

O-907-21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3531509

BY BOHEMIAN SOUL LTD

TO REGISTER:

Bohemian Soul

AS A TRADE MARK IN CLASS 14

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 423000 BY

MONTBLANC-SIMPLO GMBH

BACKGROUND & PLEADINGS

1. On 9 September 2020, Bohemian Soul Ltd (“the applicant”) applied to register the trade mark **Bohemian Soul** for “Jewellery” in class 14.

2. On 29 January 2021, the application was opposed by Montblanc-Simplo GmbH (“the opponent”) under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). In relation to its objection based upon section 5(2)(b) of the Act, the opponent relies upon the European Union Trade Mark (“EUTM”) and goods shown below:

No. 12722898 for the trade mark **BOHEME** which was filed on 24 March 2014 and entered in the register on 20 August 2014:

Class 14 - Jewellery; Cuff links; tie clips; rings (jewellery); bracelets (jewellery); earrings; necklaces (jewellery); brooches (jewellery); key rings of precious metal; watches, chronometers; clocks; watch movements; watch straps; watch bracelets; boxes of precious metal for watches and jewelry.

3. Insofar as its objection based upon section 5(3) of the Act is concerned, the opponent relies upon the EUTM shown above, adding that its trade mark enjoys a reputation for “Jewellery; watches, chronometers; watch movements”. Having answered “Yes” to question 3 in the Notice of opposition which reads:

“Is it claimed that the similarity between the [trade mark being relied upon] and the later trade mark is such that the relevant public will believe that they are used by the same undertaking or think that there is an economic connection between the users of the trade marks?”

the opponent states:

“The parties marks are similar and cover identical or closely similar goods. There is likelihood that public will believe that goods offered under the

contested mark originate from the opponent or an economically linked undertaking.”

4. In relation to unfair advantage, the opponent states:

“The applicant will benefit from the opponent’s investment in its advertising and promotion of its trade mark leading to advantage to the applicant without any investment. The applicant is likely to gain sales, goodwill and enhanced status with its customers as result of association with the opponent’s mark. It will be easier for the applicant to sell goods as the reputation established by the opponent in the earlier mark will attach to the applicant’s mark and to the goods sold under it.”

5. In relation to detriment to reputation, the opponent states:

“The applicant’s use will be out of the control of the opponent; any poor quality goods or merely different goods provided by the applicant under the mark will reflect upon the opponent’s business leading to detriment to the opponent’s valuable reputation and business. Furthermore, the power of attraction of the opponent’s mark will be reduced; the opponent’s goods sold under the mark are quality goods and the mark will lose its exclusive cache (sic) by virtue of the link established with third party goods.”

6. In relation to detriment to distinctive character, the opponent states:

“There will be detriment to the distinctive character and reputation of the opponent’s mark because it will no longer signify origin. The opponent’s earlier mark will be diluted by concurrent use of a similar mark for the same or similar goods. Furthermore, the economic behaviour of the relevant public will be affected as they will associate the applicant’s goods with those of the opponent. There will be damage to the opponent’s reputation if inferior or different goods are provided to those expected by the public. Customers will expect that goods supplies [sic] under the mark are protected by the same brand promise associated with the opponent’s earlier mark. The opponent’s

mark will cease to indicate exclusive origin. There is no due cause for adoption of the opposed mark.”

7. Finally, in relation to its objection based upon section 5(4)(a) of the Act, the opponent states that it has used the unregistered trade mark “¹BOEHEME” throughout the UK since July 2015 in relation to “Jewellery; watches, chronometers; watch movements”, adding:

“...Use of the later mark will misrepresent the applicant’s goods as originating from the opponent, damaging the opponent’s goodwill in the mark and its business.”

8. The applicant filed a counterstatement which, in essence, consists of a denial of the grounds upon which the opposition is based; I shall return to various points made in the counterstatement at the appropriate point later in this decision.

