

**O/594/20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF THE UK DESIGNATION OF INTERNATIONAL  
REGISTRATION NO. 1143981 BY  
SELENA MARKETING INTERNATIONAL SP. Z O.O.  
FOR THE PROTECTION OF THE FOLLOWING TRADE MARK IN  
CLASSES 1, 2, 17 & 19:**



**AND**

**IN THE MATTER OF THE OPPOSITION THERETO  
UNDER NO. 411164 BY  
TITAN CEMENT COMPANY SA**

## BACKGROUND AND PLEADINGS

1. Selena Marketing International Sp. z o.o. (“the holder”) designated International Registration (IR) No. 1143981 for protection in the United Kingdom on 18 April 2017. The priority date of the IR is 23 July 2012. The following details were also entered on the designation:

### Disclaimer

Word: *PROFESSIONAL*

### Colours claimed

*Dark blue, red and white*

### Colour Indication

*The mark contains the colours dark blue, on upper background; red, lower background; white, letters “Tytan”, “Professional”.*

2. The designation was accepted and published on 29 September 2017 in respect of the following goods:

### Class 1

*Acrylic resins, unprocessed; adhesives for industrial purposes; adhesives for wall tiles; adhesives for wallpaper; adhesives other than for stationery or household purposes; anti-incrustants; artificial resins, unprocessed; brickwork preservatives, except paints and oils; cement preservatives, except paints and oils; chemical preparations to prevent mildew; chemical products for use as fixing agents, namely self-hardening artificial resin and mortar compounds for anchoring fastening elements and contained in cartridges; concrete preservatives, except paints and oils; construction adhesives; damp proofing preparations, except paints, for masonry; epoxy resins, unprocessed; industrial chemicals; masonry preservatives, except paints and oils; preservatives for tiles, except paints and oils; sizing preparations; synthetic resins, unprocessed.*

Class 2

*Wood mordants, primers for wood, primers, oils for the preservation of wood, wood coatings, coatings for roofing, wood preservatives.*

Class 17

*Adhesive tapes other than stationery and not for medical or household purposes; caulking materials; draught excluder strips; insulating materials; insulating plaster; insulating tape and band; polyurethane aerosol foams; sealant compounds for joints; seals; silicone and acrylic sealants; substances for insulating buildings against moisture; synthetic resins; washers of rubber; waterproof packings; weatherstripping compositions.*

Class 19

*Bitumen; bituminous coatings for roofs; bituminous products for building; building materials, not of metal; building paper; coverings, not of metal, for building; framework, not of metal, for building; mortar for building; plaster; road coating materials; roof coverings, not of metal; roof flashing, not of metal; roofing shingles; tarred strips, for building.*

3. On 22 December 2017, the IR was opposed by Titan Cement Company SA (“the opponent”). The opposition is based on sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”) and concerns all the goods in Classes 1, 17 and 19 of the designation.

4. Under section 5(2)(b), the opponent is relying on the following trade marks:

a) UK trade mark no. 2281012 (“the 012 mark”)



Filing date: 19 September 2001

Registration date: 19 September 2003

Priority date: 15 June 2001

Registered for goods and services in Classes 16, 19 and 39.

Colours claimed: Blue and grey.

b) UK trade mark no. 2281008 (“the 008 mark”)



Filing date: 19 September 2001

Registration date: 19 September 2003

Registered for goods and services in Classes 16, 19 and 39.

Colours claimed: Blue and grey.

With both marks, the opponent is relying on the following goods:

Class 19

*Building materials, being cement, ready mix concrete, aggregates, cement products in general.*

5. The opponent claims that the marks are similar and the goods are identical or similar, such that there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the opponent’s earlier marks.

6. Under section 5(3), the opponent claims that the 008 mark has an extensive reputation for the Class 19 goods listed in paragraph 4 and that use of the contested mark would take unfair advantage of, or be detrimental to, the distinctive character and repute of the 008 mark. It claims that the holder would benefit from the substantial reputation and goodwill that the opponent has developed over many years in the earlier trade mark to the extent that the impression of the holder’s products would be enhanced and would achieve a wider public recognition than would otherwise be

obtained. Detriment to the opponent would arise as a result of the dilution of its mark and consequent loss of business.

7. Under section 5(4), the opponent claims that use of the contested mark would be contrary to the law of passing off. It says that it has used the sign **TITAN** in the UK since at least as early as September 2001. It claims that use of the contested mark for the opposed goods would deceive consumers who would mistakenly believe that the goods originate from the opponent. This would result in damage to the essential function of the mark and lead to a loss of business for the opponent.

8. The holder filed a defence and counterstatement denying the claims made and putting the opponent to proof of use of the earlier marks for all the goods relied upon.

9. Both parties filed evidence. I shall summarise this to the extent that I consider it necessary.

10. Neither party requested a hearing and both filed written submissions in lieu on 5 October 2020. I have taken this decision following a careful consideration of the papers.

11. In these proceedings, the opponent is represented by Stevens Hewlett & Perkins and the holder by Forresters IP LLP.

## **Evidence**

### ***Opponent's evidence***

12. The opponent's evidence comes from Georgios Damaskinakis, Trading Operations/Administration & European Terminals Manager of the International Trade Division of Titan Cement Company SA. It is dated 25 September 2019.

13. Mr Damaskinakis explains that his company is part of the Titan group of companies headed by Titan Cement International. He states that the mark TITAN was first used in 1902 in Greece, that the company began its expansion into overseas markets in

1933, and in 1991 opened a distribution terminal in the UK, from which it has been supplying cement to UK businesses through Titan Cement UK Limited, incorporated in 1988. Mr Damaskinakis says that his company has approximately 2.7% of the UK cement market.<sup>1</sup> Later in his witness statement, he lists six UK concrete manufacturers that he states are “amongst our many UK customers”.<sup>2</sup> Exhibit GD8 is a print-out from [www.titanuk.co.uk](http://www.titanuk.co.uk) that states that Titan Cement UK Limited is a wholly owned subsidiary of Titan Group. The print-out is undated, but it contains a link to the group’s 2018 results.

14. UK sales figures are given as follows:<sup>3</sup>

<b>Year</b>	<b>Sales of cement</b>
2013	£12.276m
2014	£15.994m
2015	£18.15m
2016	£23.147m
2017	£20.132m

15. Mr Damaskinakis states that advertising expenditure in the UK was £18,077 during 2014-2018.<sup>4</sup> No examples of this advertising are provided.

16. Attached to the witness statement are 15 exhibits. Exhibits GD1-3 concern the Titan group as a whole and give no indication of use in the UK. Exhibit GD1 is an article from the *Global Cement* website, dated 4 December 2017, entitled “Global Cement Top 100 Report 2017-18”. It provides an overview of the sector and the largest companies by worldwide production capacity at the end of November 2017. Titan is sixteenth. The annual reports in Exhibit GD2 give turnover figures for regions, rather than individual countries, and the pages on awards won (which are reproduced in Exhibit GD3) show nothing related to the UK. There is one reference to a Europe-wide

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<sup>1</sup> Paragraph 16.

