

O-219-07

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2385083
BY FLOREAL LIMITED TO REGISTER
THE TRADE MARK ARION IN CLASS 3**

AND

**IN THE MATTER OF OPPOSITION No. 93781
BY THE PROCTER & GAMBLE COMPANY**

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IN THE MATTER OF Application No. 2385083

by Floreal Limited to register the Trade Mark ARION in Class 3

and

IN THE MATTER OF Opposition No. 93781

by The Procter & Gamble Company

BACKGROUND

1. On 22 February 2005 Floreal Limited applied to register the trade mark ARION for a specification of goods that reads:

“Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; washing powder, clothes washing liquid, laundry detergents, stain-removing preparations; fabric conditioner; scented preparations for use in ironing; laundry starch; household cleaning preparations.” (Class 3).

2. On 29 September 2005 The Procter & Gamble Company filed notice of opposition to this application. The opponent is the proprietor of CTM No. 199976, ARIEL, which is registered with a specification of goods that reads “Bleaching preparations and other substances for laundry use, cleaning, polishing, scouring and abrasive preparations, soaps”. These goods are also in Class 3 of the International Classification system. The ARIEL mark was filed on 9 April 1996 and has a registration date of 28 August 1998. It was, thus, subject to The Trade Marks (Proof of Use, etc) Regulations 2004. In accordance with the requirement placed on it by these Regulations the opponent claimed use in respect “Preparations and other substances for laundry use, washing powder, clothes washing liquid, laundry detergents, stain-removing preparations”.

3. On this basis objection is raised under Section 5(2)(b) of the Act. The opponent claims that the marks are similar and the respective goods identical and/or similar such that there exists a likelihood of confusion. Furthermore, having regard to use dating back to 1968 the opponent claims a considerable reputation in its mark in relation to laundry care products. The opponent asks that the application be refused in its entirety.

4. The applicant filed a counterstatement denying that there was a likelihood of confusion. The applicant makes a number of submissions in relation to the marks themselves and the way in which consumers will react to them.

5. The counterstatement also contains the following:

“We question whether the goods for which there has been use are similar to all of the goods of the application. General surface cleaners, polishes, scourers,

abrasive preparations and other such household cleaners are not used in clothes care and are likely to damage clothing if so. The differences in the nature and intended use of these products, compared with clothes washing preparations, is such that there is no likelihood of confusion.”

6. I infer from this that the applicant makes no challenge to the claim of use made by the opponent but does challenge the consequences in terms of similarity.

7. Both parties ask for an award of costs.

8. Only the opponent has filed evidence in this case.

9. The Registry wrote to the parties in the usual manner at the conclusion of the evidence rounds offering the parties the opportunity to be heard or to file written submissions. In the event neither side requested a hearing but both have filed written submissions. In the case of the applicant the written submissions came under cover of a letter dated 27 November 2006 from Reddie & Grose and in the case of the opponent they are under cover of a letter dated 22 November 2006 from D Young & Co. Acting on behalf of the Registrar I give this decision.

Opponent's evidence

10. Carl J Roof has filed a witness statement. He is Associate General Counsel and Global Trademark Director of The Procter & Gamble Company.

11. He says that the ARIEL brand was first launched in 1968 and comprises a variety of laundry care products. These items are made available in powder, liquid, tablet and 'liquid' form through a variety of UK outlets including supermarkets, general stores and cash and carry stores. Samples/photographs of the current range of products and those products available in Western Europe (including the UK) during the period 1967/68 to 2000 are exhibited at XX1. Pictures of ARIEL labels/packaging are shown at XX2 along with details of advertising campaigns undertaken in the UK in recent years. The material includes pages from the Tesco website and the opponent's own UK site.

12. This advertising exposure is said to have led to substantial consumer awareness of the ARIEL brand. Consumer awareness data from July 2005 shows that 81% of people are familiar with the brand (unaided awareness) and 99% of people in terms of aided awareness which I take to mean when prompted for a response. These figures are provided by "Equity Scan", a rolling study run by the opponent with TNS Company. It is based on interviewing 100 British consumers per month, aged 18-70 years, who are responsible for household shopping and doing the laundry. It involves face to face interviews covering all UK laundry brands using a questionnaire a copy of which is exhibited at XX3.

13. Exhibited at XX4 is a table showing turnover (expressed as net realisation) for the ARIEL range of products. Suffice to say for the purposes of this action that turnover has exceeded £150 million per annum in each of the last five years. As a result a high degree of public recognition is claimed for the brand.

