

O-385-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2509012
BY DEN INVESTMENTS LTD TO REGISTER THE TRADE MARK**

KENNEDY'S

IN CLASSES 29, 30 AND 35

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 99488
BY LIDL STIFTUNG & CO. KG**

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BACKGROUND

1. On 17th February 2009, Den Investments Ltd of Alpha House, Old Doncaster Road, Wath upon Dearne, Yorkshire, S63 7EU (hereafter "Den") applied to the register the following mark:

KENNEDY'S

in Classes 29, 30 and 35 for the following goods and services

Class 29:

Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats; prepared meals; soups and potato crisps; meat pies; sausages.

Class 30:

Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes; cakes and biscuits.

Class 35:

Retail services connected with the sale of food.

2. The application was published in the Trade Marks Journal on 29th May 2009 and on 28th August 2009, Lidl Stiftung & Co. KG of Stiftsbergstr. 1, Neckarsulm, 74167, Germany (hereafter “Lidl”) lodged an opposition against all goods and services.
3. The opponent based its opposition on section 5(2)(b) of The Trade Marks Act 1994 (hereafter the “Act”), citing an earlier Community mark, 5485958, the details of which are as follows:

Mark. Filing and registration dates	Goods and services relied upon in the opposition
<p>MCENNEDY</p> <p>21st November 2006 and 15th November 2007</p>	<p>Class 29</p> <p>Meat, fish, poultry and game, including the aforesaid goods frozen; meat products and charcuterie; meat extracts; shellfish; preserved, dried and cooked fruits and vegetables, including the aforesaid goods in sweet and/or sour (pickled) sauces; jellies; jams, marmalades, compotes and other sweet spreads; eggs, milk and milk products included in class 29, in particular butter, cheese, fresh milk, long-life milk, cream, yoghurt, quark, powdered milk for food, desserts of yoghurt, quark and cream; meat, sausage, fish, fruit and vegetable preserves; processed nuts; edible oils and fats; prepared meals and frozen foodstuffs included in class 29; dietetic substances and foodstuffs, not adapted for medical use, included in class 29.</p> <p>Class 30:</p> <p>Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, in particular cereals, muesli and whole-wheat products; pasta; coffee, tea, cocoa or chocolate-based drinks; coffee and cocoa preparations for making alcoholic and non-alcoholic beverages; food</p>

	<p>flavourings; Bread and pastry, in particular baguettes; pizzas; confectionery, ices; pudding; honey, treacle; yeast, baking powder, starch for food; salt; mustard; mayonnaise, ketchup; vinegar, sauces (condiments), salad dressings; spices, spice extracts, dried herbs; prepared meals and frozen foodstuffs included in class 30; dietetic substances and foodstuffs, not adapted for medical use, included in class 30.</p> <p>Class 31:</p> <p>Fresh fruits and vegetables; nuts; seeds, natural plants and flowers; dried plants; animal feed and additives for animal feed; bedding for animals.</p> <p>Class 32:</p> <p>Beers; alcohol-free beer; dietetic beer; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.</p> <p>Class 33:</p> <p>Alcoholic beverages (except beers) included in class 33, in particular wine, spirits and liqueurs, and alcoholic mixed milk beverages, cocktails and apéritifs with a spirit or wine base, except scotch, whisky; beverages containing wine; alcoholic preparations for making beverages.</p>
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4. Lidl say the respective marks are visually, phonetically and conceptually similar and the goods/services are identical or similar and therefore a likelihood of confusion arises. They say the marks both consist of surnames which are virtually identical. Given, both the doctrine of imperfect recollection and aural similarity especially, consumers will assume that goods or services bearing the respective marks emanate from the same economic source or a linked undertaking.

