

O-092-10

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 2438609

BY RUARK DISTRIBUTION LIMITED

TO REGISTER IN CLASS 9 THE TRADE MARK:

VITA AUDIO

AND

IN THE MATTER OF OPPOSITION NO 96002 BY

MARPEFA S.L.

TRADE MARKS ACT 1994

In the matter of application no 2438609
by Ruark Distribution Limited
to register in class 9 the trade mark VITA AUDIO

and

In the matter of opposition no 96002 by Marpefa S.L.

Background

1. On 15 November 2006 Ruark Distribution Limited (“Ruark”) applied to register the trade mark VITA AUDIO in class 9 of the Nice classification system¹. Registration is sought in respect of:

Radios. Electrical and electronic audio equipment for recording, transmission and reproduction of sound.

2. On 3 January 2008 Marpefa S.L. (“Marpefa”) opposed the registration of Ruark’s trade mark. Its grounds of opposition are under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). It initially relied on four of its trade marks under this ground, but now relies on only two of them, both of which are Community Trade Marks (“CTMs”); the details of these two CTMs are set out below:

1) CTM 4261988 for the mark:



Its filing date is 28 January 2005. It completed its registration procedure on 19 April 2007. It is registered in respect of:

Class 09: Sound recording discs, audio system, loudspeaker housings, car audio systems, sound amplifiers, video tapes, exposed cinematographic films, magnetic tapes, compact discs, slides, photographic apparatus, computers, video display screens, apparatus for the reproduction of sound and images, television apparatus, record players.

Class 15: Musical instruments.

Class 35: Business management assistance relating to franchises

¹ International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

2) CTM 4394219 for the mark:

The logo for VIETA is rendered in a bold, black, sans-serif typeface. The letters are thick and blocky. The 'V' is particularly prominent, with a sharp, downward-pointing apex. The 'I' is a simple vertical bar. The 'E' is composed of three horizontal bars. The 'T' has a short horizontal top bar and a vertical stem. The 'A' is a simple, slightly rounded shape.

Its filing date is 13 May 2005. It completed its registration procedure on 4 May 2007. It is registered in respect of:

Class 09: Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), life-saving and teaching apparatus and instruments; apparatus for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin-operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus; telephones.

Class 12: Vehicles; vehicles for locomotion by air, land or water.

3. In relation to these two earlier trade marks, I note that they both completed their registration procedures only six and seven months, respectively, before the publication of the applied for trade mark². Consequently, the proof of use provisions contained in section 6A³ of the Act do not apply. The two earlier trade marks may, therefore, be taken into account in these proceedings for their specifications as registered.

4. Ruark filed a counterstatement denying the grounds of opposition. Ruark states that if the marks are similar (which it denies) such similarity would not lead to a likelihood of confusion. As proof that there is no likelihood of confusion, Ruark also highlights its use of its trade mark prior to application, with there being no instances of confusion.

5. Only Ruark filed evidence, I will come back to this shortly. The matter then came to be heard before me on 4 March 2010 at which Ruark were represented by Ms Amanda Michaels, of Counsel, instructed by Loven. Marpefa did not attend the hearing nor did it file written submissions in lieu of attendance.

² The applied for mark was published on 23 November 2007.

³ Section 6A of the Act was added to the Act by virtue of the Trade Marks (Proof of Use, etc.) Regulations) 2004 (SI 2004/946) which came into force on 5th May 2004.

Section 5(2)(b)

6. There is only one ground of opposition, namely section 5(2)(b). This section reads:

“5.-(2) A trade mark shall not be registered if because –

(a)

(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.”

7. In reaching my decision I have taken into account the guidance provided by the European Court of Justice (“ECJ”) in a number of judgments: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77, *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).

