

O-355-14

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 3011675
FOR THE TRADE MARK

ZEOS

IN THE NAME OF KOSH FOR MEN LTD

AND

OPPOSITION THERETO UNDER NO 401092

BY HENKEL AG & Co. KGaA

1. Application No 3011675 has a filing date of 27 June 2013, stands in the name of Kosh For Men Ltd (“the applicant”) and seeks registration of the trade mark ZEOS for a wide range of goods in classes 3 and 11 of the International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

2. Following publication of the application in the *Trade Marks Journal* on 26 July 2013, notice of opposition was filed by Henkel AG & Co KGaA (“the opponent”). The opposition is brought on grounds under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) against some of those goods and against all goods under section 5(3) of the Act. The opponent relies on the following Community trade mark (“CTM”):

Mark	Dates	Specification of goods relied upon
CTM 8968182 SYOSS	Filing date: 5 March 2010 Date of entry in register: 2 September 2010	Class 3 Soaps, perfumery, essential oils; preparations for body and beauty care especially hair lotions, hair care preparations; preparations for caring, cleaning, tinting, colouring, bleaching, fixing and permanent waving of the hair Class 21 Mechanical cosmetic instruments (included in class 21); sponges, brushes (except paintbrushes), equipment and containers for applying hair dye; glassware, porcelain and earthenware not included in other classes

3. The applicant filed a counterstatement in which, essentially, it denied the claims made. Both parties filed evidence and both filed written submissions in lieu of a hearing. I take all written material into account in reaching my decision.

The evidence

4. The following witness statements were filed:

Opponent

Wendy Oliver, trainee trade mark attorney with D Young & Co LLP, the opponent’s legal representatives in these proceedings

Applicant

Bobby Chotai, Director of Kosh for Men Ltd;

Dr Ines Radionovas, Irene Silberstein, Addolorata Gianfreda and João Paulo Arieira each of whom is a translator at Global Voices Ltd

Opponent

Wendy Oliver

5. Given the content of this evidence, the majority of which consists of submissions relating to the pronunciation of the respective marks and the aural (dis)similarity between them, I do not intend to summarise it but have considered it and will refer to it as necessary in this decision.

The objection under section 5(3) of the Act

6. Section 5(3) of the Act states:

“ A trade mark which-

(a) is identical with or similar to an earlier trade mark shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark, in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

7. 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.”

8. The opponent relies on the mark shown at paragraph 2 above. Given the respective dates, it qualifies as an earlier mark within the meaning of the Act. It is not subject to the proof of use provisions of the Act, however, in order for the opponent to succeed under this ground, the opponent has to show that its mark had a reputation at the relevant date which in this case is the date of the application for registration i.e. 27 June 2013

9. Reputation means that an earlier trade mark relied upon is known by a significant part of the public concerned with the goods covered by that mark (see paragraph 26 of the CJEU's judgment in *General Motors Corp. v Yplon SA (CHEVY)* [1999] ETMR 122). The Court stated:

“27 In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking promoting it.”

10. The matter can be dealt with very briefly. As I indicated above, the opponent has filed evidence. That evidence has not been prepared by an officer of the opponent company itself but rather consists of two witness statements prepared by an officer at the opponent's trade mark attorney's company. The only reference to the use made of the mark is as follows:

“The Opponent, Henkel, uses the trade mark in connection with a range of hair care products, as can be seen on their website..... printouts of which are attached at Exhibit WOO3”.

11. Exhibit WOOO3 consists of 19 pages all of which indicate they were downloaded on 15 January 2014 and each of which bears a copyright date of 2014. What text is contained on the pages refers to the products shown in graphics on them and does not, in any way, give any indication of what, if any, use may have been made of the opponent's mark at any time and certainly not at the relevant date. The evidence filed is wholly inadequate to support the claims made under this ground. That being the case, the opposition under this ground falls at the first hurdle and is dismissed.

The objection under section 5(2)(b) of the Act

12. 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, or

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

13. The opponent relies under this ground on the same earlier mark. As the mark is not subject to the proof of use provisions under this ground, it is entitled to rely on it for each of the goods set out at paragraph 2 above.

14. The test for determining whether there is a likelihood of confusion is well established. 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 Q.C., 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.”

