

O-042-13

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2586969
BY GAIL BRYDEN
TO REGISTER THE TRADE MARK**

justbe

IN CLASSES 3, 4 & 44

AND:

**OPPOSITION THERETO UNDER NO. 102638
BY ULRICH JUSTRICH HOLDING AG**

BACKGROUND


1. On 27 June 2011, Gail Bryden applied to register the trade mark shown on the cover page of this decision. The application was accepted and published for opposition purposes on 12 August 2011 for the following goods and services:

Class 3 - Oils and creams for use on the face and body.

Class 4 – Candles containing essential oils for burning at home.

Class 44 - Massage treatment services.

2. On 9 November 2011, Ulrich Justrich Holding AG (“UJH”) filed a notice of opposition, directed against all of the goods and services in Ms Bryden’s application. UJH’s opposition is based upon a single ground under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). UJH relies upon the following trade mark registration which it says has been used in relation to all of the goods for which it is registered.

Trade Mark	No.	Application Date	Registration Date	Goods
	2245480	14.9.2000	6.4.2001	3 - Substances for laundry use; cleaning, polishing and scouring preparations, soaps; perfumery, cosmetics, hair lotions; but not including cotton-wool, cotton-wool balls or cotton buds.

3. On 25 November 2011, Ms Bryden filed a counterstatement. In response to the following questions at boxes 5 and 6 of the counterstatement: “Do you want the opponent to provide proof of use?” and “If you answered “yes” to question five, please state for which goods and services you require proof”, I note that Ms Bryden left both boxes blank; I will return to this point below. In her counterstatement Ms Bryden said:

“Little if no likelihood of confusion between the two trade marks.

1. Visually the logos are distinctly different with completely different font + type families used.

2. Conceptually they’re also different; Just Be is a phrase whereas Just is a word originating as an abbreviation of the owner’s name.

3. Just Be is the company name, with the secondary branding being for the individual products such as Just be Energised Body Oil.

4. The products also have a completely different look and feel and would not cause any consumer confusion.”

4. Both parties filed evidence. While neither of the parties asked to be heard, both parties filed written submissions in lieu of attendance at a hearing; I will refer to these submissions as necessary below. However, I should mention that Ms Bryden has, attached to her letter of 26 July 2012 and in the body of her letter of 10 December 2012, referred to what appears to me to be without prejudice communications between the parties. As these letters do not appear to have been copied to Forrester Ketley & Co, UJH's professional representatives in these proceedings, and as there is no indication that UJH has waived its privilege in this regard, the contents of these letters will not, insofar as they contain without prejudice material, play any part in my decision.

EVIDENCE

UJH's evidence

5. This consists of a witness statement, dated 2 March 2012, from Hansueli Jüstrich, the co-owner and member of the board of directors of UJH; Mr Jüstrich confirms, inter alia, that he is conversant with the English language. The main points arising from Mr Jüstrich's statement are:

- UJH are a well known manufacturer and distributor of a wide range of personal care and cosmetic products, founded in 1930 by Ulrich Jüstrich;
- UJH first adopted a "JUST" trade mark in 1937. While this trade mark has evolved over time, UJH are currently using the trade mark the subject of its registration, the word JUST alone and a further stylised trade mark incorporating the word "just" with, inter alia, a device of a cross above and to the right of the letter "t". In these proceedings UJH is only relying upon its earlier registered trade mark shown above;
- UJH produce and distribute JUST branded cosmetics, bath, body care, face care and footcare products worldwide and have used its trade marks continuously in the UK since the early 1990s first as JÜSTRICH, followed by the mark JÜST and now as indicated above;
- Exhibit RB2 consists of a brochure produced by UJH which, as far as I can tell, is undated. The trade mark the subject of its registration can be seen on a range of goods for, inter alia, care of the feet, various skincare products, essential oils, sun care products, products for use in the bath and shower and shampoo. The final page of the brochure contains the following text: "If you wish to buy Just [stylised] products, hold a Home Spa Experience or enquire about business and career opportunities please call us on 0845 873 2727." In addition, it identifies Just [stylised] Swiss Health at an address in Billingham, West Sussex at the telephone number mentioned above and at the web address www.justswisshealth.co.uk as a point of contact;

