

O-229-03

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2210272
BY FREIXENET S.A. TO REGISTER A TRADE MARK
IN CLASS 33**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER
NO 52076 BY GH MUMM ET CIE SOCIETE VINICOLE
DE CHAMPAGNE SUCCESSEUR**

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**IN THE MATTER OF Application No. 2210272
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**IN THE MATTER OF Opposition thereto under
No. 52076 by GH Mumm et Cie Societe Vinicole de
Champagne Successeur**

BACKGROUND

1. On 28 November 1996 Freixenet S.A. applied to register the trade mark CORDON BLANCO in Class 33 of the register for a specification of “Cava sparkling wines, sparkling wines, wines”.
2. The application was accepted by the Registrar and published in the Trade Marks Journal.
3. On 31 January 2001 G H Mumm et Cie Societe Vinicole de Champagne Successeur filed a Notice of Opposition. In summary the Notice set out the following grounds:
 - (i) Under Section 5(2)(b) of the Act because the mark applied for is similar to the earlier registered trade marks set out in Appendix One to this decision, owned by the opponent which cover identical and similar goods and there exists a likelihood of confusion on the part of the public.
 - (ii) Under Section 5(4)(a) of the Act by virtue of the law of passing off.
4. On 8 May 2001 the applicant filed a Counterstatement denying the grounds of opposition.
5. Both sides filed evidence and asked for an award of costs in their favour. The matter came to be heard on 23 July 2003 when the applicant for registration was represented by Mr Birss of Counsel instructed by Haseltine Lake and the opponent by Mr Edenborough of Counsel instructed by Abel & Imray.

Opponent's Evidence

6. This consists of two statutory declarations, one each by Jean-Marie Barillere and Hazel Hearn dated 9 November 2001 and 14 November 2001 respectively.
7. Mr Barillere is the President of G H Mumm et Cie Societe Vinicole de Champagne Successeur, the opponent company.

8. Mr Barillere refers to Exhibit “JMB1” to his declaration which comprises a copy of a statutory declaration dated 12 November 1996 by Jean Montet-Jourdran who was, at that date, the Secretary of the opponent company and whose declaration was filed as evidence in Opposition No. 43973 to Application No 2005699 of Private Liquor Brands Limited to register the trade mark CORDON BLANCO, an application subsequently withdrawn.

9. Mr Montet-Jourdran’s declaration refers to the history of the opponent company and its predecessors and he states that his company’s famous trade marks CORDON ROUGE and CORDON VERT were first used as early as 1883 and 1920 respectively and are best known in the field of champagne or sparkling wines. He adds that the opponent’s products under the CORDON ROUGE and CORDON VERT trade marks have been marketed in the UK for many years with the CORDON ROUGE trade mark probably used in the UK as early as 1885 and the CORDON VERT trade mark going back at least to 1926 with sales more or less continuous from those dates. Turning to the opponent’s GRAND CORDON and CORDON ROSE trade marks, Mr Montet-Jourdran states that these marks were probably first used in the UK in the years 1990 and 1959 respectively.

10. Mr Montet-Jourdran goes on to set out the following figures of the volumes of shipments of his company’s products to the UK for the eight years to 1995:

TRADE MARK – CORDON ROUGE

<u>Year</u>	<u>No. 75cl bottles</u>
1988	633,818
1989	637,392
1990	754,878
1991	528,136
1992	483,202
1993	173,884
1994	246,888
1995	473,712

TRADE MARK – CORDON ROUGE (Millesime)

<u>Year</u>	<u>No 75cl bottles</u>
1988	12,602
1989	13,731
1990	14,016
1991	435
1992	6,000
1993	1,896
1994	0
1995	696

TRADE MARK – CORDON ROSE

<u>Year</u>	<u>No 75cl bottles</u>
1988	6,600
1989	7,260
1990	9,600
1991	5,400
1992	8,232
1993	3,864
1994	3,552
1995	5,760