8. The existence of a likelihood of confusion must be appreciated globally, taking into account all relevant factors (*Sabel BV v Puma AG*). As well as assessing whether the respective marks and the respective goods are similar (and to what degree), other factors are relevant including:

The nature of the average consumer of the goods in question and the nature of his or her purchasing act. This is relevant because it is through such a person’s eyes that matters must be judged (*Sabel BV v Puma AG*);

That the average consumer rarely has the chance to make direct comparisons between trade marks and must, instead, rely upon the imperfect picture of them he or she has kept in mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*) This is often referred to as the concept of “imperfect recollection”;

That the degree of distinctiveness of the earlier trade mark (due either to its inherent qualities or through the use made of it) is an important factor because confusion is more likely the more distinctive the earlier trade mark is (*Sabel BV v Puma AG*);

That there is interdependency between the various factors, for example, a lesser degree of similarity between the marks may be offset by a greater

degree of similarity between the respective goods, and vice versa (*Canon Kabushiki Kaisha v Metro- Goldwyn-Mayer Inc*).

The average consumer and the purchasing act

9. As matters must be judged through the eyes of the average consumer, I will begin with an assessment of who this is. Whilst I will come back to Ruark's evidence in more detail, it demonstrates that its target consumer (at least in relation to its sales of loudspeakers) is at the higher/luxury end of the market. Its goods are high end products. This may be so, but such a fact is not reflected in its specification which relates simply to radios and other types of audio equipment. In any event, even if Ruark wished to do so, I doubt whether such a circumstance could be reflected in a specification as it would relate more to a characteristic of the goods or to the marketing of them. I can only assess the matter on a notional basis based on the specification put forward for registration. To that extent, the goods sought for registration are goods for which the public at large would be the average consumer. I did not understand Ms Michaels to dispute this, although, she did argue that the nature of the goods meant that the purchasing act would be a reasonably considered one. She argued that the purchase of audio equipment was not a casual purchase (such as buying a packet of biscuits), that the purchased goods are meant to last for while and, so, some thought and consideration will go into the process.

10. The case-law informs me that the average consumer is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). However, this general presumption can change (or at least the degree of attention that the average consumer displays during the purchasing act) depending on the particular goods in question (see, for example, the decision of the General Court⁴ ("GC") in *Inter-Ikea Systems BV v OHIM* (Case T-112/06)). This is a case in point. Radios and other types of audio equipment are not frequent purchases. Although their cost can vary significantly, they are not low cost casually purchased items. Issues of sound quality, aesthetics and reliability may be important. I believe that the degree of care and attention likely to be used by the average consumer will be slightly higher than the norm. I cannot, though, assess it at much more than that. It is not as though huge sums of money, on average, are being paid neither is it the most important of purchasing decisions the average consumer is likely to make.

11. In terms of how purchases are made, there is little in the evidence to guide me. The goods could be purchased through a website or a retail store (be it a general electrical store, a supermarket, a department store or a specialist hi-fi store). This could follow on from seeing advertisements (Ruark's evidence shows advertisements in print media), brochures or advertorials (Ruark's evidence shows some in hi-fi magazines and other publications). All of this suggests that the act is very much a visual purchase. However, not all purchases will be made

⁴ Previously known as the Court of First Instance of the European Communities.

by a click of a mouse or by simply picking up a product from a shelf. It is not uncommon, in my experience, for the purchase of electrical products to be undertaken with the assistance of a salesperson who may guide the purchaser towards a particular product. Here, aural issues may take on more significance. There are, therefore, a variety of considerations. Whilst visual impressions may be slightly more important overall, aural impressions are still important.

Comparison of the goods

12. Ruark seeks registration for the following goods:

Radios. Electrical and electronic audio equipment for recording, transmission and reproduction of sound.

13. The specification of Marpefa's CTM 4394219 includes the term "apparatus for recording, transmission or reproduction of sound". Ruark's radios would fall within the ambit of this term being something which transmits and reproduces sound. The second of Ruark's terms is worded in almost identical terminology (save that it limits the term to being electrical and electronic audio equipment) which clearly falls within the ambit of Marpefa's term. If a term falls within the ambit of another then identical goods are in play⁵. I have no hesitation in concluding that Ruark's goods are identical to Marpefa's to the extent set out above. I also note that Marpefa's CTM 4261988 also covers the term "audio systems" and I would find that identical goods are also in play in here.

