

O-514-14

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 2612141

BY

HAJOORI & SONS (A PARTNERSHIP)

TO REGISTER THE TRADE MARK

SOSYO

IN CLASS 32

AND

THE OPPOSITION THERETO

UNDER NO 103489

BY

COTT BEVERAGES LIMITED

BACKGROUND

1. On 28 February 2012, Hajoori & Sons (the applicant) applied to register the above trade mark in class 32 of the Nice Classification system,¹ as follows:

Class 32

Soft drinks and syrups for making soft drinks; beers; mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages.

2. The application was published on 23 March 2012 and was subsequently opposed by Cott Beverages Limited (the opponent).

3. The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (the Act). The opponent relies upon Community Trade Mark (CTM) no. 5246723 in respect of the following goods:

Mark details and relevant dates	Goods relied upon
Mark: SUSO Filed: 8 August 2006 Date of entry in register: 20 May 2009	Mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages

4. The opponent states that the likelihood of confusion has been increased because the opponent's mark has acquired enhanced distinctiveness through use.

5. The applicant filed a counterstatement on 6 January 2014 in which it states:

"1. The Applicant accepts that Community Trade Mark ('CTM') registration no. EU005246723 constitutes an 'earlier mark' for the purposes of Section 6.(1)(a) and this opposition.

However, attention is drawn to the facts that the Applicant's SOSYO mark:

1.1 has been used in the UK from the late 1950's (at which time the Applicant had a SOSYO drinks bottling set-up in the UK), until the present time,

1.2 was previously registered in the UK (under number 1262269, as filed 11 March 1986), although the registration lapsed as a result of non-renewal and was removed from the register on 11 September 2007, and

1.3 was therefore registered, in use and known in the UK at the (08 August 2006) date of filing of the Opponent's Community trade mark application for its opposing SUSO registration no. EU005246723.

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

It is submitted that, taking account of the above facts, including the Applicant's continued and continuing use of the mark in the UK, there exists a goodwill and reputation in the SOSYO mark and that the Applicant possesses an earlier right (than the Opponent mark) in the SOSYO mark in the UK."

6. TPN 4/2009 is titled "*Trade mark opposition and invalidation proceedings – defences.*" Under the heading "*The position with regard to defences based on use of the trade mark under attack which precedes the date of use or registration of the attacker's mark*", the following is stated:

"4. The viability of such a defence was considered by Ms Anna Carboni, sitting as the appointed person, in *Ion Associates Ltd v Philip Stainton and Another*, BL O-211-09. Ms Carboni rejected the defence as being wrong in law.

5. Users of the Intellectual Property Office are therefore reminded that defences to section 5(1) or (2) grounds based on the applicant for registration/registered proprietor owning another mark which is earlier still compared to the attacker's mark, or having used the trade mark before the attacker used or registered its mark, are wrong in law. **If the owner of the mark under attack has an earlier mark or right which could be used to oppose or invalidate the trade mark relied upon by the attacker, and the applicant for registration/registered proprietor wishes to invoke that earlier mark/right, the proper course is to oppose or apply to invalidate the attacker's mark."**

7. If the applicant seeks to take issue with the mark relied upon by the opponent in these proceedings, the proper course is to apply to invalidate the attacker's mark. Consequently, I will say no more this submission.

8. Both parties filed evidence and neither side asked to be heard. The opponent filed written submissions in lieu of a hearing.

EVIDENCE

The opponent's evidence

Witness statement of Mark Edge with exhibits 1 – 4

9. Mr Edge is the Head of Marketing and Brand Development for the opponent, a position he has held since March 2013.

10. The main points arising from Mr Edge's evidence are as follows:

SUSO was launched in early 2008.

It is a carbonated fruit drink which contains no preservatives, sweeteners or additives.

It is aimed at those between the ages of 16 and 24.

It meets the standards necessary to enable it to be sold in schools and counts as 'one of your five a day', due to the fruit content.

