

O/936/22

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003652902
BY SHENZHEN PUREMATE TECHNOLOGY CO., LTD TO REGISTER THE
FOLLOWING TRADE MARK:**

upufe

IN CLASS 11

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 427657 BY GROUPE ETCHART SAS**

Background and Pleadings

1. On 8 June 2021, Shenzhen Puremate Technology Co., Ltd ('the Applicant') filed an application to register the mark shown on the front page of this decision, number UK00003652902. The application was published for opposition purposes in the *Trade Marks Journal* on 20 August 2021. Registration is sought in respect of the following goods:

Class 11: *Water purifying apparatus and machines; air filtering installations; disinfectant dispensers for toilets; sanitary apparatus and installations; gas scrubbing apparatus; purification installations for sewage; air deodorizing apparatus; ionization apparatus for the treatment of air or water; air sterilizers; air purifying apparatus and machines.*

2. On 20 October 2021, the application was opposed by Groupe Etchart SAS ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The Opponent relies on the following earlier registration, relying on all of the goods and services in its specification:

UK00915859481



Filing date: 26 September 2016

Date of entry in register: 6 January 2017

Registered for the following goods and services:

Class 11:	<i>Transportable instruments for processing water; Septic tanks; Purification installations for waste material; Water purifying installations; Water purification tanks; Waste water treatment tanks; Water purification units; Air handlers; Chemical installations</i>
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	<i>for conditioning drinking water; Fountains; Water supply installations; Hand held portable water purification apparatus; Sewage treatment [purification] installations; Wastewater purification units; Water purifying units for producing potable water; Air treatment equipment.</i>
Class 37:	<i>Consultancy and information services relating to construction; Construction project management services; Maintenance of water purifying apparatus; Maintenance of automata; Repair or maintenance of water pollution control equipment; Maintaining septic systems; Installing septic tanks; Installation of rainwater tanks; Installation of environmental engineering systems; Installation of rainwater collection systems; Installation of rainwater drainage systems; Installation of environmental protection systems; Repair or maintenance of water purifying apparatus; Construction services; Provision of construction information; Servicing of mains services.</i>
Class 39:	<i>Public utilities in the nature of supplying water; Water distribution and supply; Providing information relating to water supplying services; Water supply; Storage of waste; Transportation of waste; Removal of waste.</i>
Class 40:	<i>Water treating; Waste and/or water treatment services; Waste water treatment; Treatment of toxic sludges; Upcycling [waste recycling]; Air treatment; Information, advice and consultancy services relating to the recycling of waste and trash.</i>
Class 42	<i>Technical design and planning of water purification plants; Conducting engineering surveys; Technical consulting in the field of environmental engineering; Environmental surveys; Provision of surveys [technical]; Analysis of stream water quality; Water analysis; Design and development of new technology for others.</i>

3. The Opponent claims that:

- the parties' marks are highly similar;
- the parties' goods and services are identical, similar and/or complementary;

and

- that there is therefore a likelihood of confusion between the parties' marks.

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

- concedes that the following of its goods are identical or similar to the Opponent's goods: *Water purifying apparatus and machines; air filtering installations; purification installations for sewage; air sterilizers; air purifying apparatus and machines;*
- denies that the remaining goods within its specification are identical or similar to the Opponent's goods or services;
- concedes that the parties' marks are visually similar to a low degree; aurally similar to a medium degree and that there is a low level of conceptual similarity between the marks;
but
- argues that there is no likelihood of confusion between the parties' marks.

5. The Opponent is represented by Pawel Wowra. The Applicant is represented by Mathys & Squire LLP.

6. Evidence has been filed by the Opponent only. A hearing was neither requested nor considered necessary. Written submissions in lieu of a hearing have been filed by the Opponent only.

