

BL O/0493/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003696442

BY ECOO RECYCLING

TO REGISTER THE TRADE MARK:

The word "ecoo" is written in a bold, dark green, lowercase sans-serif font. The letters are thick and rounded, with a consistent weight throughout. The 'e' is lowercase and has a simple, clean design. The 'c' is lowercase and connects to the first 'o'. The two 'o's are lowercase and are identical in size and shape, following the 'c'. The overall appearance is modern and minimalist.

IN CLASSES 1, 17, 19 AND 20

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 431262

BY OASE GMBH

BACKGROUND AND PLEADINGS

1. On 30 October 2020, ECOO RECYCLING (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the European Union. The applicant subsequently applied for the same trade mark in the UK on 7 September 2021. Article 59 of the Withdrawal Agreement between the UK and the European Union provides that a holder of an EU trade mark application with a date of filing prior the end of the transition period (effectively before 1 January 2021) has the right to apply to register the same trade mark as a UK right within nine months after the end of the transition period (up to and including 30 September 2021) to retain its earlier filing date of the pending EUTM. Therefore, the date of the application in these proceedings is considered to be 30 October 2020.

2. The application was partially opposed by OASE GmbH (“the opponent”) on the 22 February 2022. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is directed against the following goods of the application:

Class 17 Processed plastics specifically processed plastic products; Plastics in extruded form for use in manufacture; Plastics in extruded form and resins for use in manufacture; Mixed semi-processed plastics (grinding materials); Unprocessed and semi-processed rubber, gutta-percha, gum, asbestos, mica and substitutes for all these materials; Packing, stopping and insulating materials; Non-metallic flexible pipes, tubes and hoses.

Class 19 Building materials, not of metal; Profiles for building construction (Non-metallic -); Building panels, not of metal; Buildings, transportable, not of metal; Parking frames, not of metal; Parking posts, not of metal; Bollards, not of metal, for managing road access; Automatic and non-automatic blocking devices, not of metal, including remote-controlled; Automatic and non-automatic parking devices, not of metal, including remote-controlled; Posts, not of metal; Barriers, not of metal; Barriers, not of metal; Panels (not of metal); Height limiters, not of metal; Gates, not of metal; Gates of non-metallic materials; Road humps (Non-metallic -) for

slowing traffic; Traffic islands, not of metal; Traffic calming islands, not of metal; Guide elements, not of metal; Signalling panels, non-luminous and non-mechanical, not of metal; Goods made of recycled plastics, such as poles, beams, boards, panels for the construction of terraces, fences, barriers, fence posts.

Class 20 Park furniture and furnishings; Garden furniture and furnishings; Furniture, mirrors, picture frames; Door, gate and window fittings, non-metallic; Goods made of recycled plastic, such as park and street furniture including benches and tables, playground equipment, plant pots, containers for the storage and transport of waste, compost bins and vegetable garden pots.

3. Under section 5(2)(b), the opponent relies upon the following trade mark:

Eco Rise

Comparable UK trade mark (EU) registration no. UK00918047974

Filing date 25 April 2019.

Registration date 26 September 2019.

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

Class 6 Building and construction materials and elements of metal; Ladders, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods of metal and for use in horticulture, creating garden decorations, fountains and water features; Water-pipes of metal, including water conduits.

Class 11 Water-conducting fittings for sanitary installations, water-pipes, swimming pools and fountains; Water conditioning units; Water filtering apparatus, water purifying apparatus, pond filters, aquarium filters, fountain filters, and parts for the aforesaid goods; Fountains and water features for public installations, gardens, balconies and interiors, and

parts therefor, including water jets and water cannons; Pressurized water cleaning apparatus, Drinking bowls (automatic drinking devices); Air-conditioning apparatus and humidifiers.

Class 19 Building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden decorations, fountains and water features; Water-pipes, not of metal, including water conduits.

Class 20 Support feet, stands, fasteners, connectors and connections for horticultural elements, in particular for fountains and water features and parts therefor; Baskets, boxes, pallets, ladders and mobile stairs, not of metal.

4. As shown above, the opposition is based upon the opponent's comparable UK trade mark (EU),¹ claiming that there is a likelihood of confusion because the marks are visually, phonetically and conceptually similar, and the goods are identical or highly similar.

5. The applicant filed a counterstatement denying the claims made.

6. The opponent is represented by Murgitroyd & Company and the applicant is represented by Bureau M.F.J. Bockstael N.V. Neither party requested a hearing, however, both parties filed submissions during the evidence rounds and the opponent filed submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

7. 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

¹ Following the end of the transition period of the UK's withdrawal from the EU, all EU trade marks ("EUTM") registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (EU)' retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

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.

