

O-079-15

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2654161
BY ALAMGEER FOODS LIMITED TO REGISTER THE TRADE MARK**

KISAN'S

IN CLASS 30

**AND IN THE MATTER OF OPPOSITION
THERE TO UNDER NO 400781
BY PURAV INTERNATIONAL LIMITED**

Background and pleadings

1) Alamgeer Foods Limited (“the applicant”) applied to register the mark “Kisan’s” in the UK on 25 February 2013. It was accepted and published in the Trade Marks Journal and following commencement of these proceedings it restricted its list of goods to *Prepared meals made of pasta; pasta dishes* in Class 30.

2) Purav International Limited (“the opponent”) opposes the mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (the Act). It relies upon one earlier UK mark, the relevant details of which are shown below:

2640513



Filing date: 31 October 2012

Registration date: 19 April 2013

Class 30: *Rice, spices*

3) The opponent submits that the respective marks are far too similar and it would misguide the consumer very easily. For similar reasons, the opponent also claims that the application offends under Section 5(3) of the Act.

4) The applicant filed a counterstatement denying the claims made. It puts the opponent to proof of use regarding the claimed reputation relied upon for the purposes of Section 5(3). Submissions are provided, but I will not detail them here, but I will refer to them as necessary, in my decision.

5) Neither side filed evidence and as a consequence of the opponent not doing so, it was notified by the Registry that the Section 5(3) grounds will be disregarded. As a consequence, the proceedings are based only on the grounds pleaded under Section 5(2)(b) of the Act.

6) No hearing was requested and so this decision is taken following a careful perusal of the papers, including the only submissions provided in these proceedings, namely, those provided by the applicant in its counterstatement.

DECISION

Section 5(2)(b)

7) Sections 5(2)(b) of the Act is 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, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

Comparison of goods

8) In the judgment of the Court of Justice of the European Union (“the CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“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”.

9) The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity also included the respective trade channels through which the goods or services reach the market.

10) In *Les Éditions Albert René v OHIM*, Case T-336/03, the General Court (“the GC”) found that:

“61... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their nature, intended purpose and the customers for those goods may be completely different.”

11) For ease of reference, the respective goods (all in Class 30) to be compared are:

Opponent’s goods	Applicant’s goods
<i>Rice, spices</i>	<i>Prepared meals made of pasta; pasta dishes</i>

12) In respect of the applicant’s goods, their nature is that of a foodstuff that has already been prepared for consumption and may only require heating before eating. The opponent’s rice is also a foodstuff. It can be in an unprepared or prepared form and is generally used as an ingredient of food and/or constituent of meals. All being foodstuffs there is some similarity of nature and intended purpose (namely to be consumed). Further, their respective methods of use are the same, namely, they are consumed/eaten as the carbohydrate element of a meal. When considering the similarity of trade, both rice and pasta are basic constituents of many meals, particularly those that are associated with food styles from outside the UK.

It is common for rice and pasta to appear close to each other on shop shelves together with prepared meals made from the same, particularly where such prepared meals do not require refrigeration or freezing. Consequently, the consumer would not be surprised by producers of prepared meals also producing the major constituents (such as pasta and rice) to be sold separately. Consequently, I conclude that there may be similarity in respect of trade channels. There is also an element of competition where the consumer may choose between cooking their own rice meal (and purchasing the rice) or relying upon a prepared meal made of pasta.

13) Taking all of the above into account, I conclude that there is a medium level of similarity between rice and the applicant's goods. The similarity of nature, intended purpose together with the fact that customers are the same results in such similarity.

14) In respect of *spices*, the position is different. Whilst *spices* are likely to still be a constituent of a pasta meal, they do not a major constituent. Further, without close examination of the ingredients list the average consumer is not likely to be aware what *spices*, if any, are used in any given prepared meal. Generally, *spices* are not provided by the same providers as prepared meals and they appear in different parts of shops and on different shelves. Therefore, the trade channels are different. Whilst both parties' goods are foodstuffs, their methods of use differ, with *spices* being added to flavour food during cooking, but prepared meals are normally just heated before consumption. The respective goods are not in competition, but *spices* may be used to flavour a prepared meal and as such there is an element of complementarity. However, when taking all of this into account, I conclude that if there is any similarity, it is only very low. Therefore, the opponent's case based on its *spices* places it in no better position than when it relies upon *rice*.