<sup>2</sup> Paragraph 25. The companies are Edgar Ready Mix Concrete Limited, Plasmor Blocks, Weinerberger plc, Armstrong Blocks Limited, Watts Mix Concrete Limited, Soundsfield Concrete Limited.

<sup>3</sup> Paragraph 15.

<sup>4</sup> Paragraph 17.

award – the European Business Awards for the Environment, at which the group was honoured twice in 2013-14.

17. Exhibits GD4-6 contain lists of trade marks owned by the group, the UK company registration details for Titan Cement UK Limited, and the registration details for the domain name titanuk.co.uk. Print-outs from the website retrieved via the Internet Archive Wayback Machine describe the company’s activities in the UK. The first of these is dated 3 December 2001 and the remainder come from 2013-2017. On 24 September 2013, the website stated that “The company currently delivers bulk cement only.”<sup>5</sup>

18. Mr Damaskinakis supplies a set of ten invoices. He states that all these orders were for cement, shown by the code “CEM”. The volumes and prices are all redacted, and some of the address details are not clear. Where addresses can be seen, they show UK orders between January 2014 and September 2017.<sup>6</sup> Both earlier marks are used, along with the marks shown below. None of the marks is particularly clear.



19. Exhibit GD10 contains twelve delivery tickets, all bearing the following mark and the product code “CEM”:



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<sup>5</sup> Exhibit GD7 contains the print-out from 2001, while the later ones can be found in Exhibit GD12.

<sup>6</sup> Exhibit GD9. The addresses are unclear on two of the ten invoices.

The earliest is dated 25 July 2014 and the latest 21 July 2017. The addresses are not clear on three of these tickets; the remaining tickets show deliveries within the UK. In Exhibit GD14, a quotation for 2,000 tonnes of cement to be delivered to a UK customer also shows the 008 mark and is dated 29 August 2016. It is not stated whether this quotation resulted in a sale.

20. The remaining exhibits contain cement test results, an undated photograph of buckets containing cement and an undated delivery tag, both showing the 008 mark, and business cards and a letter head with the same earlier mark.<sup>7</sup>

21. Towards the end of his witness statement, Mr Damaskinakis states that in 2011 the holder applied to register TYTAN PROFESSIONAL and TYTAN PROFESSIONAL with a device as trade marks in Greece. These were refused on the basis of a likelihood of confusion with marks owned by the opponent.<sup>8</sup>

### ***Holder's evidence***

22. The holder's evidence comes from Elżbieta Korczyńska, President of the Management Board of Selena Marketing International Sp. z o.o. It is dated 23 January 2020. Her evidence is directed towards showing that the contested and earlier marks are coexisting without confusion.

23. Selena Marketing is an IP management company that licenses the TYTAN PROFESSIONAL trade marks and other marks of the Selena Group, which specialises in construction chemicals such as polyurethane foams, adhesives, sealants and building insulation systems.<sup>9</sup> The first Selena company was founded in Poland in 1992 and expanded into international markets from 2000. According to Ms Korczyńska, the group is one of the four largest manufacturers of polyurethane foam in the world. She states that it has been selling products bearing the contested mark in markets including the UK, Poland, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, Italy,

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<sup>7</sup> Exhibits GD11, GD13 and GD15 respectively

<sup>8</sup> Paragraph 29.

<sup>9</sup> The group structure is shown in Exhibit EK1 and a list of trade marks in Exhibit EK2.



Turkey, Ukraine, Russia, Kazakhstan, China, USA, Canada, Brazil and Argentina for over 19 years, and she is aware of no instances of confusion during this time.

24. Exhibit EK3 contains a selection of images showing the contested mark used on packaging and product displays. However, all are undated and many contain text in languages other than English, suggesting that they are intended for non-UK markets.<sup>10</sup>

25. In the following exhibit, EK4, there can be found print-outs from a range of online stores selling products bearing the contested mark. Of 17 different websites, only one is aimed at the UK with prices in sterling.<sup>11</sup> The goods on sale consist of adhesives for PVC, silicone, polyurethane foam, waterproofing, mould/fungus killer, primer and silicone remover. The print-out is undated apart from the date of printing: 20 January 2020.

26. The collection of invoices in Exhibit EK6 paints a similar picture. Out of 45 invoices, only one concerns a sale to a UK customer. It is dated 20 March 2015, the product is a TYTAN PROFESSIONAL Gun and the invoice value is £1818.40.

27. Exhibits EK7-9 contain promotional materials, information on trade shows and awards respectively. None of these is connected to the UK.

28. The final Exhibit, EK10, contains registration details for UK trade mark no. 2457193, registered for goods in Classes 17 and 19:



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<sup>10</sup> For example, page 9 shows a product display unit with Italian text, while the cans on page 12 have words in Cyrillic script.

<sup>11</sup> The other sites are aimed at customers in Poland, Bulgaria, Italy, Russia, Brazil, the US and Turkey.

Ms Korczyńska notes that the opponent has not objected to this registration and submits that this mark has been peacefully coexisting with the opponent's marks for 13 years.

### **Preliminary Issue**

29. In paragraph 21 above, I noted that Mr Damaskinakis referred to earlier decisions to refuse trade mark applications made by the holder. I am not bound by the decisions made by another trade mark registry, nor do I have sight of the evidence and arguments that were submitted during those proceedings. Their outcome has no bearing on the decision I must make here, and so I shall take no further account of this information.

### **DECISION**

#### **Proof of Use**

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

“A trade mark shall not be registered if because –

...

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

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

31. An “earlier trade mark” is defined in section 6(1) of the Act:

“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.”

32. Section 6A of the Act<sup>12</sup> states that:

“(1) This section applies where –

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of the publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

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<sup>12</sup> Although amendments to the Trade Marks Act 1994 came into effect in January 2019, they do not apply to these proceedings, which were started in 2017.

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

...

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

33. Section 100 of the Act is as follows:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.

34. The opponent’s marks qualify as earlier marks under section 6(1)(a) of the Act. As they both completed their registration procedures more than five years before the date of publication of the contested designation, they are subject to the provisions of section 6A. The holder requested that the opponent prove use of the marks for all the goods relied on. However, in its written submissions in lieu of a hearing, the opponent stated that it would only be relying on *Cement*. The period in which use must be shown is the five years ending with the date of publication of the designation: 29 September 2012 to 28 September 2017.

35. The case law on genuine use was summarised by Arnold J (as he then was) in *Walton International Limited v Verweij Fashion BV* [2018] EWHC 1608 (Ch):

“114. *The law with respect to genuine use.* The CJEU has considered what amounts to ‘genuine use’ of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundersvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816] [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at

[36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the

proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].

