

O-080-16

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3084398
BY UNILEVER PLC**

TO REGISTER THE TRADE MARK:

The logo for Baby Dove features the word "baby" in a light blue, lowercase, sans-serif font. Below it, the word "Dove" is written in a dark blue, elegant, cursive script font. The "D" in "Dove" is significantly larger and more stylized than the other letters.


IN CLASSES 3 AND 5

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 404007 BY DM-DROGERIE MARKT GMBH + CO KG**

BACKGROUND AND PLEADINGS

1. On 3 December 2014, Unilever Plc Ltd (“the applicant”) applied to register the trade

mark  for the following goods in classes 3 and 5:

Class 3 Soaps, detergents, body powder, hair and body lotion, hair care, preparations for the care of the scalp and hair, shampoos, conditioners and hair conditioners, hair care products for removing and preventing tangles, toothpaste, grooming products for mouth and teeth, non medicated toilet care products, beauty products for bath and shower, baby care, skin care products, oils, creams and lotions for the care of hair, body and skin, oil and cream, cosmetics, talcum powder, impregnated cleansing pads, tissues and wipes for cosmetic use, wetted or impregnated cleansing pads, tissues or wipes, all the aforementioned products intended for babies and/or children.

Class 5 Diapers (baby napkins); Medicinal preparations for treatment of head and skin; ointments and creams and lotions for diaper rash, skintonics, medicated creams and lotions for the skin petroleum jelly for medical purposes; all aforementioned products for babies and/or children.

The application was published for opposition purposes on 19 December 2014.

2. The application is opposed by dm-drogerie markt GmbH + Co. KG (“the opponent”). The Notice of Opposition was originally filed on 19 March 2015. After the filing of the counterstatement, the opponent amended its claim and the opposition now proceeds on the basis of only one earlier trade mark. An amended Notice of Opposition was filed on 25 August 2015.

3. The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all of the goods in the application. The opponent relies upon international trade mark (EC) registration no. 935598 for the trade mark **babylove**, which has an international registration date of 28 December 2006 and which was granted protection in the EU on 31 January 2011. The trade mark has a priority date of 29 June 2006. It is registered for a wide variety of goods; for the purposes of the opposition, the opponent relies upon a range of goods in classes 3, 5 and 16.

4. In its Notice of Opposition, the opponent claims that there is a likelihood of confusion, including the likelihood of association, because the marks are similar and because the goods are identical or similar.

5. The applicant filed a counterstatement, which was subsequently amended to reflect the revised Notice of Opposition. It admits that some of the goods in the applied-for specification are identical or similar to the earlier mark but it does not indicate which. It

states that “although the Applicant has admitted that there is an overlap in the specifications, the Applicant denies that there is any visual, phonetic or conceptual similarity and further denies that any likelihood of confusion exists” (paragraph 23).

6. Neither party filed evidence. Whilst neither party asked to be heard, the opponent filed written submissions in lieu of attendance at a hearing. I will bear both parties’ comments in mind and refer to them, as necessary, below.

DECISION

7. The opposition is based upon section 5(2)(b) of the Act which 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”.

8. 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”.

9. In these proceedings, the opponent is relying upon the trade mark shown in paragraph 3, which qualifies as an earlier trade mark under the above provisions. As this trade mark had not completed its registration process more than 5 years before the publication date of the application in suit, it is not subject to proof of use, as per section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods it has identified.

