

O-207-20

TRADE MARKS ACT 1994

**IN THE MATTER OF
APPLICATION NO. 3351744
BY FARLA MEDICAL LTD
TO REGISTER**

KleenMe a Farla brand

**AS A TRADE MARK
IN CLASSES 16, 21 & 22
AND
OPPOSITION NO. 416140 THERETO
BY
UP GLOBAL SOURCING UK LIMITED**

BACKGROUND

1) On 08 November 2018, Farla Medical Ltd ('the applicant') applied to register **KleenMe a Farla brand**, as a trade mark, in respect of the following goods:

Class 16: Bin bags.

Class 21: Cloths; Scourers; Sponges; Mops; Mop handles.

Class 22: Laundry bags.

2) The application was published in the Trade Marks Journal on 25 January 2019 and notice of opposition was later filed, on 25 April 2019, by UP Global Sourcing UK Limited ('the opponent'). The opponent claims that the trade mark application offends under section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). Relevant details of the marks relied upon are¹:

Mark 1 (Series of 2):

Registration No. UK3068031

Filing Date: 12 August 2014

Date of entry in the register: 21 November 2014



And



Class 35: Retail services provided in a catalogue and online store connected with the sale of household cleaning products, soaps and cleaning preparations, all for

¹ Other marks, and grounds under section 5(3), were initially pleaded but withdrawn by the opponent when filing its evidence in chief.

personal or household use, bleaching preparations and other substances for laundry use, polishing, scouring and abrasive preparations, polish remover preparations, carpet shampoos, cosmetics, perfumery, essential oils, pot-pourri, printed publications, books, manuals and catalogues, stationery, paper, envelopes, sticky tape, writing implements and pens, crayons and chalk, playing cards, stickers, paint, paint boxes, paint brushes, and artists' materials, stencils, packaging materials, gift wrapping paper, paper ribbons and bows, cards, gift tags, greeting cards and card holders, brushes, handles, connectors and extensions for all the aforesaid goods, apparatus and instruments, all for dispensing cleaning or washing preparations, gloves for domestic, cleaning or household purposes, dustpans, cloths for cleaning purposes, dusters and refuse bags, household and kitchen utensils and containers, baskets for domestic use, crockery, glassware, porcelain and earthenware, coasters and place mats, clothes racks and clothes horses, containers, utensils.

Class 41: On-line publications; on-line publications providing information to distributors relating to mail order and electronic shopping.

Mark 2:

Registration No. EU17928921

Filing Date: 11 July 2018

Date of entry in the register: 11 December 2018

KLEENEZE

Class 07: Food and beverage processing and preparation machines and apparatus; pulp making machines; blenders; mixers [machines]; beating machines; electric can openers; electric kitchen mixers, electric mixers for household purposes; electric juicers; steam cleaners; steam cleaning machines; electric steam cleaning machines; multi purpose steam cleaners; steam cleaners for household purposes; vacuum cleaners; vacuum cleaner bags; wet vacuum cleaners; electric vacuum cleaners; hand held vacuum cleaners; electric carpet vacuum cleaners; automatic floor scrubbers; floor scrubbing machines; floor cleaning machines; carpet cleaning machines; vacuum cleaners for the cleaning of surfaces; sewing machines;

machines for cleaning surfaces using high pressure water; electric brooms; electric grinders for use in households; parts, fittings and accessories for the aforesaid goods.

Class 21: Household and kitchen utensils and containers; jars; jugs; whisks; sweet jars; bread bins; salt shakers; pepper shakers; combs and sponges; scrub sponges; scrubbing pads; scrubbing brushes; brushes (except paintbrushes); cookware; bakeware; non-stick bakeware; mixing bowls; baking trays; pans; saucepans; pans (frying -); baking dishes; non-stick baking trays; articles for cleaning purposes; mops; mop heads; wringer mops; mop pails; buckets incorporating mop wringers; litter bins; plastic bins; ironing boards; wireware, comprising trivets, baskets, iron stands, trays and clothes airers for use with radiators; ironing board covers; clothes airers; clothes horses; pedal bins; chopping boards for kitchen use; kitchen moulds; egg separators [kitchen utensils]; kitchen boards for chopping; coasters; meal trays; dispensers for liquid soap; household gloves; cases for toiletry articles; lavatory brush stands; flat-iron stands; trouser presses; tie presses; egg poachers; cleaning pads; abrasive pads; towel racks; laundry baskets; brushes for cleaning; dustpans; dusters; feather-dusters; carpet sweepers; brooms; buckets; dish drainers; clothes-pegs; cool boxes; bowls; dishes; glasses; plates; egg cups; saucers; mugs; cups; travel mugs; gravy boats; crockery; plastic coasters; serving dishes; serving trays; tableware; cool bags; parts, fittings and accessories for the aforesaid goods; none of the aforesaid including limited life household, commercial or industrial cloths or wipes for cleaning, wiping or dusting.

