

BL O/437/17

TRADE MARKS ACT 1994

APPLICATION 3159033 BY THE LAMBSWICK DRINKS COMPANY LTD
TO REGISTER THE MARK

Oldfields Applesecco

IN CLASS 33

AND

OPPOSITION 407081 BY CONSORZIO DI TUTELA DELLA
DENOMINAZIONE DI ORIGINE CONTROLLATA PROSECCO

Background and pleadings

1. This is an opposition by Consorzio Di Tutela Della Denominazione Di Origine Controllata Prosecco ('the opponent') to an application filed on 12 April 2016 by Lambswick Drinks Company Ltd ('the applicant') to register the trade mark 'Oldfields Applesecco' in class 33 for 'Cider'.

The opponent is a legal person created under Italian law whose functions include the protection of the appellation Prosecco which is registered as a Protected Designation of Origin (PDO) under Commission Regulation (EC) No. 1166/2009 and Council Regulation (EC) No. 479/2008. Prosecco was granted PDO status on 17 July 2009.

The grounds of opposition are, in summary:

1. Section 3(3) of the Trade Marks Act 1994 (The Act) which states that:

"A trade mark shall not be registered if it is –

(a) ...

(b) of such a nature as to deceive the public (for instance as to the nature, quality or geographical origin of the goods or service)."

The opponent submits under this ground that due to the high degree of similarity between the signs at issue, consumers will connect the opposed mark with PROSECCO. By including a term highly similar to the opponent's PDO the mark is liable to deceive the public as to the quality, characteristics and origin of the applicant's goods by making them believe that the goods offered by the applicant are PDO without complying with PDO product specifications.

2. Section 3(4) of the Act which states:

"A trade mark shall not be registered if or to the extent that its use is prohibited in the United Kingdom by any enactment or rule of law or by any provision of Community Law."

The opponent submits that the applicant's mark should be refused in light of Articles 102 and 103(2) of the Regulation (EU) No. 1308/2013 since it does not comply with the product specifications for the PDO Prosecco and would harm the PDO Prosecco under these Articles.

3. Section 3(6) of the Act which states that a trade mark shall not be registered if or to the extent that the application is made in bad faith.

The opponent submits in its statement of grounds:

“19...The Applicant has no genuine connection with PROSECCO and/or the Opponent but chose the sign OLDFIELDS APPLESECCO for opportunistic reasons in the full knowledge that consumers will associate the Opposed Mark with the PDO PROSECCO and with the reputation enjoyed in the UK...”

4. Section 5(2)(b) of the Act which states:

“A trade mark shall not be registered if because -

(a)...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

The opponent relies on the following mark, goods and services.

Mark details and relevant dates:	Goods and services relied on:
<p>EUTM 11619764 (collective):</p>  <p>Mark description: The trademark consists of nine stylised wine glasses joined together at the bases, which form a wheel, the centre of which is formed by the bases of the wine glasses themselves, with the remaining parts of the glasses (stems and tulips) branch outwards. On the wine glasses there are depicted alternating stylised vine branches. Between one wine glass and the next there are three solid circles, arranged from the smallest to the largest towards the outside. On the upper hemicycle of the wheel, there is the text "PROSECCO PDO PROSECCO DOC" in fanciful letters, inclined from left to right.</p> <p>Filed: 1 March 2013</p> <p>Priority (Italy): 22 November 2012</p> <p>Date of entry in the register: 30 July 2013</p>	<p>Class 33 Prosecco</p> <p>Class 35 Promotions which aims to raise awareness of Controlled Designation of Origin Prosecco produced by individuals in a production chain in accordance with the Rules of Production of Controlled Designation of Origin Prosecco and of this Controlled Designation of Origin, including attendance at trade fairs and organisation of publicity and promotional campaigns and by means of sponsorship agreements relating to commercial events; Development and support of commercial initiatives and events to promote Controlled Designation of Origin Prosecco and its image and reputation; Promotion of Prosecco and of Controlled Designation of Origin Prosecco by means of sponsorship agreements relating to informational, educational, cultural and sporting events.</p> <p>Class 41 Organisation of trade fairs, Publishing services (including electronic publishing services), expositions, Seminars, Round tables, Cultural activities; Development and support of information, educational, cultural and sporting initiatives and events to promote Controlled Designation of Origin Prosecco and the related Controlled Designation of Origin and to promote its image and reputation.</p>

The opponent submits that the conflicting goods in class 33 are highly similar and the parties' respective trade marks are visually, phonetically and conceptually highly similar resulting in likelihood of confusion on the part of the public.

