

O-057-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2496802
BY CARAVAN MARKETING COMPANY
TO REGISTER A TRADE MARK IN CLASS 30**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 98479 BY SOCIÉTÉ DES PRODUITS NESTLÉ SA**

BACKGROUND

1. On 6 September 2008, Caravan Marketing Company (Caravan) applied to register the following as a trade mark for "Coffee" in class 30:



This application was examined, accepted and subsequently published for opposition purposes on 3 October 2008 in Trade Marks Journal No.6755.

2. On 22 December 2008, Société des Produits Nestlé S.A. (Nestlé) filed a notice of opposition. This consisted of a single ground based upon section 5(2)(b) of the Trade Marks Act 1994 (as amended) (the Act). In their Statement of Grounds Nestlé indicate that the opposition is based upon the following trade mark:

Trade Mark	No.	Application Date	Registration Date	Goods
BONJOUR	CTM 7036726	04.07.2008	18.09.2009	Although also registered in class 29, the trade mark is registered in class 30 for the following goods: Coffee and coffee extracts; coffee substitutes and extracts of coffee substitutes, mixtures containing coffee or coffee substitutes; sugar.

3. In their Statement of Grounds Nestlé say:

"3. The dominant element of [Caravan's] mark is BONJORNNO. Phonetically this is very similar to [Nestlé's] mark BONJOUR. First two syllables sounding identical and differing only in the final syllable of [Caravan's] mark. This additional syllable is not sufficiently distinctive to prevent it being confused with [Nestlé's] mark. The distinctive aspect of both words being the first two syllables.

4. In addition, BONJOUR and BONJORNNO are visually very similar words. The first four letters are identical and the letters O and R appear in the remainder of both marks. Consequently, when first seen the two marks give a very similar impression.

5. Further [Caravan's] mark is conceptually very similar to [Nestlé's] mark. BONJORNNO is a misspelling of the Italian greeting "Buongiorno" which means hello or good morning. [Nestlé's] mark is, of course, the same French greeting."

4. On 5 February 2009, Caravan filed a counterstatement in which the ground of opposition is denied.

5. Both parties filed evidence. Nestlé also filed written submissions at both the evidence-in-chief and evidence-in-reply stages of the proceedings. Neither party asked to be heard; Nestlé filed further written submissions in lieu of a hearing. Where necessary, I will refer to these submissions below. After a careful consideration of all the material before me, I give this decision.

EVIDENCE

Nestlé's evidence-in-chief

6. This consists of a witness statement, dated 8 April 2009, by Sophia Clarke who is an Intellectual Property Adviser in the legal department of Nestlé UK Ltd. Having provided background information on the size and nature of Nestlé's commercial activities, Ms Clarke explains that the trade mark on which Nestlé rely in these proceedings has been used on an instant chicory coffee substitute with milk which has been sold in France and Belgium for over twenty years. Exhibit SDC2 is said to consist of printouts from the Internet and a television advertisement (the latter of which is said to date from 1985) which show use of the BONJOUR trade mark. I note that (i) the vast majority of this exhibit is in the French language, and (ii) that in the course of proceedings the Trade Marks Registry gave Nestlé an opportunity to file a certified translation of this exhibit; an opportunity Nestlé chose not to take advantage of.

7. Exhibit SDC3 consists of screen prints taken from the Lingvosoft, Reverso, freedict.com and french-linguistics.co.uk online dictionaries which show that the Italian word BUONGIORNO means good morning or good afternoon, and that the French word BONJOUR also means, inter alia, good morning or good afternoon. In Ms Clark's view BONJORNNO is:

"simply a misspelling of the Italian greeting."

Caravan's evidence-in-chief

8. This consists of a witness statement, dated 21 September 2009, by Matthew Gardner who is a trade mark agent at The Trade Marks Bureau, Caravan's professional representatives in these proceedings. As this statement consists of submissions rather than evidence of fact, it is neither necessary or appropriate for me to summarise it here. I will, however, refer to these submissions later in my decision.

Nestlé's evidence-in-reply

9. This consists of a witness statement, dated 19 November 2009, by Dale Carter who is also an Intellectual Property Adviser in the legal department of Nestlé UK Ltd. Mr Carter explains that he carried out internet-based translations for the French word BONJOUR and Italian word BUONGIORNO in order to clarify the English meaning of the respective words. The results of those searches using Google translate and Tiscali are provided as Exhibit DC1 and appear to support his conclusion that:

“BONJOUR and BUONGIORNO are informal greetings that may be used interchangeably as meaning either hello or good morning.”