DECISION

8. 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.”

9. The earlier mark had not completed its registration process more than five years before the relevant date (the filing date of the mark in issue). Accordingly, the use provisions at s.6A of the Act do not apply. The opponent may rely on all of the goods it has identified without demonstrating that it has used the mark.

Section 5(2)(b) case law

10. 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

11. The competing goods are as follows:

Opponent's goods	Applicant's goods
<p><u>Class 6</u> Building and construction materials and elements of metal; Ladders, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods of metal and for use in horticulture, creating garden decorations, fountains and water features; Water-pipes of metal, including water conduits.</p> <p><u>Class 11</u> Water-conducting fittings for sanitary installations, water-pipes, swimming pools and fountains; Water conditioning units; Water filtering apparatus, water purifying apparatus, pond filters, aquarium filters, fountain filters, and parts for the aforesaid goods; Fountains</p>	<p><u>Class 17</u> Processed plastics, specifically processed plastic products; Plastics in extruded form for use in manufacture; Plastics in extruded form and resins for use in manufacture; Mixed semi-processed plastics (grinding materials); Unprocessed and semi-processed rubber, gutta-percha, gum, asbestos, mica and substitutes for all these materials; Packing, stopping and insulating materials; Non-metallic flexible pipes, tubes and hoses.</p> <p><u>Class 19</u> Building materials, not of metal; Profiles for building construction (Non-metallic -); Building panels, not of metal; Buildings,</p>

and water features for public installations, gardens, balconies and interiors, and parts therefor, including water jets and water cannons; Pressurized water cleaning apparatus, Drinking bowls (automatic drinking devices); Air-conditioning apparatus and humidifiers.

Class 19

Building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden decorations, fountains and water features; Water-pipes, not of metal, including water conduits.

Class 20

Support feet, stands, fasteners, connectors and connections for horticultural elements, in particular for fountains and water features and parts therefor; Baskets, boxes, pallets, ladders and mobile stairs, not of metal.

transportable, not of metal; Parking frames, not of metal; Parking posts, not of metal; Bollards, not of metal, for managing road access; Automatic and non-automatic blocking devices, not of metal, including remote-controlled; Automatic and non-automatic parking devices, not of metal, including remote-controlled; Posts, not of metal; Barriers, not of metal; Barriers, not of metal; Panels (not of metal); Height limiters, not of metal; Gates, not of metal; Gates of non-metallic materials; Road humps (Non-metallic -) for slowing traffic; Traffic islands, not of metal; Traffic calming islands, not of metal; Guide elements, not of metal; Signalling panels, non-luminous and non-mechanical, not of metal; Goods made of recycled plastics, such as poles, beams, boards, panels for the construction of terraces, fences, barriers, fence posts.

Class 20

Park furniture and furnishings; Garden furniture and furnishings; Furniture, mirrors, picture frames; Door, gate and window fittings, non-metallic; Goods made of recycled plastic, such as park and street furniture including benches and tables, playground equipment, plant pots, containers for the storage and

	transport of waste, compost bins and vegetable garden pots.
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12. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in Canon, Case C-39/97, the court stated at paragraph 23 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.”

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

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

instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut 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.”

15. 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.”

16. I bear in mind the following applicable principles of interpretation from *Sky v Skykick* [2020] EWHC 990 (Ch), paragraph 56 (wherein Lord Justice Arnold, in the course of his judgment, set out a summary of the correct approach to interpreting broad and/or vague terms):

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

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

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

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

17. Geoffrey Hobbs KC, sitting as an Appointed Person in the case of *Raleigh International Trade Mark* [2001] RPC 11:

“20. If the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered, the objection should be supported by evidence as to their "similarity" (whether or not the objection is directed to the use of an identical mark): Canon paragraph 22”

18. 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 the responsibility for those goods lies with the same undertaking.”

19. 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. (as he then was) noted, as the Appointed Person, in *Sandra Amalia 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.” Whilst on the other hand: “... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

Whilst on the other hand:

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

20. I note that below I have compared all of the applicant’s goods with the opponent’s best case comparison. Therefore, if similarity cannot be established with those goods that I consider are its strongest comparison, then it follows that I wouldn’t find any similarity with the opponent’s remaining specification.

Class 17

Non-metallic flexible pipes, tubes and hoses.

