

O-539-15

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO 3081045
IN THE NAME OF CHRIS BLEVINS AND HANNAH BLEVINS
TO REGISTER AS A TRADE MARK:

Peter's Eden



AND

OPPOSITION THERETO UNDER NO 403824
BY HEIRLER CENOVIS GMBH

Background

1. This decision relates to an application under no 3081045 to register the trade mark shown on the cover page. Following a correction to the applicant's name, an ex parte decision which is not subject to any right to third party appeal, it stands in the name of Chris Blevins and Hannah Blevins ("the applicants"). The application has a filing date of 11 November 2014 and seeks registration in respect of the following goods:

Class 31

Agricultural, horticultural and forestry products; live animals

Class 32

Beverages consisting principally of fruit juices;Beverages (non-alcoholic-); Beverages (Non-alcoholic-);Cordials;Fruit beverages; Fruit beverages and fruit juices;Fruit-based beverages;Fruit-flavoured beverages;Lemonades;Non-alcoholic beverages;Non-alcoholic drinks;Non-alcoholic fruit juice beverages;Orange squash

2. Following publication of the application in *Trade Marks Journal* 2014/049 on 28 November 2014, a notice of opposition was filed. The opposition was originally based on two grounds, however, following the correction of the applicant's name, the single ground remaining is one brought under the provisions of section 5(2)(b) of the Trade Marks Act 1994 ("the Act") based on an earlier Community Trade Mark ("CTM"). Following an assignment of the earlier CTM, the new owner of that right, Heirler Cenovis GmbH sought to be substituted as the opponent. The substitution was allowed.

3. Details of the CTM as relied on by the opponent are as follows:

CTM No and Mark	Dates	Specification relied on
CTM 5480744 EDEN	Filing date: 9 November 2006 Date of entry in register: 23 October 2010	Class 31 Agricultural, horticultural and forestry products and grains, included in class 31; seeds, living plants; sprouts; fresh, processed fruits and vegetables; malt Class 32 Non-alcoholic beverages, in particular being substitutes for milk and milk products, beverages with a fruit and vegetable base, including with additives, including plant extracts, milk products and/or cereal products, in particular fruit juices, nectars, must, fruit and vegetable cocktails (non-alcoholic); iced teas, in particular with added fruit; unfermented spritzers, syrups and other preparations for making beverages; non-alcoholic fruit punch (included in class 32) and other non-alcoholic beverages made from wine and/or grape must, in particular non-alcoholic sparkling wine; including all the aforesaid goods being dietetic foods, not adapted for medical purposes

4. The applicants filed a counterstatement essentially denying the ground of opposition. Neither party filed evidence and neither requested to be heard but both filed written submissions. I therefore give this decision after a careful review of all the papers.

Decision

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

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

6. The opponent relies on a single CTM which, as it had not been registered for five years at the date of publication of the application, is not subject to the proof of use provisions of section 6A of the Act.

7. 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.

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

Comparison of the respective goods

8. The goods to be compared are as follows:

Opponent's goods	Applicants' goods
<p>Class 31 Agricultural, horticultural and forestry products and grains, included in class 31; seeds, living plants; sprouts; fresh, processed fruits and vegetables; malt</p>	<p>Class 31 Agricultural, horticultural and forestry products; live animals</p>
<p>Class 32 Non-alcoholic beverages, in particular being substitutes for milk and milk products, beverages with a fruit and vegetable base, including with additives, including plant extracts, milk products and/or cereal products, in particular fruit juices, nectars, must, fruit and vegetable cocktails (non-alcoholic); iced teas, in particular with added fruit; unfermented spritzers, syrups</p>	<p>Class 32 Beverages consisting principally of fruit juices;Beverages (non-alcoholic-); Beverages (Non-alcoholic-);Cordials;Fruit beverages; Fruit beverages and fruit juices;Fruit-based beverages;Fruit-flavoured beverages;Lemonades;Non-alcoholic beverages;Non-alcoholic drinks;Non-alcoholic fruit juice beverages;Orange squash</p>

and other preparations for making beverages; non-alcoholic fruit punch (included in class 32) and other non-alcoholic beverages made from wine and/or grape must, in particular non-alcoholic sparkling wine; including all the aforesaid goods being dietetic foods, not adapted for medical purposes	
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9. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated:

“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”.

10. As both specifications in class 31 include the identically worded *Agricultural, horticultural and forestry products* they are clearly identical goods. The applicants' specification in this class also includes *live animals*. The opponent submits that these are highly similar to the opponents' *agricultural products*” on the basis that “A farmer who produces agricultural products would also rear animals for assistance in growing products or meat” and that they therefore “have the same uses, users, can be complimentary or in competition to each other”. That a farmer may produce more than one product does not, of itself, make those products similar: he may, for example, grow wheat and turnips but they are not similar goods. Similarly, he may grow wheat and keep poultry and sell their eggs but that does make these similar goods. Furthermore, not all farmers rear animals. Nevertheless and insofar as *agricultural products* are concerned, the *Collins Online English Dictionary* defines “agriculture” as including “the science or occupation of rearing livestock” and defines “product” as “the result of some natural process”. On this basis and to the extent that *live animals* include livestock (e.g. cattle, poultry), the goods will be identical. Even where, live animals are not generally regarded as livestock (e.g. ferrets, dogs) I consider they are goods with at least some degree of similarity.

11. Each of the applicants' goods in class 32 is a non-alcoholic drink. They are identical to the opponent's non-alcoholic beverages.

