

O-343-15

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3047947
BY BELCHIM CROP PROTECTION, NAAMLOZE VENNOOTSCHAP**

**TO REGISTER
THE TRADE MARK:**

QUIT

IN CLASS 5

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 402579 BY SYNGENTA PARTICIPATIONS AG**

BACKGROUND

1. On 21 March 2014, Belchim Crop Protection, Naamloze Vennootschap (“the applicant”) applied to register the trade mark **QUIT** for the following goods in class 5:

Pesticides; insecticides, fungicides, herbicides, nematocides, acaricides, rodenticides, molluscicides, insect repellents, algicides, germicides and disinfectants.

The application was published for opposition purposes on 6 June 2014.

2. The application is opposed by Syngenta Participations AG (“the opponent”). The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all of the goods in the application. The opponent relies upon all of the goods (shown below) in Community Trade Mark (“CTM”) registration no. 10648467 for the trade mark: **QUILT**; applied for on 2 February 2012 and for which the registration procedure was completed on 28 June 2012.

Class 5 - Preparations for destroying vermin; Fungicides, herbicides.

In its Notice of Opposition, the opponent states:

“The mark in suit and the opponent’s earlier registration differ by only one letter and are visually and phonetically overwhelmingly similar: QUILT v QUIT. All goods within the earlier mark are identical or similar to those within the mark in suit. There is identity between the goods “fungicides and herbicides” and “preparations for destroying vermin” are identical to “pesticides, insecticides, nematocides, acaricides, rodenticides, molluscicides”. The remaining goods within the mark in suit – insect repellants, algicides, germicides and disinfectants – are identical or, in the alternative, similar to the opponent’s goods.”

3. The applicant filed a counterstatement in which it denies the basis of the opposition. It states, inter alia:

“2. The respective marks are ordinary English words with completely different meanings: QUIT means “leave”, “resign” or “stop”, while QUILT means “duvet” or “padded bed covering”. The public will be familiar with these very different meanings and will not confuse the two marks.

3. The single letter’s difference, far from being a cause of similarity as the opponent claims, serves to distinguish the marks by making them conceptually, phonetically and visually different. Even a lazy speaker would not make them sound familiar.

4. Any identity or similarity between the respective goods is immaterial because it is outweighed by the differences between the marks QUIT and QUILT themselves.”

4. On 13 November 2014, the applicant restricted its specification to read:

Pesticides and herbicides, all being leaf desiccants, weed killers and weed control preparations.

In a letter dated 28 November 2014, the opponent indicated that this amendment did not overcome its opposition.

5. Neither party filed evidence. Whilst neither party asked to be heard, both filed written submissions in lieu of attendance at a hearing. I will bear all of these submissions in mind and refer to them, as necessary, below.

DECISION

6. 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.”

7. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark, international trade mark (UK) or 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.”

8. In these proceedings, the opponent is relying upon the trade mark shown in paragraph 2 above, which qualifies as an earlier trade mark under the above provisions.

As this trade mark had not completed its registration process more than 5 years before the publication date of the application in suit, it is not subject to proof of use, as per section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods it has identified.

Section 5(2)(b) – case law

9. 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.

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 great 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

10. The competing goods are as follows:

Opponent's goods	Applicant's goods (as amended)
Class 5 - Preparations for destroying vermin; Fungicides, herbicides.	Class 5 - Pesticides and herbicides, all being leaf desiccants, weed killers and weed control preparations.

11. In its submissions, the opponent states:

“6. The applicant’s “herbicides” all being leaf desiccants, weed killers and weed control preparations” are identical to the opponent’s herbicides”.

7. The applicant’s “pesticides, all being leaf desiccants, weed killers and weed control preparations” are similar to the opponent’s “fungicides and herbicides” in that they are all used to kill unwanted living matter by spraying/applying the pesticide/fungicide/herbicide to the same.