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

Opponent's evidence

8. The Opponent's evidence comes from Gary William Anthony Johnson, a Trade Mark Attorney of the Opponent's legal representative. Mr Johnson's Witness Statement is dated 4 April 2022. There are four exhibits, GWAJ01 – GWAJ04. The Witness Statement seeks to demonstrate 'the similarity/complementarity' of the

Applicant's goods¹ with the Opponent's goods and services.² I will not summarise the exhibits in detail here, but will refer to them, where appropriate, in the course of my decision.

Decision

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

9. Section 5(2)(b) of the Act states:

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

(a) ...

(b) It is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

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

10. In accordance with section 6 of the Act, the Opponent's mark is an earlier mark by virtue of its earlier filing date (26 September 2016) which falls before the filing date of the applied-for mark on 8 June 2021.

11. Section 6A of the Act provides that where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the application date (or priority date) of the applied-for mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged because the Opponent's mark had been registered for less than 5 years on the date on which the Applicant filed its application. The Opponent is therefore entitled to rely upon all of the goods that it seeks to rely upon.

¹ Those that remain in issue in these proceedings following the concession made by the Applicant in respect of some of its goods.

² Opponent's written submissions in lieu of a hearing, paragraphs [28] – [33].

12. The following principles are derived from the decisions of the Court of Justice of the European Union³ (“CJEU”) in:

Sabel BV v Puma AG, Case C-251/95; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97; *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98; *Matratzen Concord GmbH v OHIM*, Case C-3/03; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C120/04; *Shake di L. Laudato & C. Sas v OHIM*, Case C-334/05P; and *Bimbo SA v OHIM*, Case C-591/12P

The principles:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in 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;

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

(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.

Preliminary issue

13. I note the following comment from the Applicant:⁴

‘To assess a “confusion” it has to be proven that the relevant public/average consumer believe [sic] that goods in question comes [sic] from the same undertaking. The similarity between the trade mark should indicate a certain level of similarity, leading to confusion.’

⁴ Applicant’s Counterstatement, paragraph [12].

For the avoidance of doubt, in so far as the Applicant is stating that there must be evidence of actual confusion, this is an incorrect reading of the relevant law. In the case of *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated that:

“80.the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side-by-side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur.”

14. It is not incumbent on the Opponent to demonstrate that there has been actual confusion between the parties' marks.

Comparison of goods

15. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the 'Nice Classification' means the system of

classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

16. I must also bear in mind the decision of the General Court ('GC') in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05

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

17. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties' goods and services must be taken into account:

“[23] “In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary”.

18. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281⁵, identified the following factors for assessing similarity of the respective goods and services:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;

⁵ *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

- (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. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.⁶

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

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

21. The goods to be compared are as follows:

Opponent’s (earlier) mark:	Applicant’s (contested) mark:
Class 11: <i>Transportable instruments for processing water; Septic tanks; Purification installations for waste</i>	Class 11: <i>Water purifying apparatus and machines; air filtering installations; Disinfectant dispensers for toilets;</i>

⁶ *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

material; Water purifying installations; Water purification tanks; Waste water treatment tanks; Water purification units; Air handlers; Chemical installations for conditioning drinking water; Fountains; Water supply installations; Hand held portable water purification apparatus; Sewage treatment [purification] installations; Wastewater purification units; Water purifying units for producing potable water; Air treatment equipment.

Class 37:

Consultancy and information services relating to construction; Construction project management services; Maintenance of water purifying apparatus; Maintenance of automata; Repair or maintenance of water pollution control equipment; Maintaining septic systems; Installing septic tanks; Installation of rainwater tanks; Installation of environmental engineering systems; Installation of rainwater collection systems; Installation of rainwater drainage systems; Installation of environmental protection systems; Repair or maintenance of water purifying apparatus; Construction services; Provision of construction information; Servicing of mains services.

sanitary apparatus and installations; gas scrubbing apparatus; purification installations for sewage; air deodorizing apparatus; ionization apparatus for the treatment of air or water; air sterilizers; air purifying apparatus and machines.

