

O/781/21

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3593306
IN THE NAME OF ROSEWELL HOLDINGS LTD
TO REGISTER AS A TRADE MARK**

LÖV FLOWERS

IN CLASSES 35 & 44

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. OP600001689
BY LOVEMYFLOWERS LTD**

BACKGROUND AND PLEADINGS

1. On 10 February 2021, Rosewell Holdings Ltd (“the applicant”) applied to register **LÖV FLOWERS** as a trade mark in the United Kingdom for the following services:

Class 35: *Retail services relating to flowers; Wholesale services relating to flowers; Organisation of exhibitions of flowers and plants for commercial or advertising purposes.*

Class 44: *Flower arranging; Hiring of flowers; Flower arrangements (Rental of -); Rental of flower arrangements; Flower arrangement design services; Garden or flower bed care; Providing information regarding plant and flower identification for horticultural purposes.*

2. The application was accepted and published for opposition purposes on 09 April 2021.

3. The application is opposed by Lovemyflowers Ltd (“the opponent”). The opposition was filed on 10 April 2021 and is based upon Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all of the services in the application. The opponent relies upon its UK trade mark registration number 3345742, shown below, which has a filing date of 15 October 2018 and for which the registration procedure was completed on 18 January 2019:



4. The opposition relies upon all of the goods and services for which the earlier mark is registered, namely:

Class 25: *Clothing.*

Class 31: *Flowers; Arrangements of dried flowers for decorative purposes; Arrangements of natural flowers; Dried flowers; Dried flowers for decoration.*

Class 35: *Advertising services relating to clothing.*

Class 44: *Floristry.*

5. The opponent has not filed any written submissions in support of its case. As the only claims I have from the opponent are those included at Q11 of Form TM7F, these are reproduced in full, and as written, below:

“LOVE FLOWERS SUPPLIES MANY OF THE GOODS THAT LOVEMYFLOWERS DOES SO IN CONCLUSION ANYONE SEARCHING FOR OUR COMPANY MAY BE DIRECTED TO LOVE FLOWERS. OUR NAME IS WELL KNOWN & TAKEN MANY YEARS TO BUILD UP & MAINTAIN OUR REPUTATION”.

6. The applicant filed a counterstatement denying the claims. It concedes that the goods and services are similar, but not identical, and submits that the opposing marks are visually different, and, without the addition of the figurative element in the earlier mark, the words alone may have been rejected as being non-distinctive.

7. Rule 6 of the Trade Marks (Fast Track Opposition)(Amendment) Rules 2013, S.I. 2013 No. 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

8. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings

are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.

9. In an official letter dated 15 September 2021, in accordance with Tribunal Practice Notice 2/2013, the parties were allowed until 29 September 2021 to seek leave to file evidence and/or request a hearing and until 13 October 2021 to provide written submissions.

10. Neither party elected to seek leave to file evidence or to file written submissions and neither party requested a hearing, therefore this decision is taken following a careful perusal of the papers.

11. In these proceedings, neither party is represented.

PRELIMINARY ISSUES

12. In Appendix 1 of the applicant's Notice of defence and counterstatement, it submits that the opponent's claims under Q11 of Form TM7F, as replicated earlier in paragraph 5 of this decision, are not relevant.

13. I note that this is a fast track opposition filed on Form TM7F based on Section 5(2)(b) grounds, and not an opposition under Section 5(3) of the Act based on the reputation of an earlier trade mark, which requires evidence to be filed by the opponent. Consequently, I shall take no account of the claim to a reputation of the earlier mark in my decision. Although it can be appropriate to consider if the distinctive character of an earlier mark has been enhanced through its use under Section 5(2)(b), again this would require evidence of that use to be filed. No evidence has been filed in these proceedings. I will therefore only consider the likelihood of confusion based on the similarity of the competing marks and the similarity between the respective goods and services, as is appropriate.

DECISION

14. 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”.

15. 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), European Union 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,

...”

16. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As the trade mark had not been registered for more than five years at the date the application was filed, it is not subject to the proof of use provisions contained in section 6A of the Act. The opponent is, therefore, entitled to rely upon it in relation to all of the goods and services indicated without having to prove that genuine use has been made of them.

17. Although the UK has left the European Union, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in

accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. Therefore, this decision contains references to the trade mark case-law of the European courts.

