

O-192-18

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3194412
BY EUROCELL PROFILES LIMITED TO REGISTER A
SERIES OF THREE TRADE MARKS:**

All together better

All together better

ALL TOGETHER BETTER

IN CLASSES: 1, 2, 6, 8, 9, 11, 17, 19, 35, 37 & 42

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 409058 BY REYNAERS ALUMINIUM NAAMLOZE VENNOOTSCHAP**

BACKGROUND & PLEADINGS

1. On 1 November 2016, Eurocell Profiles Limited (“the applicant”) applied to register the series of three trade marks shown on the cover page of this decision for goods and services in the classes identified. The application was published for opposition purposes on 20 January 2017.

2. The application has been opposed in classes 6, 19 and 37 by Reynaers Aluminium, naamloze vennootschap (“the opponent”). The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), in relation to which the opponent relies upon an International Registration designating the European Union (“IREU”) No. 1177083 for the trade mark shown below, which designated the EU on 2 July 2013 and for which protection was granted on 12 August 2014. The opponent indicates that it relies upon all the goods and services for which the trade mark is registered, shown in paragraph 9 below:



The IREU contains the following clauses:

“Mark details

Trade mark type

Mark consists of colour or colours per se

Colours claimed

Blue, white.”

3. The applicant filed a counterstatement in which the basis of the opposition is denied.

4. In these proceedings, the opponent is represented by Bureau M.F.J. Bockstael NV and the applicant by Freeths LLP. Although neither party filed evidence, both filed written submissions during the course of the evidence rounds. Only the applicant elected to file written submissions in lieu of attendance at a hearing. I shall refer to these submissions, as necessary, later in this decision.

DECISION

5. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

6. An earlier trade mark is defined in section 6 of the Act, which states:

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

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

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered,

would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

7. In these proceedings, the opponent is relying upon the IREU shown in paragraph 2 above, which qualifies as an earlier trade mark under the above provisions. As this earlier trade mark had not been protected for more than five years at the date the application was published, it is not subject to the proof of use provisions. As a consequence, the opponent is entitled to rely upon it without having to demonstrate genuine use.

Section 5(2)(b) – case law

8. The following principles are gleaned from the decisions of the courts of the European Union 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.

The principles:

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

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

(c) the average consumer normally perceives 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 impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, 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.

Comparison of goods and services

9. The competing goods and services are as follows:

| Opponent’s goods and services | Applicant’s goods and services |
|--|--|
| <p>Class 6 - Building materials of metal, transportable buildings of metal; metal pipes; aluminum; building materials of aluminum; windows and doors of aluminum; aluminum sections.</p> <p>Class 19 - Building materials, not of metal; non-metallic transportable buildings; non-rigid pipes, not of metal; doors and windows, not of metal; profiles not of metal.</p> <p>Class 37 - Construction; painting, interior and exterior; repair and maintenance of structures; cleaning of buildings [interior]; supervision of architectural works as well as provision of information related thereto; assembly of windows and doors.</p> | <p>Class 6 - Metal building material; screws, screw caps and covers, nails, metal hooks, nuts and bolts, fixings and fasteners; ironmongery; door and window furniture; small items of metal hardware; pipes and tubes of metal; locks, locking devices; door bolts, chains and security fittings, metal flashings, wire, handles, latches, catches, keys, bolts, chains and security fittings; fittings for doors and windows; guttering; conservatories; conservatory frames; conservatories in prefabricated form; building extensions in the form of conservatories; rigid pipes; non-rigid profiles; aluminium profiles; transportable buildings of metal; doors, door frames; components and extrusions for the construction of doors; door sills, door tracks; parts and fittings for all the aforesaid goods.</p> |

