

O-443-12

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 2524951**

**BY**

**MILLER CHEMICAL & FERTILIZER CORPORATION**

**TO REGISTER THE TRADE MARK:**

**POD CEAL**

**IN CLASS 1**

**AND**

**THE OPPOSITION THERETO**

**UNDER NO 100080**

**BY**

**DE SANGOSSE LTD**

1) On 1 September 2009 Miller Chemical & Fertilizer Corporation (Miller) filed an application for the registration of the trade mark POD CEAL (the trade mark). It was published for opposition purposes on 30 October 2009 with the following specification:

*chemical compositions for use on oleaginous field crops for agricultural purposes.*

The above goods are in class 1 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) An international priority date of 20 April 2009, deriving from the United States, is claimed.

3) De Sangosse Ltd (DSL) filed a notice of opposition to the registration of the trade mark.

4) DSL relies upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (the Act).

5) Section 5(2)(b) of the Act 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, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

Section 5(3) of the Act states:

—3) A trade mark which –

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a Community trade mark or international trade mark (EC) in the European Community) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.”

Section 5(4)(a) of the Act 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 principles of the law of passing-off were summarised by Lord Oliver in *Reckitt & Colman Products Ltd v. Borden Inc* [1990] RPC 341 at page 406:

—The law of passing off can be summarised in one short, general proposition: no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Thirdly he must demonstrate that he suffers, or in a *quia timet* action that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.”

6) In relation to sections 5(2)(b) and 5(3) of the Act DSL relies upon United Kingdom trade mark registration no 2449260, for the trade mark POD-STIK. The application for registration of the trade mark was filed on 13 March 2007 and the registration process was completed on 4 April 2008. The trade mark is registered for:

*agricultural adjuvant for foliar spray application to oilseed rape and pea crops as a pre-harvest aid.*

The above goods are in class 1 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.

7) DSL claims that the respective trade marks are highly similar. It claims that the respective goods are identical in so far as they are all chemical compositions for agricultural use, specifically for application to oilseed rape, which is an oleaginous crop. Consequently, registration of the trade mark would be contrary to section 5(2)(b) of the Act.

8) DSL claims that it has used its trade mark in respect of the goods of its registration in the United Kingdom since June 2007. It claims that the product sold under the trade mark is well-known in the industry as a high quality adjuvant that increases yield. DSL claims that use of Miller's trade mark would take unfair advantage of, or be detrimental to, the distinctive character or the repute of its trade mark. DSL claims that unfair advantage would be taken of the leading market position of the product sold under its trade mark. It claims that the distinctiveness of the brand would be diluted and its reputation tarnished if Miller's product were of an inferior quality. Consequently, registration of the trade mark would be contrary to section 5(3) of the Act.

9) DSL claims that as a result of substantial use of the trade mark in the United Kingdom on the goods of its registration since 2007, it has acquired substantial goodwill within the relevant sector of the agricultural industry and that this goodwill had been acquired —by the relevant date of the Application”. DSL claims that the use of Miller's trade mark would amount to a misrepresentation and would lead to damage of its goodwill. Consequently, registration of the trade mark would be contrary to section 5(4)(a) of the Act.

10) Miller filed a counterstatement. It denies that the respective trade marks are highly similar. It admits that the application includes goods that are identical to the goods of DSL's registration. In relation to all the other claims of DSL, Miller puts it to strict proof to substantiate them.

11) Both parties filed evidence. Both parties filed written submissions. Neither party requested a hearing.

#### *Evidence for DSL*

#### *Evidence of David G Cameron*

12) Dr Cameron is managing director of DSL.

13) The POD-STIK product was developed to solve the problem of the splitting of oilseed rape pods before or during harvest, resulting in lost seed. The product was introduced in the United Kingdom market in May 2007. Sales in eastern Europe of the product had begun before 2007. Dr Cameron states that the introduction in the United Kingdom did not meet any negative comments in relation to application or reduced combine throughput and that there was positive comment on reduced pod shatter.

14) In 2008 119 agronomists in the United Kingdom who had recommended and supplied POD-STIK (around 12% of the total number in the United Kingdom) were interviewed. The geographical area of those interviewed covered 75% of the United Kingdom oilseed rape area. 101 were able to measure the extra output, reporting higher yields. Exhibited at DC4 are results of the questionnaires from 119 agronomists involving 4 companies. Original questionnaires have not

been adduced and there is no information about the methodology used. The requirements for survey evidence are outlined in the head note of *Imperial Group plc & Another v Philip Morris Limited & Another* [1984] RPC 293:

—[a] survey is to have validity (a) the interviewees must be selected so as to represent a relevant cross-section of the public, (b) the size must be statistically significant, (c) it must be conducted fairly, (d) all the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved, (e) the totality of the answers given must be disclosed and made available to the defendant, (f) the questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put, (h) the exact answers and not some abbreviated form must be recorded, (i) the instructions to the interviewers as to how to carry out the survey must be disclosed and (j) where the answers are coded for computer input, the coding instructions must be disclosed.”

The evidence in no way satisfies the above criteria. The best that can be said for the survey evidence is that it shows use of POD-STIK in 2008. It is to be noted that those who have supplied the information in relation to the survey are agronomists who are working for undertakings that sell the product.

15) The POD-STIK product has been marketed by a number of agronomy businesses.