11. Mr Edge states at paragraph 6 of his witness statement that the profile of the SUSO brand has been raised significantly (among its target consumers) by its sponsorship of high profile events, advertising and campaigns. He provides the following examples:

- 2009 Sponsorship of the Palace to Palace Bike Ride with The Prince's Trust.
- SUSO Slopeside at the Brits in 2009.
- Sponsorship of the Rock and Bowl Festival 2010 (a two day music and beer festival).
- The SUSO Open Water Triathlon on 10 July 2010 in association with Human Race Events and The Dame Kelly Holmes Legacy Trust.
- The Mountainboard World Freestyle Championships 2010.
- June 2009 TV advertisement campaign.
- 2010 SUSO launched a Stand Up Speak Out campaign with ChildLine to help combat bullying among children and teenagers.

12. With regard to stockists of its goods, Mr Edge says:

"5. In March 2008 over 300 bars and clubs in the UK were selling SUSO as a soft drink and premium mixer and SUSO was already available in Tesco stores."

13. By November 2011 the SUSO drink was available in multipacks at ASDA. Preparations were being made for a meeting with Tesco (Exhibit 3), to propose a multipack be available in Tesco stores.

14. Sales figures for 2008 – 2012 are provided as follows:

Year	Total sales (£)
2008	931,832
2009	1,589,765
2010	1,680,980
2011	1,277,917
2012	939,104

The applicant's evidence

Witness statement of Akbar T. Mookhtiar with exhibits ATM1 to ATM4

15. Mr Mookhtiar was a Director of the now dissolved Superline Food Products Ltd, formerly called 'Cardiff Soft Drinks & Food Products Limited (from 14 June 1984 to 18 August 1987)(hereafter CSD).

16. Cardiff Soft Drinks & Food Products Limited was established to manufacture and market the SOSYO drink products in the UK.

17. Exhibit ATM1 comprises quotes, price lists and correspondence between CSD and a number of importers and exporters, *"all relating to the formulation, sample testing, packing, launching, and bottle and can filling of the SOSYO drink products in the UK"*. They are all dated 1984.

18. Exhibit ATM2 comprises script ideas and schedule for a SOSYO advert to be aired on HTV (Welsh region). The documents are dated August 1984.

19. Exhibit ATM3 consists of *“example orders, trade queries, product estimates and correspondence regarding the supply of the SOSYO drink products to UK distributors or dealers for the years 2002, 2005, and 2006.”*

20. The first five pieces of correspondence all refer to the same order by the same customer, Mr Mukesh Parikh in Birmingham. It was finalised in the quote dated 14 May 2002, for 300 cases of SOSYO 300ml. The SOSYO goods are all provided from Hajoori International Foods at an address in Gujarat, India.

21. The remaining pages refer to a second customer, Vajihi Enterprise in Bradford, West Yorkshire. The first letter is from Hajoori International Foods, in India, and explains that it no longer trades in \$ but in £.

22. The final page of the exhibit is a quote from Hajoori International Foods, dated, 2 February 2006. SOSYO is listed as one of a number of carbonated drinks available. A unit price of £4.90 per 9 x 1.5ltr bottles is given but no quantities are listed.

23. Exhibit ATM4 is described by Mr Mookhtiar as pictures of ‘old SOSYO cans’ marketed by Superline Foods in the UK. The photograph shows four drink cans on the first page, with the tops removed. They are not dated. The second page shows four similar cans with the ring pulls visible above the top of the cans. The first two have white stickers on, which show a handwritten date of 1984.

Witness statement of Abbas Mohsin Hajoori with exhibits AMH1 – AMH7

24. Mr Hajoori is one of the applicant partners, which is based in India.

25. He states that SOSYO has a long history in India dating from 1923 and that it is associated with the Indian independence struggle.

26. At AMH1 he provides a number of press articles. The first is an article titled, ‘Local Flavour’ and is dated 10 June 2012. The article is taken from Business Today which has ‘the highest circulation and readership of all business magazines in India.’

It states that:

SOSYO is among the top three soft drinks in most locations within India.

The product was renamed ‘Socio’ in 1957 but was often misspelled, resulting in the name SOSYO.

SOSYO is advertised on youth channels in India, including MTV, UTV Bindass, UTV Movies and FM Radio.

Sales at 10 June 2012 in Australia, the UK, Canada, New Zealand, South Africa, the United Arab Emirates and the US, ‘account for 10% of local turnover’.