| | |
|--|---|
| | <p>Class 19 - Non-metallic building materials; non-metallic transportable buildings; conservatory buildings; fixed building structures; non-metallic roof systems; roof materials; non-metallic roof panels; roof tiles; roof coverings; roof verges; UPVC cladding, cladding, fascia, soffits, guttering and parts and fittings for the aforesaid goods; windows; doors; non-metallic window, door and conservatory frames; plastic skirting boards, architraves, cornices, ceiling roses, mouldings, cills, dado rails, bannisters, handrails and stair components; plastic flooring; plastic facing elements for doors; plastic wall cladding; secondary glazing assemblies; glass; double glazed units for windows and for doors; glass for building; glass window panes, glass doors, glass panels, glass tiles, glass screens, glass roofs; insulating glass; heat protective glass for use in building; heat reflecting glass for use in building; infrared reflective glass for use in building; self-heating glass; solar glass; guttering; guttering; parts and fittings for the aforesaid goods.</p> <p>Class 37 - Building construction, maintenance, repair and installation services; constructing, erecting, glazing, installing and repairing conservatories,</p> |
|--|---|

| | |
|--|---|
| | windows, doors, facias, soffits and guttering; information, advice and consultancy in relation to the aforesaid services. |
|--|---|

10. In its submissions, the applicant:

“...concedes that the goods and services covered by the application are in part identical and similar to the goods covered by the opponent’s registration.”

11. Although the applicant admits that some goods and services are to be regarded as identical and others similar, as it does not identify which goods and services it considers to be identical and in relation to those goods and services it considers to be similar, the degree of similarity, it is necessary for me to conduct an analysis. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut fur Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

Class 6

12. The opponent’s specification in this class includes the term “Building materials of metal” which is an alternative way of describing the applicant’s “Metal building material” and is broad enough, in my view, to include the following goods in the application which are, as a consequence, to be regarded as identical on the *Meric* principle:

Screws, screw caps and covers, nails, metal hooks, nuts and bolts, fixings and fasteners; ironmongery; door and window furniture; small items of metal hardware; pipes and tubes of metal; locks, locking devices; door bolts, chains and security fittings, metal flashings, wire, handles, latches, catches, keys, bolts, chains and security fittings; fittings for doors and windows; guttering; conservatory frames; rigid pipes; non-rigid profiles; door frames; components and extrusions for the construction of doors; door sills, door tracks.

13. As well as being included within the term in the opponent's specification mentioned above, as "aluminium profiles" in the application would be encompassed by the term "aluminium sections" in the opponent's specification and as "doors" in the application would include "doors of aluminium" in the opponent's specification, such goods are, once again, identical on the *Meric* principle.

14. The opponent's specification includes the term "transportable buildings of metal" which is literally identical to the same term in the application and broad enough to include "conservatories; conservatories in prefabricated form; building extensions in the form of conservatories" in the application which are, once again, to be regarded as identical on the *Meric* principle.

15. That leaves "parts and fittings for all the aforesaid goods" in the application to consider. As the applicant's "parts and fittings" are all for goods which I have concluded are identical to goods in the opponent's specification, if not identical to the opponent's goods, they are, in my view, similar to the highest degree.

Class 19

16. The opponent's specification includes the term "non-metallic transportable buildings" which is literally identical to the same term in the applicant's specification and is broad enough to include "conservatory buildings" and "fixed building structures" in the application which are, as a consequence, to be regarded as identical on the *Meric*

principle. The opponent's specification also includes the term "Building materials, not of metal" which is an alternative way of describing the applicant's "Non-metallic building materials" and is broad enough to include the following goods in the application which are, once again to be regarded as identical on the *Meric* principle:

non-metallic roof systems; roof materials; non-metallic roof panels; roof tiles; roof coverings; roof verges; UPVC cladding, cladding, fascia, soffits, guttering, non-metallic window, door and conservatory frames; plastic skirting boards, architraves, cornices, ceiling roses, mouldings, cills, dado rails, bannisters, handrails and stair components; plastic flooring, plastic facing elements for doors; plastic wall cladding; secondary glazing assemblies; glass; double glazed units for windows and for doors; glass for building; glass window panes, glass panels, glass tiles, glass screens, glass roofs; insulating glass; heat protective glass for use in building; heat reflecting glass for use in building; infrared reflective glass for use in building; self-heating glass; solar glass; guttering; guttering.

17. The opponent's specification also includes the following term "doors and windows, not of metal", which is either literally identical, to or broad enough to include, "windows", "doors" and "glass doors" in the application and to be considered identical on the *Meric* principle. Finally, my comments in relation to "parts and fittings" in class 6 above apply with equal force to parts and fittings in class 19.

