

O-149-17

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO 3 135 686 BY JOSEPH
HOLT LIMITED FOR THE TRADE MARK CRYSTAL GOLD IN CLASS 32

AND

IN THE MATTER OF OPPOSITION THERETO BY N.V. BROUWERIJEN ALKEN-
MAES

Background and pleadings

1. Joseph Holt Limited (the applicant) applied to register the trade mark CRYSTAL GOLD under Number 3 135 686 in the UK on 11/11/2015. It was accepted and published in the Trade Marks Journal on 20/11/2015 in respect of beers; ales; lagers in Class 32.
2. N.V. Brouwerijen Alken-Maes (the opponent) opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (the Act). This is on the basis of, amongst others, its earlier UK Trade Mark Number 2 564 516 for the



mark . The goods relied upon are beers in Class 32.

3. The opponent argues that the respective goods are identical or similar and that the marks are similar.
4. The applicant filed a counterstatement accepting that the goods are identical or similar but denying the remaining claims made.
5. Both sides filed evidence in these proceedings. This will only be summarised to the extent it is considered necessary.
6. A Hearing took place on 7th March 2017, with the opponent represented by Mr Jonathan Day of Carpmaels & Ransford LLP and the applicant by Ms Charlotte Scott of Counsel, instructed by Wilson Gunn.

Evidence

The Opponent's evidence

7. This is a witness statement, dated 26th August 2016, from Mr Joris Verweij, the Financial Director of the opponent. The following relevant information is contained therein:

- Cristal beer was first produced and sold in Belgium in 1928. Exhibit JV1 is a screenshot from a marketing film and appears to support this point.
- Figures are provided regarding annual volume of Cristal beer sold in the UK between 2010-2015. These are all in hectolitres and amount to 1,154 in 2010; 1,148 in 2011; 798 in 2012; 1,073 in 2013; 977 in 2014 and 330 in 2015. It is noted that the main manner in which the lager is sold is in respect of a chain of restaurants.
- Exhibit JV2 is a copy of a printout of the first page of the results of a search on Google in respect of “gold beer”. Mr Verweij believes that this demonstrates that GOLD is descriptive and non distinctive for beers as it is often used to describe the colour or appearance of certain beers.
- Exhibit JV3 is a screenshot from the website of the Campaign for Real Ale which describes golden ales and their history. Notably, one of the first of its type was called EXMOOR GOLD. According to Mr Verweij, this shows that GOLD is a widely understood term in the industry to denote drinks with particular characteristics, namely colour.

The applicant’s evidence

8. This is a witness statement, dated 20th October 2016, from Mr Thomas Leo Dempsey, the Director of the applicant. Mr Dempsey explains that the applicant has been established for over 160 years and in 2000 launched a new lager under the trade mark CRYSTAL. This is sold in draught and from its launch up to 31st December 2015, 187,912 barrels had been sold (54 million pints of lager). Exhibit TLD-01 is copies of photographs showing use of the CRYSTAL trade mark on beer dispensers and drinking glasses and Exhibit TLD-02 is copies of photographs showing use of CRYSTAL GOLD on a bottle and beer dispensers. This product was launched after the original CRYSTAL product in December 2011, initially in bottles with the first barrels of draught CRYSTAL GOLD lager produced and sold in September 2012. Quantities of the bottled product sold are provided in hectolitres: 2011 – 78.6; 2012 – 94.9; 2013 – 183.0; 2014 – 392.3 and 2015 – 182.0. Details for barrels sold are

also provided: 2012 – 141; 2013 – 1,468; 2014 – 3,574 and 2015 – 3,137. Details of the applicant's estate list are provided, which demonstrate that CRYSTAL GOLD is sold in 160+ inns, hotels and public houses. Details of advertising expenditure are also given. This cannot be separated according to the specific lagers produced by the applicant but is noted by the Tribunal. Mr Dempsey ends his witness statement by asserting that, to his knowledge, there have never been any instances of confusion between the applicant's and opponent's trade marks.

DECISION

Section 5(2)(b)

9. 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, 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

10. In the judgment of the Court of Justice of the European Union 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”.

11. Beers appears in both specifications and so are self evidently identical. The contested ales and lagers are both types of beers and so are also identical.

Comparison of marks

12. 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.”

13. 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.

14. The respective trade marks are shown below:

	CRYSTAL GOLD
Earlier trade mark	Contested trade mark

15. The earlier trade mark is a composite sign containing a hexagon shape within which the verbal element CRISTAL appears. It is CRISTAL which is both distinctive and dominant and though the remaining elements are not ignored, it is this that will be accorded greater relative weight.

16. The later trade mark is comprised of two verbal elements: CRYSTAL and GOLD. As regards dominance therefore, the answer is straightforward: neither word is more dominant than the other. They are equal in this respect. As regards distinctiveness, the opponent has provided evidence to demonstrate that GOLD is used to refer to the colour of an ale. This evidence was criticised by the applicant at the hearing as being too limited in scope to enable a conclusion. Further, that at worst, this applies to ales and not lagers. Finally, the applicant argues that in any case, this later trade mark forms a complete unit with crystal qualifying gold, the effect being a distinctive whole.

17. It is true that the opponent has not provided a huge volume of evidence in respect of the use of GOLD in the industry. However, it has included materials from an independent organisation, namely the Campaign for Real Ale and the printout from Google contains clear descriptive details of GOLD in respect of

ales. It is considered that the evidence does demonstrate that GOLD is likely to be seen as denoting a characteristic of the goods, i.e. its colour. It is noted that at the Hearing, the applicant argued that if the evidence was accepted that it should only apply to ales. It is considered that such a conclusion would be a false distinction as beers, ales and lagers are essentially identical to one another and that bearing in mind the evidence filed, the use of GOLD whether on lagers or ales is likely to be seen as designating a characteristic of the goods. It is considered that CRYSTAL does not qualify GOLD in the later trade mark and the mark does not form a unit distinct from the earlier trade mark. Rather, CRYSTAL is the badge of origin and GOLD refers to a variety. The evidence from the applicant also corroborates this view as the applicant initially produced a lager called CRYSTAL and this was followed by a variety called CRYSTAL GOLD. Bearing in mind all of the aforesaid therefore, the more distinctive element in the later trade mark is CRYSTAL and so is accorded greater relative weight.