3) The opponent's registrations are earlier marks, in accordance with section 6 of the Act. As neither completed its registration procedure more than five years prior to the filing date of the contested mark, they are not subject to the proof of use conditions, as per section 6A of the Act.

4) The applicant filed a counterstatement denying any visual, aural or conceptual similarity between the respective marks or any likelihood of confusion.

5) The opponent is represented by Mathys & Squire LLP; the applicant by Graham Jones and Company. Both parties filed evidence. A hearing took place before me on

17 March 2020 at which the opponent was represented by Mr Graham H. Jones. The opponent was not represented at the hearing but filed written submissions in lieu.

EVIDENCE

Opponent's evidence

6) This comes from Laura Todhunter, a Chartered Trade Mark Attorney at Mathys & Squire LLP. Ms Todhunter provides a selection of extracts from the applicant's website which she states shows how the mark applied for is actually being used on the market.² She also provides details of a number of trade marks owned by the applicant which include the element 'a Farla brand'.³

Applicant's evidence

7) This comes from Samuel Zalcborg, Commercial Director of Farla Medical Ltd. In its submissions in lieu, the opponent requested that the evidence of Mr Zalcborg be struck out because it consists of opinion rather than evidence of fact. It is true that most of Mr Zalcborg's statement serves to give his opinion why, as a "commercial person", the respective marks are not similar and why they would not be confused. The only evidence of fact provided by Mr Zalcborg is a list of trade marks obtained from the UKIPO Trade Marks Register that contain the element 'Kleen'.⁴ At the hearing, I confirmed that Mr Zalcborg's evidence would not be struck out. I will treat Mr Zalcborg's opinion as submissions.

DECISION

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

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

² Exhibit LTT01

³ Exhibit LTT02

⁴ Exhibit SZ

(a)....

(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.”

9) The leading authorities which guide me are from the Court of Justice of the European Union ('CJEU'): *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.

Approach

10) Mark 2 clearly represents the opponent's best prospect of success because that mark is presented in plain letters and is therefore the closest of the two earlier marks to the contested mark. Mark 2 also covers goods in class 21 which are identical to some of the contested goods in the same class (Mark 1, on the other hand, covers services which, at most, could only be similar to the contested goods). For these reasons, if the opponent fails based upon mark 2, it cannot possibly be in any better position based upon mark 1. I will proceed accordingly.

Comparison of goods

11) All relevant factors relating to the goods should be taken into account when making the comparison. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the Court of Justice of the European Union ("the CJEU"), Case C-39/97, 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."

12) Guidance on this issue has also come from Jacob J where, in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, the following factors were highlighted as being relevant:

- (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.

13) In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

“It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking..”

14) I also note the decision in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM Case T-133/05) (*‘Meric’*), where the GC held:

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

Koubi v OHIM – Flabesa (CONFORFLEX) [2004] ECR II-719, paragraphs 41 and 42).”