<p>Class 39 <i>Public utilities in the nature of supplying water; Water distribution and supply; Providing information relating to water supplying services; Water supply; Storage of waste; Transportation of waste; Removal of waste.</i></p> <p>Class 40: <i>Water treating; Waste and/or water treatment services; Waste water treatment; Treatment of toxic sludges; Upcycling [waste recycling]; Air treatment; Information, advice and consultancy services relating to the recycling of waste and trash.</i></p> <p>Class 42: <i>Technical design and planning of water purification plants; Conducting engineering surveys; Technical consulting in the field of environmental engineering; Environmental surveys; Provision of surveys [technical]; Analysis of stream water quality; Water analysis; Design and development of new technology for others.</i></p>	
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22. As noted, at [4] above, the Applicant has conceded that the following of its goods are identical or similar to the Opponent's goods:

Water purifying apparatus and machines; air filtering installations; purification installations for sewage; air sterilizers; air purifying apparatus and machines.

23. The Applicant's *Water purifying apparatus and machines* will, in my view, encompass the following of the Opponent's class 11 terms: *transportable instruments for processing water; Water purifying installations; Water purification tanks; Water purification units; Hand held portable water purification apparatus; Water purifying units for producing potable⁷ water*. The parties' goods are therefore 'Merici' identical.

24. The Applicant's *purification installations for sewage* will be encompassed by the Opponent's *purification installations for waste material*, and will also encompass the Opponent's *Sewage treatment [purification] installations* in class 11. The parties' goods are therefore 'Merici' identical.

25. The Applicant's *air filtering installations; air sterilizers and air purifying apparatus and machines* will be encompassed by the Opponent's broad class 11 term *air treatment equipment*. The parties' goods are therefore 'Merici' identical.

26. Contested goods: *disinfectant dispensers for toilets; sanitary apparatus and installations*

The Opponent has submitted⁸ that the Applicant's *disinfectant dispensers for toilets and sanitary apparatus and installations* are 'similar with the Opponent's "*Water purifying installations*". The Opponent has adduced evidence in support of this submission at Exhibit GWAJ01. This Exhibit comprises three product listings from the website of 'PureShowers.co.uk' for, respectively: a bath filter and two types of shower filter. I note that the exhibit does not include material relating to *disinfectant dispensers for toilets*. The web pages were accessed 4 April 2022. It is submitted that⁹ '[...] shower and bath taps (sanitary items) are used with water

⁷ 'Potable' means drinkable.

⁸ Opponent's written submissions in lieu of a hearing, paragraph [31].

⁹ As above.

purifying filters and the latter are advertised as accessories for the former. Furthermore, they would all be found in the bathroom and sold together with sanitary accessories such as disinfectant dispensers’.

27. The Applicant’s term *disinfectant dispensers for toilets* will, to my mind, cover items which are either placed inside the toilet cistern, or hung from the toilet bowl, and contain a reservoir from which disinfectant is released into the water. The Opponent’s term *water purifying installations*, in my view, relates to equipment which treats water to render it sufficiently clean for drinking and/or washing. I do not consider ‘disinfecting’ and ‘purifying’ to be the same. The respective goods will coincide in purpose only to the broad extent that both concern the treatment of water in some way. The specific purposes of the goods will differ: disinfectant dispensers are, to my mind, intended to eradicate germs, whereas purifying equipment is intended to render water sufficiently clean to be used for drinking and/or washing. Users will overlap somewhat. Both parties’ terms will cover goods purchased, predominantly, by the general public, with some purchases made by professional customers. Many purchasers of the Applicant’s ‘disinfectant dispensers’ will, in my view, also be purchasers of *water purifying installations*. The physical nature of the respective goods will often differ; the different functions of the goods resulting in the items having different designs and, therefore, differing in appearance. I consider trade channel overlap to be unlikely, although not impossible. I do not consider the respective goods to be in a competitive relationship; a disinfectant dispenser for a toilet cannot, in my view, be substituted for a water purification system. I do not find complementarity either; neither set of goods is necessary for each other, and I consider it unlikely that the average consumer would presume both to originate from the same undertakings.¹⁰ In the light of the foregoing, I find the parties’ goods to be dissimilar.