16) Prior to and during harvest time in 2009 (May to July) discussions were held on the Internet on the benefits of POD-STIK use between farmers and agronomists in British Farming Forum. Articles were written recommending its use based on the experience of previous years. Dr Cameron states that the general tone and content of the discussions reveals not only general awareness among the agricultural community of POD-STIK but also popularity. Dr Cameron states that POD-STIK was recommended to others in a way that suggests POD-STIK was being considered a leading product in the summer months of 2009<sup>1</sup>. Exhibited at DC2 are pages downloaded from British Farming Forum. There are threads from May 2008, August 2008 and July 2009 in relation to POD-STIK. There is no way of knowing how representative of the industry those who have discussed POD-STIK on the website are. All that can be drawn from the threads is that certain farmers were discussing POD-STIK and a number of them gave favourable comments about it. Also included in the exhibit are two reviews of POD-STIK by Mike Abram, dated 9 May 2008 and 7 May 2009 from *Farmers Weekly Interactive*. The articles refer, inter alia, to an anti-pod shatter product and a product that strengthens the upper pod seam in oilseed rape. The articles praise POD-STIK; the praise emanates from persons who work for DSL or who sell its products. However, in the 2008 article, there is also a comment complimenting the product from a farmer in Yorkshire.

---

<sup>1</sup> After the material date – see below.

17) Exhibit DC3 consists of 3 items:

- A page downloaded from the website of United Oilseeds. In a piece dated 1 July 2008 there is reference to the use of —Pod Stik or NuFilm-P”. The products are described as polymers which help to retain seed.
- Newsletter of ProCam UK Limited for June 2009 (after the international priority date). An article refers to —Pod Stik”. ProCam are suppliers of the product. It is stated that by —effectively ‘sticking’ this area together the upper suture is prevented from opening thus stopping seed loss”.
- *Crop Production Magazine* for May 2010 (after the international priority date and the date of application). The article refers to 3 years of use of POD-STIK. The article includes the following:

—Pod Stik is one of those products which has quickly gained an enthusiastic following by doing exactly what it says on the label. Applied to the crop just before it’s fully ripe, the polymer blend effectively ‘closes’ the pods closed – protecting them from shatter. —Bridges the upper pod seam with a pliable adhesive staple,” says company technical manager, David Foster.”

—Mark Myers of Procam says rape growers have been quick to grasp the potential of the product. —After two years of widespread use, Pod-Stik is now a mainstream product for use – universally endorsed by our farmers and agronomists.”

The article also includes a case study from a farmer in Fife, who praises the product, having used it in 2008.

18) Sales in the United Kingdom of POD-STIK for 2007-2009 are given, these figures have been granted confidentiality from all but the registrar and the legal representatives of Miller.

19) Dr Cameron gives the following figures in relation to the oilseed rape area treated and the estimated market share:

Year	Equivalent in hectares	Oilseed rape area in UK	% of total area treated	Estimated market share
2007	20,695	675,000	3.1	
2008	77,435	598,000	12.9	> 80
2009	105,520	581,000	18.2	> 80

It is not clear in relation to what product the estimated market share relates; whether, for instance, it relates to all products to stop rapeseed oil pods bursting or such products which are also polymers.

20) Dr Cameron states that most of the marketing and advertising of POD-STIK has occurred through direct recommendations of distributors, referrals and by word of mouth. The normal process is for DSL staff to promote awareness of the product through a sales and technical presentation to —customer” agronomists, who in turn are salespersons to the end user. Dr Cameron gives figures for advertising and marketing activities combined, including sales support activities. The figures he has given also include trial costs, which cannot be considered to be promotional costs even if they are used when promoting the product. In 2008 £5,637.40 was spent and in 2009, up to 1 September, £6,771.91 was spent.

21) Copies of slides for presentations are included in exhibit DC7. In the presentations there are several references to pods eg rape pods, cracked pods and the pod wall. In one slide there is a note which states: —~~the~~ above effect is due to the sticking of the Pods”. The promotion of POD-STIK advises that it can be applied to any podded crop eg peas, beans, lupins and linseed. The exhibit also includes invoices relating to trials, a PR campaign, labels and leaflets.

22) Dr Cameron states that the main competing products for pod sealants are DesiKote Max and ISKAY and that there are no other brand names similar to POD-STIK.

*Witness statement of David Foster*

23) Mr Foster is the technical director of DSL. He joined the company in December 1993.

24) Mr Foster states that POD-STIK was the first pod-sealant in the United Kingdom to be based on a proprietary surfactant polymer blend. A previous product, launched in the 1980s, and based upon an alternative active ingredient had rapidly fallen out of use owing to its remaining tacky on the pods. He comments upon the advantages of the product. Mr Foster states that users have confirmed that the product reduces loss of yield before and during the harvesting process without any change to their normal harvesting practices. He states that it is the only product in the 35 years in which he has been working in agriculture where DSL and its distributors have received telephone calls from farmer-users at harvest time saying how good the product is.

*Witness statements of David Crossman, John Bianchi, Chris Matthews and Antony John Grayburn*

25) The witnesses work for 4 different companies which distribute agricultural chemicals. With one minor difference, all 4 witnesses have made the same declaration:

—2. My company is one of the six largest customers and national distributors of chemicals for crop production in the United Kingdom.

3. De Sangosse Ltd is a well known supplier in the UK of adjuvants for crop spraying. We have purchased adjuvant products from this company for over fifteen years.

4. We have been purchasing and reselling Pod-Stik, a crop spraying adjuvant for oilseed rape and pea crops, since 2007, distributing and re-selling to farmers under the same brand name throughout the United Kingdom.

5. I attest from my personal knowledge that Pod-Stik is an extremely well known brand in the UK market and was well known to users of crop-spraying chemicals at the date of 1 September 2009.

6. In addition, I attest from my personal knowledge that Pod-Stik is currently the most popular brand for this type of product in the UK market and was also the most popular brand at the date of 1 September 2009.”

