

O-362-14

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 2648205
BY GBUK ENTERAL LIMITED & ENTERAL UK LIMITED TO
REGISTER THE TRADE MARK:

ENTERAL UK

IN CLASS 10

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 400165 BY
INTERVENE LIMITED

BACKGROUND

1. On 9 January 2013, GBUK Enteral Limited and Enteral UK Limited (“the applicants”) applied to register the mark shown on the cover page of this decision. The application was published for opposition purposes on 8 February 2013, for the following goods in class 10:

Surgical and medical apparatus and instruments.

2. The application was opposed by InterVene Limited (“the opponent”) initially on the basis of sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”). However, as the opponent elected not to file any evidence in these proceedings, the Trade Marks Registry (“TMR”), in an official letter dated 21 November 2013, advised the parties that the opposition would be deemed withdrawn in respect of all grounds other than that based upon section 5(2)(b). Insofar as the opposition based upon section 5(2)(b) is concerned, the opposition is directed against all of the goods in the application with the opponent relying upon all the goods in the following UK trade mark registration:

No. 2494572 of the trade mark:



applied for on 6 August 2008 and the registration process for which was completed on 26 December 2008:

Class 10 - Enteral feeding products; enteral syringes and accessories; safety syringes; nasogastric products; aspiration products; oral liquid delivery systems.

3. In its Notice of opposition, the opponent states:

In addition to the degree of similarity between the earlier registration and the later application coupled with the close similarity of relevant products that each mark seeks to protect, the later sign is applied to products:

- that are used by the same class of consumer and/or end user;
- that are supplied to the same class of consumer;
- which are identical syringe products both in terms of visual appearance as well as for identical application or purpose;
- which are supplied to the same organisation that each proprietor has been contracted to supply under a preferred supplier agreement; and
- which are used by the same classes of individual and users of syringe products that each proprietor is able to supply under a preferred supplier agreement.

4. The applicants filed a counterstatement which consists, in essence, of a denial of the grounds upon which the opposition was based.

5. Neither party filed evidence or submissions during the evidential period. Whilst neither party asked to be heard, the applicants filed written submissions in lieu of attendance at a hearing. I will refer to these submissions, as necessary, below.

DECISION

6. The opposition is now based solely upon section 5(2)(b) of the Act which reads as follows:

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

(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.”

7. 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) or 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,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

8. In these proceedings, the opponent is relying upon the trade mark shown in paragraph 2 above, which qualifies as an earlier trade mark under the above provisions. As this trade mark had not been registered for more than five years when the application was published, the earlier trade mark is not subject to proof of use, as per section 6A of the Act.

Section 5(2)(b) – case law

9. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011])

FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the Court of Justice of the European Union (CJEU) cases mentioned) on the basis indicated below:

The CJEU cases

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; Marca Mode CV v Adidas AG & Adidas Benelux BV [2000] E.T.M.R. 723; Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-6/01; Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH C-120/04; Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P.

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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(k) if the association between the marks causes the public to 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

10. The competing goods are:

Opponent's goods	Applicants' goods
Class 10 - Enteral feeding products; enteral syringes and accessories; safety syringes; nasogastric products; aspiration products; oral liquid delivery systems.	Class 10 - Surgical and medical apparatus and instruments.

11. In their written submissions, the applicants admit that as the opponent's goods all fall within the goods specified in their application: “there is an identity of goods.” I agree that the competing goods should be considered identical on the principles outlined by the General Court (“GC”) in *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05 i.e.

“29 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).”

The average consumer and the nature of the purchasing decision

12. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods; I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In their submissions, the applicants state:

“The relevant public for what are specialised goods in class 10 will generally be medical professionals who will have a high degree of attention to the marks with which they are concerned. Even if the relevant public is deemed to include end users of the products their degree of attention insofar as they have a choice between products will be greater than the average consumer.”

13. The competing goods are shown above. The opponent's specification includes references to enteral, nasogastric and aspiration. I note that Collinsdictionary.com defines these terms as:

“enteral - (medicine) providing medicines or nutrients to any part of the gastrointestinal tract”;

“nasogastric - (anatomy) of or relating to the nose and stomach - a nasogastric tube”;


“aspiration as: (medicine) the sucking of fluid or foreign matter into the air passages of the body the removal of air or fluid from the body by suction.”