15) The goods to be compared are:

Opponent’s goods	Applicant’s goods
<p>Class 07: Food and beverage processing and preparation machines and apparatus; pulp making machines; blenders; mixers [machines]; beating machines; electric can openers; electric kitchen mixers, electric mixers for household purposes; electric juicers; steam cleaners; steam cleaning machines; electric steam cleaning machines; multi purpose steam cleaners; steam cleaners for household purposes; vacuum cleaners; vacuum cleaner bags; wet vacuum cleaners; electric vacuum cleaners; hand held vacuum cleaners; electric carpet vacuum cleaners; automatic floor scrubbers; floor scrubbing machines; floor cleaning machines; carpet cleaning machines; vacuum cleaners for the cleaning of surfaces; sewing machines; machines for cleaning surfaces using high pressure water; electric brooms; electric grinders for use in households; parts, fittings and accessories for the aforesaid goods.</p>	<p>Class 16: Bin bags.</p> <p>Class 21: Cloths; Scourers; Sponges; Mops; Mop handles.</p> <p>Class 22: Laundry bags.</p>

Class 21: Household and kitchen utensils and containers; jars; jugs; whisks; sweet jars; bread bins; salt shakers; pepper shakers; combs and sponges; scrub sponges; scrubbing pads; scrubbing brushes; brushes (except paintbrushes); cookware; bakeware; non-stick bakeware; mixing bowls; baking trays; pans; saucepans; pans (frying -); baking dishes; non-stick baking trays; articles for cleaning purposes; mops; mop heads; wringer mops; mop pails; buckets incorporating mop wringers; litter bins; plastic bins; ironing boards; wireware, comprising trivets, baskets, iron stands, trays and clothes airers for use with radiators; ironing board covers; clothes airers; clothes horses; pedal bins; chopping boards for kitchen use; kitchen moulds; egg separators [kitchen utensils]; kitchen boards for chopping; coasters; meal trays; dispensers for liquid soap; household gloves; cases for toiletry articles; lavatory brush stands; flat-iron stands; trouser presses; tie presses; egg poachers; cleaning pads; abrasive pads; towel racks; laundry baskets; brushes for cleaning; dustpans; dusters; feather-dusters; carpet sweepers; brooms; buckets; dish drainers; clothes-peg; cool boxes; bowls; dishes; glasses; plates; egg cups; saucers;

<p>mugs; cups; travel mugs; gravy boats; crockery; plastic coasters; serving dishes; serving trays; tableware; cool bags; parts, fittings and accessories for the aforesaid goods; none of the aforesaid including limited life household, commercial or industrial cloths or wipes for cleaning, wiping or dusting.</p>	
--	--

16) The opponent submits that the applicant's 'bin bags' in class 16 are complementary to its 'litter bins', 'pedal bins' and 'plastic bins' in class 21 because bin bags will be placed into the opponent's goods to enable them to fully perform their function. It is true that bin bags are often placed in bins to store the rubbish within them. Bin bags may therefore be important for the use of bins and vice versa. There is also a clear overlap in purpose i.e. they are both used to store the same kind of household rubbish. However, the respective nature is different and I would not expect the goods to be stocked in close proximity in a retail outlet. I find a low degree of similarity between the contested 'bin bags' and the opponent's various types of bin.

17) The applicant's 'Cloths; Scourers; Sponges; Mops' all fall within the opponent's broad term 'articles for cleaning purposes'. Those goods are therefore identical in accordance with *Meric*. The term 'none of the aforesaid including limited life household, commercial or industrial cloths or wipes for cleaning, wiping or dusting' does not disturb this finding since that term would appear to exclude only 'limited life' cloths and wipes from the opponent's specification. The opponent's specification therefore still covers other types of cloths and wipes which are identical to those of the applicant.

18) The opponent's specification includes the term 'mops' and the term 'parts and fittings...for the aforesaid goods' which relates back to the term 'mops'. The opponent's specification therefore covers 'mop handles' which are identical to the applicant's 'mop handles'.

19) The opponent submits that its 'laundry baskets' in class 21 are similar to the contested 'laundry bags' in class 22 because both are used for the purpose of collecting and storing laundry within the home. I agree that the goods share that same purpose. However, their nature is not the same; one being a basket, the other a textile bag. That said, they may be stocked in close proximity in a retail outlet and be in competition. I find a high degree of similarity between the applicant's 'laundry bags' and the opponent's 'laundry baskets'.

Average consumer and the purchasing process

20) It is necessary to determine who the average consumer is for the respective services and the manner in which they are likely to be selected. 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.”

