

O/943/22

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3677896
BY WAN JOU LIN AND GREAT INS COMPANY LIMITED
TO REGISTER THE TRADE MARK:**



IN CLASS 11

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 429368
BY GENERAL ECOLOGY, INC.**

Background and pleadings

1. On 5 August 2021, Wan Jou Lin and Great Ins Company Limited (“the applicants”) applied to register the trade mark displayed on the cover page of this decision in the UK, under trade mark number **3677896** (“the contested mark”). The contested mark was published in the Trade Marks Journal for opposition purposes on 17 September 2021. Registration is sought for the following goods:

Class 11: Drinking water filters; Drinking water (Filters for -); Filters for drinking water; Apparatus for filtering drinking water; Water filters; Water filtering installations; Water filtering units; Water purification filters; Water filtering apparatus; Filters for water purifiers; Apparatus for water filtering; Apparatus for filtering water; Domestic water filtering units; Household tap-water filters; Water filters for household purposes; Electric water purification filters for household purposes; Filter apparatus for water supply installations; Filters for use with apparatus for water supply; Faucet filters; Water filtering apparatus for domestic use.

2. On 17 December 2021, General Ecology, Inc. (“the opponent”) filed a notice of opposition. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is directed against all the goods of the application. The opponent relies upon its comparable UK trade mark number **900122143**,¹ **NATURE PURE** (“the earlier mark”) to support its claim. The earlier mark was filed 1 April 1996 and became registered on 22 June 1998 in respect of the following goods and services, all of which are relied upon for the purpose of this opposition:

Class 7: Filtering machines; washing machines; and dishwashing machines; and parts and fittings for all the aforesaid goods.

¹ On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing EUTM. As a result of the opponent’s EUTM number **122143** being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and the original EUTM filing date remains.

Class 11: Water purifying machines, water treatment machines, water conditioning machines and water softening machines; water supply apparatus and installations; sanitary apparatus and installations; refrigerating apparatus; air purifying apparatus and instruments; water treatment apparatus and installations; water conditioning apparatus and installations; water softening apparatus and installations; water purification apparatus and installations; water sterilisers; liquid, gas and air filters; and parts and fittings for all the aforesaid goods.

Class 37: Installation, maintenance and repair services relating to water purifying, treatment, conditioning and softening machines, apparatus and installations; filtering machines, installations and apparatus, plumbing services.

3. Given the respective filing dates, the opponent's mark is an earlier mark, in accordance with section 6 of the Act. As it had been registered for more than five years at the filing date of the application, it is subject to the proof of use requirements specified within section 6A of the Act. However, the applicants did not request that the opponent prove genuine use.² Consequently, the opponent may rely upon all of the goods and services identified.

4. In its notice of opposition, the opponent essentially argues that the respective goods are either identical or similar and that the marks are similar, in respect to the words "Natural Pure" and "Nature Pure", giving rise to a likelihood of confusion.

5. The applicants filed a counterstatement denying the ground of opposition. The applicants denied that the marks are similar and neither admitted nor denied the opponent's claim that the goods are identical or highly similar. However, they denied there would be a likelihood of confusion between the marks.

6. The opponent is professionally represented by Murgitroyd & Company, whereas the applicants represent themselves. Both parties were given the option of an oral hearing, though neither asked to be heard on this matter. Neither party elected to file evidence

² Section 7, Form TM8

during the evidence rounds, however, the applicants attempted to file evidence along with their counterstatement. Both parties filed written submissions in the evidence rounds as well as in lieu of an oral hearing. Whilst I do not intend to summarise these, I have taken them into consideration and will refer to them as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

7. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark case law.