Section 5(2)(b) – case law

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

Comparison of goods

11. The competing goods are as follows:

Opponent's goods	Applicant's goods
<p><u>Class 3</u></p> <p>Bleaching preparations and other substances for laundry use; cleaning, polishing, scouring and abrasive preparations; soaps; perfumery, essential oils, body care preparations, cosmetics, hair lotions; dentifrices; moist tissues, moist toilet tissues, cotton buds; oils and lotions, cremes, powders, skin care tissues, bath preparations, not for medical purposes, shampoos, sun protection preparations, the aforementioned goods in particular for babies, infants, pregnant women and mothers; shampoos.</p> <p><u>Class 5</u></p> <p>Pharmaceutical preparations; sanitary preparations for medical purposes; food for babies; cremes, powders, skin care tissues, sun protection preparations, bath preparations, the aforementioned goods for medical purposes, and in particular for babies, infants, pregnant women and mothers; baby milk.</p>	<p><u>Class 3</u></p> <p>Soaps, detergents, body powder, hair and body lotion, hair care, preparations for the care of the scalp and hair, shampoos, conditioners and hair conditioners, hair care products for removing and preventing tangles, toothpaste, grooming products for mouth and teeth, non medicated toilet care products, beauty products for bath and shower, baby care, skin care products, oils, creams and lotions for the care of hair, body and skin, oil and cream, cosmetics, talcum powder, impregnated cleansing pads, tissues and wipes for cosmetic use, wetted or impregnated cleansing pads, tissues or wipes, all the aforementioned products intended for babies and/or children.</p> <p><u>Class 5</u></p> <p>Diapers (baby napkins); Medicinal preparations for treatment of head and skin; ointments and creams and lotions for diaper rash, skintonics, medicated creams and lotions for the skin petroleum jelly for medical purposes; all</p>

<p><u>Class 16</u></p> <p>Baby diaper-pants, baby diapers, disposable bibs, all the aforementioned goods of paper or cellulose; napkins.</p>	<p>aforementioned products for babies and/or children.</p>
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12. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*, the Court of Justice of the European Union (“CJEU”) 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”.

13. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;
- c) The respective trade channels through which the goods or services reach the market;
- d) 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;
- e) 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. I also remind myself of the guidance given by the courts on the correct approach to the interpretation of specifications. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49].

Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question”.

15. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) said:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context”.

16. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods/services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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 fur 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”.

17. For the purposes of considering the similarity of goods, 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]).

18. In its Notice of Opposition, the opponent claimed that all of the applied-for goods are identical or similar to the goods relied upon in the earlier mark; it refines its position in its written submissions (paragraphs 26 and 27), providing a table in which it asserts that all of the contested goods are identical to goods in the opponent’s specification. The applicant conceded in its counterstatement that some of the applied-for specification is identical or similar to the opponent’s goods in classes 3 and 5. However, it did not set out the precise scope of this concession and it explicitly denies that any of its goods are similar to the opponent’s goods in class 16, except for “diapers (baby napkins)”.

Class 3

19. The applicant's specification in class 3 is limited to "products intended for babies and/or children". The opponent's specification is not restricted ("in particular" has no limiting effect). As the opponent's specification is generally the wider, I will not repeat the limitation on the applicant's goods at each stage of my analysis but will keep it in mind.

20. "Soaps" are included in the specifications of both the earlier mark and the application. These goods are self-evidently identical.

21. The earlier mark is registered for "bleaching preparations and other substances for laundry use". This covers "detergents" in the applied-for specification. The goods are, therefore, identical on the principle outlined in *Meric*. With that principle in mind, "detergents" would also be identical to "cleaning preparations" in the opponent's mark.

22. "Body powder", "body lotion", "non medicated toilet care products, beauty products for bath and shower, baby care, skin care products, oils, creams and lotions for the care of [...] body and skin, oil and cream" and "talcum powder" would all be covered by the term, in the earlier mark, "body care preparations". These goods are, therefore, identical.

23. The applied-for specification contains the terms "hair lotion" and "lotions for the care of hair". The earlier mark is protected for "hair lotion". These goods are plainly identical. "Shampoos" appears in both the applied-for and the earlier specifications: these goods are identical. As "hair lotions" and "shampoos" in the opponent's specification might be for babies and children, these goods fall within "hair care" and "preparations for the care of the scalp and hair" in the applied-for specification. These goods are identical. I recognise that the term "hair care" in the applicant's specification might also, notionally speaking, include goods which are neither hair lotions nor shampoos. However, no fall-back specification has been given to limit to such goods and, in any event, such goods would still be very similar: the nature, users, channels of trade and intended purpose (to care for or style the hair) are identical, and the goods are also likely to be in direct competition with one another. The terms "conditioners and hair conditioners, hair care products for removing and preventing tangles" are also, in my view, identical to "hair lotions" in the earlier specification.