21) The average consumer for the goods at issue is the general public. The marks are likely to be encountered primarily by visual means through selection of the goods on retail shelves or online equivalents. That is not to say though that the aural aspect should be ignored since the services may sometimes be the subject of discussions with sale representatives, for example. All the goods are low cost. I would expect a fairly low degree of attention to be paid to the purchase of them all and particularly to goods such as bin bags which are inexpensive and likely to be purchased frequently without much care.

Comparison of marks

22) 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 the 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 therefore be wrong to artificially dissect the 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 created by the marks.

23) The marks to be compared are:

Opponent's mark	Applicant's mark
KLEENEZE	KleenMe a Farla brand

24) The opponent's mark consists of the single invented word KLEENEZE absent any embellishments or stylisation. Its overall impression lies in that single element.

The applicant's mark naturally breaks down into two elements; the first being 'KleenMe', the second being 'a Farla brand'. I agree with the opponent that the element 'KleenMe' retains an independent distinctive role. The opponent contends that the second element is negligible in the overall impression. I disagree. The 'a Farla brand' element (containing the distinctive word 'Farla') is also an independently distinctive element and, although not presented at the beginning of the mark, takes up a large proportion of the mark, as a whole. I find that both elements, 'KleenMe' and 'a Farla brand', play an important role in the overall impression such that their weight is roughly equal.

25) Visually, I accept, as the opponent submits, that it is a general rule of thumb that the beginnings of marks tend to have the greatest impact on the perception. However, every case must be assessed on its own merits. In the instant case, aside from the common inclusion of the letters 'KLEEN' at the beginning, the respective marks are, in all other respects, very different to the eye. Given that the applicant's mark is much longer than the opponent's mark, these differences are particularly pronounced. On the whole, there is a low degree of visual similarity. I reach the same conclusion even allowing for use of the contested mark in the manner described by the opponent i.e. with the 'KleenMe' element presented as 'Kleenme' and/or in larger font than the 'a Farla brand' element. I have not, however, taken account of the applicant's form of use shown in the opponent's evidence where the 'n' and m' within KleenMe appear to be coalesced. That does not constitute notional and fair use of the contested mark, as applied for.

26) Aurally, I would expect the opponent's mark to be pronounced as KLEEN-EASE or perhaps as KLEEN-EASY. If the whole of the applicant's mark is pronounced, it will be as KLEEN-ME-A-FARLAH-BRAND. On that basis, the applicant's mark consists of six syllables, and the opponent's mark of only two/three syllables. The sole point of coincidence is in the identical first syllable; in all other respects they sound different. Regardless of which way the opponent's mark is pronounced, there is a very low degree of aural similarity, where the whole of the applicant's mark is vocalised. Owing to the length of the applicant's mark, it may be that only the first part of it is pronounced. In that scenario, the comparison is between KLEEN-

EASE/KLEEN-EASY and KLEEN-ME. In that case, and regardless of which way the opponent's mark is spoken, I find there to be a medium degree of aural similarity.

27) Conceptually, the opponent contends that neither it's mark, nor the applicant's mark portray any concept such that a conceptual comparison is not possible. I accept that KLEENEZE has the appearance of an invented word. However, even invented words can evoke a concept if they resemble known words⁵. To my mind, although the word 'KLEENEZE' appears to be invented, when used in the context of the goods at issue, it is likely to be evocative of the well-known words 'clean' and 'ease'/'easy' conjoined, given its close resemblance to those two words. It therefore evokes the idea of 'ease of cleaning' or 'easy cleaning'. Similarly, the 'KleenMe' element of the applicant's mark is evocative of the phrase 'Clean me' and that is how I would expect it to be immediately perceived by the average consumer. I would not expect the word Farla or the 'a Farla brand' element, as a whole, to evoke any immediately graspable concept. The comparison is therefore between 'Clean me' i.e. an instruction to clean me, and 'ease of cleaning'/'easy cleaning' i.e. goods that enable easy cleaning. Although both marks therefore evoke the idea of clean/cleaning in some way, the precise concept is not the same. There is therefore only a low degree of conceptual similarity between the marks. Furthermore, it is to be borne in mind that the shared concept is not a distinctive one in the context of the goods at issue.

Distinctive character of the earlier mark

28) The distinctive character of the earlier mark must be considered. The more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). 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

⁵ *Usinor SA v OHIM* (Case T-189/05)

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).”