15. In essence, the test under section 5(2)(b) is whether there are similarities in marks and goods which, when taking into account all the surrounding circumstances, would combine to create a likelihood of confusion. The likelihood of confusion must be appreciated globally and I need to address factors such as the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements and taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed.

The comparison of the respective goods

16. As indicated above, the opponent’s objection under this ground is directed at only some of the goods of the application. For ease of reference, the goods to be compared are as follows:

Opponent’s goods	Applicant’s goods
<p>Class 3 Soaps, perfumery, essential oils; preparations for body and beauty care especially hair lotions, hair care preparations; preparations for caring, cleaning, tinting, colouring, bleaching, fixing and permanent waving of the hair</p> <p>Class 21 Mechanical cosmetic instruments (included in class 21); sponges, brushes (except paintbrushes), equipment and containers for applying hair dye; glassware, porcelain and earthenware not included in other classes</p>	<p>Class 3 Hair wax; Baby hair conditioner; Baby shampoo; Baby shampoo mousse; Baby hair conditioner; Baby shampoo; Baby shampoo mousse; Bleaches for use on the hair; Bleaching preparations for the hair; Color-removing preparations; Colour-removing preparations; Conditioning balsam; Conditioning creams; Dry shampoos; Dyes (Cosmetic -); False hair (Adhesives for affixing -); Hair balm; Hair bleach; Hair color; Hair color removers; Hair colorants; Hair colouring preparations; Hair cosmetics; Hair cream; Hair dyes; Hair emollients; Hair fixing oil; Hair gel; Hair lacquer; Hair lotions; Hair mascara; Hair moisturisers; Hair moisturising conditioners; Hair oil; Hair permanent wave kit; Hair protection creams; Hair protection gels; Hair protection lotions; Hair protection mousse; Hair relaxing preparations; Hair removing cream; Hair rinses [shampoo-conditioners]; Hair setting lotion; Hair spray; Hair straightening preparations; Hair strengthening treatment lotions; Hair texturizers; Hair thickeners; Hair tinting preparations; Hair tonic [non-medicated]; Hair waving preparations; Hair wax; Hairspray; Henna powders; Medicated</p>

	<p>shampoo; Medicated shampoos; Mousses [toilettries] for use in styling the hair; Non-medicated hair lotions; Non-medicated hair shampoos; Non-medicated scalp treatment cream; Non-medicated shampoos; Permanent waving lotions; Permanent waving (Neutralizers for -); Permanent waving preparations; Preparations for permanent hair waves; Preparations for setting hair; Shampoo-conditioners; Shampoos; Shampoos for personal use; Styling mousse; Waving preparations for the hair; Wax treatments for the hair; Hair gel; Hair color; Hair color removers; Hair emollients; Hair oil; Hair permanent wave kit; Hair straightening preparations; hair lotions; Hair cosmetics; Hair cream; Hair fixing oil; Hair lacquer; Hair moisturisers; Hair moisturising conditioners; Hair texturizers; Hair tonic [non-medicated];Mousses [toilettries] for use in styling the hair; Wax treatments for the hair; Preparations for permanent hair waves; Preparations for setting hair; Hair colouring preparations; Hair wax; Hair lotions; Waving preparations for the hair; Hair dyes; Hair colorants.</p> <p>Class 11 Electric hair dryers; Hair driers; Hair drying apparatus; Electrical hair driers; Fans for hair drying; Hair drying appliances; Hair driers [dryers]; Driers (Hair -); Dryers (Hair -);</p>
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17. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) Case T-133/05*, the General Court considered the matter of identical goods and said:

“...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...”

18. As to similarity, in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 28, Jacob J gave advice as to how it should be assessed. He identified the following factors to be taken into account:

- (a) The respective uses of the respective goods;
- (b) The respective users of the respective goods;
- (c) The physical nature of the goods;
- (d) The respective trade channels through which the goods 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 are competitive. This inquiry may take into account how those in trade classify the goods, for instance whether market research companies, who of course act for industry, put the goods in the same or different sectors.”

19. Subsequently, in *Canon Kabushiki Kaisha v MGM Inc* the CJEU stated:

“23. In assessing the similarity of the goods or services concerned.....all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, intended purpose and their method of use and whether they are in competition with each other or are complementary.”

20. In relation to what constitutes complementary goods and services, the following comments of 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).”

