

O/361/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003526298

BY KNATURECARE LIMITED

TO REGISTER THE TRADE MARK:



IN CLASS 3

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600001552

BY KALABASH LIMITED

Background and pleadings

1. On 25 August 2020, KNatureCare Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 2 October 2020. The applicant seeks registration for the following goods:

Class 3 Acne cleansers, cosmetic; After-sun oils [cosmetics]; Aromatherapy oil; Aromatherapy oils; Aromatic essential oils; Aromatic oils; Aromatic oils for the bath; Aromatics [essential oils]; Baby oil; Baby oils; Bath and shower oils [non-medicated]; Bath oil; Bath oil, not for medical use; Bath oils; Beard oil; Body and facial oils; Body oil; Body oil spray; Body oils; Cleansing oil; Cosmetic oils; Essential oils; Essential oils for the care of the skin; Face oils; Facial oil; Facial oils; Hair nourishers; Hair oil; Hair oils; Natural cosmetics; Natural essential oils; Non-medicated shower oils; Oils for the skin; Shaving oil; Shaving oils; Skin care oils [cosmetic]; Skin care oils [non-medicated]; Sun tan oil.

2. The application was opposed by Kalabash Limited (“the opponent”) on 17 December 2020. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies on the following trade mark:



UK trade mark no. UK00003318259

Filing date 15 June 2018

Registration date 7 September 2018

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

Class 3 Handmade natural and organic toiletries and cosmetics including both scented and unscented for women and men: handmade bar soap; liquid

handmade soap; liquid soap; liquid hand soap/body wash; body lotions, body oil; facial moisturisers; facial oils: facial serums, balms and moisturisers; hand, foot and body scrubs; facial scrubs; facial cleanser; facial toner; hand and foot creams, lotions and balms; body butters and moisturisers; bath salts; lip balms; lip butter; lip scrubs; oil-free lotion sprays; facial cleanser, facial toner; facial moisturiser; scented bath salts; bath/shower oil; bath/shower gel; shower moisturisers; bath milks; bath bombs; perfume; body sprays; natural deodorant; face and body masks; shaving cream and shaving soap; shaving balm; beard oils; massage oils; massage oil/bars; spot cream; cosmetic floral toners and floral waters; facial mists, micellar water; gel cleanser cream cleanser, essential oils; body polish; haircare - shampoos; conditioner; masks, mousse; oil; pomade; Skincare preparations; Anti-aging skincare preparations; Non-medicated skincare preparations; Cosmetic products in the form of aerosols for skin care; Soap-free washing emulsions for the body.

Class 4 Handmade scented candles.

3. The opponent claims that there is a likelihood of confusion because its mark is similar to the applicant's mark and the parties' respective goods are similar. The opponent is opposing all goods for which the applicant seeks protection.

4. The applicant filed a counterstatement denying the similarity of the marks.

5. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20 (4) shall continue to apply. Rule 20 (4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

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

7. Rule 62 (5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary; however, the applicant did file written submissions in lieu. This decision is taken following a careful perusal of the papers.

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

Preliminary Issues

9. In its Form TM7F, and in its written submissions, the opponent made a point that I intend to address as preliminary issue.

10. In the Form TM7F, the opponent submitted an image of soap bar packaging which is branded with the 'K' from their mark. In their submissions, they stated the following:

“It should be noted that during the design process of the earlier mark UK00033318259, the letter 'K' was designed to be separate from the remaining letters in the word Kalabash intentionally

[...]

The Kalabash logo/Mark was designed to allow for several uses:

- The entire mark for the website and product labels.
- The K alone, with the calabash gourd hanging from it which is embossed on to Kalabash soap bars and packaging.
- The calabash gourd alone, as a social media icon.”

11. My comparison must be of the marks as registered. Therefore, the opponent’s submissions about the way in which the mark is used in practice, specifically the K being used by itself, does not assist them.

Section 5(2)(b)

12. 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.”

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

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

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of IR for registration earlier than that of the trade mark in question, taking

account (where appropriate) of the priorities claimed in respect of the trade marks

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

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

Section 5(2)(b) case law

15. 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

16. I note that in the Form TM8, the applicant did not deny that the parties' respective goods are similar. Consequently, I can proceed on the basis that it is not in issue that there is at least some similarity between the goods. However, as the opponent did not specify what degree of similarity it considers exists between the parties' respective goods in its pleading, I must still undertake the comparison in order to identify the degree of similarity between them.