5. Section 5(4)(a) of the Act which states:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade.”

The opponent relies on PROSECCO, which it submits has been used throughout the UK since December 2009 for, *“Sparkling wines; development and support of information; educational, cultural and sporting initiatives and events to promote Controlled Designation of Origin Prosecco and the related Controlled Designation of Origin and to promote its image and reputation.”*

The opponent submits that there is no doubt Prosecco has *‘a qualifying reputation and goodwill for wines’* and claims that use of the applicant's mark would falsely lead consumers to believe that producers of Prosecco had endorsed or licenced the applicant's goods. As a consequence the opponent claims that such use would erode *‘the exclusive goodwill of the Prosecco producers’*, *‘result in the Prosecco producers losing control of their goodwill’* and would *‘cheapen and debase the reputation of Prosecco producers’*.

The opponent filed a counterstatement denying the grounds of opposition. I note the following points in particular:

- Oldfields Applesecco is an unusually light, crisp style of cider made at Oldfields Farm with eating apples.
- The word ‘Applesecco’ uses words commonly understood in the drinks industry to suggest a dry style apple drink.

- It is made in the UK, not northern Italy and is made with apples not the glera grape.
- Label and marketing literature clearly state the product is cider.
- The bottle, manufactured in Italy, is a widely available 75cl bottle not for the sole use of Prosecco.
- Unlike Prosecco the closure is a crown cap, not a mushroom cork and no foil is used.
- The ABV of Oldfields Applesecco is 6%, much lower than the average Prosecco at 11%.
- There are valid and appropriate reasons for labelling the cider as Oldfields Applesecco.
- The word 'secco' is understood in the UK to mean 'dry' and is used across the drinks industry, not solely by Prosecco.
- "Oldfields Applesecco is open and honest that it is best enjoyed in a flute glass and 'served as you would a sparkling wine'. It shares the light, crisp characteristics of a sparkling wine and is indeed best served in a chilled flute glass. There is nothing on the label, in printed literature or the website stating that it is a sparkling wine like or similar to Prosecco..."
- Cider and wine are not identical.

Both sides filed evidence, the applicant also filed submissions. The opponent filed a skeleton argument. A hearing subsequently took place before me at which the applicant was represented by Mr Nick Davis at the UK Intellectual Property Office in Newport. The opponent was represented by Ms Fiona Clark of Counsel, instructed by Bird & Bird LLP, who attended by video conference.

EVIDENCE

The opponent's evidence

The opponent's evidence was provided by the witness statement of Stefano Zanette, dated 22 December 2016. Exhibits SZ1-SZ15 are attached to the statement. Mr Zanette is the President of the opponent.

The first six exhibits concern the opponent consortium, its creation and responsibilities and the requirements for those operating under the PDO, with the right to use the PROSECCO designation. Since none of these points are a matter of dispute between the parties I will not detail these documents here.

The key facts from Mr Zanette's statement are as follows:

- Prosecco gained PDO status on 17 July 2009.¹
- The PDO Prosecco applies exclusively to wines from a specified grape growing area of 20,000 hectares, located in Northeast Italy.
- Prosecco wine must be obtained from vineyards consisting of the Glera vine species. Other vine species may be included, to a maximum of 15%.
- between 2010 and 2014 export of Prosecco to the UK rose from 113,780 hectolitres to 486,644 hectolitres.²
- In 2015 the UK was the principal export market for Prosecco, at 31% of total export.

The opponent produces a brochure titled, 'Recognising Prosecco D.O.C.'. Examples from 2012 and 2015 are provided.³ Prosecco is described in the brochures in the following terms:

"Brilliant straw yellow wine with fine, persistent perlage and aromas of white flowers, apple and pear. It is fresh and elegant on the palate with moderate alcoholic strength."

Exhibit SZ14 comprises pages taken from the applicant's website www.oldfieldsorchard.co.uk. The first two pages were printed on 19 December 2016. The heading at the top of the page is, 'The Oldfields Story'. The second and third paragraphs read as follows:

¹ Exhibit SZ3

² Exhibit SZ8

³ Exhibit SZ6

“Once the decision had been made to team up with Hobsons and make a commercial cider, the Lambswick Drinks Company was set up and a cider press and fermentation tanks were purchased and installed in a purpose built pressings hall at Oldfields Farm.