Section 5(2)(b) –

18. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (“OHIM”)*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a greater 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 to mind the earlier mark, 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

19. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated that:

“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”.¹

20. 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 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.”

21. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“...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

¹ Paragraph 23

may think that the responsibility for those goods lies with the same undertaking".²

22. The goods and services to be compared are:

Opponent's goods and services	Applicant's services
<u>Class 25</u> <i>Clothing.</i>	
<u>Class 31</u> <i>Flowers; Arrangements of dried flowers for decorative purposes; Arrangements of natural flowers; Dried flowers; Dried flowers for decoration.</i>	
<u>Class 35</u> <i>Advertising services relating to clothing.</i>	<u>Class 35</u> <i>Retail services relating to flowers; Wholesale services relating to flowers; Organisation of exhibitions of flowers and plants for commercial or advertising purposes.</i>
<u>Class 44</u> <i>Floristry.</i>	<u>Class 44</u> <i>Flower arranging; Hiring of flowers; Flower arrangements (Rental of -); Rental of flower arrangements; Flower arrangement design services; Garden or flower bed care; Providing information regarding plant and flower identification for horticultural purposes.</i>

23. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where appropriate. In *Separode Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said:

² Paragraph 82

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”³

24. In *Gérard Meric v OHIM*, Case T-133/05, the GC stated that:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM - Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.⁴

25. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

“... 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.”⁵

³ Paragraph 5

⁴ Paragraph 29

⁵ Paragraph 12

26. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

27. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his judgment) that:

“9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent’s earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are ‘similar’ to goods are not clear cut.”

28. However, on the basis of the European courts’ judgments in *Sanco SA v OHIM*, and *Assembled Investments (Proprietary) Ltd v. OHIM*, upheld on appeal in *Waterford Wedgwood Plc v. Assembled Investments (Proprietary) Ltd*, Mr Hobbs concluded that:

i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the

consumer's point of view, they are unlikely to be offered by one and the same undertaking;

ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

29. The applicant has conceded within its counterstatement that the services covered by its application are similar to those protected under the earlier mark, but has not stated the level of similarity it believes to be shared. It is therefore for me to consider the level of similarity and identity between the opposing goods and services.

Class 35

30. It is clear from the aforementioned case law that in all instances where the applicant's retail services are to be compared with the opponent's goods, the retail services will be different in nature, purpose and method of use to those goods. However, where there is some complementarity and shared trade channels, retail services may be similar to goods, if the consumer would find it likely for them to be offered by the same undertaking. I also note that I must not treat the retail services as goods, although consideration of the retail services normally associated with the opponent's goods should be made.

31. The applicant's services "*Retail services relating to flowers; Wholesale services relating to flowers*" encompasses the retail and wholesale of the opponent's goods, including "*Flowers; Arrangements of dried flowers for decorative purposes; Arrangements of natural flowers; Dried flowers; Dried flowers for decoration*" of the earlier mark. The users are for the most part identical, although it is possible to consume retail services while purchasing goods for someone else to use. The applicant's services cannot be supplied without the goods, and so they will share trade channels. As the goods are indispensable to the services, I find them to be complementary to the extent that the average consumer will assume that they are offered by the same undertaking. Taking all factors into account, I find that there is a medium degree of similarity between the contested services and earlier goods.

32. Similar to the aforementioned retail services, the applicant's "*Organisation of exhibitions of flowers and plants for commercial or advertising purposes*" cannot be provided without the goods, being the *flowers* and/or *dried flowers* of the earlier mark. However, while there may be some overlap in users, the nature, purpose and method of use of the goods is different to that of the services and I do not consider that the the average consumer will assume that the respective goods and services are offered by the same or economically linked undertakings. I therefore find there to be only a low degree of similarity between the contested services and the opponent's goods. When comparing "*Organisation of exhibitions of flowers and plants for commercial or advertising purposes*" with the opponent's "*Floristry*", as per *Avnet* I do not consider that the average consumer would expect floristry services to include the organisation of exhibitions within the core meaning of the term. I find the competing services to be dissimilar.

Class 44

33. In my view, the average consumer would expect floristry services to include "*Flower arranging*" and "*Flower arrangement design services*", and as such, they are encompassed within the wider term "*Floristry*" of the opponent's specification, rendering them identical as per *Meric*.

