Bed covers; Comforters (bedding); Silk bed blankets; Flat bed sheets; Canopies (bed linen); Valanced bed sheets; Valances for beds; Valanced bed covers; Comforters for beds; Fitted bed sheets; Infants' bed linen; Quilt bedding mats; Bed warmer covers; Fabric bed valances; Quilted blankets [bedding]; Linen for the bed; Bed clothes and blankets; Bed linen and blankets; Cot bumpers [bed linen]; Bed sheets of paper; Crib bumpers [bed linen]; Bed blankets made of cotton; Bed linen and table linen; Runners (Table -); Table linen; Table cloths; Table covers; Table runners; Billiard table baize; Fabric table toppers; Fabric table runners; Plastic table cloths; Coasters [table linen]; Duvets; Duvet covers; Textile covers for duvets; Duvets filled with goose down; Covers for eiderdown and duvets; Duvets filled with goose feathers; Sofa covers; Sofa blankets; Throws; Throws (furniture coverings); Cot sheets; Cot blankets; Cot covers.</i></p>
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25. The Opponent has submitted the following:⁴

“All the products from the contested trademark fall within the general categories of the goods in the trademark of the Opponent. It [sic] are all types of textile

⁴ Opponent’s written submissions, page 2.

materials, upholstery fabrics, bath linnens [sic],... The goods have the same nature, purpose and methods of use. Most of them will be in competition with each other, or they should be considered as complementary. The products will be available via the same distribution channels and often produced by the same producers.

The Applicant states that for instance “bed linen” will be totally different from “bath linen” and “textile goods”.⁵ This is not the case. “Bed lines” [sic] are textile goods, thus these goods are identical. Moreover, customers are familiar with producers offering a wide range of (textile) goods, being kitchen linen, bath linen, household linen,...

The goods are identical and highly similar.”

26. I disagree with the Opponent’s submission that *bed linen* will be identical with *bath linen* by virtue of the fact that both are textile goods. ‘Textile goods’ will encompass a vast array of goods with varying purposes. I also disagree with the submission that all of the Applicant’s goods will be encompassed by the Opponent’s terms. In my view, with the exception of the Opponent’s *Bath linens* and *Coated textiles*, the Opponent’s terms cover materials from which finished goods will be fashioned as opposed to the Applicant’s finished goods. Finished goods will, to my mind, never encompass, or be encompassed by, the unworked materials for those goods. The principle in ‘Meric’, set out above at [22] will therefore not apply.

27. I also bear in mind that, in *Les Éditions Albert René v OHIM*, Case T-336/03, the General Court found that:

“61... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their

⁵ It is noted that the term ‘textile goods’ does not appear in the Opponent’s specification, so this is presumed to be an oversight or typographical error.

nature, intended purpose and the customers for those goods may be completely different.”

Applicant's goods: *Bed linen; Linen (Bed -); Flat bed sheets; Canopies (bed linen); Valanced bed sheets; Fitted bed sheets; Linen for the bed; Bed linen [...]; Bed linen [...]; Duvet covers; Covers for eiderdown and duvets; Textile covers for duvets; Infants' bed linen; Cot sheets*

28. The Applicant's goods are, or encompass, items of bed linen. I compare these goods to the Opponent's term *Woven fabrics*. The Applicant's goods are used to cover beds or duvets/eiderdowns. The Opponent's term, in my view, encompasses fabrics in their unworked state which are purchased in order to be used in the creation of other finished goods. The purposes of the parties' goods will therefore differ. Users will overlap somewhat; the Applicant's goods will be purchased by the general public, whereas purchasers of the Opponent's goods will comprise both the professional public i.e. manufacturers, and the general public. Trade channels will be different; one would not ordinarily expect the same undertaking to provide both bed linen and rolls or sheets of unworked fabrics. Methods of use will also be very different; the Applicant's goods will be fitted to beds or used to cover duvets/eiderdowns, whereas the Opponent's goods will be used to create finished goods. The Opponent's goods will include, *inter alia*, thin cotton fabric. The parties' goods will therefore coincide in physical nature somewhat in certain instances, e.g. where both cotton bed sheets and unworked cotton fabric are composed of the same material. However, the goods will also diverge in terms of physical nature to the extent that the Opponent's goods will be the raw materials whereas the Applicant's goods will have been seamed and finished to create a secondary product. The goods are not in a competitive relationship; neither is substitutable for each other. I do not find complementarity either; although the Opponent's goods, to the extent that they encompass thin cotton fabric, might be used in the manufacture of bed linen, the average consumer would not, in my view presume both parties' goods to be produced by the same undertaking. I find the parties' goods to be dissimilar. If I am wrong about that, then the goods will have only a very low level of similarity.