The statements were signed on 13 January, 19 January, 6 January and 5 January 2011 respectively. The one difference in the statements occurs in that of Mr Grayburn who omits —and was also the most popular brand at the date of 1 September 2009” from his statement.<sup>2</sup>

26) Lord Esher MR in *Re Christiansen's TM* [1885] 3 RPC 54 at 60 commented upon the weight to be given to evidence in the same wording from a number of witnesses:

"Now, to my mind, when you have evidence given upon affidavit, and you find a dozen people, or twenty people, all swearing to exactly the same stereotyped affidavit, if I am called upon to act upon their evidence, it immediately makes me suspect that the affidavits are then not their own views of things and that they have adopted the view of somebody who has drawn the whole lot of the affidavits, and they adopt that view as a whole and say 'I think that affidavit right' and they put their names to the bottom."

The witnesses can comment upon their own knowledge but they cannot state whether the trade mark is well-known, that is a matter to be proved by evidence. The witnesses will also know of the product as they are selling it. Their evidence must be viewed on the basis of the comments made in this paragraph.

*Witness statement of Roman Cholij*

27) Mr Cholij is a trade mark attorney acting for DSL. He exhibits a copy of a notice of opposition from the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM). The opposition has been brought by Miller against the application for the registration of the trade mark POD-STIK by DSL. The opposition is based upon the trade marks POD CEAL and POD-CEAL,

---

<sup>2</sup> 1 September 2009 is after the material date.

French and German registrations respectively. In the grounds of opposition Miller has written:

—In an opposition (No. 100080) filed by the present Applicant to the Opponent's British trade mark application (No. 2,524,951) for POD CEAL, the present Applicant asserted: —the mark applied for [POD CEAL] is highly similar to the Opponent's Earlier Mark [POD-STIK]". If that assertion is correct (i.e. that POD CEAL and POD-STIK are —highly similar") then it must follow, bearing in mind the identity and/or close similarity of the respective goods, that the CTM application offends the provisions of Art. 8(1)(b) CTMR."

#### *Evidence for Miller*

28) Mr Manaton, a trade mark attorney, gives evidence for Miller. Mr Manaton exhibits details of Miller's registration of POD-CEAL in Germany for *chemical products for use for containing oil field fruits stewed for agricultural purposes* (according to the translation supplied). The application for registration was filed on 8 June 2006.

#### *Written submissions*

29) The submissions of DSL mainly refer to standard case law. Taking into account the arguments of Miller, the most specific and relevant submission is:

—In the present instance the evidence in the Principal Witness Statement indicates that the mark POD-STIK has acquired through extensive use, and the reputation it acquired before the relevant date, a significant degree of distinctiveness. This distinctiveness is shared indivisibly by the different parts of the mark POD-STIK as a mark must be assessed globally by the overall impression it creates and not by its individual parts, analysed or dissected artificially (cf. *Sabel BV v Puma AG and other case law*). Thus the level of distinctiveness of the word component POD in the mark POD-STIK must be considered in relation to its integral situation, namely as connected to the component STIK (this connection being accented by a hyphen) within one indivisible sign. Consequently, it would be a false methodology to proceed in a comparison with the sign POD CEAL with the premise that the first components are descriptive and therefore the only meaningful parts to be compared are the words STIK and CEAL. Such an approach is erroneous in law."

30) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details<sup>i</sup>. 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<sup>ii</sup>. Consequently, there cannot be an artificial dissection of the trade marks, although it is necessary to take 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/she has kept in his/her mind and he/she is deemed to be reasonably well informed and reasonably circumspect and observant<sup>iii</sup>. The assessment of the similarity of the trade marks must be made by reference to the perception of the relevant public<sup>iv</sup>.

31) Consequently, it is necessary to consider the distinctive and dominant components of the trade marks; if there are any such components. DSL in its submissions wants reputation to be taken into account in relation to the comparison of the respective trade marks. The General Court (GC) stated in *Ravensburger AG v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-243/08:

—27It is appropriate at the outset to reject that complaint as unfounded. The reputation of an earlier mark or its particular distinctive character must be taken into consideration for the purposes of assessing the likelihood of confusion, and not for the purposes of assessing the similarity of the marks in question, which is an assessment made prior to that of the likelihood of confusion (see, to that effect, judgment of 27 November 2007 in Case T-434/05 *Gateway v OHIM – Fujitsu Siemens Computers (ACTIVY Media Gateway)*, not published in the ECR, paragraphs 50 and 51).”

A finding that can also be found in *Accenture Global Services GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-244/09, *Lan Airlines, SA v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-194/09 and *Ferrero SpA v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T-140/08. The comparison is sign to sign, reputation is taken into account in the global appreciation of a likelihood of confusion.

32) DSL submits that seal can mean a —~~device~~ or substance that is used to join things together so as to prevent them coming apart or to prevent anything passing between them”. Stick can mean to —~~ix~~ or become or remain fixed by or as by adhesive”. Consequently, there is a conceptual relationship between the two words.

33) DSL submits that the possibility of confusion is illustrated by Miller’s opposition to its Community trade mark application. The terms of that opposition are clear. The quid pro quo of DSL’s claim, if it is correct, is that there will be confusion in relation to Miller’s earlier trade mark. Miller has not stated that the position is correct; it has rehearsed the basis of DSL’s claim. In its opposition Miller relies upon earlier trade marks in France and Germany. Consequently, the position before OHIM will be different anyway, as it will depend upon the position in those jurisdictions which will take into account the linguistic issue; eg what, if any, conceptual link will there be for the average consumer for the goods in France and/or Germany.