27. Mr Hajoori also draws my attention to an article from the 'Sunday Times of India' which claims to be the most widely read English newspaper in India. The article is titled, 'Sosyo: Ghandi-inspired drink close to whiskey-rum cocktail!'. It states:

"About 50 million bottles of Sosyo are consumed every year, mainly in Surat and parts of Gujarat and Maharashtra where bottling plants are located.

It is exported as far as UAE, South Africa, New Zealand, UK and USA. The exported bottles are marked as 'An Indian Drink' with a tri-coloured backdrop."

28. Another article, this time taken from 'The Gulf Today', a 36 page English language newspaper based in UAE, is titled, "Indian softdrinks brands launched in the UAE". It is dated 22 April 2003.

29. Exhibit AMH4 is described by Mr Hajoori as example certificates of exports and shipping documents pertaining to exports of SOSYO drink products to the UK through Merchant Exporters for the years 2005, 2006, 2007, 2009, 2010, 2012 and 2013.

30. The 28 pages of certificates are dated between April 2006 and January 2010. Only two of the certificates show a specific number of SOSYO goods. The example dated 4 January 2012 lists 50 cases of SOSYO described as 300ml x 12. The example dated 12 September 2007 has a handwritten description on the reverse which states, "Sosyo soft drink", underneath which are, what look to be the words, "400 carton".

31. Two further certificates have a handwritten description of the goods as SOSYO/KASHMIRA but no quantities are provided.

32. The certificates shown on the remaining pages list goods such as Indian food stuff, toiletries [sic], general merchandise, cutlery and household and often relate to a large number of packages (in some cases, several thousand). One of these, dated 5 October 2009, provides a breakdown of goods. It includes cold drinks within a much longer list of goods which include, inter alia, cushions, stove lighters, beef, wheat grinders with accessories.

33. Export sales figures from Hajoori International Foods in India to the UK, US, Canada, Australia, New Zealand, South Africa and the UAE are provided, as follows²:

Year	Total (£)
2004-05	2677
2005-06	1188
2006-07	0
2007-08	1951
2008-09	1462
2009-10	1279
2010-11	839
2011-12	653
2012-13	6694
2013-14	2341
2014-15	2993

34. With regard to these figures, Mr Hajoori states:

² I have rounded the sales figures to the nearest pound for the sake of clarity.

“Unfortunately, it has not been possible to separate and therefore identify the specific figures relating to exports to the UK.”

35. The evidence filed by both sides contains a combination of evidence and submissions, all of which I have considered even though I have not referred to every page specifically. I give this decision following a review of all of the material before me.

DECISION

36. Section 5(2)(b) of the Act reads as follows:

“5. - (2) A trade mark shall not be registered if because –

...

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

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

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

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

38. The opponent's mark is an earlier mark, which is not subject to proof of use because, at the date of publication of the application, it had not been registered for five years.³

Section 5(2)(b) case law

38. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

³ See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations 2004: SI 2004/946) which came into force on 5 May 2004

The principles

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The average consumer and the nature of the purchasing act

39. In accordance with the above cited case law, I must determine who the average consumer is for the goods at issue and also identify the manner in which those goods will be selected in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J*

Fox Limited, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

40. The average consumer is a member of the general public. The goods are made available through a variety of trade channels including, inter alia, a shop, supermarket, off-licence. The selection is likely to be made by the consumer from a shelf or from a website or mail-order catalogue, where the consumer will also select the goods visually. The goods may also be sold through bars, clubs and public houses, where the goods may be requested orally, from a member of staff. In considering this point I bear in mind the comments of the Court of First Instance (now the General Court) in *Simonds Farsons Cisk plc v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM)⁴ when it said:

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

41. Consequently, even though the purchase of these goods in a bar may involve an aural element, the selection will be made, primarily, from the display of goods on shelves, in fridges and on optics at the back of the bar. Accordingly, the purchase of all of the goods at issue is primarily visual, though I do not discount an aural element. In any event the level of attention paid will be that necessary to achieve inter alia, the correct flavour/variety and possibly ingredients. Accordingly, the average consumer will pay a reasonable level of attention.