28. I now compare the Applicant’s term *sanitary apparatus and installations* against the Opponent’s *water purifying installations*. The Applicant’s term relates to sinks, bathtubs, showers, flushing cisterns and the like, i.e. appliances which use pipes

¹⁰ Even if the average consumer did presume both sets of goods to originate from the same undertaking, the first of the requirements for complementarity (i.e. that the goods are necessary or important for one another) has not been met.

and are installed by a plumber. I consider that taps and shower heads, as essential fixtures to sinks/baths/showers, are pieces of 'sanitary apparatus'. The three products listed in Exhibit GWAJ01 (a bath filter and two shower filters) are, in my view, types of 'water purifying installation' and it is evident from the information within the product listings that these goods are affixed to taps or placed inside shower heads, as the case may be. The specific purposes of the parties' respective goods are different. The Applicant's goods are intended to: hold water for washing or drinking (baths, sinks); deliver water (taps) and remove water and other waste (flushing toilets and urinals), whereas the Opponent's goods are intended to purify water. Methods of use will also differ; the Applicant's goods will be operated by way of taps/faucets/flush handles or buttons/switches. The Opponent's *water purifying installations*, such as bath and shower filters, will be affixed to taps/placed inside shower heads. Uses will coincide; users of the Opponent's *water purifying installations* will necessarily be users of the Applicant's sanitary apparatus. The physical nature of the parties' respective goods will differ. The Opponent's goods, such as bath and shower filters, are generally small in size compared to the Applicant's goods and will typically incorporate 'refills' in the form of filter cartridges or mineral/chemical 'balls'. Trade channels will, in my view, overlap somewhat; retailers and suppliers of *sanitary apparatus and installations*, such as taps and shower heads, may also offer *water purifying installations*, such as bath and shower filters. *Water purifying installations* may also be sold together with taps e.g. some business premises have tap 'systems' that dispense directly purified water. The respective goods are not in a competitive relationship; neither good is substitutable for the other. I do, however, find complementarity. The Opponent's *water purifying installations* function by virtue of being affixed to/placed inside the tap or shower head; the tap/shower head therefore being important for the Opponent's goods.¹¹ The average consumer would, in my view, likely attribute both parties' goods to the same undertaking. In the light of the foregoing, I find the parties' goods to be similar to a medium degree.

29. Contested goods: *gas scrubbing apparatus*

¹¹ It is recognised that the complementarity will not be total, however, because *water purifying installations* are not indispensable to the Applicant's *sanitary apparatus and installations*.

The Opponent has submitted¹² that: ‘the evidence demonstrates that “*gas scrubbing apparatus*” for which protection is sought in the Application is similar/complementary and offered together with products for water and wastewater treatment protected by the Registration [...]’. According to Mr Johnston’s Witness Statement,¹³ the Opponent’s Exhibit GWAJ03 ‘comprises extracts taken from the ENVIROPRO website at <https://www.enviropro.co.uk/> showing solutions for water and wastewater treatment advertised (to the same public) together with air, gas & odour control solutions, including gas scrubbing apparatus’. Exhibit GWAJ03 includes, *inter alia*, three product listings for ‘gas scrubbers’ as well as a section of products headed ‘Wastewater treatment’.