34) In Miller's written submissions it no longer admits that some of the respective goods are identical. Instead it admits that the respective goods are similar but that there are significant differences in chemical composition and physical appearance of the respective commercial products. The specification of the earlier registration is neither defined by chemical composition nor appearance; nor for that matter, is the application<sup>v</sup>. Consequently, this submission is not pertinent. The goods of the application will include those of the earlier trade mark. Goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application<sup>vi</sup>. **Consequently, the respective goods must be considered to be identical.**

35) Miller submits that the only point of similarity between the trade marks is POD, which is —~~purely~~ descriptive of the goods". Miller refers to DSL's evidence which, inter alia, refers to pod shatter. It submits that the relevant public would understand POD as describing the element of the agricultural crop that DSL's product is intended to protect. Miller submits that DSL's trade mark as a whole has low distinctive character; STIK being the phonetic equivalent of stick. Miller submits that DSL's evidence shows use of pod stick as a descriptive term. It refers to DS2 page 9. This is a posting of the British Farming Forum, it is not clear whether the term is being used in relation to DSL's product, with a misspelling of the second part, or as a descriptor. Miller also refers to another posting which describes POD-STIK as —~~basically~~ a glue that sticks the pods shut and stops them shattering". Miller refers to the article at DC2 page 13 from 9 May 2008 which begins —~~Pod~~ Stik does exactly what it says, according to Dick Neale, technical manager for Hutchinsons. It sticks oilseed rape pods, preventing them from shattering or separating..." Miller also refers to the advertisement at DC3 page 7 for POD-STIK which has the strap line: —Sticks Pods – Maintains Yield". It also notes that the reproduction of the slide, at DC7 page 4, describes the product as —~~Oilseed Rape Pod-Sticker~~".

36) Miller submits that the owing to the inherent low distinctiveness of DSL's trade mark, the relevant public will be alert to the possibility that unconnected companies might offer competing products for a similar purpose under names incorporating some of the same descriptive elements; in particular the purely descriptive word POD. Miller refers to the judgment of the Court of Justice of the European Union in *Sabel BV v Puma AG* Case C-251/95 in which it was stated that —~~the~~ more distinctive the earlier mark, the greater will be the likelihood of confusion". It states that it necessarily follows that the less distinctive the earlier trade mark, the less will be the likelihood of confusion. This was the finding of Millet LJ in *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283:

—~~The~~ more distinctive the earlier mark, the greater will be the likelihood of confusion. The converse, of course, follows. The more descriptive and the

less distinctive the major feature of the mark, the less the likelihood of confusion.”

(DSL claims that its mark has acquired additional distinctiveness through use.) In relation to the limited distinctiveness of an earlier trade mark the judgment of the CJEU in *L’Oréal SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case C-235/05 P* is pertinent:

—45The applicant’s approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

37) Miller submits that the evidence furnished by DSL does nothing more than establish that its trade mark was used to a certain extent in the United Kingdom prior to the date of application. In relation to the estimated market share, Miller submits:

—In the data appearing in paragraph 10 of Dr Cameron’s Witness Statement, it is not clear to what the —estimated market share” refers. Mr Foster refers in his Witness Statement to the fact that —Ed-Stik was the first pod-sealant in the UK market place to be based on a proprietary surfactant polymer blend” and that —a previous product... based on an alternative active ingredient had rapidly fallen out of use”. In those circumstances, one might expect the —market share” to be 100% of pod sealants based on surfactant polymer beads. In other words, a claimed share of over 80% really proves nothing.”

There is a good deal of validity in the above comment. What is pertinent, consequently, is the percentage of oil seed rape that was treated. In 2007 this was 3.1% of the area in the United Kingdom, 12.9% in 2008 and 18.2% in 2009. Dr Cameron refers to the harvest time in 2009 as being between May and July. The application benefits from an international priority date of 20 April 2009.

38) Section 35 of the Act states:

—35- (1) A person who has duly filed an application for protection of a trade mark in a Convention country (a “Convention application”), or his successor in title, has a right to priority, for the purposes of registering the same trade mark under this Act for some or all of the same goods or services, for a period of six months from the date of filing of the first such application.

(2) If the application for registration under this Act is made within that six-month period-

(a) the relevant date for the purposes of establishing which rights take precedence shall be the date of filing of the first Convention application, and

(b) the registrability of the trade mark shall not be affected by any use of the mark in the United Kingdom in the period between that date and the date of the application under this Act.

(3) Any filing which in a Convention country is equivalent to a regular national filing, under its domestic legislation or an international agreement, shall be treated as giving rise to the right of priority. A “regular national filing” means a filing which is adequate to establish the date on which the application was filed in that country, whatever may be the subsequent fate of the application.”

Miller relies upon an application in the United States of America, which is a convention country. The trade mark is registered under no 3726790 for the goods of the application. Miller has a valid claim to international priority.

39) For the purposes of section 5 of the Act the material date is the international priority date of 20 April 2009. Consequently, the use by DSL after this date cannot benefit it; this effectively excludes the 2009 use. It is, of course, possible, that DSL’s product was ordered prior to this for the May to July harvest but there is no evidence to this effect.

40) In relation to section 5(3) of the Act, Group must establish that its trade mark was known by a significant part of the public concerned by the products and services covered<sup>vii</sup>. The CJEU in *General Motors Corporation v Yplon SA* Case C-375/97 stated how a party would establish this reputation:

—27In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent

and duration of its use, and the size of the investment made by the undertaking in promoting it.”

