

O-358-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2429824
BY PAVEL MASLYUKOV
TO REGISTER THE TRADE MARK**



IN CLASSES 33 and 43

AND

**THE OPPOSITION THERETO
UNDER NO 96604
BY
FREDERIC ROBINSON LIMITED**

Trade Marks Act 1994

**In the matter of application 2429824
by Pavel Maslyukov
to register the trade mark:**



**in classes 33 and 43
and the opposition thereto
under no 96604
by Frederic Robinson Limited**

1. On 13 September 2006, Pavel Maslyukov applied to register the above trade mark in classes 33 and 43 of the Nice Classification system¹. Following publication of the application in the *Trade Marks Journal* on 14 December 2007, Frederic Robinson Limited (which I will refer to as Limited) filed notice of opposition. An amendment was made to the class 43 services, which did not dispose of the opposition. The attack is against the entire application, which, as it now stands, reads:

Class 33: *Gin; prepared alcoholic cocktails containing gin; gin-based liqueurs.*

Class 43: *Services for providing temporary accommodation, services for providing drinks from a vending machine.*

2. The sole ground of opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 (the Act), which states:

“(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,

¹ International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

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

3. To support this ground, Limited relies upon two earlier registered trade marks. The first is:

2125204 (UK)

OLD TOM

Class 32: *Beer, stout, lager, porter, ale; drinks containing not more than 1.2% (by volume) of alcohol.*

Limited relies only upon *ale* and has made a statement of use in relation to *ale*. The registration process for 2125204 was completed on 5 September 1997. The second mark relied upon is:

854052 (UK)

ROBINSON'S OLD TOM ALE

Class 32: *Ale.*

Limited has made a statement of use in relation to *ale*. 854052 was published in Journal 4483 on 29 July 1964 and was declared registered in Journal 4496 on 28 October 1964. This is the actual date of registration².

4. Mr Maslyukov filed a counterstatement denying a likelihood of confusion by virtue of a) the lack of similarity between the signs owing to the presence in his mark of the figurative element; b) lack of similarity between *ale* and the goods of the application (although Mr Maslyukov does not refer to his services which are also the subject of the opposition); and c) what he refers to as the “overall absence of likelihood of confusion because of voluntary reduction of distinctiveness by the owner of the earlier mark”. This appears to be an inference on Mr Maslyukov’s part that previous action (or lack of) by Limited amounts to a ‘reduction’ by Limited of the distinctive character of its marks. I will come back to this in more detail later.

5. Although Limited’s marks were both registered more than five years prior to the publication date of the application, there is no requirement for Limited to

² *WIS/ Trade Mark* [2006] RPC 17, Geoffrey Hobbs QC, sitting as the Appointed Person: “In an Official Notice entitled ‘*Date on which a mark is actually entered in the Register*’ printed at pp. 1536, 1527 of Issue No. 5725 of the Trade Marks Journal published on 1 June 1988 it was confirmed that, prior to June 1986, the date of the Trade Marks Journal in which the fact of registration was recorded in the list of ‘Trade Marks Registered’ was the date of actual registration.”

prove use of its marks because Mr Maslyukov has specifically stated in his counterstatement that he does not require proof of use (in box 5 of Form TM8 he has answered 'No' to the question 'Do you want the opponent to provide proof of use?'). Consequently, the earlier mark may be taken into account in these proceedings in respect of ale. I should also highlight at this point that I will consider the opposition on the basis of earlier mark 2125204 given that the goods relied upon are the same and given the nature of the two earlier marks, 854052 puts it in no better position.

6. Only Limited filed evidence. Neither side requested a hearing, both being content for a decision to be made from the papers on file. In so doing, I have taken into account the contents of Mr Maslyukov's counterstatement and Limited's evidence. Neither side filed submissions in lieu of a hearing.