29. I now compare the Applicant's above-mentioned goods to the Opponent's *bath linen*. The purposes of the parties' goods will differ; the Opponent's goods being used to dry the person after washing or bathing. Users of both parties' goods will be predominantly the general public. Trade channels may overlap somewhat; some retailers might sell both bed linen and bath linen e.g. shops selling homewares. Methods of use will differ. The goods will have some similarity in terms of physical nature to the extent that both bed linen and bath linen are often made from cotton. In the light of the foregoing, I find the parties' goods to have low level of similarity. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: [...] *table linen*; *Runners (Table -)*; *Table linen*; *Table cloths*; *Table covers*; *Table runners*; *Fabric table toppers*; *Fabric table runners*; *Coasters [table linen]*

30. The Applicant's goods are, or encompass, items of table linen. I compare these goods to the Opponent's *Coated textiles*. The Applicant's goods are intended to cover tables; to protect them and/or provide decoration. The Opponent's term, to my mind, covers fabrics and textile goods to which some sort of coating has been applied for reasons of functionality e.g. fabric with a waterproof coating. In my view, each of the Applicant's terms set out above will cover goods with a waterproof coating. The parties' goods will therefore overlap to the extent that the Opponent's *Coated textiles* will cover any coated (e.g. waterproof) goods under each of the Applicant's terms. The overlap will not be total, however, because many goods encompassed by the Applicant's terms will *not* be fashioned from coated materials. The parties' goods will be identical to the extent that goods under the Applicant's terms are *coated*. I now consider the Applicant's uncoated goods. The parties' goods will overlap in purpose to the extent that both coated textiles (where they encompass the Applicant's goods) and non-coated versions of the Applicant's goods will be used to protect and/or decorate a table, albeit the coated goods are waterproof and therefore intended to be 'wipe clean'. The goods will also overlap in nature in terms of their shape and base materials (e.g. cotton cloth can be both coated and non-coated). I consider that trade channels will, in many cases, be shared; the same undertaking might sell both coated and uncoated *table runners*,

for instance. There will also be competition between the coated and uncoated goods; one might deliberate over whether to purchase a coated tablecloth over an uncoated one, for example. There is no complementarity, however; although the average consumer may presume both coated and uncoated goods to originate from the same undertaking, neither good is necessary for the other. To the extent that the Applicant's goods are *uncoated*, I find the parties' goods to be highly similar. Overall, therefore, the Applicant's goods are either identical or highly similar to the Opponent's goods.

Applicant's goods: *Plastic table cloths*

31. In my view, the Applicant's term will include table cloths whose base material is fabric to which a plastic coating has been applied, as well as table cloths made entirely from plastic. The purpose of the Applicant's goods is to provide a waterproof covering for a table. I compare these goods to the Opponent's *Coated textiles*. In my view, the Opponent's goods will include tablecloths coated with plastic. To the extent that the Applicant's term includes table cloths with a plastic coating, the parties' goods will be 'Merik' identical. I now consider the Applicant's goods in so far as they include table cloths made entirely of plastic. The parties' goods will overlap in purpose because both function as a waterproof table covering. The goods will overlap in nature in terms of their shape. Methods of use will be the same. Trade channels will also be shared; the same company might sell both plastic-coated table cloths as well as those composed entirely of plastic. The parties' goods will be in a competitive relationship; either is substitutable for the other. To the extent that the Applicant's goods are table cloths made entirely of plastic, I find the goods to be highly similar. Overall, therefore, the Applicant's goods are either identical or highly similar to the Opponent's goods.