21. I consider that the applicant’s above goods will overlap with the opponent’s “building and construction materials and elements of metal”. I consider that the opponent’s broader category would encompass metal pipes, tubes and hoses, and therefore the goods will overlap in method of use and purpose. I also consider that the same undertaking would produce and sell all of the goods, and that they could be in competition. However, the goods do not overlap in nature as the applicant’s goods are

non-metallic and the opponent's goods are made from metal. Consequently, I consider that the goods are similar to above a medium degree.

Plastics in extruded form for use in manufacture; Plastics in extruded form and resins for use in manufacture.

22. Firstly, I note that the applicant's above goods refer to plastic material that has been extruded, which means it is forced or squeezed out of a small opening² in the shape of tubes or sheets. The goods are therefore semi-finished products for use in manufacturing. I do not consider that these goods overlap with the opponent's "building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden decorations, fountains and water features". Albeit the goods may overlap in nature, as the opponent's goods could be made from plastic, they clearly do not overlap in method of use, user or trade channels as the applicant's goods would be sold by plastic manufacturers and the opponent's goods would be sold by construction companies (with a focus on horticulture), or distributed from a hardware/DIY store. I do not consider that the goods are either complementary or in competition. I consider that the goods are dissimilar.

Processed plastics, specifically processed plastic products; Mixed semi-processed plastics (grinding materials).

23. I note that the above terms do not specify what the goods intended purposes are, it only clarifies that the goods are processed or semi-processed plastics. I therefore consider that these goods would be made and sold by plastic manufacturers, to companies that would then create or make something out of the processed plastic. Consequently, I consider that these goods are dissimilar to the opponent's class 6 and 19 goods which are building and construction materials made from, or not from, metal. The goods clearly do not overlap in method of use, user or trade/distribution channels. They are neither in competition nor complementary. I consider that the goods are dissimilar.

² <https://www.collinsdictionary.com/dictionary/english/extrude> accessed 2 May 2023

Unprocessed and semi-processed rubber, gutta-percha, gum, asbestos, mica and substitutes for all these materials.

24. I also note that the above terms do not specify what the goods intended purposes are, it only clarifies what the goods are made from. However, as these materials are unprocessed or semi-processed, I consider that these materials will eventually be made into a finished product. Therefore, I consider that the same comparison applies in paragraph 23 above. I consider that these goods do not overlap with the opponent's class 6 and 19 goods which are building and construction materials made from, or not from, metal. The goods do not overlap in nature, method of use, user or trade channels. They are neither in competition nor complementary. The goods are dissimilar.

Packing, stopping and insulating materials.

25. I consider that the applicant's above goods do not overlap with the opponent's "building and construction materials and elements of metal". The goods do not overlap in nature (metal vs non-metallic goods). The mere fact that the insulating materials are often used while constructing buildings is not sufficient to make these goods similar, as they differ in their method of use and purpose, with the opponent's goods used for construction and the applicant's goods used for finishing purposes, namely for insulation. Consequently, I do not consider that there would be an overlap in trade channels. Albeit the goods may be distributed by the same undertakings (such as hardware and DIY stores), I consider that they would be sold in different aisles and would target different users. I do not consider that the goods are complementary nor in competition. Therefore, taking the above into account, I consider that the goods are dissimilar.

Class 19

Building materials, not of metal; Profiles for building construction (Non-metallic -); Building panels, not of metal; Panels (not of metal).

26. I consider that the opponent's "building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden decorations, fountains and water features" falls within the applicant's above broader categories. I consider that the goods are identical on the principle outlined in *Meric*.

Goods made of recycled plastics, such as poles, beams, boards, panels for the construction of terraces, fences, barriers, fence posts.

27. Firstly, I note that the wording "such as" used in the applicant's term above does not limit the specification only to those goods. However, "goods made of recycled plastic" is extremely broad and could encompass such a variety of goods that it makes the term incredibly vague. Therefore my assessment will look at the goods made of recycled plastics in relation to "poles, beams, boards, panels for the construction of terraces, fences, barriers, fence posts".

28. The applicant's above goods will have some overlap with the opponent's "building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden decorations, fountains and water features", on the basis that they would be distributed by the same undertakings (hardware and DIY stores), albeit located in different aisles. The goods also overlap in nature and purpose as they are all non-metallic construction goods. However, the opponent's goods are used specifically in horticulture. The goods are neither in competition nor complementary. Thus the goods are similar to between a low and medium degree.

Gates, not of metal; Gates of non-metallic materials.