Preliminary issue

8. In their counterstatement, the applicants referred to other trade mark registrations containing the words 'natural' and 'pure'. In this connection, they provided printouts from the register showing search results for the words in class 11. Moreover, in their submissions, the applicants argued that "The UK trademark database shows that 87 brands have a word of pure, and 235 brands have the word of natural. Please refer to the evidence we submitted on TM8-2. If we violate their trademarks and so do they [sic]."³

9. Firstly, I note that the applicants did not file its evidence in the appropriate format or at the appropriate time in these proceedings. It is, therefore, inadmissible. However, even if it was admissible, I must clarify that the existence of other earlier registered marks containing the words "natural" or "pure" will not have any bearing on whether there exists a likelihood of confusion between the contested mark and the opponent's earlier mark. This is because there is no evidence that the marks are in use and that consumers have become accustomed to differentiating between them. On this point, in *Zero Industry Srl v OHIM*, Case T-400/06, the General Court ("GC") stated that:

"73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the

³ Applicants' written submissions section 3

word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '... there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71).”

Decision

Section 5(2)(b)

10. Sections 5(2)(b) and 5A of the Act read 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”.

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

Case law

11. I am guided by the following principles which 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:

(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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

12. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, [...] 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”.

13. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

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

14. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Merici')*,⁴ the GC stated that:

“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 trade mark application (Case T-388/00 Institut für Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

⁴ Case T-133/05

15. For the purposes of considering the issue of similarity of goods or services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

16. The goods and services to be compared are those outlined in paragraphs 1 and 2 of this decision.

17. The applicants' terms are all goods that clean, purify or filter water, or parts and fittings thereof, in order to remove any harmful or unpleasant elements. Therefore, they would be encompassed by the opponent's wider terms "water purifying machines, water treatment machines [...]; water supply apparatus and installations; [...] water treatment apparatus and installations; [...] water purification apparatus and installations; water sterilisers; [...] and parts and fittings for all the aforesaid goods" in class 11 of the earlier mark. As a result, these goods are *Merici* identical. However, if I am wrong in this finding, it remains the case that the respective goods are highly similar. This is because they have the same nature and intended purpose of purifying water by removing its impurities. The method of use will be the same as the goods will be installed into, for instance, a water supply system and water will pass through the goods in order to be purified. The trade channels will be the same as the opponent's goods are likely to be produced by the same manufacturers and sold in the same outlets as the applicants' water filtering apparatus. Users will be the same. It is my view that the goods are in competition with each other as a consumer could purchase and use either the applicants' goods or the opponent's goods to achieve clean drinking water.

The average consumer and the nature of the purchasing act

18. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary

according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

19. 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.”

20. Due to the nature of the goods at issue in these proceedings, it is necessary to identify two groups of relevant consumers, namely, professional trade users, such as plumbers or builders, and the general public.

21. In respect of the general public, the cost of the goods will range in price but, overall, they are likely to be fairly moderate. The frequency with which the goods are purchased will range from fairly regularly (in respect of, for example, disposable water filters that attach to water jugs) to more occasionally (for goods such as water filter machines and water filter apparatus that connects to a permanent water supply). The consumer’s thought process is likely to vary depending on the cost and permanency of the goods. However, overall, given that the by-product of the goods will be drunk by consumers, it is likely to be more careful than casual. When selecting the goods, the general public will consider factors such as reliability, compatibility, quality and cost. It is my view that, overall, the general public will demonstrate an average level of attention during the purchasing process. The goods are typically available from physical retail outlets, their online equivalents or catalogues. The purchasing process for these goods is likely to be dominated by visual considerations. However, I do not discount that there may be an aural component to the selection of these goods in the

form of, for example, word of mouth recommendations, assistance from store assistants or telephone enquiries before purchasing online.

22. Regarding professional trade users, the cost of the goods will again be moderate overall, however the frequency with which they are purchased is likely to be relatively often. Professional users will have the same considerations as members of the general public detailed above, but they will also have the added consideration of the negative impact on their business should they choose the wrong goods for their customers. Consequently, the purchasing process is likely to be more careful than casual despite the frequency with which professional users will purchase the goods. That said, the overall level of attention paid by professionals during the purchasing process will be roughly average. The goods are typically available from physical retail outlets, or their wholesale trade equivalents, as well as online or via trade catalogues. The purchasing process for these goods is likely to be dominated by visual considerations. However, I do not discount aural considerations entirely as it is possible that the purchasing of these goods would involve oral discussions with sales representatives or word of mouth recommendations.

