O/1105/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO UK00003788949
BY EVERYBODIES LTD
TO REGISTER

Everybodies

AS TRADE MARKS IN CLASSES 5, 30 & 32
AND

AND IN THE MATTER OF OPPOSITION THERETO
UNDER NO 436168
BY EVERYBODY WATER LLC

BACKGROUND AND PLEADINGS

1. Everybodies Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK on 17 May 2022. The application was accepted and published in the Trade Marks Journal on 10 June 2022 in respect of the following goods:

> **Class 5**: *Dietary supplements and dietetic preparations; nutritional supplements; health food supplements made principally of vitamins; protein powder dietary supplements.*
>
> **Class 30**: *Confectionary snack bars; confectionary protein bars.*
>
> **Class 32**: *Sports drinks.*

2. On 12 September 2022, Everybody Water LLC ("the opponent") filed a notice of opposition on the basis of section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed at the applicant's mark in its entirety. The opponent relies on the following trade mark:

UK Registration no. UK00003384113[1]
Filing date 9 August 2018; date of entry in register 14 June 2019.
Relying on the following goods:
("the opponent's mark")

[1] The opponent's mark was converted from a European Union trade mark to a UK national trade mark. The mark of which the UK mark originates is 017940956. It was filed 9 August 2018.

Class 5: *Dietetic food and substances adapted for medical use; dietary supplements and dietetic preparations; mineral waters for medical purposes; enhanced water, namely, mineral, vitamin, or nutritionally enhanced water for medical purposes; mineral water salts; vitamin and mineral supplements; vitamin and mineral preparations.*

Class 32: *Mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages; waters; non-alcoholic beverages, namely, drinking water, bottled water, flavoured waters, sparkling water, carbonated waters, flavoured carbonated waters, mineral waters, and artesian waters packaged in paperboard boxes; syrups for making mineral waters; essences for making flavoured mineral water [not in the nature of essential oils]; water-based beverages containing tea extracts; vitamin enriched sparkling water; preparations for making aerated water.*

3. The opponent submits that there is a likelihood of confusion because the applicant's mark is similar to its own mark and the respective goods are identical. The applicant filed a defence and counterstatement denying the claims made.

4. The applicant is represented by Lawdit Solicitors Limited; the opponent is represented by Mr Michael Deans. Both parties filed evidence in chief. A hearing was requested and took place before me on 3 October 2023. The applicant did not attend the hearing but filed submissions in lieu of a hearing. Mr Deans attended on behalf of the opponent.

5. 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 on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

EVIDENCE

6. The opponent filed evidence in the form of the witness statement of Mr Michael John Percy Deans dated 3 January 2023 which is accompanied by 6 exhibits. Mr Deans is a Chartered Trade Mark Attorney and the representative of the opponent.

7. The applicant filed evidence in the form of the witness statement of Evren Ozkarakasli dated 29 March 2023 which is accompanied by 1 exhibit. Mr Ozkarakasli is a Director of the applicant, and his evidence addresses population statistics and estimates concerning Farnham. The purpose of this evidence is to support the applicant's criticisms that the opponent's evidence is not a full representation of the UK market because it was collated in Farnham.

8. I do not intend to summarise the parties' evidence or submissions in full at this stage. However, I have taken them all into consideration in reaching my decision and will refer to them below, where necessary.

Section 5(2)(b): legislation and case law

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

> "(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 or association with the earlier trade mark."

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

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

11. Given its filing date, the opponent's mark qualifies as an earlier trade mark pursuant to section 6 of the Trade Marks Act. The opponent's registration did not complete its registration process more than five years before the application date of the applicant's mark. The condition of use, therefore, does not apply to the registration. Therefore, the opponent can rely on all the goods in its registration.

12. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impression 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.