29. The applicant's above goods are used to provide a physical barrier to a point of entry. I note that these goods are made of non-metallic materials and therefore could be made from wood, and installed for use in back-gardens. I therefore consider that there may be minimal overlap with the opponent's "building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden

decorations, fountains and water features”. I consider that all of the goods may be distributed by hardware or DIY stores, however, the goods would not be sold within the same aisle. The goods may overlap in nature, to the extent that they are all non-metallic goods used in the garden. Nevertheless, I do not consider that the goods would overlap in method of use or purpose, nor are they in competition or complementary. I consider that the goods are similar, but only to a very low degree.

Buildings, transportable, not of metal.

30. The applicant’s above goods are finished products such as portable toilet facilities and portable cabins which are used for temporary accommodation. I, therefore, do not consider that these goods are self-evidently similar to the opponent’s class 19 goods, specifically “building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden decorations, fountains and water features”. They do not overlap in nature, method of use or purpose as the opponent’s goods are used in building and construction, specifically for horticulture purposes. I also do not consider that there would be an overlap in trade channels as I consider that the applicant’s goods are more specialised. The goods are neither in competition nor complementary. If there was an overlap in user, this is not enough on its own to establish similarity. Therefore, I consider that the goods are dissimilar.

Parking frames, not of metal; Parking posts, not of metal; Bollards, not of metal, for managing road access; Posts, not of metal.

31. I note that all of the applicant’s above goods are short vertical posts which are used to create a guide and mark boundaries, for traffic or parking. I therefore do not consider that these goods are self-evidently similar to the opponent’s non-metallic building and construction elements, specifically for use in horticulture. They clearly do not overlap in method of use, user, purpose or trade channels. The goods are neither in competition nor complementary. I consider that the goods are clearly dissimilar.

Barriers, not of metal; Barriers, not of metal.

32. The applicant's above goods are physical objects which are used to make it difficult for someone to access somewhere. I note that the applicant hasn't provided any submissions on what type of barriers its goods are, such as those which are used for crowd control and guide the general public on pavements, or car barriers which can be found, for example, in car parks, which offer a level of security. However, I consider that in both instances, the goods are clearly not self-evidently similar to the opponent's non-metallic building and construction elements, specifically for use in horticulture to create garden decorations, fountains or water features. The goods may all be non-metallic, but they clearly do not overlap in user, method of use, purpose or trade channels. The goods are neither in competition nor complementary. I consider that the goods are clearly dissimilar.

Height limiters, not of metal.

33. The applicant's above goods are used to offer guidance and physical protection from both height and side collisions. They are also designed to stop vehicles from impacting doorway edges. These goods are most likely made from recyclable polymers (plastics). I therefore do not consider that these goods are self-evidently similar to the opponent's non-metallic building and construction elements, specifically for use in horticulture. Albeit there may be an overlap in nature (with all of the goods potentially being made from plastic), they clearly do not overlap in method of use, purpose, user and trade channels. They are neither in competition nor complementary. I consider that the goods are dissimilar.

Road humps (Non-metallic -) for slowing traffic.

34. The applicant's above goods are not self-evidently identical to the opponent's non-metallic building and construction elements, specifically for use in horticulture to create garden decorations, fountains or water features. The applicant's goods would be provided by undertakings which specialise either in road humps or in road construction. The goods do not overlap in trade channels, method of use, user, nature or purpose. They are neither in competition nor complementary. The goods are clearly dissimilar.

Traffic islands, not of metal; Traffic calming islands, not of metal.

35. A traffic island is an object which is used in the road which channels traffic and can also be used to provide a crossing for the general public. I therefore do not consider that these goods are self-evidently identical to the opponent's non-metallic building and construction elements, specifically for use in horticulture to create garden decorations, fountains or water features. Whilst they are all non-metallic goods, they clearly do not overlap in method of use, user, trade channels or purpose. They are neither in competition nor complementary. The goods are dissimilar.

Automatic and non-automatic parking devices, not of metal, including remote-controlled.

36. I have not been provided with any submissions from the parties' regarding what the applicant's above goods are. However, it is clear that they are devices which help park vehicles. Therefore the goods are not self-evidently identical to the opponent's non-metallic building and construction elements, specifically for use in horticulture. They clearly do not overlap in method of use, user, trade channels, nature or purpose. They are neither in competition nor complementary. The goods are dissimilar.

Guide elements, not of metal.