17. The competing goods are as follows:

Opponent's goods	Applicant's goods
<p><u>Class 3</u> Handmade natural and organic toiletries and cosmetics including both scented and unscented for women and men: handmade bar soap; liquid handmade soap; liquid soap; liquid hand soap/body wash; body lotions, body oil; facial moisturisers; facial oils: facial serums, balms and moisturisers; hand, foot and body scrubs; facial scrubs; facial cleanser; facial toner; hand and foot creams, lotions and balms; body butters and moisturisers; bath salts; lip balms; lip butter; lip scrubs; oil-free lotion sprays; facial cleanser, facial toner; facial moisturiser; scented bath salts; bath/shower oil; bath/shower gel; shower</p>	<p><u>Class 3</u> Acne cleansers, cosmetic; After-sun oils [cosmetics]; Aromatherapy oil; Aromatherapy oils; Aromatic essential oils; Aromatic oils; Aromatic oils for the bath; Aromatics [essential oils]; Baby oil; Baby oils; Bath and shower oils [non-medicated]; Bath oil; Bath oil, not for medical use; Bath oils; Beard oil; Body and facial oils; Body oil; Body oil spray; Body oils; Cleansing oil; Cosmetic oils; Essential oils; Essential oils for the care of the skin; Face oils; Facial oil; Facial oils; Hair nourishers; Hair oil; Hair oils; Natural cosmetics; Natural essential oils; Non-medicated shower oils; Oils for the skin; Shaving oil; Shaving oils; Skin care</p>

<p>moisturisers; bath milks; bath bombs; perfume; body sprays; natural deodorant; face and body masks; shaving cream and shaving soap; shaving balm; beard oils; massage oils; massage oil/bars; spot cream; cosmetic floral toners and floral waters; facial mists, micellar water; gel cleanser cream cleanser, essential oils; body polish; haircare - shampoos; conditioner; masks, mousse; oil; pomade; Skincare preparations; Anti-aging skincare preparations; Non-medicated skincare preparations; Cosmetic products in the form of aerosols for skin care; Soap-free washing emulsions for the body.</p> <p><u>Class 4</u> Handmade scented candles.</p>	<p>oils [cosmetic]; Skin care oils [non-medicated]; Sun tan oil.</p>
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18. 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 for 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.”

19. 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

20. 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.”

21. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

22. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“... there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think the responsibility for those goods lies with the same undertaking.”

23. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.” 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.”

24. “Acne cleansers, cosmetic”, “skin care oils [cosmetic]”, “cosmetic oils”, “skin care oils [non-medicated]” and “cleansing oil” in the applicant’s specification fall within the broader categories of “facial cleanser” and/or “skincare preparations” in the opponent’s specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

25. “Aromatherapy oil”, “aromatherapy oils”, “aromatic oils”, “aromatic essential oils”, “aromatics [essential oils]”, “essential oils”, “essential oils for the care of the skin” and “natural essential oils” in the applicant’s specification are identical on the principle outlined in *Meric* to “essential oils” in the opponent’s specification.

26. “Aromatic oils for the bath”, “bath and shower oils [non-medicated]”, “bath oil”, “bath oil, not for medical use”, “bath oils” and “non-medicated shower oils” in the applicant’s specification are either self-evidently identical or identical on the principle outlined in *Meric* to “bath/shower oil” in the opponent’s specification.

27. “Beard oil” in the applicant’s specification is self-evidently identical to “beard oils” in the opponent’s specification.

28. “Body [...] oils”, “body oil”, “body oil spray” and “body oils” in the applicant’s specification is self-evidently identical or identical on the principle outlined in *Meric* to “body oil” in the opponent’s specification.

29. “[...] facial oils”, “face oils”, “facial oil” and “facial oils” in the applicant’s specification are self-evidently identical to “facial oils: facial serums, balms and moisturisers” in the opponent’s specification.

30. I have no submissions from the opponent as to what “haircare - shampoos” in their submission covers. To my mind, the inclusion of the word ‘shampoo’ could either be

specifying what is meant by the term 'haircare' i.e. shampoo only, or it could be intended to cover both 'haircare' and 'shampoo'. If it is a broad term which covers all types of haircare, then "hair nourishers", "hair oil", and "hair oils" in the applicant's specification fall within the broader category of "haircare - shampoos" in the opponent's specification, and therefore will be considered identical on the principle outlined in *Meric*. If the term is limited only to shampoo, then similarity can still be established between the goods. They overlap in method of use, purpose and user because they are all types of hair care. They do not overlap in nature as hair oils and nourishers are oil based, and shampoos are thicker in texture and lather when massaged into the scalp. However, I consider that there may be an overlap in trade channels. They are neither complementary, nor in competition. I consider the goods to be similar to at least a medium degree.