10. That concludes my summary of the evidence filed.

DECISION

11. The opposition is based solely 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.”

12. 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.”

13. In these proceedings Nestlé is relying on the registered trade mark shown in paragraph 2 above, which has an application date of 4 July 2008 i.e. prior to that of the application for registration which has an application date of 6 September 2008; as such,

it qualifies as an earlier trade mark under the above provisions. The application for registration was published for opposition purposes on 3 October 2008 and Nestlé's earlier trade mark was registered on 18 September 2009. As a result, Nestlé's earlier trade mark is not subject to The Trade Marks (Proof of Use, etc) Regulations 2004.

Section 5(2)(b) – case law

14. The European Court of Justice (ECJ) has provided guidance in a number of judgments germane to this issue. The principal cases are: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05).

It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all the relevant factors; *Sabel BV v. Puma AG*, paragraph 22;

(b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;

(e) when considering composite marks, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element; *Shaker di L. Laudato & Co. Sas* (C-334/05), paragraph 42;

(f) an element of a mark may play an independent distinctive role within it without necessarily constituting the dominant element; *Medion AG V Thomson multimedia Sales Germany & Austria GmbH*, paragraph 30;

(g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;

(h) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;

(i) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;

(j) further, 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; *Marca Mode CV v. Adidas AG + Adidas Benelux BV*, paragraph 41;

(k) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

The average consumer and the nature of the purchasing process

15. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods; 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 reaching a conclusion on this point, I must proceed on the basis that the respective parties' trade marks will be used on all the goods for which they have either been applied or are registered.

16. The goods at issue in these proceedings are coffee, goods that will be bought by the public at large; they, then, are the average consumer of the goods. In their written submissions Caravan say:

“4....Coffee is usually purchased from supermarket shelves without asking for assistance and coffee brand names are usually prominently displayed on the packaging where they are easy to see.”

17. In their written submissions Nestlé agree with this statement and say:

“However, it must be borne in mind that the goods at issue in these proceedings are inexpensive everyday consumer goods that are normally bought by the average consumer without undertaking a thorough comparison of the marks. The level of attention of the average consumer of the products in question is also likely to be relatively low, again on account of the goods being inexpensive everyday consumer goods.”

18. Nestlé add:

“Moreover, in the context of everyday consumer goods arranged on and purchased from shelves such as those in supermarkets and convenience stores the consumer is guided by the visual impact of the mark...”

19. Generally speaking coffee is an inexpensive product which is likely to be purchased by the average consumer on a fairly regular basis. I agree that the purchasing process is likely to consist primarily of self selection in a retail environment such as a supermarket and that in those circumstances the purchasing process is likely, for the most part, to be predominantly a visual one. While I accept that the cost of the goods in issue is relatively low and this will impact on the average consumer’s level of attention, my own experience suggests that insofar as coffee is concerned, some average consumers are likely to know what type and brand of coffee they prefer and are, as a result, likely to display a degree of brand loyalty when making their selection. In those particular circumstances the average consumer’s level of attention is likely to be increased somewhat. However, when considered overall, Nestlé’s categorisation of the average consumer’s level of attention as “relatively low,” is, I agree, appropriate; this is also likely to increase the effects of imperfect recollection.

Comparison of goods

20. The goods to be compared are as follows:

Caravan’s goods	Nestlé’s goods (in class 30)
Coffee	Coffee and coffee extracts; coffee substitutes and extracts of coffee substitutes, mixtures containing coffee or coffee substitutes; sugar.

21. **As both parties’ specifications include a reference to coffee, the goods at issue in these proceedings are identical.**

Comparison of trade marks

22. For the sake of convenience, the trade marks to be compared are as follows:

Caravan’s trade mark	Nestlé’s trade mark
	BONJOUR

23. The average consumer is considered to be reasonably well informed, circumspect and observant, but perceives trade marks as a whole and does not pause to analyse their various details. In addition, he/she rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he/she has kept in his or her mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant components of the respective trade marks, and I must, as the case law dictates, compare them from the visual, aural and conceptual perspectives.

24. In approaching the comparison I am mindful of the fact that Caravan's trade mark consists of two words presented in a stylised fashion, and that the second word in their trade mark is completely alien to Nestlé's trade mark. In Case T-6/01 *Matratzen Concord v OHIM – Hukla Germany* the Court of First Instance (CFI) said:

“32. In this context, the Court of Justice has held that the assessment of the similarity between two marks must be based on the overall impression created by them, in light, in particular, of their distinctive and dominant components (SABEL, paragraph 23, and Lloyd Schuhfabrik Meyer, paragraph 25).