Class 37

18. The opponent's specification includes the broad terms "construction" and "repair and maintenance of structures", whereas the applicant's specification includes "Building construction, maintenance, repair and installation services; constructing, erecting, glazing, installing and repairing conservatories, windows, doors, facias, soffits and guttering". Such services are, once again, identical on the *Meric* principle. As all of the applicant's services in this class are identical to the opponent's services and as the

average consumer will be very familiar with the fact that those trading in such services also provide information, advice and consultancy in relation to such services, they are to be regarded as highly similar to the services to which they relate.

Conclusion in relation to the competing goods and services

19. In summary, I have concluded that the applicant's goods and services in classes 6, 19 and 37 are either identical or similar to a high degree to the opponent's goods and services in the corresponding classes. Given the applicant's concession in this regard mentioned earlier, those conclusions are unlikely to be controversial.

The average consumer and the nature of the purchasing act

20. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods and services at issue. I must then determine the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were 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.”

21. In its Notice of Opposition, the opponent submits that the average consumer of the goods and services at issue in these proceedings are “consumers, architects and

fabricators”, whereas the applicant states that the average consumer is “the public at large”. If, by the public at large, the applicant meant the general public (which the opponent refers to as “consumers”) including professional users of the type mentioned by the opponent, then I agree. As neither party has made any submissions on how the competing goods and services will be selected, I must reach my own conclusions. As the goods at issue are, in my experience, most likely to be obtained by self-selection from bricks and mortar retail outlets such as builders’ merchants, DIY home improvement stores and from websites specialising in such goods, visual considerations are likely to be an important part of the selection process. However, as many of the goods are technical in nature, oral requests to sales assistants both in person and by telephone (particularly from non-specialist average consumers) must also be borne in mind. As to the services at issue, once again my own experience informs me that such services are likely to be selected having reviewed promotional material and conducted investigations on-line. However, such services are also, in my experience, often the subject of word of mouth recommendations. Although visual considerations are likely to dominate the selection process, aural considerations are likely to feature to a degree.

22. As to the degree of care with which such goods and services will be selected, in its submissions, the applicant states:

“However the goods in question are expensive; the applicant therefore asserts that the level of attention will vary from average to high when choosing the relevant goods.”

23. The cost of the goods at issue can vary considerably. Compare, for example, the relatively low degree of care likely to be paid by the average consumer to the selection of inexpensive screws and nails, with the high degree of care that is likely to be paid by the same average consumer to the selection of an expensive transportable building such as a conservatory. Similar considerations apply to the services in class 37, for example, contrast the medium degree of care an average consumer might pay when selecting an undertaking to carry out a routine repair of a window or door, as opposed to

the degree of care the same average consumer would deploy when choosing a company to build a conservatory costing several thousands of pounds.

Comparison of trade marks

24. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“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.”

25. It would be wrong, therefore, artificially to dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The trade marks to be compared are:

| Opponent’s trade mark | Applicant’s trade marks |
|---|--|
|  | ALL TOGETHER BETTER - please see paragraph 27. |

26. It is, I think, fair to say that it is this aspect of the case upon which the parties have expended the most time. In reaching the conclusions which follow, I have taken into

account all of the parties' competing submissions, but do not intend to record them all here.

27. The application consists of a series of three trade marks. The first two trade marks in the series (the first of which is slightly stylised) consist of the words "All together better" and the third mark in the series consists of the same words presented in block capital letters. As the degree of stylisation present in the first trade mark in the series is unremarkable and as the difference in presentation between the second and third trade mark is not material, I shall base my comparison on the third trade mark in the series i.e. ALL TOGETHER BETTER, referring to it as the applicant's trade mark. Although consisting of three words, the individual words do not play an independent and distinctive role in the trade mark. Rather, the words form a unit, the unit having a different meaning to the individual words of which the trade mark is composed and that is the overall impression it will convey. The applicant submits that its trade mark may be understood as "entirely better" or "totally better". While I agree that is by some distance the most likely interpretation of the applicant's trade mark (resulting in turn in a trade mark possessed of a low degree of distinctiveness), that is not the only interpretation; I shall return to this point below.