37. I note that the parties have not provided me with any evidence or submissions regarding what the applicant's above goods are. The term is extremely vague, and it isn't clear from the term what the goods are used for and what they do. As highlighted by *Sky v Skykick* above, "a term which cannot be interpreted is to be disregarded". Consequently, I consider that the applicant's goods are dissimilar to all of the opponent's goods.

Automatic and non-automatic blocking devices, not of metal, including remote-controlled; Signalling panels, non-luminous and non-mechanical, not of metal.

38. I note that, again, the parties haven't provided me with any evidence or submissions regarding that the above goods are, what they are used for and what they

do. I consider that the same comparison applies in paragraph 37. The parties' goods are dissimilar.

Class 20

Garden furniture and furnishings.

39. I consider that the applicant's above goods may overlap with the opponent's "support feet, stands, fasteners, connectors and connections for horticultural elements, in particular for fountains and water features and parts therefor". I consider that fountains and water features would be encompassed by the term "garden furnishing", and that the same undertaking would sell both the furnishing and the parts for them. Therefore the goods will overlap in trade channels, distribution channels (being sold in the same aisle of a hardware/DIY store) and user. I also consider that the goods may be complementary. Taking the above into account, I consider that the goods are similar to a medium degree.

Door, gate and window fittings, non-metallic.

40. I consider that the applicant's above goods will have minimal overlap with the opponent's "building materials and construction elements, not of metal, pedestals, columns, bases, frameworks, supports and stands, all of the aforesaid goods not of metal and for use in horticulture, creating garden decorations, fountains and water features", on the basis that the goods would be distributed by the same undertakings (hardware and DIY stores), albeit located in different aisles. I also consider that the goods overlap in nature to the extent they are all non-metallic. However, they do not overlap in method of use or purpose. They are neither in competition nor complementary. Taking the above into account, the goods are similar to a very low degree.

Park furniture and furnishings.

41. The applicant's above goods are not self-evidently identical to the opponent's class 20 goods which are used in relation to gardens. The applicant's goods would be made

and distributed by specialist undertakings which create park furniture. The opponent's goods would be sold by hardware stores. They clearly don't overlap in nature, purpose or method of use. They are neither in competition nor complementary. Even if there was an overlap in user, this would not be enough on its own to establish similarity. Consequently, the goods are dissimilar.

Furniture, mirrors, picture frames.

42. I do not consider that the applicant's above goods are self-evidently identical with the opponent's class 20 goods. Albeit the goods may all be distributed through the same hardware/DIY stores, they would be located in different aisles. The goods clearly do not overlap in nature, method of use or purpose. They are neither in competition nor complementary. There may be an overlap in user, however, this is not enough on its own to establish similarity. Therefore, I consider that the goods are dissimilar.

Goods made of recycled plastic, such as park and street furniture including benches and tables, playground equipment, plant pots, containers for the storage and transport of waste, compost bins and vegetable garden pots.

43. As highlighted above, the wording "such as" used in the applicant's term above does not limit the specification only to those goods. However, "goods made of recycled plastic" is extremely broad and could encompass such a variety of goods that it makes the term incredibly vague. Therefore my assessment will look at the goods in relation to "park and street furniture".

44. I consider that the applicant's above goods would be made and sold by specialists in park and street furniture. I therefore do not consider that these goods would overlap with the opponent's class 20 goods, which would be used in relation to the user's garden. Therefore, the goods do not overlap in user, nature, method of use or purpose. I also do not consider that there would be an overlap in trade channels as the opponent's goods would be distributed in hardware/DIY stores or garden centres. The goods are neither in competition nor complementary. Taking all of the above into account, I consider that the goods are dissimilar.

45. It is a prerequisite of section 5(2)(b) that the goods be identical or at least similar. The opposition will, therefore, fail in respect of the above goods that I have found to be dissimilar.³ The opposition under section 5(2)(b) fails for the following goods:

Class 17 Processed plastics specifically processed plastic products; Plastics in extruded form for use in manufacture; Plastics in extruded form and resins for use in manufacture; Mixed semi-processed plastics (grinding materials); Unprocessed and semi-processed rubber, gutta-percha, gum, asbestos, mica and substitutes for all these materials; Packing, stopping and insulating materials.

Class 19 Buildings, transportable, not of metal; Parking frames, not of metal; Parking posts, not of metal; Bollards, not of metal, for managing road access; Automatic and non-automatic blocking devices, not of metal, including remote-controlled; Automatic and non-automatic parking devices, not of metal, including remote-controlled; Posts, not of metal; Barriers, not of metal; Barriers, not of metal; Height limiters, not of metal; Road humps (Non-metallic -) for slowing traffic; Traffic islands, not of metal; Traffic calming islands, not of metal; Guide elements, not of metal; Signalling panels, non-luminous and non-mechanical, not of metal

Class 20 Park furniture and furnishings; Furniture, mirrors, picture frames; Goods made of recycled plastic, such as park and street furniture including benches and tables, playground equipment, plant pots, containers for the storage and transport of waste, compost bins and vegetable garden pots.