14. In her skeleton argument, Ms Michaels also assessed the identity/similarity with other goods in Marpefa's specification. This was done because Marpefa claimed in its statement of case that goods beyond that set out above were also identical/similar. However, given my conclusion in the preceding paragraph it is not necessary to deal with this further.

Comparison of the marks

15. When assessing this factor I must do so with reference to the visual, aural and conceptual similarities between the respective marks bearing in mind their distinctive and dominant components (*Sabel BV v. Puma AG*, paragraph 23). Both earlier marks are the same, so I need only make one comparison. For ease of reference, the marks under comparison are set out below:

⁵ See *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)*(OHIM) Case T-133/05.

| Marpefa's mark | Ruark's mark |
|---|--|
|  |  |

16. As a basis for the comparison, I note that the parties are agreed that Marpefa's mark is the single (but stylised) word VIETA. I also note that the word AUDIO in Ruark's mark is entirely descriptive for the goods of interest to it. This makes the word VITA the dominant and distinctive element of the mark. Whilst this does not mean that I will perform anything other than a whole mark comparison, the comparison must still reflect, although not based solely upon⁶, the dominant and distinctive element.

17. In terms of visual similarity, Ms Michaels highlighted the key visual difference created by the striking visual appearance of Marpefa's mark. Highlighted were the unusual presentation of the letter E, the non-standard form of the final letter A (and its symmetry with the letter V at the beginning of the mark), and what she described as the "cinemascope" form of presentation of the mark as a whole. Ms Michaels compared this to Ruark's mark which has no presentation and which is made up of two words as opposed to one. Marpefa, on the other hand, highlight in its statement of case that the word VIETA and the dominant and distinctive word in Ruark's mark (VITA) have four letters in common and that they differ only in the additional letter E in its mark.

18. Whilst I accept that the VIETA mark has a more striking form of presentation (the VITA mark has none), it is still clearly legible as VIETA and it is still made up of five letters, four of which are the same, and in the same order, as the word VITA. Although Ruark's mark has the additional word AUDIO, the dominant and distinctive element is still the word VITA and this, therefore, creates a point of similarity. The presentation does have some form of impact, but not so much so as to outweigh, completely, any similarity. I come to the view, after weighing up the visual differences with the visual similarity, and bearing in mind the dominant and distinctive element, that the marks are similar to a reasonable degree.

19. In terms of aural similarity, Marpefa argues that its mark will be pronounced as "VEE-TA" or "VY-TA" and that the VITA element of VITA AUDIO will be pronounced in the same way. In view of this, it highlights that the only aural difference between the respective marks resides in the descriptive word AUDIO. For Ruark, Ms Michaels highlighted that Marpefa had filed no evidence to support its proposition with regards to pronunciation. Ms Michaels argued that the VIETA mark would be pronounced with three syllables (presumably as VI-E-TA or VEE-E-TA), in a similar way as words such as VI-EN-NA, VI-ET-NAM or VI-ER-A.

⁶ It is only permissible to undertake the comparison solely on the basis of the dominant and distinctive element if the other element is completely negligible in the mark's overall impression - *Shaker di L. Laudato & Co. Sas* (C-334/05).

This, she argued, produces a quite different sound to Ruark's mark which not only consists of two words, but also that the VITA element has only two syllables (rather than three), likely to be pronounced as VEE-TA or VY-TA⁷.

20. Neither side has provided evidence to support their contentions. I am left, therefore, to consider the different alternatives put forward. The parties are at least agreed that Ruark's VITA element will be pronounced as VEE-TA or VY-TA. In relation to VIETA, my initial pronunciation upon first reading the word was to pronounce it VY-TA, the letters VIE forming one syllable pronounced VY, or for sake of clarity "VIGH". I have considered Ms Michaels argument carefully. Whilst I do not regard the presentation (the separation of the letter E from the letters VI and TA) as having a significant impact on pronunciation, the alternative proposition she puts forward is not unreasonable and is supported with examples of similar words pronounced in similar ways. She has at least given some form of reason as to why the average consumer will pronounce the word in the way put forward. Whether the earlier mark is pronounced with two syllables or three is a finely balanced matter. However, on the basis of the arguments before me, I am prepared to accept that the proposition put forward by Ms Michaels is the more likely proposition, I will make the primary comparison on this basis.