TRADE MARK – CORDON VERT

<u>Year</u>	<u>No 75cl bottles</u>
1988	0
1989	1,296
1990	0
1991	0
1992	12,280
1993	0
1994	0
1995	324

TRADE MARK – GRAND CORDON

<u>Year</u>	<u>No 75cl bottles</u>
1991	489
1992	697
1993	0
1994	9,636
1995	120

11. Mr Montet-Jourdran confirms that his company's products under the CORDON ROUGE, CORDON VERT, CORDON ROSE and GRAND CORDON trade marks have been sold through the UK and he lists a number of major UK stockists selling the products. He also draws attention to examples of labels of his company's products and states that over the last five years, over £2 million has been spent in the UK in promoting mainly products identified by the CORDON trade marks.

12. I return now to the remainder of Mr Barillere's declaration in which he goes on to update the information supplied by Mr Montet-Jourdran. Mr Barillere sets out the following figures sharing the volumes of shipments of his company's products to the UK for the five years to 2000:

TRADE MARK – CORDON ROUGE

<u>Year</u>	<u>No. 75cl bottles</u>
1996	586,644
1997	290,176
1998	550,352
1999	826,744
2000	491,832

TRADE MARK – CORDON ROUGE (Millesime)

<u>Year</u>	<u>No 75cl bottles</u>
1996	17,580
1997	27,840
1998	53,100
1999	48,690
2000	_____

TRADE MARK – CORDON ROSE

<u>Year</u>	<u>No 75cl bottles</u>
1996	2,800
1997	576
1998	1,188
1999	1,200
2000	_____

TRADE MARK – CORDON VERT

<u>Year</u>	<u>No 75cl bottles</u>
1996	684
1997	216
1999	_____
1999	78
2000	_____

TRADE MARK – GRAND CORDON

<u>Year</u>	<u>No 75cl bottles</u>
1996	60
1997	1,260
1998	16,668
1999	29,760
2000	_____

13. Mr Barillere confirms that his company's products have been sold under the CORDON ROUGE, CORDON VERT, CORDON ROSE and GRAND CORDON trade marks throughout the UK and he lists a number of major retailers who sell the products.

14. Mr Barillere declares that his company's products have been promoted in the UK by means of, inter alia, television and press advertising, the production of point of sale material and through promotional materials. He adds that over the past five years over £2 million has been spent in the UK in promoting his company's products mainly identified by the CORDON trade marks and at Exhibit "JMB2" to his declaration are copies of promotional materials.

15. Mr Barillere concludes his declaration by stating that, in his view, his company's reputation in CORDON trade marks and in particular in trade marks consisting of the word CORDON in conjunction with a word describing a colour, the use by the applicant of the trade mark CORDON BLANCO, particularly in relation to wines, would cause confusion on the part of the public.

16. Ms Hearn is a registered trade mark attorney in the employ of Abel & Imray, the opponent's professional advisors in these proceedings.

17. Ms Hearn states that the opponent in these proceedings has previously opposed UK trade mark applications to register trade marks incorporating the words CORDON BLANCO, in particular Application Nos. 2024149, 2024193 and 2024195 by Codorniu S.A. by Opposition Nos. 46084, 46085 and 46086. She adds that the oppositions were consolidated and were successful under Section 5(2)(b) and Section 5(4)(a). Ms Hearn at Exhibit HH1 provides a copy of the official decision of the Registrar's Principal Hearing Officer, Dr W J Trott, which is dated 6 June 2000 (BL O/192/00).

18. Ms Hearn believes that the comments of the Principal Hearing Officer, particularly regarding the opponent's reputation and goodwill, their very long history of trade in the UK and the conceptual link between the opponent's trade marks and the trade mark CORDON BLANCO, to be relevant to the current proceedings.