21. Also of relevance in determining whether goods are complementary are the comments of the appointed person Mr Daniel Alexander Q.C. in *Sandra Amalia Mary Elliott and LRC Products Limited* (BL O-255-13).

22. Finally, in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J stated:

"... 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."

23. In its notice of opposition, the opponent states:

“The goods covered by the application are highly similar if not identical to the opponent’s goods in Classes 3 and 21. Accordingly, given these overlaps it is considered that there is a high risk of confusion and association.”

24. In its written submissions it expands on this and states:

“In connection with Class 3, the goods applied for by the Applicant are identical or closely similar to those covered in the Opponent’s earlier trade mark. The Office will appreciate that these goods are primarily personal care products in Class 3 in both specifications. In addition, the Opponent’s earlier trade mark covers “hair care products for personal use” which are also detailed in the Applicant’s trade mark.

In connection with Class 11, the goods applied for by the Applicant’s trade mark include, in particular but not exclusively: “Depilatory wax heaters; Electric hair dryers; Hair driers; Hair drying apparatus, Electrical hair driers; Fans for hair drying; Hair drying appliances; Hair driers [dryers]; Driers (hair-); Dryers (hair-)” which are all hair care related products which are covered by the Applicant’s specification. “Appliances for bathing the feet” are, again, personal care products which are similar to those covered by the Opponent’s goods in Class 3.

As noted from the above analysis both the Applicant’s and Opponent’s products and business activities are identical or closely similar. Therefore, both sets of products would be sold or advertised alongside each other to the same end users, both online as well as in retail shops. As such, the products and services could be viewed by consumers side by side and are therefore in direct competition with each other.”

25. I have quoted in the submissions in full but note that they make reference to goods that are not opposed under this ground (i.e. depilatory wax heaters and appliances for bathing the feet). Nothing hangs on this.

26. I go on to consider the respective goods. With the exception of *Color removing preparations; Colour removing preparations; Conditioning balsam; Conditioning creams; Dyes (Cosmetic-); Henna powders; and Non-medicated scalp treatment cream*; each of the applicant’s goods are specifically used in the care, cleaning, colouring, bleaching, fixing or perming of hair and so are included within the opponent’s *preparations for caring, cleaning, tinting, colouring, bleaching, fixing and permanent waving of the hair*. On the principles outlines in *Meric*, they are identical goods.

27. *Color removing preparations; Colour removing preparations; Conditioning balsam; Conditioning creams; Dyes (Cosmetic-); Henna powders*; are not stated as being for use on the hair but are goods which are likely to be for such use and are therefore identical to the opponent’s *preparations for....the hair*”. Were these goods intended for use other than on the hair, they would be included within the opponent’s

preparations for body and beauty care as is the applicant's *Non-medicated scalp treatment cream*. Consequently, these are also identical goods.

28. The applicant's goods in class 11 are all apparatus for drying the hair. Whilst I accept the opponent's submissions that these are items for personal care, I do not accept that this, of itself, would make them similar goods to the opponent's own personal care products and I go on to make the comparison on the basis of the above case law.

29. The opponent's goods in class 3 are for cleaning, colouring and otherwise caring for the hair. Whilst these may have the same users to the applicant's hair dryers, i.e. those members of the public with hair, the uses of the respective goods differ to some extent (the opponent's being for cleaning, colouring etc. the applicant's for drying) though both are used on the hair, The nature of the goods differ (products for application to the hair as opposed to an item of electrical equipment). Whilst I have no doubt that the same traders may sell both items, they are likely to be displayed in separate departments (e.g. "toiletries" and "electrical"). There is no evidence that these are goods which share common channels of trade nor that there is a close connection between them such that one is indispensable for the other or important in such a way that consumers will think they have the same source. Any similarity between these respective goods is low.

30. The opponent's goods in class 21 include *glassware, porcelain and earthenware*. I can find no meaningful way in which any of these goods are in any way similar to the applicant's hair driers. Neither can I find any meaningful way in which the applicant's hair driers are similar to the opponent's *sponges, equipment and containers for applying hair dye. Mechanical cosmetic instruments* is a term which is not further defined and I am not aware that such goods include any for use on the hair. That being the case, I can find no way in which these goods have any similarity to the applicant's hair driers.