21. On the basis that Marpefa's mark is pronounced as VIGH-E-TA or VEE-E-TA then, compared to VIGH-TA AUDIO or VEE-TA AUDIO, whilst there is a difference created in VIETA's additional syllable (when compared to the dominant and distinctive element of Ruark's mark) there is still some aural similarity created by the similar sounding beginnings and endings of this element. The additional word AUDIO creates a further point of difference, but, as observed earlier, this is not the dominant and distinctive element. I do not consider the differences to outweigh the similarities. My view is that the marks have a reasonable degree of aural similarity.

22. For sake of completeness, if I am wrong on my assessment that Marpefa's mark will be pronounced with three syllables and it will, instead, be pronounced as VIGH-TA or VEE-TA then, compared to VIGH-TA AUDIO or VEE-TA AUDIO, the only difference, as Marpefa highlights, resides in the non-distinctive element AUDIO. This would, inevitably, create a reasonably high degree of aural similarity notwithstanding the fact that there is a second word in Ruark's mark.

23. In terms of conceptual similarity, Marpefa states in its statement of case that both marks are invented words. If this is the case then I take this to be a claim that the marks are neither conceptually similar nor conceptually identical – they cannot be either if the marks have no concept underpinning them. Ruark do not dispute the lack of concept in relation to the VIETA mark, but in relation to its mark it argues that the word VITA is the Latin word for life (which it says some consumers will be aware of) and that, at the very least, the word will have a suggestive or allusive quality that raises a conceptual idea based on vitality or

⁷ Paragraph 18 of Ms Michaels skeleton argument.

being vital (as in lively or energetic). Ruark says that this ties in with the goods and also the word AUDIO in the mark, so creating a mark suggestive of audio equipment that gives a lively sound.

24. When assessing whether a mark has a conceptual meaning capable of immediate grasp⁸, I must be conscious to not accept too readily the degree of knowledge that an average consumer may or may not possess⁹. That being said, I also accept that a conceptual meaning may come from a suggestive or evocative reference¹⁰. I do not consider that the average consumer will know that the word VITA is the Latin for life. Some members of the general public will have a grasp of Latin, but this cannot be taken to account for the average consumer in question. In relation to the allusive quality of the word, and whilst the average consumer will be aware of the meaning of words such as VITALITY, I do not consider that the average consumer will approximate the word VITA in the same way. If asked to pause and consider the origins of the word in question then some consumers (although not all) may guess at this, but this would not equate to the immediate grasp that is important in considering conceptual meanings. The suggestive or evocative meaning is too subtle to endow the mark with a conceptual identity, there is doubt as to the degree of knowledge in any event. In view of this, my finding is that neither mark has a conceptual meaning for the purposes of mark comparison and, therefore, there is no counteraction to the degrees of visual and aural similarity that I have identified.

Distinctive character of the earlier trade mark

25. The distinctiveness of the earlier marks is another factor to consider because the more distinctive they are (based either on inherent qualities or because of the use made of them), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). The earlier marks both consist of the word VIETA in a particular form of presentation. The word VIETA, as stated earlier, has no meaning. Neither does it have a suggestive or evocative quality in relation to any goods or services, let alone the goods of interest here. This means that the mark must be assessed as having a reasonably high degree of distinctive character.

26. Marpefa has filed no evidence of use of its mark. Although Ruark state in its evidence that it has been used (the claim is made on the basis of confusion free concurrent trading activities), this does not enable me to assess whether any use that may have taken place will have resulted in the mark taking on an enhanced distinctive character. The mark is, though, reasonably high in distinctiveness as a result of its inherent qualities.