- UJH operates in the premium sector of the cosmetic and personal care markets. Its products are supplied through direct marketing channels, on-line outlets and individual consultants;
- UJH has a number of on-line distributors and individual consultant distributors through which its products are sold. Exhibit RB3 consists of a number of pages downloaded on 27 February 2012 from UJH’s website which identify distributors in a range of countries including The Wellness Tree Ltd of Billingham, West Sussex in the UK;
- Worldwide sales of “JUST branded products” exceeded £175m in 2006. No figures for sales in the UK for 2006 (or any other years) are provided. Exhibit RB4 consists of 4 invoices dated 27 May 1998, 20 December 2011, 23 March 2005 and 2 September 2003 respectively. The first two invoices are to JUESTRICH UK LTD, White Waltham, Berkshire (in the amount of 48,064 Swiss Francs) and The Wellness Tree Ltd at the address mentioned above (in the amount of 4,527 Swiss Francs) respectively; the goods identified in the invoices are of the type identified above; no conversion/exchange rate from Swiss francs to £ sterling is provided. The third and fourth invoices are to Just Italia in Grezzana, Italy and are of no assistance to UJH in these proceedings. Only the final two invoices bear the trade mark the subject of UJH’s registration;
- UJH “invests heavily in advertising and promoting its business and branded JUST products.” No further explanation or figures of any type are provided in support;
- UJH “also advertises and promotes JUST branded products by attending conferences and trade shows in the EU.” No details of any type are provided in support;

6. Mr Jüstrich concludes his statement in the following terms:

“15...I do however believe that I have shown that my company’s JUST marks have a high level of distinctiveness in relation to cosmetics and personal care products and a very significant reputation and goodwill and are therefore entitled to a broad scope of protection...”

Ms Bryden’s evidence

7. This consists of a witness statement, dated 26 April 2012, from Gail Bryden. Ms Bryden states that she is the owner of Just Be Oils (which she describes as “my company”). The following points emerge from Ms Bryden’s statement:

- Her “company” was founded in 2009. Ms Bryden operates as a sole trader making a range of natural hand made products for use in spas and salon

treatments (for which she provides training). She also acts as a retailer of these goods and is involved in what she describes as “Pamper Parties”;

- The just be trade mark was first used in the UK in 2009 and appeared on massage and body oils and rollerballs that were available in 5 independent retail outlets in Edinburgh;
- In March 2010, a “bespoke range” was developed and training was provided to Zest Health and Beauty at 2 salons in Edinburgh;
- In June 2010, an on-line store was launched;
- In October 2010, the first just be Pamper Party was held;
- In November 2010, goods were supplied to and training provided at Armathwaite Hall Spa in the Lake District;
- In August 2011, just be was mentioned in *Natural Health Magazine*;
- In October 2011, just be Anti-Ageing facial range and treatment was launched;
- In March 2012, just be Fresh Faced (Teens) facial was launched;
- Attached to Ms Bryden’s statement are a number of appendices. These are as follows: (1) a list of the “current” Just Be range (which consists of rollerballs, massage and body oils, candles, body butters, body scrub, a range of facial products, burning oils and inspiration cards), (2) undated examples of the just be trade mark as it appears on bottles, rollerballs, treatment candles and body butters, (3) extracts downloaded on 26 April 2012 from www.justbeoils.co.uk (including an on-line shop section) in which the just be trade mark can be seen on the type of products identified above, (4) an undated photograph of a retail display in which bottles bearing the just be trade mark can be seen, (5) undated photographs of “salon use and treatments” and the treatment room at Armathwaite Hall Spa in which the just be trade mark can be seen and (6) undated photographs of an A1 poster which appeared in Leith Walk, Edinburgh on which the just be trade mark can be seen;
- Sales of goods prior to the date of application amounted to £21,463. An invoice from Just Be Oils to Zest Health and Beauty of Haddington Place, Edinburgh dated 20 April 2010 in the amount of £1,517.25 is provided as appendix 8;
- £19,690 was spent promoting the goods prior to the date of application with Ms Bryden explaining that the focus of recent marketing and publicity initiatives has been on online reviews to reflect the changes in media patterns. Ms Bryden refers to just be featuring in a range of publications and on web sites i.e. *The Scotsman* Newspaper (5 November 2010), *The List* (a Glasgow and Edinburgh

