

O-187-10

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION No. 2375664  
BY THE BLUE ANCHOR BREWING COMPANY LIMITED  
TO REGISTER A SERIES OF THREE TRADE MARKS  
IN CLASS 32**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER No. 94498  
BY ANCHOR BREWING COMPANY**

## BACKGROUND

1) On 13 October 2004 The Blue Anchor Brewing Company Ltd filed an application to register the following series of three trade marks:



2) Following examination, the trade marks were accepted and published for opposition purposes on 21 April 2006 in Trade Marks Journal No.6629 for the following goods in class 32: “Beers and Ales”. It was accepted by Consent with Trade Mark No. 1154307.

3) On 21 July 2006 a notice of opposition was filed. The opponent is the registered proprietor of the following trade marks:

Trade Mark	Number	Application date & date of registration	Class	Specification
Anchor Steam  By consent 1305077 and 1305078	1311816	02.06.87 / 08.11.96	32	Beer, ale, porter, malt beverages; all included in Class 32.
ANCHOR STEAM BEER  Proceeding because of prior rights in Registration No. 1311816	2113407	21.10.96 / 27.06.97	32	Beer.
ANCHOR STEAM	CTM 404459	08.11.96 / 19.11.03	32	Beer; ale; porter; malt beverages.
ANCHOR WHEAT BEER    Proceeding because of prior rights in Registration No. 1311816	2122910	06.02.97 / 12.09.97  Expired	32	Beer; ale; malt beverages.

<p>ANCHOR</p>  <p>PORTER</p>	2122912	06.02.97 / 26.09.97	32	Beer; porter; malt beverages.
<p>ANCHOR</p>  <p>PORTER</p>	CTM 451948	06.02.97 / 18.05.99	32	Beer: Porter; malt beverages.
 <p>Proceeding because of prior rights in Registration No. 1311816</p>	2069943	26.04.96 / 30.05.97	32	Beer, ale, porter and other malt beverages; all included in Class 32.
	CTM 404418	08.11.96 / 18.05.99	32	Beer; ale; porter; malt beverages.
<p>ANCHOR STEAM BEER</p>	CTM 405936	08.11.96 / 03.05.02	32	Beer; ale; porter; malt beverages.
	CTM 371468	11.11.96 / 14.10.98  Expired	32	Beer; Wheat beer.
	CTM 393603	11.11.96 / 21.01.04	32	Beer; Porter; malt beverages.

4) The opponent states that the marks and goods of the two parties are similar and so the application in suit offends against Section 5(2)(b). Also the opponent claims reputation in the marks “ANCHOR” and “ANCHOR BREWING” with regard to “beers, ales, porter and malt

beverages; glasses and drinking receptacles; beer mats” and states that the marks in suit offend against Section 5(4)(a).

5) On 27 July 2007 the applicant filed a counterstatement which consists of a denial of the grounds on which the opposition is based. I also note that they also put the opponent to strict proof of use.

6) Both parties filed evidence in these proceedings. The matter came to be heard on 17 May 2010. At the hearing, the opponent was represented by Mr Aiken of Messrs Rouse & Co. International; the applicant was represented by Mr Mooneapillay of Waterlow Legal and Company Services.

### **OPPONENT’S EVIDENCE**

7) This consists of two witness statements. The first, dated 1 March 2008, is by Linda Rowe the Office Manager of Anchor Brewing Company, San Francisco, USA, a position she has held for twenty-one years. She states that between 1988 and 16 October 2007 her company sold US\$875,711 worth of product in the UK. She states that the opponent does not advertise its product but does provide point of sale and souvenir materials, and that US\$15,000 worth of table tents, coasters, signs, t-shirts and glass ware was provided to buyers. At exhibit A she provides a detailed yearly breakdown of sales as follows:

Year	Sales US\$
2001	49,810
2002	51,147
2003	50,610
2004	70,356
2005	53,733
2006	90,086
2007	91,588