14. The remaining goods in the opponent's specification i.e. “safety syringes” and “oral liquid delivery systems” are all likely, in my view, to be used in concert with the goods mentioned above as part of a suite of products with a common goal. The applicants' specification would include surgical and medical apparatus and instruments for a wide variety of applications (and includes goods for which a member of the general public would be a potential average consumer). Despite this, given the inclusion of the word ENTERAL in both the trade mark and the names of the applicant companies, it is, in my view, reasonable for me to proceed on the basis that the goods of interest to them are those involved in enteral use. In those circumstances, the average consumer for both parties' goods will, in my view, be a medical professional such as a doctor or, for example, an individual or individuals in an organisation such as a hospital buying medical products on behalf of such an organisation. Whilst a member of the public may also be a user of the goods at issue, it is unlikely that, in my view, they will be responsible for their selection. Much more likely, in my view, is that the goods at issue will be provided to a member of the public by a professional user such as a doctor. As to how the goods are purchased by the average consumer, I have no evidence or submissions to assist me. However, it is, in my view, not unreasonable for me to proceed on the basis that an average consumer is likely to purchase such goods either on-line or from, for example, a medical wholesaler with a bricks and mortar presence, having (on occasion) consulted bespoke publications such as catalogues and product reviews (both in printed

form and on-line) before making a selection. That suggests to me that visual considerations will play an important part in the selection process. In addition, as such goods may also be ordered by telephone, aural considerations are also likely to feature in the selection process. As to the degree of care the average consumer will take when selecting the goods, the applications to which the goods will be put and the obvious importance of selecting the correct item for the correct procedure (an incorrect selection could (potentially) have life threatening consequences), and bearing in mind the likely sums that will be involved when an individual or individuals is buying on behalf of an organisation, suggest to me that the average consumer will pay a high degree of attention to the selection of the goods at issue.

Comparison of marks

15. The marks to be compared are:

Opponent's mark	Applicants' mark
	ENTERAL UK

16. It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as a whole and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must then go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

17. The opponent's mark consists of a number of elements. The first is a purple square, inside which is a circular device in white inside which is a capital letter E in purple. As the opponent's mark is presented in the colours mentioned above, the comments of Mann J in *Specsavers International Healthcare Limited & Others v Asda Stores Limited* [2010] EWHC 2035 (Ch) are relevant. However, as the applicants' mark is not limited to colour, the colours in which the opponent's mark appears is not relevant and it will, as per the comments of Mann J, be drained of colour for the purposes of the comparison of the respective marks. The second element of the opponent's mark is the word EnteraLok, in which the first letter E and the letter L are capitalised. The third and final element is a line in purple which serves as an underlining for the word EnteraLok. This third element (if it is noticed at all by the average consumer), has no distinctive character and I need say no more about it. The combination of features in the first element of the mark means that it is clearly a distinctive element of the mark. As to the second element i.e. EnteraLok, in their submissions, the applicants state:

“That word, we believe, is coined by the opponent as it does not appear in any dictionary. Although it is one word as the letter L is written as a capital letter the effect is to create the feeling of two words Entera and Lock. For people familiar with the term Enteral this might also be read as Enteral and Lok. Conceptually it would be reasonable to assume that the intention is to allude to some form of Enteral Lock (whatever that may mean). The specification of goods [of the opponent’s mark] indicates that the term Enteral is an English word used in relation to class 10 goods. Whilst it may not be a word which is familiar to the general public, for medical and surgical professionals in the field the term is commonly recognised as referring to the human gastrointestinal tract. It would follow from this that the word Enteral would be entirely descriptive when used in relation to the goods of the opponent’s registration which are goods for such things as enteral feeding products and enteral syringes and accessories. As that is the case, in order to develop a distinctive and registrable trade mark, the opponent has chosen to incorporate a device element and to create a new word in relation to its products.”

18. I agree with the applicants that to the average consumer the EnteraLok element of the opponent’s mark is (to use the applicants’ word) likely to “allude” to an enteral device which incorporates a locking mechanism of some sort. However, as this second element does not consist of the words Enteral Lock but utilises the shared letter L to form the last letter of the word Enteral and the first letter of the phonetic equivalent of the word Lock, this second element is, in my view, also a distinctive element of the opponent’s mark. Whilst both the first and second elements of the opponent’s mark contribute to its overall distinctiveness, given its size in relation to the first element, the second element has, in my view, a degree of dominance over the element which precedes it.

19. Turning to the applicants’ mark, this consists of the word ENTERAL and the letters UK presented as separate elements in upper case. In their submissions, the applicants state:

“The first word Enteral is a descriptive term in relation to certain class 10 products...The mark ENTERAL UK is considered to be a distinctive mark by reason of the addition of the term UK. That is the common abbreviation recognised to mean United Kingdom...”

And:

“The elements that give the respective marks distinctiveness are quite different. The distinctiveness of the opponent’s mark visually is the letter E device and the Lok ending to the word Entera or Enteral. What distinguishes the mark applied for is the second word UK. It is also to be noted that the application is two distinct words whereas the word element of the opponent’s mark is a single word.”

20. Having identified the average consumer above, I agree that the word ENTERAL in the applicants' mark will be considered descriptive in relation to the goods applied for. As the letters UK are a well known and commonly used abbreviation for the United Kingdom, they have no distinctive character regardless of any elements which may accompany them. When considered in that context, neither the word ENTERAL nor the letters UK are distinctive elements of the applicants' mark. Consequently, any distinctiveness the mark ENTERAL UK has in relation to the goods applied for can only stem from the combination created rather than the individual elements of which it is made up.