⁸ This is highlighted in numerous judgments of the GC and the ECJ including the case referred to by Ms Michaels, *Ruiz Picasso v OHIMi* [2006] e.c.r. –I-643; [2006] E.T.M.R. 29.

⁹ See, for example, the decision of Anna Carboni (sitting as the Appointed Person) in *Cherokee* BL-O-198-08.

¹⁰ See, for example, the decision of the GC in *Usinor SA v OHIM* (Case T-189/05).

Concurrent/parallel trading activities

27. Ruark claims to have been trading concurrently with Marpefa without confusion. This is said to prove that the marks themselves (once all the other factors are considered) are not similar enough to cause confusion. The evidence is given by Mr Alan O'Rourke, Ruark's Managing Director. The evidence mostly (my use of the word mostly will become apparent below) focuses on Ruark's use of its trade mark, or the VITA element of it. What is clear from the evidence is that Ruark produced a speaker system (initially in 1999) which was aimed at the higher/luxury end of the market. The first version was called the VITA 100. The product is fairly expensive, consistent with the fact that it is a high end product. Different versions followed later (VITA 120, VITA 50 & VITA 200). There is nothing to suggest that the other versions were aimed at a different part of the market. The products have won a number of awards and have been positively recommended and reviewed by hi-fi magazines such as *What Hi-Fi*. The products have also been exhibited in trade shows, Ms Michaels highlighted the trade show in Las Vegas called the Consumer Electronics Show. Other magazines have featured the product such as *T3*, *The British Audio Journal*, *What Video and TV*, *Home Entertainment*, *Essential Home Cinema*. All these publications have received the product very well.

28. In 2006 the VITA AUDIO name was introduced in relation to the sale of DAB radios. The exact date is not given, although I note that the launch was mentioned in an October 2006 press release which was embargoed until 13 November 2006. Mr O'Rourke says that these products have also featured in many prominent lifestyle and specialist audio magazines and newspapers. A number of examples are shown from publications such as *Stuff*, *the Telegraph*, *Esquire*, *HiFi World*, *HiFi choice*, *What Home Cinema*, *T3*, *The Sunday Times*, *The Guardian*, *Boys Toys*, *Home*, *Loaded*, *What Hifi* and *Smart Life*. The DAB radio appears to cost in the region of £160. The products, according to the reviews, are again well received both in terms of sound quality and in relation to its design characteristics. In terms of annual turnover for UK sales, this was £864,335 in 2006 (but this also included sales for a brand called TIVOLI, subsequent figures are for VITA only), £612,195 in 2007, £884,416 in 2008 and £573,510 in 2009 (up until July of that year).

29. The evidence is said to demonstrate that there has been no confusion in the marketplace despite the concurrent trading activities of Marpefa and Ruark. I emphasise the word concurrent because Marpefa have filed no evidence in the proceedings to explain what use, if any, it has been made of its mark. Without evidence of concurrent trade, i.e. evidence relating to the trade of both parties, the fact that Ruark may have used its mark is not relevant. Ms Michaels answered this point by highlighting what Mr O' Rourke said in his evidence about the concurrent trade. He stated:

“Our use of Vita and Vita Audio has been concurrent with that of Vieta and both of the Vita and Vieta brands have co-existed in the audio market for many years, indeed since 1999 and to the best of my knowledge neither brand has been confused with the other, both companies having carved out their own respective reputations with their respective brands.”