8) At exhibit B Ms Rowe provides copies of 92 invoices which cover the period 1988 – 2007. They relate to sales of Anchor Steam Beer, Liberty Ale, Anchor Wheat Beer, Anchor Porter, Our Special Ale, Old Foghorn Ale, Old Poterro, Junipero Gin and Anchor Summer Beer. Only twenty are within the relevant period for proof of use. At the top of each invoice are the words “Anchor Brewing Co.” and also the logo mark UK 2069943 which is identical to CTM 404418. At the bottom of each invoice is a depiction of six bottles and a wine glass. It is just possible to see that the bottles have labels which could include CTM 393603, CTM371468 and UK 2069943/CTM 404418. It is not clear what marks are on the other three bottles as even comparing them directly with the marks at paragraph 3 above I could not match them. These twenty invoices show sales as listed in the table below. There is no indication as to whether the figures shown on the invoices are in US\$ or UK£. I assume that as the invoices are generated in the USA that the invoice amounts are in US\$. This was confirmed by the agent at the hearing. I note that there are no figures for VAT which you would expect if these were in UK£.

Date	Anchor Steam Beer	Anchor Porter	Anchor Wheat	Liberty Ale/ Old Foghorn/ Anchor Small Beer/Our Special Ale/ Anchor Summer Beer
27.04.01	3751.68 6384.00			703.44 5586.00
28.09.01	11970.00	1596.00	67.05	2394.00 142.10 1341.00
21.12.01	3908.00 3192.00	78.16 798,00		781.60 7182.00 568.00 77.50
25.04.02	2344.80 4788.00 355.80	195.40 798.00		1875.84 5586.00 1136.80
07.10.02	1563.20 7980.00			390.80 7182.00
22.10.02	10108.00	1596.00		6384.00 310.00
28.01.03	816.86 13272.00	758.40		371.30 1516.80 540.00
15.04.03				8848.00 7584.00
21.08.03	9859.20	2275.20		5308.80
21.01.04	8342.40 4400.00			4171.20 1100.00
08.04.04	11502.40	1516.80		4424.00
16.07.04	7584.00 1650.00	758.40		7584.00
15.09.04	13398.40 1650.00			2275.20
02.02.05	9859.20	2275.20		1516.80
02.02.05	4400.00			
28.04.05	13651.20 1512.50			1820.10 825.00
15.07.05	12134.40 2200.00	884.00		2654.40
06.01.06	11502.40 1375.00	1769.60		2654.40 275.00
07.03.06	10617.60 3300.00	884.00		2907.20 550.00
TOTAL	199,373.04	16,183.16	67.05	98,567.28

9) The second witness statement, dated 20 November 2007, is by Edward Anthony Hardcastle the opponent's Trade Mark Attorney. He provides the following exhibits:

- EAH-1: Copies of print-outs from the IPO and OHIM showing that the opponent does own the registrations relied upon.
- EAH-2: Mr Hardcastle notes that his client needs to provide proof of use of the following marks: 1311816, 2122912, 2113407, 2069943 and CTM's 451948 & 404418. He provides copies of invoices, during the period 21 April 2001 to 21 April 2006. These are duplicates of some of those filed under the witness statement of Ms Rowe. The invoices show the following names "Anchor Steam Beer", "Anchor Porter" and "Liberty Ale". At the top of each invoice are the words "Anchor Brewing Co." and also the logo mark UK2069943/CTM 404418. At the bottom of each invoice is a depiction of six bottles and a wine glass. It is just possible to see that the bottles have labels which could include CTM 393603, CTM371468 and UK 2069943/CTM 404418.
- EAH-3: Internet printouts showing a review of ANCHOR STEAM BEER from 13 June 2001 from the [www.doyoo.co.uk](http://www.doyoo.co.uk) website. This shows use of UK 2069943/CTM 404418.
- EAH-4: Printouts showing reviews of ANCHOR STEAM BEER complete with logo mark (UK 2069943/CTM 404418). The other reviews for ANCHOR PORTER, Anchor Old Foghorn, Anchor Brewery Liberty Ale, Anchor Brewery Our Special Ale, Anchor Brewery and Small Beer did not show the marks as registered just the words in plain script. The reviews dated from 2000- October 2007 are from the [www.bottledbeer.co.uk](http://www.bottledbeer.co.uk) website.
- EAH-5: Printouts of a review of ANCHOR STEAM BEER (no logo used) from May 2003 on the Ciao! Shopping website- [www.Ciao.co.uk](http://www.Ciao.co.uk).

