

O-0182-23

TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NOS.3643402 & 3643400
FOR THE MARKS

COQVID

AND

QVID

TO BE REGISTERED BY PHARMA NORD APS
AS TRADE MARKS IN CLASS 5
AND CONSOLIDATED OPPOSITIONS THERETO
(UNDER NOS.428171 & 428473)
BY
REGENERON PHARMACEUTICALS, INC

Background & pleadings

1. Pharma Nord ApS (“the applicant”) applied to register the trade marks COQVID (“the ‘402 mark”) and QVID (“the ‘400 mark”) on 18 May 2021. The ‘402 mark was examined and published in the Trade Marks Journal on 13 August 2021 and the ‘400 mark was published on 27 August 2021. Both applications were published in class 5 for the following goods: *Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic preparations adapted for medical use; food for babies; dietetic foods adapted for medical use and dietetic supplements for medical purposes; vitamin preparations.*

2. Regeneron Pharmaceuticals, Inc (“the opponent”) opposed the ‘402 mark on 12 November 2021 and the ‘400 mark on 24 November 2021. Both applications were opposed under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) on the basis of all goods in the opponent’s UK registration no. 3532049. The details of the earlier mark are set out below.

UK TM No. 3532049
QVIDCO
<i>Class 5: Pharmaceutical preparations for treatment or prevention of COVID-19, coronavirus disease, and respiratory diseases and disorders; antivirals for treatment or prevention of COVID-19, coronavirus disease, and respiratory diseases and disorders.</i>
Filing date: 10 September 2020
Registration date: 1 January 2021

3. The opponent’s registration is an earlier mark, in accordance with section 6 of the Act, but has not been registered for five years or more before the filing date of the applications. Therefore, it is not subject to the proof of use requirements, as per section 6A of the Act.

4. The applicant filed counterstatements for both applications in which it denied the grounds of opposition.

5. The proceedings were consolidated and confirmed in a tribunal letter dated 14 February 2022.

6. Both parties have been represented throughout the proceedings. The applicant has been represented by Stevens Hewlett & Perkins and the opponent by Boulton Wade Tennant LLP.

7. Both sides filed evidence. A hearing was requested and held before me, via video conference, on 30 November 2022. The opponent was represented by Mr Christopher Hall of Counsel, instructed by Boulton Wade Tennant. The applicant did not attend the hearing but provided submissions in lieu.

Opponent's evidence in chief

8. The opponent filed a witness statement in the name of Catherine Wolfe, a Chartered Trade Mark Attorney and partner at Boulton Wade Tennant LLP, who are the opponent's legal representatives. Ms Wolfe appends 13 exhibits which largely go to demonstrating the similarity of the respective goods in the proceedings. I do not intend to summarise the exhibits in detail here, but I will refer to them later in this decision.

Applicant's evidence

9. The applicant filed a witness statement in the name of Shaun Sherlock, a Chartered Trade Mark Attorney and employee of Stevens Hewlett Perkins who are the applicant's legal representatives. Mr Sherlock appends 5 exhibits which are largely rebuttals of the opponent's evidence in chief. As previously stated, I do not intend to summarise these exhibits in detail here, but I will refer to them later in this decision.

Opponent's evidence in reply

10. The opponent filed a second witness statement from Catherine Wolfe appending a further 11 exhibits relating to vitamins and in particular vitamin D which I will return to later in this decision.

Section 5(2)(b)

11. 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.

12. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

13. The leading authorities which guide me are from the Court of Justice of the European Union ('CJEU')¹: *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-

¹ Although the UK has left the EU, section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts

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

14. With regard to the comparison of goods and services, in the judgment of the CJEU in *Canon*², the court stated at paragraph 23 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”.

15. Jacob J (as he then was) in the *Treat* case³, identified the following factors as relevant for assessing similarity:

a) The respective users of the respective goods or services;

² Case C-39/97

³ [1996] R.P.C. 281

- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- e) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

16. In addition I find the following case law to be relevant in these proceedings.

17. In *Gérard Meric*⁴ (“*Meric*”), the General Court (“GC”) held:

“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).”