The average consumer and the nature of the purchasing act

46. As the case law above indicates, 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 the goods are likely to be selected by the average consumer. In

³ eSure Insurance v Direct Line Insurance, [2008] ETMR 77 CA

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.”

47. The average consumer for the goods will be professionals who work in the building or construction industry, as well as members of the general public. The cost of purchase is likely to vary, although it is unlikely to be particularly high. The frequency of the purchase is also likely to vary, although it is unlikely to be particularly regular. The average consumer will take various factors into consideration such as the materials, cost, durability, quality and suitability for the user’s needs. Consequently, I consider that between a medium and high degree of attention will be paid by the average consumer when selecting the goods.

48. The goods are likely to be obtained by self-selection from the shelves of a DIY retail outlet, wholesale outlet, or its online equivalent. Alternatively, the goods may be purchased following perusal of advertisements or inspection of a catalogue. Visual considerations are therefore likely to dominate the selection process. However, I do not discount that there may also be an aural component to the purchase through advice sought from sales assistants or word-of-mouth recommendations.

Comparison of the trade marks


49. 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 trade marks must be assessed by reference to the overall impressions created by the trade 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 respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
Eco Rise	

52. The opponent's mark consists of the words “Eco Rise”. I consider that the overall impression lies in the combination of these words.

53. The applicant's mark consists of the word “ecoo” presented in stylised dark green typeface. I consider that the word “ecoo” plays a greater role in the overall impression of the mark, with the colour and stylisation playing a lesser role.

54. Visually, the marks coincide in the first 3 letters; E, C and O. I note this is a visual point of similarity. However, the opponent's mark ends in the second word "Rise", and the applicant's word mark ends in a second letter O. I bear in mind that the beginning of marks tend to make more of an impact than the ends. I also note that the marks are short in length. There is no special test which applies to the comparison of short marks, the visual similarities must be assessed in the normal way.⁴ However, it is clear that the addition of three letters to a mark which is only four letters long is clearly more significant than such an addition of three letters to a longer mark. Furthermore, the applicant's mark is presented in a green stylised typeface, which is another point of visual difference. Taking all of the above into account, I consider that the marks are visually similar to between a low and medium degree.

55. Aurally, the opponent submits that the addition of the word RISE at the end of its mark "may be dropped completely from the pronunciation at times" as consumers pay less attention to the end of marks. However, I do not consider that there is anything to suggest that the consumer would completely overlook, or choose to not articulate the end of the opponents mark (i.e. the word RISE is neither descriptive nor allusive). I therefore consider that, aurally, the opponent's mark will be pronounced as EE-CO-RISE. The applicant's mark will be pronounced as EE-COO or EK-OH. If the applicant's mark is pronounced as the former, then the marks overlap in the beginning EE syllable, and to some extent the sound of the CO v COO elements, making them aurally similar to a medium degree. However, if the applicant's mark is pronounced as the latter, only the sharing the minimal "E" beginning element, then the marks are aurally similar to a low degree.

56. Conceptually, the applicant submits that its mark has no meaning. The opponent submits that the applicant's mark would be understood as referring to the word "eco" with an altered spelling. However, I consider that the average consumer will recognise that the applicant's mark, as a whole, is an invented word that derives from the word "eco", which is reinforced by the green colour typeface. Therefore the concept of "eco" will be brought to the consumers mind. However, I also consider that there may be a

⁴ *Bosco Brands UK Limited v Robert Bosch GmbH*, Case BL- O/301/20, paragraph 44

proportion of consumers who may not notice the “eco” element, and will simply view it as an invented word.

57. The opponent’s mark consists of two ordinary dictionary words; ECO and RISE. Eco will be recognised as a shortening of the word ecology which looks at the relationship between plants, animals, people and their environment.⁵ The opponent states that the additional word rise “is simply a qualifier due to its meaning of an increase”. I agree that the word rise qualifies eco, and therefore the words create a unitary meaning that the average consumer will recognise as “the rise of ecology”.

58. Therefore, as the applicant’s mark may be seen as a derivative of the abbreviation of the word ecology (eco), and this concept is also somewhat conveyed in the opponent’s mark, I consider that the marks are conceptually similar to a low degree.