## **APPLICANT'S EVIDENCE**

10) The applicant filed three witness statements. The first, dated 1 July 2005, is by Iain R Loe the Research and Information Manager at the Campaign for Real Ale (CAMRA). He explains that CAMRA is an independent voluntary organisation which campaigns for real ale, real pubs and consumer rights. Membership is open to individuals but not to corporate entities such as breweries and pubs He states that he first became aware of "The Blue Anchor" when it featured in a CAMRA book in 1974. He has also heard of, and drunk "Spingo Ales". He has been aware of The Blue Anchor in Helston and its brewery business for 34 years. Mr Loe states that "To me, the name "The Blue Anchor" means one of the oldest brew pubs in the UK. The Blue Anchor's "Spingo" ales are the strongest beers produced by their brewery." He states that he has a high regard for the name and that it is well known to anyone with an interest in British beer and brewing. He states that most members of CAMRA would be familiar with the Blue Anchor Brewery and their Spingo beers, as he has been contacted by many members about the ales.

11) The second witness statement, dated 1 August 2008, is by Douglas Polman the branch social secretary and brewery liaison officer for the Cornwall Region of CAMRA. He states that he first heard of The Blue Anchor brew pub of Helston when visiting Cornwall in 1974. He moved to

Cornwall in 1984 and since has met many people from USA, Canada and Australia who had heard of the pub from relatives of miners who had emigrated in the 1800's.

12) The third witness statement, dated 10 July 2008, is by Simon Stone, the landlord of the Blue Anchor Inn in Helston, Cornwall, a position he has held since 1993. He provides a history of the establishment which began brewing at the premises some 600 years ago. He states that in 1978 the marks BLUE ANCHOR and SPINGO ALES began to be used by the landlord of the pub at that time. Both marks have been used on bottled beer since this time. Mr Stone provides evidence of use of the mark by the applicant and its predecessors in business since 1978. He provides evidence of use for these years. However, he does not provide turnover figures for sales under the marks in suit, and the evidence on the invoices provided shows that most of the sales are of relatively modest value and are to establishments in Cornwall. Nor is there any indication that the goodwill was passed on from the previous owner when Mr Stone took over in 1993. He provides evidence of internet and other media attention, but a considerable amount of this is focussed upon the public house, The Blue Anchor. Mr Stone provides evidence of other "anchor" marks on the Register, but does not provide any evidence of the use made of them.

#### **OPPONENT'S EVIDENCE IN REPLY**

13) This consists of a witness statement, dated 15 December 2008 by Linda Rowe who has already provided evidence in these proceedings. She states that her company has a co-existence agreement with Asia Pacific Breweries Ltd which owns a number of UK "Anchor" trade marks. Also attached at exhibit C is a copy of a decision of Knox J. in the Chancery Division of the High Court in *Island Trading Company and Others v Anchor Brewing Company and Another* [1989] RPC 287A. She refers to the references to Anchor Steam Beer having appeared in the CAMRA dictionary of beer and that "it was not disputed on the plaintiff's part that Anchor Steam Beer enjoys a reputation among the real cognoscenti in this country."

14) That concludes my summary of the evidence filed in these proceedings to the extent that I consider it necessary.

#### **DECISION**

15) At the hearing the opponent withdrew the ground of opposition under Section 5(4)(a). I shall therefore consider the sole ground of opposition under Section 5(2)(b) of the Trade Marks Act 1994 which reads as follows:

"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."

16) An “earlier trade mark” is defined in section 6, the relevant part of which states:

“6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

17) In these proceedings the opponent is relying upon a number of earlier marks which have registration dates ranging from 8 November 1996 to 21 January 2004. All are clearly earlier marks but only some are subject to The Trade Marks (Proof of Use, etc) Regulations 2004, paragraph six of which states:

“6A Raising of relative grounds in opposition proceedings in cases of non-use.