28. The opponent's trade mark consists of a number of components i.e. a blue rectangle, a stylised letter "R" presented in white and the word "REYNAERS" and words "TOGETHER FOR BETTER" also presented in white in a conventional font. The parties agree that below the word "REYNAERS" there appears the word "ALUMINIUM" and they have made their submissions on that basis. Whilst I am unable to discern that the opponent's trade mark contains that word, as the parties agree that it is present and as its presence or otherwise will have no material impact on the outcome of these proceedings, I shall proceed on the basis that it is present.

29. Although the blue rectangle will contribute to the overall impression the trade mark conveys, acting as it does as a background, it will make very little, if any, contribution, to its distinctive character. Proceeding on the basis that the word "ALUMINIUM" is present,

given its apparent size and positioning in the context of the trade mark as a whole and as it will be seen as descriptive both generally and for specific goods in class 6, it will make very little contribution to the overall impression conveyed and no contribution to the trade mark's distinctive character. The stylised letter "R" is distinctive and, given its size and positioning at the beginning of the trade mark, will make an important contribution to the overall impression conveyed. Below the stylised letter "R" there appears the word "REYNAERS". Although smaller than the letter "R" which appears above it, given its positioning, this word will also make an important contribution to the overall impression the trade mark conveys. The average consumer is, in my view, most likely to treat "REYNAERS" as a foreign language word (with no specific meaning) or a foreign name (most likely a surname). Either way, the word will be distinctive to the average consumer in the United Kingdom. That leaves the words "TOGETHER FOR BETTER" which appears to the right of the stylised letter and words I have already described. Once again, the individual words form a unit, with the unit having a different meaning to the individual words of which it is composed. In its submissions, the applicant states that these words will be understood as meaning "collectively or in combination for a good outcome, for example, "in order to be better it must be together." That, I think, is a not unreasonable view of how the phrase may be understood by the average consumer. The applicant submits that:

“...The slogan “TOGETHER FOR BETTER” is a commonly understood phrase in the UK and is not the subject of any particular stylisation...”

30. The unit created plays an independent and distinctive role in the opponent's trade mark and its size and positioning ensures it will contribute to the overall impression it conveys. However, as it consists of what, in my view, the average consumer will take as an indication that it (i.e. the average consumer) would be better off doing business with the opponent, it is, as a consequence, possessed of a low degree of distinctiveness.

31. I shall now compare the competing trade marks with the above conclusions in mind. The competing trade marks only coincide in respect of the words "TOGETHER" and

“BETTER”. Although these words appear in the same order in both trade marks, the applicant’s trade mark contains the word “ALL” before these words whereas the words are separated by the word “FOR” in the opponent’s trade mark. Balancing the similarities and differences (in particular the presence of the stylised letter “R” and the word “REYNAERS” in the opponent’s trade mark), results in, at best, a moderate (i.e. between low and medium) degree of visual similarity between them.

32. As the words in the applicant’s trade mark will be well-known to the average consumer, the manner in which it will be verbalised is entirely predictable. As for the opponent’s trade mark, it is well-established that when a trade mark consists of a combination of words and figurative components, it is by the words that it is most likely to be referred. Proceeding on that basis, it is, in my view, most unlikely that the average consumer will attempt to verbalise the stylised letter “R” (as “R” or otherwise), nor is it likely they will articulate the word “ALUMINIUM” (assuming they notice it at all). Much more likely, in my view, is that they will verbalise the opponent’s trade mark as simply “REYNAERS”, or, while possible, less likely in my view, as “REYNAERS TOGETHER FOR BETTER”. In the first example, there is no aural similarity between the competing trade marks and in the second example, a moderate degree.

33. Finally, the conceptual comparison. While the word “REYNAERS” in the opponent’s trade mark may be conceptualised by the average consumer as a word or name of foreign origin, that does not affect how the average consumer is likely to conceptualise the phrase “TOGETHER FOR BETTER” i.e. as the applicant suggests, as meaning “collectively or in combination for a good outcome, for example, “in order to be better it must be together.” As I explained earlier, I agree with the applicant that its trade mark is by some distance most likely to be conceptualised by the average consumer as meaning, broadly speaking, “entirely better” or “totally better”. Considered on that basis, the applicant’s trade mark and the phrase “TOGETHER FOR BETTER” in the opponent’s trade mark are, in my view, conceptually different. However, it is, just, possible that the average consumer may construe the applicant’s trade mark as meaning, broadly speaking, we are better when we are all together. Construed in that

way, and despite the applicant's submission to the contrary, that is also likely to evoke a concept of being better through "togetherness"; I shall return to this point below.