8. The applicant’s and the opponent’s goods are often sold by the same retail outlets and can be found close to each other in retail establishments. These goods are therefore in competition with and are complimentary in nature to each other in that both can be used within the same setting.”

12. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* case T-133/05, the General Court (“GC”) stated:

“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 the trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM – Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more

general category designated by the earlier mark (Case T-104/01 Oberhauser v OHIM – Petit Liberto (Fifties) [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 Vedral v OHIM – France Distribution (HUBERT) [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

13. As the applicant has not denied the opponent’s claim that the goods in its original specification are “identical or similar” to those contained in the opponent’s earlier trade mark, I would be entitled to proceed on the basis that the goods in its now limited specification are as the opponent suggests. However, for the avoidance of doubt, as all of the goods in the applicant’s amended specification are for use in relation to plant matter, they would all, in my view, be encompassed by the term “herbicides” in the opponent’s specification and are, as a consequence, identical on the principle outlined in *Merica*. However, even if I am wrong in that regard, when one considers, inter alia, the similarities in the nature, intended purpose, method of use and trade channels through which the competing goods pass, if the competing goods are not identical, they are still, in my view, similar to a very high degree.

The average consumer and the nature of the purchasing act

14. 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 these goods 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.”

15. In its submissions, the opponent states:

“4. The opponent’s and applicant’s goods are bought by consumers on a visual level on reviewing the packaging. The purchase is visually driven as the products are bought in stores or on line rather than by the telephone and consumers are looking at the brand name on the packaging. Consumers inspect the goods on a visual level because of the nature of the products...”

7. [The goods at issue] can be used by the average consumers in their gardens as well as by farmers and agricultural specialists...they can be purchased by a wide audience of consumers for domestic and agricultural use.”

16. In its submissions, the applicant states:

“5. A further consideration is the fact that, given their nature and purpose, the respective goods are aimed at specialists – farmers and agricultural contractors – and will involve careful and educated purchasing decisions. Purchases of the goods are likely to be the result of a visual act because buyers will exercise care and attention to ensure that the goods are suitable for the intended purpose...”

17. As the opponent suggests, the average consumer of the goods at issue consists of both members of the general public and specialist users such as farmers and agricultural specialists (and not just the latter group, as the applicant suggests). As the goods are, as the opponent suggests, most likely to be self-selected from the shelves of a store or from the pages of a website, I agree with the parties that visual considerations are likely to dominate the selection process. However, as (in particular) specialist users may order the goods by telephone and as members of the public may seek advice from a sales assistant prior to making a selection, I must not lose sight of aural considerations. As to the degree of care taking during the purchasing act, in its submissions, the opponent states that “customers are lazy by nature” (which is, of course, contrary to the guidance in the case law), whereas the applicant argues that the selection of the goods will involve a “careful and educated purchasing decision.” Although the goods are not likely to be highly expensive, the need for both sets of average consumers to ensure they select the correct goods for the purpose intended (be they for use on a domestic garden or for commercial purposes), suggests at least an average degree of attention will be paid during the purchasing act.

Comparison of trade marks

18. 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 the trade marks, 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.”

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

therefore contribute to the overall impressions created by the trade marks. The trade marks to be compared are as follows:

Opponent's trade mark	Applicant's trade mark
QUILT	QUIT

20. The competing trade marks consist of four and five letters respectively; both are presented in upper case. The first three letters i.e. "Q-U-I" are identical as is the final letter "T"; they differ only to the extent that the opponent's trade mark includes an additional letter "L" after the letter "I" and before the letter "T". There are no distinctive or dominant components in either trade mark; the overall impression both convey will be of single words, the individual meanings of which will be very well known to the average consumer.