(1) This section applies where-

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if-

- (a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes-

- (a)....
- (b)....

(5) In relation to a Community trade mark, any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

18) At the hearing the opponent decided not to rely upon UK registrations 2122910, 1311816 and 2133407 and CTM 404459 and 405936. I note that prior to the hearing CTM 371468 had expired on 11 November 2006. In *MIP METRO Group Intellectual Property GmbH & Co. KG v OHIM*, Case T-191/04, (“*Metro*” the General Court (GC) considered circumstances where an earlier (UK national) mark relied upon in opposition to a CTM had expired after the date the opposition was filed but before the decision was taken. The Court stated:

“30 According to well-established case-law, the essential function of a trade mark is to guarantee the identity of the origin of the marked goods to the consumer or end user by enabling him, without any possibility of confusion, to distinguish those goods from others which have another origin (Case 102/77 *Hoffmann-La Roche* [1978] ECR 1139, paragraph 7; Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 48; and Case C-329/02 P *SAT. 1 v OHIM* [2004] ECR I-8317, paragraph 23). There is no public interest in conferring the benefit of the full protection envisaged by Regulation No 40/94 on a trade mark which does not fulfil its essential function (*Henkel v OHIM*, paragraph 48).

31 The essential purpose of Articles 8 and 42 of Regulation No 40/94 and Rules 15, 16 and 20 of the implementing regulation, concerning relative grounds for refusal and opposition proceedings, is to ensure that, by making it possible to refuse registration of a new mark which may conflict with an earlier mark as there is a likelihood of confusion between them, the earlier mark may retain its function of identifying origin.

32 The possibility of such a conflict must be considered from two different angles. Firstly, with regard to the substantive scope of the abovementioned provisions, the earlier mark and the mark applied for must be identical or similar, as must the goods or services designated by those marks, so that confusion may arise between the two signs. Secondly, concerning the temporal scope of those provisions, both those marks must co-exist for a certain period. The function of an earlier mark as a means of identifying its origin cannot be undermined by another mark which is registered only after the term of protection of the earlier mark has expired. If there is no period during which both marks co-exist, no conflict can arise.

33 Accordingly, the Court of First Instance finds that the assertion in the contested decision that ‘[t]here is nothing that permits the Opposition Division to retroactively change an opponent’s status simply because in the course of opposition proceedings ... a national registration ... expires’ fails to take account of the fact that no conflict can arise between the mark applied for and an earlier mark which has expired during that period, given that the mark applied for may be registered only after the end of the opposition

proceedings. As a consequence, the protection which the Board of Appeal recognised the earlier mark as having is not justified by the need to protect the mark's essential function and is contrary to the spirit and the logic underlying the provisions governing the assessment of relative grounds for refusal and opposition proceedings."

19) On this basis the opponent cannot rely upon CTM 371468, however in case I am wrong in this conclusion I shall continue to consider whether the evidence filed regarding proof of use is sufficient for this mark to be considered.

20) The publication date of the application was 21 April 2006. Therefore, the relevant period for the proof of use is 22 April 2001- 21 April 2006. Thus, of the opponent's marks left in the opposition all were registered prior to 22 April 2001 and require evidence of use, with the exception of CTM 393603. I must first consider whether the opponent has fulfilled the requirement to show that genuine use of the marks has been made. The guiding principles to be applied in determining whether there has been genuine use of a mark are *Ansul BV v Ajax Brandbeveiliging BV* [2003] R.P.C. 40 and *Laboratoire de la Mer Trade Mark* [2006] F.S.R. 5. From these cases I derive the following main points:

- genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);
- the use must be 'on the market' and not just internal to the undertaking concerned (*Ansul*, paragraph 37);
- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);
- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);
- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);
- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);
- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);
- an act of importation could constitute putting goods on the market (*Laboratoire de la Mer*, paragraph 25 referring to the earlier reasoned order of the ECJ);
- there is no requirement that the mark must have come to the attention of the end user or consumer (*Laboratoire de la Mer*, paragraphs 32 and 48);

- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*Laboratoire de la Mer*, paragraph 34);

- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*Laboratoire de la Mer*, paragraph 44).