33. Consequently, it must be held that a complex trade mark cannot be regarded as being similar to another trade mark which is identical or similar to one of the components of the complex mark, unless that component forms the dominant element within the overall impression created by the complex mark. That is the case where that component is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the overall impression created by it.

34. It should be made clear that that approach does not amount to taking into consideration only one component of a complex trade mark and comparing it with another mark. On the contrary, such a comparison must be made by examining the marks in question, each considered as a whole. However, that does not mean that the overall impression created in the mind of the relevant public by a complex trade mark may not, in certain circumstances, be dominated by one or more of its components.

35. With regard to the assessment of the dominant character of one or more given components of a complex trade mark, account must be taken, in particular, of the intrinsic qualities of each of those components by comparing them with those of other components. In addition and accessorially, account may be taken of the relative position of the various components within the arrangement of the complex mark.”

25. In *José Alejandro SL v Office for Harmonization in the Internal Market (Trade Marks and Designs), Anheuser-Busch Inc Intervening* (Case T-129/01) [2004] ETMR 15 the CFI said:

“The Court notes that the public will not generally consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark.”

26. In their written submissions Nestlé say:

“Notwithstanding the stylised appearance of the Application the dominant element of the mark remains the word BONJORNO.”

And:

“However CAFÉ is very descriptive and lacks distinctive character. It does not contribute in any significant way to the overall impression created by the Application. It is therefore incapable of strengthening or distinguishing this mark.”

And:

“In the context of the overall impression created by [Caravan’s] mark, it is evident that the stylisation is *de minimis*, being neither a dominant nor distinctive element thereof.

Nonetheless, the form in which [Caravan’s] mark is represented does, in our submission, create a clear visual distinction between the respective words BONJORNO and Café. The word Café is represented in handwritten script and is positioned below and to the right of the word BONJORNO. In this respect Café should be regarded as constituting a less dominant element of the mark vis-a-vis the word BONJORNO.

Although the second letter of [Caravan’s] mark is a graphic representation of a coffee bean, we believe that the ability of this feature to distinguish the respective marks is low. We say this because features of this nature are descriptive of the goods covered by [Caravan’s] mark and are incapable of functioning as an indicator of the commercial origin of coffee and related goods and services.

In consideration of the above and having regard to the low distinctive character of the word Café in relation to [Caravan’s] goods, the dominant and more distinctive element of [Caravan’s] mark must be regarded as being the word BONJORNO.”

27. In their written submissions Caravan say:

“[Nestlé] has appeared to completely ignore the stylisation of [Caravan’s] mark BONJORNO CAFÉ. Although the stylisation is not the most prominent feature of [Caravan’s] mark it should be considered in the overall impression of the mark (especially considering that coffee products are usually purchased visually). The stylisation being the term BONJORNO CAFÉ in gold and the letter “O” being the form of a coffee bean.”

28. Caravan's trade mark consists of the words Bonjorno and Café. Bonjorno is presented with the letter B capitalised and the remaining characters in lower case. While I accept that the words Bonjorno and Café are presented with a degree of stylisation, I agree with Nestlé that the degree of this stylisation is at best *de minimis*. I note that both parties agree that the letter O in the word Bonjorno has been replaced with a representation of a coffee bean. As to the word Café, this is presented with the letter C capitalised in what Nestlé describe as (and with which I agree) a handwritten script. Finally, I note that Caravan's trade mark was applied for in the colour gold.

29. In their written submissions Nestlé argue that given the goods at issue in these proceedings the word Café and the device of a coffee bean are descriptive and lack distinctive character. While I agree with these submissions, I am, given the nature of the purchasing decision mentioned above, far from convinced that the device of a coffee bean in place of the letter O in the word Bonjorno is a feature that would be immediately apparent to the average consumer. In addition, the positioning of the word Café to the bottom right of the word Bonjorno and within the confines of the final two letters of the word inevitably relegates it to a much less dominant position within the trade mark as a whole. Finally, given the propensity of traders in all sectors to present their trade marks in a wide range of colours, the fact that Caravan's trade mark was applied for in the colour gold is not a factor which is likely to be of great significance.

30. In summary, I agree with Nestlé that the word Bonjorno is likely to be considered by the average consumer as the distinctive and dominant element of Caravan's trade mark. The other elements present in the trade mark i.e. the stylisation, colour, replacement of the letter O with a device of a coffee bean and the word Café are, in my view, negligible within the overall impression created by the trade mark. I shall conduct my comparison of the respective trade marks with that conclusion in mind.