event guide) in December 2010, in *Natural Health Magazine* (described as UK's leading glossy on complementary therapies and holistic living) in August 2011, *The Spa PR* blog post (November 2011), *Easier.com* (February 2012), *fashionmonitor.com* (February 2012), *Beauty Balm* blog spot (February 2012), *The Beautypages.com* (February 2012), *ivillage.co.uk* (described as a women's lifestyle website which has 350,000 unique users) March 2012, in promotions in "Love the skin you're in" newsletter (March 2012) and in social media i.e. Just Be Twitter and regular Just Be blogs. Only the articles in *The Scotsman* and *The List* are before the date of Ms Bryden's application. With the exception of the article from "Love the skin you're in" (appendix 7.1), copies of the various articles mentioned have not been provided;

- The goods and services have been provided in Edinburgh, Glasgow, Aberdeen, Loch Lomond and the Lake District. Appendix 7 refers to, inter alia, "Just Be Together Day Spa" and "Just Be Together" Packages" being available at Armathwaite Hall in the Lake District in March and April 2012 (i.e. after the date of Ms Bryden's application);
- Ms Bryden has supported charitable events as a way of "generating trail" and building awareness. Appendix 8.0 consists of 3 photographs taken at Zest in November 2010 (attended by 800+ people), in February 2011 and at an undated event, and at a Christmas Fair in 2011 (attended by 600+ people) but whose location is not provided. The just be trade mark appears in all of these photographs;
- "Considerable investment" has also been made in the training and support of therapists. Appendix 9 consists of an undated photograph of what Ms Bryden describes as "one of the training videos being filmed";
- Ms Bryden says:

"14. The word "just" has been adopted by many brand owners, whether registered or unregistered..."

Appendix 11 contains 9 references to what Ms Bryden refers to as: "...use of the word Just within Bodycare category." However, as copies of the various websites mentioned have not been provided, it is not possible for me to examine the nature of the use to which Ms Bryden refers and as such these references do not assist her in these proceedings;

8. Ms Bryden concludes by saying:

"15. Whilst JUST may have achieved considerable turnover with the UK, this does not give grounds for presuming a likelihood of confusion. The law of passing off protects goodwill regardless of the size of the enterprise. Just be has established goodwill within the existing outlets over the last couple of years."

9. That concludes my summary of the evidence filed to the extent that I consider it necessary.

DECISION

10. Section 5(2)(b) of the Act reads as follows:

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

(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, or

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

11. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade mark” means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

12. In these proceedings UJH is relying solely upon the trade mark shown in paragraph 2 above which constitutes an earlier trade mark under the above provisions. Given the interplay between the date on which Ms Bryden’s application was published i.e. 12 August 2011 and the date on which UJH’s registration completed its registration procedure i.e. 6 April 2001, UJH’s registration is subject to proof of use, as per The Trade Marks (Proof of Use, etc) Regulations 2004. However, as I mentioned above, by leaving boxes 5 and 6 of her counterstatement blank, Ms Bryden did not ask UJH to provide proof of use, the consequence of which is that in these proceedings UJH is entitled to rely upon all the goods for which its earlier trade mark is registered.

Section 5(2)(b) – case law

13. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* -BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the CJEU cases mentioned) on the basis indicated below:

The CJEU cases

Sabel BV v Puma AG [1998] RPC 199; Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc [1999] RPC 117; Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V. [2000] F.S.R. 77; Marca Mode CV v Adidas AG & Adidas Benelux BV [2000] E.T.M.R. 723; Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-6/01; Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH C-120/04; Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P.