21) I must also keep in mind the guidance in *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 in relation to determining what constitutes a fair specification, namely:

“29 I have no doubt that Pumfrey J. was correct to reject the approach advocated in the Premier Brands case. His reasoning in paras [22] and [24] of his judgment is correct. Because of s.10(2), fairness to the proprietor does not require a wide specification of goods or services nor the incentive to apply for a general description of goods and services. As Mr Bloch pointed out, to continue to allow a wide specification can impinge unfairly upon the rights of the public. Take, for instance, a registration for "motor vehicles" only used by the proprietor for motor cars. The registration would provide a right against a user of the trade mark for motor bikes under s.10(1). That might be understandable having regard to the similarity of goods. However, the vice of allowing such a wide specification becomes apparent when it is envisaged that the proprietor seeks to enforce his trade mark against use in relation to pedal cycles. His chances of success under s.10(2) would be considerably increased if the specification of goods included both motor cars and motor bicycles. That would be unfair when the only use was in relation to motor cars. In my view the court is required in the words of Jacob J. to "dig deeper". But the crucial question is--how deep?

30 Pumfrey J. was, I believe, correct that the starting point must be for the court to find as a fact what use has been made of the trade mark. The next task is to decide how the goods or services should be described. For example, if the trade mark has only been used in relation to a specific variety of apples, say Cox's Orange Pippins, should the registration be for fruit, apples, eating apples, or Cox's Orange Pippins?

31 Pumfrey J. in *Decon* suggested that the court's task was to arrive at a fair specification of goods having regard to the use made. I agree, but the court still has the difficult task of deciding what is fair. In my view that task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use. The court, when deciding whether there is confusion under s.10(2), adopts the attitude of the average reasonably informed consumer of the products. If the test of infringement is to be applied by the court having adopted the attitude of such a person, then I believe it appropriate that the court should do the same when deciding what is the fair way to describe the use that a proprietor has made of his mark. Thus, the court should inform itself of the nature of trade and then decide how the notional consumer would describe such use.”

22) The comments of Mr Justice Jacob (as he then was) in *Animal Trade Mark* [2004] FSR 19 are also relevant.

“20 The reason for bringing the public perception in this way is because it is the public which uses and relies upon trade marks. I do not think there is anything technical about this: the consumer is not expected to think in a pernicky way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. Thus, for instance, if there has only been use for three holed razor blades imported from Venezuela (Mr T.A. Blanco White's brilliant and memorable example of a narrow specification) "three-holed razor blades imported from Venezuela" is an accurate description of the goods. But it is not one which an average consumer would pick for trade mark purposes. He would surely say "razor blades" or just "razors". Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods--are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard to the use which has been made.”

23) I now turn to consider the evidence filed in this case.

<p>2122912 &amp; CTM 451948</p> 	<p>No use of this mark has been shown. Only use of the term “Anchor Porter” on invoices has been provided. The invoices show sales of US\$16,183 during the period April 2001-March 2006. However, there is no evidence of which “Anchor Porter” mark was used, this one or CTM 393603. The mark on the bottles at the bottom of the invoices from 2001 appears to be the same as CTM 393603.</p>
<p>2069943 &amp; CTM 404418</p> 	<p>Features on invoices during the period 1988 – 2007 in exhibit B in a large format at the top of the invoice. The invoices show some US\$200,000 of sales during the period April 2001-March 2006. Also, another US\$100,000 of other brands (Anchor Porter, Old Foghorn etc) sold with this mark being used as a “House” brand.</p>
<p>CTM 371468</p> 	<p>The only use shown was of the words “Anchor Wheat Beer” on one invoice for US\$67.05 in 2001. It is contended that it features on one of the six bottles shown at the bottom of each invoice. It is possible that this is the case but it is not absolutely clear that this is the mark used.</p>