The Law

14. Section 5(2)(b) reads:

- (2) A trade mark shall not be registered if because -
- (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
 - (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.”

15. An objection under Section 5(2)(b) requires me to consider whether there are similarities in the marks and similarities in the goods that cumulatively, lead to a likelihood of confusion. The leading guidance from the European Court of Justice is contained in *Sabel BV v Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *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 BV* [2000] E.T.M.R. 723.

16. 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* paragraph 22;
- (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 & C. GmbH v. Klijsen Handel B.V.* paragraph 27;
- (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* paragraph 23;
- (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* paragraph 23;
- (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* paragraph 17;

- (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* paragraph 24;
- (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* paragraph 26;
- (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 BV* paragraph 41;
- (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.*, paragraph 29.

The opponent's submissions

17. The main points to emerge are that:

- the goods in question are inexpensive high volume everyday items. This is likely to be reflected in the level of attention paid by consumers when purchasing such goods.
- the issue of potential economic linkage needs to be borne in mind particularly given the trend for brand extension or variation that is said to exist for successful brands like ARIEL.
- visually the marks are of the same length and share the first three letters. The first parts of marks are important.
- phonetically both marks consist of three syllables. The only difference is in the endings which tend to be slurred.
- the applicant's approach to semantic similarity (see below) is unlikely to reflect that of the average consumer for whom both marks will be invented words.
- the likelihood of confusion is increased by the fact that the ARIEL brand enjoys a reputation in the UK by virtue of its long-standing use.
- in relation to the goods the *Canon* criteria are relied on. It is submitted that all types of cleaning products are made available in the same sections of supermarkets and that it is common for the same manufacturer to produce different types of household cleaning preparations. Thus, it is said the FAIRY brand is used in relation to washing up liquid, dishwasher

tablets and laundry products and the FLASH brand is used on a wide range of household cleaning preparations and appliances as well as car wash preparations and appliances.

The applicant's submissions

18. The main points (taking the counterstatement and written submissions together) are:

- there are clear visual differences in the endings of the words.
- the effect of the "ION" ending is to make the initial vowel sound a short one, ah-ri-on, in contrast to air-ri-el.
- conceptually, the mark of the application has a "scientific" meaning using the idea that ions are used in the cleaning. The meaning of ARIEL is a lion of god.
- certain of the applicant's goods are not similar. General surface cleaners, polishes, scourers, abrasive preparations and other such household cleaners are not used in clothes care and are likely to damage clothing.
- the opponent's brand extension argument is rejected. It is submitted that the public would always expect to see the mark ARIEL in any brand extension product, perhaps with a sub-brand.
- the applicant is not aware of any famous brands which are altered in the event of brand extension. The ARIEL, FAIRY and FLASH examples support this view of the matter.
- it is not sufficient to look only at channels of trade when comparing goods. In any case supermarkets separate domestic cleaning products from laundry detergents.

Similarity – general

19. The principles derived from the ECJ cases summarised above have underpinned the approach to issues of similarity and likelihood of confusion for some time now. There has, however, existed a debate as to whether any degree of similarity (in marks and/or goods and services) is sufficient to engage the need to consider the (cumulative) likelihood of confusion test or whether there is some threshold level of similarity that must be crossed before the Court or tribunal needs to consider the interdependency principle and whether there is a likelihood of confusion. The competing arguments have recently been given full consideration by Mr Justice Lindsay in *esure Insurance Limited and Direct Line Insurance plc*, [2007] EWHC 1557(Ch). It will suffice for present purposes to record that he said:

“I would hold there to be some form of threshold, albeit a low one” (paragraph 46 of the judgment).

and

“Once that low threshold test I have described is passed then the fact-finder is, in my judgment, obliged to go on to consider whether, in consequence, there is a likelihood of confusion – see *Soffass* para 31. That is not to say that any party can safely decide to assert no more, as to similarity, than that so low a threshold has been exceeded because similarity and the likelihood of confusion are so inter-related that proof of a higher degree of similarity may conduce to a greater willingness in the fact-finder to hold that there is, on the facts, a likelihood of confusion.” (paragraph 48).

20. I am satisfied in this case that the low threshold referred to by Mr Justice Lindsay has been reached in the case of the marks before me (and the goods) and that as a consequence I am obliged to consider, *inter alia*, the interrelationship between them and reach a finding on the likelihood of confusion. I therefore, go on to consider the issues of similarity in greater detail.

Similarity of goods

21. The starting point for comparison purposes is the following passage from the *Canon* case:

“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.”