Distinctive character of the earlier trade mark

34. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade marks to identify the goods and services for which they have been registered as coming from a particular undertaking and thus to distinguish those goods and services from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

35. As the opponent has filed no evidence of any use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. The presence of, in particular, the stylised letter "R" and the word "REYNAERS" results in a trade mark which, when considered as a whole, is possessed of an average degree of inherent distinctive character. It is, of course, only the distinctiveness of the component in conflict that matters; I shall return to this point below.

Likelihood of confusion

36. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more it is, the greater the likelihood of confusion. I must

also keep in mind the average consumer for the goods and services the nature of the purchasing process and 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 he has retained in his mind.

37. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods/services down to the responsible undertakings being the same or related.

38. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson* and stated:

“18. The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19. The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20. The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21. The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

39. Earlier in this decision, I concluded that the competing goods and services are either identical or similar to a high degree (that is a point in the opponent’s favour). I then went on to conclude that the average consumer comprised members of the general public and professional users who, whilst not forgetting aural considerations, are most likely to select the goods and services at issue by predominantly visual means, paying a varying degree of attention during that process. Having identified the distinctive and dominant components of the competing trade marks, I assessed them as visually and aurally similar to a moderate degree. Insofar as conceptual similarity is concerned, I concluded that while it was possible that the applicant’s trade mark and the words “TOGETHER FOR BETTER” in the opponent’s trade mark may, just, convey similar conceptual messages, it was much more likely that the conceptual messages would be different. Finally, I concluded that while the opponent’s trade mark as a whole was possessed of an average degree of inherent distinctive character, the component in conflict was only distinctive to a low degree.

40. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

"38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it."

41. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask 'in what does the distinctive character of the earlier mark lie?' Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

42. In *The Picasso Estate v OHIM*, Case C-361/04 P, the CJEU found that:

"20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law."

43. However, in *Nokia Oyj v OHIM*, Case T-460/07, the GC stated:

“Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98).”

44. I must now apply the guidance in the above cases to the matter at hand, reminding myself of my earlier conclusions. Having done so, I will consider the matter on the basis most favourable to the opponent i.e. an average consumer paying a low degree of attention during the selection process who is, as a consequence, more prone to the effects of imperfect recollection. Having done so, the presence of, in particular, the stylised letter “R” and the word “REYNAERS” in the opponent’s trade mark is, in my view, more than sufficient to avoid direct confusion. I am also satisfied that the conceptual meanings the overwhelming majority of average consumers will attribute to the applicant’s trade mark and the words “TOGETHER FOR BETTER” in the opponent’s trade mark and, importantly, the low degree of distinctiveness enjoyed by both this component in the opponent’s trade mark and the applicant’s trade mark, is sufficient to avoid a likelihood of indirect confusion. For those average consumers paying even an average degree of attention to the selection of the goods and services at issue, the position is, in my view, even more clear-cut.

45. In reaching the above conclusions, I have not overlooked the fact that earlier in this decision I concluded that the applicant’s trade mark and the words “TOGETHER FOR BETTER” in the opponent’s trade mark may convey a similar conceptual message to some average consumers. I am, however, of the view that as this is only likely to apply to (at best) a very small percentage of average consumers, it is not sufficient to justify the rejection of the application. The opposition fails and is dismissed accordingly.

Overall conclusion

46. The opposition in relation to the goods and services in classes 6, 19 and 37 has failed and, subject to any successful appeal, the application will proceed to registration in respect of these goods and services (as well as in relation to the other goods and services in the application which were not opposed).

Costs

47. As the applicant has been successful, it is entitled to a contribution to its costs. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. Applying the guidance in that TPN, I award costs to the applicant on the following basis:

| | |
|--|-------------|
| Reviewing the Notice of Opposition and preparing a counterstatement: | £200 |
| Written submissions: | £300 |
| Total: | £500 |

48. I order Reynaers Aluminium, naamloze vennootschap to pay to Eurocell Profiles Limited the sum of **£500**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 26th day of March 2018

C J BOWEN
For the Registrar