24) I will first consider UK 2122912 and CTM 451948 which are identical marks. Given that the mark used on the bottom of invoices from 2001 would appear to be the newer version of the “Anchor Porter” mark CTM 393603 it not clear that the sales of US\$16,183 shown in the invoices under the heading “Anchor Porter” relate to use of these two marks. It seems inconsistent that the opponent would use the “newer” version CTM 393603 on the bottles on the invoices and supply the actual bottles with the older marks UK 2122912 and CTM 451948. CTM 393603 contains a significant number of additional items within the mark which are distinctive. The words “Anchor” and “Porter” are shown in a very different manner, there is a “legend” around the edge of the mark stating where the beer is produced and a considerable amount of plant life in and around the centre of the mark. This contrasts with the very stark images presented by UK 2122912 and CTM 451948. In my opinion no use of these marks has been shown. In reaching this view I take into account the ECJ decisions in Case C-171/06P *Devinlec Developpement Innovation Leclerc SA v Office for Harmonisation in the Internal Market* [2007] ECR I-41, Case C-131/06P *Castellblanch SA v Office for Harmonisation in the Internal Market* [2007] ECR I-63 and Case C-234/06P *Il Ponte Finanziaria SpA v Office for Harmonisation in the Internal Market* [2008] ETMR 13. I also note the Appointed Person’s view in O/061/08 *Remus* and the Court of Appeal in *BUD / BUDWEISER BUDBRAU* [2003] RPC 24.

25) Turning to UK 2069943 and CTM 404418. There is substantial use of these identical marks as they appear on all the invoices provided. It would seem that the mark is used on the bottles of “Anchor Steam Beer” as it seems to be shown at the bottom of the invoice. I note that in the relevant period the opponent has sold a reasonable amount of beer under this mark. The invoices show beer, ale and porter being sold. Its specification will therefore be reduced for the comparison test by the deletion of the term “malt beverages” from the specification.

26) Lastly, I consider CTM 371468. The only use shown for this mark is US\$67.05 in 2001 and the contention that it appears at the bottom of each invoice on one of the six bottles shown there. The average consumer of the product will never see the invoices, only those in the trade will see them. However, in and of itself this would suffice if the mark was clearly shown. To my mind the average trades person will not study the device of six bottles and a wine glass closely enough to realise that the bottles have labels which, in all probability, reflect those on the products being sold. The images are quite small and the details on the labels are very difficult to ascertain even when studying them very closely as I have had to do as part of this case. A magnifying glass did not assist with many of the words and details on the labels. This maybe because I was dealing with photocopies but I doubt that even in the original version that the labels would prove easy to read, given their size. I do not regard the evidence provided as reaching the standard required under paragraph 18 above. Thus, this mark is ruled out on two counts.

27) The result of the proof of use exercise is that only two marks UK2069943/CTM 404418 can go forward to be used in the comparison test, where it joins the only mark which has not been subject to this test CTM 393603. With regard to UK 2069943/CTM 404418 the specification used in the comparison test are “beer, ale and porter” whilst CTM 393603 has a specification of “Beer; porter; malt beverages”.

28) In my consideration of a likelihood of confusion, I take into account the guidance from the settled case law provided by the European Court of Justice (ECJ) in *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

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

(b) the matter must be judged through the eyes of the average consumer of the goods/ services in question; *Sabel BV v Puma AG*, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

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

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

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

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

(g) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*,

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

(i) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

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

(k) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(l) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*

29) In essence the test under section 5(2)(b) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the judgments mentioned above. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. Furthermore, I must compare the applicant's marks and the marks relied upon by the opponent on the basis of their inherent characteristics assuming normal and fair use of the marks on the goods in their original or revised specifications (see paragraph 25).