THE COMPARISON OF THE GOODS

13. The goods to be compared are as follows:

The applicant's goods	**The opponent's goods**
Class 5 *Dietary supplements and dietetic preparations; Nutritional supplements; Health food supplements made principally of vitamins; Protein powder dietary supplements.*	Class 5 *Dietetic food and substances adapted for medical use; dietary supplements and dietetic preparations; mineral waters for medical purposes; enhanced water, namely, mineral, vitamin, or nutritionally*

Class 30 *Confectionary snack bars; confectionary protein bars.* Class 32 *Sports drinks.*	*enhanced water for medical purposes; mineral water salts; vitamin and mineral supplements; vitamin and mineral preparations.* Class 32 *Mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages; waters; non-alcoholic beverages, namely, drinking water, bottled water, flavoured waters, sparkling water, carbonated waters, flavoured carbonated waters, mineral waters, and artesian waters packaged in paperboard boxes; syrups for making mineral waters; essences for making flavoured mineral water [not in the nature of essential oils]; water-based beverages containing tea extracts; vitamin enriched sparkling water; preparations for making aerated water.*

14. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon,* Case C-39/97, the court stated at paragraph 23 that:

> "In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be

taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary."

15. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

16. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (GC) stated that "complementary" means:

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

Class 5

17. *"Dietary supplements and dietetic preparations"* appear in both parties' specifications, and therefore, are self-evidently identical.

18. *"Nutritional supplements"* in the applicant's specification, although worded differently, are identical to *"dietary supplements and dietetic preparations"* in the opponent's specification.

19. "Health food supplements made principally of vitamins" in the applicant's specification is encompassed by the opponent's broader term *"dietetic foods and substances adapted for medical use"* in the opponent's specification. Therefore, these goods are identical according to the principle outlined in *Meric.*

20. I note the opponent's submissions in both the hearing and statement of case that *"protein powder dietary supplements"* in the applicant's specification is identical or highly similar to *"dietetic food substances adapted for medical use"* in the opponent's specification. Whilst I recognise the similarity between those goods, I consider that the better comparator with the applicant's goods is *"dietary supplements and preparations"* in the opponent's specification. I am of the view that the applicant's goods fall within the opponent's goods. Therefore, I consider the goods to be identical on the principle outlined in *Meric.*

Class 30

21. In considering the similarity between the opponent's goods and the applicant's goods in class 30, I note that the opponent's goods do not include any protection for goods in class 30. However, I note that the opponent's mark covers "*dietary supplements and dietetic preparations"* in class 5 which would include, for example, protein supplements. Whilst the goods belong to different classes this does not mean that they are dissimilar.[2]

22. I note that "*confectionary snack bars"* and *"confectionary protein bars"* in the applicant's specification are confectionary products. I consider that *"confectionary*

[2] Section 60A of the Trade Marks Act 1994

snack bars" in the applicant's specification can include snack/protein bars which have a higher protein content. The opponent submitted that as confectionary products are sold with specific characteristics such as being *"high in protein"*[3] they are goods that are designed to meet specific dietary or medical aims. Consequently, the opponent submits that they can be included in the wider category of *"dietetic food for medical use"* or *"[…] dietetic preparations"* in the opponent's specification.

23. Alongside copies of both parties' marks, the opponent has provided evidence of a receipt for goods purchased at Farnham Waitrose on 29 November 2022 and images of the packaging for confectionary and sports drinks products – which the opponent states are those goods listed in the receipt. I note that the applicant has criticised the opponent's evidence on the basis that it is of a limited geographical area, which fails '*to provide a fair or true representation of the UK market'*. In addition, the applicant submits that the opponent's images and wording of select products '*does not provide a true representation as to the workings of sales channels and the average consumer's evaluation of the product's function, is vague and unconvincing'*.[4] Whilst I agree that the opponent's evidence is from a limited geographical area, I note that the evidence,[5] especially in relation to what can be purchased at the national chain stores[6] and the content/blurb relating to the products[7] presented in evidence aligns with my personal knowledge and understanding.