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 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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

The average consumer and the nature of the purchasing process

14. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services and then to determine the manner in which these goods and services will be selected by the average consumer in the course of trade. As all of the goods and services at issue in these proceedings will be used by members of the general public, they are the average consumer.

15. As to how the average consumer will select the goods and services at issue, in their evidence/submissions the parties identify the manner in which their goods and services actually reach their end consumers, with UJH's goods supplied through direct marketing, on-line and by individual consultants and Ms Bryden's goods and services available through spas, salons, on-line and at Pamper Parties. However, as none of the specifications at issue are limited in any way to reflect these characteristics, it is use on a notional basis across all trading types that I must consider. On that basis, the average consumer is, in my experience, likely to select the goods and services at issue by primarily visual means having encountered the trade marks on goods selected from, for example, a shelf in a conventional retail setting or (in relation to both goods and services) from the pages of a website or brochure. However, that does not mean that aural considerations will not also play a part in the selection process. To the contrary, given the nature of the goods and services at issue, interaction with, where possible, a sales assistant/consultant prior to selection is, in my view, quite possible. As to the cost of the goods and services at issue, bearing in mind that none of the specifications are limited in any way, I must once again (and notwithstanding the parties' submissions to

the effect that their goods and services are both positioned at the premium end of the market) consider the notional position. In her statement Ms Bryden said:

“12...These products are not impulse purchases (due to their premium positioning and the fact they are skincare)...”

16. In my experience, the cost of (broadly speaking) personal care products in class 3, candles containing essential oils and massage treatment services can vary quite considerably, ranging from relatively modest sums to many hundreds of pounds. However, even when relatively small sums are in play, given that the goods and services at issue are for use on or in relation to the body (classes 3 and 44) or for scenting one’s home (class 4), the average consumer is, in my view, likely to take at least a reasonable degree of care when making their selection.

Comparison of goods and services

17. The competing goods and services are as follows:

Ms Bryden’s goods and services	UJH’s goods
Class 3 - Oils and creams for use on the face and body.	Substances for laundry use; cleaning, polishing and scouring preparations, soaps; perfumery, cosmetics, hair lotions; but not including cotton-wool, cotton-wool balls or cotton buds.
Class 4 – Candles containing essential oils for burning at home.	
Class 44 - Massage treatment services.	

18. The leading authorities on how to determine similarity between goods and services are considered to be *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117 and *British Sugar Plc v James Robertson & Sons Ltd (Treat)* [1996] R.P.C. 281. In the first of these cases the CJEU accepted that all relevant factors should be taken into account including the nature of the goods/services, their intended purpose, their method of use and whether they are in competition with each other or are complementary. The criteria identified in the *Treat* case were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market.
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular

whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

19. In reaching a conclusion I will also keep in mind the decision of the General Court in *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05 i.e.

“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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

20. In relation to complementary goods and services the comments of the Court of First Instance (now the General Court) in *Boston Scientific Ltd v OHIM* case T-325/06 are relevant:

“82 It is true that goods are complementary if 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 (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 *P Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM – Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR I-0000, paragraph 48).”

Class 3

21. In its submissions UJH said:

“...Thus, we would submit that the goods [in Ms Bryden’s application in class 3]...are identical to “cosmetics” or, in the alternative, would be highly similar to those goods or indeed other goods covered by [UJH’s] earlier registration.”

22. Collins English Dictionary 2000 defines “cosmetic” as:

“1. noun any preparation applied to the body, especially the face, with the intention of beautifying it.”

23. As “oils and creams for use on the face and body” in Ms Bryden’s application would fall within the broader term “cosmetics” contained in UJH’s earlier trade mark, the competing goods are, on the principle outlined in *Gérard Meric*, identical.

Classes 4 and 44

24. In its submissions UJH said:

“The class 44 services...are clearly very similar to the class 3 goods in [UJH’s] earlier trade mark. Thus [UJH’s] goods can be used in the provision of class 44 massage treatment services. Cosmetics will often take the form of oils and creams and those goods are commonly applied to the body during the provision of massage treatment services...”