Distinctive character of the earlier trade mark

59. 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 C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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

⁵ <https://www.collinsdictionary.com/dictionary/english/ecology> accessed 1 May 2023

widespread and long-standing use of the mark has been; the amount invested by the undertaking in promotion of 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).”

60. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

61. The opponent submits that the dominant element of its mark is the word “Eco” with the word “Rise” being “ancillary” because it qualifies the word “Eco”. I also note that the applicant submits that the word “Eco” within the opponent’s mark cannot be considered as distinctive because of its reference to “ecology” i.e. the environment. Therefore, in relation to the products for which the earlier right is registered, the opponent’s mark can be seen as referring “to ecological or eco-friendly building and construction materials. Hence, it must be questioned whether the earlier trademark is distinctive”.

62. Firstly, as per *Formula One Licensing BV v OHIM*⁶, the earlier mark must be considered to have at least some distinctive character. Secondly, I do not consider that the word “Eco” is the dominant part of the opponent’s mark. As highlighted above, the words Eco and Rise together creates a new unitary meaning; the rise of ecology. Therefore the combination of these words is what makes the opponent’s mark distinctive. Thirdly, as to the distinctiveness of the word Eco in the opponent’s mark, I consider that in relation to the opponent’s goods, especially which contains the limitation “all of the aforesaid goods of metal and for use in horticulture, creating garden decorations, fountains and water features”, the word Eco is less distinctive. This is because of the overlap between ecology and horticulture, which is also known

⁶ Case C-196/11P, paragraphs 41 to 44

as ecological horticulture, which is essentially sustainable gardening. Consequently, I consider that the mark, Eco Rise, as a whole, is mildly allusive of its goods which are to be used in horticulture and therefore the mark is inherently distinctive to between a low and medium degree.

Likelihood of confusion

63. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

64. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually similar to between a low and medium.
- I have found the marks to be aurally similar to either a medium degree, or a low degree, depending on how they are pronounced.
- I have found the marks to be conceptually similar to a low degree.
- I have found the opponent's mark to be inherently distinctive to between a low and medium degree.
- I have identified the average consumer for the goods and services to be professionals who work in the building or construction industry as well as

members of the general public, who will select the goods and services primarily by visual means, although I do not discount an aural component.

- I have concluded that between a medium and high degree of attention will be paid during the purchasing process.
- I have found the parties' goods to be identical to similar to a low degree.

65. Taking all of the factors listed in paragraph 64 into account, and even bearing in mind the principle of imperfect recollection, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. This is particularly the case given the lower visual similarity (to between a low and medium degree) between the marks, and the predominantly visual purchasing process. Furthermore, the average consumer will be paying between a medium and high degree of attention during the purchasing process. Consequently, they are less prone to the effects of imperfect recollection. Nonetheless, even where the average consumer pays a medium degree of attention, the length of the parties' marks are short, and therefore I consider that the differences are more likely to be noticed. I do not consider that the average consumer would overlook the word "Rise" in the opponent's mark, or the additional "O" at the end of the applicant's mark, especially as this creates a clear conceptual hook in order to differentiate the marks (the rise of ecology vs an invented word deriving from the word eco). Consequently, I do not consider there to be a likelihood of direct confusion.

66. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

"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.”

67. In *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.

68. I also bear in mind the comments made in *Bimbo*. The CJEU stated (my emphasis):

“19. As to the merits, according to settled case-law, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see Case C-334/05 P *OHIM v Shaker* EU:C:2007:333, paragraph 33, and Case C-193/06 P *Nestlé v OHIM* EU:C:2007:539, paragraph 32).

20. The existence of a likelihood of confusion on the part of the public must be assessed globally, account being taken of all factors relevant to the circumstances of the case (see, to that effect, Case C-251/95 *SABEL* EU:C:1997:528, paragraph 22; *OHIM v Shaker* EU:C:2007:333, paragraph 34; and *Nestlé v OHIM* EU:C:2007:539, paragraph 33).

21. The global assessment of the likelihood of confusion, in relation to the visual, aural or conceptual similarity of the marks at issue, must be based on the overall impression given by the marks, account being taken, in particular, of their distinctive and dominant components. The perception of the marks by the average consumer of the goods or services in question plays a decisive role

in the global assessment of that likelihood of confusion. In this regard, the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (see, to that effect, *SABEL* EU:C:1997:528, paragraph 23; *OHIM v Shaker* EU:C:2007:333, paragraph 35; and *Nestlé v OHIM* EU:C:2007:539, paragraph 34).