Comparison of goods

42. The goods to be compared are as follows:

The opponent’s goods	The applicant’s goods
<p>Class 32 Mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages</p>	<p>Class 32 Soft drinks and syrups for making soft drinks; beers; mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; syrups and other</p>

⁴ T-3/04

	preparations for making beverages.
--	------------------------------------

43. In comparing the goods, I bear in mind the following guidance provided by the General Court (GC) in *Gérard Meric v OHIM*, Case T-133/05:

“29. ...goods can be considered identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

44. Factors which may be considered include the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 (hereafter *Treat*) for assessing similarity between goods and services:

- (a) the respective *uses* of the respective goods or services;
- (b) the respective *users* of the respective goods or services;
- (c) the physical nature of the goods or acts of service;
- (d) the respective trade channels through which the goods or services reach the market;
- (e) in the case of self-serve consumer items, where in practice they are found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) the extent to which the respective goods or services are competitive, taking into account how goods/services are classified in trade.

45. Also relevant are the comments of the CJEU in *Canon* in which it stated, at paragraph 23 of its judgment:

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

46. I also bear in mind the decision in *El Corte Inglés v OHIM Case T-420/03*, in which the court commented:

“96...goods or services which are complementary are those where there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for the production of those goods or provision of those services lies with the same undertaking (*Case T-169/03 Sergio Rossi v OHIM-Sissi Rossi* [2005] ECR II-685)”

47. I also bear in mind the comments of Daniel Alexander, sitting as the Appointed Person, in *LOVE*⁵, in which he said:

“18... the purpose of the test, taken as a whole, is to determine similarity of the respective goods in the specific context of trade mark law. It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

48. Where appropriate I will, for the purposes of comparison, group related goods together in accordance with the decision in *Separode Trade Mark*⁶:

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

49. ‘Mineral and aerated waters and other non-alcoholic beverages’ and ‘syrups and other preparations for making beverages’, are terms which are included in both specifications and are clearly identical.

50. ‘Soft drinks and syrups for making soft drinks’ in the application are broad terms which include the goods contained in the opponent’s specification. In accordance with the decision in *Meric*, these are identical goods.

51. ‘Fruit beverages and fruit juices’ in the application is an identical term to ‘fruit drinks and fruit juices’ contained within the opponent’s specification; ‘beverages’ being another word for ‘drinks’.

52. The remaining goods in the application are beers. The opponent’s specification includes ‘non-alcoholic drinks’, which may include non-alcoholic equivalents of alcoholic drinks such as beers. Non-alcoholic beer is clearly a drink which contains no alcohol. As such it may be considered to be equivalent to a soft drink. However, in making a comparison I must construe the words of the trade mark specification in the context of the way in which the product is regarded for the purposes of trade. A non-alcoholic beer is exactly that, a beer without alcohol, and will be marketed as such. These goods may be sold in close proximity to low alcohol beers and alcoholic beers, and at some level, are in competition with each other. They are likely to be displayed in the same or similar shelves or areas of a website. In my experience, they may also be offered by the same undertaking and supplied via the same distribution channels. Taking all of these factors into account I find there to be a moderate degree of similarity between these goods.

Comparison of marks

53. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created

⁵ *BL O/255/13*

⁶ *BL O-399-10*

by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, Bimbo SA v OHIM, that:

“...it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

55. The respective trade marks are shown below:

Opponent's mark	Applicant's mark
SUSO	SOSYO

56. Both parties' marks consist of a single element, the opponent's being the word SUSO, in block capitals with no form of stylisation and the applicant's being the word SOSYO, in block capitals, with no form of stylisation. Consequently, the overall impressions of both marks are based solely on those words.

Visual similarities

57. The applicant states:

“2.1 the respective marks differ visually.

As well as the different lengths of the marks, the prefixes and suffixes making them up have virtually nothing in common. They do not share a same or similar prefix, suffix or middle content

SUSO is a mere four letter word comprising the prefix 'SU' followed by the suffix 'SO'

In contrast, the Applicant's 'SOSYO' mark comprises five letters, the prefix being immediately recognisable as the well-known 'SOS' distress signal, and the suffix comprising the unusual word 'YO', most familiarly associated with the popular children's toy 'yoyo'

The letter 'Y' in the 'SOSYO' mark provides a key visual distinctive and distinguishing element It immediately catches the eye and contributes to the result and striking effect of a word that comprises an unusual combination of letters.”