9. In these proceedings, the opponent is represented by HGF Limited; the applicant represents itself. Only the opponent filed evidence. At the conclusion of the evidence rounds the parties were asked if they wished to be heard, failing which, a decision from the papers would be issued. While neither party requested a hearing, the opponent elected to file written submissions in lieu. I shall bear these written submissions in mind referring to them to the extent I consider it appropriate later in this decision.

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

¹ When read in context, this is clearly a typographical error which ought to have read “BOHEME.”

DECISION

11. The opposition is based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Act which read as follows:

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

(a)...

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

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

(3) A trade mark which 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 (EC), 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.

(3A) Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.

(4) 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 of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade,

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.

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

12. In these proceedings the opponent is relying upon the trade mark shown in paragraph 2, which qualifies as an earlier trade mark under the provisions of section 6 of the Act. Given the interplay between the date on which the opponent’s trade mark was entered in the register and the application date of the trade mark being opposed, the earlier trade mark being relied upon is, in principle, subject to the proof of use provisions contained in section 6A of the Act. In its Notice of opposition, the opponent states that it has used its earlier trade mark in relation to all the goods upon which it is relying. However, as in its counterstatement the applicant chose not to ask the opponent to provide proof of use, the opponent can rely upon all the goods it has identified without having to demonstrate that its trade mark has been used in relation to such goods.

The objection based upon section 5(2)(b) of the Act

Case law

13. The following principles are gleaned from the decisions of the courts of the European Union in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a 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;

(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.

14. In its counterstatement, the applicant states:

“...Contrary to the statements made by the opponent with respect to the simplicity and potential confusion on the unwitting public, no reasonable member of the public would be confused regarding the brand messaging or the product specialisation. This is clearly demonstrated by the myriad trade marks (recognised in the UK) under class 14...with the word “Bohemian”, “Boheme” or derivatives thereof...”

15. Attached to the Notice of Defence the applicant lists twenty one trade marks which conform to the criteria it has identified above. In its written submission, the opponent states

“56. The applicant’s unsubstantiated claims regarding the existence of other trade marks comprising “Bohemian”, “Boheme”, or derivatives thereof have no bearing on the matter. The applicant did not substantiate said claims and in any case the state of the register is not an indicator of harmonious co-existence in the marketplace.”

16. In *Zero Industry Srl v OHIM*, Case T-400/06, the General Court (“GC”) stated that:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71).”

17. For the reasons explained by both the opponent and the GC, the existence of the trade marks referred to does not assist the applicant.

Comparison of goods

18. The comparison is as follows:

Opponent’s goods	Applicant’s goods
<p>Class 14 - Jewellery; Cuff links; tie clips; rings (jewellery); bracelets (jewellery); earrings; necklaces (jewellery); brooches (jewellery); key rings of precious metal; watches, chronometers; clocks; watch movements; watch straps; watch bracelets; boxes of precious metal for watches and jewelry.</p>	<p>Class 14 - Jewellery</p>

19. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the Court stated at paragraph 23:

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

20. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

21. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the

observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

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

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

23. In its written submissions, the applicant, by reference to information it gleaned from the opponent’s website, attempts to draw a distinction between its goods and those of the opponent. However, as I explained earlier, the applicant did not ask the opponent to provide proof of use and, as a consequence, the opponent is entitled to rely upon all the goods in class 14 it has identified without having to prove that it had made genuine use of its trade mark in relation to such goods. In those circumstances, what I am required to do is to compare the words as they appear in the competing specifications on a notional and fair basis (in relation to goods at all price points), whilst giving the words their ordinary and natural meanings.

24. The applicant has applied for registration in respect of “Jewellery” and, as the opponent’s specification includes the same term, the competing goods are literally

identical. Although the opponent's specification also includes a range of other items, for reasons which will shortly become clear, I will also compare the applicant's "Jewellery" to "watches" in the opponent's specification. In this respect, in its written submissions, the opponent points to two decisions of this Tribunal in which an assessment of the similarity between "jewellery" and "watches" featured. One of those decisions was the subject of an appeal to the Appointed Person ("AP"). In BL-O-487-17, the AP, Mr Daniel Alexander Q.C., stated:

"36. Second, as regards the specification for the 1409174 mark, [the Hearing Officer] held that the degree of similarity between the respective goods varied from high in the case of bracelets and other goods capable of being worn on the wrist, to medium in the case of other items of jewellery made from precious or semi-precious metals and/or stones, to low in the case of jewellery items made from plastic or other non-precious/semi-precious metals/stones, and which are not designed to be worn on the wrist.