Evidence

7. Limited's evidence is brief, comprising a witness statement and exhibits from Jennifer Hitchcock, Limited's trade mark attorney. She states that Limited has used OLD TOM along with the device of a cat since 1899 on beer and ale. The form of the mark was updated in 2005 so that the cat element looks different, but the words OLD TOM have always been used. OLD TOM was a gold medal winner in 2005 at the International Strong Beer Competition and was World's Best Dark Ale at the World Beer Awards in 2007. The ABV (alcohol by volume) of OLD TOM ale is 8.5%. Ms Hitchcock states that its reputation among aficionados is as a strong winter ale. The draught version has changed from being sold 'from the wood' at the turn of the 20th century to being drawn predominantly by pumped hand-pull dispensers on the bar, with the pump clip at point of sale following that of the present bottle graphics. As for the bottle, since 2005 the ale has been sold in a 330ml bottle size. The ale has been sold over the years through Limited's own pubs, inns and hotels in its trading area of north west England and north to mid Wales. It has also been sold through other traders and supermarkets.

8. Ms Hitchcock gives the following table as a breakdown of turnover:

	BOTTLED (CASES)		BULK BARRELS	CASK			BULK BARRELS
	275ML	330ML		KILS	FIRKS	PINS	
TOTAL	4645	71749	1923.6122	58	4360	521	1184.125
2004	2254		90.88	13	1446	75	377.375

2005	2391	6517	254.12	29	1078	87	294.875
2006		20539	497.04	5	477	114	136.00
2007		24859	601.59	7	1066	117	284.625
2008		19834	479.98	4	293	128	91.25

She explains that a barrel contains 36 gallons, a KIL contains 18 gallons, a FIRK contains 9 gallons and a PIN contains 4.5 gallons. Exhibit JH3 is a collection of invoices. Of those that are before the relevant date (13 September 2006), there are small amounts of bottle and cask sales to pubs in Stockport, Crewe, Leeds and Lincoln. Those after the relevant date show sales to major supermarkets and pubs in bottle and cask format.

9. The promotional material in exhibit JH4 which is before the relevant date shows pictures of casks with OLD TOM near the tap, bottles with the words embossed on the bottle body and also on the neck label. There are references to awards including the CAMRA Campaign for Real Ale Champion Winter Beer 2005. The page dated September 2005 refers to 'exclusive availability' of the bottles at selected Sainsbury's stores (the 2005 invoices only show cask sales). The promotional page dated January 2006 again refers to the CAMRA award and the international strong beer award and shows the bottle with the words clearly visible. The ale is described in the following terms:

"Old Tom is a dark and warming superior strong ale, with aromas of dark fruit and a palate booming with ripe malt and hops followed by a deep port wine finish."

Decision

10. The leading authorities which guide me in this ground are from the Court of Justice of the European Union: *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

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

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be

reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

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

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

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

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

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

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

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

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

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

l) it is only when all other components of a complex mark are negligible that it is

permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*.

Average consumer and the purchasing process

11. The average consumer is the adult general public. Alcohol may be bought in shops or at a bar. In the case of beer/ale, it is primarily a visual purchase. I note that the General Court (GC), in *Simonds Farsons Cisk plc v Office for Harmonization in the Internal Market (OHIM) Case T-3/04* said:

“58 In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant’s goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.

59 Moreover, and above all, it is not disputed that bars and restaurants are not the only sales channels for the goods concerned. They are also sold in supermarkets or other retail outlets (see paragraph 14 of the contested decision), and clearly when purchases are made there consumers can perceive the marks visually since the drinks are presented on shelves, although they may not find those marks side by side.”

The GC’s judgment fits in with my view of the goods in issue: the purchaser either visually scans the hand pumps in a bar and asks for a number of pints or half pints or will scan the bottles on a shelf and make a self-selection; in a bar, in my experience, one asks for a gin and mixer generically, not by brand name. The gin will be dispensed from an optic at the back of the bar, where the bottle will be visible. A liqueur will be asked for by brand name, possibly after a scan of the bottles kept behind a bar. A cocktail may be asked for by its generic name unless known as a branded, already prepared, bottled creation. In the case of beer, gin, prepared cocktails and liqueurs sold in shops, the purchasing process will be visual and will be a process of self-selection. Overall, there is a predominantly visible aspect to the purchasing process.