24. I consider that "oils [...] for the care of hair" and "creams [...] for the care of hair" are at least highly similar to the opponent's "hair lotions". While the physical nature of the goods may be different, the purpose (styling or conditioning of the hair) is identical, as are the users. The channels of trade are identical and the goods are in competition.

25. "Toothpaste" in the applied for specification is identical to "dentifrices" in the specification of the earlier mark. "Grooming products for mouth and teeth" would include "dentifrices" and these goods are, applying *Meric*, identical.

26. Both specifications contain the term “cosmetics”. These goods are clearly identical.

27. The opponent’s “skin care tissues” covers “tissues for cosmetic use” and “wetted or impregnated tissues” in the applied-for specification. These goods are identical. I also consider that the opponent’s “moist tissues” are identical to both “impregnated wipes for cosmetic use” and “wetted or impregnated wipes”. In my experience, the terms are synonyms for the same goods; I have no evidence or submissions from the parties to the contrary.

28. The remaining terms in the applicant’s class 3 specification are “impregnated cleansing pads for cosmetic use” and “wetted or impregnated cleansing pads”. I consider that these goods are highly similar to the opponent’s “moist tissues”. The physical nature of the goods may be different but the users are identical, as is the intended purpose (for cleaning the skin). The goods will both be sold through the same channels of trade and be in competition.

Class 5

29. The earlier mark is protected, in class 16, for “baby diapers [...] all the aforementioned goods of paper or cellulose”, while the applied-for specification includes “diapers (baby napkins)” in class 5. I note that the *International Classification of Goods and Services for the Purposes of the Registration of Marks (10th ed. 2011)*, published by the World Intellectual Property Organization, transferred all diapers for human use to class 5, irrespective of their material composition. The classification of goods into particular classes is an administrative function (as per *Altecnic Trade Mark Application [2002] RPC 34*) and cannot be relied on to determine the similarity of goods. In this case, whilst they have been placed in different classes, both parties’ goods are babies’ diapers and are therefore identical goods.

30. “Medicinal preparations for treatment of head and skin; ointments and creams and lotions for diaper rash, skintonics, medicated creams and lotions for the skin petroleum jelly for medical purposes; all aforementioned products for babies and/or children” in the applied-for specification are covered by the broad term “pharmaceutical preparations” in the earlier specification. Again applying *Meric*, these goods are identical.

The average consumer and the nature of the purchasing act

31. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods. I must then determine the manner in which these goods are likely to be selected by the average consumer 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”.

32. The opponent submits that the average consumer will be “the general public, most notably pregnant women, mothers or those with babies or children”. I have no submissions from the applicant on this point. I consider that the average consumer for the goods I have identified in class 3 and for diapers will be a member of the general public.

33. It is my experience that these goods are generally sold through bricks and mortar retail premises, such as supermarkets and pharmacies, and their online equivalents. The goods will normally be chosen via self-selection from a shelf or the online equivalent. While I do not rule out that there may be an aural component (advice may, for example, be sought from a shop assistant), when considered overall, the selection process will be mainly visual.

34. In relation to the goods in class 5, in *Mundipharma AG v OHIM*, Case T-256/04, the GC accepted that there were two groups of relevant consumers for a pharmaceutical product, namely professional users and the general public. The goods at issue may be purchased over the counter or be made available on prescription only. In my experience, a member of the public would purchase such goods from a shelf in a retail outlet or from the pages of a catalogue or website. This method of selection involves primarily visual considerations. As advice may be sought before purchase, however, aural considerations are also likely to play their part. I have no evidence as to how a healthcare professional would select the goods at issue. However, I think it likely that in making their selection they would consult, for example, specialist publications (in both hard copy and online) and also discuss the goods with, for example, sales representatives from pharmaceutical companies. The selection process is therefore likely to consist of a combination of both visual and aural considerations.

