

O-353-06

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2365917
BY BRAND ASSOCIATES LIMITED
TO REGISTER THE TRADE MARK:**

ADORA

IN CLASSES 29 AND 30

AND

**THE OPPOSITION THERETO
UNDER NO 93095
BY
UNILEVER NV AND UNILEVER PLC JOINTLY**

Trade Marks Act 1994

**In the matter of application no 2365917
by Brand Associates Limited
to register the trade mark:
ADORA
in classes 29 and 30
and the opposition thereto
under no 93095
by Unilever NV and Unilever Plc**

BACKGROUND

1) On 16 June 2004 Brand Associates Limited, which I will refer to as BAL, applied to register the trade mark ADORA (the trade mark). The application was published for opposition purposes in the *Trade Marks Journal* on 8 October 2004. Subsequent to amendment after publication, the specification of the application reads:

eggs; milk and milk products, yoghurts, lasi; fish, poultry and game; pickle and vegetable pastes; preserved, dried and cooked fruits and vegetables; jellies; jams; preserves; prepared meals; preparations made from potatoes; potato chips, potato crisps; chana dahl; pickles; bombay mix; nuts;

rice and food products made from rice; cereal and cereal preparations; coffee, artificial coffee; tea; sugar; tapioca; sago; flour; yeast; baking powder; honey; treacle; vinegar; sauces; spices, salt; mustard; pastes; prepared meals; desserts, sweets; breads, snack foods, preparations made from cereals for human consumption; non-medicated confectionery; popadoms; popads (roasted popadoms), sev, prawn crackers, nan, paratha, chappatis, popcorn, pretzels, tortilla chips; salad dressings.

The above goods are in classes 29 and 30 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) On 7 January 2005 Unilever NV and Unilever Plc, which I will refer to as Unilever, jointly filed a notice of opposition to the application. The grounds of opposition have been amended since the initial filing. In a letter of 1 February 2005 Unilever withdrew opposition against the class 29 goods of the application. Unilever NV is the owner of Community trade mark registration no 3475381 for the trade mark AMORA. It was applied for on 30 October 2003 and registered on 10 June 2005. It is registered for the following goods:

mustard; vinegar, sauces (condiments); spices.

The above goods are in class 30 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15

June 1957, as revised and amended. Unilever claims that the respective trade marks are similar and that *vinegar, sauces, spices, salt, mustard, pickles and pastes, prepared meals and salad dressings* are similar or identical goods to those of its earlier registration. Consequently, there is a likelihood of confusion and registration of the trade mark would be contrary to section 5(2)(b) of the Trade Marks Act 1994 (the Act).

3) Unilever claims that its trade mark has a reputation in respect of *vinegar, sauces and mustard*. It claims that the respective trade marks are similar. Unilever claims that use of the trade mark would take unfair advantage of, or be detrimental to, the distinctive character or the repute of its trade mark as the goods covered by the application are identical or similar to those covered by the earlier trade mark and BAL's trade mark is phonetically and visually similar to the earlier trade mark. Consequently, registration of the trade mark would be contrary to section 5(3) of the Act. At the hearing the grounds under section 5(3) of the Act were limited to taking unfair advantage of the distinctive character or repute of the earlier trade mark.

4) Unilever seeks refusal of the application in respect of *vinegar, sauces, spices, salt, mustard, pickles and pastes, prepared meals and salad dressings* and an award of costs. There is an anomaly in relation to the goods for which refusal is sought; *pickles* are in class 29 and Unilever withdrew its opposition in respect of class 29 goods. The date of the amended statement of grounds is 1 February 2005, the same date as the letter which advised of the withdrawal of the attack on the class 29 goods of the application. In these circumstances I consider that there is a slip in the letter of 1 February 2005 and that the opposition covers *pickles*. At the hearing counsel accepted that this was the position.

5) BAL filed a counterstatement in which it denies the grounds of opposition. Both sides filed evidence.

6) A hearing was held on 29 November 2006. Unilever was represented by Mr Edenborough of counsel, instructed by Unilever UK – Legal Group. BAL was represented by Ms Berkeley of counsel, instructed by Dechert LLP.