36. The holder submits that the opponent has not proved that it has made genuine use of the earlier marks in the UK for *Cement*. In its written submissions in lieu of a hearing, it explains how it considers that each of the opponent's exhibits fails to show use. I accept that some of the evidence has no bearing on the question of use. For example, the trade mark, company and domain name registration details in Exhibits GD4-6 do not in themselves demonstrate any presence on the UK market. However, I remind myself of the comments of the General Court (GC) in *New Yorker SHK Jeans GmbH & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-415/09:

"In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use

of the trade mark on the market concerned (*COLORIS*, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of 17 April 2008 in Case C-108/07, *Ferrero Deutschland v OHIM*, not published in the ECR, paragraph 36).<sup>13</sup>

### *Form of the marks*

37. As I have already noted, the evidence shows the marks as registered but also the forms reproduced in paragraphs 18 and 19 above. The holder submits that these variants do not constitute genuine use of the earlier marks. The relevant test was set out by Mr Richard Arnold QC (as he then was), sitting as the Appointed Person, in *Nirvana Trade Mark*, BL O/262/06:

“33. ... The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period ...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all.”

38. The 012 marks consists of a device made up of grey arranged to give the impression of a circle, superimposed with blue lines forming another, offset circle and,

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<sup>13</sup> Paragraph 53.



to the right of that device, the word TITAN in blue capital letters in a standard font. The 008 mark is identical, save for the words “CEMENT UK” in grey capital letters beneath “TITAN”. I consider these words to be non-distinctive as they simply describe the goods sold and the geographical location in which the sales occur. Consequently, the distinctive character of both marks rests in the same elements.

39. In my view, the word “TITAN” plays the greater role in the overall impression of the mark, with the device playing a lesser role. The average consumer is more likely to pay attention to the word element than the device: see *Wassen International v OHIM (SELENIUM-ACE)*, Case T-312/03. I find that the placing of the device above the word “TITAN”, rather than to the left of it, does not alter the distinctive character of the mark. All other things being equal, the eye is naturally drawn to the top of a mark or the left, as English speakers read from top to bottom and from left to right, and the word “TITAN” still makes the same contribution to the distinctiveness of the marks.

40. I will now consider the role of colour. As all the evidence before me is in black-and-white, I cannot tell whether the marks have been used in the colour scheme of the registration. However, the word “TITAN” seems to be in a darker colour, or bolder typeface, than “CEMENT UK”, where this appears, and the lines in the device are shown in two different shades. The level of contrast between the different elements looks to me to be similar and it is my view that the distinctiveness of the mark is not affected. I find that the marks shown in paragraphs 18 and 19 are acceptable variants of the earlier marks.

41. Even if I discount the instances where the device is not entirely clear on the invoices, and only one set of lines is fully visible, I consider there is sufficient evidence elsewhere, for instance on the remaining invoices and delivery tickets, to support the finding I have made.

#### *Sufficiency of Use*

42. I have already noted that Mr Damaskinakis’s witness statement provides UK sales figures. The holder submits that these figures are not broken down by category, trade mark or product. Mr Damaskinakis states that these relate to cement. This statement

and the figures themselves were unchallenged during the evidence round. Following the decision of Richard Arnold QC (as he then was), sitting as the Appointed Person, in *Pan World Brands Ltd v Tripp Ltd (EXTREME Trade Mark)*, BL O/161/07, I must take great care if I am to disbelieve evidence that is challenged at such a late stage when it would have been open to the holder to make such a challenger earlier in the proceedings.

43. The figures in Mr Damaskinakis's witness statement are not obviously implausible. The market share of 2.7% may not be large, but I recall that there is no *de minimis* threshold that must be reached. The sales figures are supported by examples of invoices and delivery tickets showing sales to UK customers of products coded "CEM". I see no reason to disbelieve Mr Damaskinakis's assertion that this code refers to cement. Taking the evidence as a whole, it seems to me that the opponent has sold a sufficient level of cement to qualify as genuine use.

#### *Consent*

44. Finally, I turn to the holder's submission that there is nothing in the evidence that shows that use of the earlier marks by Titan Cement UK Ltd is with the consent of the opponent. While it is the case that no licence has been submitted as evidence, Mr Damaskinakis states that the sales were made by a wholly owned subsidiary of the business and the delivery tickets show that the cement was produced in Greece at locations identified in the annual report as cement plants run by the Titan group: Kamari and Patras.<sup>14</sup> I consider it reasonable to infer that use was made with the consent of the opponent.

45. The opponent may therefore rely on the two earlier marks for *Cement*.

#### **Section 5(2)(b)**

46. In considering the opposition under this section, I am guided by the following principles, gleaned from the decisions of the CJEU in *SABEL BV v Puma AG* (Case

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<sup>14</sup> Exhibit GD2, page 111.

C-251/95), *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (Case C-39/97), *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* (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-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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 greater 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; and

k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### ***Comparison of goods***

47. When comparing the goods, all relevant factors should be taken into account, per *Canon*:

“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 complementary.”<sup>15</sup>

48. Guidance was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281. At [296], he identified the following relevant factors:

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<sup>15</sup> Paragraph 23.

- “(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.”

49. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) gave the following guidance on construing terms in trade mark specifications:

"... 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."

50. In *Sky Plc & Ors v Skykick UK Ltd & Anor* [2020] EWHC 990 (Ch), Arnold LJ considered the validity of trade marks registered for, amongst many other things, the general term “computer software”. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“...the applicable principles of interpretation are as follows:

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

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

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

(4) A term which cannot be interpreted is to be disregarded.”<sup>16</sup>

51. I also take account of the following case law. In *Gérard Meric v OHIM*, Case T-133/05, the GC stated:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”<sup>17</sup>

52. In *SEPARODE Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, stated:

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<sup>16</sup> Paragraph 56.

<sup>17</sup> Paragraph 29.

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”<sup>18</sup>

53. 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. The GC clarified the meaning of “complementary” goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06:

“... 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.”<sup>19</sup>

54. The goods to be compared are shown in the table below:

Earlier goods	Contested goods
<p><u>Class 19</u> Cement</p>	<p><u>Class 1</u> <i>Acrylic resins, unprocessed; adhesives for industrial purposes; adhesives for wall tiles; adhesives for wallpaper; adhesives other than for stationery or household purposes; anti-incrustants; artificial resins, unprocessed; brickwork preservatives, except paints and oils; cement preservatives, except paints and oils; chemical preparations to prevent mildew; chemical products for use as fixing agents, namely self-hardening artificial resin and mortar compounds for anchoring fastening elements and contained in cartridges;</i></p>

<sup>18</sup> Paragraph 5.

<sup>19</sup> Paragraph 82.