18. In *Avnet Incorporated v Isoact Limited*⁵, Jacob J. (as he then was) stated that:

⁴ *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* (Case T-133/05)

⁵ [1998] F.S.R. 16

“In my view, specification for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance as it were, the core of the possible meanings attributable to the rather general phrase”

19. Also in *YouView TV Ltd v Total Ltd*⁶ 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.”

20. In *Kurt Hesse v OHIM*⁷, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*⁸, the General Court (“GC”) stated that “complementary” means:

“...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking”.

⁶ [2012] EWHC 3158 (Ch)

⁷ Case C-50/15 P

⁸ Case T-325/06

21. The goods to be compared are:

Opponent's goods	Applicant's goods
<p><i>Pharmaceutical preparations for treatment or prevention of COVID-19, coronavirus disease, and respiratory diseases and disorders; antivirals for treatment or prevention of COVID-19, coronavirus disease, and respiratory diseases and disorders.</i></p>	<p><i>Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes; dietetic preparations adapted for medical use; food for babies; dietetic foods adapted for medical use and dietetic supplements for medical purposes; vitamin preparations.</i></p>

22. For the purpose of a comparison, it is appropriate to group related goods together, where they are sufficiently comparable to do so⁹.

23. Clearly the applicant's term *Pharmaceutical preparations* at large is sufficiently broad to encompass the opponent's goods under the *Meric* principle.

24. The applicant's term *veterinary preparations* may overlap in nature with the opponent's terms *pharmaceutical preparations for treatment or prevention respiratory diseases and disorders; antivirals for treatment or prevention of respiratory diseases and disorders* as both could take the same form, namely tablets or medicines. The users will also overlap to a degree, as both could be purchased by members of the public. However, I find that the purpose of the goods differs as one is to treat human respiratory diseases, the other is to treat animal respiratory conditions, although there will be some overlap due to both being intended to treat these particular conditions. The method of use will also be different, as one will need to be administered to the animal whereas the other is to be taken by the user. I cannot see that there is any overlap in trade channels and there is no competition or complementarity, as per

⁹ *Separode Trade Mark* decision, BL O-399-10 (AP)

Boston Scientific. As such I consider these goods to be similar only to a medium degree.

25. The opponent in its skeleton argument¹⁰ submits that *sanitary preparations for medical purposes* in the applications should be considered as *Meric* identical to the opponent's goods or in the alternative at least similar as,

“The word ‘sanitary’ relates to matters of hygiene and keeping things clean. Sanitary preparations for medical purposes are therefore goods which are related to keeping things clean for medical purposes.”

It goes on to submit that the goods have a similar nature, purpose, end user and channels of trade in addition to being complementary and potential in competition. I agree with the opponent that these contested goods can be considered similar to a high degree to the opponent's goods. The goods *sanitary preparations for medical purposes* are likely to have properties for the cleaning of wounds or prevention of infection which gives a similar nature and purpose to the opponent's goods. I agree that the end user and trade channels will be shared as these goods are sold together in pharmacies or in the pharmaceutical aisle of a larger retail premises.

26. With regard to the applicant's goods namely *dietetic preparations adapted for medical use; dietetic foods adapted for medical use and dietetic supplements for medical purposes*, the opponent submits in evidence and in its skeleton argument¹¹ that these goods are specifically intended “to assist in the management, prevention or treatment of a medical condition” and therefore share a common purpose with pharmaceuticals. I note the opponent's submissions with regard to the nature of the applicant's goods and the point it raises as to how such goods relate to pharmaceuticals at large, however, the opponents goods are limited to the *treatment or prevention of COVID-19, coronavirus disease, and respiratory diseases and disorders* which is a very specific subset of pharmaceutical products. I do not find any evidence to suggest that dietetic substances are used to treat respiratory

¹⁰ Paragraphs 13 & 14

¹¹ Paragraphs 16 & 17

disorders. It might be the case that consumers using dietetic preparations are doing so to improve their general health or to add some specific element to their overall nutritional needs, which, at the most general level, may be seen as in some way as having a similar nature and purpose, but I regard this as being too general for the purposes of comparison. I accept that there may be shared users and channels of trade but that alone is not sufficient for me to find similarity overall. Nor is it obvious to me how dietetic preparations can be seen as specifically complementary to pharmaceutical preparations for respiratory diseases.