Applicant's Evidence

19. This consists of a witness statement by Graham John Porter Fortune dated 6 August 2002. Mr Fortune is the Managing Director of Freixenet (DWS) Ltd, a wholly owned subsidiary of Freixenet S.A. (the applicant).

20. Mr Fortune explains that the applicant is a wine producer whose business was founded in 1861 in Sant Sadurnis of Noya in the Penedes region of Spain specialising in the production of the natural sparkling wine Cava.

21. Mr Fortune goes on to provide considerable information about the applicant's CORDON NEGRO trade mark which was launched in 1974. He states that in 1996, the applicant's share of the UK market in sparkling wines by volume was about 5% of

which about 80% was made up of the CORDON NEGRO Cava. Mr Fortune provides the following sales figures for CORDON NEGRO Cava since 1984 in the UK:

Year	Turnover (£,000)	Cases (,000)
1984	300	10.8
1985	600	14.4
1986	1100	30.4
1987	1600	39.3
1988	1900	53.4
1989	2300	65.7
1990	2800	91.0
1991	2900	87.8
1992	3100	90.5
1993	3100	98.3
1994	3200	104.3
1995	3700	114.5

22. Mr Fortune explains that the figures for cases sold are for the industry standard of 9 litre cases of twelve bottles, hence approximately 1.4 million bottles of CORDON NEGRO Cava were sold in the UK in 1995, the last full year before the relevant date in these proceedings.

23. Mr Fortune declares that CORDON NEGRO Cava has been sold very widely throughout the UK and he specifies a number of well known national supermarkets and off licenses selling the product. Exhibited at "Exhibit GJPF3" to his declaration, is a print-out showing the names and addresses of CORDON NEGRO stockists in 1996.

24. Turning to the promotion of the mark, Mr Fortune states that there was extensive advertising and publicity of the mark up to 1996 and the total spend on this from the years 1993 to 1995 was as follows:

YEAR	SPEND (£,000)
1993	365
1994	198
1995	241

25. Mr Fortune goes on to list a comprehensive list of publications in which advertisements for CORDON NEGRO Cava have appeared. These include national newspapers, consumer magazines and trade magazines. He adds that promotions were also arranged nationally through leading supermarkets, off licenses and wholesalers and he names examples.

26. Next, Mr Fortune compares Cava with Champagne and he states there are significant differences between the two products including price, and he believes that consumers of the products will be aware of their different countries of origin.

27. Mr Fortune considers the meaning of CORDON NEGRO and CORDON BLANCO and states that CORDON is a Spanish word meaning “cord or string”, NEGRO is a Spanish word meaning “black” and BLANCO is a Spanish word meaning “white”.

28. Mr Fortune states that he is not aware of any instances of confusion having arisen between the UK of the CORDON NEGRO trade mark and the name of any other brand of sparkling wine, including the CORDON ROUGE trade mark. He also notes that the trade mark CORDON NEGRO has been registered by the applicant as a community trade mark with effect from 1 April 1996 for “wines, sparkling wines, spirits and liqueurs” and a copy containing details of this registration and taken from the OHIM database is at Exhibit “GJPF6” to his statement.

29. This completes my summary of the evidence filed in this case. I now turn to the decision.

DECISION

30. Firstly I turn to the ground of opposition based upon Section 5(2) of the Act which reads as follows:

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

- (a) it is identical with an earlier trade mark and is to be registered for goods or services similar to those for which the earlier trade mark is protected, or
- (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.”

31. An earlier right is defined in Section 6, the relevant parts of which state:

“6.-(1) In this Act an “earlier trade” marks means –

- (a) a registered trade mark, international trade mark (UK) or Community trade mark 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,”

32. I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel BV v. Puma AG* [1998] E.T.M.R. 1, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc* [1999] E.T.M.R. 1, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG* [2000] E.T.M.R. 723.