Earlier goods	Contested goods
	<p data-bbox="791 248 1394 629"><i>concrete preservatives, except paints and oils; construction adhesives; damp proofing preparations, except paints, for masonry; epoxy resins, unprocessed; industrial chemicals; masonry preservatives, except paints and oils; preservatives for tiles, except paints and oils; sizing preparations; synthetic resins, unprocessed.</i></p> <p data-bbox="791 696 911 730"><u><i>Class 17</i></u></p> <p data-bbox="791 748 1394 1234"><i>Adhesive tapes other than stationery and not for medical or household purposes; caulking materials; draught excluder strips; insulating materials; insulating plaster; insulating tape and band; polyurethane aerosol foams; sealant compounds for joints; seals; silicone and acrylic sealants; substances for insulating buildings against moisture; synthetic resins; washers of rubber; waterproof packings; weatherstripping compositions.</i></p> <p data-bbox="791 1301 911 1335"><u><i>Class 19</i></u></p> <p data-bbox="791 1352 1394 1787"><i>Bitumen; bituminous coatings for roofs; bituminous products for building; building materials, not of metal; building paper; coverings, not of metal, for building; framework, not of metal, for building; mortar for building; plaster; road coating materials; roof coverings, not of metal; roof flashing, not of metal; roofing shingles; tarred strips, for building.</i></p>

55. The opponent submits that all the contested goods are identical or similar to the earlier goods as they are all construction materials. In making my comparison, I must give thought to the appropriate level of generality to adopt as I consider the purpose



of the goods. In my view, the phrase “construction materials” encompasses a wide variety of different goods used for specific activities – building, decorating, insulation, to name only a few. In what follows, I have sought to avoid the extremes of the very general and the over-specific.

56. The opponent’s goods are restricted to *Cement*, which comes in the form of a powder and is used in construction for the purpose of binding other materials together to make substances such as concrete and mortar. It is used by companies working on a range of building or infrastructure projects and may also be purchased by individuals who are carrying out building works themselves. It is distributed through specialist companies, building merchants and DIY stores.

#### *Class 1 goods*

57. *Acrylic resins, unprocessed, Artificial resins, unprocessed, Epoxy resins, unprocessed, Industrial chemicals, Synthetic resins, unprocessed* are all chemicals that are used to make finished goods, such as paints, plastics or adhesives. They will be used by the manufacturers of such finished articles, and so their use and users are different from those of *Cement* and the distribution channels are also likely to be different, with the contested goods being purchased directly from specialist manufacturers. The goods are not in competition, neither are they complementary. I find them to be dissimilar.

58. *Adhesives for industrial purposes, adhesives for wall tiles, adhesives for wallpaper, adhesives other than for stationery or household purposes and construction adhesives* are substances that are used for sticking materials together. In my view, the average consumer will understand the term to refer to viscous substances that are ready-to-use or pastes or powders that need to be mixed with water. Their physical nature therefore overlaps with that of cement. There are also overlaps in users and distribution channels, as building merchants and DIY stores will also sell these goods. However, they are likely to be found in different aisles. There may be a degree of competition but this will be relatively low and, to my mind, restricted to *construction adhesives*, which is a fairly broad term. The consumer may choose to buy a ready-made adhesive, or cement and other materials to make their own adhesive substance.

In my view, *adhesives for industrial purposes, adhesives for wall tiles, adhesives for wallpaper and adhesives other than for stationery or household purposes* are dissimilar to *cement*, while the overlaps will be greater for *construction adhesives* and so I find a low degree of similarity between these goods and *cement*.

59. *Sizing preparations* are used to prepare surfaces for the application of other materials, such as wallpaper or paint. Their purpose is different, therefore, from that of *Cement*, as is the method of use. They are neither in competition nor complementary. There may be some overlap in users and distribution channels, but overall I consider that *Sizing preparations* are dissimilar to *Cement*.

60. The opponent submits that *anti-incrustants* are similar to the contested goods on account of a similar nature (i.e. building materials), and identical distribution channels and identical users. I understand the word “incrustation” to refer to the deposit of a chemical such as salt or lime on a surface. *Anti-incrustants* would therefore be products that could be used to prevent the formation of such deposits. Their purpose is different from that of *Cement*, and the goods are neither in competition nor complementary. There may be some overlap in users, distribution channels and physical nature of the goods. However, I consider that these overlaps are not sufficient to find any similarity between *anti-incrustants* and the earlier goods.

61. *Brickwork preservatives, except paints and oils, concrete preservatives, except paints and oils, damp proofing preparations, except paints, for masonry and masonry preservatives, except paints and oils* are chemicals that are used, as the name suggests, to keep brickwork, concrete and masonry in good condition and protect it from the elements. They will be in a form that can be applied or inserted into walls, for example liquids, creams or pastes. The purpose, physical nature and method of use are different from those of *Cement*. The goods do not compete with each other and, given the difference in physical nature and composition, I do not consider that they are complementary in a trade mark sense, as it seems to me unlikely that the average consumer would think that the goods come from the same or connected undertakings. As with the *anti-incrustants*, there will be some overlap in users and distribution channels, but taking the factors together I find that the contested goods are dissimilar to *Cement*.

62. The same analysis applies in the case of *Preservatives for tiles, except paints and oils* and *Chemical preparations to prevent mildew*. I also find these goods to be dissimilar to *Cement*.

63. *Cement preservatives, except paints and oils*, will have the same physical nature and method of use as the preservatives I have just considered. However, in my view, there is a degree of complementarity. *Cement* is essential for the use of *Cement preservatives* and in my view the average consumer may believe that the producer of cement was also responsible for a range of products intended to look after it. It is the direct connection between the contested and the earlier goods that distinguishes this comparison from that between *Cement* and the other preservatives. In those cases, the average consumer must make the mental jump from cement to the goods of which it is a component, such as concrete and brickwork/masonry. I find that *Cement preservatives, except paints and oils*, are similar to a medium degree to *Cement*.

64. The remaining goods in Class 1 of the applicant's specification are *Chemical products for use as fixing agents, namely self-hardening artificial resin and mortar compounds for anchoring fastening elements and contained in cartridges*. The use of the word "namely" means that this term is limited to the goods listed after that word. I have already noted that *Cement* is used to bind materials and is a component of mortar. The fact that one good is a part, element or component of another good is not sufficient to show similarity: see *Les Éditions Albert René v OHIM*, Case T-336/03. However, I find that there is a degree of similarity between the physical nature and uses of the *mortar compounds* and *Cement*, and they will have the same users and share distribution channels. Furthermore, there is a degree of competition. A consumer may choose to buy cement and mix their own mortar or a mortar compound in a cartridge. I find there to be a high degree of similarity between *Cement* and the contested goods as far as they relate to mortar compounds. Artificial resin, on the other hand, has a different physical nature and is less likely to share the same distribution channels. Even if the goods are sold in the same building merchants or DIY stores, they are likely to be found in different aisles. Consequently, I find a low degree of similarity between *Cement* and the contested goods as they relate to artificial resin.

## *Class 17 goods*

65. The first goods in this class are *Adhesive tapes other than stationery and not for medical or household purposes*. The purpose of these goods is to stick surfaces together. At least one side of the tapes will be coated with an adhesive substance. Their physical nature is therefore different from that of *Cement*. There is an overlap in the users but in my view the goods are not complementary or in competition. Taking all the factors into consideration, I find that the goods are dissimilar.