DECISION

7) Evidence has been filed by both sides. However, unfortunately, it has no bearing on the case. The evidence of Unilever indicates that the Amora brand has a substantial reputation in France for various food products such as mustard and mayonnaise. In 2002 and 2003 there was sales of €193 million and €202 million respectively. Figures are also given for sales in Germany, the Netherlands and Switzerland. Sales in Germany were €51,400 and €71,100 in 2002 and 2003 respectively; sales in the Netherlands in the same years were €120,800 and €2,800 respectively. In terms of foodstuffs the sales figures for Germany and the Netherlands do not seem large, indeed they seem small. There is no evidence of promotion in these countries. The exhibited evidence virtually all relates to France; invoices to Germany, the Netherlands, Switzerland and Andorra are exhibited; the latter two countries are not members of the EU. Evidence downloaded from the Internet in October 2005, some time after the date of application, shows use of

Amora in relation to a variety of products eg mustard, mayonnaise, sauces, stock, vinegar, ketchup, herbs, spices, gherkins and vinaigrettes. There are three CD ROMs of television advertisements; all but one in French. The exception emanates from 15 April 2000, it is labelled as being for Belgium and is in Flemish. Lists are exhibited showing when the various advertisements were broadcast, this shows them as being broadcast on French television channels. Press articles exhibited all emanate from French publications and after the date of application. So the evidence might show a reputation in France. Mr Edenborough relied upon the judgment of the European Court of Justice (ECJ) in *General Motors Corporation v Yplon SA* [2000] RPC 572:

“Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation ‘in the Member State’. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation ‘throughout’ the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

He submitted that a reputation in France would represent a substantial part of the Community and so satisfy the requirements of section 5(3) of the Act. He also argued that the unitary nature of the Community trade mark meant that reputation in one country was enough. So a reputation in Malta, for example, would be enough to give section 5(3) rights in the United Kingdom. The corollary of the argument in relation to the unitary nature of the Community trade mark would appear to be that it would be necessary to show a reputation across the twenty five member states; the unitary nature ought to work both ways; not that I consider that a feasible position, just the corollary of the position advanced. Relying upon a Community trade mark under section 5(3), where there is only reputation in one member state, might be seen as a sleight of hand; effectively using a Community trade mark as a Trojan horse to gain extra jurisdictional protection for a national trade mark. It would be an encouragement to register existing national trade marks to gain exceptional extra-jurisdictional protection. The requirement under section 5(3) of the Act, for a Community trade mark, is that it has a reputation “in the European Community”. I cannot see that reputation in one of twenty five member states (at the date of application there were twenty five member states) can satisfy this requirement. If reputation in one member state was enough the legislature would have written this into the Act. If Unilever has a reputation in one member state that is what it has; that is the fact. A reputation in a member state is not a reputation in the Community. Fortunately, I do not have the more complicated task of considering a reputation in more than one member state and deciding where a reputation can be accepted; I accept Mr Edenborough’s submission that the reputation does not have to be in the twenty five member states of the Union. The bizarre situation could arise that a United Kingdom undertaking with a reputation in the United Kingdom with a Community trade mark, could not rely upon section 5(3) of the Act as the reputation would be in a member state and not in the Community. The situation might be bizarre but the remedy is simple, to have a parallel United Kingdom registration. Ms Berkeley referred to paragraph 14 of the judgment of Patten J in *Intel Corporation Inc v CPM United Kingdom Ltd* [2006] ETMR 90 where he stated:

“The existence of a reputation enjoyed by the earlier mark in the United Kingdom has, of course, to be established in order the for the issues of unfair advantage and detriment to rise at all.”

As *Intel* relied upon Community trade marks and United Kingdom trade marks, she submitted that this was authority for the establishment, in relation to a Community trade mark, of a reputation in the United Kingdom. The hearing officer at first instance looked just at the position in the United Kingdom, which he could do as there were various United Kingdom registrations. He had to look no further, nor did Patten J on appeal. The reputation of *Intel* was a given. There was no argument as to what had to be proved in relation to Community trade marks, there was no need for the matter to be considered. I, therefore, do not consider that the judgment of Patten J supports the submission that the reputation for a Community trade mark, in proceedings in the United Kingdom under section 5(3), needs to include a reputation in the United Kingdom. However, the absence of a reputation in the United Kingdom is likely to lead to failure under this head for the reasons that I set out below. **Unilever has not established a reputation in the European Community and so its claim under section 5(3) is dismissed.**

8) If this were not the case a further obstacle would have stood in the way of Unilever. In *Mastercard International v Hitachi Credit (UK) Plc* [2005] RPC 21 Smith J held that there “must be real possibilities as opposed to theoretical possibilities” of the damage claimed. In *Intel Corporation Inc v CPM United Kingdom Ltd* Patten J stated:

“In cases of opposition where the mark is unused, there can never be evidence of the actual consequences or use and the enquiry is necessarily prospective. The question in such cases is whether the prohibitive consequences will or are likely to occur not simply whether there is a risk of them occurring.”

