

O-299-11

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION No. 2501325
BY UPSILON LIMITED
TO REGISTER A TRADE MARK IN CLASS 32**

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 99037 BY BLITZSPIRIT LIMITED**

BACKGROUND

1. On 30 October 2008, Upsilon Limited (“Upsilon”) applied to register the word BLITZ as a trade mark. Following examination, the application was accepted and published for opposition purposes on 6 February 2009 for the following goods in class 32:

“Non-alcoholic drinks, but not including fruit juices.”

2. On 5 May 2009, Blitzspirit Limited (“BL”) filed a notice of opposition. This consists of a single ground based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), directed, I note, against all of the goods in Upsilon’s application for registration. BL relies upon the following trade mark:

Trade Mark	No.	Application date	Registration date	Goods relied upon
BLITZSPIRIT	2461468	16.07.2007	11.01.2008	32 - Beers; ale; beer; cider; lager; stout; porter; preparations for making the aforesaid. 33 - Wines; spirits; liqueurs; alcopops; cocktails; and other alcoholic beverages included in this class; preparations for making the aforesaid.

3. On 5 October 2010, Upsilon filed a counterstatement in which the ground of opposition is denied.

4. Only BL filed evidence. This consists of a witness statement, dated 20 December 2010, from Ian Wilkes, a trade mark attorney at Groom Wilkes & Wright LLP, BL’s professional representatives in these proceedings. Attached to Mr Wilkes’ statement as exhibit IW1 is a printout of the trade mark upon which BL relies in these proceedings obtained from the IPO website. Neither party asked to be heard nor did they file written submissions in lieu of attendance at a hearing.

DECISION

5. 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 -

(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, or

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

6. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

7. In these proceedings BL is relying upon the trade mark shown in paragraph 2 above. This constitutes an earlier trade mark under the above provisions and is not (given the interplay between the date on which Upsilon’s application was published and the date on which BL’s trade mark completed its registration procedure), subject to proof of use, as per The Trade Marks (Proof of Use, etc) Regulations 2004.

Section 5(2)(b) – case law

8. The leading authorities which guide me are from the CJEU (Court of Justice of the European Union): *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). 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*,

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG*, 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.*,

(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*,

(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*,

(e) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

(f) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*.

(g) 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*,

(h) 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*,

(i) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(j) 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*,

(k) 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 and Adidas Benelux BV*,

(l) 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.

The average consumer and the nature of the purchasing process

9. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. The goods at issue in these proceedings are beverages of one sort or another or preparations for making such beverages. The average consumer for such goods will be the public at large, albeit insofar as those goods which have an alcoholic content in excess of 0.5% are concerned, the average consumer will be over the age of 18.

10. All of the goods at issue are sold through a range of channels, including retail premises such as supermarkets and off-licences (where the goods are normally displayed on shelves and are obtained by self selection) and in bars and restaurants (where the goods are displayed on, for example, shelves behind the bar and where the trade marks will appear on dispensers at the bar and on menus etc.). When the goods are sold in, for example, bars and restaurants, the selection process is likely to be an oral one. However, there is nothing to suggest that the goods are sold in such a manner as to preclude a visual inspection. In *Simonds Farsons Cisk plc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, case T-3/04, the Court of First Instance (now the General Court) said:

“In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.”

11. Consequently, while the goods may be ordered orally in bars and restaurants, it is likely to be in the context of, for example, a visual inspection of the bottles containing the goods prior to the order being placed. Considered overall, the selection process is likely to be predominantly a visual one, although I accept that aural considerations will also play their part. Turning now to the level of attention the average consumer will display when selecting the goods, given that for the most part the cost of the goods is likely to be relatively low, but bearing in mind that the average consumer will wish to ensure they are selecting the correct type, flavour, strength etc. of beverage, they are, in my view, likely to pay at least a reasonable level of attention to the selection of the goods at issue.

Comparison of goods

12. For the sake of convenience, the goods to be compared are as follows:

BL's goods	Upsilon's goods
32- Beers; ale; beer; cider; lager; stout; porter; preparations for making the aforesaid.	32 - Non-alcoholic drinks, but not including fruit juices.
33 - Wines; spirits; liqueurs; alcopops; cocktails; and other alcoholic beverages included in this class; preparations for making the aforesaid.	

13. BL's trade mark is registered for, inter alia, "beer" and "cider" at large in class 32. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) case T-133/05* the GC said:

"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 Vedral 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)."

14. As the terms "beer" and "cider" appearing in BL's specification in class 32 would include "non-alcoholic beer" and "non-alcoholic cider" (goods which would also be included within the phrase "non-alcoholic drinks" appearing in Upsilon's specification), to that extent the competing goods must be regarded as identical. In addition, BL's specification includes, inter alia, "wines" and "cocktails" in class 33. The non-alcoholic equivalents of these goods are to be found in class 32 and would once again be included in "non-alcoholic drinks". Given the similarity in the uses, users, nature and the respective trade channels through which the respective goods reach the market, the non-alcoholic version of an alcoholic drink must (at the very least) be considered similar to its alcoholic equivalent. In short, the phrase "non alcoholic drinks" in Upsilon's application includes goods which are either identical or at the very least similar to the goods contained in BL's registration.

Comparison of trade marks

15. The trade marks to be compared are: **BLITZ & BLITZSPIRIT**

16. The average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, he rarely has the chance to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has kept in his mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant components of the respective trade marks and, with that conclusion in mind, I must then go on and compare the respective trade marks from the visual, aural and conceptual perspectives.

Distinctive and dominant components

17. Upsilon's trade mark consists of the word BLITZ presented in upper case. As no part of the trade mark is emphasised or highlighted in any way, its distinctiveness must lie in its totality.