66. *Caulking materials, polyurethane aerosol foams, sealant compounds for joints, seals, silicone and acrylic sealants* are all sealants, used to fill gaps in buildings or where fittings such as baths and washbasins are fixed to walls. Their physical nature is different from that of cement, as is their purpose. There is some overlap in users and distribution channels, but the goods will be sold in different aisles. They are not in competition or complementary. I find that the goods are dissimilar.

67. The same analysis applies in the case of *Insulating materials, insulating plaster, insulating tape and band, substances for insulating buildings against moisture, weatherstripping compositions*. The purpose of these goods is to protect buildings against the cold, moisture and adverse weather conditions. They are dissimilar to *Cement*.

68. I have already compared *Synthetic resins* in Class 1. However, those goods were unprocessed raw materials, to be used to manufacture finished goods. Class 17 covers a different set of goods:

*Unprocessed and semi-processed rubber, gutta-percha, gum, asbestos, mica and substitutes for all these materials; plastics and resins in extruded form for use in manufacture; packing, stopping and insulating materials; flexible pipes, tubes and hoses, not of metal.*

69. In *Pathway IP Sarl (formerly Regus No. 2 Sarl) v Easygroup Ltd (formerly Easygroup IP Licensing Limited)* [2018] EWHC 3608 (Ch), Carr J considered whether it was appropriate to take the class(es) in which the trade mark was registered into

account in revocation or invalidation proceedings when deciding whether a description covered the goods or services shown in the evidence. After considering the judgments of the High Court in the *Omega 1* and *Omega 2* cases,<sup>20</sup> he stated that in his (provisional) view, the class number should be taken into account where the meaning of the disputed term is not otherwise sufficiently clear and precise. In particular the judge stated that where:

“... the words chosen may be vague or could refer to goods or services in numerous classes, the class may be used as an aid to interpret what the words mean with the overall objective of legal certainty of the specification of goods and services.”<sup>21</sup>

70. As *synthetic resins* may refer to goods in more than one class, I interpret its meaning here to be “synthetic resins in extruded form for use in manufacture”. The users are still, then, manufacturers of goods to be sold. Their physical nature is different from that of *Cement*, and they are neither in competition nor complementary. Trade channels will also be different. I find that *Synthetic resins* are dissimilar to *Cement*.

71. *Washers of rubber* are used to prevent leaks of liquid from hoses and taps. Their physical nature and uses are therefore different from those of *Cement*. While there will be some overlap in users and trade channels, the goods are not in competition with each other or complementary. Taking all these factors into account, I find that the goods are dissimilar.

#### *Class 19 goods*

72. *Building materials, not of metal* is a broad term that encompasses *Cement*. Under the *Meric* principle, I find that these goods are identical.

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<sup>20</sup> [2010] EWHC 1211 (Ch) and [2012] EWHC 3440 (Ch).

<sup>21</sup> Paragraph 94.

73. *Bitumen, bituminous coatings for roofs, bituminous products for buildings, tarred strips for building* are products of the petrochemical industry and used for coating roofs and in road building and maintenance. They come in the form of a sticky, viscous substance which can be applied to surfaces. Their physical nature is different from that of *Cement*. There will be a degree of overlap between users and trade channels. They are neither complementary or in competition with each other. I find that the goods are dissimilar to *Cement*.

74. *Building paper, Coverings, not of metal, for building, plaster and framework, not of metal, for building*, are all goods that are used in construction. The framework provides the basis for the building, while the coverings and plaster will go on the walls. Building paper is used as a layer between other elements in a building. There will be an overlap between the users and trade channels. Again, I find there to be no complementarity or competition between the goods. In my view, they are dissimilar.

75. I turn now to *Mortar for building*. In my view, the same analysis applies as with *Chemical products for use as fixing agents, namely ... mortar compounds for anchoring fastening elements and contained in cartridges*. I find the goods to be highly similar.

76. *Plaster* is used to protect and decorate walls, ceilings or other structures. Its use is therefore different from that of *Cement*, although I note that cement may be used as an ingredient in substances that perform similar functions, such as render. I refer again to the decision in *Les Éditions Albert René*, which I have mentioned in paragraph 64 above, and remind myself that I must conduct a comparison between *Cement* itself and *Plaster*. They are similar in physical nature, generally being supplied as powders that can be mixed with water to form a paste, although their chemical composition would not be the same. There is an overlap in users and distribution channels, although the goods are unlikely to be sold in the same section of a DIY store. The goods are not in competition nor do I consider them to be complementary. Taking all the factors into account, I find them to be dissimilar.

77. *Road coating materials* may be bituminous substances, which I have already considered in paragraph 73 above. They may also be concrete, a component of which

is cement. The purpose of road coatings is to provide a smooth surface across which vehicles can travel safely. There is an overlap in users and trade channels and a degree of competition. A company constructing or maintaining a road may choose to buy road coating materials or cement and other products to mix their own. I find that there is a medium degree of similarity between the goods.

78. *Roof coverings, not of metal, roof flashing, not of metal and roofing shingles* are all goods that are used to keep roofs watertight and insulated. Their purpose and physical nature are different from that of *Cement* and I see no complementarity between them. As I have found for many of the goods, there will be some overlap in users and trade channels, but this is not sufficient for me to find any similarity between the goods.

79. Where there is no similarity between the goods, a section 5(2)(b) claim must fail: see *eSure Insurance v Direct Line Insurance* [2008] ETMR 77 CA. I will continue my examination of the claim under section 5(2)(b) with respect to the following contested goods:

*Class 1*

*Cement preservatives, except paints and oils; chemical products for use as fixing agents, namely self-hardening artificial resin and mortar compounds for anchoring fastening elements and contained in cartridges; construction adhesives.*

*Class 19*

*Building materials, not of metal; mortar for building; road coating materials.*

80. The section 5(2)(b) ground fails in respect of all the remaining goods.

***Average Consumer and the Purchasing Process***

81. In *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“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.”<sup>22</sup>

82. The parties are agreed that the goods are directed at the public at large (including do-it-yourself enthusiasts) and at business customers who have specific knowledge in the building and construction field. The degree of attention paid will vary from average to “above average” (the opponent) or “high” (the applicant). I agree that attention will be at an average or higher than average level, although perhaps not at the very highest.

83. The consumer will select the goods after browsing websites, catalogues or other printed publications, or seeing the goods on display in a building merchant or DIY store. The visual element will therefore play a significant role. However, I do not discount the aural element, as the consumer may seek advice from sales staff or order goods on the telephone.

### ***Comparison of marks***

84. It is clear from *SABEL* (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 in *Bimbo* that:

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

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<sup>22</sup> Paragraph 60.