27. I note the opponent made similar submissions with regard to the applicant's goods namely *food for babies* as it did in relation to the *dietetic preparations adapted for medical use; dietetic foods adapted for medical use and dietetic supplements for medical purposes* in the above paragraph. I come to the same conclusion as in the previous paragraph and find those goods are not similar.

28. Finally with regard to the applicant's goods namely *vitamin preparations*, both sides filed evidence in relation to medical studies undertaken on the effectiveness or otherwise of using vitamin D to treat Covid-19. These studies appear to indicate that there is some link between increasing vitamin D levels and thereby reducing the severity of Covid-19 but that there is not sufficient evidence at this stage to conclusively state that the former is an effective treatment for the latter. The opponent's contention is that *vitamin preparations* should be seen as similar to pharmaceutical preparations for preventing Covid-19. Vitamin D is of course just one of a number of vitamins covered by the applicant's broad term *vitamin preparations* and I must assess what this term means as per the *Avnet* and *YouView* case extracts. In my experience *vitamin preparations* are generally used to supplement a dietary requirement or taken to improve overall health. Some can be prescribed by medical professionals. But much like the submissions around dietetic preparations I do not find there is a significant level of similarity between *vitamin preparations* and the opponent's specific goods targeting Covid-19 and other respiratory disorders. The level of similarity regarding nature, purpose, user and channel of trade are simply too general to be meaningful. Therefore I find they are not similar.

29. For those goods I did not find similar, I am guided by the judgment in *eSure Insurance v Direct Line Insurance*¹², in which Lady Justice Arden stated that:

“49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.

Average consumer and the purchasing process

30. I next consider who the average consumer is for the contested goods and how they are purchased. It is settled case law that the average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.¹³ 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.¹⁴

31. The average consumer for the goods at issue will be the general public, and some medical professionals. The goods will be selected from primarily visual means, for example from bricks and mortar retailers such as pharmacies or their online equivalent. I do not discount an aural element however as these goods can be asked for over the counter or if advice is sought by consumers from pharmacists or other medical professionals. The contested goods being both prescription and over the counter products are relatively inexpensive and probably frequent purchases but given the contested goods are for health purposes and for internal consumption, I find consumers will be paying at least a medium degree of attention during the purchasing process.

¹² [2008] ETMR 77 CA

¹³ *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)

¹⁴ *Lloyd Schuhfabrik Meyer*, Case C-342/97.

Mark comparisons

32. 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 CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*¹⁵, 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.”

33. 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.

34. The respective trade marks to be compared are:

Opponent's registration	Applicant's marks
QVIDCO	COQVID (the '402 mark) QVID (the '400 mark)

35. The opponent's registration comprises a single word namely QVIDCO with no other aspect such as a device or stylisation to it. The overall impression is derived solely from this word.

¹⁵ Case C-591/12P

36. The applicant's '402 and '400 marks are similarly comprised of single words namely COQVID and QVID with no other aspect such as devices or stylisation to them. The overall impression is similarly derived solely from these words.

Visual similarity and the '402 mark

37. The opponent's registration and the applicant's '402 mark both share the six letters Q-V-I-D-C-O. The letter ordering combination of Q-V-I-D is the same in both marks. However as a point of difference the opponent's registration has the letters C-O positioned as the last two letters in the mark, whereas in the applicant's '402 mark the C-O combination is positioned as the first two letters in the mark. The positioning of the C-O letter combination has a visual impact when reading from left to right. As such I find there is only a medium level of similarity between the respective marks.

Visual similarity and the '400 mark

38. The opponent's registration and the applicant's '400 mark both share the Q-V-I-D letter ordering combination at the beginning of the respective marks. These letters comprise the entirety of the applicant's '400 mark and four out of the six letters of the opponent's registration. The point of difference in this comparison are the additional letters C-O which end the opponent's registration and have no counterpart in the '400 mark. It is settled case-law¹⁶ that consumers are more likely to pay attention to the beginnings of words rather than to the ends. Taking this into account, I find there to be a between a medium and high level of visual similarity.