Distinctive character of the earlier mark

23. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97

Windsurfing Chiemsee v Huber and Attenberger [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

24. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods and services will be somewhere in between. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion, the more distinctive the earlier mark, the greater the likelihood of confusion.

25. Further, although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use (nor was it required to do so). Consequently, I have only the inherent position to consider.

26. The earlier mark is in a word-only format and consists of the words “NATURE PURE”. The word “PURE” is defined as “clean and free from harmful substances”.⁵ In the context of the goods, it will be seen as strongly alluding to the intended purpose of the goods, i.e. to produce pure/clean water. The word “NATURE” has a dictionary definition meaning “all the animals, plants, rocks, etc. in the world and all the features,

⁵ <https://dictionary.cambridge.org/dictionary/english/pure>

forces, and processes that happen or exist independently of people, such as the weather, the sea, mountains, the production of young animals or plants, and growth”.⁶ Nature brings to mind natural rivers and streams and is therefore somewhat allusive of the goods producing natural unspoilt water. Therefore, in my opinion, the distinctiveness of the mark lies in both words in roughly equal measure, however the word “NATURE” is slightly more distinct as its allusive meaning is less direct than that of the word “PURE”. However, both word elements, whether alone or in combination, will be lowly distinctive. Accordingly, overall, I consider that the earlier mark possesses a low degree of inherent distinctive character.

Comparison of the marks

27. It is clear from *Sabel BV v. Puma AG*⁷ that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, Case C-591/12P, that:


“34. [...] 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.”

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

⁶ <https://dictionary.cambridge.org/dictionary/learner-english/nature>

⁷ Case C-251/95, paragraph 23

29. The respective trade marks are shown below:

Earlier mark	Contested mark
NATURE PURE	

Overall impressions

30. The earlier mark is in word-only format and consists of the words “NATURE PURE”. The word is presented in upper case; there are no other components to the mark. The overall impression of the mark lies in each of the words in roughly equal measure, with the word “NATURE” having slightly more impact as it is the first word in the mark.

31. The contested mark is a figurative mark and encompasses the words “Natural Pure” in standardised blue font. Above these words is a figurative element, which, in context of the mark as a whole, will be perceived as a blue water droplet with a stylised green leaf positioned inside. Below the words “Natural Pure”, are the words “NATURAL PURE DRINKING WATER”, in small font. Together, these words will be considered a strapline for the product, informing the customer that the goods are for producing natural, pure drinking water. Therefore, they will have little trade mark significance and play a minimal role in the overall impression.⁸ The words “Natural Pure” and the figurative element dominate the overall impression in roughly equal measure, but the words “Natural Pure” will have slightly more impact as consumers’ eyes are naturally drawn to elements of marks that can be read.⁹

⁸ *Metamorfoza d.o.o. v EUIPO*, Case T-70/20, paragraph 57

⁹ *MigrosGenossenschafts-Bund v EUIPO*, T-68/17

Visual comparison

32. The competing marks are visually similar as the second word, “Pure”, is identical. Moreover, the first words are highly similar, sharing five identical letters in the same order. This similarity appears at the beginning of the respective marks, a position which is generally considered to have more of an impact due to consumers in the UK reading from left to right.¹⁰ I do not consider the distinction in letter case between the earlier mark and the contested mark to be a point of significant difference between them. This is because the registration of word-only marks provides protection for the word itself, irrespective of whether it is presented in upper or lower case. However, the ends of the respective first words vary; the first word of the earlier mark ends in a letter “E”, whereas that of the contested mark ends in the letters “al”. The marks also differ in length, as the earlier mark consists of two words and the contested mark consists of six words. However, as discussed above, the additional words in the contested mark play a minimal role in the overall impression. Furthermore, the contested mark contains a figurative element that is not replicated in the earlier mark. Taking into account the overall impressions, I find that the competing marks are visually similar to a medium degree.