5. Den filed a counterstatement denying the ground of opposition. They say MCENNEDY is unlikely to be confused with KENNEDY'S. The marks are visually and phonetically different, with the beginning letters of each mark, 'M' and 'K' being markedly distinct and 'strong' letters, appearing at the beginnings of each mark. The endings are also different with Den's mark being 'possessive'. They say Lidl's mark is not a surname at all but a made up word, noting that KENNEDY always starts with a 'K' never a 'C'.
6. Neither party has filed evidence although submissions have been filed by Lidl. Neither party has asked to be heard and instead, both are content that the matter be decided on the papers. Both parties seek an award of costs. After careful consideration of the papers I give my decision.

DECISION

7. The opposition is founded solely upon Section 5(2) (b) of the Act. This reads:

“(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.”

8. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade mark” means –

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

9. With a filing date of 21st November 2006 and a registration date of 15th November 2007, it is clear that under Section 6(1) of the Act, Lidl's mark is an earlier trade mark. Further, as it completed its registration procedure less than five years before the publication of the contested mark (29th May 2009), it is not subject to the proof of use requirements set out in section 6A of the Act.

10. In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (“CJEU”) in

Sabel BV v Puma AG [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P* (LIMONCELLO). 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) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,
- (h) 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*,

(i) 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*,

(j) 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.*,

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

Comparison of goods and services

11. In assessing the similarity of goods and services, it is necessary to apply the approach advocated by case law and to take account of all the relevant factors relating to the services in the respective specifications. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23 of the Judgment:

‘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 end users and their method of use and whether they are in competition with each other or are complementary.’

12. Other factors have been identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281, such as the nature of the users and the channels of trade.

13. Three further cases on the way that specifications ought to be interpreted (particularly in respect of services) should be borne in mind. In *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd (“Thomson”)* [2003] RPC 32, at para 31, Aldous LJ, says

“In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use.”

Although this was in the context of arriving at a fair specification consequent to an attack of revocation on the grounds of non-use, the principle that it is the public and circumstances of the relevant trade that should underpin consideration as to the terms used in a specification nonetheless holds good. Secondly, there is the case of *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd* (“*Beautimatic*”) [2000] FSR 267, in which the principle of giving words their ordinary (rather than an unnaturally narrow) meaning was enshrined. In summary, the *Beautimatic* case urges an approach that is not unnaturally narrow, whilst the *Thomson* case stresses that the exercise is not one of lexical analysis in a vacuum, but by reference to how the average consumer may perceive matters in the relevant trade.

14. It is important to recognise that even though there is no evidence on similarity, I nevertheless have the statements of case and am able to draw upon commonly known facts. Mr Geoffrey Hobbs QC sitting as the Appointed Person said in *Raleigh International trade mark* [2001] R.P.C. 11 at paragraph 20, that such evidence will be required if the goods or services specified in the opposed application for registration are not identical or self-evidently similar to those for which the earlier trade mark is registered. But where there is self-evident similarity, and especially in relation to everyday items, evidence may not be necessary. He also stated that the tribunal may, in an appropriate case, consider the question of similarity from the viewpoint of the notional member of the relevant purchasing public.
15. I should also mention a further case in terms of the application of legal principles, and that is the European Court of First Instance (“GC”) in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* (“*Meric*”) Case T-133/05, where, at para 29, it is stated:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

16. With my introductory comments out of the way, I turn to the services to be compared, which are as follows:

Lidl's goods and services	Den's goods and services
<p>Class 29</p> <p>Meat, fish, poultry and game, including the aforesaid goods frozen; meat products and charcuterie; meat extracts; shellfish; preserved, dried and cooked fruits and vegetables, including the aforesaid goods in sweet and/or sour (pickled) sauces; jellies; jams, marmalades, compotes and other sweet spreads; eggs, milk and milk products included in class 29, in particular butter, cheese, fresh milk, long-life milk, cream, yoghurt, quark, powdered milk for food, desserts of yoghurt, quark and cream; meat, sausage, fish, fruit and vegetable preserves; processed nuts; edible oils and fats; prepared meals and frozen foodstuffs included in class 29; dietetic substances and foodstuffs, not adapted for medical use, included in class 29.</p> <p>Class 30:</p> <p>Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, in particular cereals, muesli and whole-wheat products; pasta; coffee, tea, cocoa or chocolate-based drinks; coffee and cocoa preparations for making alcoholic and non-alcoholic beverages; food flavourings; Bread and pastry, in particular baguettes; pizzas; confectionery, ices; pudding; honey, treacle; yeast, baking powder,</p>	<p>Class 29:</p> <p>Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats; prepared meals; soups and potato crisps; meat pies; sausages.</p> <p>Class 30:</p> <p>Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes; cakes and biscuits.</p>