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.”<sup>23</sup>

85. It would be wrong, therefore, artificially to dissect the marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

86. The respective marks are shown below:

Earlier mark	Contested mark
<p>The 012 mark:</p>  <p>The 008 mark:</p> 	

87. Earlier in my decision I considered where the overall impression of the earlier marks lay, when I discussed the variants that had been used. To recap, I found that the word “TITAN” made the larger contribution to the overall impression of the mark, although the device also plays a part. I also found that the words “CEMENT” and “UK” in the 008 mark were non-distinctive.

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<sup>23</sup> Paragraph 34.

88. Turning to the contested mark, I note that the word “PROFESSIONAL” has been disclaimed. However, following the judgment of the CJEU in *Patent- och registreringsverket v Mats Hansson*, C-705/17, such a disclaimer has no effect on the assessment of a likelihood of confusion. Tribunal Practice Notice (TPN) 1/2020 states that:

“The element(s) of a trade mark that is (are) subject to a disclaimer will be taken into account in the assessment of a likelihood of confusion with (or other damage from) a later mark, even where the disclaimed element is the only point of similarity with the later mark.”

89. The contested mark consists of the word “TYTAN” in white capital letters in a standard font on a dark rectangular background. This background appears to be black, although the colour claimed in the designation is dark blue. The upper corners of the rectangle are rounded and below it is a narrower red rectangle with rounded lower corners in which the word “PROFESSIONAL” is shown, also in white capital letters. Between the two rectangles is a white border, and a larger white border with rounded corners surrounds both, with a thinner dark border beyond that. It is the word “TYTAN” that makes the most significant contribution to the overall impression of the mark, and the colour arrangement makes a lesser contribution. The shapes of the backgrounds and borders are, to my mind, commonplace, and so do not affect the overall impression of the mark. The word “PROFESSIONAL” is, to my mind, non-distinctive as it conveys the message that these are higher quality goods, suitable for use by professionals in the relevant trades.

#### *Visual comparison*

90. The marks contain a five-letter word, identical in all but the second letter: TITAN/TYTAN. The device element of the earlier marks is a noticeable difference, as are the respective colour arrangements. In my view, the contested mark is similar to the earlier marks to a low to medium degree.

### *Aural comparison*

91. The only element of the earlier marks that will be pronounced is the word “TITAN” which will be articulated as “TIE-TAN”. In the case of the 008 mark, the average consumer is unlikely to say the non-distinctive “CEMENT UK”. The holder submits that:

“TYTAN is not an ordinary English word and has no dictionary definition. To the average consumer, therefore, TYTAN would be viewed as a newly coined word, which could be pronounced as individual letters, or, alternatively, as the individual letters T and Y and the syllable TAN.”<sup>24</sup>

92. The holder goes on to submit that, because “TYTAN” sounds foreign, the average consumer will say the word “PROFESSIONAL”, but as the latter word has been disclaimed, I must focus on “TYTAN”. I consider it unlikely that it would be articulated as “T-Y-T-A-N” or “T-Y-TAN” even if the average consumer believed it to be a newly coined word. To my mind, the average consumer would say “TIE-TAN”, meaning that the marks are aurally identical.

### *Conceptual comparison*

93. With regard to the conceptual comparison, the opponent submits that:

“The word TITAN refers to a family of giants in Greek mythology. When spoken, TITAN and TYTAN are indistinguishable due to the identical pronunciation. Accordingly, when spoken, the two marks must evoke the same concept of a ‘titan’. The additional word elements in both marks, being purely non-distinctive, do not diminish this conceptual identity.

Consequently, the marks are similar to a high degree conceptually.”<sup>25</sup>

94. The holder submits that:

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<sup>24</sup> Holder’s written submissions, paragraph 47.

<sup>25</sup> Opponent’s written submissions, §24.

“... the Opponent’s marks TITAN and TITAN CEMENT UK have a strong conceptual element. Specifically, the marks evoke the notion of something that is powerful and strong. No such conceptual scope can be found in the Applicant’s Mark, which would be completely meaningless to the relevant public in the UK.”<sup>26</sup>

95. In Greek mythology, the Titans were the early gods and are often depicted as giants. It does not seem to me likely that the average consumer will know this. However, I do consider that they will be familiar with the word “TITANIC” meaning something large, strong or powerful, and will identify “TITAN” as a related word. The device will, in my view, not alter the conceptual content of these earlier marks.

96. It is possible that some consumers will, as the holder suggests, believe that the contested mark is an invented word. For these consumers, there will be conceptual dissimilarity between the marks. However, I consider that a significant proportion will see the contested mark as a misspelling of “TITAN” and for them the marks will have a conceptual identity, whatever meaning they ascribe to that word.

### ***Distinctive character of the earlier mark***

97. In *Lloyd Schuhfabrik Meyer*, 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 Alternberger* [1999] ECR I-0000, paragraph 49).

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<sup>26</sup> Holder’s written submissions, 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).”

98. Registered trade marks possess varying degrees of inherent distinctive character from the 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.

99. The opponent refers me to the decision of the European Union Intellectual Property Office (EUIPO) First Board of Appeal in *THERMISOL TITAN/TYTAN PROFESSIONAL*, R1789/2010-1. In this decision, the Board said:

“The argument that ‘TITAN’ is descriptive because it ‘indicates’ a specific product line is not easy to understand: identifiers of product lines are not necessarily descriptive. If the applicant alludes to the fact that ‘titan’ might mean ‘giant’, the Board notes that it is not a notion that comes spontaneously to mind in this particular business: ‘gigantic’ does not seem, *prima facie*, to be a strong selling point as regards building or insulation materials.”<sup>27</sup>

100. I have already found that “giant” is not the only meaning that is likely to be ascribed to the word “TITAN”. The notions of strength and power are also conveyed by this word, and it seems to me that these are more likely qualities that would be sought in the products at issue. That said, I do not forget that “TITAN” is only one element of the earlier marks. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13,

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<sup>27</sup> Paragraph 18.

Mr Iain Purvis QC, sitting as the Appointed Person, pointed out that the level of distinctive character is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

101. I found that the role of the device, which has no counterpart in the contested mark, played a lesser role in the overall impression of the marks, with the word “TITAN” making the larger contribution to the marks’ distinctiveness. I find that the inherent distinctiveness of the earlier marks is at a medium level.

102. The opponent submits that the distinctiveness of the earlier marks has been enhanced through the use made of them. I have already found that there has been genuine use of the marks and note that Mr Damaskinakis states that the UK distribution centre opened in 1991. In 2014-18, the opponent spent £18,077 on advertising the mark, but this seems to me to be a relatively modest sum and the evidence contains no examples showing how this money was spent. The evidence also states that the opponent has a 2.7% share of the UK cement market which is not a particularly large proportion. To my mind, the opponent has not shown that the distinctiveness of the marks has been enhanced beyond a medium level.

### ***Conclusions on likelihood of confusion***

103. There is no scientific formula to apply in determining whether there is a likelihood of confusion. 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 or vice versa. It is necessary for me to take account of the distinctive character of the opponent or holder's marks, the average consumer and the nature of the purchasing process for the contested goods. In doing so, I must be aware 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 they have in their mind.

104. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting as the Appointed Person, explained that:

“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 recognised 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.’”<sup>28</sup>

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<sup>28</sup> Paragraph 16.

105. In summary, I found that the following goods were identical or similar to the earlier goods:

<b>Level of Similarity</b>	<b>Goods</b>
Identical	<i>Building materials, not of metal</i>
High	<i>Chemical products for use as fixing agents, namely self-hardening mortar compounds for anchoring fastening elements and contained in cartridges; mortar for building.</i>
Medium	<i>Cement preservatives, except oils and paints; road coating materials</i>
Low	<i>Chemical products for use as fixing agents, namely self-hardening artificial resin for anchoring fastening elements and contained in cartridges; construction adhesives.</i>

106. I also found that the average consumer would be a member of the general public or a business and that they would be paying an average or higher than average degree of attention during the purchasing process, where the visual element would be the most significant, although I do not discount the aural element.

107. I found the earlier marks to have a medium degree of inherent distinctiveness and to be visually similar to a low to medium degree and aurally identical. For a significant group of consumers, the marks would also be conceptually identical.

108. Although the average consumer views the mark as a whole, the case law also directs me to bear in mind the dominant and distinctive elements of the marks. In all the marks at issue, I found the greater contribution to the overall impression to be the word “TITAN” or “TYTAN”. Where the goods are identical or similar to at least a medium degree, it is my view that there is a likelihood of imperfect recollection leading to a mistaking of the later mark for the other. In making this finding, I have balanced the lower level of visual similarity with the aural identity, as word-of-mouth



recommendations and phone ordering will play a part in the purchasing process. I find that there is a likelihood of direct confusion.

109. I must now consider whether the similarity between the marks is sufficient to override the low degree of similarity between the opponent's *Cement* and the holder's *Chemical products for use as fixing agents, namely self-hardening artificial resin for anchoring fastening elements and contained in cartridges and Construction adhesives*. The physical nature of the artificial resin is quite different and, in my view, the average consumer would not expect the same trader to be responsible for them. In my view, the differences in physical nature mean that, despite some degree of similarity, the average consumer would not be directly confused. I also see no reason why, if they have recognised that the marks are different, they would assume an economic connection and be indirectly confused.

110. I now turn to *Construction adhesives*. This term is relatively broad and would include goods with a similar nature to that of *Cement*. As I have already noted, a user, who would be likely to be a construction company, could decide to purchase cement and other materials to make their own adhesive substance to use in their building project. On balance, therefore, I consider that there is a likelihood of direct confusion if the contested mark were to be registered for these goods.

111. Having made this finding, I must now consider the holder's submission that the earlier marks have been peacefully coexisting with UK trade mark no. 2457193, which I have reproduced in paragraph 28.<sup>29</sup> In *Victoria Plumb Ltd v Victorian Plumbing Ltd* [2016] EWHC 2911 (Ch), where Carr J considered the CJEU's judgment in *Budějovický Budvar NP v Anheuser-Busch Inc. (BUDWEISER)*, Case C-482/09, and the Court of Appeal's judgments in that case and in *IPC Media Ltd v Media 10 Ltd* [2014] EWCA Civ 1403, and stated that a defence of honest concurrence use could, in principle, defeat an otherwise justified claim of trade mark infringement where the two parties had been using the same or closely similar names honestly for a long time

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<sup>29</sup> The holder also submits that the parties' marks have been coexisting in other jurisdictions, but it is the situation in the UK that is relevant here.

and the guarantee of origin of the claimant's trade mark was not impaired by the defendant's use.

112. It must be noted, however, that the CJEU said that the circumstances of the *BUDWEISER* case were exceptional. The court's answer to the third question put to it was as follows:

"In the light of the foregoing, the answer to the third question is that Article 4(1)(a) of Directive 89/104 must be interpreted as meaning that the proprietor of an earlier trade mark cannot obtain the cancellation of an identical later trade mark designating identical goods where there has been a long period of honest concurrent use of those two trade marks where, in circumstances such as those in the main proceedings, that use neither has nor is liable to have an adverse effect on the essential function of the trade mark which is to guarantee to consumers the origin of the goods or services."

113. Whether the exceptional circumstances referred to by the CJEU in *BUDWEISER* apply in a particular case, is ultimately a question of fact. There is little evidence of use of the contested mark or UK Trade Mark no. 2457193 on the UK market beyond a single invoice, and so it falls short of what would be required to mount a successful defence of honest concurrent use.

114. The section 5(2)(b) ground succeeds with respect to the following goods:

Class 1

*Cement preservatives, except paints and oils; chemical products for use as fixing agents, namely self-hardening mortar compounds for anchoring fastening elements and contained in cartridges; construction adhesives.*

Class 19

*Building materials, not of metal; mortar for building; road coating materials.*

115. The section 5(2)(b) ground fails in respect of the remaining goods:

Class 1

*Acrylic resins, unprocessed; adhesives for industrial purposes; adhesives for wall tiles; adhesives for wallpaper; adhesives other than for stationery or household purposes; anti-incrustants; artificial resins, unprocessed; brickwork preservatives, except paints and oils; chemical preparations to prevent mildew; chemical products for use as fixing agents, namely self-hardening artificial resin for anchoring fastening elements and contained in cartridges; concrete preservatives, except paints and oils; damp proofing preparations, except paints, for masonry; epoxy resins, unprocessed; industrial chemicals; masonry preservatives, except paints and oils; preservatives for tiles, except paints and oils; sizing preparations; synthetic resins, unprocessed.*

Class 17

*Adhesives tapes other than stationery and not for medical or household purposes; caulking materials; draught excluder strips; insulating materials; insulating plaster; insulating tape and band; polyurethane aerosol foams; sealant compounds for joints; seals; silicone and acrylic sealants; substances for insulating buildings against moisture; synthetic resins; washers of rubber; waterproof packings; weatherstripping compositions.*

Class 19

*Bitumen; bituminous coatings for roofs; bituminous products for building; building paper; coverings, not of metal, for building; framework, not of metal, for building; plaster; roof coverings, not of metal; roof flashing, not of metal; roofing shingles; tarred strips for building.*

**Section 5(3)**

116. Section 5(3) of the Act is as follows:

“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 European Union trade mark or international trade mark (EU) in the European Union) 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.”

117. The conditions of section 5(3) are cumulative:

- a) the opponent must show that the earlier mark has a reputation;
- b) the level of reputation and the similarities between the marks must be such as to cause the public to make a link between the marks; and
- c) one or more of three types of damage (unfair advantage, detriment to distinctive character or repute) will occur.

118. It is not necessary for the goods to be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

### ***Reputation***

119. In *General Motors Corp v Yplon SA*, Case C-375/97, the CJEU held that:

“24. The public amongst which the earlier trade mark must have acquired a reputation is that concerned by that trade mark, that is to say, depending on the product or services marketed, either the public at large or a more specialised public, for example traders in a specific sector.