33. It is clear from these cases that:

- (a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v. Puma AG*, paragraph 22;
- (b) the matter must be judged through the eyes of the average consumer of the goods/services in question; *Sabel BV v. Puma AG*, paragraph 23, 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.* paragraph 27;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;
- (d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;
- (e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;
- (f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;
- (g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;
- (h) further, 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; *Marca Mode CV v. Adidas AG*, paragraph 41;
- (i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29.

34. The reputation of a trade mark is an element to which importance may be attached in Section 5(2) considerations in that it may enhance the distinctive character of the mark at issue and widen the penumbra of protection of such a mark. The opponent has filed evidence relating to the reputation of its marks covered by the prior registrations. On the basis of this evidence I have come to the view that the opponent possesses a substantial reputation in its CORDON ROUGE mark in relation to

champagne. However, the extent of the opponent's use in relation to its CORDON ROSE, CORDON VERT and GRAND CORDON is to a far lesser degree and the evidence relating to the promotion and use of these latter marks is far less persuasive. Accordingly, in relation to the opponent's CORDON ROSE, CORDON VERT and GRAND CORDON trade marks I conclude that the evidence filed does not demonstrate a reputation sufficient to impact upon the penumbra of protection under Section 5(2) and widen that protection that would normally be afforded to each of these marks.

35. At the hearing, Mr Edenborough submitted that the opponent possessed a family of CORDON marks namely, CORDON ROUGE, CORDON VERT, CORDON ROSE and GRAND CORDON as the use of these marks increased the ambit of protection conferred upon the group. He drew my attention to the decision of the Appointed Person, Professor Ruth Annard in the *Infamous Nut Company Limited v Percy Dalton (Holdings) Limited* [2003] RPC 126 case. In particular page 133 lines 37 to 44 are relevant and they state:

“In some circumstances, it may be possible for the opponent to argue that an element in the earlier trade mark has achieved enhanced distinctiveness in the eyes of the public because it is common to a “family of marks” in the proprietorship and use of the opponent (AMOR Decision No 189/1999 of the Opposition Division, OHIM O.J. 2/2000, Page 235). However, that has not been shown by the evidence to exist in the present opposition and cannot, as contended by Mr Walters on behalf of the opponent, be presumed from the state of the register in Classes 29 and 31”.

36. To a large extent the position as to a family of trade marks follows that under the old law as exemplified by the decision of the Assistant Comptroller in *Beck Koller* [1947] 64 RPC 76, which set out the following principles:

- (i) there must be use of the marks, such that the public are aware of the marks so that they can associate the common element with one particular trader;
- (ii) the less common the element the lesser the strength of the family;
- (iii) use of the common element by other traders will weaken the strength of the family.

37. I am not aware that there are any express criteria relating to the extent of use necessary to demonstrate that a family of trade marks exist. In the present case, I accept that the mark CORDON ROUGE has a considerable reputation in relation to champagne. However, as mentioned earlier, use of the marks CORDON VERT, CORDON ROSE and GRAND CORDON is to a far lesser degree and on the basis of the sales figures provided in the opponent's evidence and the lack of substantive evidence going to support the promotion of these particular marks, I feel unable to conclude with any degree of certainty that these marks are or would be automatically associated by the relevant public as a family of marks belonging to the opponent as the relevant public are not likely to be aware of the CORDON VERT, CORDON ROSE and GRAND CORDON marks. Furthermore, as pointed out by Mr Burns on

behalf of the applicant, the applicant is the proprietor of the registered trade mark CORDON NEGRO which has been used on a considerable scale in the UK since the 1970s in relation to cava (similar goods). This is a circumstance strongly adverse to the opponent's position on the family of marks issue.

38. In relation to the opponent's submissions on the family of marks I have come to the conclusion that, on the evidence, it is impermissible to collectively group together the opponent's earlier marks for the purposes of the Section 5(2) comparisons. Thus the registerability of the applicant's mark must be considered against each of the opponent's trade marks separately.

