

O-092-15

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3039219
BY GREENE KING BREWING AND RETAILING LIMITED
TO REGISTER
THE TRADE MARK:

ZIN SPRITZ

IN CLASS 33

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 402164 BY
ASDA STORES LIMITED

BACKGROUND

1. On 24 January 2014, Greene King Brewing and Retailing Limited (“the applicant”) applied to register the trade mark **ZIN SPRITZ**. The application was published for opposition purposes on 14 February 2014, for the following goods in class 33:

Alcoholic beverages (except beers); wines; wine-based cocktails.

2. The application is opposed in full by Asda Stores Limited (“the opponent”) on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon all the goods (shown below) in UK trade mark registration no. 3027262 for the trade mark: **SPRITZINI** which was applied for on 21 October 2013 and the registration process for which was completed on 24 January 2014:

Class 33 - Alcoholic beverages (except beer); wines.

In its Notice of opposition, the opponent states:

“Both marks contain SPRITZ. Both contain ZIN. The overwhelming majority of the letters in the respective marks are identical and in the same order. Thus, there are clear visual, phonetic and conceptual similarities between the respective marks.

The opposed mark covers “alcoholic beverages (except beers)” as does the opponent’s earlier trade mark. The opposed mark covers “wines”, as does the opponent’s earlier trade mark. The opposed mark covers “wine based cocktails”, which fall within the term “alcoholic beverages (except beers)” of the opponent’s earlier trade mark, at least. As such, the respective goods are identical and/or overlapping.”

3. The applicant filed a counterstatement in which it admits the competing goods are identical or similar. However, it denies that the competing trade marks are similar.

4. Both parties filed evidence. Although neither party asked to be heard, both filed written submissions in lieu of attendance at a hearing; I will keep all of these submissions in mind and refer to them, as necessary, below.

The opponent’s evidence

5. This consists of a witness statement from David Moy, a trade mark attorney at Appleyard Lees, the opponent’s professional representatives. Attached to Mr Moy’s statement are two exhibits. Exhibit DM1 consists of a copy of the details of the trade mark upon which the opponent relies in these proceedings obtained from the Intellectual Property Office’s (“IPO”) website, and a copy of the examination report issued by the IPO in relation to this trade mark at the examination stage (exhibit DM2). Mr Moy notes

that no objections were raised at the examination stage nor, he explains, was the application opposed.

The applicant's evidence

6. This consists of a witness statement from Katherine Shadbolt, a trade mark attorney at Birketts LLP, the applicant's professional representatives. Ms Shadbolt states that the terms "spritz" and "spritzer" are "well recognized in relation to wine based drinks." Exhibit KS1 consists of an extract obtained from Wikipedia in relation to the term "Spritz (alcoholic beverage)". Based on this extract, Ms Shadbolt states:

"A Spritz is a wine based cocktail prepared with sparkling wine, a dash of a bitter liqueur and topped off with sparkling water, although usually served over ice in a lowball glass, a martini glass is often used. This cocktail originated from the Austrian Spritzer, a combination of equal parts of white wine and soda water."

Exhibit KS2 consists of a copy of the examination report issued by the IPO in relation to the applicant's trade mark, with Ms Shadbolt noting that no objections were raised.

DECISION

7. The opposition is based 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."

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) 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."

9. 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, it is not subject to the proof of use provisions as per section 6A of the Act. As a consequence, the opponent is entitled to rely upon all of the goods for which its stands registered.

Section 5(2)(b) – case law

10. 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.

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 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.

Comparison of goods

11. The competing goods are as follows:

Opponent's goods	Applicant's goods
Class 33 - Alcoholic beverages (except beer); wines.	Class 33 - Alcoholic beverages (except beers); wines; wine-based cocktails.

12. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court (“GC”) stated:

“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).”

13. In its counterstatement, the applicant admits that the competing goods are identical or similar. As both specifications include “Alcoholic beverages (except beer); wines”, these goods are literally identical. As “wine based cocktails” in the application would be included within the general term “Alcoholic beverages (except beer)” appearing in the opponent’s specification, these goods are also to be regarded as identical on the principles outlined in *Merica*.