Aural comparison

33. The earlier mark comprises three syllables i.e. “NAY/TURE/PURE”. As for the contested mark, the words “NATURAL PURE DRINKING WATER” (positioned at the bottom of the mark, in a small font) are descriptive of the intended purpose and/or by-product of the goods. Therefore, these words are highly unlikely to be pronounced by consumers. Furthermore, the phrase repeats the larger words in the mark “Natural Pure”, which consumers are unlikely to repeat, instead opting to find the quickest verbal path. Accordingly, I consider that the only elements that will be pronounced are the words “Natural Pure” as consumers will also make no attempt to articulate the figurative element in the contested mark. As such, the contested mark consists of four syllables i.e. “NAT/UR/AL/PURE”. Despite having five identical letters in the same

¹⁰ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

order in the first word, the letters will be pronounced differently (although I accept that the difference created by these syllables is subtle). Therefore, only the last syllable is identical. Overall, I find that the marks are aurally similar to between a medium and high degree.

Conceptual comparison

34. In the contested mark, the word “Natural” is dictionary defined as meaning “found in nature and not involving anything made or done by people”.¹¹ The word “natural” in the contested mark is simply the adjective of the noun “nature” in the earlier mark. Therefore, these words in the competing marks have very similar, if not identical, conceptual meanings that will be easily understood by consumers, i.e. originating from nature, or deriving from naturally made elements. The word “pure” in the marks will be perceived by consumers as meaning free from impurities or contamination; when used in connection with the goods at issue, it alludes to their intended purpose. Conceptually the marks overlap as they both evoke the concept of nature and being free from impurities. However, the contested mark also contains the additional words “NATURAL PURE DRINKING WATER” which will be understood as a descriptive reference to the intended purpose of the goods, informing consumers that the goods will produce natural and pure drinking water. The figurative element of the contested mark will be viewed as a water droplet with a green leaf inside. This device reinforces the conceptual meaning of the words. Bearing in mind my assessment of the overall impressions, I find that there is a high degree of conceptual similarity between the marks.

Likelihood of confusion

35. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods, and vice versa. It is also

¹¹ <https://dictionary.cambridge.org/dictionary/english/natural>

necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be aware of the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

36. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

37. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis K.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would

assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.)

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

38. These examples are not exhaustive but provide helpful focus.

39. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis K.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

40. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

41. I have found that the respective goods are highly similar, if not identical, and that the average consumer of the goods will be both the general public, who will pay an

average level of attention and professional trade users, who will pay roughly an average level of attention. I have found that the purchasing process will be largely visual, however, I have not discounted aural considerations. The words “NATURE” and “PURE” dominate the overall impression of the earlier mark in roughly equal measure, whereas the words “Natural Pure” and the figurative element co-dominate the overall impression of the contested mark. I have found that the earlier mark and the contested mark are visually similar to a medium degree, aurally similar to between a medium and high degree and conceptually highly similar. I have also found that the earlier mark possesses a low level of inherent distinctive character.

42. I acknowledge that both marks contain the identical word “Pure” as their second word. I also accept that the first word within each of the marks starts with the same five identical letters in the same order. However, the endings of the respective first words are different, the contested mark ending “al” and the earlier mark ending “E”. Furthermore, the contested mark has additional elements, such as the figurative device, which is the largest element within the mark and co-dominant. Additionally, the contested mark also contains the phrase “NATURAL PURE DRINKING WATER” in small font at the bottom of the mark. Even though this phrase is descriptive and plays a smaller role within the overall impression of the mark, it is not negligible; it will not be entirely ignored or overlooked by consumers. In my opinion, the differences would not be unnoticed and are of heightened importance given that I have found the purchasing process to be predominantly visual in nature.¹² Aurally, the number of syllables differ in the earlier mark compared to the contested mark and, although the last syllable is identical, the difference in the remaining syllables creates enough variance for the consumer to aurally distinguish between the marks. The marks also share a high level of conceptual overlap. However, that exists in words that are suggestive or allusive of the intended purpose of the goods. Consequently, this is not a distinctive similarity. I remind myself that weak distinctive character of an earlier mark does not preclude a likelihood of confusion.¹³ However, in *Whyte and MacKay*¹⁴ the court stated that “[...] if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of