Applicant's goods: *Bed spreads; Bed quilts; Bed covers; Bed coverings; Comforters for beds; Comforters (bedding); Valanced bed covers; Fabric bed valances; Bed clothes [...]; Duvets; Duvets filled with goose down; Duvets filled with goose feathers; cot covers*

32. The Applicant's terms are, or encompass, bed (or cot) coverings of one sort or another. I compare these goods to the Opponent's term *Woven fabrics*. The Applicant's goods are intended as coverings for beds to provide warmth and/or decoration. The purpose of the Opponent's goods has already been noted. The purposes of the parties' goods will therefore differ. Users will overlap somewhat; the Applicant's goods will be purchased by the general public, whereas purchasers of the Opponent's goods will comprise both the professional public i.e. manufacturers, and the general public. Trade channels will also differ; one would not ordinarily expect the same undertaking to provide both bed coverings and rolls or sheets of unworked fabrics. Methods of use will also be very different; the Applicant's goods will be arranged on beds, whereas the Opponent's goods will be used to create finished goods. The goods will differ in terms of physical nature; the Opponent's goods will be sold in rolls as compared to the Applicant's finished quilts/bedspreads. I find the goods to be neither competitive nor complementary. Although fabrics encompassed by the Opponent's term will be necessary in order to produce some of the Applicant's goods, I consider it unlikely that the average consumer would presume both parties' goods to originate from the same undertaking. I find the parties' goods to be dissimilar. If I am wrong about that, then the goods will have only a very low level of similarity.

33. I now compare the Applicant's above-mentioned goods to the Opponent's *bath linen*. The purposes of the parties' goods will differ; the Opponent's goods being used to dry the person after washing or bathing. Users of both parties' goods will be predominantly the general public. Trade channels may overlap somewhat; some retailers might sell both the Applicant's goods and bath linen e.g. shops selling homewares. Methods of use will differ. The goods will have some similarity in terms of physical nature to the extent that both the Applicant's goods and bath linen are often made from cotton. In the light of the foregoing, I find the parties' goods to have low level of similarity. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: *Bed skirts; Bed valances; Valances for beds*

34. The Applicant's goods are intended to be arranged around the base of a bed by way of decoration. I compare these goods to the Opponent's term *bath linen*. For the same reasons provided above at [33], I find the parties' goods to have a low level of similarity. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: *Blankets (Bed -); Bed throws; Bed blankets; Silk bed blankets; Quilted blankets [bedding]; [...] and blankets; Bed blankets made of cotton; Cot blankets; Sofa blankets; Throws; Throws (furniture coverings)*

35. The Applicant's goods are all blankets or throws intended to be placed on beds, sofas or chairs for warmth and/or adornment. I compare these goods to the Opponent's term *Textile material*. The Opponent's term will, in my view, include materials in their raw unworked state for use to create finished goods e.g. wool to be spun into yarn; or raw cotton to be made into fabric. The parties' goods will differ in purpose; the Opponent's goods used as materials to create finished goods. Users will be distinct; the Applicant's goods will be purchased by the general public, whereas purchasers of the Opponent's goods will, in my view, typically be the professional public i.e. manufacturers. Trade channels will also differ; one would not ordinarily expect the same undertaking to provide both blankets or throws and textile materials. Methods of use will also be very different; the Applicant's goods will be arranged on beds whereas the Opponent's goods will be used to create finished goods. The parties' goods will differ in physical nature; the Opponent's materials will be unrefined fibres/materials as compared to the Applicant's finished goods. I find the goods to be neither competitive nor complementary. Although the Opponent's raw materials will be necessary in order to produce the Applicant's goods, I consider it unlikely that the average consumer would presume both parties' goods to originate from the same undertaking. I find the parties' goods to be dissimilar.