Visual similarity

31. In their written submissions Nestlé say:

“Both words begin with the same five letters in the same order BONJO and in each case, end with a combination of very similar letters RNO and UR. It has been established that the public's attention is usually drawn to the beginning of words. In this case, in the overall impression the common features of these marks outweigh the minor difference in their endings.”

32. In response to the above Caravan say in their written submissions:

“[Nestlé] has not indicated why they feel RNO and UR should be considered similar letters, the only similarity is that these string of letters contain the letter R which does not render the whole string similar.

It has previously been established that consumers can be drawn to the beginning of marks if the beginning of the mark is the distinctive feature of it. However, the comparison must then go on to consider the mark as a whole as the average consumer normally perceives a mark as a whole and does not proceed to analyse its various components.”

33. As I have already concluded that is the word Bonjorno that is the distinctive and dominant element of Caravan’s trade mark, it is this element that I must compare with Nestlé’s BONJOUR trade mark. I note that the respective elements are seven and eight letters long respectively and that the first five letters are identical. Insofar as the endings of the respective elements are concerned, I agree with Caravan that the mere presence of the letter R does not render their endings similar. However, as Caravan also point out it is the trade marks as a whole I must compare (or in this case the distinctive and dominant element of Caravan’s trade mark with the trade mark of Nestlé). **Given that the distinctive and dominant element of Caravan’s trade mark and the trade mark of Nestlé differ in length by only one letter and as the first five letters are identical, this results in a reasonably high degree of visual similarity between them.**

Aural similarity

34. In their written submissions Nestlé say:

“BONJORNNO CAFÈ is also phonetically similar to BONJOUR. The two words are different lengths and have different spellings. However phonetically they are very similar. The first two syllables in each mark are identical and in the same sequence. The emphasis in speech will fall upon the first two syllables. The additional syllable in BONJORNNO is not sufficiently distinctive to separate it from the earlier mark. Equally the slight difference in spelling and length are negligible particularly when compared to the phonetic impression of each word. Again, phonetically, the common features of these marks significantly outweigh the minor difference.”

35. In their written submissions Caravan say:

“The opposed mark consists of four syllables and two separate words and is much longer in length compared with [Nestlé’s] mark:

BON-JOR-NO CAFÈ
BON JOUR

Subsequently, the overall pronunciation of the marks is sufficiently different to avoid any likelihood of confusion with [Nestlé’s] earlier mark..”

36. In comparing the distinctive and dominant element of Caravan’s trade mark with Nestlé’s trade mark, the parties appear to agree that Bonjorno would be articulated as

a three syllable word i.e. Bon-jour-no and BONJOUR as a two syllable word i.e. BON-JOUR. It is of course well established that the average consumer has a tendency to slur the endings of words, thus placing greater importance on the initial elements of the respective trade marks. **Bearing in mind that the first two syllables of the distinctive and dominant element of Caravan's trade mark and the trade mark of Nestlé are identical, combined with the tendency of the average consumer to slur the endings of words, results in a high degree of aural similarity between the respective trade marks.**

Conceptual similarity

37. In their written submissions Nestlé say:

“The average consumer would understand BONJORNNO and BONJOUR to mean the same thing. We note from the UKIPO work manual that French and Italian are acknowledged as languages that are well known and understood in English society. The conceptual similarity between [Nestlé's] earlier mark and the Application would therefore not be lost on the average consumer who is then likely to be confused...”

And:

“Furthermore, the average consumer of the respective goods in question may, in some instances, be English speaking consumers that are unfamiliar with the meanings of the respective words “Buongiorno” and BONJOUR. In such circumstances, the fact that [Caravan's] mark incorporates the visually and phonetically similar prefix element BONJOUR..is, we submit, sufficient to give rise to a likelihood of public confusion.”

38. In their written submissions Caravan say:

“[Nestlé] contends....that BONJOURNO is a misspelling of the Italian word “Buongiorno” which means “morning”. Firstly, it should be known that “Buongiorno” is never used to say “hello” in Italian. “Ciao” is the Italian equivalent of “bonjour” which both mean “hello”.

Although it may be possible to link the terms BONJORNNO and BONJOUR to personal greetings by a lengthy process of analysis of the marks this is not an analysis which would be taken by the average consumer..It is highly unlikely that the average consumer will see [Caravan's] mark BONJORNNO CAFÉ, know (or go to the trouble of investigating) that it is a misspelling of “Buongiorno” which is Italian for good morning and then compare [Caravan's] mark to [Nestlé's] mark BONJOUR which is predominantly used to say “hello” and then confuse the marks.

The only conceptual similarity that exists between the marks are that, upon further analysis/investigation of the marks, they could be related to a personal greeting but it is highly unlikely that this will give rise to a likelihood of confusion.”

