

O-086-15

**TRADE MARKS ACT 1994**

**CONSOLIDATED PROCEEDINGS**

**TRADE MARK APPLICATION NOS. 3028924 AND 3028926  
BY CROYDEX LIMITED  
TO REGISTER THE TRADE MARKS**

**SIT TIGHT**

**AND**



**IN CLASS 11**

**AND**

**THE OPPOSITIONS THERETO UNDER NOS. 401739 AND 401740  
BY BEMIS MANUFACTURING COMPANY**

## Background and pleadings

1. Croydex Limited (“the applicant”) applied for the trade marks shown below on 1 November 2013, for “Toilet seats; parts and fittings in this class for use with toilet seats”, in class 11.

(i) 3028924: SIT TIGHT

(ii) 3028926:



2. The applications were published in the Trade Marks Journal on 22 November 2013 and were subsequently opposed by Bemis Manufacturing Company (“the opponent”). The oppositions were originally based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”), but the section 5(3) and 5(4)(a) grounds were dropped by the opponent by way of a letter dated 17 December 2014. Therefore, the oppositions are proceeding in respect of section 5(2)(b) only. The opponent claims that the applications will cause a likelihood of confusion with the opponent’s earlier Community Trade Mark, as shown below:

3032844

STA-TITE

Class 6: Metal hinges.

Class 11: Toilet seats and fittings therefor.

Class 20: Non-metal hinges.

Date filed: 3 February 2003

Date registration procedure completed: 15 December 2004

3. The opponent claims:

“The respective Trade Marks are similar, consisting of two words, the first word being comprised of three letters, commencing with the letter “S” and the second words being virtually identical, comprised of four/five letters. The overall impression conveyed by the Marks is that the products, namely toilet

seats, will not move. The figurative element in the opposed Application depicts a fastening system, which reinforces the conceptual message.

Moreover, the goods included in the opposed Application are identical or in the alternative, similar to the goods covered by the Opponent's earlier Trade Mark. Further and more detailed submissions on these points will be made at the appropriate point in the opposition proceedings."

4. The applicant filed counterstatements in which it denied all the grounds as originally pleaded. In a nutshell, the applicant's defence in relation to section 5(2)(b) is that TITE and TIGHT are descriptive for the goods, and STA and SIT are completely different visually, aurally and conceptually. The applicant puts the opponent to proof of use of its mark because it had been registered for more than five years on the date on which the applications were published, as per section 6A of the Act. The period during which the opponent must show genuine use of its mark is 23 November 2008 to 22 November 2013.

5. The proceedings were consolidated. Both parties are professionally represented. The opponent filed evidence and submissions, the applicant filed evidence, and both parties filed written submissions in lieu of a hearing, choosing to have a decision made from the papers. I make this decision after a careful reading of all the papers filed by both parties.

## **Evidence**

### Opponent's evidence

6. The opponent's evidence comes from Lee Oddie, the finance director of Bemis Limited which is a wholly owned subsidiary of the opponent. Mr Oddie begins his statement with some general information and history about the opponent, which is not relevant to the issues to be decided. He also refers twice in his witness statement to information which can be found on the opponent's websites, [bemiseurope.com](http://bemiseurope.com) and [bemisseats.com/sta-titesystem/](http://bemisseats.com/sta-titesystem/), but does not exhibit any of the documents or prints. It is not acceptable to ask the decision maker to look for further details on websites (or elsewhere). The pages might have changed since the witness statement was written and, more importantly, it is not for the Tribunal to seek out evidence. The role of the Tribunal is to decide the case based on the evidence which the parties have provided.

7. Mr Oddie provides figures for approximate UK annual sales turnover for STA-TITE goods for 2012 and 2013, but states that he does not wish to disclose turnover for any other years owing to commercial sensitivity. This is a curious statement when the burden is on the opponent to prove the use it has made of its mark. If the opponent had concerns about sensitive commercial information, it could have asked for a confidentiality order under rule 59 of the Trade Marks Rules 2008.