In *Spa Monopole v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-67/04 the Court of First Instance (CFI) stated:

“He must however adduce prima facie evidence of a future risk, which is not hypothetical, of unfair advantage or detriment.”

There is consensus that the unfair advantage or detriment is not hypothetical or theoretical. In *Electrocoin Automatics Limited v Coinworld Limited and others* [2004] EWHC 1498 (Ch) Mr Geoffrey Hobbs QC (sitting as a deputy judge) stated:

“102. I think it is clear that in order to be productive of advantage or detriment of the kind proscribed, 'the link' established in the minds of people in the market place needs to have an effect on their economic behaviour. The presence in the market place of marks and signs which call each other to mind is not, of itself, sufficient for that purpose.”

How can BAL be taking advantage of Unilever’s possible reputation in France when there is no evidence of anyone knowing of Unilever’s trade mark in the United Kingdom?

Where is the advantage? How can there be an advantage? How would there be any effect on economic behaviour? Taking advantage is often characterised as piggybacking. The nature of this head of damage was helpfully explained by the First Board of Appeal in *Mango Sport System SRL Socio Unico Mangone Antonio Vincenzo v Diknah SL* (Case R 308/2003-1) [2005] ETMR 5:

“19 As to unfair advantage, which is in issue here since that was the condition for the rejection of the mark applied for, that is taken when another undertaking exploits the distinctive character or repute of the earlier mark to the benefit of its own marketing efforts. In that situation that undertaking effectively uses the renowned mark as a vehicle for generating consumer interest in its own products. The advantage for the third party arises in the substantial saving on investment in promotion and publicity for its own goods, since it is able to "free ride" on that already undertaken by the earlier reputed mark. It is unfair since the reward for the costs of promoting, maintaining and enhancing a particular trade mark should belong to the owner of the earlier trade mark in question (see, to that effect, decisions of the First Board of Appeal of 8 February 2002 in Case R 472/2001-1-- BIBA/BIBA (fig. MARK), First Board of 20 October 2003 in Case 2003-R 1004/2000-1-- KINDERCARE (fig. MARK)/kinder et al., at [26], and of the Fourth Board of Appeal of 26 July 2001 in Case R 552/2000-4 COSMOPOLITAN COSMETICS/COSMOPOLITAN).”

BAL will, for instance, gain no advantage in promoting, maintaining and enhancing the trade mark. **So even if Unilever could claim a reputation based on its use in a single member state, there would be just no advantage to BAL and so the case must fail.**

9) Most of the evidence of BAL is not evidence of fact but consists of submissions and a critique of the evidence of Unilever. BAL has also filed state of the register evidence. The lack of relevance of state of the register evidence has been noted in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 and *GfK AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-135/04*. The state of the register evidence does not tell me what is happening in the market and so how the perception of the average consumer would be affected. The evidence of BAL ends with a reference to a Community trade mark application no 3396702 for the trade mark Adora. This has an application date of 8 October 2003, before that of Unilever's trade mark. This trade mark was opposed by three undertakings, including Unilever BV; the oppositions have all been withdrawn and the application accepted for publication. I have to consider the case on the basis of the facts before me and the law; not what has happened before the Community office. BAL could have sought to invalidate Unilever's registration if it did not want it to potentially act as a bar to its United Kingdom registration. Equally, Unilever might seek to invalidate BAL's registration. The principles behind this issue were dealt with by the Court of First Instance (CFI) in *PepsiCo, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) T-269/02*:

“23 Thus the applicant did not at any stage of the proceedings before OHIM rely on the use of that mark in order to prove de facto coexistence of that mark and the intervener’s mark, although such coexistence could have been a relevant factor in the assessment, carried out independently by OHIM in application of Regulation No 40/94, of the likelihood of confusion between the Community mark requested and the intervener’s mark.

