

O-457-20

TRADE MARKS ACT 1994

IN THE MATTER OF:

TRADE MARK APPLICATION NO. UK00003406694

IN THE NAME OF LIVING AYURVEDA PRODUCTS HOLDINGS LTD

ANANDA

IN CLASS 05

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP000417823

BY AYANDA GMBH

Background and pleadings

1. **Living Ayurveda Products Holdings Ltd (the applicant)** applied to register the trade mark ANANDA in the UK on 13 June 2019. It was accepted and published in the Trade Marks Journal on 21 June 2019 in respect of the following goods:

Class 5: Dietary Supplement.

2. **Ayanda GmbH (the opponent)** opposes the trade mark under Section 5(2)(b) of the Trade Marks Act 1994 (the Act). This is on the basis of, amongst others, its European Union (formerly Community) Trade Mark no. 3315405 for the mark AYANDA. The following goods are relied upon in this opposition:

Class 5: Pharmaceutical and veterinary preparations, all the aforesaid goods other than contraceptives, products for treating endometriosis, hormone preparations; sanitary preparations for medical purposes; dietetic substances adapted for medical use, food for babies; plasters, materials for dressings; material for stopping teeth, dental wax; disinfectants.

3. The opponent also relies upon a second mark, its International trade mark registration no. 1342430 for AYANDA. The following goods and services are relied upon in this opposition:

Class 5: Pharmaceutical preparations, medical and veterinary preparations and articles, all the aforesaid goods other than contraceptives, products for treating endometriosis, hormone preparations; capsules sold empty for pharmaceuticals; capsules sold empty for nutritional supplements; dietetic food and substances adapted for medical or veterinary use; food for babies; nutritional supplements; dietetic preparations; nutritional supplements in the form of capsules, dragees, tablets, capsules made from gelatin; sanitary preparations for medical purposes; dental preparations and articles;

disinfectants; preparations for destroying noxious animals; fungicides, herbicides.

Class 40: Processing of foodstuffs for use in manufacture; processing of raw materials for the manufacture of food and beverages; custom manufacture and assembly services of pharmaceuticals and nutraceuticals; custom manufacture and assembly services of dietetic preparations and nutritional supplements; custom manufacture and assembly services of medical and veterinary preparations and articles; and rental, hire and leasing in connection with the aforesaid, included in the class; and advice, consultancy and information for the aforesaid, included in the class.

4. The opponent argues that the respective goods and services are identical or similar and that the marks are highly similar. The opponent requests the application is rejected, and that the opponent is awarded costs.
5. The applicant filed a counterstatement denying the claims made.
6. The applicant argues the trade marks are not highly similar, and that there is no conflict as the products differ.
7. The applicant states that the word Ananda is an English translation of the Sanskrit word meaning joy, and that their products are foods, and not medical, and that they will never sell medicines, whereas the opponent's mark AYANDA is for medicinal items. The applicant states the company logo is used on all products and has no bearing to the AYANDA packaging.
8. Further, the applicant submits the only common class is class 5, but that dietary supplements is a very broad group, and that its products are organic and almost all sourced from India. The applicant claims there is no conflict of interest between the two brands in any class or in any territory within which they use the mark.

9. The applicant summarises by stating the parties operate in different buying channels, have a different names and logos, different packaging, that its products are food and its mark is different to the opponent's.
10. Neither side filed evidence in these proceedings. However, the representative for the opponent, Potter Clarkson LLP, filed written submissions on behalf of the opponent during the evidence rounds. These submissions claim the marks are highly similar and the goods are identical, and rebuts or dismisses several of the applicant's claims above. The opponent's submissions will not be summarised further at this stage, but they will be referred to as and where appropriate throughout this decision.
11. Although the opponent's EU trade mark no. 3315405 was five years old at the filing date of the application, no proof of use has been requested by the applicant. The opponent's International Registration no. 1342430 was not over five years old at the time the application was filed, and so proof of use is not relevant in respect of this mark.
12. No hearing was requested and so this decision is taken following a careful perusal of the papers.