The average consumer and the nature of the purchasing decision

14. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue. 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 *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.”

15. The average consumer of the goods at issue is a member of the adult general public. Such goods are sold through a range of channels, including retail premises such as supermarkets and off-licences (where they are normally displayed on shelves and obtained by self selection) and in public houses and restaurants (where they will be displayed on, for example, shelves behind the bar and where the trade marks will appear on wine lists, menus etc.). When the goods are sold in public houses and restaurants, there will be an oral component to the selection process. However, there is nothing to suggest that the goods are sold in such a manner as to preclude a visual inspection. Consequently, while the goods may be ordered orally in public houses and restaurants, it is likely to be in the context of, for example, a visual inspection of the bottle or wine list/menu prior to the order being placed. Considered overall, the selection process will, in my view, be a predominantly visual one, although aural considerations will play their part. As to the level of attention that will be paid, the cost of the goods is, typically, likely to be relatively low. However, as the average consumer will wish to ensure they are selecting the correct type, flavour and size of beverage, they are likely, in my view, to pay an average degree of attention (i.e. no higher or lower than the norm) to their selection.

Comparison of trade marks

16. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“CJEU”) 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.”

17. 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 trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the trade marks.

18. The competing trade marks are: **ZIN SPRITZ** (the application) and **SPRITZINI** (the opponent's trade mark). The opponent's trade mark consists of a single word presented in upper case. In its submissions, the applicant states:

“Both marks include the word SPRITZ, a term that consumers will recognise as describing a wine based cocktail. Therefore, it is submitted that the opponent has no exclusivity in this word and for both marks, the word SPRITZ has low distinctive character.”

In its submissions, the opponent states in relation to the word SPRITZ:

“It is submitted that even if such is known to the relevant consumer...”

19. Even if one construes the opponent's comment above as a tacit acceptance that the word SPRITZ will be known to the average consumer, it would, given the evidence provided, only be in relation to wine based drinks/cocktails and the word SPRITZ would, as a consequence, only have low distinctive character for such goods. There is no evidence or submissions to suggest that the word SPRITZ has a low distinctive character for other goods that would be included within the broad term “alcoholic beverages”, whisky, vodka and rum for example. Consequently, whilst the word SPRITZ may have a lower relative weight when considered in relation to wine based drinks/cocktails, the fact that the word appears in the opponent's trade mark as the first part of a unified whole, no part of which is highlighted or emphasised in any way, does not, in my view, materially affect the overall impression the trade mark creates, which is of a single word.

20. As to the applicant's trade mark, when considered in relation to wine based drinks/cocktails, the word ZIN (in relation to which no evidence or submissions have been provided to indicate it is anything other than distinctive) is likely to have a higher relative weight than the word SPRITZ which accompanies it and is likely, as a consequence, to dominate the overall impression the trade mark conveys. However, the same would not be true in relation to other alcoholic beverages, in relation to which both words are, in my view, likely to make a roughly equal contribution to the overall impression the applicant's trade mark creates.

21. Considered from a visual perspective, both trade marks consist of nine letters, eight of which are the same. They differ to the extent that: (i) the opponent's trade mark is presented as one word whereas the applicant's trade mark is presented as two, (ii) the word ZIN appears as the first and separate element of the applicant's trade mark, whereas the letters Z-I-N- appear as the sixth to eight letters of the opponent's unified trade mark, (iii) the opponent's trade mark contains the letters S-P-R-I-T-Z as the first six letters of its unified trade mark, whereas the word SPRITZ appears as the second and separate element in the applicant's trade mark and, (iv), the opponent's trade mark contains an additional letter "I" at the end of its unified trade mark, whereas the applicant's trade mark contains an additional letter "Z" at the beginning of the first word in its trade mark. In view of the above analysis, it is undeniable that the competing trade marks consist of substantially the same letters. However, the fact that these letters appear in significantly different positions in the competing trade marks, combined with the differing manner in which the competing trade marks are presented i.e. as either separate words or as part of a unified whole, significantly reduces, in my view, the impact of these shared letters, resulting in only a low degree of visual similarity between the competing trade marks.