12. The level of attention in buying the goods themselves will not be of the very highest level. Ale is cheaper than gin. Allowing for real ale aficionados and those who simply wish to quench their thirst, and bearing in mind the relatively low cost of ale, the attention level of the consumer in the category of ale is average or slightly higher than average. In the case of gin, liqueurs and cocktails, these have an alcoholic content far above that of beers and a much

higher price. If self-selected, a reasonable amount of care will be taken owing to the cost, although, in the case of gin ordered in a bar, price is less of an issue as the price will be set as per optic measure. For liqueurs sold over a bar, brand awareness plays a greater part as it is asked for by brand name. However, none of the goods will involve the very highest level of consideration.

Comparison of goods

13. In comparing the respective specifications, all relevant factors should be considered, as per *Canon* where the ECJ stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose³ and their method of use and whether they are in competition with each other or are complementary.

The criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 for assessing similarity between goods and services were:

- (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, taking into account how goods/services are classified in trade.

14. The goods and services to be compared are:

³ The earlier incorrect translation of ‘Verwendungszweck’ in the English version of the judgment has now been corrected.

Earlier mark	Application
Ale	<p><i>Gin; prepared alcoholic cocktails containing gin; gin-based liqueurs.</i></p> <p><i>Services for providing temporary accommodation, services for providing drinks from a vending machine.</i></p>

15. The Collins English Dictionary (2000 edition) primary definition of ‘ale’ is “a beer fermented in an open vessel using yeasts that rise to the top of the brew.” Collins Dictionary gives the following definitions of liqueurs and cocktails:

gin: “an alcoholic drink obtained by distillation and rectification of the grain of malted barley, rye, or maize, flavoured with juniper berries”;

liqueur: “any of several highly flavoured sweetened spirits such as kirsch or cointreau, intended to be drunk after a meal”;

cocktail: “any mixed drink with a spirit base, usually drunk before meals.”

16. Ale is sold in bottles, cans, crates or by the pint/half pint in the UK. Gin, liqueurs and cocktails are sold in much smaller measures in bars, commensurate with their much higher potency. They are sold in varying sizes of bottles in shops, but would not be drunk in the same quantity as is the case for ale. Mr Maslyukov states in his counterstatement that:

“The comparative approach may also be done by the volume of consumption. The filling method for the ale and for the gin is radically different. The gin is basically filled into the small cup of 50ml – the ale is filled into the big cup of 500-1000ml. It is enough to look on a famous art work “Gin Lane” and “Beer Street” issued by English artist William Hogarth in 1751 to understand the dramatic difference in the effect of the goods when consumed on a daily basis. Also the approach may be done by comparing the method of production which is radically different for the gin and for the ale. The smell of the two goods is radically different too, because the one is made by distillation and another - by fermentation.”

Mr Maslyukov’s comments are reminiscent of the findings of the GC in two cases. In *The Coca-Cola Company v OHIM*, Case T-175/06, the GC considered beer, ale and porter as opposed to wine, noting the difference in colour, taste, smell, ingredients and production methods. It considered that the relevant consumer would consider beer and wine as two distinct products, not belonging to the same family of alcoholic beverages. It found that they were not complementary but that they competed, to a certain extent, because they were both capable of meeting identical needs (consumption during a meal or as an