58. Similarities between the marks are that they both have the letter 'S' as their first and third letters and end with the letter 'O'. They differ in the second letter which is 'U' in the earlier mark and 'O' in the applied for mark, which also has a letter 'Y' as its fourth letter. The earlier mark is four letters long. The mark applied for is five letters in length. It is unlikely that the average consumer will divide the word SOSYO in the way described by the applicant. The mark is an invented word which will be considered in its totality. The marks are similar to a medium degree.

Aural similarities

59. With regard to the pronunciation of the respective marks the applicant submits:

"2.2 the respective marks also differ aurally and phonetically whichever of the alternative actual and potential pronunciations discussed below are applied.

The obvious pronunciation of the Opponent mark is 'su' as in the start of the name 'Suzanne' followed by 'so' as in the word 'sew'. Alternatively, the prefix may be pronounced as in the word 'supper'.

On the other hand, and in contrast,

the Applicant mark " was derived from the Latin word 'Socious', since it became a social drink"; and

unlike the Opponent mark, the Applicant mark is phonetically identical to the 'socio' element of the above-mentioned 'Socious' word, which is also an English language prefix denoting 'social' or 'society' (An extract from the Chambers (English) dictionary [12th edition] will be provided as evidence to confirm the latter point).

An alternative way of pronouncing the first two letters of the Applicant mark would be as in the word 'sausage' i.e. with the letter 'o' pronounced as in the word 'otter';

The letter 'Y' in the 'SOSYO' mark provides a key aural distinguishing element. It is not silent, being pronounced as if the first letter 'e' in the word 'elongate' and creating a third syllable in contrast to the two syllable opposing 'SUSO' mark."

60. In my view, the most likely pronunciation of the opponent's mark is SUE-ZO, though I don't rule out the possibility that it may be pronounced SUE-SO. The applicant's mark is most likely to be pronounced SOS (as in sausage) followed by YO. Both begin with an 'S' sound and end with the same 'O' sound, as in the word OPEN and they are both two syllables in length. The marks are aurally similar to a medium degree.

Conceptual similarities

61. For a conceptual message to be relevant, it must be capable of immediate grasp by the average consumer⁷ and the assessment must be made from their point of view.

⁷ This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R. 29.

62. In its counter-statement the applicant states:

“2.3 Given the derivation of the Applicant mark and the fact that the word SUSO is (to the best of the Applicant’s knowledge) an invented word with no meaning, it is submitted that there is no conceptual similarity between the respective marks.”

63. With regard to its own mark the applicant maintains that the letters SOS are, *“immediately recognisable as the well-known ‘SOS’ distress signal”*, which it claims is followed by the unusual word ‘YO’, *“most familiarly associated with the popular children’s toy ‘yoyo’.”*

64. The applicant also refers, throughout its evidence and submissions, that the mark is derived from the latin word ‘socius’, meaning social.

65. Having considered all of these submissions, in my view, none of these are capable of immediate grasp by the average consumer. The overall impression of both marks is that of a single invented word. Accordingly, the average consumer will take no meaning from the marks at all.

66. I find the marks to be conceptually neutral.

Distinctive character of the earlier mark

67. In determining the distinctive character of a trade mark it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify its goods as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger Joined Cases C-108/97 and C-109/97* [1999] ETMR 585.

68. The opponent’s mark, ‘SUSO’ is an invented word which is neither descriptive nor allusive of the goods at issue and consequently enjoys a high level of inherent distinctive character.

69. I note that the opponent claims enhanced distinctive character as a result of the use it has shown of the mark in evidence. Whilst sales figures have been provided, the evidence does not give any indication of the size of the market, which in the case of these goods in class 32, I have no doubt, is considerable. Examples have been given of some sponsorship and advertising but I have no evidence of the value or extent of it. No attempt has been made to indicate the market share held by the opponent in the relevant sector. Consequently, I am unable to conclude that the opponent’s earlier mark has enhanced distinctive character due to the use made of it.