30. I compare the Applicant’s *gas scrubbing apparatus* against the Opponent’s *waste water treatment tanks*. It is apparent from the product listings and information provided in the above-mentioned exhibit that *gas scrubbing apparatus* includes large polypropylene vessels which neutralise chemical fumes by way of: pumps; and chemicals with neutralising properties.¹⁴ *Waste water treatment tanks* cover vessels designed to treat waste water by way of some sort of process involving aeration of, and/or the application of chemicals to, the waste water. The respective goods share a purpose only to the very broad extent that both involve a process of cleansing. The specific purposes of the goods will diverge; the Applicant’s goods involve the cleansing of gases, whereas the Opponent’s goods involve the cleansing of waste water. I note that Exhibit GWAJ03 includes the text:¹⁵ “Technologies and services for waste water treatment ranging from sewage to industrial effluent”. In my view, users of the Opponent’s goods will comprise professionals operating water/chemical treatment plants, or manufacturers. I find that users of the Applicant’s goods, *gas scrubbing apparatus*, will also be professionals in the business of manufacturing. To my mind, many manufacturing processes will produce both waste water and gases/fumes. I find that users of the parties’ respective goods will overlap. Trade channels will also be shared, and this is borne out by the Opponent’s evidence of the same undertaking providing both

¹² Opponent’s written submissions in lieu of a hearing, paragraph [33].

¹³ Witness Statement of Gary Johnston, paragraph [6].

¹⁴ Exhibit GWAJ03, fifth page (the exhibit is unpaginated).

¹⁵ As above, seventh page.

parties' goods. The physical nature of respective goods will be very different, by virtue of the fact that one deals with liquids while the other deals with gases; such differences requiring different product designs. I do not consider the goods to be in a competitive relationship; neither good is substitutable for the other. I disagree with the Opponent's argument that the parties' goods are complementary. Although the respective goods would be (and, according to the evidence, are) offered by the same undertaking, I do not find either good to be necessary for the other. Neither *gas scrubbing apparatus* nor *waste water treatment tanks* are indispensable to each other. In the light of the foregoing, I find the respective goods to have a medium level of similarity.

31. Contested goods: *air deodorizing apparatus*

32. The Opponent has submitted¹⁶ that the Applicant's '*air deodorizing apparatus* (i.e. products with essential oil diffusers) are identical/similar to' the Opponent's *air treatment equipment*. The Applicant's goods will cover equipment intended to eliminate odours. The elimination of odours is, in my view, a result obtained by the treatment of air. I find that the Applicant's *air deodorizing apparatus* will fall under the Opponent's broader term *air treatment equipment*. The parties' respective goods are therefore 'Merici' identical.

33. Contested goods: *ionization apparatus for the treatment of air or water*

34. The Opponent has submitted¹⁷ that its *Water purifying installations* and *Air treatment equipment* 'overlap with the Applicant's *ionization apparatus for the treatment of air or water*. In my view, the Applicant's '*ionization apparatus for the treatment of [...] water*' will be encompassed by the Opponent's broader term *Water purifying installations*. I also find that the Applicant's '*ionization apparatus for the treatment of air [...]*' will be encompassed by the Opponent's broader term *Air treatment equipment*. The parties' respective goods are therefore 'Merici' identical.

¹⁶ Opponent's written submissions in lieu of a hearing, paragraph [33].

¹⁷ As above, paragraph [32].

Average consumer and the purchasing act

35. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

36. In *Hearst Holdings Inc*¹⁸ Birss J. (as he then was) described the average consumer thus:

“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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”



37. The average consumer of the class 11 goods that come into play in this Opposition will depend on the particular goods purchased. I consider that the average consumer of the terms *gas scrubbing apparatus* and *purification installations for sewage* will be the professional public i.e. manufacturers. The purchasing process of these goods will be visual to the extent that the product listing would likely be initially encountered by way of a product listing on a website, catalogue or trade publication. These goods will be expensive. Any purchases will be carefully considered; transactions likely concluding only after detailed consultation/discussion with the seller of the goods. There will therefore be an aural aspect to the purchasing process. Factors considered will include, *inter alia*: the purchaser's requirements, e.g. the goods' capacity to deal with the volume/type of effluence produced by the particular manufacture process; compatibility with

¹⁸ *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).

existing equipment. I find that the average consumer would pay a high level of attention when purchasing these goods.