8. The figures are £810,000 in 2012 and £1,150,000 in 2013. Exhibit LO02 contains a selection of STA-TITE sales invoices during 2009, 2011, 2012 and 2013 to UK customers. Goods identified as STA-TITE are shown in the invoices.

9. STA-TITE goods have been promoted via websites, brochures, flyers, presentations, press releases etc. At retail outlets, STA-TITE point-of-sale advertising is used. Exhibit LO03 contains some examples of marketing material for STA-TITE goods which all show the mark and are within the relevant period, including a Screw-Fix catalogue from January 2013. Exhibit LO04 comprises examples of STA-TITE product demonstrations given to UK wholesalers during 2011 and 2012. The content shows that the STA-TITE toilet seat system technology has been patented and designed so that the toilet seats do not work loose. STA-TITE goods were also promoted at events, shows and exhibitions in the UK from 2010 to 2013 (a list is provided by Mr Oddie). The marketing material shows how the seats and the fittings work. STA-TITE appears along the length of the fittings.

10. Exhibit LO05 comprises UK price lists for STA-TITE goods from 2011 and 2013, showing prices of about £25 per seat. LO06 shows the packaging from 2012. Although some of the use of the mark looks like this



there are also numerous examples throughout the evidence of word-only use of STA-TITE, for example on the back of the packaging:



11. One of the opponent's customers for STA-TITE goods is Homebase. Screenshots from Homebase's website (from the internet archive's Wayback

Machine) are shown in exhibit LO08, dated 8 March 2012, 11 June 2012 and 25 May 2013. The prints show, for example, that a toilet seat was on sale described as "Toilet Seat Statite Fastening System" (at £39.99). Although Homebase lists the goods as 'Statite' (rather than Sta-Tite or STA-TITE), this is likely to be the fault of Homebase's webmaster, rather than a deliberate alteration to the mark by the opponent. The packaging of the goods actually sold by Homebase will have shown the mark as reproduced in the preceding paragraph. Mr Oddie states that the goods were also sold to Argos, Screwfix, B&Q, Travis Perkins, PTS Plumbing and Plumb Center, although no exhibits relating to the goods on sale by these undertakings are provided.

### Applicant's evidence

12. The applicant's evidence comes from Peter Pegden who is the applicant's Product and Procurement Director. Mr Pegden's evidence is about the concept for the goods and the trade mark. Since the ground of opposition is section 5(2)(b), I will give only a flavour of Mr Pegden's evidence, for reasons of procedural economy.

- The SIT TIGHT toilet seat and seat fixings form the subject of a pending patent.
- The SIT TIGHT toilet seats and fixings are designed not to work loose.
- The word TIGHT directly describes the opposite of loose, which was a word used by consumers during market research, when describing the problem of toilet seats moving.
- To the extent that the applicant even thought about the opponent's mark STA-TITE, it thought it was a reference to the material from which the seats are made because the kitchen and bathroom industry is awash with names ending in TITE for various composite materials, such as LUCITE, FRAGANITE, TECTONITE, REVANITE, DURALITE and MARMITE. Exhibit PP4 shows screen shots from websites showing these names in relation to kitchen and bathroom goods.

### **Proof of use of the opponent's mark**

13. Section 6A of the Act states:

"(1) This section applies where—

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark 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 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

(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.

(5) In relation to a Community trade mark, any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(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.

(7) Nothing in this section affects—

(a) the refusal of registration on the grounds mentioned in section 3 (absolute grounds for refusal) or section 5(4) (relative grounds of refusal on the basis of an earlier right), or

(b) the making of an application for a declaration of invalidity under section 47(2) (application on relative grounds where no consent to registration).”

14. The enquiry under section 6A of the Act is identical to that set out under section 46, the part of the Act which deals with the issue of revocation on the grounds of non-use, because both Section 6A and section 46 relate to genuine use of a mark. In *Stichting BDO and others v BDO Unibank, Inc and others* [2013] EWHC 418 (Ch), Arnold J commented on the case law of the Court of Justice of the European Union (“CJEU”) in relation to genuine use of a trade mark:

“In *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging*

BV [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I have added references to Case C-416/04 P *Sunrider v OHIM* [2006] ECR I-4237):

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

(2) The use must be more than merely 'token', which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(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, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider*, [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22]-[23]; *Sunrider*, [70]-[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating 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: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72].”