In 2008 12.9% of the oilseed rape crop had been treated with the product. It is to be expected that farmers producing a particular crop keep an eye out for products that may increase the harvest and will take an active interest in new products. The evidence shows that major suppliers of chemicals for agriculture have been supplying the product. The evidence from the suppliers has little weight, for the reasons given above. It is known that 12.9% of the oilseed rape crop was treated with the product in 2008. However, that figure does not identify the percentage of oilseed rape producers who used the product. The amount of promotion was limited. At the material date DSL can only rely upon two years use, in one of those years the use was very limited. **Taking into account all of these factors, DSL has not established that at the material date it had the necessary reputation for the purposes of section 5(3) of the Act.**

41) Miller submits that the extent of use at the material date is not sufficient to enhance the distinctiveness DSL's trade mark. The use will certainly have brought the trade mark to the attention of certain relevant consumers; most specifically those who have used it. The evidence does not demonstrate that in the general class of consumers of the product that the trade mark was known at the material date. **Consequently, DSL cannot rely upon any enhanced distinctiveness through use at the material date.**

42) Miller accepts that the trade mark has been used but still does not concede goodwill in relation to it:

—~~B~~earing in mind the inherent descriptive nature of the Opponent's mark, the protectable goodwill (if any) attaching to POD-STIK will be narrow and relatively weak.”

43) A similar provision to section 5(4)(a) of the Act is to be found in Article 8(4) of Council Regulation 40/94 of December 20,1993. This was the subject of consideration in *Last Minute Network Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Joined Cases T-114/07 and T-115/07, in which the GC stated:

—50First, there was goodwill or reputation attached to the services offered by LMN in the mind of the relevant public by association with their get-up. In an action for passing off, that reputation must be established at the date on which the defendant began to offer his goods or services (*Cadbury Schweppes v Pub Squash* (1981) R.P.C. 429).

51 However, according to Article 8(4) of Regulation No 40/94 the relevant date is not that date, but the date on which the application for a Community trade mark was filed, since it requires that an applicant seeking a declaration of invalidity has acquired rights over its non-

registered national mark before the date of filing, in this case 11 March 2000.”

The reasoning of the GC, *mutatis mutandis*, is followed in relation to the Act; so DSL must establish protectable goodwill as of the date of the international priority date, 20 April 2009. (There is no indication of use of Miller’s trade mark in the United Kingdom and so there will be no earlier date for the behaviour complained of.)

44) The judgments in *Phones 4u Ltd v Phone4u.co.uk. Internet Ltd* [2007] RPC 5 and *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) show that the question of goodwill cannot be established by the application of a formula. In the latter judgment Floyd J stated:

—Those observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least *prima facie*, that the opponent’s reputation extends to the goods comprised in the application in the applicant’s specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

The law of passing-off does not protect trivial goodwill but it does protect small goodwill<sup>viii</sup>. The scale of use, taking into the goods and the market, is certainly more than trivial. **The evidence of DSL shows that at the material date it enjoyed goodwill for an *agricultural adjuvant for foliar spray application to oilseed rape as a pre-harvest aid* in relation to the sign POD-STIK.**

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

#### *Average consumer and the purchasing process*

45) The average consumers of the respective goods will be farmers. They are goods that will be bought on the basis of increase of crop yield; careful consideration will be made as to the costs of the product and the increase in crop yield. Consideration will also be taken as to the method of dispersal, including if it is to be used with another product and the subsequent cleaning of the equipment; the threads from British Farming Forum are indicative of this. The products will be bought as the result of a very careful and educated decision. The effects of imperfect recollection will be extremely limited in these circumstances. The products are likely to be bought subsequent to the careful reading of literature; although the verbal use by sales representatives also has to be considered.

46) In *New Look Ltd v Office for the Harmonization in the Internal Market (Trade Marks and Designs)* Joined Cases T-117/03 to T-119/03 and T-171/03 the GC stated:

—49—However, it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market (*BUDMEN*, paragraph 57). The extent of the similarity or difference between the signs may depend, in particular, on the inherent qualities of the signs or the conditions under which the goods or services covered by the opposing signs are marketed. If the goods covered by the mark in question are usually sold in self-service stores where consumer choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any aural similarity between the signs.”

As per the comments in paragraph 45, visual similarity will be of greater importance than aural similarity.

#### *Comparison of trade marks*

47) The trade marks to be compared are POD CEAL and POD-STIK. In relation to the respective goods POD is descriptive; the goods may be used on the pods of crops. CEAL is the phonetic equivalent of seal and for goods that have a sealing function, eg sealing the pod, is directly descriptive. The most distinctive component of Miller's trade mark is CEAL, owing to its misspelling; a distinctiveness which will vanish in oral use. In oral use there is no dominant and distinctive separate component; the distinctiveness lies in the trade mark as a whole. In visual use CEAL is the dominant and distinctive component. STIK is the phonetic equivalent of stick. The goods of the earlier registration may have a function of keeping the pod together but stick (or STIK) is not directly descriptive of the function. POD CEAL has an immediate message, a product that seals the pod. POD-STIK is more allusive of the function. Miller refers, inter alia, to DSL's evidence which refers to the product being “basically a glue that sticks the pods shut and stops them shattering”, —“SticksPods – Maintains Yield” and —“Seed Rape Pod-Sticker”. —“Pod-Sticker” and —“Stks Pods” are terms, in themselves, which do not represent use of derivations of stick in a normal fashion. STIK (or even stick) is allusive rather than directly descriptive. STIK is the more distinctive element of the trade mark, however, the main distinctiveness lies in the trade mark in its entirety.

48) The trade marks share the POD component, this component is visually, phonetically and conceptually identical. Hyphenation is an erratic practice;

people are used to hyphens appearing and disappearing. The hyphen in DSL's trade mark will have no effect on the perception of the average consumer. As DSL has submitted, seal and stick, the phonetic equivalents of CEAL and STIK, can have similar meanings. The misspellings will not remove the meaning of these elements, owing to the phonetic identity to the correct spellings. CEAL and STIK are not, in normal use, fungible; however, they share a general concept. The trade marks, in their entireties, are conceptually similar.