<p>starch for food; salt; mustard; mayonnaise, ketchup; vinegar, sauces (condiments), salad dressings; spices, spice extracts, dried herbs; prepared meals and frozen foodstuffs included in class 30; dietetic substances and foodstuffs, not adapted for medical use, included in class 30.</p> <p>Class 31:</p> <p>Fresh fruits and vegetables; nuts; seeds, natural plants and flowers; dried plants; animal feed and additives for animal feed; bedding for animals.</p> <p>Class 32:</p> <p>Beers; alcohol-free beer; dietetic beer; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.</p> <p>Class 33:</p> <p>Alcoholic beverages (except beers) included in class 33, in particular wine, spirits and liqueurs, and alcoholic mixed milk beverages, cocktails and apéritifs with a spirit or wine base, except scotch, whisky; beverages containing wine; alcoholic preparations for making beverages.</p>	<p>Class 35:</p> <p>Retail services connected with the sale of food.</p>
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Class 29

17. The only terms in Den's specification not identical to those used in Lidl's specification are "fruit sauces"; "soups and potato crisps" and "meat pies". "Fruit

sauces” are, in effect, covered by the term “preserved, dried and cooked fruits and vegetables, including the aforesaid goods in sweet and/or sour (pickled) sauces”. “Meat pies” are caught by the terms “meat products”, or “prepared meals and frozen foodstuffs”. A meat pie is, in effect, a prepared meal. “Potato crisps” are caught by the term “dried and cooked vegetables”, as that is what they are. Finally, that leaves ‘soups’. The dictionary definition of ‘soup’ is

soup

→ **noun** [mass noun]

1. a liquid dish, typically savoury and made by boiling meat, fish, or vegetables etc. in stock or water: *a bowl of tomato soup*.¹

18. Lidl’s attorney says that soup is caught by the term “prepared meals”, because a soup is a prepared meal which only requires to be heated up by the consumer before being eaten. Whilst I accepted the submission that a “meat pie” could be caught by the term “prepared meal”, I am not so sympathetic to the argument that a soup is similarly caught. A soup is a soup, commonly consumed as a starter, rather than a prepared ‘meal’. The average consumer would not regard a soup as a prepared meal; soups and prepared meals are not necessarily housed together on supermarket shelves. That said, Lidl has the broad term, “preserved, dried and cooked fruits and vegetables” and as the literal definition states, soups invariably contain cooked vegetables, with or without fish or meat. Lidl also has the broad term “meat products” and “fish preserves”. So, even if soups are not expressly contained within these broad terms, then they are highly similar to the items covered. So, in conclusion, in Den’s specification: meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces, eggs, milk and milk products; edible oils and fats; prepared meals; meat pies and sausages are all identical to the same products or terms in Lidl’s specification. Soup is highly similar to terms I have identified and used in Lidl’s specification.