In September 2013 our first press took place. We used Discovery eating apples from nearby Augernik Fruit Farm. Intended as a trial, this first press astounded us with a cider almost like Prosecco in style. With this in mind we decided to bottle it in beautiful black Italian Prosecco bottles which have been a huge hit with customers, specially as we managed to keep the price down!”

The second article in this exhibit was printed from the applicant’s website on 3 January 2017 and is not dated. It is titled, ‘*Oldfields Applesecco is launched*’. The first three paragraphs are as follows:

“This week we are launching our new ‘Oldfields Applesecco’ at the Ludlow Spring Festival. This very unusual cider is made with local handpicked Discovery apples, a juicy eating variety which ferments - into a very crisp, clean and light drink more like a sparkling wine in character than a traditional cider.

When we started making cider and ran our first press in 2013 we experimented with Discovery apples as they are an early cropper. We had no idea that it would result in a fantastic new style of drink.

We soon realised that it was similar in style to sparkling wine so we got hold of some beautiful Italian bottles and launched it as Discovery Cider. The feedback from customers has been fantastic and they often remark on the fact that it smells of fresh Discovery apple not cider, so we decided to take one step further and rebrand it as ‘Oldfields Applesecco’ which gives drinkers a much better idea of how they should enjoy it as it tastes like apples rather than cider but is dry in style.”

The following photograph is shown within the article:



The final article which makes up this exhibit was printed on 3 January 2017 and is not dated. It is titled, ‘*So You Think You Don’t Like Cider!*’ The article provides three pieces of advice for those “who ‘don’t drink cider’ in the hope they’ll give Oldfields Orchard a try...” The third of these is as follows:

“Thirdly, if shoppers like a sparkling wine such as Prosecco then we recommend they try Oldfields Orchard Discovery Cider. It was the first cider we made with our new press in September 2013 and we were amazed how well it holds the wonderful fresh aroma of Discovery apples - which don’t keep well once picked. There’s something about it that reminds everyone who’s tried it of an alternative to Prosecco when they taste it, not like a traditional cider at all! Although a slightly higher alcoholic content than our medium sweet and medium dry, at 6% ABV it’s definitely a potentially safer alternative to wine.”

Exhibit SZ15 is described by Mr Zanette as ‘extracts from third party websites’ that provide commentary on the launch of the applicant’s product. The first of these is taken from www.shropshirestar.com. The article is titled, ‘Shropshire orchard to launch apple

alternative to Prosecco' and was published on 12 May 2016. The penultimate paragraph reads:

“Hobsons Cider Product Manager, Alison Chadwick, added: ‘We soon realised it was similar in style to sparkling wine so we imported some beautiful Italian bottles and launched it as Discovery Cider. The feedback from customers has been fantastic and they often remark on the fact that it smells of fresh Discovery apple not cider, so we decided to take one step further and rebrand it as applesecco which gives drinkers a much better idea of how they should enjoy it.’”

The second of these is an article featured on myartisanbusiness.com, dated 14 January 2016. It is written by Catherine Moran and is a feature on ‘Tenbury Applefest’, which is described as a celebration of local heritage fruit and a showcase for producers who turn the fruit into ‘desirable, drinkable and eatable’ goods. One of the producers referred to in the article is the applicant. The following image of the applicant’s stand is shown:



The author of the article interviewed a number of the producers at the show. The transcript of those interviews is detailed in the article. She asked Alison Chadwick, (Cider Product Manager) at Hobson’s Brewery, what Oldfields Orchard Discovery Cider (now named Oldfields Applesecco) tastes like. Alison Chadwick stated:

“It’s a dry drink but it’s very light, crisp, refreshing and we felt it was like a Prosecco...”

The applicant’s evidence

The applicant’s evidence is provided by the witness statement of Mr Nicholas Davis. It is titled ‘written submissions’ but has a signed statement of truth and exhibits attached and referred to in the statement, so I will treat it as evidence.

Mr Davis states:

“Any comparisons made between ‘Oldfields Applesecco’ and sparkling wines concern the manner in which it should be enjoyed. In the [applicant’s] opinion this is not the same as passing off the brand as another product.”