35. In my experience, the goods at issue in class 3, along with “diapers”, are not terribly expensive and are reasonably frequent purchases. That notwithstanding, the consumer will be attentive to select, for example, a product for their particular skin or hair type or, for diapers, to select the right size or level of absorbency. I am of the view that the average consumer will pay an average degree of attention in the selection of these goods.

36. Insofar as the pharmaceutical products in class 5 are concerned, I would expect the level of attention paid by the general public to vary depending on the nature of the product and the severity of the condition it is intended to treat. My experience tells me that the goods at issue are not particularly expensive. However, the member of the public buying the goods at issue will wish to choose the correct product for the condition to be treated. The general public will, in my view, pay a reasonably high, though not the

highest, degree of attention to the selection of the goods. The professional user selecting the goods at issue (which will, for example, be available on prescription or from a doctor, or on request from a pharmacist) will pay a high level of attention to the selection of the goods at issue.


Comparison of trade marks

37. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) 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 the trade marks, 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”.

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 the trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the trade marks.

38. The trade marks to be compared are as follows:

Opponent's trade mark	Applicant's trade mark
babylove	 The logo for 'Baby Dove' features the word 'baby' in a light blue, sans-serif font above the word 'Dove' in a dark blue, serif font.

39. The applicant submits that “[a]ny level of similarity that might exist in the overall impressions of the marks is more than easily balanced by the high level of distinctiveness in the DOVE element, which will be instantly recognised by the consumer and which will prevent any likelihood of confusion from arising” (paragraph 21). It further contends that “[t]he marks have very different visual impressions” (paragraph 10) and that “the phonetic appreciation of the mark as a whole will also be dominated by the word DOVE. The mark denotes a BABY variant under the DOVE

brand, and will therefore be read by the average consumer as DOVE (baby)" (paragraph 13).

40. According to the opponent, the marks are visually, aurally and conceptually very similar. It submits that the visual difference created by the different letters in the marks is "so small as to be insignificant" and that the stylisation of the applicant's mark is "minimal" (paragraphs 14 and 16). In terms of aural similarity, the opponent argues that "[c]ontrary to the assertion made by the Applicant in its Counterstatement, its mark will not be read DOVE-BABY. The mark applied for seeks protection in the United Kingdom and it is inconceivable that an English speaking person would ever articulate the mark as DOVE BABY" (paragraph 20).

41. The applicant's figurative mark consists of the dictionary words "baby" and "Dove". The word "baby" is in lower case and is in a smaller font than the word "Dove". It is presented in a pale blue colour and is placed above and slightly towards the right of the word "Dove". The word "Dove" is in a slightly stylised italic font and is presented in a dark blue colour. It is in a larger typeface than the word "baby" and has a greater visual impact. The letter "D" is capitalised while the other letters are in lower case. I agree with the opponent that the mark is most likely to be read as "baby Dove" rather than "Dove baby". Whilst I accept that "baby" has little distinctiveness in relation to the applicant's goods, I consider that the overall impression is of the unit "baby Dove" (as opposed to two separate and unrelated words), with neither word dominating.

42. The opponent's word-only mark consists of the eight-letter word "babylove", presented all in lower case. Although the words are conjoined, I think it clear that the mark will be perceived as a combination of the words "baby" and "love". Given the wording of the opponent's specification, the word "baby" has little distinctiveness in relation to the goods. However, even bearing this in mind, I think that the words form a unit, with each word making an equal contribution to the overall impression and neither word dominating the other.

43. Visually, both marks share the first four letters "baby" and the last three letters "-ove". There is, though, a difference in the fifth letter of each mark ("l" and "D"). There is also a presentational difference because of the arrangement one above the other of the words in the applicant's mark. As notional and fair use means that the opponent's mark could be used in any standard typeface (including italic) or any colour, the differences created by these elements in the marks as presented above are not relevant. I consider there to be a medium degree of visual similarity.

44. Aurally, the word "baby" will be pronounced identically in each mark. There is, however, a difference because of the soft letter "l" and the hard letter "D", which follows a natural break in the marks. I am of the view that there is a reasonably high degree of aural similarity.