Decision

13. Section 5(2)(b)

Section 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”.

14. The opponent has based this opposition on two earlier marks. I will begin my assessment by considering the opponent's earlier trade mark International trade mark registration no. 1342430 for AYANDA. For procedural efficiency, I will only consider the second of the opponent's marks, namely European Union no. 3315405 for the mark AYANDA, should it become necessary to do so.

The Principles

15. 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.

Comparison of goods and services

16. The categorising of goods and services into classes serves an administrative purpose. The fact that after categorisation, goods or services fall into the same class is not sufficient for a finding of similarity between the terms themselves. Similarly, terms are not dissimilar simply on the basis they fall within a different class. This is reflected within Section 60A of the Act, which is set out below.

Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

17. Similarity between terms is to be considered based on the criteria set out by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, as well as the factors in *Canon*¹. These cases references factors including the nature, intended purpose, method of use, and whether they are in complimentary or

¹ *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97

in competition, alongside other factors such as the trade channels, users, and where these are likely to be found. In respect of identity of goods, in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”)stated that:

“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 trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

18. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

19. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

20. The goods for comparison are as follows:

Opponent's goods	Applicant's goods
Class 5: Pharmaceutical preparations, medical and veterinary preparations and articles, all the aforesaid goods other than contraceptives, products for treating endometriosis, hormone preparations; capsules sold empty for pharmaceuticals; capsules sold empty for nutritional supplements; dietetic food and substances adapted for medical or veterinary use; food for babies; nutritional supplements; dietetic preparations; nutritional supplements in the form of capsules, dragees, tablets, capsules made from gelatin; sanitary preparations for medical purposes; dental preparations and articles;	Class 5: Dietary Supplement.

disinfectants; preparations for destroying noxious animals; fungicides, herbicides.

Class 40: Processing of foodstuffs for use in manufacture; processing of raw materials for the manufacture of food and beverages; custom manufacture and assembly services of pharmaceuticals and nutraceuticals; custom manufacture and assembly services of dietetic preparations and nutritional supplements; custom manufacture and assembly services of medical and veterinary preparations and articles; and rental, hire and leasing in connection with the aforesaid, included in the class; and advice, consultancy and information for the aforesaid, included in the class.

21. The applicant's goods consist of the term *Dietary Supplement* in class 5. I find the natural meaning of a dietary supplement to be a substance, be it in the form of a liquid, powder, tablet, pill or otherwise, that is consumed alongside a person's normal food and drink for the purpose of maintaining or increasing their intake of a particular vitamin, mineral or other substance in their diet.

22. The opponent's specification of goods covers, amongst other things, *nutritional supplements*. I find nutritional supplements to fall within the meaning of *Dietary Supplement* in the applicant's specification, within the meaning of *Meric*. I find *Dietary Supplement* to be the slightly broader term, on the basis that it may cover substances that both are and are not strictly nutritional.

23. Within its counterstatement, the applicant submits “we have no conflict because we have very different products”. The applicant goes on to talk about the features of its goods, stating that they are organic, sourced from India, and are not medicines. The applicant submits that, on the contrary, the opponent’s goods are medicinal. However, the applicant has applied for the goods *Dietary supplement*, which as the applicant itself notes, is inclusive of a broad range of goods. It is clear to me that the origin of the applicant’s goods (by nature of ingredients or geography) is not relevant here, as the applicant has not limited its specification of goods applied for on this basis. Furthermore, it is also apparent that even if the applicant’s goods were limited, for example, to *organic dietary supplement*, or even as far as *organic dietary supplement, all of which originate from India* (although at this point I make no comment on the suitability of the wording of these particular terms) this would not reduce the conflict with the opponent’s goods. The opponent’s goods are in this instance, to be taken broadly as nutritional supplements, and are therefore inclusive of supplement’s sourced from India and/or those which are organic.