Regarding the articles filed by the opponent, Mr Davis states:

“1) ‘The Oldfields Story’ was written in 2013, three years before the launch of ‘Oldfields Applesecco’, and the quotes referred to by the opposition concern the choice of the upmarket bottle shape. The article contains no mention whatsoever of ‘Oldfields Applesecco’ and does not claim that the product is certified DOC or PDO.

2) ‘So You Think You Don’t Like Cider’ was written in June 2014, nearly two years before the launch of ‘Oldfields Applesecco’. In context it explains how ‘Oldfields’ ciders taste like apples and to quote from the article ‘definitely not scrumpy’. The article explains how ‘Oldfields Orchard Discovery Cider’ is an “alternative to Prosecco” qualified by “not like a traditional cider at all” to explain the light style and manner in which it should be enjoyed. It does not suggest it is a fake Prosecco.

3) ‘Oldfields Applesecco is launched’ was written in May 2016.

The article refers to the product being ‘more like a sparkling wine’ but in context it says ‘than a traditional cider’.”

Regarding the name of the product, Mr Davis makes the following statement:

“It must be acknowledged that [the] article explains the name very clearly: ‘Oldfields Applesecco’ gives drinkers a much better idea of how they should enjoy it as it tastes like apples rather than cider but is dry in style.”

‘Secco’ is a commonly used term in the drinks industry as a description of style.

The Lambswick Drinks Company holds that this, and the words ‘Apple’ are very important tools to help consumers understand the taste of ‘Oldfields Applesecco’ which is not sweet tasting nor a traditional cider in style.”

The Lambswick Drinks Company invites the opponent’s opinion of Angioletti Secco Sparkling Craft Cider as a product seen on the average UK supermarket shelf and on websites including Rebellion Beer and Winesava compared to ‘Oldfields Applesecco’ Discovery Cider. The following is the label of the bottle representation which is attached at ND5:



Mr Davis states, *“It is unfair to object to the brand name ‘Oldfields Applesecco’ with products like this freely available”.*

Mr Davis concludes:

“I truly believe that as a result of the use of it by my firm, the mark ‘Oldfields Applesecco’ is known and understood by customers and drinkers in the United Kingdom, is uniquely associated with Oldfields Ciders and that it distinguishes the ciders made and sold by the Lambswick Drinks Company from other ciders.”

Preliminary issues:

The logo marks

Mr Davis has provided two examples of his company ‘logo’ for the goods which are the subject of this application. Neither of these are the mark applied for and I will say no more about them as they do not form part of these proceedings.

Other drinks on the market

Mr Davis has also provided examples of other drinks which include ‘secco’ on the label. It is not clear if these are available in the UK, at least two of the examples appear to have labels in German. He also asks for the opponent’s view on the Angioletti Secco Sparkling Craft Cider which I have shown above.

The matter before me is the applicant’s ‘Oldfields Applesecco’ mark which must be considered in light of the grounds raised under sections 3 and 5 of the Act by the opponent. Whether or not the opponent would have a case against a different mark, proprietor or producer, is a matter for the opponent and does not form part of the decision I must make, though I will bear in mind Mr Davis’s submission regarding the meaning of ‘secco’ later in this decision.

Fall-back position

At the hearing Mr Davis asked to put forward a fall-back position. He did not provide a specific form of words but submitted the following:

“We would like to create a limited specification to Class 33 to represent the fact that we are producing an alcoholic drink principally made from (farm fermented) apples and pears and that we will not produce anything based on grapes.”

Ms Clark submitted that this suggested limitation results in a specification which is wider than the applicant’s current goods which are ‘cider’ and so the limitation could not be accepted. I agree. A specification that begins ‘alcoholic drink’ is clearly wider than cider and is not a ‘limitation’.

In addition, following the decision in *PostKantoor*⁴ an exclusion of objectionable goods may be acceptable to the Registry at the examination stage or in response to an opposition, providing it excludes a characteristic of those goods. The applicant’s current specification is for ‘cider’. Limiting the current specification to, for example, ‘cider not being made from grapes’ would not be an acceptable limitation since cider is typically not made from grapes. The limitation would not ‘exclude a characteristic’ of the goods.

The proposed limitation is not acceptable.

Use contrary to law?

It is convenient first to consider the opponent’s opposition under s.3(4) of the Act which states:

(4) A trade mark shall not be registered if or to the extent that its use is prohibited in the United Kingdom by any enactment or rule of law or by any provision of Community law.

