O-0686-23

TRADE MARKS ACT 1994

IN THE MATTER OF

TRADE MARK APPLICATION NO. UK00003693903

IN THE NAME OF SOCIEDAD COOPERATIVA ANDALUZA GANADERA DEL VALLE DE LOS PEDROCHES, COVAP

AND

AN OPPOSITION UNDER NO. 429912

BY THE A2 MILK COMPANY LIMITED

Background and pleadings

1. On 13 September 2021, Sociedad Cooperativa Andaluza Ganadera Del Valle De Los Pedroches, Covap ("the applicant") applied to register the trade mark shown on the cover page of this decision. The application was filed pursuant to article 59 of the Withdrawal Agreement between the United Kingdom ("UK") and the European Union ("EU") and, consequently, the applicant can rely upon the earlier EU filing date of 7 January 2020.

2. The application was published for opposition purposes on 5 November 2021 for milk products in Class 29.

3. The A2 Milk Company Limited ("the opponent") filed a notice of opposition on 5 January 2022 on the basis of section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all the goods in the application. For its claim under section 5(2)(b), the opponent relies upon all the goods covered by the following UK trade marks:

Mark 1: a2 Milk

Registration No. 00914406326

Filing date: 22 July 2015

Registration date: 12 September 2016

Goods:

Class 5	Food for infants; powdered milk for babies; dietetic beverages adapted for medical use.
Class 29	Milk powder; milk; butter; cheese; yoghurt; milk beverages, milk predominating.

Mark 2: THE a2 MILK COMPANY

Registration No. 3422602

Filing date**:** 20 August 2019

Registration date: 29 November 2019

Goods:

Class 5 Food for infants; powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder (dietary supplement).

Class 29 Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating; protein milk; whey; milk-based protein drinks; vitamin-enriched milk.

Mark 3: 

Registration No. 3422603

Filing date**:** 20 August 2019

Registration date: 29 November 2019

Goods:

Class 5 Food for infants; powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder (dietary supplement).

Class 29 Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating; protein milk; whey; milk-based protein drinks; vitamin-enriched milk.

Mark 4: a2 True

Registration No. 00917819608

Filing date**:** 16 February 2018

Registration date: 16 June 2018

Goods:

Class 5 Food for infants; milk and powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional

supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder; protein powder for use as a food additive.

Class 29 Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating; milk-based protein drinks; whey; dry whey.

Mark 5: a2 Only

Registration No. 00917471641

Filing date**:** 13 November 2017

Registration date: 23 March 2018

Goods:

Class 5 Food for infants; milk and powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder; protein powder for use as a food additive.

Class 29 Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating; milk-based protein drinks; whey; dry whey.

Class 30 Ice cream; frozen yoghurt; edible ices; desserts, namely, bakery desserts, dessert puddings, and frozen desserts; pastries; confectionery.

Mark 6: a2 PLATINUM

Registration No. 3422606

Filing date**:** 20 August 2019

Registration date: 29 November 2019

Goods:

Class 5 Food for infants; powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; powdered nutritional supplement drink mixes; dietary supplemental drinks; protein dietary supplements; protein powder (dietary supplement).

Class 29 Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating; protein milk; whey; milk-based protein drinks; vitamin-enriched milk.

Mark 7: 

Registration No. 00801362333

Filing date**:** 1 June 2016

Registration date: 26 January 2018

Goods:

Class 5 Food for infants; milk and powdered milk for infants; dietetic foods adapted for medical purposes; dietetic beverages adapted for medical purposes; nutritional supplements; protein dietary supplements.

Class 29 Milk powder; milk; butter; cheese; cream; yoghurt; milk beverages, milk predominating.

Class 30 Ice cream, frozen yoghurt; ices; frozen desserts.

4. Given their filing dates, the above marks are earlier trade marks in accordance with section 6 of the Act. As the opponent's marks have not completed their registration process more than 5 years before the application date of the contested mark, the marks are not subject to proof of use provisions contained in section 6A of the Act. The opponent can, therefore, rely on all the goods covered by its registrations.