Likelihood of confusion

70. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.⁸ I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity

⁸ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

between the respective goods and vice versa.

71. I have found the parties' marks to be visually and aurally similar to a medium degree. I have found the marks to be conceptually neutral. I have found the earlier mark to have a high degree of inherent distinctive character which has not been shown to have been enhanced through use. The goods are identical and will be purchased by members of the general public. The purchase is likely to be primarily visual and the degree of attention paid is likely to be reasonable.

72. Taking all of these factors into account and bearing in mind the concept of imperfect recollection, in the context of widely available and fairly low cost goods, the similarity of the marks is such that there will, in my view, be direct confusion (where one mark is mistaken for the other).

73. Having found there to be a likelihood of confusion I will consider the applicant's further point raised at paragraphs 7 and 8 of Mr Hajoori's witness statement in which he submitted:

"7. The Opponent has stated that its carbonated fruit juice drink bearing the opposing SUSO trade mark was launched (by its predecessor in title) in the UK in February 2008.

8. Consequently, the subject Applicant and Opponent:

a) marks have coexisted on the respective UK and Community (encompassing the UK) trade mark Registers for the period between 08 August 2006 (i.e. the date from which the opposing Community trade mark registered rights run) and 11 September 2007 (i.e. the date when the opposed mark was removed from the UK Register due to nonrenewal); and

b) respective drinks products bearing the respective SOSYO and SUSO marks have also coexisted in the UK marketplace for the period from February 2008 until the present day (including up to the 21 June 2012 date of filing of the opposition).

Notwithstanding the above, to the best of my knowledge, there have not been any incidents of confusion between the respective Applicant and Opponent marks during the above-mentioned pre-opposition period, or indeed to date, thus supporting the Applicant's argument that there is no likelihood of confusion, including a likelihood of association with the Opponent's SUSO mark."

74. Paragraphs a and b appear to be referring to honest concurrent use of the type defined in *Budejovicky Budvar v Anheuser-Busch Inc.* [2011] CJEU C-482/09. In that case the court held:

"74 In that context, it follows from the foregoing that art.4(1)(a) of Directive 89/104 must be interpreted as meaning that a later registered trade mark is liable to be declared invalid where it is identical with an earlier trade mark, where the goods for which the trade mark was registered are identical with those for which the earlier trade mark is protected and where the use of the later trade mark has or is liable to have an adverse effect on the essential

function of the trade mark which is to guarantee to consumers the origin of the goods.

75 In the present case, it is to be noted that the use by Budvar of the Budweiser trade mark in the United Kingdom neither has nor is liable to have an adverse effect on the essential function of the Budweiser trade mark owned by Anheuser-Busch.

76 In that regard, it should be stressed that the circumstances which gave rise to the dispute in the main proceedings are exceptional.

77 First, the referring court states that Anheuser-Busch and Budvar have each been marketing their beers in the United Kingdom under the word sign “Budweiser” or under a trade mark including that sign for almost 30 years prior to the registration of the marks concerned.

78 Secondly, Anheuser-Busch and Budvar were authorised to register jointly and concurrently their Budweiser trade marks following a judgment delivered by the Court of Appeal (England & Wales) (Civil Division) in February 2000.

79 Thirdly, the order for reference also states that, while Anheuser-Busch submitted an application for registration of the word “Budweiser” as a trade mark in the United Kingdom earlier than Budvar, both of those companies have from the beginning used their Budweiser trade marks in good faith.

80 Fourthly, as was stated in [10] of this judgment, the referring court found that, although the names are identical, UK consumers are well aware of the difference between the beers of Budvar and those of Anheuser-Busch, since their tastes, prices and get-ups have always been different.

81 Fifthly, it follows from the co-existence of those two trade marks on the UK market that, even though the trade marks were identical, the beers of Anheuser-Busch and Budvar were clearly identifiable as being produced by different companies.

82 Consequently, as correctly stated by the Commission in its written observations, art.4(1)(a) of Directive 89/104 must be interpreted as meaning that, in circumstances such as those of the main proceedings, a long period of honest concurrent use of two identical trade marks designating identical products neither has nor is liable to have an adverse effect on the essential function of the trade mark which is to guarantee to consumers the origin of the goods or services.