39. In essence the test under Section 5(2) is whether there are similarities in marks and goods which would combine to create a likelihood of confusion. In my consideration of whether there are similarities sufficient to show a likelihood of confusion I am guided by the recent judgments of the European Court of Justice mentioned earlier in this decision. The likelihood of confusion must be appreciated globally and I need to address the degree of visual, aural and conceptual similarity between the marks, evaluating the importance to be attached to those different elements, taking into account the degree of similarity in the goods, the category of goods in question and how they are marketed. In this case it is accepted that the opponent's mark CORDON ROUGE has a reputation in relation to champagne. However, it was held in *Marca Mode v Adidas AG* [2000] ETMR 723:

“The reputation of a mark, where it is demonstrated, is thus an element which, amongst others, may have a certain importance. To this end, it may be observed that marks with a highly distinctive character, in particular because of their reputation, enjoy broader protection than marks with a less distinctive character (*Canon*, paragraph 18). Nevertheless, the reputation of a mark does not give grounds for presuming the existence of a likelihood of confusion simply because of the existence of a likelihood of association in the strict sense.”

40. Furthermore, in addition to making comparisons which take into account actual use of the respective marks, I must also compare the mark applied for and the opponent's registration on the basis of their inherent characteristics assuming normal and fair use of the marks on a full range of the goods covered within the respective specifications.

41. Turning first to a consideration of the respective goods covered by the specification of the application in suit and the opponent's earlier registration, while the opponent's use of its marks is in relation to champagne, the specifications of the respective marks include, inter-alia, “sparkling wines” at large. Accordingly the specifications include identical and similar goods.

42. I now go on to a comparison of the mark in suit with the opponent's earlier registrations. While the opponent relies upon numerous earlier marks it seems to me that the opponent's strongest case is in relation to its registration No. 850382, the words CORDON ROUGE registered in respect of “sparkling wines”; and registration No 2137633, the label mark containing the opponent's house mark (GH Mumm & Co) and in which the words CORDON ROSE are prominent, registered in respect of

“alcoholic beverages (except beers)”. For the purpose of the mark comparisons I intend to concentrate upon a comparison of the mark in suit with the two marks mentioned above as I do not believe the opponent’s remaining registrations offer the opponent any greater likelihood of success.

43. The respective marks must be compared as a whole and by reference to overall impression but, as recognised in *Sable BV v Puma AG* (mentioned earlier in this decision), in any comparison reference will inevitably be made to the distinctiveness and prominence of individual elements. It is, of course, possible to over analyse marks and in doing so shift away from the real test which is how marks would be perceived by customers in the normal course and circumstances of trade and I must bear this in mind when making the comparisons.

44. The mark in suit consists of the words CORDON BLANCO which in Spanish means “white string”, or according to the translation appearing in the advertisement of the mark “white ribbon”. While the word CORDON means “ribbon” or “string” in the French and Spanish languages I doubt this signification would be apparent to the average customer for the goods in the UK. While the French and Spanish languages are relatively well known in the UK I very much doubt that the average consumer possesses the depth of knowledge sufficient to identify the meanings of the word CORDON and it is very likely that it will be perceived as an invented word or perhaps a foreign (European) word with no apparent meaning. The word CORDON is both a distinctive and dominant component within the mark applied for. The remaining element of the mark is the word BLANCO which means “white” in the Spanish and Italian languages and notwithstanding the deficiencies in the foreign language skills of UK consumers, it seems to me that the average customer is likely to be able to identify the meaning of their word, specially given that BLANCO (solus) in relation to wine has an obvious descriptive meaning or connotation ie white, as opposed to red or rose, wine. While the word BLANCO is also a dominant aspect of the mark it is not in itself a distinctive component.