And:

“The class 4 goods...are again goods which would commonly be used during the provision of class 44 massage treatment services. On the same basis as explained above, the goods in class 4 are similar to [the goods in UJH’s registration] in that there is often use, simultaneously, of the class 3 goods and class 4 candles during the provision of class 44 massage treatment services. There is therefore a clear and direct link in respect of the products and services...”



25. Turning first to the services in class 44, as massage treatment can take place without the use of oils, creams etc., the use of UJH’s cosmetics in class 3 (which would, as I mentioned above, include oils and creams) are not, to use the words of *Boston Scientific*, indispensable for the provision of Ms Bryden’s massage treatment services. However, I am inclined to agree with UJH that as massage treatment is often (more usually) conducted in combination with various oils and creams etc., the average consumer is likely to think that UJH’s goods are important/complementary to the provision of Ms Bryden’s service.

26. Finally, insofar as Ms Bryden’s goods in class 4 are concerned, while the users of these goods may be the same as UJH’s goods i.e. the general public, this point of similarity tells one little. The intended purpose and method of use of the competing goods are clearly different, and while perfumery and cosmetics may include essential oils as a constituent (giving rise to a degree of similarity in the physical nature of the competing goods), the goods are not in competition with one another, nor are they likely to appear (for example) in the same area (let alone on the same shelf) of a supermarket. Finally, the goods are not, in my view, complementary on the basis

outlined in *Boston Scientific*. If there is any similarity between the competing goods it must, in my view, be at an extremely low level.

Comparison of trade marks

27. For the sake of convenience the trade marks to be compared are as follows:

Ms Bryden's trade mark	UJH's trade mark
	

28. It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as a whole and does not pause to analyse their various details. In addition, he/she rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he/she has kept in his or her mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must then go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

Distinctive and dominant components

29. Ms Bryden's trade mark consists of the word "just" presented in lower case in a slightly stylised font accompanied by the enlarged word "be" presented in a cursive script. UJH's trade mark consists of the word Just presented in title case in a slightly stylised script above and below which appears two lines creating the appearance of an oval or background to the word. In its submissions UJH said:

"...whilst [the competing trade marks] are stylised, the level of styling of each of the marks is minimal.."

And:

"The word JUST, while being a dictionary word, is a distinctive word in relation to the goods and services in question."

30. In her statement Ms Bryden said:

"9...One fundamental factor is that the word "just" is a common English language word, which only attracts limited protection..."

And:

"14. The word "just" has been adopted by many brand owners, whether registered or unregistered..."

31. Insofar as UJH's trade mark is concerned, the addition of the oval/border is (if it is noticed at all) unlikely to be given any trade mark significance by the average consumer. The word "Just" is, therefore, the dominant element of UJH's trade mark. As to Ms Bryden's trade mark, although the word "just" appears as the first element and the second element i.e. the word "be" is significantly larger, it will still be construed by the average consumer as the phrase "just be". As, in my view, this combination is likely to identify a concept in the mind of the average consumer (I will return to this point below), I do not think either element can be considered dominant.

32. Turning now to distinctiveness, I note that in *Bignell v Just Employment Law Ltd* - [2008] FSR 6, Mr Robert Englehart QC sitting as a deputy judge concluded that the words "Just Employment" were descriptive of, inter alia, legal services relating to employment matters. The Trade Marks Registry's approach to trade marks containing the word "Just" has been drafted with this decision in mind and indicates that trade marks containing, inter alia, the word "Just" can mean, inter alia, we specialise in (Just Education) or to denote purity (JUST JUICE) or to mean all that is required (JUST PLUG IT IN). Equally the practice indicates that:

“...this practice will not be applied blindly, and trade marks containing words such as “just” and “simply” will be assessed in their totality.”