36. I now compare the Applicant's above-mentioned goods to the Opponent's *bath linen*. Although purposes and methods of use would differ, in my view, the parties' goods will overlap in trade channels. With the exception of the Applicant's *Silk bed blankets*, the parties' goods may be made from the same material i.e. cotton. I find the goods to have a low level of similarity. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: *Bed sheets of paper*

37. The Applicant's goods will typically be used on beds in a hospital setting where sterility and hygiene are particularly important because the items can be disposed of after use. Bearing in mind the purposes, uses, users, trade channels and physical natures of the parties' goods, and whether the goods are competitive or complementary, I do not find these goods to have any level of similarity with the Opponent's goods.

Applicant's goods: *Cot bumpers [bed linen]; Crib bumpers [bed linen]*

38. I understand that cot/crib bumpers are cushioned surrounds that are placed around the inside edges of a cot or crib in the manner of a buffer to protect the infant from injuring itself on the cot/crib. I compare these goods to the Opponent's *Mattress fabrics*. The Opponent's term will, in my view, cover fabrics used to manufacture mattresses. The purposes of the parties' goods are very different. Users will also be distinct; the average consumer of the Applicant's goods will be the general public i.e. parents or carers of infants, whereas consumers of the Opponent's goods will, in my view, be almost exclusively the professional public, i.e. manufacturers of mattresses. Trade channels will also be distinct; one would not ordinarily expect the same undertaking to provide both cot/crib bumpers and *mattress fabrics*. Methods of use will be different; the Applicant's goods will be positioned around the inside edge of a crib/cot, whereas the Opponent's goods will be used to fashion finished goods, i.e. mattresses. The goods will differ in physical nature; the Opponent's goods will, to my mind, comprise unworked fabrics in sheets or rolls as compared to the Applicant's goods which will be lengths of

cushioning/padding. I find the goods to be neither competitive nor complementary. Although the Opponent's goods may be necessary in order to produce the Applicant's goods, I consider it unlikely that the average consumer would presume both parties' goods to originate from the same undertaking. I find the parties' goods to be dissimilar. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: *Quilt bedding mats*

39. The Applicant's goods will, in my view, cover quilted mats that are designed to be slept on, either placed on the floor/ground (e.g. when camping or sleeping on a floor), or on top of a mattress, but underneath the sheet, on a bed. I compare these goods to the Opponent's *Woven fabrics*. The purposes of the parties' goods will differ. Users will overlap somewhat; the Applicant's goods will be purchased by the general public, whereas purchasers of the Opponent's goods will comprise both the professional public i.e. manufacturers, and the general public. Trade channels will differ; one would not ordinarily expect the same undertaking to provide both bedding mats and unworked fabrics. Methods of use will also be very different; the Applicant's goods will be placed on the floor or atop a mattress, whereas the Opponent's fabrics will be used to create finished goods. The parties' goods will differ in physical nature; the Opponent's unworked fabrics will be sold in rolls as compared to the Applicant's finished goods. I find the goods to be neither competitive nor complementary. Although fabrics encompassed by the Opponent's term will be necessary in order to produce the Applicant's goods, I consider it unlikely that the average consumer would presume both parties' goods to originate from the same undertaking. I find the parties' goods to be dissimilar. If I am wrong about that, then the goods will have only a very low level of similarity.

40. I now compare the Applicant's above-mentioned goods to the Opponent's *bath linen*. For the same reasons provided above at [33], I find the parties' goods to have a low level of similarity. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: *Sofa covers*