34. In my view, it is likely that the average consumer would perceive “*Hiring of flowers; Flower arrangements (Rental of -); Rental of flower arrangements*” to be of a more specialised nature than the core meaning of *Floristry*. While there may be an overlap in users, channels of trade, and purpose, the essential nature of the respective services differs. There is an element of competition between the competing services whereby the consumer may elect to hire flowers for a particular event, rather than choose to engage the services of a Florist to create a bespoke arrangement of flowers. It would not be unreasonable to expect that both services would be provided by the same or economically linked undertakings. Consequently, I find there to be a medium degree of similarity between “*Hiring of flowers; Flower arrangements (Rental of -); Rental of flower arrangements*” and “*Floristry*”.

35. Comparing “*Providing information regarding plant and flower identification for horticultural purposes*” to the opponent’s “*Flowers*”, once again, the services will be different in nature, purpose and method of use to those goods. However, in my view, there is a connection between the goods and services, with an overlap in users, as the purveyor of the goods would also provide a certain level of information relating to said goods. I would therefore expect the average consumer to believe that the goods and services to be offered by the same undertaking. I find the goods and services to be similar to at least a low degree.

36. In my view, the average consumer would perceive “*Garden or flower bed care*” to be a service provided by a gardening specialist/horticulturist rather than as a “*Floristry*” service, with the respective services having different purposes, users, nature and trade channels. Consequently, I find the applicant’s services to be dissimilar in substance to the opponent’s *Floristry*. I acknowledge that in order to provide the flower bed care, *flowers* would need to first be provided, and I accept that there may be occasions that these are offered by the same undertakings and share trade channels. I also note that the users may be shared, however, I do not consider that the average consumer would normally expect the respective goods and services to be provided by the same undertaking, and they have different purposes, and are different in nature. I find any similarity between these goods and services will be to a very low degree.

The average consumer and the nature of the purchasing act

37. 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. (as he was then) described the average consumer in these terms:

“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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.⁶

38. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

39. Neither party has submitted a view on who the average consumer of the respective goods and services might be. In my view, the average consumer for the competing goods and services for which I found a degree of similarity will most likely be the general public, but I note that the relevant public will also include professionals, such as those in the field of event planning, hospitality, or the advertising industry.

40. The relevant goods and services are sold through a range of channels including flower shops, supermarkets, and specialist providers, as well as online. In retail stores, the goods will be on open display, where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a web page. In these circumstances, visual considerations will dominate the process. The visual element will be important, as they see the mark used on signage and advertising, both in print and online. However, I do not discount the aural element, as word-of-mouth

⁶ Paragraph 60

recommendations may play a part, as would advice sought from sales representatives during the selection process.

41. Although the price of the goods can vary considerably, on balance it seems to me that the cost of the purchase is likely to be relatively low and, although not an everyday purchase, the goods will be sought reasonably frequently by the general public for either self or as a gift or for a special occasion. When using the floristry, retail and wholesale services at issue, the average consumer will make their choice based on the range of goods and services available and their corresponding costs, the respective customer services being offered, and other factors, for example, in the case of bricks and mortar retailers, the location of a store. Consequently, I find that the level of attention of the general public will be medium, while the professional is likely to base their selection on the suitability of those goods and services, as well as the cost, quality and reliability. With their own reputation being paramount, they will pay a higher than average degree of attention to the selection process.

Comparison of marks

42. 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 in *Bimbo SA v OHIM* Case C-591/12P, 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.”⁷

⁷ Paragraph 34

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

44. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
	<p style="text-align: center;">LÖV FLOWERS</p>

45. The applicant submits that the graphic element is a significant part of the opponent's mark, and the additional word "my" makes the two marks conceptually different. Further, it submits that the use of the umlaut in the word "LÖV" in its own trade mark is not something which is normally used in written English, giving the trade mark a Germanic or Scandinavian flavour and thus providing an element of differentiation between the competing marks.

Overall impression

46. The opponent's mark consists of a number of components. Positioned on the left hand side of the mark is an artistic representation of what is likely to be perceived as the head of a four leaf clover or a flower, with each of the four, heart-shaped segments or petals presented in a different two colour combination of triangles. This device precedes the words "lovemyflowers", which are presented in cursive script in lower case in the colour purple and are conjoined, with the word "LTD" written in capitals in a much smaller standard purple font at the end. The device appears to be positioned slightly off centre when compared to the position of the words which follow it. Although it could be said that the device element is slightly larger than the words in the overall

impression, I consider that the device and the words “lovemyflowers” make a roughly equal contribution to the overall impression: while the average consumer’s attention is likely to be drawn to the verbal elements, the device element also reinforces the message of flowers. The word LTD makes a much lesser contribution due to its size and position and, as submitted by the applicant, serves to denote the name of the company providing those goods and services and so is non-distinctive. I also note that in the context of the goods and services for which I found there to be similarity earlier in this decision, the word “flowers” will be seen as descriptive.