24. Whilst I am conscious not to assume that my own knowledge is more widespread than it is, I do not consider it to be an issue of dispute to take it on judicial notice that the average consumer will be aware that a range of national stores stock the same or similar products as evidenced by the opponent in exhibit 4, of a confectionary snack bar. Further, the evidence supports my view that that there is a demand for high protein products, which has in a way blurred the line between dietary supplements, such as protein supplements, and high protein snack foods. In

[3] Exhibit MJPD4 is an image of a package of a confectionary protein bar. The blurb on the packaging makes reference to the product being *"high in protein"* and states that the goods *"contributes to maintenance of muscle mass and bones".*
[4] Witness Statement of Evren Ozkarakasli, paragraph 8
[5] In particular, exhibits MJPD3-6
[6] Exhibit MJDP3
[7] Ehibit MJDP4-6

turn, I consider that consumers may make a choice between the parties' goods, resulting in a level of competition between the goods, as a user may wish to obtain their own supplements in a pill or powder form and may not opt for a snack instead, or vice versa. Nor do I consider it to be an issue of dispute that there are goods marketed with specific dietary/nutritional benefits which are available as snacks. [8] As a result, I consider that the goods overlap in trade channels. I also consider that the goods may be produced by the same manufacturer, and they are likely to be found near each other in stores and the same sections of online retailers.

25. Further, I do not consider that the applicant's goods are the same as the opponent's goods. However, there is a level of similarity between them. I consider that the goods will share the same user and purpose in that they will be used by the same consumers with the aim of introducing nutrients into the body. I consider that the nature and method of use of the goods may differ, and I do not consider the goods to be complementary, in that I do not consider the goods to be important/indispensable to one another. Overall, I consider that these goods are similar to a medium degree.

Class 32

26. I note the opponent's submissions in the hearing that *"sports drinks"* in the applicant's specification and "*mineral waters for medical purposes", "enhanced water, namely, mineral, vitamin, or nutritionally enhanced water for medical purposes", "mineral water salts", "vitamin and mineral supplements",* and *"vitamin and mineral preparations"* in class 5 of the opponent's specification are either identical or highly similar. Whilst the similarity between these goods is noted, I consider that the better comparator with the goods is *"non-alcoholic drinks"* in the opponent's specification. I consider that the applicant's goods are encompassed by the broader term *"non-alcoholic drinks"* in the opponent's specification in class 32. This is on the basis that the term includes non-alcoholic drinks of all kinds, including the applicant's sports drinks. Therefore, I consider the goods to be identical on the principle outlined in *Meric.*

THE AVERAGE CONSUMER AND THE PURCHASING PROCESS

[8] *Chorkee Ltd v Cherokee Inc.,* Case BL O/048/08

27. 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 the goods are likely to be selected by the average consumer. 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. (as he then was) described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

28. In the hearing, Mr Deans submitted that the purchasing process of the goods at issue will be a combination of both aural and visual considerations. Further, Mr Deans submitted that the consumer would select goods from store shelves; although in the context of purchasing some of the goods, advice may be sought as to where the goods are located and they may be requested over the counter in stores such as pharmacies. In addition, Mr Deans submitted that the frequency and cost of the goods will vary depending on the goods purchased.

29. I consider that the average consumer of the goods at issue is the general public. I agree with the opponent that the goods are likely to be self-selected from the shelves of a retail outlet and consider this will also be the case in relation to their online equivalent. Consequently, I consider that visual considerations are likely to dominate the purchasing process. However, I do not discount aural considerations, as it is possible that the purchasing of these goods would involve discussions with sales representatives or word of mouth recommendations. Therefore, I agree that aural considerations will also play a role.

30. I consider that the goods are relatively low in price and frequently purchased. I am of the view that when considering the goods, the average consumer will bear in mind factors such as dietary requirements, taste, cost and lifestyle. Taking all of the above into account, I consider that the degree of attention for the goods at issue will be no more than medium.