18. Turning to BL's trade mark, this consists of the word BLITZSPIRIT also presented in uppercase; once again no part of the trade mark is emphasised or highlighted in any way. Although the case law indicates that the average consumer will perceive a trade mark as a whole and will not pause to analyse its details, I think it is highly likely that the average consumer will notice that BL's trade mark consists of the conjoining of two well known English words i.e. BLITZ and SPIRIT.

19. Consisting as it does of the first part of BL's trade mark, the word BLITZ inevitably assumes a degree of positional dominance over the word that follows it. It is, as far as I am aware, neither descriptive of nor non-distinctive for the goods upon which BL relies in these proceedings. While the word SPIRIT is clearly meaningful in relation to some goods in BL's registration (spirits and goods made from spirits in class 33 for example), and is, in those circumstances, unlikely to be accorded distinctive significance by the average consumer, in relation to all the other goods in BL's registration the word is, as least as far as I am aware, neither descriptive nor non-distinctive.

20. In summary, in my view the average consumer will notice that BL's trade mark is made up of two words and in relation to goods for which the word SPIRIT is meaningful the word BLITZ is likely to be considered by them to be the distinctive and dominant component. However, in relation to all the other goods in BL's registration, the manner in which the trade mark is presented and the meaningless nature of the word SPIRIT in relation to those goods, suggests to me that the distinctiveness of BL's trade mark is likely to be in the totality it creates. I will approach the visual, aural and conceptual comparison with those conclusions in mind.

Visual similarity

21. The competing trade marks either consist of, or contain the word BLITZ as a component. In relation to those goods for which the word SPIRIT is meaningful, the word BLITZ becomes the dominant and distinctive component resulting, in my view, in a

high degree of visual similarity between the competing trade marks. In relation to all the other goods in BL's registration for which the word SPIRIT is distinctive, and while BL's trade mark will be viewed as a totality, the positioning of the word BLITZ as the first component of BL's trade mark still results, in my view, in a reasonable degree of visual similarity.

Aural similarity

22. As well known words in the English language the pronunciation of the competing trade marks is relatively easy to predict. Upsilon's trade mark will be pronounced as a single syllable word, whereas BL's trade mark will (despite its presentation) be pronounced as two single syllable words i.e. BLITZ and SPIRIT. Once again, in relation to those goods for which the word SPIRIT is meaningful, the word BLITZ becomes the dominant and distinctive component resulting, in my view, in a high degree of aural similarity. In relation to all the other goods in BL's registration, the fact that the word BLITZ will be the first component of BL's trade mark that the average consumer articulates, results, in my view, in a reasonable degree of aural similarity.

Conceptual similarity

23. The word BLITZ will be known to the average consumer as (most likely in my view) a word used to describe the air attacks on UK towns which took place during the second world war, or (less likely in my view) a period of hard work to get something finished; these then are the conceptual images Upsilon's trade mark is likely to create in the mind of the average consumer. BL's trade mark also contains this word. In relation to spirits and goods made from spirits, the dominant and distinctive component BLITZ appearing in BL's trade mark will send similar conceptual messages to the average consumer. In relation to those goods for which the word SPIRIT has no meaning, the totality of BL's trade mark is likely, in my view, to convey connotations of the spirit that prevailed in the United Kingdom during the blitz. In those circumstances, the conceptual messages that both parties' trade marks are likely to convey to the average consumer both relate to the blitz and as such they are similar to a high degree.

Distinctive character of BL's earlier trade mark

24. I must now assess the distinctive character of BL's earlier trade mark. The distinctive character of a trade mark must be appraised first by reference to the goods in respect of which it has been registered and, second, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. I have already commented on the distinctive and dominant components of BL's trade mark above. When considered in

relation to spirits and goods made from spirits, the word BLITZ (whilst not in the category of an invented word) is, in my view, possessed of a fairly high degree of inherent distinctive character. When BL's trade mark is considered in relation to goods for which the word SPIRIT would not be meaningful, the resulting combination (which once again neither describes nor is non-distinctive for the goods at issue), is also, in my view, inherently distinctive to a fairly high degree.

Likelihood of confusion

25. In determining whether there is a likelihood of confusion, I need to bear a number of factors in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. It is also necessary for me to keep in mind the distinctive character of BL's earlier trade mark, as the more distinctive this trade mark is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind.

26. Earlier in this decision I concluded, inter alia, that: (i) the average consumer was the public at large, (ii) the goods at issue were identical or highly similar and would be purchased primarily by visual means (iii) depending on the goods at issue there was either a high or reasonable degree of visual and aural similarity, (iv) the competing trade marks were conceptually similar to a high degree and (v) BL's earlier trade mark was possessed of a fairly high degree of inherent distinctive character.

27. The presence in both parties' trade marks of the distinctive word BLITZ is, when considered in the context of the relatively low cost of the goods at issue, the nature of the purchasing act, the fact that identical or highly similar goods are in play and the degree of visual, aural and conceptual similarity between the competing trade marks I have identified above, more than sufficient, in my view, to establish (at the very least) a likelihood of indirect confusion i.e. where the average consumer assumes that the goods come from undertakings which are economically linked. The consequence of that conclusion is that BL's opposition succeeds.

Costs

28. As BL has been successful, it is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice 4 of 2007. Using that TPN as a guide (and making no award to BL for its evidence which consisted solely of an extract obtained from the IPO website of its earlier right), I award costs to BL on the following basis:

Preparing a statement and considering Upsilon's statement:	£200
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Official fee £200

Total: £400

29. I order Upsilon Limited to pay to Blitzspirit Limited the sum of **£400**. 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 23rd day of August 2011

**C J BOWEN
For the Registrar
The Comptroller-General**