47. The applicant’s mark consists of two words “LÖV” and “FLOWERS” presented in capital letters in a standard font without any other elements to contribute to the overall impression. The overall impression conveyed by the mark therefore rests in the words themselves. As all of the applicant’s services are in some way related to flowers, I again note that the word “flowers” is non-distinctive and consequently, it is the word “LÖV” which plays the greater role in the overall impression.

Visual comparison

48. The applicant’s mark comprises two separate words, while the earlier mark consists of a device element alongside four conjoined words, as previously described. The umlaut on the three letter word “LÖV” in the applicant’s mark is unlikely to go unnoticed. I agree with the applicant that the average consumer would distinguish the visual differences between “LÖV” and the four letter, dictionary defined word “LOVE” in the earlier mark. Both parties’ trade marks include the non-distinctive word “FLOWERS”. Considering the marks as a whole, in view of the additional device element in the earlier mark and the brevity of the words in the applicant’s mark, I find there to be a low degree of visual similarity between the two marks.

Aural comparison

49. The common element in both marks is the word “FLOWERS”, which would be pronounced the same in both marks, as two syllables, FLOW-ERS. The word “LÖV” in the contested mark may be pronounced as the English word “LOVE” [lʌv], however, some consumers may pronounce it as “L-OF” [lɒv], the whole being read as either

“LOVE FLOW-ERS” or “L-OF FLOW-ERS”. The words “LOVE” and “MY” in the earlier mark would also be articulated, with “LOVE” pronounced as one syllable “LUV” [lʌv], and “MY” also pronounced as one syllable [maɪ]. The word LTD at the end of the mark is less likely to be articulated, but to those consumers who do, it would be pronounced as three syllables “LIM - IT – ID” [lɪmɪtɪd], the whole mark therefore being read as “LUV MY FLOW-ERS LIM-IT-ID”. As the figurative element in the opponent’s mark would not be voiced, in this case I find its mark to be aurally similar to the applicant’s mark to a low to medium degree where the consumer pronounces the word “LÖV” as “LOVE” and “LTD” is voiced, and to a low degree where it is pronounced as “L-OF” and “LTD” is voiced. Where the word “LTD” is not voiced, in either of the above scenarios, I consider the marks to be aurally similar to a medium degree and to a low degree, respectively.

Conceptual comparison

50. To some consumers, the word “LÖV” in the applicant’s mark will be seen as a made up term with no conceptual identity, when set aside from the word “FLOWERS”, which has a wholly descriptive meaning in relation to the services being provided, therefore the only conceptual similarity between the marks is in the non-distinctive element “FLOWERS”. However, other consumers may perceive “LÖV” as either alluding to the word “LOVE”, or a foreign equivalent of that word, which is reinforced by the umlaut on the letter “O”. The earlier mark is, in my view, sending a direct message inviting the consumer to “love my flowers”, with the word “my” referring to the provider. To those consumers who see the device element as petals of a flower, it merely reinforces the message of the goods and services being related to flowers, while to those who perceive the device as a four leaf clover, the concept of good luck may also play a part. In the contested mark, to those consumers who see “LÖV” as alluding to the word “LOVE”, the concept is more subtle, with no clear indication of whose flowers the consumer is being asked to love. Taking this into account, I consider that the marks are conceptually similar to between a medium and high degree where the concept of both LOVE and FLOWERS is conveyed to the consumer in the applied for mark. Where only the concept of flowers is shared, I find the marks to be conceptually similar to a low to medium degree. I find this to be true both where the device element is viewed as a clover, and where it is viewed as a flower.

Distinctive character of the earlier marks

51. 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.

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

53. Registered trade marks can possess varying degrees of inherent distinctive character, being low where they are allusive or suggestive of a character of the goods and services, whereas invented words usually have the highest degree of distinctive

character. The distinctiveness of a mark can be enhanced by virtue of the use made of it. The opponent has not claimed that its mark has enhanced distinctiveness and no evidence has been filed. Therefore, I only have the inherent characteristics of the mark to consider.