aperitif). However, the Court said that it must be accepted that the average consumer would consider it normal for the two types of product to come from different undertakings, since the perceived differences between them would also make it unlikely that there would be an expectation that the same undertaking would produce and market the two types of beverage. The Court noted that, in Austria, there is a tradition of producing both beer and wine and that this is done by different undertakings. Its conclusion was that there was little similarity between wines and beers (that there was any was purely on account of the possible competition between them, as mentioned above). In *Bodegas Montebello, SA v OHIM*, Case T-430/07, the Court made a comparison in that case between wine and rum. It found that wine and rum are not composed of the same ingredients, their method of production is also different, and the end products are different as regards their taste, colour and smell. Consequently, the public perceives wine and rum as different in nature. It also found that wines are normally consumed as an accompaniment to a meal but that rum is not served at a meal, so that the two types of product are consumed on different occasions. The Court observed that the alcoholic content of the two products is very different and that even though the wine and rum might share distribution channels, they will not generally be sold on the same shelves. The Court considered there was no competing or complementary consideration and concluded that wine and rum are clearly distinguished by their nature, method of production, provenance, use and alcoholic content, with the overall result that there was no similarity between them.

17. The findings of the GC are helpful in making a comparison between ale, on the one hand, and gin and gin-based drinks on the other. Although, for example, lemonade can be added to ale to make a shandy, I bear in mind that ale is generally drunk without modification whereas gin is usually drunk in combination with another component, such as tonic water or a fruit juice as a mixer. Even though they both contain alcohol, the nature of the goods is quite different: they do not belong to the same family of alcoholic beverages. As in the first of the two GC cases, it is my perception that, in the UK, the two types of product would come from different undertakings. There has been no evidence to suggest otherwise. I bear in mind that the GC said that beer and wine compete to a certain extent because they are both capable of meeting identical needs: consumption during a meal or as an aperitif. In the case before me, I think there is a further distance in that ale is not traditionally regarded as an aperitif and gin, liqueurs and cocktails are not commonly drunk during a meal. The goods are very different in relation to taste, colour, smell, alcoholic content and the measures in which they are sold. The goods are sold in different areas of shops and bars and there is no evidence of common producers of ale and gin, or of common ingredients.

18. For all these reasons, I conclude that there is no similarity between *ale* and *gin; prepared alcoholic cocktails containing gin; gin-based liqueurs*. Moving on to a comparison between *ale* and Mr Maslyukov's services (*services for providing*

temporary accommodation, services for providing drinks from a vending machine), I consider it highly unlikely that ale would be sold from a vending machine. I say this because apart from the licensing considerations, I have never encountered ale sold in such a way. There is no evidence and there have been no submissions to persuade me otherwise. In relation to *services for providing temporary accommodation*, there are too many steps between *ale* and services for providing ale which may occur at an establishment for *providing temporary accommodation* to satisfy the legal tests. There is no competition, complementary nature, similar nature, purpose or channel of trade involved. The only shared component is the average consumer, the general public, but this is on such a general level as not to sway the outcome of the comparison. I find that there is no similarity between *ale* and *services for providing temporary accommodation, services for providing drinks from a vending machine*.

19. There being no similarity of goods or services, that is, effectively the end of the matter; where there is no similarity between goods or services, there can be no likelihood of confusion⁴. However, in the event that I am wrong, I will go on to consider the marks themselves and make a global comparison to assess whether there is a likelihood of confusion; although, if there is any similarity between the goods and services, then the similarity must be at a very low level.

Comparison of trade marks

20. The authorities direct that, in making a comparison between the marks, I must have regard to each mark's visual, aural and conceptual characteristics. I have to decide which, if any, of their components I consider to be distinctive and dominant, without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details. Despite Limited's pleadings and evidence that the words have been used with a cat device, the mark relied upon is the word-only mark which is all that I can consider⁵.