5. The opponent claims that the marks are similar and the goods are identical or highly similar, with the result that there is a likelihood of confusion.

6. The applicant filed a counterstatement denying the grounds of opposition.

7. The applicant is represented by Lincoln IP and the opponent is represented by HGF Limited. Only the opponent filed evidence and submissions in lieu. This decision is taken after careful reading of all the papers filed by the parties.

Evidence

8. The opponent's evidence consists of the witness statement of Mr Jaron James McVicar dated 20 October 2022 together with 31 exhibits. Mr McVicar is the Chief Legal and Sustainability Officer & Company Secretary of The a2 Milk Company Limited (the opponent is the parent company within the a2Milk Company Group).

9. I will return to the evidence later in the decision.

10. Although the UK has left the EU, section 6(3)(a) of the European Union (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 Act relied upon 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.

11. Section 5(2)(b) of the Act reads as follows:

> "5(2) A trade mark shall not be registered if because –
>
> (a)… 5 (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."

Section 5(2)(b) - Case law

12. The following principles are gleaned from the judgments 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 C3/03, *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 the 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 greater 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 to mind the earlier mark, 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.

My approach

13. The opponent relies on seven earlier marks. I will first make an assessment based on the earlier mark a2 Milk as it is closer in terms of similarity with the contested mark.

Comparison of goods

14. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In *Canon*, the Court of Justice of the European Union ("CJEU") stated at paragraph 23 of its judgment:

> "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. In *Gérard Meric v OHIM*, the General Court held that 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 - and vice versa.[1]

16. The only goods covered by the applicant's mark is milk products in Class 29. The applicant's 'milk products' is a broad term and includes various types of milk products such as milk powder, milk beverages etc. covered by the opponent's goods. The competing goods are, therefore, identical under the *Meric* principle.

The average consumer and the nature of the purchasing act

17. I will proceed to determine who the average consumer is for the respective party's goods discussed above.

18. 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

[1] case T-133/05

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”.

19. The goods consist of everyday products, and the average consumer is a member of the general public. The goods are purchased with a reasonable degree of frequency from supermarkets, their online equivalents or convenience stores. The average consumer will see the mark on the products when they visit shops or check the products online. This means that visual considerations will dominate the selection process. I do not, however, rule out an aural aspect of the selection process. Consumer would likley be checking for skimmed, semi skimmed or full fat milk. Given that some milks can cause stomach issues, people are likely to be attentive to milk purchases for things like lactose free etc. These factors suggest that the average consumer will pay a medium degree of attention when selecting the goods.

Distinctive character of earlier mark

20. The distinctive character of the earlier mark must be considered. The more distinctive the mark is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). 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 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)."

21. Invented words usually have the highest degree of distinctive character, while words which are allusive of the goods have the lowest. Distinctiveness can also be enhanced through the use of the mark.

22. The applicant submits:

> "The common element A2 may be viewed by some members of the public as being descriptive. Members of the public with some knowledge of the dairy industry will understand that A2 refers to a type of beta casein protein present in cows' milk. In addition, the use of numbers is common on some types of milk, such as babies' milk where numbers such as 1 to 3 are used internationally to designate the stage (or age) of baby the particular milk is suitable for. For example, the use of the number 2 is often to indicate that the milk in question is specifically for babies aged between 6 and 12 months. In such a case the letter a may also be seen as an abbreviation of the word "age" or some other descriptive term. In both cases, the common element A2 is unlikely to be viewed as being particularly distinctive and in the case of the mark applied for it is the word COVAP that would likely have a stronger impact."[2]

[2] The applicant's counterstatement, paragraph 31.