54. The earlier mark comprises four ordinary, albeit conjoined, dictionary defined words, one of which refers to the provider as being a limited company "LTD". I consider that the choice of flower device to be non-arbitrary in its inclusion and serves to reinforce the idea of goods and services related to flowers, although I acknowledge that some consumers will see the device as a lucky four leaf clover, which will have a less direct association with the goods and services. As considered earlier in paragraph 50 of this decision, to my mind, the mark is inviting the consumer to love (and therefore purchase) the opponent's flower related goods and services. Consequently, I find the inherent distinctive character of the mark to be at the lower end of the spectrum, although not of the very lowest degree.

Likelihood of confusion

55. There is no simple formula for determining whether there is a likelihood of confusion. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind.

56. It is clear then that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them 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 (*Canon* at [17]). In making my assessment, I must consider the various factors from the perspective of the average consumer, bearing in mind 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 (*Lloyd Schuhfabrik* at [26]).

57. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer realises the

marks are not the same but puts the similarity that exists between the marks/goods and services down to the responsible undertakings being the same or related. The distinction between these was explained by Mr Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

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

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

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

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

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

58. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

59. Earlier in this decision, I found that:

- The level of attention of the general public as the average consumer will be medium when selecting the goods and services, while the professional consumer is likely to pay a higher than average degree of attention to the selection process;
- Both groups, whilst not ignoring aural considerations, will select the goods and services at issue by predominantly visual means;
- The competing trade marks are visually similar to a low degree and are aurally similar to a low - medium degree;
- Where the word “LÖV” is seen as an invented word, it will have no conceptual identity, with the only overlap in concept of the competing marks being in the non-distinctive word FLOWERS, resulting in a low to medium degree of conceptual similarity, depending on whether the device element is seen as a clover or a flower; where “LÖV” in the applicant’s mark is seen as alluding to the word “LOVE”, there is a medium to high level of conceptual similarity between the marks;
- The earlier mark is inherently distinctive to a low degree, but not the lowest;
- The applicant conceded that its services were similar to the opponent’s goods and services. I found the contested services to range from identical to the opponent’s goods and services to similar to a very low degree.

60. Taking into account the previously outlined guidance of Mr Iain Purvis Q.C. on likelihood of confusion, while allowing that the average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they

have kept in their mind, I consider it unlikely that they would mistake one mark for the other. In my view, the average consumer will notice and recall the visual, aural and conceptual differences between the marks. I do not consider there is any likelihood of direct confusion, even where I found the respective services to be identical, which offsets a lesser degree of similarity between the marks, as the differences between the marks are too great for confusion to arise.

61. I now turn to consider whether there might be a likelihood of indirect confusion. Here the average consumer recognises that the marks are different but assumes that the goods and services are the responsibility of the same or connected undertakings. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), 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.

62. I acknowledge that the categories listed by Mr Iain Purvis Q.C. in *L.A. Sugar* are not exhaustive, and although the marks share in common the non-distinctive word “FLOWERS”, and to some they may be viewed as sharing the concept of “love”, considering the low degree of distinctive character of the earlier mark, I do not see anything which would lead the average consumer into believing that one mark is a brand extension of the other, or assume that there is an economic connection between the parties. I therefore find no likelihood of indirect confusion.

Conclusion

63. The opposition has failed and, subject to any successful appeal, the application may proceed to registration.

Costs

64. The applicant has been successful, and is therefore entitled to a contribution towards its costs. Awards of costs in fast track opposition proceedings are governed by Tribunal Practice Notice (“TPN”) 2 of 2015. The applicant is a litigant in person and

I note the completed proforma detailing the time spent on particular activities associated with its defence of this opposition.

65. Taking all of this into account, I consider the following to be reasonable:

Considering the opposition filed by the opponent	3 hours
Preparing and filing a Counterstatement	6 hours
Total	9 hours

66. In relation to the hours spent on these proceedings, I note that The Litigants in Person (Costs and Expenses) Act 1975 (as amended) sets the minimum level of compensation for litigants in person in Court proceedings at £19.00 an hour. I see no reason to award anything other than this. I therefore award the applicant the sum of £171 (9 hours at £19 per hour).

67. I therefore order Lovemyflowers Ltd to pay Rosewell Holdings Ltd the sum of £171. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 19th day of October 2021

Suzanne Hitchings
For the Registrar,
the Comptroller-General