¹² *Quelle AG v OHIM*, Case T-88/05

¹³ *L'Oréal SA v OHIM*, Case C-235/05 P

¹⁴ *Whyte and Mackay Ltd v Origin Wine UK Ltd* [2015] F.S.R. 33.

confusion.” This point was taken further in *Nicoventures*¹⁵ where Justice Birss stated “[...] in particular having regard to the low degree of distinctiveness about the features these two marks have in common, even taking into account imperfect recollection the differences in the two marks will take on a greater significance for the average consumer that they might otherwise.” In my opinion, given the shared elements (i.e. the identical word, “pure” and the similar words “natural” in the contested mark and “nature” in the earlier mark) are weak in distinctiveness, this will lead to consumers to have greater awareness of the differences between the marks. It is my view that, despite the similarity between the marks created by the commonality of the word “pure” and the similar words “nature” and “natural”, it is unlikely that the competing marks will be mistaken or misremembered for one another. Rather, the aforementioned differences are likely to be sufficient to enable consumers to differentiate between them. Therefore, in my judgement, taking all the above factors into account, the differences between the competing trade marks are likely to enable consumers, paying an average level of attention, to avoid mistaking the marks for one another, even when factoring in the principles of imperfect recollection and interdependency. As a result, I find that there is no likelihood of direct confusion, even in relation to goods that are highly similar or identical.

43. That leaves indirect confusion to be considered. I bear in mind that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.¹⁶

44. As explained above, consumers will recognise the common word “Pure” and the similar words “nature” and “natural”. However, as explained above, they are words that are lowly distinctive and allusive of a characteristic of the goods. In *Purity*,¹⁷ Mr Philip Harris, sitting as the appointed person, said that “The point about weak distinctiveness is that consumers will be less likely, depending on context, to jump to the conclusion the term is functioning in a distinct, origin indicative way.” I certainly consider that to be the case here. I do not believe that consumers will assume that

¹⁵ *Nicoventures Holdings Ltd v The London Vape Company Ltd* [2017] EWHC 3393

¹⁶ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

¹⁷ *Purity Wellness Group LTD v The Stockroom Kent*, BL O/115/22

the applicants and the opponent are economically linked undertakings on the basis of the competing trade marks; I am unconvinced that consumers would assume a commercial association or licensing arrangement between the parties, or sponsorship on the part of the opponent, merely because of the shared word “pure” and the similar words “natural” and “nature”. The words “pure” and “nature” are not so strikingly distinctive that consumers would assume that only the opponent is using them in a trade mark. To the contrary, I have found these words, and the earlier mark as a whole, to be low in distinctive character. Moreover, it is my view that the differences between the competing marks are not conducive to any logical brand extensions. Although I can appreciate why the addition of the figurative element in the contested mark could be said to be indicative of a brand extension or variation to some members of the public, the other differences are not. It is my view that the similarities between the marks are likely to be seen as purely coincidental; the common use of the words “pure” and “nature”/ “natural” would be attributed to different undertakings merely using similar allusive messages. In my opinion, this remains the case even in relation to goods that are highly similar or identical. Therefore, I find that there is no likelihood of indirect confusion.

Conclusion

45. The opposition under section 5(2)(b) of the Act has failed. Subject to any appeal, the application will proceed to registration in the UK.

Costs

46. As the applicants have been successful, they are entitled to a contribution towards their costs. As they have not instructed professional representatives, they were invited by the Tribunal by letter on 2 August 2022 to indicate whether they intended to make a request for an award of costs, including accurate estimates of the number of hours spent on a range of given activities relating to defending the proceedings. However, I note that the applicants were not provided with a costs proforma. As a result, I am unable to deal with the issue of costs at this stage.

47. A copy of the costs proforma will be provided to the applicants upon the issuance of this decision. The applicants are hereby directed to file a completed costs proforma to the Tribunal within 14 days of the date of this decision. Once this is received, I will issue a supplementary decision dealing with the issue of costs.

48. In the event that the applicants fail to file a costs proforma within 14 days of the date of this decision, I still propose issuing a supplementary decision dealing with the issue of costs.

Dated this 31st day of October 2022

Sarah Wallace
For the Registrar