Comparison of marks

15) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

16) It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

17) The respective marks are shown below:

Opponent's mark	Applicant's mark
	<p data-bbox="1066 309 1171 338">Kisan's</p>

18) The applicant submits that the dominant and distinctive element of the opponent's mark is the stylisation of the lettering, the colouration and the pictorial emblem above the wording. I do not agree. Due to the size and position within the mark, it is the word KISAAN that is the dominant. However, I recognise that I must not ignore the other elements identified by the applicant. The applicant's mark consists of the possessive of a single word and consequently, the distinctive character resides in its totality.

19) Visually and aurally, whilst conceding that the marks share the same first three letters, the applicant submits that their endings "differ substantially". These differences are not particularly significant. In essence, the dominant word element of the opponent's mark consists of the word KISAAN. The applicant's mark consists of the possessive form of the word KISAN. Other than one is in possessive form and the other is not, the word elements differ only by the additional letter "a" that appears in the opponent's mark. Taking account of this, together with the other elements present in the opponent's mark, the respective marks share a reasonably high level of visual similarity. Aurally, the similarity is higher because the marks are almost identical with the exception of the "s" sound at the end of the applicant's mark.

20) Conceptually, the applicant's mark is likely to be seen as the possessive of a name. The absence of the possessive "s" in the opponent's mark makes it less likely to be perceived as a name. Beyond the name association in the applicant's mark, neither has a conceptual meaning in the mind of the UK consumer.

Average consumer and the purchasing act

21) The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

"60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

22) The average consumer for all the goods is likely to be an ordinary member of the public. The goods are everyday grocery items and the choice of such goods is not likely to involve anything more than an average level of care and attention.

23) The marks will normally encountered visually on shop shelves or the online equivalent. However, the aural impact will not be ignored as the goods could be requested aurally in some circumstances.

Distinctive character of the earlier trade mark

24) In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

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

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

25) The opponent’s mark consists of a word that has no obvious meaning to the UK consumer. The word is endowed with high level of inherent distinctive character. The other elements of the mark do not materially change this level. The opponent has not provided any evidence of use and therefore, there is no issue of enhanced distinctive character to consider.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

26) The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson*

Multimedia Sales Germany & Austria GmbH, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

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

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

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

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

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

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

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

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

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

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

27) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of

confusion (*Sabel BV v. Puma AG*, paragraph 22). All the factors must be considered from the view point of the average consumer. A greater level of similarity between the respective marks may offset a lesser degree of similarity between the respective goods and vice versa.

28) I have found that the word element of the opponent's mark is the dominant and distinctive element. Further, this is the element that creates similarity with the applicant's mark. I have also found that the respective marks share a moderately high level of visual similarity and that aural similarity is higher. I have noted that there is no conceptual meaning of either mark, although the use of the possessive in the applicant's mark may lead the consumer to assume it is a reference to a name. The opponent's *rice* shares a medium level of similarity with all of the applicant's goods.

29) I concluded that the purchasing process was mainly visual in nature and that the level of care and attention paid during the purchasing act was average. In *Quelle AG v OHIM*, Case T-88/05, the GC found that visual similarity (and difference) is most important in the case of goods that are self selected or where the consumer sees the mark when purchasing the goods. This is the case here. With the reasonably high level of visual similarity I find that there is a likelihood of confusion between the opponent's *rice* and the applicant's goods.

30) In summary, I conclude that there is a likelihood of confusion in respect of the applicant all of the applicant's goods. Therefore, the opposition is successful.

COSTS

31) The opponent has been successful and is entitled to a contribution towards its costs, according to the published scale in Tribunal Practice Notice 4/2007. Neither side filed evidence. I award costs as follows:

Preparing a statement and considering the counterstatement	£300
Opposition fee	£200
Total:	£500

32) I order Alamgeer Foods Limited to pay Puraz International Limited the sum of £500, which, in the absence of an appeal, should be paid within seven days of the expiry of the appeal period.

Dated this 18th day of February 2015

**Mark Bryant
For the Registrar,**