24. I note further that, even where these factors may feature strongly within the marketing of the applicant and not the opponent, or where there may be other marketing differences as mentioned by the applicant, I agree with the opponent’s statement within its written submissions that this will not be relevant. The Court of Justice of the European Union in *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P clearly states this should not be a consideration for the following reasons:

“59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.”

25. For the reasons set out above, within the meaning of *Meric*, I find the parties' goods to be identical.

Comparison of marks

26. 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 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.”

27. 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.

28. The respective trade marks are shown below:

Ayanda	Ananda
--------	--------

Earlier trade mark	Contested trade mark

29. Both the opponent's and the applicant's marks consist of a single word element only. The dominant and distinctive element of both marks is contained within the single word element of each, namely AYANDA in the opponent's mark, and ANANDA within the applicant's mark.

Visual comparison

30. Both marks are made up of six letters, starting with 'A' and ending with the four letters 'anda'. The only visual difference between the marks are the use of a 'y' as the second letter by the opponent, and the use of an 'n' as the second letter by the applicant. When the marks are used in lowercase lettering as shown, the 'y' hangs below the rest of the mark, slightly increasing the visual difference between them. However, depending on the case and font used, this will not always be the case. Overall, I find the marks visually similar to a high degree.

Aural comparison

31. The opponent's mark appears to be a made-up word. For this reason, there is no obvious 'correct' way of pronouncing the opponent's mark Ayanda. The opponent submits that its mark will be pronounced as A-YAN-DA, and the applicant's as A-NAN-DA by the relevant public. There are no submissions or evidence attesting to the way the mark is verbalised within the opponent's or the applicant's marketing material. Within the English language, the letter combination AY commonly produces an 'i' or 'eye' sound. It seems plausible that the opponent's mark may be pronounced by the relevant consumer in the three syllables EYE-AN-DA. However, it also seems plausible that the Y in the

opponent's mark will be separated from the A, and that it will instead be pronounced as A-YAN-DA as submitted by the opponent. The 'a' may be pronounced either as a short or long A.

32. On the other hand, the applicant's mark is not made up. The applicant submits that it is an English translation of the Sanskrit word for 'joy', but does not say how it is pronounced. I find it likely that the word will be pronounced A-NAN-DA, using a short A, as in the female name AMANDA. The proportion of the relevant consumer in the UK who would know of the Sanskrit origins must, in my view, be small. In this instance, I believe it is most likely this will be pronounced in the second way mentioned above.

33. I agree with the opponent's submissions that there is a high degree of aural similarity.

Conceptual comparison

34. As mentioned above, it is my understanding that the opponent's mark is a made up word, and therefore has no concept.

35. The applicant's mark may also be seen as a made up word with no concept or it may be seen as having the meaning submitted by the applicant, namely the English translation of the Sanskrit word for 'joy'.

36. The opponent argues that the meaning of ANANDA as the English translation of the Sanskrit word for joy is irrelevant in these proceedings. I disagree. It is my view that this meaning should be considered, so far as it will be understood by the relevant public.

37. It is my view that for a portion of the UK population, particularly those familiar with the Buddhist faith, and other faiths that may use this word, the conceptual meaning of ANANDA may be immediately obvious. However, I also find that for the majority, or at least for a significant portion of the relevant consumer of the goods in the UK, the conceptual meaning of ANANDA will not be known.

38. I find therefore find that for a portion of the relevant consumer, these marks are conceptually dissimilar. However, I find that for a further, significant portion of the relevant consumer, the conceptual comparison will be irrelevant because the marks are conceptually neutral, being seen as invented words.

Average consumer and the purchasing act

39. 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.

40. 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.”

41. The relevant consumer of the applicant's goods, and of the opponent's goods to which they are identical, will be in part, the general public. These consumers may be looking for either general vitamins, minerals or other substances for the purpose of supplementing their general health, or for more specialised items for treating dietary requirements or deficiencies. In addition to the general public, the relevant consumer will also in part be made up of

professionals, particularly dieticians but also on occasion other medical professionals such as general practitioners.