31. That leaves the opponent's *brushes (except paintbrushes)* to be compared. I am aware, from my own experience, that some hair dryers have brushes in the form of attachments so that the hair can e.g. be styled in a certain way or have volume added to it whilst it is being dried. Clearly, some users may also use a separate brush to style the hair whilst also using a drier. Whilst the respective users may be the same and the uses and nature of them overlap to some extent, I do not consider the connection between them to be so close that one is indispensable or important for the use of the other. I find that any similarity between these respective goods is low.

The average consumer and the nature of the purchasing process

32. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and then to determine the manner in which these goods are likely to be selected by the average consumer in the course of trade.

33. Neither parties' specification of goods is limited in any way. The respective goods are such as will be used by the general public. The goods in class 3 are all for personal care but are everyday products bought regularly and available widely at

relatively low cost. They are goods likely to be bought by self-selection and thus the visual aspects of the respective marks are likely to be of greater importance. Whilst they are everyday goods, they are likely to be bought with a reasonable degree of care as the purchaser will wish to ensure they are e.g. suitable for the intended use, appropriate for hair type or will impart the intended colour etc. The cost of hair driers is likely to be somewhat higher and the purchase more infrequent, however, they are also goods that are likely to be bought by self-selection but with a slightly higher degree of attention being given to their purchase to ensure e.g. they are of the right type, are comfortable to the hand of the user and have the appropriate attachments etc.

Comparison of the respective marks

34. For ease of reference, the marks to be compared are:

Opponent's Mark	Applicant's Mark
SYOSS	ZEOS

Both marks consist of a single word no part of which is highlighted in any way. Neither, therefore, has any dominant element and the distinctiveness of each rests in its whole. I am not aware that either is anything other than an invented word. As invented words, neither has any meaning. From the conceptual consideration the matter is neutral.

35. Both marks are short (5 and 4 letters respectively). The beginnings of each differ greatly though both end with the letter S. Both also have the letters OS within them (as the last two letters of the applicant's mark and the third and fourth letters of the opponent's mark) but this is the extent of the similarity between them from a visual perspective. If there is any visual similarity between the respective marks, it is a very low one.

36. As for the aural comparison of the respective marks, the parties have much to say. The opponent submits that the marks are highly similar phonetically and, in support, has filed a number of documents. In her witness statement, Ms Oliver states:

“When considering the trade marks from an aural point of view there is a clear phonetic similarity. The phonetic similarity would be relevant when considering English speaking consumers, as well as those in other EU countries.”

37. The documents Ms Oliver exhibits are prints taken from the Internet indicating how e.g. English, German, French, Portuguese and Italian speakers would pronounce various letters. I note that with reference to English pronunciation, the material she exhibits at WOO1 is headed as relating to American English. This material has been filed in an attempt to support the opponent's view that to the average consumer the respective marks are aurally similar if not identical. Perhaps understandably, the applicant's evidence responds to the opponent's evidence and also consists of material directed to the pronunciation of the marks by various

speakers. That evidence includes witness statements from professional translators in each of the non-English languages referred to above.

38. I do not consider it necessary to summarise any of this evidence in any greater detail. This is because the evidence is of no value to the matter to be decided. The average consumer to be taken into account is an English speaker in the UK and how (s)he would pronounce the marks is a matter on which I can make my own judgment.

39. The opponent, through Ms Oliver, submits:

“Both the Applicant’s and Opponent’s trade marks are made up of two syllables, which would be spoken ‘ZE-OS’ and ‘SY-OSS’ respectively.

The first syllable in the Applicant’s trade mark is ‘ZE-’ and in the Opponent’s trade mark it is ‘SY-’. The letters ‘e’ and ‘y’ in English possess a very closely similar pronunciation when spoken, with the letter ‘y’ in most cases creating an ‘e’ sound.”

and;

“In addition to the above the letters ‘z’ and ‘s’ in English are also very closely similar in their pronunciation”.

40. Ms Oliver summarises the position by stating that the marks have the following ‘possible’ pronunciations:

“Applicant’s Trade Mark: ZE- Possible pronunciations: ‘zee’, ‘see’, ‘zay’, ‘zeh’ or ‘zigh’

Opponent’s Trade Mark: SY- Possible pronunciations: ‘sigh’, ‘zigh’ or ‘see’”

41. In his letter dated 7 March 2014, Mr Chotai submits:

“the two trademarks are visual and aural different.”