⁴ The ECJ said in *Waterford Wedgwood plc v OHIM* Case C-398/07: "35 It must be noted that the Court of First Instance, in paragraphs 30 to 35 of the judgment under appeal, carried out a detailed assessment of the similarity of the goods in question on the basis of the factors mentioned in paragraph 23 of the judgment in *Canon*. However, it cannot be alleged that the Court of First Instance did not take into account the distinctiveness of the earlier trade mark when carrying out that assessment, since the strong reputation of that trade mark relied on by Waterford Wedgwood can only offset a low degree of similarity of goods for the purpose of assessing the likelihood of confusion, and cannot make up for the total absence of similarity. Since the Court of First Instance found, in paragraph 35 of the judgment under appeal, that the goods in question were not similar, one of the conditions necessary in order to establish a likelihood of confusion was lacking (see, to that effect, *Canon*, paragraph 22) and therefore, the Court of First Instance was right to hold that there was no such likelihood."

⁵ *L'Oreal SA v Bellure NV* [2008] RPC 9, Jacob LJ: "The test is, and must be, founded on the mark as registered, not material which forms no part of that. There is simply no warrant in the Directive for taking more than the registered mark into account. The global appreciation test does not amount to the proposition that once a registered mark is used in marketing, anything,

21. The marks to be compared are:

Earlier mark	Application
<p style="text-align: center;">OLD TOM</p>	

Limited's mark consists entirely of the words OLD TOM, whilst Mr Maslyukov's mark contains the same words above a picture of a cat sitting on a barrel. The device has an old fashioned appearance. Neither OLD nor TOM is more dominant than the other: the words work together. In the application, the words and the device are equally prominent in size, although the words are clearer. As the words are identical but the application contains the device element there is a reasonable degree of visual similarity. The words are the only element in both marks which will be spoken: there is consequently aural identity.

22. Limited's mark signifies the forename TOM which is qualified as being OLD, so the concept is that of an elderly male person called TOM. There is nothing else in Limited's mark to point away from this concept. Conversely, there is a further conceptual layer in the applicant's mark. As a male cat is commonly referred to as a 'tom cat', the words could be a reference to the cat in the device. In combination, if the connection between the words OLD TOM and a cat is made, the concept is that of an old tom cat, rather than an elderly man called Tom. If the tom cat connection is not made, or until it is made, the concept of the word element of the application is also that of an elderly man called Tom. Overall, I find that there is a reasonable degree of similarity between the marks.

extraneous to the mark used in marketing, comes in too – as though it formed part of the registered mark."

Distinctive character of the earlier mark

23. A factor in the global comparison is a consideration of the distinctive character of Limited's trade mark because the more distinctive the earlier trade mark (either by nature or nurture) the greater the likelihood of confusion⁶. OLD TOM has a reasonably high level of inherent distinctive character for the goods; although not invented words, the mark does not describe or allude to any characteristic of the goods. In 2006 (the year the application was made), Limited's evidence seems to indicate a marked increase in bottle sales. Prior to 2006, the evidence shows that use was more in relation to cask sales of real ale via pubs and bars, rather than retail (shop sales) to the general public. It was also limited in terms of geographical area. The use from 2006 may have changed in emphasis but it is difficult to gauge the significance of this on the average consumer over such a short space of time. However, the use is not on a large enough scale to say that the mark's reasonably high degree of inherent distinctive character has been enhanced to any significant extent through use, bearing in mind the large size of the beer market in the UK.

24. In his counterstatement, Mr Maslyukov states that there is an:

“Overall absence of likelihood of confusion because of voluntary reduction of distinctiveness by the owner of the earlier mark. Four elements reduced the distinctiveness and an overall assessment of of likelihood of confusion of my mark with the opponent's mark:

- a) The suggestion made by the UK trademark 854052 (ROBINSON'S OLD TOM ALE) that “Old Tom” is a generic name for ale;
- b) The special abandon of the UK figurative registered mark 2125625 with a cat;
- c) Allowance by non-filing of the opposition for the UK producer of gin, Diageo plc, to register the figurative Community trademark 6207963 reproducing the cat for the identical goods to my goods;
- d) Allowance by non-filing of the opposition for the UK producer of gin, Hayman Limited, to register the word Community trademark 6278618 (HAYMAN'S OLD TOM GIN) for the identical goods to my goods