37. He considered that this was because complementary jewellery is likely to be designed either to be worn on the wrist alongside the watch, such as bracelets or bands, or to be worn elsewhere on the body to complement the material from which the watch is made and that the latter is much more likely to be the case where the material is (say) gold or silver than when it is plastic or common metal. However, as most of the applicant's descriptions of goods are general terms, such as articles of jewellery, this observation, in his view, only (sic) affected only one of the terms in the applicant's specification, i.e. charms [jewellery] of common metals.

38. No criticism is or could be made of those evaluations."

25. I agree with those conclusions and, insofar as the comparison between "jewellery" and "watches" is concerned, shall adopt the same approach in these proceedings i.e. that the applicant's "jewellery" is similar to the opponent's "watches" to varying degrees ranging from high to low.

The average consumer and the nature of the purchasing act

26. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

27. The average consumer of the goods at issue is a member of the general public. The opponent submits that such goods “are typically offered for sale in retail outlets, brochures, catalogues and online”; I agree. The opponent further submits that “visual considerations may prevail during the selection process when the goods are likely to be selected from stalls/shelves/cabinets or bought online” and, it suggests, that aural considerations will be relevant “particularly when the goods are purchased from jewellers and may be researched or discussed with a member of staff”. While I agree that aural considerations must not be discounted, as the average consumer is most likely to encounter the trade marks on the goods themselves or on their packaging, visual considerations are, in my view, likely to dominate the selection process.

28. As to the degree of attention that will be paid when selecting such goods, the opponent submits the average consumer:

“35...will generally pay an average level of attention when purchasing jewellery especially when the price point is mid-level.”

29. Even in relation to goods at the lower end of the price spectrum, the material of which the goods are made, size, fit and aesthetic considerations are all likely to be relevant factors. In such circumstances, I would expect a consumer to pay an average degree of attention during the selection process. As the cost of such goods increases, so is likely to be the degree of attention paid to their selection, with goods at the top end of the price spectrum attracting a high degree of attention.

Comparison of trade marks

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

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

31. It would be wrong, therefore, artificially to dissect the trade 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 they create. The trade marks to be compared are as follows:

Opponent's trade mark	Applicant's trade mark
BOHEME	Bohemian Soul

32. Although I do not intend to record them all here, for the avoidance of doubt, I have taken all of the competing submissions in relation to this aspect of the case into account in reaching the conclusions which follow.

Overall impression

33. The opponent's trade mark consists of a single word presented in block capital letters. As no part of the word is highlighted or emphasised in any way, the overall impression it conveys and its distinctive character lie in the single word of which it is composed.

34. The applicant's trade mark consists of two words presented in title case. As the first word qualifies the second, the two words form a unit and it is in that unit the overall impression and distinctiveness lie.

Visual similarity

35. The opponent's trade mark consists of one word containing six letters, whereas the applicant's trade mark consists of two words containing eight and four letters respectively. The first five letters in the opponent's trade mark are identical to the first five letters in the first word in the applicant's trade mark. There are, however, differences, most notably, the inclusion of the word "Soul" in the applicant's trade mark. Weighing the similarities and differences results in what I regard as a between low and medium degree of visual similarity between the competing trade marks.

Conceptual similarity

36. The individual words in the applicant's trade mark and their meanings are likely to be well-known to the average consumer. Considered as a unit, the average consumer is, in my view, most likely to construe the totality as relating to goods created by/or which appeal to a person who has the soul (i.e. mind, character, thoughts and feelings) of a bohemian (i.e. an artistic person who lives in an unconventional way).