45. In respect of the conceptual similarity, the opponent asserts at paragraph 23 of its written submissions that: "[t]he word "baby" appears at the beginning of both marks. A

prefix element is accepted to be the most important when comparing trade marks. Further, the remaining elements, “love” and “dove” are conceptually similar since a *dove* is widely recognised as a symbol of *love*”. As a result, the opponent is of the view that the marks are conceptually very similar.

46. For its part, the applicant argues that, in the opponent’s mark, “the meanings of the words BABY and LOVE lead to associations which imply that the Opponent’s goods are beneficial for babies and/or that they are formulated so as to be mild for babies” (paragraph 15). In contrast, it contends that the applicant’s mark:

“merely describes a babycare variant of the Applicant’s well known DOVE brand. There is no laudatory connotation or description of goods which are mild and therefore suitable for babies (as implied by the presence of LOVE in the Opponent’s mark) and instead the emphasis of the Applicant’s mark is on the word DOVE, which will either be associated with the Applicant’s well known brand or, in the alternative, will be associated with the bird of that name” (paragraph 16).

47. The concept associated with the applicant’s mark will be that of a baby bird (a dove). The average consumer will perceive the “Dove” element of the mark as referring to love, particularly as there is nothing else in the mark to prompt an interpretation of the word in that way. While a little more nebulous, the concept attributed to the opponent’s mark will be of love for a baby or the love of a baby. In either case, it is clearly a different concept from that of a baby dove and I therefore find that the marks are conceptually dissimilar.

Distinctive character of the earlier trade mark

48. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. 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-2779, 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)".

49. The opponent has made no submissions regarding the distinctiveness of its trade mark and has filed no evidence in support of a claim of enhanced distinctiveness. The applicant states that "[t]he component BABY is individually descriptive and non-distinctive and the component LOVE is individually laudatory and non-distinctive". As a result, the applicant argues, "any distinctive character of the Opponent's Mark results from the specific way in which the non-distinctive elements are brought together and fused to form the mark BABYLOVE" (paragraph 9).

50. I do not accept the applicant's point that "love" is laudatory or non-distinctive in relation to the goods. It has no specific meaning regarding the goods at issue. I indicated earlier that the wording of the opponent's specification suggests that the opponent uses its mark on goods intended for babies and children (or their mothers), in which case "baby" has only low distinctiveness. However, the assessment I must make is of the inherent distinctiveness of the mark as a whole. Although conjoined, the mark is easily split into two recognisable dictionary words, one of which has no particular meaning in relation to the goods. I find that the earlier mark has average inherent distinctiveness.

Likelihood of confusion

51. 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 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 bear 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.

52. I have found that the parties' marks are visually similar to a medium degree and aurally similar to a reasonably high degree but that they are conceptually dissimilar. I have found the earlier mark to have an average degree of inherent distinctive character. I have identified the average consumer as a member of the general public or a professional, who will select the goods primarily by visual means (though I do not discount an aural component). I have concluded that the degree of attention paid will be average for diapers and the goods in class 3, and reasonably high or high for the goods in class 5. I have found the parties' goods to be identical or highly similar.

53. Before making my decision, I remind myself of the guidance of the European courts on the correct approach when assessing likelihood of confusion between marks which are conceptually dissimilar. In *The Picasso Estate v OHIM*, Case C-361/04 P, the CJEU found that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law”,

while in *Nokia Oyj v OHIM*, Case T-460/07, the GC stated that:

“Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98)”.

54. Whilst keeping in mind the visual and aural similarities between the marks, and the identical or highly similar nature of the goods at issue, I consider that the conceptual differences between the marks are sufficient to ensure that the marks will not be misremembered or mistakenly recalled as each other (i.e. there is no risk of direct confusion). I am also satisfied that, given the quite different conceptual messages the competing trade marks will convey, the average consumer would not assume the goods at issue come from undertakings which are economically linked (i.e. there will be no indirect confusion). That being the case, the opposition fails.

Conclusion

55. The opposition has been unsuccessful and the application will proceed to registration.