38. I consider that the remainder of the goods in issue will be purchased by both the general and professional public. The terms will cover goods for both domestic and business/industrial use. The purchasing act will be primarily visual; the goods likely first encountered in product listings (either online or hard copy) or, in some cases, in retail outlets or showrooms. There will be an aural aspect to the purchasing act where advice is sought from the seller. Goods such as *disinfectant dispensers for toilets* will, to my mind, include the disposable kind sold in supermarkets for a few pounds, which will be purchased with a low level of attention. For the remaining goods, the general purchaser will, in my view, display a measure of care when making their purchases. The goods will be purchased with a medium level of attention. The professional purchaser will, to my mind, have business needs as a primary concern and will, therefore, pay a level of attention in the medium-high range.

Comparison of the marks

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

39. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“...it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration

is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

40. 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.

41. The Opponent’s mark comprises a word element and a device. The word ‘opure’ is rendered in a plain sans serif typeface, all characters in lower case. A device comprising of a spherical shape constructed from horizontal wavy lines is present to the left of the word element. The overall impression of the mark resides in the mark in its entirety, with the word element having visual dominance owing to the fact that it can be read and articulated.

42. The Applicant’s mark is a word mark¹⁹ consisting of the single word ‘upure’, all characters (with the exception of the ‘r’) rendered in a plain sans serif typeface, and all in lower case. The curved part of the ‘r’ has been extended to hover part way across, and parallel to, the top of the neighbouring ‘e’. There is a separation between the vertical stem and the curved part of the ‘r’ which gives the impression that the character is folded or twisted, resulting in the curved part resembling a water droplet. The overall impression of the mark resides in the mark in its entirety.

43. Visual comparison

¹⁹ In *LA Superquimica v EUIPO*, Case T-24/17, at paragraph [39] it was held that:

‘ [...] it should be noted that a word mark is a mark consisting entirely of letters, words or groups of words, without any specific figurative element. The protection which results from registration of a word mark thus relates to the word mentioned in the application for registration and not the specific figurative or stylistic aspects which that mark might have. As a result, the font in which the word sign might be presented must not be taken into account. It follows that a word mark may be used in any form, in any colour or font type (see judgment of 28 June 2017, *Josel v EUIPO — Nationale-Nederlanden Nederland (NN)*, T-333/15, not published, EU:T:2017:444, paragraphs 37 and 38 and the case-law cited).’

The Opponent has submitted that the parties' marks are visually highly similar.²⁰ The marks share the final four letters 'pure'. The points of visual difference between the marks are:

- the presence of the spherical device in the Opponent's mark, which is absent from the Applicant's mark;
- the above-described stylisation of the 'r' in the Applicant's mark, which is absent from the Opponent's mark;

and

- the 'o' at the beginning of the Opponent's mark in contrast to the 'u' at the beginning of the applied-for mark.

I find the parties' marks to have a medium-high level of visual similarity.

44. Aural comparison

The Opponent has submitted that the parties' marks are aurally highly similar.²¹ I find that the Opponent's mark will be articulated as 'OH-PURE'; while the applied-for mark will be articulated as 'YOU-PURE'. Both marks are of two syllables, the final syllables being aurally identical. The only aural difference between the marks resides at the beginning of the marks i.e. 'YOU'/'OH'. I find the marks to be aurally similar to between a medium and high degree.

45. Conceptual comparison

The Opponent has submitted that the parties' marks are conceptually identical.²² In my view, the Opponent's mark will be understood by the average consumer as an invented word, albeit conveying the notion of purity and cleanliness. The device, in my view, would be perceived by the average consumer as a sphere with horizontal wavy lines. I have considered the possibility that it might be seen as a filter of some sort, but, in my view, a large proportion of average consumers will not see this. The Applicant's mark will, in my view, also be perceived as an invented word, albeit conveying the concept of purity and cleanliness. I find the parties' marks to be conceptually identical.

²⁰ Opponent's written submissions in lieu of a hearing, paragraph [41].