30. Ms Michaels highlighted that Mr O'Rourke's evidence had not been challenged by Marpefa. Whilst the tribunal should not disbelieve unchallenged evidential based statements of fact¹¹, I have some reluctance in accepting as a fact something which is nothing more than an assertion that the VIETA brand has been used concurrently with the VITA brand. Mr O'Rourke has provided no evidence of fact to support this assertion. If the VIETA brand had been used then it would have been a simple matter to have filed some evidence to support the assertion or to provide a more detailed explanation as to the trade of Marpefa under the VIETA sign. That being said, there is a more fundamental problem. That is, whilst evidence of parallel or concurrent trade could, potentially, assist in deciding whether there exists a likelihood of confusion, because it could establish that the respective marks have actually been put to use in the same market with the consumer not being confused and so inform the tribunal as to the likelihood of confusion, the case-law is cautious, and rightly so, about this approach. Although Alan Steinfield QC, sitting as a deputy judge of the High Court, in *Fiorelli Trade Mark* [2007] RPC 18 gave weight to an absence of confusion in the marketplace, this is tempered by a number of judgments which express caution about the circumstances in which it is appropriate to give these factors weight (see the Court of Appeal in *The European Ltd v. The Economist Newspaper Ltd* [1998] FSR 283 at page 291, Laddie J in *Compass Publishing BV v. Compass Logistics Ltd* [2004] RPC 41 at 809 and the Court of Appeal in *Phones 4U Ltd v. Phone 4u. co. Uk Internet Ltd* [2007] RPC 5 at paragraphs 42 to 45.) In the first of the above cases Millet LJ stated:

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

31. I have no idea as to the characteristics of Marpefa's trade. There could be a whole tranche of characteristics that could, potentially, contribute to assisting the distinguishing process in terms of any trade thus far. Marpefa could be targeting the lower end of the market, its use could be accompanied by other signs, its use may be so small so as to limit the potential for any confusion to arise, its use may be in relation to a particular product which is only similar to loudspeakers/radios as opposed to the identical goods I am considering here. Any one of these characteristics, or a combination of them, may have averted confusion, but these distinguishing characteristics may not be present in the notional assessment of the marks and the goods which I must ultimately decide upon.

¹¹ See, for example, the decision of Mr Richard Arnold QC (sitting as the Appointed Person) in *Extreme* [2008] RPC 24.

32. Ms Michaels argued that any use by Marpefa would have led to a potential for confusion (if confusion was likely) given that Ruark's use is, she argued, a broad one which includes coverage in a variety of magazines and newspapers (not just hi-fi magazines), that its use in relation to DAB radios is not aimed at the luxury end of the market but at a more general level and that its use has a wide geographical spread. Whilst I accept that the DAB radios are not targeted as highly as the speaker systems, they are certainly not what one would describe as the budget end of the market. They are highlighted for their stylishness as well as their sound quality. In any event, I do not agree that any trade by Marpefa, taken against the context of Ruark's trade, is bound to have created the potential for confusion. The simple answer to all this is that I am not able to make an informed decision on whether the lack of confusion is down to the marks not being similar enough (when all the other factors relating to confusion are factored in) or whether it is down to the circumstances and characteristics of the different companies trade. All things considered, I place no weight on the evidence of confusion free concurrent trade.

Likelihood of confusion

33. It is clear that the relevant factors have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17) and that a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

34. The goods are identical and the earlier mark has a reasonably high degree of distinctive character. I have found the most likely pronunciation of the earlier marks to be in three syllables, but have still found that the marks are reasonably similar from a visual and aural perspective and that there is no real conceptual difference to counteract this similarity. It is not, therefore as though the identity between the goods is off-set by only a low degree of similarity between the marks. The factors assessed so far point more towards confusion than away from it. I must also consider the concept of imperfect recollection which, applied to the circumstances here, heightens the likelihood of confusion. The one possible mitigation to all of this is the slightly higher degree of care and attention that may be used at the point of purchase. However, this should not be overplayed (I only found a slightly higher degree of care and attention) and my finding is that **the factors would combine to create a likelihood of confusion**. If the earlier mark were pronounced in two syllables then Ruark is in a worse position (its mark would be even closer, aurally, to Marpefa's mark) so I need say no more in relation to that. **Marpefa's opposition to Ruark's application succeeds.**

Costs

35. Marpefa has been successful and is entitled to a contribution towards its costs. I hereby order Ruark Distribution Limited to pay Marpefa S.L. the sum of £800. This sum is calculated as follows:

Preparing a statement and considering the other side's statement
£400

Considering Ruark's evidence
£200

Expenses (opposition fee)
£200

36. The above sum should 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 15 day of March 2010

**Oliver Morris
For the Registrar
The Comptroller-General**