42. I note that the goods in question concern the consumers health, and that they will generally be consumed. I consider these two factors to be relevant to the attention paid by the consumer to a degree. In respect of the more general items covered by the broad terms, such as everyday vitamins and minerals for the purpose of keeping good health, I find a medium degree of attention will be paid by the relevant consumer, those being members of the general public. Where these goods are more specialised and are for the purpose of treating of health concerns or conditions, I find both the general public and any professionals involved in the process of recommending or prescribing these goods will pay a higher degree of attention. In summary, I find the degree of attention paid to the goods will range from medium to high.

43. Where the goods are purchased by the general public, I find these will primarily be bought on visual inspection being on display in shops. I also find professionals will primarily purchase the goods on visual inspection. However, considering there will be instances in which these items are recommended via word of mouth (by a professional or otherwise), or purchased over the counter, I find I cannot discount the aural comparison of the marks.

Distinctive character of the earlier trade mark

44. 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).”

45. The opponent’s mark appears to be to be a made up word, and I have had no submissions or evidence from either party which suggests anything on the contrary. I therefore I do not find it to be descriptive or allusive of the goods. Further, I do not find it to be descriptive or allusive of any particular characteristic of the goods. I find the earlier mark to hold a high level of distinctive character.

46. No evidence has been filed by the opponent, and I therefore cannot find that the distinctive character of the earlier mark has been enhanced through use.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

47. Prior to reaching a decision on this matter, I must consider all relevant factors, including those as set out within the principles A-K within paragraph 15 of this decision.

48. I found the dominant and distinctive elements of each mark to be held in its entirety. I found the marks to be visually similar to a high degree. I found there may be different ways the consumer will pronounce each of the marks, and

that the aural similarity will therefore range from high, to medium at best. Conceptually, I found the marks to be dissimilar to some consumers, and for others, I found no conceptual meaning would resonate in respect of either mark.

49. As per *Canon*, it should be considered that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks. Further, there is a greater likelihood of confusion where the earlier mark has a highly distinctive character. In this instance, I found the goods to be identical, and the earlier mark to hold a high degree of inherent distinctive character for the goods concerned.

50. I found the relevant consumer to be the general public as well as professionals. I found they would purchase the goods primarily on visual inspection, but that aural considerations cannot be discounted. I found the relevant consumer will pay from a medium to a high level of attention in respect of the goods.

51. I consider at this point that there are two types of confusion that I may find. The first type of confusion is direct confusion. Direct confusion occurs where the consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This will occur where the consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same economic undertaking².

52. I consider that the average consumer, deemed to be reasonably well informed and circumspect but rarely having the chance to make direct comparisons between marks, must instead rely upon the imperfect picture of them he has kept in his mind. Considering my findings above, including both the high visual similarity and the identical goods, it is my view that a significant portion of the relevant consumer will be likely to directly confuse the applicant's trade mark with the opponent's.

² *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10,

53. For this reason, I find the opposition against the application on Section 5(2)(b) of the Act to be successful in its entirety.

Final Remarks

54. As the opposition has succeeded on the basis of earlier International Registration no. 1342430, consideration of the likelihood of confusion with the opponent's European Union no. 3315405 for the mark AYANDA will not be required.

55. As the opposition has been successful in its entirety, the application will be refused.

COSTS

56. The opponent has been successful and is entitled to a contribution towards its costs. In the circumstances I award the opponent the sum of £750 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official opposition fee	£100
Preparing the statement of case and Considering the counterstatement	£350
Preparing and filing submissions	£300
Total	£750

I therefore order Living Ayurveda Products Holdings Ltd to pay Ayanda GmbH the sum of £750. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 18th September 2020

**Rosie Le Breton
For the Registrar**