33. The word "Just" alone is an English dictionary word with a range of meanings that will, in my view, be well known to the average consumer. Although Ms Bryden refers to a number of trade marks that are in use by others which include the word "Just" (appendix 11 refers), as I mentioned above, as no details of the trade marks in use have been provided these references do not assist Ms Bryden. Considered alone, the word "just" does not, as far as I am aware, describe the goods for which UJH's trade mark is registered, nor is it non-distinctive for such goods; it is then both the dominant and distinctive element of UJH's trade mark. As to Ms Bryden's trade mark, the phrase "just be" does not (once again as far as I am aware) either describe the goods or services for which registration is sought nor is it non-distinctive for such goods and services. In my view, Ms Bryden's trade mark has no dominant elements, the distinctiveness lies in the trade mark as a whole. I will now approach the visual, aural and conceptual similarity with these conclusions in mind.

Visual similarity

34. The word "Just" is the distinctive and dominant element of UJH's trade mark and the first word in Ms Bryden's trade mark. However, bearing in mind the additional word "be" in Ms Bryden's trade mark and the differences in presentation, there remains, in my view, a reasonable degree of visual similarity between the competing trade marks.

Aural similarity

35. As the oval/background to UJH's trade mark will not be articulated by the average consumer, UJH's trade mark will be referred to by the single word "Just"; Ms Bryden's

trade mark will be referred to as “just be”, which, once again in my view, results in a reasonable degree of aural similarity between the competing trade marks.

Conceptual similarity

36. The word “Just” has, as I mentioned above, a range of meanings many of which will be known to the average consumer. Considered alone, the word “Just” is likely to convey one or more of these meanings to the average consumer. However, in my view, Ms Bryden’s trade mark is likely to create in the average consumer’s mind the concept of equilibrium or alternatively invites the average consumer to ask “just be” what? In my view, the conceptual messages triggered by Ms Bryden’s trade mark are likely to be different to any of the conceptual messages triggered by the word “Just” alone, and as a consequence, the competing trade marks are, in my view, conceptually dissimilar.

Distinctive character of UJH’s earlier trade mark

37. I must now assess the distinctive character of UJH’s trade mark. The distinctive character of a trade mark can be appraised only, first, by reference to the goods for which it is registered and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In its submissions UJH said:

“[UJH] has submitted evidence of use of the JUST trade mark in relation to a broad range of personal care and cosmetic products in the UK, including bath products, body care products, face care products and foot care products. [Ms Bryden] has not challenged [UJH’s] evidence and it is submitted that the use of the JUST trade mark in the United Kingdom further supports and enhances the inherent distinctiveness of the term JUST in relation to the goods for which it is registered.”

38. Although I have found that the word “Just” in UJH’s trade mark neither describes nor is non distinctive for the goods for which it is registered, consisting as it does of a well known English language word as its dominant element, UJH’s trade mark is, absent use, possessed of only a modest degree of inherent distinctive character. Insofar as the evidence provided is concerned, this does not assist UJH. It is, as I noted above, either undated (exhibit RB2), after the material date (exhibit RB3), or provides no clear indication of turnover in the United Kingdom or of any amounts spent on or events attended to advertise and promote goods sold under the trade mark.

Likelihood of confusion

39. In determining whether there is a likelihood of confusion, 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 services and vice versa. As I mentioned above, it is also necessary for me to factor in the distinctive character of UJH's trade mark as the more distinctive this trade mark is the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods and services, the nature of the purchasing process and 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 he has retained in his mind. Earlier in this decision I concluded that:

- The average consumer of the goods and services is a member of the general public;
- While the average consumer will select the goods and services by predominantly visual means, aural consideration will also play a part in the selection process;
- The average consumer is likely to take at least a reasonable degree of care when selecting the goods and services at issue;
- The competing goods in class 3 are identical;
- If Ms Bryden's goods in class 4 are similar to UJH's goods in class 3 at all, the degree of similarity is extremely low;
- Ms Bryden's services in class 44 are complementary to UJH's goods in class 3;
- The word "Just" is the distinctive and dominant element of UJH's trade mark;
- Ms Bryden's trade mark has no dominant element, the distinctiveness lying in the trade mark as a whole;
- There is a reasonable degree of visual and aural similarity between the competing trade marks;
- The competing trade marks are conceptually dissimilar;
- UJH's trade mark is inherently distinctive to only a modest degree, and, on the basis of the evidence provided, this inherent degree of distinctive character has not been enhanced through use.