The visual, aural and conceptual comparison

Visual similarity

21. In their submissions, the applicants state:

“From a visual perspective and assuming normal and fair use by the applicant of its mark there is little similarity. Where the marks overlap it is in relation to the term Enteral which is a descriptive term.”

22. The fact that both marks contain the letters E-N-T-E-R-A-L-* K in the same order, inevitably results in a degree of visual similarity between them. However, the presence in the opponent's mark of the devices and letter E at the beginning of its mark combined with the differing presentations, results, in my view, in at best a moderate degree of visual similarity between them.

Aural similarity

23. In their submissions, the applicants state:

“Considering phonetic similarity it cannot be disregarded that the opponent's mark begins with the stylised letter E so that if pronounced in totality that mark would be E EnteraLok. The EnteraLok part would be pronounced as four syllables i.e. Ent-er-a-Lok. The mark applied for would be pronounced according to all of its elements. The UK element would be pronounced with the letters U and K sounded individually so that the mark would be of five syllables i.e. ENT-ER-AL-U-K. The mark applied for would not be heard to be like the opponent's mark because of the substantial difference in the pronunciation of the respective endings.”

24. It is well established that when confronted with marks which have both words and figurative elements, it is by the word elements that the average consumer is most likely to refer to the mark. Applied to these proceedings, I think it unlikely that the average consumer would refer to the opponent's mark in the manner the applicants suggest i.e. by articulating the letter E which appears as part of the device element. More likely, in my view, is that the opponent's mark will be pronounced as the four syllable word Ent-

er-a-lok whereas the applicants' mark will be pronounced as the three syllable word ENT-ER-AL followed by the letters U & K as separate letters. Considered on that basis, there is, in my view, a slightly higher than moderate degree of aural similarity between the competing marks.

Conceptual similarity

25. In their submissions, the applicants state:

“...The opponent's mark would appear to refer to some form of Enteral lock. The mark applied for has a geographical significance alluding to enteric goods which come from the United Kingdom.”

26. In my view, the opponent's mark is likely, as the applicants suggests, to convey the impression of an enteral product incorporating a locking mechanism of some sort, whereas the applicants' mark is likely, in my view, to convey the impression of, for example, enteral products which originate in the UK or which are supplied by an undertaking based in the UK. To the extent that both parties' marks will create in the average consumer's mind the concept of enteral products, there is conceptual similarity, although I accept that the inclusion of the word Lok in the opponent's mark is likely to create the more concrete conceptual picture mentioned above.

Distinctive character of the opponent's earlier trade mark

27. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. As the opponent has not filed any evidence in these proceedings, I have only the inherent characteristics of its mark to consider. As I mentioned above, the EnteraLok element of the opponent's mark appears to merely allude to the goods for which the mark is registered. When the inclusion in the opponent's mark of a distinctive device and letter combination is also taken into account and the mark considered as a whole, it results, in my view, in a mark which is possessed of a reasonable level of inherent distinctive character.

Likelihood of confusion

28. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of

similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's mark as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision, I concluded that:

- the competing goods are identical;
- whilst the average consumer is a professional user who is likely to select the goods by both visual and aural means, visual means are likely to be the more dominant mode of selection;
- the average consumer will pay a high level of attention when selecting the goods at issue;
- whilst the device and letter E and the word EnteraLok in the opponent's mark are both distinctive elements, the word EnteraLok has, given its size in relation to the device and letter E, a degree of dominance over that element;
- the applicants' mark has no distinctive and dominant elements, the distinctiveness lying in the mark as a whole;
- there is at best a moderate degree of visual similarity and a slightly higher than moderate degree of aural similarity between the competing marks;
- there is conceptual similarity to the extent that both marks contain the word Enteral;
- the opponent's mark is possessed of a reasonable level of inherent distinctive character.

29. In my view, the similarity between the competing marks stems primarily from the element of each mark i.e. EnteraL--/ENTERAL which would be considered by the average consumer as a reference to the goods in relation to which it appears a trade by the parties is being conducted i.e. goods for enteral use. In those circumstances, I can see no reason why an average consumer of such goods who is familiar with this word and its meaning, would rely on this element alone to signify trade origin. Much more likely, in my view, is that the differences between the competing marks I have identified earlier in this decision, are, when considered in the context of the nature of the average consumer and the degree of care that is likely to be taken in the selection process, more than sufficient to avoid the likelihood of either direct confusion (i.e. where one mark is mistaken for the other) or indirect confusion (i.e. where the average consumer assumes the goods come from undertakings which are economically linked).

Conclusion

30. As a consequence of the above conclusions, the opposition fails and, subject to any successful appeal, the application will proceed to registration.

Costs

31. The applicants have been successful and are entitled to a contribution towards their costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Using that TPN as a guide, I award costs to the applicants on the following basis:

Preparing a statement and considering the opponent's statement:	£400
Written submissions:	£300
Total:	£700

32. I order InterVene Limited to pay to GBUK Enteral Limited and Enteral UK Limited (jointly) the sum of **£700**. 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 13th day of August 2014

C J BOWEN
For the Registrar
The Comptroller-General