15. The assessment can only be made on the basis of the evidence filed by the opponent, because Section 100 of the Act states:

“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.”

16. The opponent has only shown use of its mark in the UK. In *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, the CJEU noted that:

“36. It should, however, be observed that..... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

And

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).”

The court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial

borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to 'genuine use in the Community' within the meaning of that provision.

A Community trade mark is put to 'genuine use' within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity."

17. The opponent had a clear share in the UK market during the relevant period, as evidenced, in particular, by the turnover figures, marketing material and invoices during successive years which all show the mark. I note, in particular, the sales by Homebase, which is a DIY chain of stores found the length and breadth of the UK, and Screw-Fix, a similarly widely found (and online) store. Although there are no specific examples relating to sales in Argos, B&Q and the other national chains, given that there are specific examples provided for Homebase and Screw-Fix, I have no reason to doubt that the goods were also sold in the other outlets named by Mr Oddie. The use of the mark has been nationwide and shows use in accordance with the mark's essential function, for the purpose of maintaining or creating market share within the European Community. The applicant submits that there is no evidence of use for hinges. The evidence shows clearly a combination of seats and fittings for use as a composite whole. As mentioned earlier, STA-TITE appears on some of the fittings. However, I do not need to decide the point because I consider that genuine use has been shown for the opponent's class 11 goods, *toilet seats and fittings therefor*. As I go on to find below, the parties' goods in class 11 are identical. The opponent will not be in any better position in relation to the class 6 and 20 goods, so the opposition will be considered in relation to the opponent's class 11 goods, for which there is genuine use and upon which the opponent may rely; i.e.

Class 11: *Toilet seats and fittings therefor*.

### **Section 5(2)(b) of the Act**

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

"(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.”

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

### **The principles**

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

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public 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

20. The opponent has cover in class 11 for *toilet seats and fittings therefor*. The applicant has applied in class 11 for *toilet seats; parts and fittings in this class for use with toilet seats*. The goods are identical.

### Average consumer

21. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. The average consumer may be a member of the general public or a tradesman, but there will not be a great deal of difference in the amount of attention paid by them to the purchase. Toilet seats and fittings are not an everyday purchase, but they are not a high-cost purchase either. A reasonable level of attention will be paid to fit and aesthetics and the purchase will be, for these reasons, overwhelmingly visual. However, I do not discount the potential for aural use, such as a plumber phoning a plumber's merchant to order goods for installation.

### Comparison of marks

22. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union 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.”

It is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

23. The respective marks are:

Opponent	Applicant
<p>STA-TITE</p>	<p>(i) SIT TIGHT</p> <p>(ii)</p> 

24. I will make the comparison between the parties' word-only marks as the additional, dissimilar, material in the applicant's composite mark means that if the opponent cannot succeed in relation to the word-only mark, it will not be in a better position in relation to the composite mark.

25. The overall impression of the mark SIT TIGHT is a phrase which hangs together. Neither part of the mark is more dominant than the other. The overall impression of STA-TITE is of two invented elements, neither of which is dominant. Although TIGHT is descriptive in the context of the goods, SIT TIGHT is a well known phrase which reduces the descriptive impact of TIGHT. TITE may be reminiscent of TIGHT, when viewed in the context of fittings for seats to keep them tight; however, the overall impression created by the two invented elements STA-TITE is of an invented whole.

26. There is a slight amount of visual similarity between TITE and TIGHT, and they are aurally identical. There is little visual similarity between STA and SIT; they are such short elements that the co-incidence of letters does not make STA and SIT similar. This is particularly so when one considers that, conceptually, there is an immediate hook for SIT, whilst there is none for STA. As the opponent's evidence indicates that it considers STA to be a replacement for STAY, I have considered whether it is likely that STA will be perceived as approximating STAY by the average UK consumer. I do not think it is likely. The natural inclination is to see STA as an invented word pronounced with a short A and not as a misspelling of STAY. The concept created by SIT TIGHT is, on first impressions, of a well-known phrase meaning to wait until moving or taking some sort of action: "Sit tight until I get back". In the context of the goods, there is a second concept of sitting on a toilet seat which

is tightly fixed. Allowing for the possibility that TITE will be seen as a misspelling of TIGHT, there is a low overall degree of similarity between the marks.