23. The opponent's evidence, such as product label and marketing materials, indicate that a2 is a protein contained in milk and that the milk sold under the mark naturally contains a2 protein.[3] Those consumers who may have come across those descriptions on the opponent's own materials or are otherwise aware that a2 is a protein contained in milk will ascribe a descriptive meaning to the term. Where consumers perceive a descriptive meaning in the mark, it is the stylisation of the mark that bestows a certain degree of inherent distinctiveness and the level of inherent distinctiveness, in those circumstances, is low. For those consumers who do not know the meaning of a2 in relation to milk, the level of inherent distinctiveness is medium. The applicant has advanced an alternative argument that the a2 still has a descriptive connotation as consumers may see the letter 'a' as indicating the age and numeral 2 as the age group targeted. In the absence of evidence, it is difficult to draw an inference in favour of the applicant in respect to this submission. Nonetheless, even if I accept the applicant's argument, I do not think the position differs from what I have considered earlier.

24. The opponent has filed evidence and claims enhanced distinctiveness of its earlier mark. The opponent argues that the average consumer has been educated to recognise that any mark featuring the element 'a2' originates from the opponent.[4]

25. The opponent's evidence is that the opponent company was founded in New Zealand in 2000 and has been operating internationally. The company entered the UK market in 2011 through a venture with milk supplier Robert Wiseman Diaries.[5]

26. The opponent has provided evidence of use until 2019, the mark was used in relation to milk. The goods bearing the mark appear to have been offered for sale during 2015 – 2019 through supermarkets such as Tesco, Sainsbury's, Waitrose and their online equivalents.[6] The opponent has provided the annual

[3] Exhibit 9, page 5.
[4] The opponent's submission in lieu, paragraphs 29 and 30.
[5] Exhibit 5, page 27.
[6] Exhibit 6

revenue generated in the UK only for the period 2017 and 2018. The revenue generated was reported to be £8.027 million and £10.078 million, respectively.[7] However, the financial report also shows a total comprehensive loss of £1.376 million and £1.93 million, which exceeded a gross profit of approximately half a million and £1.12 million during that period. In this respect, I also note that the company's 2018 Annual Report refers to the UK as a 'challenging market to achieve scale'.[8] The report also mentions that the results of the volume of sales in 2017 and 2018 include a contribution from the sale of 'a2 Platinum' infant formula.[9] So it is not clear what proportion of the revenue is attributable to the sale of goods under the earlier mark a2 Milk or or presumbly under any of the other marks.

27. The opponent has not indicated the value of the UK milk market. I presume it to be measured in billions of pounds. It appears from the evidence the opponent's market presence, on the basis of its turnover, is small.

28. There is evidence of advertising and marketing of the marks. Mr McVicar states that the marketing expenditure in the UK per year during 2013-2018 was around £1 million.[10] The evidence of TV adverts is from 2012, 2013 and 2015.[11] However, it is not clear to me how many people in the UK must have come across those adverts. There are examples of newspaper and magazine adverts (for example, The Sun (2018), The Scottish Sun online (2018), Women's Health (2018)) and pages from publications (for example, Tesco, ASDA and Morrison's magazines). The opponent has also given the circulation figures of some of the newspapers and magazines to demonstrate the reach of the advert. However, most of the evidence is from 2017 and 2018. The awards and recognitions the opponent received are also in 2018.[12] Considered overall, I struggle to assess the extent of marketing efforts and how widespread the recognition of the mark was before or after those periods.

[7] Exhibit 2
[8] Exhibit 1
[9] *Ibid*
[10] Witness statement paragraph 47.
[11] Exhibits 11,12, 14 and 16
[12] Witness statement, paragraph 53.

29. Although there is evidence of the use of the mark from 2012 - 2019, the assessment I must make here is not for proof of use but of enhanced distinctive character and enhanced distinctiveness requires recognition of the mark by the relevant public. Overall, I am of the view that the evidence does not show extensive media coverage or intensive advertising for the period during which the use has been shown. Whilst 2018 turnover was higher than 2017's neither was sufficiently pursuasive. No turnover at all is evidenced for 2019 although there appears to be some marketing activity that year. I am, therefore, not convinced that the opponent has shown that the distinctiveness of the mark has been enhanced through its use.