22. The respective specifications are set out at the beginning of this decision along with the opponent’s statement of use which the applicant has not indicated that it is contesting. The statement of use does not follow the precise wording of the specification as registered but I regard the statement of use as being within the scope of the registered specification given the breadth of the original terminology. No question of widening arises.

23. A number of items in the applicant’s specification clearly fall within the broad term “preparations and other substances for laundry use”. In this category are “bleaching preparations and other substances for laundry use; ... washing powder, clothes washing liquid, laundry detergents, stain removing preparations; fabric conditioners; scented preparations for use in ironing; laundry starch.” These are identical goods.

24. That leaves “cleaning, polishing, scouring and abrasive preparations” and “household cleaning preparations”. “Cleaning preparations” is a broad term that must include laundry preparations and substances. On the basis that the general includes the particular I find that cleaning preparations are also identical goods, laundry

products being a subset of cleaning preparations. Furthermore, if household cleaning preparations is taken to mean or include any cleaning preparations used in the house or home in the broadest sense then that term too would include goods for laundry use.

25. The applicant submits that polishing, scouring and abrasive preparations are not used on clothes and by inference cannot be the same or similar to laundry preparations and substances. That is highly likely to be the case so far as polishing preparations are concerned. I am less clear (and there is no detailed evidence on the point) as to whether scouring and abrasive preparations could include such goods for laundry use. Nevertheless, I consider that these functions would be features of, for instance, dishwasher cleaning agents. In terms of the *Canon* test such goods would be similar to their laundry equivalents in nature, and uses in the sense that they would be cleaning agents in powder or liquid form, one for washing machines the other for a dishwasher, and likely to be purchased by the same consumers from the same outlets. I note that the applicant's submissions acknowledge that, for instance, the FAIRY brand is used in relation to both laundry and dishwasher products. There is an element of complementarity. Moreover, a product such as soda crystals can be used for a very wide variety of purposes including laundry, dishwashing and general household cleaning functions. So the dividing line between these various cleaning, scouring and abrasive preparations is not clear cut and it is not possible to draw clear lines of demarcation according to functionality. In short I found these other goods to share marked similarities with laundry preparations and substances.

Similarity of marks

26. I have already recorded the parties' submissions in relation to the marks. Any analysis of similarities and differences involves some dissection of the marks. It is important, however, to bear in mind that the average consumer does not go through this process and it is the overall impression that must be borne in mind at the end of the day.

27. Both words are relatively short words with the first three letters in common. Even allowing for the importance that is traditionally attached to the beginnings of words I consider it highly unlikely that, in words of this length, consumers would fail to notice the different endings.

28. Phonetically, both marks have three syllables. I agree with the applicant's submission that ARIEL has a long vowel sound at the start (rendered by the applicant as air-ri-el) and the stress on the first syllable. I am less certain as to how the applied for mark would be pronounced. My initial inclination on encountering the mark was that the first letter would be a short A sound but I accept that others might pronounce it as a long A sound. There may also be room for debate as to which syllable will be stressed in speech. The analogy that comes to mind is the word orion where the stress is on the middle syllable though my unprompted reaction was to stress the first syllable (thus producing a word that would rhyme with carrion) . Given that alternative pronunciations are possible the degree of phonetic similarity will vary somewhat depending on how consumers approach the applicant's mark with a stressed first syllable and long vowel sound being closest to the opponent's mark.

29. Conceptually, the applicant's submissions suggest that the applied for mark is likely to be seen as having a scientific meaning said to be attributable to the presence of the element 'ION'. Further, it is said that ARIEL has the meaning of a lion of god. The inference that I am invited to draw is that they are conceptually distinguishable. I have some difficulties with these submissions. The first submission seems to me to run counter to the doctrine that consumers do not unpack marks and search for meanings. The second submission does not strike me as a sufficiently well known meaning for me to be confident that consumers will fasten upon it unhesitatingly as a recognisable point of conceptual differentiation. That is not to say that the word ARIEL is devoid of all meaning. Some may recognise it as the name of a character from *The Tempest*, others as the name of a font on word processing packages. It may even be seen as a miss-spelling of the word aerial.

30. The European Courts have held that for conceptual considerations to counteract visual and aural similarity at least one of the marks must have a clear and specific meaning so that the public is capable of grasping it immediately (see *Phillips-Van Heusen Corp v Pash Textilvertrieb und Einzelhandel GmbH* Case T-292/01 and *Ruiz-Picasso and Others v OHIM* Case C-361/04 P). I am not sufficiently confident that the meanings of ARIEL (taken individually or collectively) would be grasped immediately by consumers such that conceptual dissimilarity on its own is sufficient to tip the balance in favour of the applicant.