49) In considering the degree of similarity between the respective trade marks, whilst comparing them in their entireties, it is necessary to bear in mind that the identical element, POD, is completely descriptive. There is a degree of conceptual similarity between STIK and CEAL but these components are visually and aurally dissimilar. Overall the trade marks are conceptually similar. Overall there is a low degree of similarity between the trade marks.

*Overall conclusion in relation to likelihood of confusion*

50) 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<sup>ix</sup>. In this case the respective goods are identical. However, the sequitur of the identity is not that the trade marks have to be very different to avoid a finding of likelihood of confusion<sup>x</sup>.

51) It is necessary to consider the distinctive character of the earlier trade mark; the more distinctive the earlier trade mark the greater the likelihood of confusion<sup>xi</sup>. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public<sup>xii</sup>. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the mark to identify the goods for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods from those of other undertakings<sup>xiii</sup>. The earlier trade mark, as a whole is clearly allusive of the goods and has limited distinctiveness; it has been decided that the use, by the material date, has not enhanced that distinctiveness.

52) The first parts of the trade marks are identical and normally the consumer attaches more importance to the first parts of words. However, the GC stated in *Spa Monopole, compagnie fermière de Spa SA/NV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-438/07*:

-23 Admittedly, the consumer normally attaches more importance to the first part of words (Joined Cases T-183/02 and T-184/02 *El Corte Inglés v OHIM – González Cabello and Iberia Líneas Aéreas de España (MUNDICOR)* [2004] ECR II-965, paragraph 81). However, that argument

cannot hold in all cases (see judgment of 16 May 2007 in Case T-158/05 *Trek Bicycle v OHIM – Audi (ALL TREK)*, not published in the ECR, paragraph 70 and the case-law cited) and does not, in any event, cast doubt on the principle that the assessment of the similarity of marks must take account of the overall impression created by them.

In this case POD is directly descriptive for the potential use of the respective goods and lacks any distinctive character. Consequently, the rule of thumb does not apply in this case. The common element of the trade marks is the descriptive element POD<sup>xiv</sup>. This is not an element by which the average consumer will identify the goods of either party.

53) The respective goods will be purchased as the result of careful and highly educated decisions. In *Apple Computer, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-328/05 the GC stated:

—59Accordingly, the fact that the relevant public is composed of persons whose level of attention may be considered high is not sufficient, given the fact that the signs at issue are almost identical and the similarity between the goods in question, to exclude the possibility that that public might believe that the goods and services concerned come from the same undertaking or, as the case may be, from economically-linked undertakings (GALZIN, paragraph 48 above, paragraph 80).”

In *Honda Motor Europe Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-363/06 the GC stated:

—62Furthermore, although the relevant consumer’s high degree of attention may, admittedly, lead him to be aware of the technical characteristics of car seats in order that he may ensure their compatibility with the relevant car model, it should be borne in mind that, taking into account the identity of the goods concerned, the similarity of the conflicting marks and the high distinctive character of the earlier trade mark, the fact that the relevant public may consist of professionals is not sufficient to rule out the possibility that they may believe that the goods come from the same undertaking or, as the case may be, from economically-linked undertakings (see, to that effect, *ALADIN*, paragraph 100). While the relevant public’s high degree of attention implies that it will be well informed about vehicle seats and may thus avoid making mistakes regarding the compatibility of those seats with the relevant car model, it cannot prevent that public from believing that the seats bearing the MAGIC SEAT trade mark are part of a new range of products developed by the well-known Spanish car manufacturer Seat.”

In this case the respective trade marks are not almost identical and the earlier trade mark does not have a highly distinctive character. The strongest case for DSL is the conceptual similarity.

54) Taking into account the nature of the purchasing process, the nature of the average consumer, the differences between the trade marks and the non-distinctiveness of the common element, the conceptual similarity is not sufficient to give rise to a likelihood of confusion, either directly or indirectly. **There is not a likelihood of confusion and the ground of opposition under section 5(2)(b) of the Act is dismissed.**

### **Section 5(3) of the Act**

55) **DSL does not have the requisite reputation and so this ground of opposition must be dismissed.** If the trade mark had the requisite reputation, owing to the differences in the trade marks and the nature of the goods and the purchasing process, even if a link were to be created (as per *Intel Corporation Inc v CPM United Kingdom Ltd* Case C-252/07) there would be neither dilution of the distinctiveness of DSL's trade mark nor any advantage. In relation to the latter point, DSL has furnished no evidence to show that if there were an advantage that it would be unfair (see *L'Oreal SA v Bellure NV* [2010] RPC 23, *Whirlpool Corporations and others v Kenwood Limited* [2009] EWCA Civ 753 and *Specsavers International Healthcare Limited & Others v Asda Stores Limited* [2012] EWCA Civ 24); nor on the facts of the case could this be inferred. In relation to the former point, DSL has not satisfied the requirement of the CJEU at paragraph 38 of *Intel Corporation Inc v CPM United Kingdom Ltd*:

—38 The proprietor of the earlier trade mark is not required, for that purpose, to demonstrate actual and present injury to its mark for the purposes of Article 4(4)(a) of the Directive. When it is foreseeable that such injury will ensue from the use which the proprietor of the later mark may be led to make of its mark, the proprietor of the earlier mark cannot be required to wait for it actually to occur in order to be able to prohibit that use. The proprietor of the earlier mark must, however, prove that there is a serious risk that such an injury will occur in the future.”