39. The evidence of Ms Clarke and Mr Carter of Nestlé indicates that the Italian word Buongiorno can mean, inter alia, good morning (good afternoon) or hello. Similarly, their evidence establishes that the French word BONJOUR can also have the same meanings. While I accept that the average consumer in this country is unlikely to be familiar with a range of foreign languages, as Nestlé point out in their written submissions, this may not apply with such force to French and Italian. While I accept that the word Bonjorno appearing in Caravan’s trade mark is not the Italian word Buongiorno, it is however, in my view, phonetically and conceptually very similar if not identical to it. While I have no evidence on the point, I very much doubt that the average consumer would be familiar with the correct spelling of the Italian word Buongiorno (I certainly was not). In addition, the Italian and French words in issue in these proceedings are not obscure words in those languages but words that the average consumer is likely to have come into contact with in a range of different situations, for example, when on holiday in the countries concerned.

40. For the reasons indicated above, as the distinctive and dominant element of Caravan’s trade mark consists of a misspelling of the Italian word Buongiorno (the correct spelling of which is unlikely to be known by the average consumer), the word Bonjorno is, in my view, likely to send to the average consumer a similar conceptual message to that conveyed to them by Nestlé’s BONJOUR trade mark. **In those circumstances, there is a high degree of conceptual similarity between the distinctive and dominant element of Caravan’s trade mark and the trade mark of Nestlé.**

Distinctive character of Nestlé’s trade mark

41. I must now assess the distinctive character of Nestlé trade mark. 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.

42. In their written submissions Nestlé say:

“[Nestlé’s] earlier mark does not describe the goods or give any allusion to their nature. Given the highly distinctive nature of [Nestlé’s] mark...”

43. Although Nestlé provided examples of its BONJOUR trade mark in use in exhibit SDC2, the majority of the documents provided are in the French language and translations of these documents into English have not been provided. As I am unable in those circumstances to assess whether their use of their BONJOUR trade mark has enhanced its distinctive character, I must assess Nestlé's trade mark upon the basis of its inherent characteristics. While I have already concluded that the French word BONJOUR and its meaning in English is likely to be known to the average consumer, as far as I am aware, it has no meaning in relation to the goods at issue in these proceedings. **Although not in the category of an invented word, Nestlé's BONJOUR trade mark is possessed of a reasonable level of inherent distinctive character.**

Likelihood of confusion

44. 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 Nestlé'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 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 they have retained in their mind.

45. In summary, I have concluded that:

- (i) the respective goods at issue are identical;
- (ii) the average consumer for the goods at issue is the general public;
- (iii) the purchasing process will consist predominantly of a visual act;
- (iv) the average consumer is likely to pay a relatively low level of attention to the selection of the goods;
- (v) the word Bonjour is the distinctive and dominant element of Caravan's trade mark;
- (vi) there is a reasonably high degree of visual similarity and a high degree of both aural and conceptual similarity between the distinctive and dominant element of Caravan's trade mark and the trade mark of Nestlé;
- (vii) absent use, Nestlé's BONJOUR trade mark is possessed of a reasonable level of inherent distinctive character.

46. I must now apply the global approach advocated to my findings to determine whether direct confusion (where one trade mark is mistaken for the other) or indirect confusion (where the goods would be assumed to come from economically linked undertakings) is likely to occur.

47. Having done so, I have no hesitation in concluding that the identity in the goods, the fact that the word Bonjorno is the distinctive and dominant element of Caravan's trade mark, the reasonably high degree of visual similarity, the high degree of both aural and conceptual similarity together with the reasonable level of inherent distinctiveness Nestlé's BONJOUR trade mark possess, when combined with the average consumer for the goods at issue and the traits they are likely to display when selecting the goods, combine to create a likelihood of confusion. Bearing in mind the concept of imperfect recollection, I think that the average consumer is likely simply to mistake one trade mark for the other, rather than assume that Caravan's trade mark is a variant trade mark from an undertaking economically linked to Nestlé.

48. In summary, the opposition is successful and the application should be refused in its entirety.

Costs

49. As Nestlé have been successful they are entitled to a contribution towards their costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. Using that TPN as a guide, I award costs to Nestlé on the following basis:

Preparing a statement and considering the other side's statement:	£200
Official fee:	£200
Preparing evidence and commenting on Caravan's evidence	£500
Preparation of written submissions	£300
Total:	£1200

50. I order Caravan Marketing Company to pay to Société des Produits Nestlé S.A the sum of £1200. 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 12 day of February 2010

**C J BOWEN
For the Registrar
The Comptroller-General**