#### Distinctive character of the earlier marks

27. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*<sup>1</sup> the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

28. The opponent’s evidence of use does not show use on such a scale as to have enhanced its inherent level of distinctive character, which I assess as being high because the mark, as a whole, will be perceived as invented. In case I am wrong about that and that TITE will be perceived as a misspelling of TIGHT, the mark, as a whole, is still inherently distinctive to a good degree.

#### Likelihood of confusion

29. Deciding whether there is a likelihood of confusion is not scientific; it is a matter of considering all the factors, weighing them and looking at their combined effect, in accordance with the authorities set out earlier in this decision. This includes keeping in mind the whole mark comparison, because the average consumer perceives trade marks as wholes and rarely has the opportunity to compare marks side by side, relying instead upon the imperfect picture he has of them in his mind. One of the principles in the authorities states that a lesser degree of similarity between goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*). In this case, the goods are identical.

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<sup>1</sup> Case C-342/97

30. Despite the fact that the goods are identical, there is no likelihood of confusion. Even if TITE will be seen as TIGHT, so creating some level of conceptual similarity between those particular elements of the marks, the marks, as wholes, are too dissimilar. Further, if TITE is perceived as a misspelling of TIGHT, it becomes descriptive in the context of the goods. Less weight is accorded to elements which are descriptive, which then puts the focus on the dissimilar elements STA and SIT. SIT TIGHT, as a well-known phrase with its own well-known meaning, is sufficiently different to the opponent's mark so as not to be confused with it. Again, even if I am wrong that STA will not be approximated to STAY and that, instead, the average consumer will see the opponent's mark as, effectively, STAY TIGHT, this then sends a descriptive message which considerably weakens the distinctive character of the earlier mark. The differences between the marks will not be overlooked by the average consumer paying a reasonable level of attention to the visual purchase, or even an aural purchase. The opponent cannot use its trade mark to protect the idea of a seat which does not move. The test is whether there is a likelihood of confusion between the marks. There is no likelihood of confusion.

## **Outcome**

### **31. The oppositions fail.**

## **Costs**

32. The applicant has been successful and is entitled to a contribution (rather than compensation) towards its costs, according to the published scale in Tribunal Practice Notice 4/2007. The applicant's written submissions in lieu of a hearing dated 6 January 2015 included written submissions in relation to section 5(3) and 5(4)(a), even though the opponent had already written to say it would not be pursuing those grounds in a letter dated 17 December 2014. The applicant's evidence did not assist me in making this decision. Information about how the product was designed and how the trade mark was chosen does not assist in the analysis of whether there is a likelihood of confusion. It is a matter of comparing mark for mark from the perspective of the average consumer for the goods. Consequently, since it was not relevant and was of no assistance, there will be no award for filing the applicant's evidence. I will also make one award for consideration of the statement of cases and filing the counterstatements as they were essentially the same. The breakdown is as follows:

Considering the statements of case and filing the counterstatements	£200
Considering opponent's evidence and filing submissions (consolidated)	£700
<b>Total:</b>	<b>£900</b>

33. I order Bemis Manufacturing Company to pay Croydex Limited the sum of £900 which, in the absence of an appeal, should be paid within seven days of the expiry of the appeal period.

**Dated this 24<sup>th</sup> day of February 2015**

**Judi Pike  
For the Registrar,  
the Comptroller-General**

### **Postscript**

34. Following the issue of this decision, I received a letter from the attorneys acting for the applicant in relation to my comments regarding costs. Specifically, they point out that the applicant's evidence was filed before the opponent withdrew its grounds under section 5(3) and 5(4)(a) of the Act. This is true, and it is also true that the applicant's written submissions in lieu of a hearing addressed the withdrawn grounds after it had received notice that the grounds had been withdrawn. I set this out here for clarification. This does not affect the appeal period.