29) As there is no evidence of use before me, I have only the inherent distinctiveness of the opponent’s mark to consider. The earlier mark alludes to ease of cleaning/easy cleaning. That is not a distinctive concept in relation to the relevant goods at issue for obvious reasons. However, KLEENEZE is also clearly a made-up word. I therefore consider it to have at least a normal degree of distinctiveness, despite its allusive meaning.

Likelihood of confusion

30) I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*); ii) the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and; iii) the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare

marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*).

31) I have found that:

- The overall impression of KLEENEZE lies in the whole.
- The contested mark breaks down into two elements, each with an independent distinctive role and each contributing equally to the overall impression of the mark.
- The marks are visually similar to a low degree.
- The marks are aurally similar to a very low degree if the whole of the contested mark is spoken and aurally similar to a medium degree if only the KleenMe element is spoken.
- Conceptually, the marks are similar to a low degree.
- Some of the respective goods are identical; others are similar to a high degree; the remainder are similar to a low degree.
- The average consumer, being the general public, is likely to pay a fairly low degree of attention and encounter the marks primarily by visual means.
- The earlier mark has, at least, a normal degree of inherent distinctiveness.

Weighing all these factors, I find that one mark is unlikely to be mistaken for the other bearing in mind, in particular, that the marks are likely to be encountered mainly by visual means and the visual similarity is only of a low degree. This is so despite the fairly low degree of attention that is likely to be afforded and despite some of the goods being identical. There is therefore no likelihood of direct confusion.

32) Turning to whether there is nevertheless a likelihood of the consumer believing that the respective goods emanate from the same (or linked) undertaking(s) (also known as 'indirect confusion'), I note that in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.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.”

33) Further, in *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

34) In this particular case, it is also appropriate to bear in mind the judgments of Arnold J. in *Aveda Corporation v Dabur India Limited*⁶ and *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another*⁷. 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.

⁶ [2013] EWHC 589 (Ch)

⁷ [2015] EWHC 1271 (Ch)

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.”

35) The opponent submits that, at the date of filing of the contested mark the average consumer was more and more used to seeing the collaboration of brands in the marketplace which, in its submission, increases the likelihood of the contested mark being perceived as being a collaboration between two economically linked entities. This submission does not assist the opponent. Firstly, there is no evidence before me to support such an assertion and secondly, even if that scenario were a common one it does not automatically follow that the marks before me would be indirectly confused. The assessment must take account of the similarities (or lack of) between the specific marks at issue.

36) In the case before me, I find that the similarities between the marks, as a whole, stemming from the common word 'Kleen', are unlikely to lead the average consumer to believe that the respective goods come from the same or linked undertaking(s), despite the independent distinctive role played by KleenMe in the contested mark. I reach this conclusion having borne in mind, in particular, that although the earlier mark, as a whole, has at least a normal level of distinctiveness, the conceptual similarity between the marks is low and that shared concept stems from a non-distinctive allusion to the word 'clean'. I find that the common use of the word 'Kleen' is likely to be put down to mere coincidence and nothing more. There is no likelihood of indirect confusion, even in respect of the identical goods in play and bearing in mind the fairly low degree of attention likely to be paid.

37) As the opponent has failed based upon mark 2, it would also fail based upon mark 1 for the reasons given earlier in this decision (paragraph 10).

OUTCOME

38) The opposition fails.

COSTS

39) As the applicant has been successful, it is entitled to a contribution towards its costs. I make no award for the preparation of the applicant's evidence which consisted, overwhelmingly, of opinion rather than evidence of fact. That evidence has been of no assistance to me in determining these matters. The state of the register evidence was also not helpful since it does not reflect actual use in the marketplace. Using the guidance in Annex A of Tribunal Practice Notice 2/2016, I award the applicant costs on the following basis:

Preparing a statement and considering the opponent's statement	£300
Considering the other side's evidence	£300

Preparing for, and attending, the hearing £400

Total: £1000

40) I order UP Global Sourcing UK Limited to pay Farla Medical Ltd the sum of **£1000**. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 1st day of April 2020

**Beverley Hedley
For the Registrar,
the Comptroller-General**