41. The purpose of the Applicant's goods is to provide a covering for sofas. I compare these goods to the Opponent's *Upholstery fabrics*. The Opponent's goods, in my view, comprise fabrics in their unworked state purchased for use in the creation of other finished goods; in this case, for the upholstering of furniture (or any item that might be upholstered). The purposes of the parties' goods are therefore very different. I consider users to be separate; the average consumers of the Applicant's goods will be predominantly the general public, whereas the Opponent's goods will likely be purchased by the professional public, e.g. furniture manufacturers or upholsterers. Trade channels will differ; one would not ordinarily expect the same undertaking to provide both sofa covers and unworked upholstery fabrics. Methods of use will also be very different; the Applicant's goods will be fitted to sofas, whereas the Opponent's fabrics will be used to upholster furniture. The parties' goods will differ in physical nature; the Opponent's unworked fabrics will be sold in rolls or sheets as compared to the Applicant's finished goods. I find the goods to be neither competitive nor complementary. Although fabrics encompassed by the Opponent's term may be used to produce the Applicant's goods, I consider it unlikely that the average consumer would presume both parties' goods to originate from the same undertaking. I find the parties' goods to be dissimilar. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: *Bed warmer covers*

42. The Applicant's term will, to my mind, encompass covers for hot water bottles or heat pads used to warm beds. I compare these goods to the Opponent's *Woven fabrics*. The parties' goods will differ in purpose. Users will overlap somewhat; the Applicant's goods will be purchased by the general public, whereas purchasers of the Opponent's goods will comprise both the professional public i.e. manufacturers, and the general public. Trade channels will differ; one would not ordinarily expect the same undertaking to provide both *Bed warmer covers* and unworked fabrics. Methods of use are different; the Applicant's goods are fitted to hot water bottles (or heat pads) whereas the Opponent's fabrics will be used to create other finished

goods. The parties' goods will differ in physical nature; the Opponent's unworked fabrics will be sold in rolls or sheets as compared to the Applicant's finished goods. I find the goods to be neither competitive nor complementary. Although fabrics encompassed by the Opponent's term may be used to produce the Applicant's goods, I consider it unlikely that the average consumer would presume both parties' goods to originate from the same undertaking. I find the parties' goods to be dissimilar. I have considered the other terms in the opponent's specification and I can see no further point of overlap which would put it in any stronger position.

Applicant's goods: *Billiard table baize*

43. *Billiard table baize* is a woven cloth used to cover billiard tables. I compare this to the Opponent's term *Woven fabrics*. My view is that the Applicant's *billiard table baize* will be encompassed by the Opponent's term. The parties' goods are therefore 'Merik' identical.

Average consumer and the purchasing act

44. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. The word "average" denotes that the person is typical. 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*.

45. It is my view that the average consumer of *Billiard table baize* will be predominantly the professional public, i.e. manufacturers of billiard tables. I recognise that a smaller number of purchasers will be members of the general public who own billiard tables and may purchase replacement baize. The purchasing act will, in my view, be predominantly visual; the goods will likely be inspected at a showroom or selected from a catalogue. There will also be an aural aspect in some instances where the purchaser seeks advice from the seller. In the case of professional purchasers, a medium – high level of attention will



likely be paid, factors considered including, *inter alia*, the purchaser's business needs. In the case of purchasers who are the general public, I consider that a measure of care will be taken because the goods are unlikely to be frequent purchases. I find that the general public would display a medium level of attention during the purchasing process.

46. *Woven fabrics* will, in my view, be purchased predominantly by the professional public e.g. manufacturers. A smaller number of purchasers will be the general public. In both cases, I consider the purchasing act to be primarily visual and that the goods would likely be inspected in real life in a shop or showroom before a purchase is made because the 'feel' of a fabric will be important. There will also be an aural aspect where requests are made to staff. I consider that in the case of professional purchasers, a high level of attention would be paid; and in the case of the general public, a medium level of attention would be paid. Factors considered would include, *inter alia*, business needs (professional purchaser), suitability of the goods for the project in question (general public).

47. *Plastic table cloths* will be purchased predominantly by the general public. The purchasing process will be primarily visual, the goods having been selected in a shop or online. There will be an aural aspect where requests are made to staff. I consider that the purchaser will display an average (or medium) level of attention when making their purchase. These are fairly 'every day' goods with a low price point. Factors considered will include, *inter alia*, the colour and pattern. I consider that the average consumer and the nature of the purchasing act will be the same for purchasers of *Coated textiles*.

48. My comments above at [47] also apply to *Bath linen* and the 'bed-related' goods.

Comparison of the marks

Opponent's (earlier) mark	Applicant's (contested) mark
	

49. 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.”