37. In its submissions, the opponent states that “Bohemian” is the English translation of the French word “Bohème” (which is correct) and goes on to argue (by reference to guidance contained in the UK Manual of Trade Mark Practice), that the word “is widely known and used in English.” Notwithstanding the absence of the accent above the first letter “E” in the opponent’s trade mark, as French is routinely taught in schools in the UK, I accept that many average consumers are likely to have a basic understanding of the language and many may recognise this meaning. For those consumers the word is likely to convey the same (or a very similar) meaning to the word “Bohemian” in the applicant’s trade mark. However, even for the not-insignificant number of average consumers in the UK who are unfamiliar with French, the degree of, in particular, visual similarity between the word “BOHEME” and “Bohemian” is, in my view, likely to evoke broadly similar concepts in the mind of such a consumer. Although the word “Soul” in the applicant’s trade mark introduces a concept alien to the opponent’s trade mark, as the word “Bohemian” qualifies the word “Soul”, for both sets of consumers there is likely to be a high degree of conceptual similarity.

Aural similarity

38. As the words in the applicant’s trade mark will be well-known to the average consumer their pronunciation is predictable. As for the opponent’s trade mark, in its counterstatement, the applicant states:

“As noted “BOHEME” is purposely crafted to be pronounced in French...”.

39. In its submissions, the opponent states:

“45. The BOHEM- beginnings will be pronounced in identical fashion...”

40. Although the accent above the first letter “E” has been omitted, an average consumer familiar with French is, as the applicant suggests, likely to pronounce the opponent’s trade mark in line with standard French pronunciation i.e. as “BO-EM”, whereas a UK consumer unfamiliar with French is most likely to pronounce it as “BO-HE-MEE” or “BO-HEEM”. As the sound produced by the verbalisation of the word

“Soul” in the applicant’s trade mark is absent when the opponent’s trade mark is verbalised, when considered from the perspective of a UK consumer unfamiliar with French, it results in a between low and medium degree of aural similarity and a low degree of similarity if pronounced as a word in the French language.

Distinctive character of the earlier trade mark

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

Inherent distinctive character

42. I shall consider the position in relation to the opponent’s “jewellery” and “watches”. In its submissions, the opponent states:

“49. BOHEME is inherently distinctive for the opponent’s goods in class 14. The mark conveys no information whatsoever in relation to the goods. Any evocative aspects of “boheme”/“bohemian” refer to the consumer rather than the goods *per se*; social unconventionality is not a characteristic or quality of jewellery or watches.”

43. Although “BOHEME” may be construed as a French language word, I have concluded that both sets of consumers are likely to construe it in a broadly similar way to “Bohemian.” Considered on that basis and given the type of goods at issue (in which aesthetic/artistic considerations are important), absent use, the opponent’s

trade mark enjoys a between low and medium degree of inherent distinctive character.

Enhanced distinctiveness

44. That, of course, is not the end of the matter as the opponent has also filed evidence. This consists of a witness statement, dated 25 June 2021, from Arlène Marcé, an Attorney-in-Fact authorised to represent the opponent, a position she has held since June 2017. Ms Marcé's information comes from her own knowledge, the opponent's records and publicly available information. Her statement is accompanied by eight exhibits. Although I do not propose to record Ms Marcé's evidence here in great detail, the main points emerging from her evidence are as follows:

- the BOHEME trade mark has been used for a range of watches since 2014, with the global launch taking place at the Children's Art Theatre in Shanghai on 28 August 2014 – exhibit AM1, dated 7 September 2014, is from www.forbes.com. It refers to “the global launch of its new Bohème ladies watch collection”;
- exhibit AM2 consist of “screen captures” from the opponent's website (www.montblanc.com) from May 2021 “showing the current range of BOHEME watches”. The pages provided show images of six ladies' watches all described as “Bohème”, the least expensive of which is priced at £2615;
- further examples from the same source and of the same type from December 2015 to August 2020 (obtained using the waybackmachine Internet archive) are provided as exhibit AM3;
- in the period September 2015 to September 2020, turnover in the UK and EU under the BOHEME brand in relation to watches was in excess of €13.6m;
- in the same period, turnover in France, Spain, Italy and the Netherlands under the BOHEME brand in relation to watches amounted to in excess of €6m;