18. Visually the marks coincide in respect of the letters CRSTAL. This means that the elements CRISTAL and CRYSTAL are highly similar. There are also differences, notably the device element in the earlier trade mark and the addition of GOLD in the later trade mark. The overall degree of visual similarity is low to medium.

19. Aurally, it is highly likely that CRISTAL and CRYSTAL will be articulated in an identical manner. Though the later trade mark also contains GOLD which will also likely be articulated, the degree of aural similarity remains high.

20. Conceptually, the word CRYSTAL in the later trade mark will be understood as referring to the mineral or indeed, high quality glass. GOLD will be understood as referring to the precious metal. It is likely that the earlier trade mark will also be understood as the mineral or glass, bearing in mind that it will be articulated in an identical manner. On visual inspection, it may be seen as a misspelling of CRYSTAL with the same meaning being grasped on that basis. It is also possible that it will be seen as a non-English word with no clear meaning. The outcome of the conceptual comparison therefore involves

two scenarios. The first, where the meaning of CRYSTAL is grasped in both marks and so there is conceptual identity or at least a high degree of similarity bearing in mind the addition of GOLD (this will not create a conceptual gap nor will it be unnoticed). The second, where the earlier trade mark is not understood as having any meaning and so in such an instance, there is no conceptual similarity.

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*.

22. 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.”

23. These goods are relatively inexpensive consumables purchased on a fairly regular basis, by the general public and also business establishments such as bars and restaurants. They are likely to be self selected from a supermarket

shelf or a specialist establishment. However, they can also be purchased orally, in a bar or restaurant. Both visual and aural considerations are therefore important. These are goods for which there is a good deal of variety in terms of flavour, colour, alcohol content etc. As such, it is considered that a reasonable degree of attention will be displayed during the purchasing process.

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. In its evidence, the opponent claims that its earlier trade mark has a reputation. However, its evidence falls far short of demonstrating this. There is no market share information, just bare figures. Further, there is no information from which to gauge the perception of the earlier trade mark by the public at large.

26. On a prima facie basis, the earlier trade mark is meaningless in respect of the goods at issue and also contains additional graphical elements. It is considered to be distinctive to an above average degree.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

27. 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Preliminary remarks

28. The applicant argues (via the witness statement of Mr Dempsey) that it is not aware of any instances of confusion despite the long standing use of each of the trade marks, the subject of these proceedings. At the hearing, Ms Scott argued that due to the length of use from both parties, this aspect requires careful consideration. In considering the matter, I bear in mind the following guidance: In *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220, Kitchen L.J. stated that:

“80.the likelihood of confusion must be assessed globally taking into account all relevant factors and having regard to the matters set out in *Specsavers* at paragraph [52] and repeated above. If the mark and the sign have both been used and there has been actual confusion between them, this may be powerful evidence that their similarity is such that there exists a likelihood of confusion. But conversely, the absence of actual confusion despite side by side use may be powerful evidence that they are not sufficiently similar to give rise to a likelihood of confusion. This may not always be so, however. The reason for the absence of confusion may be that the mark has only been used to a limited extent or in relation to only some of the goods or services for which it is registered, or in such a way that there has been no possibility of the one being taken for the other. So there may, in truth, have been limited opportunity for real confusion to occur.”

29. Further, in *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283 Millett L.J. stated that:

"Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

30. It is true that the opponent has used its trade mark for around 15 years and the applicant since 2011 in respect of the trade mark applied for and since 2000 in respect of CRYSTAL. However, there is no evidence that at any stage the marketplace conditions have coincided. As such, there is no evidence that prospective consumers have been exposed to each of the trade marks sold in comparable conditions. Bearing in mind the foregoing and the aforementioned case law, the applicant's assertions that it is unaware of confusion are not determinative. As such, its position must be set aside.

31. The goods in question are identical. This is important as the interdependency principle is in full effect. The earlier trade mark is distinctive, with greater relative weight being accorded to CRISTAL which is distinctive and dominant within the mark. This element is also visually highly similar to its counterpart CRYSTAL in the later trade mark with the marks being visually similar to a low to medium degree overall. CRISTAL and CRYSTAL are also likely to be aurally identical and so even though GOLD will likely be articulated the marks are still highly similar aurally overall. For at least some consumers, there will also be conceptual identity (or at least a high degree of similarity). Though it is true that a reasonable degree of attention is likely to be displayed during the purchasing process, the identical nature of the goods together with the degree of similarity between the trade marks leads to the conclusion that a consumer is highly likely to mistake one mark for the other. The opposition therefore succeeds in its entirety.

Final Remarks

32. As this earlier trade mark leads to the opposition being successful in its entirety, there is no need to consider the remaining trade mark upon which the opposition is based.

COSTS

33. The opponent has been successful and is entitled to a contribution towards its costs. In the circumstances I award the opponent the sum of £1600 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Notice of opposition and opposition fee - £300

Preparing and filing evidence and considering evidence - £600

Preparation for and attendance at Hearing - £700

TOTAL - £1600

34. I therefore order Joseph Holt Limited to pay N.V. Brouwerijen Alken-Maes the sum of £1600. The above sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 29th day of March 2017

Louise White

For the Registrar,