24 Nor did the applicant claim, and even less prove, that it had used its earlier German mark to obtain cancellation of the intervener’s mark before the competent national authorities, or even that it had commenced proceedings for that purpose.

25 In those circumstances, the Court notes that, quite irrespective of the question whether the applicant had adduced evidence of the existence of its earlier German mark before OHIM, the existence of that mark alone would not in any event have been sufficient reason for rejecting the opposition. The applicant would still have had to prove that it had been successful in having the intervener’s mark cancelled by the competent national authorities.”

10) Unilever furnished evidence in reply. As is, unfortunately, common, the evidence in reply is for the most part not evidence in reply but a list of submissions. It also includes state of the register evidence! I cannot see that anything within this evidence is germane to the case. There is a statement that many people visit France and so the use of the trade mark AMORA will have extended to other countries. The state of knowledge of these visitors is pure speculation with no evidence to support it. It is also stated that the opposition by Unilever to BAL’s Community trade mark application was withdrawn was the result of an administrative error.

11) The evidence of Unilever does not indicate any knowledge of the trade mark in the United Kingdom and so I cannot see that for this jurisdiction use will have “strengthened” the penumbra of protection in respect of section 5(2)(b) of the Act. The evidence does not establish a claim under section 5(3) of the Act and has no effect in relation to section 5(2)(b) of the Act. I deal with the case on the basis that there is a tabula rasa before me; the respective trade marks will be considered on the basis of notional and fair use.

Likelihood of confusion – section 5(2)(b) of the Act

12) According to section 5(2)(b) of the Act a trade mark shall not be registered if because:

“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.”

Section 6(1)(a) of the Act defines an earlier trade mark as:

“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”

Unilever’s trade mark is an earlier trade mark within the meaning of the Act.

13) In determining the question under section 5(2)(b), I take into account the guidance provided by the 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 BV* [2000] FSR 77, and *Vedial SA v Office for the Harmonization of the Internal Market (trade marks, designs and models) (OHIM) C-106/03 P*.

Comparison of goods

14) In *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* the ECJ held in relation to the assessment of the similarity of goods that the following factors, inter alia, should be taken into account: their nature, their intended purpose (the original incorrect translation of ‘Verwendungszweck’ in the English version of the judgment has now been corrected), their method of use and whether they are in competition with each other or are complementary. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, Jacob J considered that the following should be taken into account when assessing the similarity of goods and/or services:

- “(a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.”

In relation to the terms used in specifications Jacob J stated:

“When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all a trade mark specification is concerned with use in trade.”

Neuberger J in *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267 stated:

“I should add that I see no reason to give the word "cosmetics" and "toilet preparations" or any other word found in Schedule 4 to the Trade Mark Regulations 1994 anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context. In particular, I see no reason to give the words an unnaturally narrow meaning simply because registration under the 1994 Act bestows a monopoly on the proprietor.”

I take on board the class in which the goods or services are placed is relevant in determining the nature of goods and services (see *Altecnic Ltd's Trade Mark Application* [2002] RPC 34). Although it dealt with a non-use issue, I consider that the words of Aldous LJ in *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32 are also useful to bear in mind:

“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 section 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.”

15) The goods of the application under attack are:

vinegar, sauces, spices, salt, mustard, pickles and pastes, prepared meals and salad dressings.

The goods of the earlier registration are:

mustard; vinegar, sauces (condiments); spices.

The highlighted goods of the application are identical to the goods of the earlier registration.

16) *Pastes* of the application will cover a variety of products; included amongst these will be curry pastes. The *spices* of the earlier registration will include curry powder. These products will be used to add curry seasoning and so have the same intended purpose. They will both be stirred into a dish whilst it is cooking and so have the same method of use. One can be substituted for the other, they are, therefore, in competition. There is, therefore, a high degree of similarity between these goods.