45. The opponent’s earlier registrations, numbers 850382 and 2137633 also contain the word CORDON and in the case of registration No. 850382 the word ROUGE, in totality being the French for “Red Ribbon”. The word ROUGE would in my view, be readily recognized by the average consumer as the French word for “red”. In the case of the label mark 2137633, the mark contains house mark G H Mumm & Co and the words CORDON ROSE meaning “rose ribbon”. In my view the word ROSE (solus) would be readily recognized by the average consumer as an English and French word, especially as it may be a descriptor for “rose” wine. Accordingly, while the words ROUGE and ROSE are both significant elements within the opponent’s registrations they are not, in themselves, distinctive components.

46. On a visual and aural comparison of the respective marks there are apparent differences in that the mark in suit contains the word BLANCO while the opponent’s registration No. 850382 contains the word ROUGE and registration No. 2137633 (the label mark instead contains the word ROSE and in addition, the opponent’s house mark. However, the respective marks all share an identical distinctive and dominant component, the word CORDON. Accordingly, there is a significant visual and aural similarity in the totality of the marks.

47. Turning to a conceptual comparison of the mark it seems to me that the French or Spanish meanings of the word CORDON are likely to be lost on the average UK consumer, who will perceive the CORDON element as either an invented word or unknown foreign language word, but that the average consumer is likely to be aware of the meanings of the words BLANCO, ROUGE and ROSE and in relation to the goods at issue could well perceive these words as descriptors of white, red and rose wine.

48. At the hearing Mr Birss submitted that the applicant's mark had a Spanish ring or feel to it, whilst the opponent's marks possessed a French identity. There is some merit in this point but I believe Mr Birss' point is a somewhat fine one which may not be readily apparent to the consumer, especially if imperfect recollection comes into play. Furthermore, my own knowledge and experience tells me it is not unusual for a supplier of wine or a wine merchant to offer, under the same trade mark, different varieties of wines from different geographical locations, which could encompass white wine from Spain and red and/or rose wine from France. In my view there is a strong conceptual similarity between the mark in suit and the opponent's earlier registrations on when these marks are considered in their totalities.

49. The guiding authorities mentioned earlier in this decision, in particular *Sable BV v Puma AG*, make it clear that the likelihood of confusion must be appreciated globally, taking account of all relevant factors. My attention has been drawn to the applicant's use and registration of the mark CORDON NEGRO and I have no doubt that the applicant's evidence demonstrates that it has a considerable reputation in this mark in relation to "cava". The applicant declares that there have been no instances of confusion with the marks of the opponent and submit that the mark in suit would be associated with their CORDON NEGRO mark rather than the opponent's marks.

50. While the applicant's submissions in relation to their CORDON NEGRO mark are highly pertinent and superficially attractive, there are a number of different factors which apply to a comparison of the CORDON NEGRO mark (as opposed to the unused CORDON BLANCO mark) with the opponent's registrations, namely:

- (i) In the market place the applicant's mark is used only on Cava whilst the opponent's marks have been used on champagne – different (albeit similar) goods, while notional use of the mark in suit includes use on identical goods ie sparkling wines, which would encompass use of the respective marks on cava, champagne and all other sparkling wines – identical goods.
- (ii) In the market place, the evidence shows that the CORDON NEGRO mark of the applicant and the marks of the opponent are used with the respective house mark being prominent on the products ie the Freixenet house mark of the applicant and the G H Mumm & Co house mark of the opponent. Notional fair use of the mark in suit and the opponent's registrations does not involve the addition of house marks.
- (iii) The relevant public may, through the use and reputation of the respective marks, have learned to differentiate between the goods of the applicant and opponent. However, there has been no use of the

mark CORDON BLANCO.

- (iv) The BLANCO element of the CORDON BLANCO mark could readily be perceived as a descriptor of the goods whereas the NEGRO element of the CORDON NEGRO mark is unlikely to be perceived as a descriptor. This is of particular relevance as the ROUGE and ROSE elements of the opponent's marks could also indicate the colour of the wines.