30) The effect of reputation on the global consideration of a likelihood of confusion under Section 5(2)(b) of the Act was considered by David Kitchin Q.C. (as he was then) sitting as the Appointed Person in *Steelco Trade Mark* (BL O/268/04). Mr Kitchin concluded at paragraph 17 of his decision:

“The global assessment of the likelihood of confusion must therefore be based on all the circumstances. These include an assessment of the distinctive character of the earlier mark. When the mark has been used on a significant scale that distinctiveness will depend upon a combination of its inherent nature and its factual distinctiveness. I do not detect in the principles established by the European Court of Justice any intention to limit the assessment of distinctiveness acquired through use to those marks which have become household names. Accordingly, I believe the observations of Mr. Thorley Q.C in *DUONEBS* should not be seen as of general application irrespective of the circumstances of the case. The recognition of the earlier trade mark in the market is one of the factors which must be taken into account in making the overall global assessment of the likelihood of confusion. As observed recently by Jacob L.J. in *Reed Executive & Ors v. Reed Business Information Ltd & Ors*, EWCA Civ 159, this may be particularly important in the case of marks which contain an element descriptive of the goods or services for which they have been registered. In the case of marks which are descriptive, the average consumer will

expect others to use similar descriptive marks and thus be alert for details which would differentiate one mark from another. Where a mark has become more distinctive through use then this may cease to be such an important consideration. But all must depend upon the circumstances of each individual case.”

31) The opponent has provided overall turnover figures and I have extracted other figures from the invoices provided. In both instances they are quite modest. The market for beer in the UK has not been established in the evidence of either party but I believe that it is reasonable to assume that it would amount to hundreds of millions of pounds per annum. The turnover shown for the opponent’s marks is certainly not sufficient for them to enjoy enhanced protection because of reputation. However, I do accept that the opponent’s marks are inherently very distinctive for the goods for which they are registered.

32) I must now determine the average consumer for the goods of the parties. The applicant contended that the average consumer would be the more discerning drinker, perhaps a member of CAMRA. I do not accept this as it is common practice for pubs, clubs, off licences and supermarkets to sell “common” and “premium” brands alongside each other and so they are in direct competition with each other. Real Ale is sold in a large number of hostelrys and it is sold alongside standard beers for those of a less discerning palate. It is my view that the goods offered by the two parties are aimed at the general public who are over eighteen years old and who are not teetotal. I also note that the specifications of both parties allow them to produce beers and ales of any strength and quality.

33) I shall first consider the goods of the two parties. At the hearing the applicant accepted that the goods of both parties were identical even allowing for the slight amendment as a result of the proof of use at paragraph 25 above.

34) I now turn to consider the marks of the two parties. For ease of reference these are reproduced below:

Applicant’s Trade Mark	Opponent’s Trade Marks
	<p data-bbox="810 1397 1177 1424">UK2069943 &amp; CTM 404418</p> 
	<p data-bbox="810 1693 979 1720">CTM 393603</p> 

35) The applicant contended that the marks were different visually, aurally and conceptually. There are obvious differences between the marks in each of these areas. Both marks contain elements not found in the other parties mark. It was contended that these differences would mitigate against any confusion. The applicant also relied upon the reputation that the applicant claims in its Spingo Ale. Mr Mooneapillay stated:

“My point was going to be that a pre-existing reputation in a pub that is known for brewing beer and known for brewing an ale called Spingo, which appears within the mark amongst real ale drinkers in the UK should militate against a finding of a likelihood of confusion.”

36) He also referred me to the decision in the *Cardinal Place* case B/L O-339-04 relying upon the words “The” and “Blue” to change the meaning of the word “anchor” into a pub name as opposed to being just another “anchor” mark. He contended that the term “The Blue Anchor” would be seen as a house mark with “Spingo” being the name of the beer. He also suggested that the word “Steam” was a distinctive part of the opponent’s mark.

37) I turn first to the issue of the reputation of the Blue Anchor Public House. The evidence supplied by the applicant seeks to show that the establishment has a reputation not only in Cornwall but throughout the UK. I accept that a number of members of CAMRA may be aware of the pub and the fact that it brews beer on the premises. Its beer has also featured in a number of beer festivals throughout the UK although it is unclear what mark is used as there is evidence that kegs were supplied and that names of beers are chalked upon boards within the festival area. It is quite possible that the beer was sold under the “Spingo” name. The pub may well have a reputation as a Public House and as a brewery, amongst a very select group, mostly members of CAMRA. However, I have to consider the issue from the view point of the average consumer who is described at paragraph 30 above. This person is unlikely to have ever heard of either the establishment or its “Spingo” beer. Quite why this consumer would assume that “The Blue Anchor” was the name of a public house is unclear, even when its location “Helston, Cornwall” is shown. They will understand that the beer originates from Helston, but the rest of the message suggested by Mr Mooneapillay requires knowledge of the applicant’s establishment or business.