31. "Natural cosmetics" in the applicant's specification is identical on the principle outlined in *Meric* to "handmade natural and organic toiletries and cosmetics including both scented and unscented for women and men" in the opponent's specification.

32. "Shaving oil" and "shaving oils" in the applicant's specification are similar to "shaving cream and shaving soap" in the opponent's specification. They overlap in user, method of use and purpose because they are all used to prepare and be applied to the skin before shaving for the purpose of hair removal. However, they differ in nature, as shaving creams and soaps are creamy in texture and lather when massaged into the skin, whereas, an oil does not, but creates a thin layer of protection. They are not complementary; however, they will be in competition with each other because the average consumer could choose either to achieve the same result. Therefore, I consider the goods to be similar to a high degree.

33. "Body oil" and/or "facial oils [...]" in the opponent's specification fall within the broader category of "oils for the skin" in the applicant's specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

34. "After-sun oils [cosmetics]", "sun tan oil", "baby oil" and "baby oils" in the applicant's specification fall within the broader category of "oil" in the opponent's specification. These goods will be considered identical on the principle outlined in *Meric*.

The average consumer and the nature of the purchasing act

35. 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 *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.”

36. The average consumer for the goods will be members of the general public. However, I do not discount the users of essential oils and body oils could include a professional such as an aromatherapist or masseuse. The cost of the goods in question is likely to vary, however, on balance it is likely to be relatively low. The majority of the goods will be purchased relatively frequently. The average consumer will take various factors into consideration such as the fragrance, texture, cost, quality and suitability for their specific skin/hair type. Therefore, the level of attention paid during the purchasing process will be medium.

37. The goods are likely to be obtained by self-selection from shelves of a retail outlet or online equivalent. 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 a sales assistant or representative.



Comparison of the trade marks

38. 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 Court of Justice of the European Union (“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.”

39. 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.

40. The respective trade marks are shown below:

Opponent’s trade mark	Applicant’s trade mark
	

41. The opponent's mark consists of the word Kalabash in a stylised black font. The stylised K's top arm over reaches the majority of the mark, with a droplet at the end which contains two rows of hollow circles; first a row of 4, second a row of 5. I consider that the overall impression lies in the combination of these elements.

42. The applicant's mark consists of the highly stylised letter K. Underneath, in a less stylised font, is the wording KNatureCare. The whole mark is in green. Although the eye is naturally drawn to the element of the mark which can be read, given the size of the letter above, I consider that it plays a roughly equal role in the overall impression with the word element. The use of colour plays a lesser role.

43. Visually, the marks coincide in the fact that they both start with, and include, a stylised letter K. However, due to its highly stylised nature, the K in the applicant's mark could also be viewed as either the letter H, the letters JC, or it could be just seen as a purely decorative device. As the wording beneath the applicant's mark, KNatureCare, starts with the letter K, I consider that this allows the average consumer to make the connection that the element above is in fact the letter K. As this represents the opponent's best case, I will proceed on the basis that the average consumer will identify the letter K in the applicant's mark. As both marks include the letter K, which is stylised in a similar way, this acts as a point of visual similarity. Both marks also include the letter 'a', although it only appears twice in the applicant's mark, whereas, it appears three times in the opponent's mark. This also acts as a visual point of similarity.

44. However, the stylised K differs in both marks. The opponent's K is bigger with the arm of the K extended across the mark, unlike the applicant's K which is not extended. Visually the opponent submits that the "extended arm of the 'K' in the earlier mark is a visual representation of a branch from a Calabash tree" and "the droplet represents a decorated calabash gourd growing from the branch". Firstly, I do not consider that a significant proportion of average consumers would know or recognise the calabash tree or the traditional presentation of the gourds. Secondly, although both K's have a droplet device, it differs in both marks, with the opponent's containing hollow circles, and the applicant's containing geometric lines to create a leaf design. These all further act as points of visual difference.

45. There are also a number of letters which are not shared by both marks. The opponent's mark is one word; Kalabash, composed of eight letters. The applicant's mark is composed of a large letter device which is followed by a conjoined letter, K, the word 'Nature' and the word 'Care' put together to create one word. This is composed of eleven letters. These act as points of visual difference between the marks. Taking the above into account, I consider the marks are visually similar to a low degree.