40. In reaching a conclusion on the likelihood of confusion, I note that in *The Picasso Estate v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) – Case C-361/04, the CJEU said:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

41. However, I also note that in *Nokia Oyj, v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) – Case T-460/07 the GC said:

“66. Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98).”

42. Having considered the reasonable degree of visual and aural similarity between the competing trade marks, the identity in the goods in class 3, what I consider to be the complementary nature of the services in class 44, the reasonable degree of care the average consumer will take when selecting the goods and services and the concept of imperfect recollection, I am not satisfied that the different conceptual messages the competing trade marks are likely to convey to the average consumer are, in the circumstances of this case, (to use the words of the court) sufficient “to neutralise the visual and aural similarities” between them. While the differences in the competing trade marks are, in my view, more than sufficient to avoid direct confusion (i.e. where one trade mark is mistaken for another), the similarities I have identified earlier in this decision are, in my view, likely to lead to indirect confusion i.e. where the average consumer assumes the goods and services come from undertakings which are economically linked. As a consequence of that conclusion, UJH’s opposition to Ms Bryden’s goods in class 3 and services in class 44 succeeds.

43. However, the differences in the competing trade marks combined with what I consider to be (at best) the extremely low level of similarity between Ms Bryden’s goods in class 4 and UJH’s goods in class 3 are, when taken together, sufficient to avoid either direct or indirect confusion and UJH’s opposition to Ms Bryden’s goods in class 4 fails.

44. Having reached the above conclusions, I have not overlooked that in her statement and submissions, Ms Bryden points to what she considers to be the different “routes to market” of the parties’ goods and services (upon which I have commented above), and the difference in the packaging/get up of the parties’ products. The latter argument does not assist Ms Bryden for the reasons outlined in *Devinlec Développement Innovation Leclerc SA v Office for Harmonization in the Internal Market (Trade Marks and Designs)*

(OHIM) Case T- 147/03, in which the Court of First Instance (now the General Court) said:

“104 Consideration of the objective circumstances in which the goods covered by the marks are marketed is fully justified. The examination of the likelihood of confusion which the OHIM authorities are called on to carry out is a prospective examination. Since the particular circumstances in which the goods covered by the marks are marketed may vary in time and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, that is, the aim that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions, whether carried out or not, and naturally subjective, of the trade mark proprietors.”

45. Finally, Ms Bryden’s evidence indicates that she has used the trade mark the subject of her application since 2009. However, the relatively low level of turnover achieved (£21,463) and the modest amount spent on making the trade mark known (£19,690) prior to the date of the application for registration, combined with the limited geographical nature of the use (Edinburgh, Glasgow, Aberdeen and Loch Lomond in Scotland and at one venue in the Lake District), falls a long way short of allowing me to conclude that by the date of her application for registration, the average consumer had become exposed to the competing trade marks to such an extent that they are able to distinguish between them.

Conclusion

46. UJH’s opposition to Ms Bryden’s goods in class 3 and services in class 44 succeeds but fails in relation to the goods in class 4.

Costs

47. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. As UJH has been successful in relation to 2 of the 3 classes it opposed, it is entitled to an award of costs. Bearing this in mind, combined with the fact that UJH’s evidence served no purpose in these proceedings, I award costs to UJH on the following basis:

Preparing a statement and considering Ms Bryden’s statement:	£200
Considering Ms Bryden’s evidence:	£200
Written submissions:	£200
Official fee:	£200

Total

£800

48. I order Gail Bryden to pay to Ulrich Justrich Holding AG the sum of **£800**. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25th day of January 2013

**C J BOWEN
For the Registrar
The Comptroller-General**