The parties agree that ‘Prosecco’ is a PDO and there does not appear to be any disagreement that it was protected before the date that the opposed trade mark application was filed.

⁴ *Omega SA (Omega AG) (Omega Ltd) v Omega Engineering Incorporated* [2012] EWHC 3440 (Ch)

The opponent relies on articles 102 and 103(2) of EU Regulation 1308/2013, which govern the use of PDOs for wine and the relationship between them for wine and trade marks.

“Article 102

Relationship with trade marks

1. The registration of a trade mark that contains or consists of a protected designation of origin or a geographical indication which does not comply with the product specification concerned or the use of which falls under Article 103(2), and that relates to a product falling under one of the categories listed in Part II of Annex VII shall be:

(a) refused if the application for registration of the trade mark is submitted after the date of submission of the application for protection of the designation of origin or geographical indication to the Commission and the designation of origin or geographical indication is subsequently protected;
or

(b) invalidated.

2. Without prejudice to Article 101(2), a trade mark referred to in paragraph 1 of this Article which has been applied for, registered or established by use in good faith, if that possibility is provided for by the law concerned, in the territory of the Union either before the date of protection of the designation of origin or geographical indication in the country of origin, or before 1 January 1996, may continue to be used and renewed notwithstanding the protection of a designation of origin or geographical indication, provided that no grounds for the trade mark's invalidity or revocation exist under Directive 2008/95/EC of the European Parliament and of the Council (31) or under Council Regulation (EC) No 207/2009 (32).

In such cases, the use of the designation of origin or geographical indication shall be permitted alongside the relevant trade marks.

Article 103

Protection

1. A protected designation of origin and a protected geographical indication may be used by any operator marketing a wine which has been produced in conformity with the corresponding product specification.

2. A protected designation of origin and a protected geographical indication, as well as the wine using that protected name in conformity with the product specifications, shall be protected against:

(a) any direct or indirect commercial use of that protected name:

(i) by comparable products not complying with the product specification of the protected name; or

(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;

(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;

(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;

(d) any other practice liable to mislead the consumer as to the true origin of the product."

Article 102 prohibits the registration of trade marks which contain or consist of a PDO for products falling within the categories listed in Part II of Annex VII to that article. This covers a range of wines, grape must and wine vinegar. Since the opponent's goods are cider the opponent cannot succeed under this article of the regulation. Furthermore, the applicant's mark 'Oldfields Applesecco' does not contain or consist of the PDO 'Prosecco' in its entirety.

At the hearing Ms Clark submitted that article 103(2) goes wider than article 102 because it is not limited to the goods within listed in Part II of Annex VII but applies to 'comparable products not complying with the product specification of the protected name'. In addition, the article does not require exact reproduction of the PDO, in this case 'Prosecco', but also prevents 'any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated'.

The nature of evocation was described by Court of Justice of the European Union ('CJEU') in *Gorgonzola*⁵ where it was stated:

"25 'Evocation', as referred to in Article 13(1)(b) of Regulation No 081/92, covers a situation where the term used to designate a product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected.

26 As the Advocate General states in points 37 and 38 of his Opinion, it is possible, contrary to the view taken by the defendants, for a protected designation to be evoked where there is no likelihood of confusion between the products concerned and even where no Community protection extends to the parts of that designation which are echoed in the term or terms at issue."

⁵ *Case C-87/97*

In addition, the opponent draws my attention to paragraph 97 of the recital to Regulation 1308/2013 which states:

“Registered designations of origin and geographical indications should be protected against uses which take advantage of the reputation enjoyed by complying products. So as to promote fair competition and not to mislead consumers, that protection should also extend to products and services not covered by this Regulation, including those not found in Annex I to the Treaties.”

Ms Clark referred me to a number of cases including the recent decision in *EUIPO v Instituto dos Vinhos do Douro e do Porto*.⁶ Paragraph 98 of which reads:

“Even ‘in the absence of any likelihood of confusion’ with the PDO Porto/Port, the trade mark ‘Port Charlotte’ may evoke, in the mind of a reasonably well informed and reasonably observant European consumer, the wines protected by that PDO. The General Court should have disregarded the likelihood of confusion in order to focus on whether the new mark created, ‘in the mind of the public an association of ideas regarding the origin of the products’, particularly since the products concerned are similar in appearance, both being bottled as alcoholic beverages, and in light of the (partial) aural similarity between the well-known PDO and the mark in respect of which a declaration of invalidity was sought.”