50. 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.

51. The Opponent's mark comprises a figurative element and text. The figurative element might be described as a strip that is looped twice. It is coloured in various shades of purple and orange, the gradations in tone creating a 3-dimensional impression. The text element 'LOVE HOME FABRICS' is presented below the figurative element; the words 'LOVE' and 'FABRICS' appear slightly emboldened relative to the word 'HOME'. In my view, all three words are fairly low in distinctive character for the relevant goods; 'HOME' and 'FABRICS' being of a descriptive nature, and the word 'LOVE' being, in my view, a ubiquitous word in the context of branding. I find that the three words will be perceived as one unit conveying the message of loving fabrics for the home. Given the size of the device in the opponent's mark, it will play a roughly equal role in the overall impression with the word element. However, given that the eye is naturally drawn to the elements of the mark that can be read, the wording will play a slightly greater role.

52. The Applicant's mark also comprises a figurative element and text elements. The figurative element appears to be the outline of two houses touching each other side-by-side with a heart shape positioned centrally inside the outline of the houses. The figurative and text elements are deep pink in colour set against a black background. Below the figurative element, the text 'LOVE HOME BRITAIN' is arranged in a semi-circle as if cradling the figurative element. Below this, appears the text 'Since 2022'. I consider that the average consumer would presume that 'Since 2022' simply referred to the year that the undertaking was established and would not therefore perceive this text element to be distinctive. In my view, the overall impression lies in the mark in its entirety, with the text 'LOVE HOME BRITAIN' playing the slightly greater role because it can be read. In my view, the figurative element will also play an important visual role owing to its size and positioning.

Visual comparison

53. Both parties' marks feature the words 'LOVE HOME'.

Points of visual difference are:

- the presence of the 'looped' figurative element in the Opponent's mark, which is absent from the Applicant's mark;

- the presence of the word 'FABRICS' following the words 'LOVE HOME' in the Opponent's mark, which is absent from the Applicant's mark;
- the presence of the word 'BRITAIN' following the words 'LOVE HOME' in the Applicant's mark, which is absent from the Opponent's mark;
- the presence of the 'house and heart' figurative element in the Applicant's mark, which is absent from the Opponent's mark;
- the presence of the 'Since 2022' element in the Applicant's mark, which is absent from the Opponent's mark;
- the semi-circular arrangement of the 'LOVE HOME BRITAIN' element in the Applicant's mark as compared to the linear arrangement of the 'LOVE HOME FABRICS' element in the Opponent's mark;
- the solid black background against which the figurative and text elements are set in the Applicant's mark, which is absent from the Opponent's mark.

In the light of the foregoing, I find the parties' marks to be visually similar to a low degree.

Aural comparison

54. The Opponent's mark will be articulated as 'LUV HOME FAB-RIX'. I consider that the Applicant's mark will be articulated as 'LUV HOME BRIT-UN'. The average consumer is, in my view, unlikely to articulate the 'Since 2022' element of the Applicant's mark since it will be perceived simply as indicating the date when the undertaking was established. I find the parties' marks to be aurally similar to no more than a medium – high degree.

Conceptual comparison

55. I deal with the Opponent's mark first. The words 'love', 'home' and 'fabrics' are dictionary words with which the average consumer will be familiar. 'Love' will be understood by the average consumer as denoting deep affection. 'Home' will, to my mind, be understood to refer to where one resides or feels a sense of belonging. 'Fabrics' will, in my view, be understood as materials e.g. such as cotton or nylon. The device will, to my mind, be perceived by the average consumer merely as a looped shape and, conceptually speaking, will unlikely add anything. I consider that

the Opponent's mark will, for the average consumer, convey the idea of loving fabrics for the home.