31. The goods at issue are largely self-serve consumer items which the consumer will select by eye. Bearing in mind that these are relatively short words I find overall that there is a moderate degree of similarity between the competing marks when the above factors are weighed in the balance.

Distinctive character of the earlier trade mark

32. The duration and extent of use attested to in Mr Roof's witness statement speaks for itself. I have little hesitation in concluding that ARIEL is a brand leader and enjoys a high reputation in the UK market in relation to laundry products. I have not needed to rely on the consumer awareness questionnaire at XX3 in reaching this view. There are a number of problems with the questionnaire in terms of its value in the context of trade mark proceedings. For instance, the audience was limited to "females who are mainly responsible for doing the household laundry ..."; it was designed to probe for brand answers; and it addressed issues that are of no relevance to this case. That is not, of course, a criticism of the professionalism with which the questionnaire survey was conducted. It is simply that care is needed when considering the results of a survey outside the context for which it was intended. However, as indicated, from the remaining evidence, my own knowledge and the absence of any serious challenge by the applicant I am of the view that the ARIEL mark enjoys a very high degree of distinctive character.

The average consumer

33. Laundry preparations and household cleaning products generally are normally purchased as part of the weekly (or more regular) shopping process. They are likely to be purchased by the member(s) of the household who is normally responsible for this part of the domestic routine. There is force to the opponent's submission that

these are relatively inexpensive, high volume items. Being largely functional in nature they may not attract a particularly high degree of care and attention in the purchasing process. Not as much say as clothing or cosmetics that affect personal appearance. But that is not to say that consumers will be inattentive. Decisions have to be made on type of goods (e.g. biological/non biological), nature (powder/liquid etc), suitability for whites, colours etc. That points to a reasonable degree of care in selecting and purchasing such goods but certainly not the highest degree of care.

Brand extension

34. The opponent has contended that, due to the trend for brand extension or addition, the public would simply assume that ARION was an addition to the ARIEL family. The applicant for its part points to the fact, whilst the product range under certain leading brands may be extended, the brand itself does not change. The FAIRY and FLASH examples appear to support the applicant's view of the matter as does the opponent's evidence in exhibits XX1 and 2. The latter shows ARIEL being used with various descriptive additions but with no variation to the core brand itself which has remained in its present form since 1968.

Likelihood of confusion

35. In considering whether there is a likelihood of confusion various factors have to be taken into account. There is the interdependency principle – a lesser degree of similarity between the marks may be offset by a greater degree of similarity between goods, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*). In this case I have found that the marks have a moderate degree of similarity; that the earlier trade mark is highly distinctive and that there are identical and similar goods. Furthermore, consumers are likely to pay some attention to the purchase of laundry and household cleaning preparations but are unlikely to exercise the degree of care that will be shown where higher priced items are concerned.

36. There is also the effect of imperfect recollection to be taken into account and the fact that the respective marks may be encountered sequentially rather than concurrently. Laundry and household cleaning preparations are domestic consumable items that are purchased on a regular basis. Regular exposure to such goods/brands may mitigate the effects of imperfect recollection (in comparison say to the position where products are only purchased on an occasional basis with potentially lengthy periods between). But it will not eliminate it and I bear in mind that these are not goods that command high levels of attention.

37. Taking all these factors into account I am of the clear view that there are insufficient similarities between the marks for there to be a likelihood that consumers will confuse one with the other.

38. That is not the end of the matter because it is well established that indirect as well as direct confusion must be borne in mind. In that respect it has been held that 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*, paragraph 26; and 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*, paragraph 41.

39. On the other hand 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*, paragraph 29.

40. I think it is possible that the reputation enjoyed by the ARIEL brand will lead some consumers to make an association between the marks. In other words the similarities between them are sufficient to bring to mind a brand that is one of the market leaders. However, I am not persuaded that the association will be more than that. The opponent's evidence does not support the view that consumers will see this as a brand extension. The consistent position is that the word ARIEL has been used unchanged since 1968. Furthermore, the evidence shows that, even where leading brands in this area of trade such as ARIEL, FAIRY and FLASH are used as the basis for product diversification, the common denominator is the continued use of the core brand rather than a variant form of it. I find, therefore, that the opposition fails under Section 5(2)(b) and the application should proceed for all the goods of the specification.

COSTS

41. The applicant has been successful and is entitled to a contribution towards its costs. I order the opponent to pay the applicant the sum of £800. This sum is 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 2nd day of August 2007

**M Reynolds
For the Registrar
The Comptroller-General**