Comparison of marks

30. 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 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."

31. It would be wrong, therefore, artificially to 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.

Earlier mark	Contested mark
	

32. The earlier mark consists of the words a2 and milk presented one above the other in a slightly stylised script. The words are presented in purple, with ‘a2’ appearing slightly larger than the word milk. Due to the size and positioning, ‘a2’ makes an important contribution to the overall impression of the mark. While the word 'milk' will contribute to the overall impression, its contribution is less due to its descriptive connotation in respect of goods for which the mark is registered. The colour is not negligible and also contributes to the overall impression of the mark.

33. The contested mark consists of the words COVAP in slightly stylised capital letters. Underneath that word is a cloud-shaped device followed by the words ‘a2’. COVAP and the device are in brown, while ‘a2’ is in blue. Given the size, colouring and presentation, the words and the device equally contribute to the overall impression of the mark.

34. In terms of visual similarity, both marks contain the word ‘a2’ and the letter ‘a’ is presented in small letters. Although there is a slight difference in the typeface of those words in the respective marks, I am of the view that those differences are likely to be overlooked by average consumers who do not conduct a microscopic analysis of the marks and who retains an imperfect picture of marks in mind. In terms of other differences, the words ‘milk’, ‘COVAP’ and the device element do not have counterparts in the respective marks. Notwithstanding the fact that ‘a2’ is presented in different colours, considering its contribution to the overall impression of the respective marks and the extent of visual similarity in the typeface, I find that the marks are visually similar to a degree that is between low and medium.

35. Aurally, the two words in the respective marks, namely 'a2 and milk' and 'COVAP and a2', will be pronounced conventionally. The device element in the

applicant's mark will go unpronounced. Given that both marks coincide in the pronunciation of the word 'a2', I find that the marks are aurally similar to a medium degree.

36. Conceptually, the word milk in the opponent's mark has a clear meaning to the average consumer. The opponent's mark conveys a clear conceptual message for consumers who know that a2 is a protein contained in milk. For the remaining group of consumers, the word 'a2' will not convey any conceptual meaning, and the only concept derived from the mark is from the word milk. In the contested mark, the word COVAP appears to be invented with no meaning. The device element is likely to evoke the concept of cloud. My analysis given above for the word 'a2' in the opponent mark applies equally to the contested mark. For those consumers who are aware of the milk protein a2, I find the marks are conceptually similar to a medium degree. The marks are conceptually dissimilar for those who do not know about a2 proteins.

Likelihood of confusion

37. In determining whether there is a likelihood of confusion, I need to bear in mind several factors. The first is the interdependency principle, i.e. a lesser degree of similarity between the respective goods may be offset by a greater degree of similarity between the trade marks (Canon at [17]). It is also necessary for me to bear in mind the distinctive character of the opponent's trade mark, as the more distinctive the trade mark is, the greater the likelihood of confusion (Sabel at [24]). I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks, relying instead upon the imperfect picture of them he has retained in his mind (Lloyd Schuhfabrik at [26]).

38. Confusion can be direct (which occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertaking being the same or related).

39. The difference between direct and indirect confusion was explained in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, by Iain Purvis Q.C., sitting as the Appointed Person, where he 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.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).
>
> (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)."

40. I bear in mind that the examples given in *L.A. Sugar* decision is not exhaustive and there could be other instances of likelihood of indirect confusion.

41. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*,[13] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria*,[14] where he said that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion." Arnold L.J. agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

42. I have found the respective marks to be visually similar to a degree that is between low and medium and aurally similar to a medium degree. I also found that there is a degree of conceptual similarity between the marks where knowledgeable consumers recognise the meaning of the word 'a2' in the respective marks. I also found that the marks are conceptually dissimilar where consumers do not recognise the meaning of the word a2 in relation to milk. The goods will be selected primarily by visual means, with a medium degree of attention by the general public The goods are identical. I also concluded that the distinctiveness of the shared component "a2" is either low or medium and the distinctiveness of the earlier mark has not been enhanced through the use.