17) *Collins English Dictionary* (5th Ed 2000) defines condiment as “n. any spice or sauce such as salt, pepper, mustard, etc. [C15: from Latin *condimentum* seasoning, from]

condire to pickle”. The *sauces* of the earlier registration and *mustard* will be used in small quantities to add flavour to a dish, in the same way that *pickles* do. Indeed it is very difficult to draw a line between where the former goods stop and the latter goods start. The respective goods could be of the same nature, used in the same manner, have the same intended purpose and be substituted for one another, and so in competition. Consequently, there is a high degree of similarity between *mustard* and *sauces (condiments)* and *pickles*.

18) *Salad dressings* will include such products as mayonnaise and vinaigrettes. These are goods that will be used to season and add flavour to salads. All of the goods of the earlier registration can and often will be used to season and add flavour to foodstuffs; which can include salads. It is not uncommon for *vinegar* and olive oil to be added separately by the diner. *Salad dressings* have the same purpose as the goods of the earlier registration, they can be of the same nature, certain of the goods of the earlier registration could be substituted for *salad dressings*, so there is a degree of competition. *Salad dressings* are similar to the goods of the earlier registration.

19) *Salt* is the classic condiment, *salt* sits upon the table besides pepper which, of course, is a spice. The goods when sprinkled upon prepared food come in the same type of receptacles, whether in cellars or grinders. They can be in ground or unground form. Both goods are used for the seasoning food; they are complementary in so far as they are invariably used together, although they do not have a symbiotic or mutually dependent relationship. I consider that *salt* and *spices* are highly similar.

20) *Prepared meals* are complete items. The goods of the earlier registration are not goods upon which one would dine, they are added to a dish during preparation or put upon the plate when being consumed. Mr Edenborough submitted that the respective goods would have the same users, that they were all eaten. Effectively, Mr Edenborough was arguing that all foodstuffs are similar. One would not substitute *prepared meals* for *mustard*, *vinegar*, *sauces (condiments)* or *spices*; so they are not in competition. Although one could readily use the latter goods with the former goods there is no symbiotic or mutually dependent relationship; I do not consider that they are complementary in any meaningful manner. In my experience such goods are sold in discrete areas of shops. Their end purpose is different to some extent. The former goods are to supply a meal, the latter goods to add flavour or piquancy. It is also my view that the nature of the goods will be different. Taking all these factors into account, I come to the conclusion that *prepared meals* are not similar to the goods of the earlier registration.

Average consumer and purchasing process

21) The goods of both the earlier right and the application are goods that are bought by the public at large. They are every day goods which can be of very low cost. They are not the sort of goods that will be purchased with a great deal of care and consideration. They will quite often be purchased in a hurry, for instance, during a weekly shopping expedition to a supermarket.

Comparison of trade marks

22) The trade marks to be compared are:

Unilever's trade mark:

AMORA

BAL's trade mark:

ADORA

23) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Sabel BV v Puma AG*). 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*). Consequently, I must not indulge in an artificial dissection of the trade marks, although taking into account any distinctive and dominant components. The average consumer 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 he/she is deemed to be reasonably well informed and reasonably circumspect and observant (*Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV*). "The analysis of the similarity between the signs in question constitutes an essential element of the global assessment of the likelihood of confusion. It must therefore, like that assessment, be done in relation to the perception of the relevant public" (*Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02).

24) Ms Berkeley submitted that ADORA is not a common dictionary word; the fact is, as far as I am aware, it is not a dictionary word. It is an invented word. It was her submission that it would bring to mind the word adore. I am not sure why this should be the case. However, if this is the case, it seems only reasonable to assume that AMORA will bring to mind the word AMOUR; a common dictionary word meaning love. Love and adore are synonyms, so it would seem to be reasonable to argue, on the basis of Ms Berkeley's logic, that the two trade marks are conceptually similar. However, it was Ms Berkeley's argument that AMORA would be seen as an invented word; and so there would be conceptual dissimilarity. Ms Berkeley was seeking assistance from the judgment of the CFI in *Phillips-Van Heusen Corp v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-292/01 [2004] ETMR 60:

"54. Next, it must be held that the conceptual differences which distinguish the marks at issue are such as to counteract to a large extent the visual and aural similarities pointed out in paragraphs 49 and 51 above. For there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately. In this case that is the position in relation to the word mark BASS, as has just been pointed out in the previous paragraph. Contrary to the findings of the Board of Appeal in paragraph 25 of the contested decision, that view is not invalidated by the fact that that word mark does not refer to any characteristic of the goods in respect of which the registration of the marks in question has been made. That fact does not prevent the relevant public from

immediately grasping the meaning of that word mark. It is also irrelevant that, since the dice game Pasch is not generally known, it is not certain that the word mark PASH has, from the point of view of the relevant public, a clear and specific meaning in the sense referred to above. The fact that one of the marks at issue has such a meaning is sufficient - where the other mark does not have such a meaning or only a totally different meaning - to counteract to a large extent the visual and aural similarities between the two marks.”