Aural similarity and the '402 mark

39. In relation to the aural comparison between its registration and the '402 mark, the opponent in its skeleton argument¹⁷ submits that given the invented nature of the '402 mark, pronunciation will vary. In particular,

“Aural similarity turns on whether the application is pronounced as three syllables ‘CO-Q-VID’ or as two ‘COQ-VID’. In this regard because COQVID is

¹⁶ *El Corte Inglés, SA v OHIM*, Case T-39/10

¹⁷ Paragraph 27

entirely made up and includes a 'Q' without its customary bedfellow 'U', the average consumer will not immediately be able to read the sign. They will have to pause for thought as to what the correct pronunciation might be. We submit, therefore, that there is likely to be a sufficiently large proportion of the public for whom the favoured pronunciation is 'CO-Q-VID', such that the overall degree of similarity with the earlier mark is high. Even for those consumers who pronounce the sign 'COQ-VID, there remains an overall degree of similarity, just less of it.

40. I agree with the opponent that invented words often vary in pronunciation because of the unfamiliar letter ordering or non-conformity with the accepted rules of English grammar. I also accept that in the instant case both pronunciation variations submitted by the opponent are possible, although in my view the "CO-Q-VID" seems the less likely option. Consumers will generally alight on a certain pronunciation if they recognise some tangible word sound, making it likely that 'COQ-VID' would be pronounced if consumers recognise the 'COQ' element as in 'coquette' or 'coq-au-vin'. Taking all these factors into account, I find that if the '402 mark is pronounced as 'CO-Q-VID' then there is a medium degree of similarity with the opponent's registration which I believe will be pronounced rather more straightforwardly as Q-VID-CO. However this degree of similarity is reduced to low if the '402 mark is pronounced as 'COQ-VID'.

Aural similarity and the '400 mark

41. The aural comparison for these marks is, in my view, more straightforward. Both marks will begin with the same likely pronunciation namely Q-VID. The point of difference being the additional letters (and syllable) CO the end of the opponent's registration. I find there is a higher than medium degree of aural similarity between these marks.

Conceptual similarity

42. Each of the respective marks in these proceedings are invented words and as such have no concept. Therefore I find no conceptual similarity.

Distinctiveness of the earlier mark

43. The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, based either on inherent qualities or because of use made, the greater the likelihood of confusion. In *Lloyd Schuhfabrik Meyer*¹⁸ 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).”

44. Registered trade marks possess varying degrees of inherent distinctive character starting from the very low, because they are suggestive of, or allude to, a characteristic of the goods or services, scaling up to those with high inherent distinctive character, such as invented words.

¹⁸ *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97

45. Whilst evidence was provided in this case by the opponent, it did not include any evidence of enhanced distinctiveness so I have only the inherent position to consider.

46. The applicant in its written submissions¹⁹ contends that,

“The opponent’s list of goods are very specific, covering preparations and antivirals for the treatment or prevention of COVID-19. It is therefore submitted that the elements “CO” and “VID” must have an extremely low level of distinctiveness in relation to such goods”

47. I note the applicant’s contention but would point out that the earlier registration has an additional letter Q beginning the mark and the letter ordering is such that the VID element appears before CO, which in my view makes the word Covid more difficult to ascertain even in relation to Covid specific goods. Overall though I find the mark as whole is an invented word and therefore distinctive to a high degree.

Likelihood of confusion

48. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they have kept in mind.²⁰ I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to 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.

49. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related.

¹⁹ Paragraph 15

²⁰ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

50. In *L.A. Sugar Limited*²¹, Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark

51. However it is also settled case law that it is not sufficient to find a likelihood of confusion if a mark merely calls to mind another mark²². This is considered mere association, not indirect confusion.