The Community trademark application 6278618 not opposed by Robinson and the figurative Community trademark application not opposed by Robinson (filed after special surrender of registered figurative mark 2125625) applied for the identical goods with my goods was a kind of heavy tanks so strangely accepted by the owners of the earlier mark for the ale to destroy the well constructed distinctiveness. The non-opposed applications of the UK gin makers accompanied by the voluntary

⁶ *Sabel BV v Puma AG* [1998] RPC 199.

surrender of the UK registration dramatically damaged the distinctiveness of the remained trademark belonging to Robinson.”

The non-renewal of 2125625 is explained by Ms Hitchcock as a non-renewal due to a change in the label. In any case, what Limited chooses to do with its trade marks is a matter for Limited, as is whether it chooses to oppose or not to oppose other trade marks. It can have no bearing on this case: guesswork as to what is happening between third parties cannot affect the inherent distinctive character of its marks. No evidence of other OLD TOM marks in use has been shown, so any potential issue of dilution of distinctive character cannot begin to be assessed.

Likelihood of confusion

25. As stated earlier, where there is no similarity of goods or services, there can be no likelihood of confusion. The test is cumulative⁷. In the event that I am wrong and that there is a degree of similarity between the goods and services, albeit a very low degree of similarity, then I must look at this in combination with all the other factors I have analysed. According to the interdependency principle (*Canon*), a lesser degree of similarity between trade marks may be offset by a greater degree of similarity between goods and services, and vice versa. I found that there is reasonable degree of similarity between the marks. In the event that there is a very low degree of similarity between the goods and services, the factors still do not combine to create a likelihood of confusion. The goods and services have such a low degree of similarity that the goods and services sold under the marks will not be mistaken for each other. Direct confusion will not occur. Even if the average consumer notices the similarity of the marks, in the sense of bringing them to mind, they are likely to put the similarity down to a coincidence of name, rather than any economic link between the undertakings, because the goods and services are so far removed from one another. The consequence of this is that there is no likelihood of confusion: the marks will not be mistaken for each other and there will be no expectation on the part of the average consumer that the goods and services emanate from the same or linked undertakings.

⁷ *Commercy AG v OHIM*, Case T-316/07 “42 It has also been held that, for the purposes of applying Article 8(1)(b) of Regulation No 40/94, a likelihood of confusion presupposes both that the two marks are identical or similar and that the goods or services which they cover are identical or similar. Those conditions are cumulative (see, to that effect, Case C-106/03 P Vedral v OHIM [2004] ECR I-9573, paragraph 51, and Case C-234/06 P Il Ponte Finanziaria v OHIM [2007] ECR I-7333, paragraph 48).

43 Consequently, for the purposes of applying Article 8(1)(b) of Regulation No 40/94, it is still necessary, even where the two marks are identical, to adduce evidence of similarity between the goods or services covered by them (see, to that effect, order of 9 March 2007 in Case C-196/06 P Alecansan v OHIM, not published in the ECR, paragraph 24; and Case T-150/04 Mülhens v OHIM – Minoronzoni(TOSCA BLU) [2007] ECR II-2353, paragraph 27).”

26. The opposition fails against all of Mr Maslyukov's goods and services.

Costs

27. Mr Maslyukov having been successful is entitled to a contribution towards his costs. Mr Maslyukov has not been legally represented in these proceedings; it is the registrar's practice to award costs to litigants-in-person at half the rate that he awards them where a party has had legal representation. I award costs upon the following basis:

Preparing a counterstatement and considering the statement of Limited	£200
Considering the evidence of Limited:	£100
Total:	£300

28. I order Frederic Robinson Limited to pay Pavel Maslyukov the sum of £300. 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 19 day of October 2010

**Judi Pike
For the Registrar,
the Comptroller-General**