Class 30

19. Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee, flour and preparations made from cereals, bread, pastry, confectionery, ices, honey, treacle, yeast, baking powder, salt, mustard, vinegar, sauces (condiments), spices, prepared meals and pizzas are all identical to the same terms used in Lidl’s specification. The following terms are not covered expressly within Lidl’s specification: ice, sandwiches, pies, pasta dishes, cakes and biscuits. I would not agree with the submission that “ice” is highly similar to “ices”, on the basis

¹“soup noun” *The Oxford Dictionary of English* (revised edition). Ed. Catherine Soanes and Angus Stevenson. Oxford University Press, 2005. *Oxford Reference Online*. Oxford University Press. Intellectual Property Office. 31 August 2010 <<http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t140.e73769>>

that, although both may be different in nature, they will be sold from the same, freezer area in a supermarket. Ice is frozen water, whereas 'ices' in trade would be understood to be frozen confection. Nevertheless I would accord a degree of similarity on the basis of their proximity in the freezer compartment in a supermarket. "Sandwiches and pies" are highly similar to "bread and pastry... baguettes, prepared meals and frozen foodstuffs". Sandwiches are made from bread; a baguette is a form of sandwich, and pies are made from pastry. All the items can invariably be found in the same chiller area of a supermarket, where consumers wanting a quick and easy lunch or snack can go. The term "pasta dishes" is highly similar to "pasta". Whilst "pasta dishes" may contain more than just pasta, the chief element will obviously be pasta. It is also highly likely that both plain pasta and dishes based on pasta will be available from the same area of a supermarket. Finally, "cakes and biscuits" are highly similar to "flour and preparations made from cereals" on the basis that cakes and biscuits are literally preparations made from cereals. So, in conclusion I have found every item in Den's specification in Class 30 to be either identical, highly similar, similar or, in the case of 'ice' similar to a degree to the goods covered by Lidl's specification.


Class 35

20. The issue here is whether "retail services connected with the sale of food" can be said to be similar to the food itself. The European Courts have issued two key decisions on this question. In Case C-418/02 *Praktiker Bau-und Heimwerkermärkte AG ("Praktiker")* the CJEU approved the registration of retail services and said that it was not necessary to specify in detail the services in question (ie, whether they are provided, eg by a supermarket, department store, mail order or electronically online). However it was necessary to specify the goods or types of goods in all cases. Plainly Den has done exactly that in their specification.
21. The second case is that of T-116/06 *Oakley Inc v OHIM ("Oakley")*. In this case before the GC, the Court held that the respective goods and services do not have the same nature, purpose and method of use, for example, because goods are fungible when services are not (para 47). Despite this, the Court found that the Board of Appeal was correct to find that there were similarities, given the complementary nature of the goods and the respective retail services. That is to say that the goods are indispensable to, or at the very least important for the provision of the retail services, which are specifically provided when the goods are sold (paras 54 and 55). This must be true, regardless of how those services are provided, whether by means of a catalogue or traditional brick and mortar environment. As a consequence, the Court found that retail services are not merely auxiliary or ancillary to the goods in question (para 56). The one rider I should note to this is that the finding of overall similarity is only endorsed by the GC insofar that the retail services are in respect of *identical, or closely connected* to the goods of the earlier mark (para 56). Plainly in this case the goods on sale by Den comprise "food" and so are identical to those specified by Lidl.

22. I appreciate there is always a danger in regarding cases like *Oakley* as being authority for broad and inflexible legal propositions, eg to the effect that in all cases retail services for the sale of goods identical to or closely connected to those specified in an opponent's specification *must, a priori*, be regarded as similar to the goods themselves. This is far too rule-based and prescriptive an approach; it potentially obviates the need for any evidence on the point and absolves the decision maker from any responsibility for weighing such evidence, even in technical cases which involve specialist goods and retailing. In the *particular* circumstances of the *Oakley* case, it was accepted, eg by the GC (para 50) that, "the manufacturers of the goods in question (clothing) often have their own sales outlets for their goods or resort to distribution agreements which authorise the provider of the retail services to use the same mark as that affixed to the goods sold". I have no evidence or even submissions on that point as concerning the goods and services in issue here.
23. With this reservation in mind, I nonetheless find that, as in *Oakley*, the respective goods and retail services are similar. Inasmuch as it customary to additionally find what *degree* of similarity is engaged, I would find that the respective goods and services in this case are similar to a moderate degree.