In his witness statement he submits:

“I agree with the witness statement by the opponents that both trademarks are made up of two Syllables words which would be spoken. However I see the pronunciations of the first 2 letters set out below.

ZE-	-ZE, ZEE	(Applicant)
SY	-SI,SIGH	(Opponents)

The Opponent have put forward a case that the letter (E) and (Y) possess a very close pronunciation I believe that it is wrong just to look at the single letter in this case as both the applicant and the opponent agree these are two syllable words and therefore should be judged as Follows

-The first letter should be taking into account as most important letter (S) in SYOSS. They are both sibilant sounds which is produced by forcing air out toward your teeth. Is characterised by a hissing sound (sssss) for the letter (S), a buzzing sound (zzzzz) for the letter (Z).”

42. Whilst it is possible for any two people to pronounce almost any word in different ways, in my view, it is most likely that the average consumer will pronounce the applicant’s mark as Zee–Os and the opponent’s as Sigh-Os. There is a degree of aural similarity in that both end in the same Os sound. Whilst the first letters of the respective marks differ, there is a further degree of similarity in that both are sibilant letters and any difference between them as an initial letter is unlikely to be noticed in normal use. But there is also a point of difference resulting from the different vowel sound produced by the letters E and Y appearing in the respective marks. I am not persuaded that the letter Y will create an ‘e’ sound given its position within the mark: that is rather more likely where it appears at the end of a word. As exemplified in the words ‘rhythmically’ or ‘hyper’ the letter ‘y’ in this forward position is akin to the letter ‘i’. Overall, the respective marks have a reasonable degree of aural similarity. Even if pronounced slightly differently, I would have reached the same finding as to aural similarity.

The distinctiveness of the earlier mark

43. I must also assess the distinctive character of the earlier mark. The distinctive character of a 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 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 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 Cheimsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

44. As I indicated above, the only evidence of the use of the mark filed by the opponent consists of a few pages taken from its website in January 2014. That being the case, the opponent has not shown that the distinctiveness of its mark has been enhanced through its use. That said, as a mark consisting of an invented word, it has a high degree of inherent distinctive character.

Likelihood of confusion

45. In determining whether there is a likelihood of confusion, a number of factors have to be borne in mind. The first is the interdependency principle whereby 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. I also have to factor in the distinctive character of the earlier marks as the more distinctive they are the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between

trade marks and must instead rely on the imperfect picture of them he or she has retained in mind.

46. Earlier in this decision I found:

- The applicant's goods in class 3 to be identical to those of the opponent in this class;
- The applicant's goods in class 11 to have a low degree of similarity with the opponent's *brushes*;
- The respective marks to have none or a very low degree of visual similarity, a reasonable degree of aural similarity and to be conceptually neutral;
- The visual aspects of the marks are of greater importance given the nature of the purchasing process;
- The goods are such as will be bought with at least a reasonable degree of care;
- The earlier mark has a high degree of inherent distinctive character which has not been shown to have been enhanced through its use.

47. I accept that the concept of imperfect recollection is of greater potential relevance in cases where the marks being compared consist of invented words, however, whilst acknowledging that there is a greater degree of aural similarity between them, the stark visual differences between the marks for goods lead me to find that there is no likelihood of confusion even where identical goods are concerned. That being the case, the opposition brought on grounds under section 5(2)(b) of the Act fails.

Costs

48. The applicant having succeeded, it is entitled to an award of costs in its favour. In making the award, I take into account that a case management conference took place, the evidence filed by the opponent was ill-directed and led the applicant to file its own equally ill-directed evidence in response and that the decision has been taken from the papers, without a hearing with both parties filing written submissions in lieu of attendance at a hearing.

49. I make the award on the following basis:

For filing a statement and reviewing the other side's statement:	£400
For preparation of evidence:	£200
For filing written submissions:	£200
Total:	£800

50. I order Henkel AG & Co KGaA to pay Kosh For Men Ltd the sum of £800 as a contribution towards its costs. This sum is to be paid within seven days of the expiry of the period for appeal against this decision or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 7th day of August 2014

**Ann Corbett
For the Registrar
The Comptroller-General**