52. So far in this decision I have found that,

- Some of the goods are identical and similar to varying degrees, but that some of the goods are dissimilar
- The average consumer will be paying a medium degree of attention during a mainly visual purchasing process, although I do not discount an aural element
- In relation to the visual comparison with the ‘402 mark, I found there was a medium degree of similarity
- In relation to the visual comparison with the ‘400 mark, I found there was between a medium and high level of visual similarity
- In relation to the aural comparison with the ‘402 mark, I found there was a medium degree of similarity if the application is pronounced ‘CO-Q-VID’ but the degree of similarity is reduced to low if pronounced as ‘COQ-VID’

²¹ *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10

²² *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

- In relation to the aural comparison with the '400 mark, I found there was a higher than medium degree of aural similarity
- I found no conceptual similarity between the respective marks
- The earlier mark is inherently distinctive to a high degree

Decision regarding the '402 mark

53. The respective marks each contain the same letters but which only coincide in letter ordering for the letters QVID. The opponent's mark has a different ending and the applicant's mark a different beginning albeit that the letters involved in both are CO. However the positioning of the letters CO at the beginning of the contested mark gives rises to a differing visual and aural impact and I also factor in that the marks are invented and there is no conceptual hook to assist consumers with fixing the marks in their mind. As such even given the effect of imperfect recollection I find it is unlikely that consumers will directly confuse the respective marks, i.e. mistake one mark for the other.

54. Having found that there is no likelihood of direct confusion, I now consider whether there is any indirect confusion. I remind myself of the guidance given in *L.A.Sugar* that indirect confusion requires a consumer to undertake a thought process whereby they acknowledge the differences between the marks yet attribute the common element to a shared undertaking, taking the later mark to be a possible brand extension or sub brand of the earlier mark.

55. I do not consider that the average consumer is likely to believe that the respective goods come from the same or linked undertakings because of the letters in common. The way the respective marks position the CO element alters the visual and aural aspect and does not fit with the notion of a plausible brand extension. Therefore I do not find that there is a likelihood of indirect confusion.

Decision regarding the '400 mark

56. The respective marks share the same four letters, namely QVID, at their beginnings. In this case I take into account the case law relating to the beginnings of words²³, the inherent high degree of distinctiveness of the earlier mark and the

²³ *El Corte Inglés, SA v OHIM*, Case T-39/10

medium to high degree of visual and aural similarity in this comparison. In my view, the common letters QVID at the beginning of the marks and being sufficiently distinctive are likely to stick in the mind of the average consumer and, when factoring in the principle of imperfect recollection, they will overlook the CO ending. I recognise that the average consumer will be paying at least a medium level of attention and that this may point away from direct confusion. However, I note that the average consumer for medical goods includes members of the general public who will be far less familiar with the names of pharmaceutical products than professional users and, consequently, it would be easy to see a circumstance in which they may mistakenly recall the ending of mark that are otherwise identical in their beginnings. As such I find there is direct confusion.

57. If I am wrong on the direct confusion finding, then I will go on to assess the likelihood of indirect confusion. If the average consumer does recall the different CO ending of the earlier mark then they will, in my view, conclude that the goods of the later mark come from the same common undertaking. This is because the common beginning, QVID, is highly distinctive for the goods and consumers are likely to view the alternative ending as identifying variant products sold by the same business. Therefore I find that there is a likelihood of indirect confusion.

Conclusion

58. The opposition no. 428171 brought against application no. 3643402 fails in its entirety and subject to any appeal against this decision, the application can proceed to registration.

59. The opposition no. 428473 brought against application no. 3643400 partially succeeds. Subject to any appeal against this decision, this application should be refused for the following goods in class 5:

Pharmaceutical and veterinary preparations; sanitary preparations for medical purposes.

60. But it can proceed to registration for the class 5 goods set out below:

Dietetic preparations adapted for medical use; food for babies; dietetic foods adapted for medical use and dietetic supplements for medical purposes; vitamin preparations.

Costs

61. The opponent has been partially successful with regard to opposition no. 428473 and the applicant has been entirely successful with regard to opposition no. 428171. Taking this into account, I award no costs with regard to 428473 as each party has had a measure of success. For 428171, I award costs to the applicant as set out below, being guided by Tribunal Practice Notice 2/2016:

£300 Considering the Notice of opposition & preparing counterstatement

£500 Considering & preparing evidence

£300 Preparation of written submissions

£1100 Total

62. I order Regeneron Pharmaceuticals, Inc to pay Pharma Nord ApS the sum of £1100. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 27th day of February 2023

June Ralph

For the Registrar

The Comptroller-General