22. The assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole (*OHIM v Shaker* EU:C:2007:333, paragraph 41).

23. The overall impression conveyed to the relevant public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components. However, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element (*OHIM v Shaker* EU:C:2007:333, paragraphs 41 and 42, and *Nestlé v OHIM* EU:C:2007:539, paragraphs 42 and 43 and the caselaw cited).

24. In this connection, the Court of Justice has stated that it is possible that an earlier mark used by a third party in a composite sign that includes the name of the company of the third party retains an independent distinctive role in the composite sign. Accordingly, in order to establish the likelihood of confusion, it suffices that, on account of the earlier mark still having an independent distinctive role, the public attributes the origin of the goods or services covered by the composite sign to the owner of that mark (Case C-120/04 *Medion* EU:C:2005:594, paragraphs 30 and 36, and order in Case C-353/09 P *Perfetti Van Melle v OHIM* EU:C:2011:73, paragraph 36).

25. None the less, a component of a composite sign does not retain such an independent distinctive role if, together with the other component or components of the sign, that component forms a unit having a different meaning as compared with the meaning of those components taken separately (see, to

that effect, order in Case C-23/09 P *ecoblue v OHIM and Banco Bilbao Vizcaya Argentaria* EU:C:2010:35, paragraph 47; *Becker v Harman International Industries* EU:C:2010:368, paragraphs 37 and 38; and order in *Perfetti Van Melle v OHIM* EU:C:2011:73, paragraphs 36 and 37).”

69. In *Deakins*, BL O/421/14, Mr Geoffrey Hobbs KC, sitting as the Appointed Person, stated:

“24. It is not correct to proceed on the basis that an element of a composite mark retains an independent distinctive role if, together with the other component or components of the mark, it *‘forms a unit having a different meaning as compared with the meaning of those components taken separately’*: *Bimbo SA v. OHIM* C-591/12P, EU:C:2014:305 at paragraph [25]. And even if a component of a composite mark is found to be sufficiently ‘unitary’ to retain an independent distinctive role, it still remains necessary for any assessment of ‘*similarity*’ to be made by reference to the composite mark as a whole in the manner summarised in *Bimbo SA* at paragraphs [34] and [35]:

[34] Indeed, as the Advocate General observed in points 25 and 26 of his Opinion, 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.

[35] The determination of which components of a composite sign contribute to the overall impression made on the target public by that sign is to be undertaken before the global assessment of the likelihood of confusion of the signs at issue. Such an assessment must be based on the overall impression produced by the trade marks at issue, since the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, as has been stated in

paragraph 21 above. Therefore, this does not involve an exception, that must be duly substantiated, to that general rule.”

70. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. (as he then was) considered the impact of the CJEU’s judgment in *Bimbo*, Case C-591/12P, on the court’s earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

71. In that case, Arnold J. considered the registrability of a composite word mark - JURA ORIGIN - which included the opponent’s earlier trade mark – ORIGIN. The judge found that the mark JURA ORIGIN formed a unit having a different meaning to those of the individual components. I have found the same in these proceedings.

72. I consider that having noticed that the competing trade marks are different, I see no reason why the average consumer would assume that they came from the same or economically linked undertakings. The words “Eco Rise” in the opponent’s mark forms a unit, so that as a whole, it evokes the meaning of the “rise of ecology”. I therefore do not consider that the applicant’s mark, which is an invented word deriving from the word “eco”, is a logical nor obvious brand extension of the opponent’s mark. I do not consider that the average consumer would make a connection between them because of their clear conceptual hooks (the rise of ecology vs an invented word deriving from the word eco). Consequently, I do not consider that the average consumer would think that the applicant’s trade mark was connected with the opponent, and vice versa.

73. Furthermore, and as highlighted above, the opponent’s mark, is mildly allusive of its goods which are to be used in horticulture. Therefore if a connection was made by the average consumer, in relation to the use of the word “eco” at the beginning of both marks, this would likely be viewed as a coincidence because of its allusiveness. Furthermore, if the opponent’s mark is brought to mind, this is mere association, not confusion: see *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81. Consequently, I consider there is no likelihood of indirect confusion.

CONCLUSION

74. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

75. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£550** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£200
Preparing and filling written submissions	£350
Total	£550

76. I therefore order OASE GmbH to pay ECOO RECYCLING the sum of £550. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 30th day of May 2023

L FAYTER

For the Registrar