Comparison of marks

24. The respective marks are as below:

Lidl's mark	Den's mark
MCENNEDY	

25. The case law makes it clear that I must undertake a full comparison of both marks in their totalities, taking account of all differences and similarities. The comparison needs to take account of the visual, aural and conceptual similarities and differences between the marks.
26. In terms of visual appearance, Lidl's mark presents as a single word of 8 letters' length. It is in plain, upper case, script. At this point it is worth saying that I do not agree with the submissions of Lidl's attorneys that the plain typeface "covers the opponent for use in *any* typeface". As I see it, the situation is similar to use of colour in an application; that is to say that if a mark is registered in black and white, it is effectively registered without reference to colour². In the case of a

² See para 10 especially of the Appointed Person's decision in Able C&C Co Ltd's Application (BL O-246-08)

plain typeface, although such a registration may 'cover' the proprietor against another mark in upper *and* lower case, it would not necessarily be the case that use in any or *all* typefaces would be considered to be use of an identical mark. Lidl's mark looks like a surname, but a slightly unusual one, perhaps of Scottish or Irish origin, given that it starts with "MC" (being an abbreviation of the Gaelic word 'MAC', meaning 'son of'). Den's mark also presents visually as a single, eight letter word in fancy script, somewhat reminiscent of 'wild west' or 'fairground' lettering. The last two letters being separated by an apostrophe, giving the obvious impression that the word is a surname and the apostrophe makes it possessive, whereas Lidl's is not in the possessive. I should at this point stress that my *visual* comparison must be fixed on the marks as filed and registered, and so I am not persuaded by Lidl's attorneys that I should consider their mark *as if used* in the possessive. The respective marks share the letter string, -ENNEDY-, comprising the bulk of each mark, with the significant beginning and ends however, being different. Taking into account the similarities and dissimilarities, I find the respective marks to share a moderate level of visual similarity.

27. Aurally, Lidl's mark will be pronounced "MAK – EN- EDY" or "MUK-EN-EDY". I agree with the submissions that the 'C' will be 'hard' and pronounced as a 'K', rendering the pronunciation virtually identical to the name "McKennedy". Den's mark will be pronounced "KEN- EDYS". Unlike my visual comparison, I am inclined to accept the submissions of Lidl's attorney's that use of Lidl's mark in the possessive or genitive can be factored in, as, in actual use, the consumer may refer to and ask for a product along the lines of "MCENNEDY'S meat or ready meal, etc". Taking account the similarities and dissimilarities at the beginnings and ends of the respective marks that I have identified, I find that the respective marks share a moderate level of aural similarity.
28. Conceptually, I believe both marks will be seen as surnames by the average consumer. The fact that Lidl's mark may not *in fact* be a surname does not alter the perception that it conveys and it is the perception of the average consumer that is all important in my consideration. The fancy script in Den's mark will not vary, or otherwise impact upon, that perception. Den's mark is plainly in the possessive or genitive. Lidl's mark is not in the possessive or genitive, but I nevertheless factor in that in aural use, the consumer may well use it in that form. Lidl's mark will, as I have said, look like a surname, albeit a slightly unusual one. The likely perception is that the average consumer will see it as having Irish or Scottish derivation, given the letters "MC" at the beginning. As I have said "MC" is an abbreviation of "MAC", meaning, in Gaelic, 'son of'. I think there is a strong probability that the average consumer will perceive Lidl's mark as "McKennedy"; aurally, as I have said there is virtually no difference and although visually there is no 'K' in the Lidl mark, this may go either unnoticed or maybe even the consumer may not appreciate the normal spelling of "Kennedy".
29. In conclusion, as regards conceptual comparison, my finding is that there is slight conceptual similarity on the basis that both marks are surnames which, whilst not