- in the same period, turnover in the UK under the BOHEME brand in relation to watches amounted to in excess of €1.7m;
- BOHEME watches “retail, inter alia, via select third party retailers” including John Lewis, Harrods, Selfridges and Fraser Hart – exhibit AM4, which consists of invoices issued to third party retailers in the UK between September 2015 and February 2020, is provided in support;
- exhibit AM6 consists of invoices from 2016 issued to third party retailers in Germany, Italy and France;
- between September 2015 and September 2020, the opponent received over 3,400 orders for BOHEME watches, with at least 712 orders originating in the UK;
- between September 2015 and September 2020, over 7.2 million sessions were carried out by visitors from the UK to the opponent’s website mentioned earlier, with over 30 million sessions from EU Member states – exhibit AM7, from Google Analytics, is provided in support;
- BOHEME watches can also be bought at mono brand MONTBLANC boutiques, of which there are 9 such boutiques in the UK, 10 in Germany, 17 in France, 16 in Italy and 14 in Spain – exhibit AM8, which consists of extracts from the opponent’s website from, it appears 2021, are provided in support.

Assessment of the opponent’s evidence

45. As any enhancement to the inherent distinctiveness of the earlier trade mark is only likely to be relevant if it has impacted on the perception of a UK consumer, it is upon the UK that I shall focus. In this regard, the evidence shows that from as early as December 2015, the word “Bohème” has appeared on the opponent’s website (with prices shown in £sterling) in relation to a range of watches for women. The evidence also shows that the word “Bohème” continued to be used on the opponent’s website between 2016 and 2020 and was still being used on the opponent’s website for the same goods in May 2021. Sales of such goods in the UK

in the period September 2015 to September 2020 amounted to in excess of €1.7m with sales taking place via the opponent's website and boutique stores and through a number of UK retailers such as John Lewis, Harrods and Selfridges. In the same period, at least 712 orders were placed in the UK for watches sold under the "Bohème" trade mark. One can readily discern from the retail prices of watches sold under the "Bohème" trade mark that the opponent's watches compete at the upper end of the market.

46. The opponent has, however, given no indication of the amount it has spent promoting the trade mark. Although the trade mark as registered consists of the word "BOHEME" presented in block capital letters and, for the most part, in use the first letter "E" has an accent appearing above it, that, in my view, is not a point that counts against the opponent. Bearing the totality of the evidence in mind, it would, I think, be unrealistic not to conclude that the opponent's use will have built upon its trade mark's inherent distinctiveness. However, given what is likely to be the size of the market in the UK both for watches generally and for watches at the upper end of the price spectrum in which the opponent's goods compete, I think any enhancement is likely to be modest, resulting in a trade mark which, in relation to ladies' watches, enjoys, at best, a medium degree of distinctive character.

Likelihood of confusion

47. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

48. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

49. Earlier in this decision I concluded that:

- the applicant's goods are identical to "jewellery" in the earlier trade mark and similar to "watches" in the earlier trade mark to the varying degrees identified in paragraph 25;
- the average consumer of the goods at issue is a member of the general public;
- whilst not ignoring aural considerations, such a consumer is most likely to select the goods at issue by predominantly visual means whilst paying an average degree of attention;
- the competing trade marks are visually similar to a between low and medium degree, aurally similar to at least a low degree and conceptually highly similar;
- absent use, the earlier trade mark possesses a between low and medium degree of inherent distinctive character which, on the basis of the evidence provided has, in relation to ladies' watches, been enhanced to, at best, a medium degree.

50. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. (as he then was) considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. He stated:

"18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for

which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

51. In reaching a conclusion, I begin by reminding myself that the words in the applicant’s trade mark form a unit, and in that unit the word “Bohemian” does not play an independent distinctive role. The fact that the competing goods are either identical or may be similar to a high degree together with the high degree of

conceptual similarity between the competing trade marks are, however, points in the opponent's favour. I have also concluded that the competing trade marks are visually similar to a between low and medium degree and that the purchasing process is predominantly a visual one. When one also factors in the at best medium degree of distinctive character the earlier trade mark enjoys and the at least average degree of attention the average consumer will pay when selecting the goods at issue (thus making him/her less prone to the effects of imperfect recollection), the likelihood of such a consumer failing to notice, in particular, the word "Soul" in the applicant's trade mark is highly unlikely. In short, in my view, the likelihood of direct confusion is remote.

52. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even

where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

53. I begin by noting that the decision in *LA Sugar* only represents examples of when indirect confusion may be relevant (see in this respect the decision of the Court of Appeal in *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207 at [12]). I also note that in *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., (as the Appointed Person), stressed that a finding of indirect confusion should not be made merely because the two trade marks share a common element. In this connection, he pointed out that it is not sufficient that a trade mark merely calls to mind another trade mark. This is mere association not indirect confusion.

54. For the reasons mentioned earlier (see paragraphs 43 and 46), the word “BOHEME” does not fit into category (a) and category (b) does not apply. Insofar as category (c) is concerned, I see no reason why a consumer would assume that a trade mark consisting of the English language equivalent of the word “BOHEME” in combination with an additional English language word (and in which the combination forms a unit), was a brand extension of the opponent’s trade mark. As I can see no other basis for such a finding, nor any other proper basis for a finding of indirect confusion, there is, in my view, unlikely to be indirect confusion and the opposition based upon section 5(2)(b) is dismissed. The fact that since 2015 the opponent has consistently used a single word in the French language to identify its ladies’ watches is a further point leading to the same conclusion.

Conclusion under section 5(2)(b) of the Act

55. The opposition has failed.

The objection based upon section 5(3) of the Act

56. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Saloman*, Case C-487/07, *L'Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The law appears to be as follows:

(a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel*, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel*, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel*, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure*).

57. In *General Motors*, Case C-375/97, the CJEU held:

“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.”

58. As the earlier trade mark being relied upon is an EUTM, the comments of the CJEU in *Pago International GmbH v Tirolmilch registrierte GmbH*, Case C-301/07, are relevant:

“20. By its first question, the national court in essence asks the Court, first, to clarify the meaning of the expression ‘has a reputation in the Community’, by means of which, in Article 9(1)(c) of the regulation, one of the conditions is laid down which a Community trade mark must fulfil in order to benefit from the protection accorded by that provision and, second, to state whether that condition, from a geographical point of view, is satisfied in a case where the Community trade mark has a reputation in only one Member State.

21. The concept of 'reputation' assumes a certain degree of knowledge amongst the relevant public.

22. The relevant public is that concerned by the Community trade mark, that is to say, depending on the product or service marketed, either the public at large or a more specialised public, for example traders in a specific sector (see, by way of analogy, *General Motors*, paragraph 24, with regard to Article 5(2) of the directive).

23. It cannot be required that the Community trade mark be known by a given percentage of the public so defined (*General Motors*, by way of analogy, paragraph 25).

24. The degree of knowledge required must be considered to be reached when the Community trade mark is known by a significant part of the public concerned by the products or services covered by that trade mark (*General Motors*, by way of analogy, paragraph 26).

25. In examining this condition, 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 (*General Motors*, by way of analogy, paragraph 27).

26. In view of the elements of the main proceedings, it is thus for the national court to determine whether the Community trade mark at issue is known by a significant part of the public concerned by the goods which that trade mark covers.

27. Territorially, the condition as to reputation must be considered to be fulfilled when the Community trade mark has a reputation in a substantial part of the territory of the Community (see, by way of analogy, *General Motors*, paragraph 28).

28. It should be noted that the Court has already ruled that, with regard to a Benelux trade mark, it is sufficient, for the purposes of Article 5(2) of the

directive, that it has a reputation in a substantial part of the Benelux territory, which part may consist of a part of one of the Benelux countries (*General Motors*, paragraph 29).

29 As the present case concerns a Community trade mark with a reputation throughout the territory of a Member State, namely Austria, the view may be taken, regard being had to the circumstances of the main proceedings, that the territorial requirement imposed by Article 9(1)(c) of the regulation is satisfied.