43. The opponent submitted that the opponent's earlier marks represent a family of marks. In order to rely on a family of marks argument, the opponent must show that the earlier trade marks which are part of that 'family' must be present on the market.[15] Where there is a 'family' of trade marks, the likelihood of confusion

[13] [2021] EWCA Civ 1207
[14] (O/219/16)
[15] Il Ponte Finanziaria SpA v OHIM, Case C-234/06

results more specifically from the possibility that the consumer may erroneously think that that trade mark is part of that family of marks.[16]

44. For this proceeding, the opponent relies on seven earlier marks. There are some examples of the use of the mark  from 2016. Mr McVicar's states that the opponent's logos have changed over the years, and I infer it could be the reason for not including more examples of the use of that mark. The evidence also shows the use of the logos  and  . However, the opponent has relied upon the word only mark 'a2 PLATINUM', and the use of the logo containing the words 'a2 Platinum' is not sufficient to show the use of the word only mark[17]. Overall, the opponent's evidence, predominantly, shows use of the marks  and  and as such it does not demonstrate use of a sufficient number of trade marks capable of constituting a family.[18] I, therefore, dismiss the opponent's reliance on family of marks argument.

45. The applicant submits that the word COVAP is sufficient to distinguish its mark from the opponent's mark. There is an issue with the applicant's analysis as it would involve artificially dissecting the mark and arriving at a conclusion based only upon one element in the mark. In this context, I remind myself that I must not lose sight of the overall impression given by the combination of the various elements that constitute the mark. I agree that the word COVAP is a distinctive feature of the applicant's mark. It is prominent enough to dispel a likelihood of direct confusion. However, when assessing the mark as a whole, the word 'a2' also equally contributes to the overall impression of the mark. For those consumers who do not know the significance of a2 in respect of milk, the combination of a letter and numeral is likely to be seen as a slightly unusual

[16] Supra paragraph 63.
[17] Lactalis McLelland Limited v Arla Foods AMBA, BL O/265/22
[18] Il Ponte Finanziaria SpA v OHIM, Case C-234/06 paragraph 64.

combination. When faced with the opponent's goods, notwithstanding the presence of an invented word COVAP in the applicant's mark, the consumers are likely to take account of the common element 'a2' in the context of the later mark as a whole and conclude that it is another brand of the owner of the earlier mark used on milk. There is, therefore, a likelihood of indirect confusion.

46. I should make it clear that this group of consumers is, in my view, likely to constitute a sufficiently significant proportion of consumers to warrant intervention.[19]Confusion amongst this group of consumers will, therefore, suffice for the application to be refused.

47. The opponent is in no better position in relation to the rest of the earlier marks. The difference between the marks is more prominent, taking the visual, aural and conceptual differences further away from the assessment I have already undertaken. As the opponent has succeeded in respect of the earlier mark I have assessed, I do not consider it necessary to compare the rest of the earlier marks with the applicant's mark.

48. Since the opponent has succeeded in relation to the mark I have considered, the opposition succeeds under section 5(2)(b).

Conclusion

49. The opposition has been successful. The application is refused.

Costs

50. The opponent has been successful and is entitled to a contribution towards its costs. Awards of costs are governed by Tribunal Practice Notice ("TPN") 2/2016. I award costs to the opponent on the following basis:

Preparing a statement of case and Considering other side's statement:	£200

[19] See Cosmic Enterprises Ltd v Twentieth Century Fox Film Corporation [2016] EWCA Civ 41 at [34].

Filing evidence:	£300
Filing written submissions:	£300
Official fee:	£100
Total:	£800

51. I order Sociedad Cooperativa Andaluza Ganadera Del Valle De Los Pedroches, Covap to pay The A2 Milk Company Limited the sum of £900. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 19th July 2023

Karol Thomas
For the Registrar
The Comptroller-General