The claim that if the goods of Miller were of low quality that there would be tarnishing is misconceived. In *L'Oreal SA and others v Bellure NV and others* Case C-487/07 the CJEU considered tarnishment:

—40As regards detriment to the repute of the mark, also referred to as ‘tarnishment’ or ‘degradation’, such detriment is caused when the goods or services for which the identical or similar sign is used by the third party may be perceived by the public in such a way that the trade mark's power of attraction is reduced. The likelihood of such detriment may arise in particular from the fact that the goods or services offered by the third party

possess a characteristic or a quality which is liable to have a negative impact on the image of the mark.”

There is nothing in the nature of the goods of Miller that would give rise per se to tarnishment.

***Section 5(4)(a) of the Act – passing-off***

56) Owing to the differences between the trade marks, the descriptiveness of POD, the nature of the purchasing process and the nature of the purchasers, there would be no misrepresentation. **Consequently, the grounds of opposition under section 5(4)(a) of the Act are dismissed.**

**Costs**

57) Miller having been successful is entitled to a contribution towards its costs. Costs are awarded upon the following basis:

Preparing a statement and considering the statement of DSL	£300
Filing evidence and considering evidence of DSL (owing to limited nature of evidence of Miller)	£300
Written submissions	£300
Total	£900

**De Sangosse Ltd is ordered to pay Miller Chemical & Fertilizer Corporation the sum of £900. 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 13th day of November 2012**

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

---

<sup>i</sup> *Sabel BV v Puma AG* Case C-251/95.

<sup>ii</sup> *Sabel BV v Puma AG* Case C-251/95.

<sup>iii</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* Case C-342/97.

<sup>iv</sup> *Succession Picasso v OHIM - DaimlerChrysler (PICARO)* Case T-185/02.

<sup>v</sup> This is a matter that has been considered on many occasions. In *Oakley, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-116/06, the GC stated:

“76 Consideration of the objective circumstances in which the goods and services covered by the marks in dispute are marketed is fully justified. The examination of the likelihood of confusion which the OHIM authorities are called on to carry out is prospective. Since the particular circumstances in which the goods covered by the marks are marketed may vary in time, and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, that is, that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions, whether carried out or not – and which are naturally subjective – of the trade mark proprietors (*QUANTUM*, paragraph 75 above, paragraph 104, and *T.I.M.E. ART/Devinlec v OHIM*, paragraph 75 above, paragraph 59).”

(Also see *NHL Enterprises BV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-414/05 and *Devinlec Développement Innovation Leclerc SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-147/03.) It is necessary to consider the trade mark the subject of the application in respect of the goods for which the application has been made; the consideration cannot be limited to the manner of the use claimed.

<sup>vi</sup> See *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-133/05 paragraph 29:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

<sup>vii</sup> *General Motors Corporation v Yplon SA* Case C-375/97.

<sup>viii</sup> *Hart v Relentless Records* [2002] EWHC 1984, *Stannard v Reay* [1967] FSR 140, *Teleworks v Telework Group* [2002] RPC 27 and *Stacey v 2020 Communications* [1991] FSR 49.

<sup>ix</sup> *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* Case C-39/97.

<sup>x</sup> See *Meda Pharma GmbH & Co KG c Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI)* Dans les affaires jointes T-492/09 et T-147/10:

---

« 50 La requérante soutient que, en cas d'identité de produits, il est nécessaire, pour exclure tout risque de confusion, que les signes présentent une plus grande différence que dans une situation où l'écart entre les produits est important. Or, dans les circonstances de l'espèce où l'identité des produits n'est pas contestée, la chambre de recours aurait dû conclure au risque de confusion, à l'instar de ce qui a été considéré dans la décision R 734/2008-1 de la première chambre de recours de l'OHMI, du 14 septembre 2009 (Alleris et Allernil). Selon la requérante, plusieurs décisions de l'OHMI démontrent que les décisions attaquées s'écartent de la pratique décisionnelle de l'OHMI, ce qui viole les principes d'égalité et de non-discrimination.

51 Il ressort de la jurisprudence que l'OHMI est tenu d'exercer ses compétences en conformité avec les principes généraux du droit de l'Union. Si, eu égard aux principes d'égalité de traitement et de bonne administration, l'OHMI doit prendre en considération les décisions déjà prises sur des demandes similaires et s'interroger avec une attention particulière sur le point de savoir s'il y a lieu ou non de décider dans le même sens, l'application de ces principes doit toutefois être conciliée avec le respect du principe de légalité. Au demeurant, pour des raisons de sécurité juridique et, précisément, de bonne administration, l'examen de toute demande d'enregistrement doit être strict et complet afin d'éviter que des marques ne soient enregistrées de manière indue. C'est ainsi qu'un tel examen doit avoir lieu dans chaque cas concret. En effet, l'enregistrement d'un signe en tant que marque dépend de critères spécifiques, applicables dans le cadre des circonstances factuelles du cas d'espèce, destinés à vérifier si le signe en cause ne relève pas d'un motif de refus [voir, en ce sens, arrêt de la Cour du 10 mars 2011, *Agencja Wydawnicza Technopol/OHMI*, C-51/10 P, non encore publié au Recueil, points 73 à 77, et la jurisprudence citée, et arrêt du Tribunal du 22 novembre 2011, *LG Electronics/OHMI (DIRECT DRIVE)*, T-561/10, non publié au Recueil, point 31).