30. The answer to the first question referred is therefore that Article 9(1)(c) of the regulation must be interpreted as meaning that, in order to benefit from the protection afforded in that provision, a Community trade mark must be known by a significant part of the public concerned by the products or services covered by that trade mark, in a substantial part of the territory of the Community, and that, in view of the facts of the main proceedings, the territory of the Member State in question may be considered to constitute a substantial part of the territory of the Community.”

59. In *Burgerista Operations GmbH v Burgista Bros Limited* [2018] EWHC (IPEC), Judge Hacon considered whether an EU trade mark registered for restaurant services had a reputation under article 9(2)(c) of the EU Trade Mark Regulation (which is equivalent to s.10(3) of the Trade Marks Act). The judge summarised the law as follows:

“69. I draw the following from the judgments of the Court in *PAGO* and *Iron & Smith* and from the opinion of Advocate General Wahl in *Iron & Smith*:

(1) An EU trade mark has a reputation within the meaning of art.9(2)(c) if it was known to a significant part of the relevant public at the relevant date.

(2) The relevant public are those concerned by the products or services covered by the trade mark.

(3) The relevant date is the date on which the defendant first started to use the accused sign.

(4) From a geographical perspective, the trade mark must have been known in a substantial part of the EU at the relevant date.

(5) There is no fixed percentage threshold which can be used to assess what constitutes a significant part of the public; it is proportion rather than absolute numbers that matters.

(6) Reputation constitutes a knowledge threshold, to be assessed according to a combination of geographical and economic criteria.

(7) All relevant facts are to be taken into consideration when making the assessment, 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 undertaking in promoting it.

(8) The market for the goods or services in question, and from this the identity of the relevant public, ought to assume a paramount role in the assessment.

(9) The territory of a single Member State (large or small) may constitute a substantial part of the EU, but the assessment must be conducted without consideration of geographical borders.”

60. The registered EU trade mark had been used for 8 months prior to the relevant date in the proceedings, in relation to 7 restaurants, mainly in Austria. The judge concluded as follows:

“85. In July 2015 the Trade Mark was far from being known throughout Austria. It had not become known outside Austria, save possibly to a very limited extent in Mönchengladbach. It was known in two local areas of Vienna, two in Linz, one in Salzburg and one in Pasching. No figure has been attempted for the share of the European Union restaurant business held by the restaurants trading under the mark, but it must have been very small indeed, even if presented as a share of the burger restaurant business. Marketing was largely confined to social media sites, although it is not clear how much of this had been done by July 2015.

86. In my view, although at the relevant date the Trade Mark had a reputation of some sort by dint of restaurants having traded under the Trade Mark, it did not have a reputation in the Union within the meaning of art.9(2)(c).”

61. I have summarised the opponent’s evidence earlier and concluded that its use in the UK since 2015 had resulted in its “BOHEME” trade mark possessing at best, a medium degree of distinctive character. Irrespective of its use in the EU (which, in my view, meets the qualifying criteria), I shall proceed on the basis most favourable to the opponent i.e. that in relation to ladies’ watches, the use the opponent has made of its earlier trade mark in UK is sufficient for it to get this objection off the ground.

62. In Case C-408/01, *Adidas-Salomon*, the CJEU held:

“28. The condition of similarity between the mark and the sign, referred to in Article 5(2) of the Directive, requires the existence, in particular, of elements of visual, aural or conceptual similarity (see, in respect of Article 5(1)(b) of the Directive, Case C-251/95 *SABEL* [1997] ECR I-6191, paragraph 23 in fine, and Case C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraphs 25 and 27 in fine).

29. The infringements referred to in Article 5(2) of the Directive, where they occur, are the consequence of a certain degree of similarity between the mark and the sign, by virtue of which the relevant section of the public makes a connection between the sign and the mark, that is to say, establishes a link between them even though it does not confuse them (see, to that effect, Case C-375/97 *General Motors* [1999] ECR I-5421, paragraph 23).”