46. Aurally, the opponent's mark would be pronounced as KAL-AH-BASH. The applicant's KNatureCare element would be given its ordinary pronunciation, KAY-NATURE-CARE. As the marks only share the 'KA' part of the first syllable, I consider the marks to be aurally similar to a low degree.

47. Conceptually, as highlighted by the above, the opponent submits that their mark's concept is based on the Calabash tree which grows in Dominica. I consider it unlikely that the average consumer will recognise this meaning in the opponent's mark. Therefore, I consider the opponent's mark is likely to be viewed as an invented word which would be attributed no particular meaning.

48. The letter 'K' in the applicant's mark will not convey any particular meaning. The average consumer will recognise the words 'nature' and 'care' within the applicant's mark. The leaf design of the droplet, and the green colouring of the mark also reinforces the idea of nature. Care is an ordinary dictionary word which will be given its ordinary meaning. The applicant's mark as a whole could be recognised as conveying the concept of nature, which takes care of you, or provides you with care. Consequently, I consider the marks to be conceptually dissimilar.

Distinctive character of the earlier trade mark

49. 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 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).”

50. 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.

51. As the opponent has not filed any evidence to show that the distinctiveness of its mark has been enhanced through use, I only have the inherent position to consider.

52. The opponent submits that the K “was designed to be and is the dominant distinctive element of the earlier mark”. However, I disagree. The earlier mark’s distinctiveness lies in the combination of the stylised K and the remaining letters - alabash. This is because the mark will be viewed as a whole. As the letter K in the earlier mark is incorporated into a word, I do not consider that it will be attributed any independent significance. Overall, I consider the opponent’s mark is inherently distinctive to a high degree.

Likelihood of confusion

53. 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.

54. 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 a low degree.
- I have found the marks to be aurally similar to a low degree.
- I have found the marks to be conceptually dissimilar.
- I have found the earlier mark to be inherently distinctive to a high degree.
- I have identified the average consumer as members of the general public and professionals such as aromatherapists or masseuses, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process.
- I have found the parties goods to be highly similar or identical.

55. Taking all of the factors listed in paragraph 54 into account, particularly the visual, aural and conceptual differences between the marks, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. Notwithstanding the similarities in the stylisation of the letter 'K' in each mark, I consider that the average consumer would not overlook the KNatureCare element within the applicant's mark or the additional letters -alabash in the opponent's mark. Taking the above into account, I do not consider there to be a likelihood of direct confusion.

56. 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., 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."

57. Having identified the visual, aural and conceptual differences between the marks, I can see no reason why the average consumer would conclude that they originate from the same or economically linked undertakings. KNatureCare is not a natural variant, nor logical brand extension of the word Kalabash. In my view, given that they are incorporated into different words in each mark, the similarities in the stylisation of the letter 'K' is more likely to be viewed as a coincidence, rather than indicating that the marks originate from the same or economically connected undertakings. I do not, therefore, consider there to be a likelihood of indirect confusion.

Conclusion

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

Costs

64. The applicant has been successful and is entitled to a contribution towards its costs. On 3 May 2021, the applicant submitted a costs proforma setting out the costs incurred in defending these proceedings. These consisted of:

Notice of Defence:	5hrs
Considering forms filed by the other party	2hrs
Total:	7hrs

65. The registrar usually awards costs on a scale published in Tribunal Practice Notice 2/2016. As a matter of practice, litigants in person are asked to complete a costs proforma. The purpose of this is to ensure that the costs awarded do not exceed the amount spent on the proceedings. There is no right to be awarded the amount claimed. This is subject to an assessment of the reasonableness of the claim and must also take account of the registrar's practice of awarding costs on a contributory, not compensatory, basis.

66. Approaching the matter in this way, I consider the above figures submitted by the applicant to be a fair and reasonable award of costs.

Total	7 hours @ £19	£133.00
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67. I have calculated the latter by adopting the standard rate used to calculate costs for unrepresented parties under The Litigants in Person (Costs and Expenses) Act 1975 (as amended) which sets the minimum level of compensation for litigants in person at £19 per hour. I multiplied this by the time I consider was reasonably spent on this application (7 hours).

68. I therefore order Kalabash Limited to pay KNatureCare Limited the sum of £133.00
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 13th day of May 2021

L FAYTER

For the Registrar