83 It should be added that, in the event that, in the future, there is any dishonesty associated with the use of the Budweiser trade marks, such a situation could, where necessary, be examined in the light of the rules relating to unfair competition.

84 In the light of the foregoing, the answer to the third question is that art.4(1)(a) of Directive 89/104 must be interpreted as meaning that the proprietor of an earlier trade mark cannot obtain the cancellation of an identical later trade mark designating identical goods where there has been a long period of honest concurrent use of those two trade marks where, in circumstances

such as those in the main proceedings, that use neither has nor is liable to have an adverse effect on the essential function of the trade mark which is to guarantee to consumers the origin of the goods or services.”

75. Whether or not *Budweiser* type exceptional circumstances are present in the current case is a jury question and one which the Tribunal must decide based on the facts of the case. Despite the fact that the applicant has filed two witness statements and a number of exhibits, I have no evidence which shows any use of the applicant’s mark, nor any examples of where the applicant’s goods are available. Export sales figures are provided for UK, US, Canada, Australia, New Zealand, South Africa and the UAE. These amount to little more than £20,000 over an 11 year period and I cannot determine what percentage of this figure applies to UK sales. In short, I cannot begin to consider this point in the absence of relevant evidence.

76. The remaining paragraph of these submissions seeks to rely on an absence of confusion in the marketplace. On this point TPN⁹ 4/2009 states:

“6. Parties are also reminded that claims as to a lack of confusion in the market place will seldom have an effect on the outcome of a case under section 5(2) of the Act.

7. In *Compass Publishing BV v Compass Logistics Ltd [2004] RPC 41* Laddie J held:

‘22. It is frequently said by trade mark lawyers that when the proprietor’s mark and the defendant’s sign have been used in the market place but no confusion has been caused, then there cannot exist a likelihood of confusion under Article 9.1(b) or the equivalent provision in the Trade Marks Act 1994 (“the 1994 Act”), that is to say s. 10(2). So, no confusion in the market place means no infringement of the registered trade mark. This is, however, no more than a rule of thumb. It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer’s use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place.’

8. (In *Rousselon Freres et Cie v Horwood Homewares Limited [2008] EWHC 881 (Ch)* Warren J commented:

‘99. There is a dispute between Mr Arnold and Mr Vanhegan whether the question of a likelihood of confusion is an abstract question rather than whether anyone has been confused in practice. Mr Vanhegan relies on what

⁹ *Tribunal Practice Notice*

was said by Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at paragraphs 22 to 26, especially paragraph 23. Mr Arnold says that that cannot any longer be regarded as a correct statement of the law in the light of *O2 Holdings Ltd v Hutchison 3G Ltd* [2007] RPC 16. For my part, I do not see any reason to doubt what Laddie J says...')

9. In *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283 Millett LJ stated:

'Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark.'

77. The applicant's evidence and submissions state that it has used the trade mark the subject of the application since the late 1950s. As I have stated above, I cannot be sure of the volume of sales in the UK at any point during the life of the trade mark. Whilst there may well have been extensive use of the mark in other countries, what matters is what use has been shown in the UK. Two photographs of eight drink cans have been provided, said to show the goods sold in the UK. They date from 1984. It is not clear how the mark has been used in respect of these goods and I do not have any indication of the amount spent (if any) on marketing and advertising in respect of the mark applied for. Furthermore, I have nothing before me to show that the parties' goods are available in the same outlets.

78. Consequently, the evidence falls a long way short of allowing me to conclude that by the date of the application for registration, the average consumer had become exposed to the competing trade marks to such an extent that they would be able to distinguish between them.

Conclusion

79. The opposition succeeds.

COSTS

80. The opposition having succeeded, the opponent is entitled to a contribution towards its costs. I make the award on the following basis:

Preparing a statement and considering the other side's statement:	£300
Preparing evidence and considering/commenting on the other side's evidence	£400
Preparing submissions in lieu of attendance at the hearing:	£200
Official fee	£200
Total	£1100

81. I order Hajoori & Sons (a partnership) to pay Cott Beverages Limited the sum of £1100. 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 5th day of December 2014

**Ms Al Skilton
For the Registrar,
The Comptroller General**