52 Or il apparaît que, dans la présente affaire, la chambre de recours a correctement pris en compte les circonstances de l'espèce. À cet égard, elle a, à juste titre, constaté l'identité des produits concernés en l'espèce, elle a aussi retenu une similitude très faible des signes en cause sur les plans phonétique et visuel et une impossibilité de comparaison de ces mêmes signes sur le plan conceptuel, comme il ressort des points 40, 41 et 46 ci-dessus. Dès lors, comme le soutient à juste titre l'OHMI, l'identité entre les produits désignés est compensée par un très faible degré de similitude entre les signes en cause et la chambre de recours a pu conclure à bon droit à l'absence de tout risque de confusion, d'autant que le degré d'attention du public est accru et qu'il n'est pas démontré que la marque antérieure présente un caractère distinctif élevé. »

<sup>xi</sup> *Sabel BV v Puma AG* Case C-251/95.

<sup>xii</sup> *Rewe Zentral AG v OHIM (LITE)* Case T-79/00.

<sup>xiii</sup> *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97.

<sup>xiv</sup> In *Bundesverband der Deutschen Volksbanken und Raiffeisenbanken eV (BVR) g Harmonisierungsamt für den Binnenmarkt (Marken, Muster und Modelle) (HABM)* Case T-197/10 the GC considered the issue of similarity and likelihood of confusion where trade marks coincide in relation to descriptive or non-distinctive elements:

-48 Diese Rügen des Klägers können jedoch das Ergebnis der Beschwerdekammer nicht in Frage stellen, wonach zwar zwischen den einander gegenüberstehenden Zeichen eine „gewisse Ähnlichkeit—auf begrifflicher Ebene vorliege, diese jedoch schwach bleibe. Genauso wie sich nämlich die Begriffe „Austria—und „Leasing—oder die Abkürzung „Gesellschaft m.b.H.— jeweils auf Österreich, Mietkaufverträge oder eine Gesellschaftsform beziehen, verweist der Begriff „Raiffeisen—in allerdings weniger offenkundiger, jedoch ebenso bedeutsamer Weise, was die Prüfung auf begrifflicher Ebene angeht, auf eine Art genossenschaftlicher Organisation im Bankensektor, die durch die von Friedrich Wilhelm Raiffeisen im 19. Jahrhundert entwickelten Grundsätze

---

geleitet wird. Zudem übernimmt die Beschwerdekammer zwar die Auffassung, dass das Wortelement „Raiffeisenbank— der älteren Marke von den angesprochenen Verkehrskreisen als Hinweis auf den Namen „einer bekannten Gruppe regionaler Banken, die Raiffeisenbanken, verstanden—werde, doch seien diese „Raiffeisenbanken— dem Publikum nicht im Zusammenhang mit Österreich oder einer österreichischen Bankengruppe bekannt, die sich von den Ideen von Friedrich Wilhelm Raiffeisen leiten lasse. Bankengruppen nach dem von diesem erdachten Konzept gebe es in verschiedenen Ländern.

49 Der Begriff „Raiffeisen—hat nämlich eine beschreibende Bedeutung, die auf eine Art genossenschaftlicher Organisation verweist und die für den Kläger in Deutschland ebenfalls Kennzeichnungskraft hat, denn die von dieser Organisation in diesem Land angebotenen Dienstleistungen werden durch eine Bildmarke gekennzeichnet, die diesen Begriff verwendet. Eine andere Bildmarke kann jedoch diesen Begriff ohne Weiteres enthalten, wenn dieser auf begrifflicher Ebene nur auf seine beschreibende Bedeutung oder zumindest auf einen Wirtschaftsteilnehmer, der mit dieser Art genossenschaftlicher Organisation in einem anderen Land als Deutschland tätig ist, hinweist. ....

... 61 Außerdem kann sich die Beurteilung der Verwechslungsgefahr entgegen dem Vorbringen des Klägers nicht mit der Feststellung begnügen, dass der Begriff „Raiffeisen— möglicherweise als dominierender Bestandteil der älteren Marke betrachtet, oder, wie der Kläger ausführt, einem Bestandteil gleichgestellt werden kann, der eine selbständig kennzeichnende Stellung in der angemeldeten Marke im Sinne des in Randnr. 56 des vorliegenden Urteils angeführten Urteils Medion hat. Aus dem Vorstehenden ergibt sich nämlich, dass die Beschwerdekammer davon ausgegangen ist, dass die anderen Elemente der älteren Marke und der angemeldeten Marke bei der Beurteilung der Verwechslungsgefahr eine Rolle spielten. Sie hat die einander gegenüberstehenden Bildmarken zu Recht insgesamt geprüft, ohne sie auf den einzigen Begriff zu reduzieren, der in jeder dieser Marken enthalten ist.

62 Überdies legt der Kläger, da es „Raiffeisen-Bankengruppen—in verschiedenen Ländern, wie Österreich und Deutschland, gibt, nicht überzeugend dar, aus welchen Gründen die maßgeblichen Verkehrskreise, bei denen in Bezug auf die Finanzdienstleistungen ein höherer Grad an Aufmerksamkeit vorliegt (vgl. Randnr. 20 des vorliegenden Urteils), die in Deutschland niedergelassenen „Raiffeisenbanken—gedanklich mit den in Österreich niedergelassenen „Raiffeisenbanken—in Verbindung bringen könnten.

63 Im Ergebnis ist davon auszugehen, dass die Beschwerdekammer zu Recht aufgrund der Ausführungen in der angefochtenen Entscheidung zu dem Ergebnis gelangt ist, dass unter Berücksichtigung der maßgeblichen Verkehrskreise und trotz der Ähnlichkeit der beanspruchten Dienstleistungen die zwischen den Zeichen bestehenden Unterschiede in Anbetracht des Gesamteindrucks ausreichend sind, um jede Verwechslungsgefahr auszuschließen.”