38) I will firstly compare the applicant’s marks to the opponent’s mark CTM 393603. Clearly, the marks of both parties contain more than one word or element and are, therefore, composite marks. The *Medion* case acknowledges that the overall impression conveyed to the relevant public by a composite mark may, in certain circumstances, be dominated by one or more of its components. Turning firstly to the applicant’s marks the device element of an old fashioned anchor complete with flukes, eyelet and rope emphasised by the word “Anchor” must form one distinctive element. The geographical information “Helston, Cornwall” is not in my view distinctive. The other distinctive part of the mark is the word “Spingo Ales”. I note that the third mark in the series has the words “home brewed” but consider this to be descriptive and non-distinctive. To my mind the two main elements of the marks are equally distinctive and dominant. The opponent’s mark also has an old fashioned anchor complete with flukes, eyelet and rope emphasised by the word “Anchor”. In addition it has the descriptive word “Porter” which simply informs the consumer of the type of ale contained within the bottle. The opponent’s mark also has what appears to be wheat or barley sheaves and, in very small print,

information that the beer was brewed and bottled in San Francisco by the Anchor Brewing Company. To my mind the sheaves are non-distinctive and the wording so small as to be rendered almost unreadable, certainly from more than an arms distance. However, I must compare the marks as wholes.

39) There are clearly visual differences between the marks, however visually the most distinctive element of both marks is the device of an anchor. It was stated that the applicant's device was at an angle, but the anchor is only slightly off the vertical and I do not consider this enough to register in the mind of the average consumer, particularly given the maxim of imperfect recollection. The overwhelming visual impression of an anchor is emphasised by the presence of the word "Anchor" in both marks. The fact that the applicant's mark is "The Blue Anchor" will not affect this impression as in the first mark in the series the anchor is indeed blue in colour.

40) There are obvious aural differences as well as similarities. However, normal aural use would include in a pub where it is reasonable to envisage the customer requesting an "anchor beer" or a bottle or pint of "the one with the anchor". It is unlikely that anyone would use all of the words within the applicant's mark when referring to the product, there are simply too many words and a shorthand version is more likely to be used.

41) Conceptually, the marks are most memorably "anchor" marks. An anchor has no obvious connection to beer and is highly distinctive. It is therefore the element most likely to be recalled by the average consumer. With regard to the "spingo" element of the applicant's mark this is an invented word which has no meaning, or none which has been raised in the course of this case. As such it does not evoke an image in the mind of the average consumer.

42) Considering the marks as wholes and acknowledging the minor differences I consider the marks to be quite similar.

43) I take all of the above into account when considering the marks globally. I also take into account the interdependency principle – a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods, and vice versa. The similarities in the marks are such that even if used on goods which are only slightly similar (and in the instant case it was agreed that they are identical) I believe that there is a likelihood of consumers being confused into believing that the goods provided by the applicant are those of the opponent or provided by some undertaking linked to them. The opposition under Section 5(2) (b) therefore succeeds in relation to the entire application. Given this finding I do not have to consider the opponent's other marks.

## **COSTS**

44) As the opponent has been successful it is entitled to a contribution towards costs. I order the applicant to pay the opponent the sum of £1,900. This sum is calculated as shown below and is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Preparing a statement and considering the other side's statement	£300
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Preparing evidence and considering and commenting on the other side's evidence	£800
Prepare for and attend a hearing	£600
Official Fee	£200
TOTAL	£1,900

**Dated this 08 day of June 2010**

**George W Salthouse  
For the Registrar,  
the Comptroller-General**