

O-061-07

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No 2362711  
BY ADL HEALTHCARE LIMITED  
TO REGISTER THE TRADE MARK  
CETRAL  
IN CLASS 5**

**AND IN THE MATTER OF OPPOSITION  
THERE TO UNDER NO 93879  
BY PFIZER PRODUCTS INC.**

## BACKGROUND

1) On 7 May 2004, ADL Healthcare Ltd, of Fullbrook House, Captains Lane, Barton-under-Needwood, Burton-on-Trent, Staffordshire, DE13 8EZ applied under the Trade Marks Act 1994 for registration of the trade mark CETRAL in respect of the following goods in Class 5: "Pharmaceutical preparations and substances; medicines; all for human use".

2) On 4 November 2005 Pfizer Products Inc., of Eastern Point Road, Groton, Connecticut 06340-5146, United States of America filed notice of opposition to the application. The grounds of opposition are in summary:

a) The opponent is the proprietor of the following trade marks:

Mark	Number	Effective date	Class	Specification
CENRAL	CTM 2563807	05.02.02	5	Pharmaceutical and veterinary preparations and substances; all included in class 5.

b) The opponent claims that the goods are identical and/or similar and that the marks are confusingly similar. The mark therefore offends against Section 5(2)(b) of the Trade Marks Act 1994.

3) The applicant subsequently filed a counterstatement accepting that the goods of the two parties are identical or similar but denying that the marks are similar or that there would be confusion.

4) Neither side filed evidence in these proceedings. Both sides ask for an award of costs. The matter came to be heard on 6 February 2007 when the opponent was represented by Mr Harris of Messrs Gill Jennings & Every and the applicant was represented by Mr Hodgkinson of Messrs Marks & Clerk.

## DECISION

5) The only ground of opposition is under section 5(2)(b) which reads:

"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."

6) An "earlier trade mark" is defined in section 6, the relevant part of which states:

"6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

7) The opponent is relying upon its Community Trade Mark No. 2563807 which has an effective date of 5 February 2002 and which is clearly an earlier trade mark.

8) In determining the question under section 5(2)(b), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG and Adidas Benelux B.V.* [2000] E.T.M.R 723. It is clear from these cases that:

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*;
- (b) the matter must be judged through the eyes of the average consumer, of the goods / services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*;
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either *per se* or because of the use that has been made of it; *Sabel BV v Puma AG*;
- (g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*;
- (h) further, 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; *Marca Mode CV v Adidas AG and Adidas Benelux B.V.*;

(i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*

9) In essence the test under section 5(2)(b) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the judgements of the European Court of Justice mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, I must compare the applicant's mark and the mark relied upon by the opponent on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods covered within the respective specifications.

10) The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was considered by David Kitchin Q.C. sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). Mr Kitchin concluded at paragraph 17 of his decision:

“The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr. Thorley Q.C in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average consumer will expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case.”

11) The opponent has not provided any evidence of use and cannot benefit from an enhanced level of protection due to reputation. I also have to consider whether the opponent's mark is inherently distinctive. The opponent's mark consists of the word CENRAL and is registered for goods in Class 5, and appears to be inherently distinctive.

12) I shall first consider the specifications of both parties. For ease of reference these are as follows:

Applicant's specification	Opponent's specification
Pharmaceutical preparations and substances; medicines; all for human use.	Pharmaceutical and veterinary preparations and substances; all included in class 5.

13) In carrying out the comparison of the specifications of the two parties I take into account the factors referred to in the opinion of the Advocate General in *Canon* [1999] ETMR 1. In its judgement, the ECJ stated at page 6 paragraph 23:

“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, intended purpose and their method of use and whether they are in competition with each other or are complementary.”

14) The applicant accepted in its counterstatement that the goods were identical and/or similar. To my mind the opponent's specification encompasses the whole of the applicant's specification and the goods must therefore be considered as identical.

15) I now turn to consider the marks of the two parties which are as follows:

Applicant's mark	Opponent's mark
CETRAL	CENRAL

16) The applicant contended that the first syllable was critical to the way in which, what it described as, a short trade mark would be considered. Mr Hodkinson pointed out that the first syllable can be neither lost nor hidden in the mark. He contended that the marks would be pronounced in a completely different way with the applicant's mark being SEE-TRAL and the opponent's mark being SEN-RAL. He also reminded me that the beginnings of marks are generally considered more important in the impression they give to the average consumer.

17) Visually the marks are identical other than the third letter of each mark where the applicant's mark has a letter “T” and the opponent's mark the letter “N”. In my view, phonetically the first syllable of each mark begins the same but has a slightly different ending. The second syllable of each mark is identical. I believe that the average consumer will view each mark in a similar manner so the marks will either be SEE-TRAL against SEEN-RAL or CET-RAL against CEN-RAL. Neither mark has any conceptual meaning both being made up names.

18) I agree with Mr Hodkinson's views on the beginnings of words and accept that there are differences in the first syllable, and a slight visual difference. However, there are also visual and phonetic similarities. I consider that the similarities far outweigh the differences. I also note that neither mark has any conceptual meaning which might serve to differentiate between the marks.

19) I must also consider the average consumer for the types of goods covered by the specifications of both parties. In my opinion, there are two distinct groups. The professional group which would include doctors, nurses and pharmacists and the second group comprising the general public. I take both groups to be reasonably well informed and reasonably circumspect and observant. Pharmaceutical products are not prescribed, purchased or taken without considerable care being exercised by all those involved in the process including the patient, although, I must take into account the concept of imperfect recollection.

20) Taking account of all of the above when considering the marks globally, I believe that there is a likelihood of confusion, with consumers of both types believing that the goods provided by the applicant are those of the opponent or provided by some undertaking linked to them. The opposition under Section 5(2)(b) therefore succeeds.

### **COSTS**

21) As the opponent is successful it is entitled to a contribution towards its costs. I order the applicant to pay the opponent the sum of £1,000. This sum takes into account that no evidence was filed by either party and that the hearing also related to another case between the two parties. This sum to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 26th day of February 2007**

**George W Salthouse  
For the Registrar,  
the Comptroller-General**