The average consumer and the nature of the purchasing process

12. 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 in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

13. 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.”

14. The respective goods in class 31 may be bought by the general public but may also be bought by those in business such as farmers, smallholders or gardeners. The respective goods in class 32 are general consumer items also bought by the general public though they may also be bought by businesses such as restaurants or public houses.

15. The purchasing process for all of the goods is likely to be primarily a visual one, with goods being bought either in person from a display area or from an internet site but I do not discount the fact that aural considerations will also have a part to play given that goods such as beverages may be bought, e.g. from a bar. The respective goods in class 32 will be bought on a regular basis and at relatively low cost with the purchaser (whether a business or member of the general public) paying no more than an average degree of care to that purchase. The same is true for the majority of the goods in class 31 though in the case of live animals, the purchase is likely to be made with more care, especially where they are bought for e.g. breeding purposes.

Comparison of the respective marks

16. 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 by them, bearing in mind their distinctive and dominant components. The CJEU 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.”

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

18. The marks to be compared are:

Opponent's earlier mark	Application
EDEN	 The logo for 'Peter's Eden' features the words 'Peter's Eden' in a black cursive script. To the right of the text is a stylized tree with a brown trunk, green foliage, and red fruit. A green oval encircles the top of the tree. A horizontal green line underlines the entire logo.

19. The opponent's earlier mark consists of the single word EDEN presented in plain block capitals. As no part of the mark is highlighted in any way, its distinctiveness rests in the whole. The applicants' mark is a composite one consisting of a number of elements: the words Peter's Eden, presented in black, in title case and a cursive script; the stylised device of a tree presented in brown, green and red; and, underneath both of the other elements but not quite extending to the full extent of them, an underlining in green. For the reasons given in *Specsavers International Healthcare Ltd & Others v Asda Stores Ltd* [2012] EWCA Civ 24 at [96], the fact that the mark is presented in colour does not affect my consideration. The largest element, in terms of the proportion of the mark it makes up, is the word element which appears to the left of the tree device though this latter distinctive element is taller than the word element, is not insignificant and will not be overlooked.

20. To the extent that the word EDEN/Eden appears in both marks, there is a degree of visual similarity between them. Given the other elements appearing in the applicants' mark which are not present in that of the opponent, the degree of similarity is very low.

21. Aurally, the comparison is between the opponent's mark and the word element of the application as the other elements of the latter mark are unlikely to be articulated. That being the case, the respective marks share the word EDEN/Eden as their only or one of the two words within them and to that extent there is some aural similarity. There are also aural differences because of the word Peter's as the first word of the application which has no counterpart in the earlier mark. Considered as a whole, there is a reasonable degree of similarity between the marks from an aural consideration.

22. The word EDEN making up the opponent's mark is an ordinary and well-known dictionary word which will bring to mind either a biblical garden or a place or state of delight, utter happiness or contentment-a paradise. The words within the applicants' mark consists of the name Peter in the possessive form and the word Eden which, particularly because of the possessive form, form a complete unit and bring to mind a paradise belonging to someone named Peter, the tree device serving to focus the particular place as being somewhere outside where there are trees. Whilst there is some conceptual similarity in that both bring to mind a paradise, there are clear differences in that, in the case of the applicants' mark, the paradise belongs to a person named Peter and is outside where there are trees. Taken as wholes, there is a low degree of conceptual similarity between the respective marks.

The distinctiveness of the earlier mark

23. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated:

“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).

24. The opponent has not filed any evidence and therefore I have only the inherent distinctiveness of the mark to consider. Whilst the word EDEN is known as the name of a particular garden and some of the goods in class 31 could be for use in a garden or be the product of a garden, the mark is not descriptive of such goods. The mark has a normal degree of inherent distinctive character.

The likelihood of confusion

25. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first 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. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and 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 he has retained in his mind.

26. Earlier in this decision I found:

- The respective goods are at least similar with most being identical;
- The average consumer is a member of the general public but would include businesses and they will take at least an average degree of care over the purchase;
- The purchase of the goods will be, primarily, visual though aural considerations will have a part to play;
- The respective marks have a very low degree of visual similarity, a reasonable degree of aural similarity and a low degree of conceptual similarity;
- The earlier CTM has a normal degree of inherent distinctive character which has not been shown to have been enhanced through its use.

27. The mark applied for is a composite mark which contains the whole of the earlier mark, albeit in a different typeface. In *Whyte and Mackay Ltd v Origin Wine UK Ltd*

and Another [2015] EWHC 1271 (Ch), Arnold J. considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

28. As I indicated above, the words Peter's Eden within the applicants' mark form a complete unit. I do not consider the word Eden has a distinctive significance which is independent of the significance of the whole. Whilst there are some similarities between the respective marks, there are also differences and in my view, when considered as wholes, the differences outweigh the similarities such that there is no likelihood of confusion even where identical goods are involved. The opposition based on grounds under section 5(2)(b) of the Act fails.

Summary

29. The opposition fails in its entirety.

Costs

30. The applicants, having succeeded, are entitled to an award of costs in their favour. In making the award, I note that neither party filed evidence and that a decision was reached without a hearing. I make the award on the following basis:

For reviewing the notice of opposition and filing a counterstatement:	£300
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For filing written submissions:	£300
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Total:	£600
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31. I order Heirler Cenovis GmbH to pay Chris Belvins and Hannah Blevins (jointly) the sum of £600 as a contribution towards their costs. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 19th day of November 2015

**Ann Corbett
For the Registrar
The Comptroller-General**