56. I now turn to the Applicant's mark. 'Britain' will be understood by the average consumer as a reference to a geographical location i.e. the island encompassing England, Wales and Scotland. I consider that the Applicant's mark will convey the idea of love for or pride in one's home and that the element 'Britain' will be understood as indicating the geographical location of the undertaking producing the goods. The device element, by virtue of its 'heart' and 'house' shapes, in my view, simply reinforces, or echoes, the words 'love' and 'home'

In the light of the foregoing, I find the marks to be conceptually similar to a medium-high degree.

Distinctive character of the earlier mark

57. *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).”

58. Registered trade marks possess varying degrees of inherent distinctive character: perhaps lower where a mark may be suggestive or allusive of a characteristic of the goods, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities.

59. The Applicant has conceded that the earlier mark has “a ‘normal’ level of distinctive character”. Although the parties have agreed that the earlier mark is ‘normal’ in distinctiveness as a whole, the common word element is low in distinctiveness.

60. The Opponent has not filed evidence. I am therefore unable to make a finding in respect of enhanced distinctiveness.

Likelihood of confusion

61. Confusion can be direct or indirect. Mr Iain Purvis Q. C., (as he then was) as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v Back Beat Inc*⁶. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*⁷, 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 they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly

⁶ Case BL O/375/10 at [16].

⁷ *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

matches it to the imperfect image of the earlier mark in their 'mind's eye'. Indirect confusion occurs when the average consumer recognises that the competing marks are not the same in some respect, but the similarities between them, combined with the goods at issue, leads them to conclude that the goods are the responsibility of the same or an economically linked undertaking.

62. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [16]. 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.

63. In my view, despite the identity and similarity between some of the parties' goods, the net effect of the visual differences is, in my view, sufficient to prevent the average consumer from mistaking one party's mark for the other. Despite both parties' marks containing the words 'LOVE HOME', the average consumer will, in my view, notice the differences in the figurative elements of the parties' marks and the presence of the solid black background in the Applicant's mark. Although I have found the marks to be similar to a medium degree, the purchasing process is predominantly a visual one and the visual differences will therefore play a heightened role. I find this to be the case even where the average consumer pays only an average level of attention during the purchasing process. Despite the high conceptual similarity between the marks, the low distinctive character of the words 'love' and 'home' in the earlier mark (and common to both marks) further points away from a finding of a likelihood of direct confusion.

64. I now consider whether there is a likelihood of indirect confusion. I note that in the recent case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper

basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

65. In *L.A. Sugar Limited v By Back Beat Inc*⁸ Mr Iain Purvis Q. C., as the Appointed Person, explained that [my words in parentheses]:

“17. Instances where one may expect the average consumer to reach such a conclusion [i.e. to conclude that marks relate to the same or economically linked undertakings] 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)”.

66. In my view, the instant case does not fall squarely within any of the categories identified by Mr Purvis Q.C. Whilst I recognise that these categories are non-exhaustive, I can see no other mental process by which the average consumer would arrive at a conclusion indicative of indirect confusion. The parties’ marks are, to my mind, so stylistically distinct that the average consumer would not presume that both relate to the same or economically-linked undertakings. A finding of indirect confusion should not be made purely because the two marks share a

⁸ Case BL O/375/10

common element.⁹ I also bear in mind the low distinctive character of the words 'love' and 'home' in both parties' marks. I can find no proper basis on which to conclude that there is a likelihood of indirect confusion.

67. The Opposition has been unsuccessful. The Application may, subject to a successful appeal, proceed to registration.

COSTS

68. I award the Applicant the sum of £750 based upon the scale published in Tribunal Practice Notice 2/2016, calculated as follows:

Consideration of the Opposition and preparation of Defence and Counterstatement	£200
Preparation of evidence and considering the opponent's evidence	£200 ¹⁰
Preparation of submissions	£350
Total:	£750

69. I therefore order Ter Molst International NV to pay to Love Home Britain Limited the sum of £750. 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 21st day of February 2023

N. R. Morris

**For the Registrar,
the Comptroller-General**

⁹ Case BLO-547-17, paragraph [81.4].

¹⁰ I have awarded a sum lower than the minimum because the material adduced was slight and included material that did not constitute evidence but information to which the decision-taker necessarily had access.