63. In *Intra-Press SAS v OHIM*, Joined cases C-581/13P & C-582/13P, the CJEU stated (at paragraph 72 of its judgment) that:

“The Court has consistently held that the degree of similarity required under Article 8(1)(b) of Regulation No 40/94, on the one hand, and Article 8(5) of

that regulation, on the other, is different. Whereas the implementation of the protection provided for under Article 8(1)(b) of Regulation No 40/94 is conditional upon a finding of a degree of similarity between the marks at issue so that there exists a likelihood of confusion between them on the part of the relevant section of the public, the existence of such a likelihood is not necessary for the protection conferred by Article 8(5) of that regulation. Accordingly, the types of injury referred to in Article 8(5) of Regulation No 40/94 may be the consequence of a lesser degree of similarity between the earlier and the later marks, provided that it is sufficient for the relevant section of the public to make a connection between those marks, that is to say, to establish a link between them (see judgment in *Ferrero v OHMI*, C-552/09 P, EU:C:2011:177, paragraph 53 and the case-law cited).”

64. In determining whether the public will make the required mental ‘link’, the following factors in *Intel* are to be considered: (i) the degree of similarity between the conflicting trade marks, (ii) the nature of the goods for which the conflicting trade marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods, and the relevant section of the public, (iii) the strength of the earlier trade mark’s reputation, (iv) the degree of the earlier trade mark’s distinctive character, whether inherent or acquired through use, and (v) whether there is a likelihood of confusion.

65. I have considered many of the above factors under section 5(2)(b) of the Act and, where appropriate, adopt those conclusions here. I have also reminded myself of the comments in *Intra-Press* and the likely high degree of similarity in the goods. However, even assuming that in relation to ladies’ watches the opponent’s trade mark has the necessary qualifying reputation, for essentially the same reasons I concluded there would be no likelihood of confusion (see paragraphs 51 and 54), I also conclude that no link will be formed in the mind of the average consumer. Without the creation of a link, there can be none of the adverse consequences for the opponent envisaged by this section of the Act and, as a consequence, the opposition based upon section 5(3) fails.

Conclusion under Section 5(3) of the Act

66. The opposition has failed.

The objection based upon section 5(4)(a) of the Act

67. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “*a substantial number*” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

68. In *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O-410-11, Mr Daniel Alexander Q.C., as the Appointed Person, considered the relevant date for the purposes of s.5(4)(a) of the Act. Having reviewed the relevant case law, he stated:

“43. In *SWORDERS TM* O-212-06 Mr Alan James acting for the Registrar well summarised the position in s.5(4)(a) proceedings as follows:

‘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.’ ”

69. As the applicant has filed no evidence of any use it may have made of its trade mark, the relevant date is the date of the filing of the application i.e. 9 September 2020. I am satisfied that at that date the use the opponent’s business had made of its “BOHEME” trade mark in the UK in relation to ladies’ watches was sufficient for it to have established a protectable goodwill in relation to such goods. However, the trade mark being relied upon is the same as that under section 5(2)(b), in relation to which I have already concluded that there is no likelihood of either direct or indirect confusion. Given the comments of the court in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes. As a consequence, and for the same reasons given at paragraphs 51 and 54, there will, in my view, be no misrepresentation, without which there can be no damage. The opposition based upon section 5(4)(a) fails and is dismissed accordingly.

Conclusion under section 5(4)(a) of the Act

70. The opposition has failed.

Overall conclusion

71. The opposition has failed on all grounds and, subject to any successful appeal, the application will proceed to registration.

Costs

72. As the applicant has been successful it is, in principle, entitled to a contribution towards its costs. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice 2 of 2016. In the official letter of 16 September 2021 sent to the applicant at the conclusion of the evidence rounds, the Tribunal stated:

“If you intend to make a request for an award of costs you must complete and return the attached pro-forma and send a copy to the other party..

If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded...”

73. As the applicant did not respond to that invitation either by the deadline set (or by the date of the issuing of this decision) and as it has incurred no official fees in the defence of its application, I make no order as to costs.

Dated this 15th day of December 2021

C J BOWEN

For the Registrar