22. The opponent's trade mark will be pronounced as a three syllable word, whereas the applicant's trade mark will be pronounced as two syllables. As the significant visual differences I have identified above will also impact on the manner in which the competing trade marks are spoken and heard, with, in particular, the beginnings of the competing trade marks sounding completely different, there is, in my view, once again, only a low degree of aural similarity between them.

23. Finally, I must consider conceptual similarity. In relation to wine based drinks/cocktails, the opponent argues that if the word SPRITZ is known to the average consumer this would increase the degree of conceptual between the competing trade marks. The applicant agrees that the shared use of the word SPRITZ does "create a conceptual link", but adds that as any conceptual similarity is "descriptive" it does not assist the opponent. As the opponent's submissions appear to allow for the possibility that the word SPRITZ is likely to convey a concrete conceptual message in relation to the goods mentioned, and assuming the average consumer identifies this word as an element of the opponent's unified trade mark, as this conceptual message will be largely descriptive, I agree with the applicant that the fact that both trade marks contain this element is not a point in the opponent's favour. Of course, if the word SPRITZ is not known to the average consumer or is not picked out as an element of the opponent's trade mark, both trade marks are likely to be approached as novel, and the conceptual position is likely to be neutral (as it will be in relation to other alcoholic beverages where the word SPRITZ would have no significance).

Distinctive character of the opponent's earlier trade mark

24. 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 of the use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. Irrespective of whether the average consumer knows the meaning of the word SPRITZ and identifies it as an element of the opponent's trade mark, the fact that this word appears as the first part of a unified whole, the totality of which is clearly distinctive, results in the opponent's trade mark being possessed of a fairly high degree of inherent distinctive character in relation to all the goods for which it is registered.

Likelihood of confusion

25. 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 trade 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;
- the average consumer is a member of the adult general public who will select the goods by predominantly visual means and who will pay an average degree of attention when doing so;
- the competing trade marks are visually and aurally similar to only a low degree;
- in relation to wine based drinks/cocktails, the fact that the competing trade marks contains an element i.e. SPRITZ which may send similar conceptual messages does not, given its likely low distinctive character, assist the opponent;
- if the word SPRITZ sends no conceptual message (and in relation to goods other than wine based drinks/cocktails in any case), the conceptual position is neutral;
- the opponent's earlier trade mark is possessed of a fairly high degree of inherent distinctive character.

26. In reaching a conclusion on the likelihood of confusion, I begin by reminding myself that the competing goods are identical and that the opponent's earlier trade mark enjoys a fairly high degree of inherent distinctive character. Assuming in the opponent's favour that in relation to all the goods at issue neither parties' trade marks will create any conceptual hook in the average consumer's mind (thus increasing the potential effects of imperfect recollection), I am satisfied that the low degree of, in particular visual similarity between the competing trade marks is sufficient, bearing in mind that an average degree of care will be taken during the selection process, to avoid the likelihood of either direct or indirect confusion. As a consequence of the above conclusion, the opposition fails.

Conclusion

27. The opposition fails, and subject to any successful appeal, the application will proceed to registration.

Costs

28. The applicant has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice ("TPN") 4 of 2007. Using that TPN as a guide, but bearing in mind the very brief nature of the parties' competing evidence and as only exhibit KS1 to Ms Shadbolt's statement was ever going to have any relevance to the proceedings (the sort of evidence provided in the exhibits to Mr Moy's statement and as exhibit KS2 to Ms Shadbolt's statement adds nothing to proceedings and should be avoided), I award costs to the applicant on the following basis:

Preparing a statement and considering the opponent's statement:	£200
Preparing evidence and considering and commenting upon the opponent's evidence:	£100
Written submissions:	£100
Total:	£400

29. I order Asda Stores Limited to pay to Greene King Brewing and Retailing Limited the sum of **£400**. 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 27th day of February 2015

C J BOWEN
For the Registrar
The Comptroller-General