And *L’Oreal v Bellure*⁷ in which the court stated that:

“Article 5(2) of Directive 89/104 must be interpreted as meaning that the taking of unfair advantage of the distinctive character or the repute of a mark, within the meaning of that provision, does not require that there be a likelihood of confusion or a likelihood of detriment to the distinctive character or the repute of the mark or, more generally, to its proprietor.

⁶ Case C-56/16

⁷ Case C-487/07

The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an advantage taken unfairly by that third party of the distinctive character or the repute of the mark where that party seeks by that use to ride on the coat-tails of the mark with a reputation in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image."

The relevant public in this case is the alcoholic beverage buying public in the UK. They are unlikely to be aware of the specific product standards required by producers in order to use the PDO Prosecco. Similarly, I am not convinced that they will know the flavour description provided by the opponent that describes Prosecco as having an element of apple in its flavour, or even that Prosecco must be made from grapes. The PDO relates to wine, the application is made in respect of ciders. These are clearly both alcoholic beverages, which are comparable products for the purposes of the regulation.

Mr Davis submitted that the inclusion of 'Oldfields' at the start of the applied for mark makes it clear where it comes from. Ms Clark stated that in her view 'Oldfields' makes no difference as a PDO of the type at issue will always be accompanied by a bottler, retailer and so on.

The regulation is clear that a mark can fall foul of the regulation 'even if the true origin of the product or service is indicated', as is the situation here where 'Oldfields' proceeds 'Applesecco' and is clearly the originator of the goods.

In his witness statement and at the hearing Mr Davis stated that the mark relates to the ingredients, namely apples with 'secco' meaning dry. I have no evidence to indicate the average consumers' perception of 'secco' and in any case, it does not appear as a word in its own right within the mark. Rather, the APPLESECCO part of the mark is a neologism and I must determine whether the mark as a whole has an evocative effect in bringing to mind the PDO relied on by the opponent.

Ms Clark maintains that the applicant's change of its product to APPLESECCO is significant. I agree. The product was first pressed in 2013 and subsequently launched as 'Discovery Cider'. The evidence indicates that from the outset the applicant thought the product was *'a cider almost like Prosecco in style'*. At the Tenbury Applefest the applicant's stand is shown with a bottle of Discovery Cider, next to which is a small blackboard with the words, 'CIDER LIKE PROSECCO £5'. In an interview at that event the Cider Product Manager for the Applicant described the taste of the product as, "... *a dry drink but it's very light, crisp, refreshing and we felt it was like a Prosecco...*" From the pages of the applicant's website⁸ it is clear that the bottles for the cider were selected *'with this in mind'*.

The evidence in this case suggests that the re-brand of the applicant's product was as a result of the applicant's customers and the applicant itself finding the product to be like sparkling wine and in particular 'prosecco-like'. To my mind, it is no coincidence that the name chosen for the rebrand includes part of the word 'prosecco'.

All things considered, I find that the applicant's trade mark does create an association of ideas regarding the origin of these products by evoking the PDO PROSECCO. The applicant's mark as a whole will be seen as a product from 'Oldfields' which is either apple flavoured Prosecco or is made from apples in the same style as Prosecco. Furthermore, the evidence supports the view that this was the applicant's intention when it rebranded its goods and it has been successful in that intention.

The opposition succeeds under section 3(4) of the Act.

At the hearing the opponent identified the section 3(4) ground as its strongest case. I agree and having found in the opponent's favour on this ground I see no merit in considering the remaining grounds which put the opponent in no better position and do not advance its case.

⁸ See 'Oldfields Story' from exhibit SZ14 referred to above.

Costs

The opponent has been successful, so it is entitled to a contribution towards its costs. I will make an assessment based on the relevant scale which is included in Tribunal Practice Notice 2/2016.

I award the following:

Official fee -	£200
Preparing a statement of case and considering the counterstatement -	£400
Filing evidence -	£900
Preparation for and attending the hearing -	£600

Total - £2100

I order Lambswick Drinks Company Ltd to pay Consorzio Di Tutela Della Denominazione Di Origine Controllata the sum of £2100 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 14th day of September 2017

Al Skilton

For the Registrar,

The Comptroller-General