COMPARISON OF THE MARKS

31. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, Bimbo SA v OHIM, that:

> ".....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

32. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

33. The respective marks are shown below:

Applicant's mark	**Opponent's mark**

Everybodies	

34. In the hearing, Mr Deans submitted that the distinguishing and dominating part of the opponent's mark is the word 'Everybody'. It was submitted that the word water is '*somewhat incongruous', 'does not seem to serve any useful purpose'* and *'is somewhat descriptive of the goods'*. The opponent's mark consists of the word 'everybody' in slightly stylised blue text. This appears above the word 'WATER.' which appears capitalised in standard blue font. This is presented on a cream background. Due to its positioning and size, I agree with the opponent that the dominant element of the mark is the word 'everybody'.

35. Contrary to the opponent's submissions, I do not consider that the text 'WATER.' does not seem to serve any useful purposes, however, I am of the view that it plays a lesser role. I also consider that the stylisation, colour blue and cream background play lesser roles. I will address the potential descriptive nature of the word 'WATER' below when considering the conceptual comparison between the marks in the decision.

36. The applicant's mark comprises of the word 'Everybodies' and therefore the overall impression lies in the entirety of the word.

37. Visually, the marks overlap in the extent that each mark begins with the identical first eight letters 'EVERYBOD/Everybod'. However, the endings of the marks differ; the letters 'ies' in the applicant's mark, and the text 'y WATER.' in the opponent's mark. I note that the stylisation and the colour of the opponent's mark are also points of difference. I recognise that the majority of these differences, I have found to play a lesser role in the overall impression of the marks. Taking all the above into account, I consider the marks to be visually similar to a medium to high degree.

38. In the hearing, Mr Deans submitted that aurally, the marks are almost indistinguishable. He submitted that this is on the basis that if one pronounces the word 'Everybodies' the 'S' at the end of the mark is lost in pronunciation, therefore the words will sound exactly the same. Further, Mr Deans submitted that the marks are '*not identical but they are as close as you can get to being identical whilst being similar'.* Contrary to this, in its submissions, the applicant submits that the beginning of the marks share the word 'every' and the remainder of the marks will be viewed as being distinct. Consequently, the applicant submits that the similar elements are unlikely to be seen as a significant factor. I am of the view that the applicant's submissions about parts of the marks being distinct and the other parts not, is suggestive of breaking down the marks. In the analysis of the marks, I must note that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; therefore, the applicant's approach to the marks cannot be applied in these circumstances.

39. Aurally, the opponent's mark will be pronounced EV-RI-BOD-EE WAR-TER. I am not of the view that the full stop will be pronounced and the stylisation of the first word will not be pronounced. I consider that the applicant's mark will be pronounced as EV-RI-BOD-EES. The marks will coincide in the pronunciation of 'EV-RI-BOD-EE' and will differ in the pronunciation of the 'S' at the end of the applicant's mark and 'WAR-TER' in the opponent's mark. Taking the above into account, I consider that the marks are aurally similar to a medium to high degree.

40. Conceptually, Mr Deans submitted in the hearing that as the applicant's mark is the plural of the dominant word in the opponent's mark, the marks are conceptually very similar. I agree that the word 'Everybodies' in the applicant's mark is the plural form of the word 'Everybody', which appears in the opponent's mark; which means *'every person; everyone'*.[9] The fact that one word is in a singular form and the other is in a plural form does not alter the fact that the words in the marks convey the same concept, namely that of the same pronoun in a singular and plural form respectively. However, the opponent's mark differs conceptually in the presence of the word 'Water.'. Whilst I recognise that this will be descriptive/allusive for some of the goods

[9] https://www.collinsdictionary.com/dictionary/english/everybody accessed 13/11/2023

at issue and that I have found the word ‘water’ to play a lesser role in the overall impression of the mark, I am of the view that it introduces some very slight points of conceptual difference. Consequently, I find that the marks are conceptually similar to a medium to high degree.

DISTINCTIVE CHARACTER OF EARLIER MARK

41. 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 C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see Windsurfing Chiemsee, paragraph 51).”

42. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark

can be enhanced by virtue of the use made of it. The opponent makes no claim to enhanced distinctiveness through the use made of the earlier mark, therefore I only have the inherent distinctiveness of the mark to consider.

43. The opponent makes no claim for enhanced distinctiveness through use made of the earlier mark, therefore, I only have the inherent distinctiveness of the mark to consider.

44. The opponent's mark consists of the word 'everybody' in slightly stylised blue text which appears above the word 'WATER.'; this appears capitalised in standard blue font. I note that in the hearing, Mr Deans submitted that the opponent's mark had an average degree of distinctive character. Whilst the 'everybody' element is not directly descriptive of the goods; I consider that the opponent's mark might be understood as alluding to the fact that the goods are suitable for everyone. That said, the 'WATER.' element of the mark is descriptive/allusive for most of the goods. Taking into consideration that it must be assumed to have a minimum degree of distinctiveness,[10] and all the above, in my view, the marks' inherent distinctiveness varies from a medium degree (for those goods that water is not allusive/descriptive) and a low to medium degree (for those goods that water is allusive/descriptive).

LIKELIHOOD OF CONFUSION

45. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 or vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade

[10] *Formula One Licensing BV v OHIM,* Case C-196/11P

mark, the average consumer of the goods and the nature of the purchasing process. In doing so, I must be mindful of the fact 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 that he has retained in his mind.

46. I have found the marks to be visually, aurally and conceptually similar to a medium to high degree. I have found the degree of inherent distinctiveness of the earlier mark to vary between low to medium (for those goods for which 'Water' is descriptive/allusive) to medium (for goods for which 'water' is not descriptive/allusive). I have found the average consumer to be members of the general public. I have found that the purchasing process will be visual, although I do not discount aural considerations. I have found that the degree of attention paid during the purchasing process for the goods will be no more than medium. I have found the goods to vary in similarity from identical to similar to a medium degree.

47. While I note that the parties' marks present some differences, namely in the presence/absence of 'ies', 'Y water.', stylisation and colour in the marks respectively, I consider that the differences between the marks are insufficient to avoid confusion, even when the principle of imperfect recollection is considered. I consider that the marks are likely to be mistakenly recalled or misremembered for one another. I consider this to be the case, particularly taking into consideration the medium to high degree of visual, aural and conceptual similarity between the marks. I am of the view that the average consumer will overlook or misremember the differences between the marks. This is particularly the case given the marks share the first letters 'EVERYBOD' at the beginning of the marks where the average consumer tends to focus its attention.[11] In the present circumstances, the focus will be aimed towards the beginning of the marks, which are identical. Given that consumers rarely have a chance to compare marks side-by-side, I am satisfied that the marks will be imperfectly recalled when identical goods are involved. I consider that this applies to the goods for which 'WATER' is not purely descriptive, as I consider that given its size and positioning, I consider that this element will be overlooked. I consider that there are sufficient similarities between the marks for the consumers to directly confuse them

[11] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

and mistake one for the other. Notwithstanding the fact that I have found the opponent's mark for some goods to be inherently distinctive to a low to medium degree, I bear in mind that this does not preclude a finding of likelihood of confusion.[12] Consequently, it is my view that the marks are likely to be mistakenly recalled or misremembered for one another. This finding also applies to the goods that I have found to be similar to a medium degree.

CONCLUSION

48. The opposition succeeds. The application is refused.

COSTS

49. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the opponent the sum of £1500 as a contribution towards the costs of the proceedings. I have made the costs award factoring in that the opponent filed two oppositions. The sum is calculated as follows:

Preparing a notice of opposition and considering the counterstatement	£200
Preparing evidence and considering the applicant's evidence	£500
Preparing for and attending a hearing	£500
Considering the applicant's submissions in lieu	£200
Official fees	£100
Total	**£1500**

50. I therefore order Everybodies Ltd to pay. Everybody Water LLC the sum of £1500. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 21st day of November 2023

[12] *L'Oréal SA v OHIM*, Case C-235/05

A KLASS

For the Registrar

For the Comptroller-General