identical, can be said at the least to be 'similar'. That said, it is impossible to ignore the fact that they are *different* surnames; SMITH is not to be confused with SMYTH. Names are of course a paradigm form of trade mark and as such, consumers are very alert to the smallest of differences and the letters "MC" at the start of Lidl's will undoubtedly create a certain impression; as I have said, of a name of Irish or Scottish origin. The prefix "MC" will clearly and *instantly* impart that Gaelic connection. This prefix "MC" is absent from Den's mark and so, whilst KENNEDY could in fact also be a surname of Scottish or Irish origin, this will not be as plain and obvious to the average UK consumer as in Lidl's mark. For this reason I am unwilling to conclude that the conceptual similarity is anything but slight.

30. Overall, I conclude that the respective marks share a low level of similarity.

The average consumer and nature of purchase

31. As matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23), it is important that I assess who the average consumer is for the goods at issue, and whether there is anything about the nature of transactions under the respective marks that may lead me to conclude that the average consumer is other than someone "deemed to be reasonably well informed and reasonably circumspect and observant" (see authority (b) in para 10 above).

32. The average consumer for the goods covered by the Lidl's specification will be the general public. The average consumer for the Den's goods and services will likewise comprise the general public.

33. The goods and services concerned are everyday food and drink items and the retail of the same. They would not normally engage a particularly high level of circumspection in their selection or access and are often accessed in a completely random and purely opportunistic manner.

Use and distinctive character of the earlier trade mark

34. Before I bring my findings together in an overall assessment, I have to consider whether the opponent's mark has a particularly distinctive character, either arising from the inherent characteristics of the trade mark or because of the use made of it. In terms of its inherent distinctiveness, I consider Lidl's mark to have a moderate level of distinctiveness. In this regard it is not an invented word, such as KODAK, meaning nothing at all and which, as such, would render it highly distinctive. Lidl's mark would be perceived as a name of Gaelic origin, and whilst I have no evidence before me as to the commonality of that name (or even that the name exists), that is sufficient for me not to accord the mark the highest level of distinctiveness urged upon me by Lidl's attorneys. There is no evidence by which I can say that the moderate level of inherent distinctiveness has been enhanced through use in the UK.

Likelihood of confusion

35. The various findings I have arrived at above need now to be factored into an overall assessment of likelihood of confusion. I need to adopt a global approach, which takes into account 'imperfect recollection' on the part of the consumer, as advocated by the ECJ in *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Imperfect recollection is the doctrine whereby a side by side mark comparison does not altogether reflect how marks will be compared in the market place.
36. I have found the respective marks to share a low level of similarity and the respective goods and services are all either identical, or at the least sharing a degree of 'similarity'. In particular, I have found that conceptually the marks present as different surnames, and crucially, the "MC" element of Lidl's mark will instantly convey in particular (and in contrast to Den's mark) Gaelic descent or derivation. I have also found the earlier mark to have a moderate degree of inherent distinctiveness the nature of the consumer and purchases involved *not* to engage a particularly high level of circumspection. Weighing up and globally assessing all these factors as I must, I have come to the conclusion that direct confusion is not likely in the circumstances, given especially that both marks comprise *different* surnames. It follows in this case that indirect confusion is also unlikely. If the consumer would see the marks as different surnames then both direct and indirect confusion must be ruled out. In all the circumstances, I find that the opposition fails in respect of all of the goods and services.

Costs

37. Den has been totally successful in defending the opposition and is entitled to a contribution towards its costs. I take account of the fact that that the decision has been reached without a hearing taking place. In the circumstances I award Den the sum of £600 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

1. Preparing a counterstatement and considering statement -	£300
2. Considering submissions -	£300
Total	£600

38. I order Lidl Stiftung & Co. KG to pay Den Instruments Ltd the sum of £600. The sum should 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 5 day of November 2010

**Edward Smith
For the Registrar,
the Comptroller-General**