51. In assessing the degree of similarity between the respective marks and whether it is sufficient to give rise to a likelihood of confusion I must also consider the goods at issue, the average customer for the goods and also make allowance for imperfect recollection. The customers for sparkling wines are members of the general public over eighteen years of age. Such goods are available in retail outlets as well as pubs, bars and clubs. Purchases of sparkling wines are often made on an occasional basis or for the benefit of others eg for parties or special occasions. While some sparkling wines, including champagne, may be relatively expensive and this is by no means a "bag of sweets" case, the customer is not necessarily a sophisticated or specialised consumer and imperfect recollection could well be a factor as such goods are often purchased on an occasional basis or for the benefit of others.

CONCLUSION

52. Notwithstanding that there are differences in the marks, they share a distinctive dominant component and in my view, on the basis of notional use, the average customer for the goods is likely to perceive the BLANCO, ROUGE and ROSE elements within the respective marks as being descriptors. The marks are visually, aurally and conceptually similar. As notional fair use of the marks involves use on all types of sparkling wine ie identical goods, it seems to me very likely that the customer for the goods would believe that sparkling wines sold under the CORDON BLANCO trade mark emanated from the opponent.

53. In reaching a decision in relation to the likelihood of confusion I have particularly borne in mind the following comments of the European Court of Justice in *Canon*:

"Accordingly, the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings, constitutes a likelihood of confusion within the meaning of Article 4(1)(b) of the Directive (see *SABEL*, paragraph 16 to 18)."

54. The opposition under Section 5(2)(b) of the Act is successful.

55. As I have found for the opponent under Section 5(2) of the Act, I have no need to consider the ground of opposition raised under Section 5(4)(a) I would only add that I do not consider the opponent to have any stronger case under that ground.

COSTS

56. On costs, both parties made submissions in relation to the "striking out" of the

evidence in reply filed by the opponent under Rule 13(1) and the applicant's observations thereto and to the interlocutory hearing held in relation to the applicant's request for an extension of time to file evidence under Rule 13(9). It seems to me that on an overall basis the costs position on these preliminary issues is counter-balanced. Accordingly I do not believe that their costs should favour either side.




57. As the opponent has been successful in this opposition it is entitled to a contribution towards costs and I therefore order the applicant to pay the opponent the sum of £1,900. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 13TH day of August 2003




**JOHN MACGILLIVRAY
For the Registrar
the Comptroller-General**



APPENDIX ONE


SCHEDULE OF TRADE MARKS

<u>Mark</u>	<u>Number</u>	<u>Goods/Class</u>	<u>Journal</u>
	42607	De-alcoholized wines Class 32 Wines Class 33	360 p. 368
	436257	Champagne wine Class 33	2358 p. 1172
	455200	Champagne wines Class 33	2460 p. 1130
CORDON ROUGE	458256	Champagne wines Class 33	4416 p. 542

	823004	Champagne wines Class 33	4416 p. 542
	823902	Champagne wines Class 33	4438 p.1322
	824198	Sparkling wines Class 33	4358 p. 288
	824199	Sparkling wines Class 33	4358 p. 288
	824200	Champagne wines Class 33	4416 p. 541
	824201	Champagne wines Class 33	4438 p.1323
CORDON ROUGE	850382	Sparkling wines Class 33	4468 p. 608

	850383	Sparkling wines Class 33	4466 p. 529
	850384	Sparkling wines Class 33	4466 p. 529
	958687	Sparkling wines Class 33	4859 p. 2085

GRAND CORDON	1410073	Champagne, wines, sparkling wines Class 33	6026 p. 3194
	1450666	Champagne Class 33	6038 p.5090
	1538072	Sparkling wines Class 33	6053 p. 7665

 The logo for Cordon Rose, featuring a banner with the text "CORDON ROSE" and "J. & F. MUMM & CO." above it.	2137633	Alcoholic beverages (except beers). Class 33	6201 p. 13240
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