In *GfK AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-135/04 the CFI held that the conceptual meaning must be clear:

“the fact remains that that meaning must be clear, so that the relevant public are capable of grasping it immediately (see, to that effect, Case T-292/01 *Phillips-Van Heusen v OHIM – Pash Textilvertrieb und Einzelhandel(BASS)* [2003] ECR II-4335, paragraph 54).”

I do not believe that the average consumer spends his or her time analysing trade marks and so I do not see why ADORA would be seen as anything other than an invented word. I have a great deal of doubt that the allusion to adore would be grasped immediately. If this were the case then, sauce for the goose is sauce for the gander, I do not see why AMORA should not bring to mind amour and the trade marks would be conceptually similar. I am of the view that both words are invented words without conceptual associations and if this were not the case, it would be to BAL’s prejudice as there would be conceptual similarity.

25) The two words differ in respect of one letter, this is the only visual and phonetic difference. I consider that the stress, in speech, will fall upon the middle syllable. These are not very long words but they follow the same orthographical pattern, both visually and phonetically. As the CFI found in *Succession Picasso v OHIM - DaimlerChrysler (PICARO)*, in considering whether trade marks are similar the perception of the relevant public has to be taken into account and so I take into account the average consumer and the nature of the purchasing process. I also have to take into account that trade marks are rarely compared directly, the average consumer will be prey to imperfect recollection. **I am of the view that the respective trade marks are similar, and to a good degree.**

Conclusion

26) In considering whether there is a likelihood of confusion various factors have to be taken into account. There is 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 (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*). In this case there is a variation between the degrees of similarity between the goods. Certain goods are identical, some highly similar, some have a good degree of similarity, some are “just similar”. However, none of the similar goods are similar only to a limited extent. (The non-similar goods do not have to be considered, as there can be no likelihood of confusion if the goods are not similar.) The trade marks are, in my view, highly similar.

It is not determinative of my decision, but in writing it I have had difficulty in distinguishing between the two signs and have had to regularly check which sign belongs to which undertaking.

27) It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade marks (either by nature or nurture) the greater the likelihood of confusion (*Sabel BV v Puma AG*). The distinctive character of a trade mark can be appraised only, first, by reference to the goods or services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public (European Court of First Instance Case T-79/00 *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91). In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ETMR 585). AMORA is an invented word, it has no reference or allusion to the goods. I am of the view that it has a good deal of inherent distinctiveness.

28) There is no conceptual hook for the consumer to rely upon for either trade mark, which will increase the effects of imperfect recollection. As has been indicated above the goods will not be purchased with a great deal of consideration. (Of course, if Ms Berkeley is right and there is a conceptual hook, it is one that gives rise to conceptual similarity and so brings greater similarity to the trade marks.)

28) In making the global appreciation, every factor is in favour of Unilever. There is a likelihood of confusion in respect of:

pickles in class 29 and

vinegar, sauces, spices, salt, mustard, pastes and salad dressings in class 30.

The application is to be refused in respect of the above goods.

COSTS

29) Unilever having, to a great extent, been successful is entitled to a contribution towards its costs. The evidence filed in this case had no bearing upon the outcome. Consequently, I do not consider that Unilever should receive any compensation in relation to the evidence. This is a straight forward section 5(2)(b) case that was only complicated by the filing of evidence. It is the right of either side to have a hearing but I cannot see that there was any need for one. Perhaps counsel would not have been instructed if the evidence had not obscured matters and generated the fog of law. In the circumstances of this case I consider that costs of £200 for preparation and attendance at the hearing are appropriate. Unilever is entitled to £300 for its statement of grounds and

£200 for the opposition fee. I order Brand Associates Limited to pay Unilever NV and Unilever Plc the sum of £700. This sum 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.

Dated this 7th day of December 2006

**David Landau
For the Registrar
the Comptroller-General**