²¹ Opponent's written submissions in lieu of a hearing, paragraph [41].

²² Opponent's written submissions in lieu of a hearing, paragraph [41].

Distinctive character of the earlier mark

46. 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 C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

47. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

48. ‘Opure’ does not appear in the English dictionary. In my view, the mark will be perceived by the average consumer as a made-up word, albeit incorporating the

word 'pure' which will be understood as an adjective ascribing purity, cleanliness or the state of being 'unsullied'. I find the Opponent's mark to have a medium level of inherent distinctive character.

49. The evidence adduced by the Opponent does not include material capable of demonstrating that the earlier mark has an enhanced level of inherent distinctive character. I am therefore unable to make a finding in respect of enhanced distinctive character.

Likelihood of confusion

50. Confusion can be direct or indirect. Mr Iain Purvis K. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v Back Beat Inc*²³. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*²⁴, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly matches it to the imperfect image of the earlier mark in their 'mind's eye'. Indirect confusion occurs when the average consumer recognises that the competing marks are not the same in some respect, but the similarities between them, combined with the goods/services at issue, leads them to conclude that the goods/services are the responsibility of the same or economically linked undertaking.

51. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [12]. When considering all relevant factors 'in the round', I must bear in mind that a greater degree of similarity between goods/services *may* be offset by a lesser degree of similarity between the marks, and vice versa.

²³ Case BL O/375/10 at [16].

²⁴ *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

52. With the exception of *disinfectant dispensers for toilets*, I have found all of the Applicant's goods to have some level of similarity with the Opponent's goods; ranging from 'Meric' identity, to a medium level of similarity.

53. In my view, a significant proportion of average consumers would confuse the marks. The respective marks are visually and aurally similar to a medium-high degree.. The marks are conceptually identical. The purchasing act will, in the case of all of the goods, be *primarily* visual. I note the observation by the General Court in the case of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02 that the beginnings of words tend to have more of a visual and aural impact than the ends of words, although I recognise that this is not an absolute rule. In the instant case, the respective marks share the final four characters, 'pure'. In my view, the differences that I have identified between the marks (i.e. the first characters 'o' and 'u' respectively; the device present in the earlier mark; and the stylised 'r' in the applied-for mark) will be easily overlooked by the average consumer. The device present in the earlier mark, to my mind, will not be readily perceived by the average consumer as denoting any particular identifiable object; it will be viewed simply as a spherical shape with wavy lines. The device will not, in my view, add any further concept over and above that conveyed by the applied-for mark. It is my view that when the average consumer encounters the Opponent's mark, they may mistake it for the Applicant's mark (or vice versa) because the mind's eye has failed to register the visual differences between the marks; and consumers do not compare marks side-by-side. There is a likelihood of confusion. I find this to be the case even where the average consumer displays a high level of attention during the purchasing act.

Conclusion

54. The Opposition has succeeded in respect of all goods, save for those that I have found to be dissimilar (i.e. *disinfectant dispensers for toilets*). Subject to any successful appeal, the application is refused in respect of all goods, save for *disinfectant dispensers for toilets*. The Application may therefore proceed in respect of *disinfectant dispensers for toilets* only.

COSTS

55. The Opponent is the successful party overall and is entitled to contribution towards its costs, based upon the published scale.²⁵ I award the Opponent the sum of **£1,000** calculated as follows:

Preparation of statement and consideration of the Applicant's statement:	£200
Official fee for 5(2)(b) only:	£100
Preparation of evidence:	£400 ²⁶
Written Submissions in lieu of hearing:	£300
Total:	£1,000

56. I therefore order Shenzhen Puremate Technology Co., Ltd to pay to Groupe Etchart SAS the sum of £1,000. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 27th day of October 2022

N. R. Morris
For the Registrar,
the Comptroller-General

²⁵ Tribunal Practice Notice 2/2016

²⁶ I have awarded a sum below the threshold because the evidence is very light.