21. The fact that the competing trade marks consist of single syllable words which differ only to the extent I have identified above, inevitably results in a degree of visual and aural similarity. In its submissions, the applicant refers to the decision of the Court of First Instance (now the GC) in Case T-112/06 - *Inter-Ikea Systems BV v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, in which the court stated:

"54. As regards the visual comparison between the verbal element of the contested mark and the earlier word marks, the applicant claims that the only difference between them is the presence of the letter 'd' in the contested mark and the letter 'k' in the earlier word marks. However, the Court has already held in Case T-185/02 *Ruiz-Picasso and Others v OHIM – DaimlerChrysler(PICARO)* [2004] ECR II-1739, paragraph 54) that, in the case of word marks which are relatively short, even if two marks differ by no more than a single consonant, it cannot be found that there is a high degree of visual similarity between them."

22. The above quotation was commented upon by the Appointed Person, Ms Amanda Michaels, in BL O-387-11. Ms Michael's commented:

"11(f)...How or why the Court in Inter-IKEA summarised paragraph 54 of Picasso in such a way is unclear, but what is clear is that it was mistaken when it suggested that the Court had already made a finding in the terms set out at the end of paragraph 54 of the later decision. In the circumstances, it is difficult to read the later case as actively seeking to make such a ruling itself and it appears to me that the passage in that case must be treated with a great deal of caution."

23. Bearing the above in mind, the similarities I have identified result, in my view, in a medium degree of both visual and aural similarity. As to the conceptual position, in its submissions, the applicant repeats the comments contained in its counterstatement, whereas at no point has the opponent commented upon the conceptual comparison. As the competing trade marks consist of words with which the average consumer will be

very familiar and which have entirely different meanings, the competing trade marks are, as the applicant suggests, conceptually dissonant.

Distinctive character of the earlier trade mark

24. The distinctive character of a trade mark can be appraised only, first, by reference to the goods 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 mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. As the opponent has not filed any evidence of the use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. Although a well known English language word, as far as I am aware (and there are no submissions to the contrary), it is neither descriptive of nor non-distinctive for the goods for which it stands registered; in my view, it does not even possess any suggestive qualities. The opponents QUILT trade mark is, in my view, possessed of a normal/average degree of inherent distinctive character.

Likelihood of confusion

25. 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 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 distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision, I concluded that:

- the competing goods are either identical or similar to a very high degree;
- the average consumer is either a member of the general public or a specialist user such as a farmer or agricultural contractor;
- whilst the selection process will be primarily visual, aural considerations must not be ignored;
- the average consumer will pay at least an average degree of attention during the purchasing act;

- the competing trade marks are visually and aurally similar to a medium degree and are conceptually dissonant;
- the opponent's earlier trade mark is possessed of a normal/average degree of inherent distinctive character.

26. In its submissions, the applicant referred to the decision of the CJEU in *The Picasso Estate v OHIM*, Case C-361/04 P, where it 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.”

27. In reaching a conclusion, I am also mindful of the comments of the GC in *Nokia Oyj v OHIM*, Case T-460/07, in which it 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).”

28. In my view, the completely different conceptual messages that will be conveyed by the competing trade marks will fix themselves in the average consumer's mind. In so doing, they will assist the average consumer's recall, thus making them less prone to the effects of imperfect recollection. This clear conceptual difference is, in my view, more than sufficient to neutralise the medium degree of visual and aural similarity I have identified earlier. Although I have reached this conclusion in the context of, inter alia, an average consumer who will pay at least an average degree of attention during the purchasing act, given the very clear and distinct conceptual messages that will be conveyed by the competing trade marks, I would have reached the same conclusion even if I had characterised the degree of attention paid as low and the degree of visual and aural similarity between the competing trade marks as high.

Conclusion

29. The opposition has failed, and subject to any successful appeal, the application will be refused.

Costs

30. As the applicant has been successful it is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice 4 of 2007. Using that TPN as a guide, I award costs to the applicant on the following basis

Preparing a statement and considering the other side's statement:	£200
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Written submissions:	£200
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Total:	£400
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31. I order Syngenta Participations AG to pay to Belchim Crop Protection, Naamloze Vennootschap the sum of **£400**. 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 24th day of July 2015

C J BOWEN
For the Registrar
The Comptroller-General