25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

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 in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

120. The opponent claims that it has a substantial reputation in the UK for *Cement*, while the holder submits that the evidence adduced by the opponent does not show that this requirement has been met. I recall that I found that the opponent had demonstrated genuine use of the mark but the holder is correct to state that use of a mark, even if this is longstanding, does not necessarily equate to a reputation. Reputation is, as HHJ Hacon said in *Burgerista Operations GmbH v Burgista Bros Limited*, [2018] EWHC 35 (IPEC), a knowledge test. I accept that the opponent has sold cement in the UK and these sales rose from £12m in 2013 to £23m in 2016, falling back to £20m 2017<sup>30</sup> and that it has been in the UK market for some time, as the distribution centre opened in 1991. However, I also note that it has a relatively small market share of 2.7% and that the opponent has not shown me any examples of how the mark has been promoted to the relevant public, which I take to be businesses,

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<sup>30</sup> See paragraph 14.

including concrete manufacturers and the construction industry, and private individuals carrying out their own building projects. When considering the distinctiveness of the mark under section 5(2)(b), I noted that Mr Damaskinakis stated that advertising expenditure was £18,077 in the UK between 2014 and 2018 but that it was not clear how this was spent and where the goods were advertised. An assessment of reputation is a multi-factorial one and taking all the factors together, I find that the evidence before me does not demonstrate that the opponent had established a reputation for *Cement* for the purposes of section 5(3).

121. The section 5(3) ground fails in its entirety.

### **Section 5(4)(a)**

122. Section 5(4)(a) of the Act states that:

“A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule or law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, or

[...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of ‘an earlier right in relation to the trade mark’.

123. In *Erwin Warnink BV v J Townend & Sons (Hull) Ltd (ADVOCAAT)*, [1980] RPC 31, Lord Diplock identified the characteristics that must be present for a valid cause of action for passing off:

“... (1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable

consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia timet action) will probably do so.”<sup>31</sup>

### **Relevant Date**

124. In *Advanced Perimeter Systems v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander QC, sitting as the Appointed Person, quoted with approval the summary made by Mr Allan James, acting for the Registrar, in *SWORDERS Trade Mark*, BL O/212/06:

“Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.”<sup>32</sup>

125. The priority date of the contested mark is 23 July 2012. In her witness statement, Ms Korczyńska states that the mark was devised in July 1992, but the evidence of its use in the UK is, as I have already noted earlier in this decision, very limited, with one invoice from 2015 and an otherwise undated extract from the website of an online retailer printed on 20 January 2020. There is therefore no evidence of use before the priority date, so this is the relevant date for the purposes of the section 5(4)(a) ground.

### **Goodwill**

126. The concept of goodwill was considered by the House of Lords in *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217:

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<sup>31</sup> Page 93.

<sup>32</sup> Quoted in paragraph 43 of BL O-410-11.

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantages of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has the power of attraction sufficient to bring customers home to the source from which it emanates.”

127. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), Pumfrey J stated:

“27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent’s reputation extends to the goods comprised in the applicant’s specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s. 11 of the 1938 Act (see *Smith Hayden & Co Ltd’s Application (OVAX)* (1946) 63 RPC 97 as qualified by *BALI Trade Mark* [1969] RPC 472). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”



128. However, in *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) Floyd J (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent’s reputation extends to the goods comprised in the application in the applicant’s specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

129. The opponent claims that it has used the sign **TITAN** in the UK since 2001 for cement.<sup>33</sup> However, there is no evidence of sales in the UK before the relevant date and the case law is clear that goodwill requires UK customers: see *Starbucks (HK) Limited & Anor v British Sky Broadcasting Group Plc & Ors* [2015] UKSC 31. On the basis of the evidence before me I am unable to find that the opponent had established protectable goodwill. The section 5(4)(a) claim therefore fails.

## **Conclusion**

130. The partial opposition has been partially successful and the designation will be registered for the following goods:

### *Class 1*

*Acrylic resins, unprocessed; adhesives for industrial purposes; adhesives for wall tiles; adhesives for wallpaper; adhesives other than for stationery or household purposes; anti-incrustants; artificial resins, unprocessed; brickwork preservatives, except paints and oils; chemical preparations to prevent mildew; chemical products for use as fixing agents, namely self-hardening artificial resin*

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<sup>33</sup> In its notice of opposition, it claimed use over a wider range of goods but in its written submissions admitted that any earlier rights are limited to *Cement*.

*for anchoring fastening elements and contained in cartridges; concrete preservatives, except paints and oils; damp proofing preparations, except paints, for masonry; epoxy resins, unprocessed; industrial chemicals; masonry preservatives, except paints and oils; preservatives for tiles, except paints and oils; sizing preparations; synthetic resins, unprocessed.*

*Class 2*

*Wood mordants, primers for wood, primers, oils for the preservation of wood, wood coatings, coatings for roofing, wood preservatives.*

*Class 17*

*Adhesives tapes other than stationery and not for medical or household purposes; caulking materials; draught excluder strips; insulating materials; insulating plaster; insulating tape and band; polyurethane aerosol foams; sealant compounds for joints; seals; silicone and acrylic sealants; substances for insulating buildings against moisture; synthetic resins; washers of rubber; waterproof packings; weatherstripping compositions.*

*Class 19*

*Bitumen; bituminous coatings for roofs; bituminous products for building; building paper; coverings, not of metal, for building; framework, not of metal, for building; plaster; roof coverings, not of metal; roof flashing, not of metal; roofing shingles; tarred strips for building.*

131. As the opposition has succeeded with respect to the broad category of *Building materials, not of metal*, I have considered whether it would be appropriate to ask the holder if it wishes to submit an amendment to this part of the specification, in line with TPN 1/2012. Having examined the evidence, I am of the view that the remaining terms in the specification cover the goods provided by the holder's business, and so an amendment to the specification is unlikely to improve the holder's position. The designation will be refused for the following terms:

Class 1

*Cement preservatives, except paints and oils; chemical products for use as fixing agents, namely self-hardening mortar compounds for anchoring fastening elements and contained in cartridges; construction adhesives.*

Class 19

*Building materials, not of metal; mortar for building; road coating materials.*

**Costs**

132. Both parties have enjoyed some success, with the greater part going to the holder, who is entitled to a contribution towards the costs of these proceedings in line with the scale set out in TPN 2/2016. In the circumstances, I award the holder £1400, which has been calculated as follows:

*Preparing a statement and considering the other side's statement: £250*

*Preparing evidence and*

*considering and commenting on the other side's evidence: £800*

*Preparation of submissions in lieu of a hearing: £350*

**TOTAL: £1400**

133. I therefore order Titan Cement Company SA to pay Selena Marketing International Sp. z o.o. the sum of £1400. The above sum should be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 25th day of November 2020**

**Clare Boucher**

**For the Registrar,**

**Comptroller-General**