

O/327/12

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NO 2583328
BY
JONATHAN BRYAN THORNES
TO REGISTER THE TRADE MARK



IN CLASS 35
AND
IN THE MATTER OF OPPOSITION THERETO
UNDER NO 102400
BY
RED BULL GMBH

BACKGROUND

1) On 02 June 2011, Jonathan Bryan Thornes (“the applicant”) applied to register the following mark:

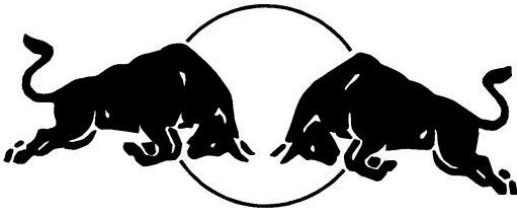


2) The application was made in respect of Class 35 which, further to an amendment, now reads as follows:

Business advisory services relating to the management of dairy farms and dairies; business advisory services relating to the organisation and operation of dairy farms and dairies; provision of business advice relating to accounting, marketing, franchising, all in relation to dairy farms and dairies.

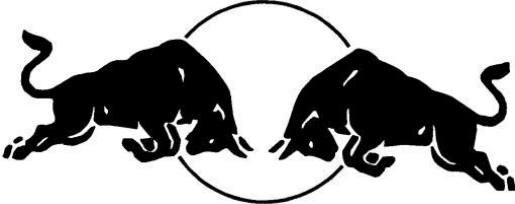
3) The application was published on 24 June 2011 in the *Trade Marks Journal* and a notice of opposition was later filed by Red Bull GmbH (“the opponent”). The opponent claims that the application offends under section 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). Both grounds of opposition are directed against all of the applicant’s services.

4) In respect of Section 5(2)(b), the opponent relies upon one International Registration designating the UK (“IR (UK)”), relevant details of which are as follows:

Mark details	Services relied upon
<p data-bbox="204 1518 443 1556">IR (UK): 971408</p>  <p data-bbox="204 1850 778 1921">Date of International registration: 19 March 2008</p> <p data-bbox="204 1924 778 1995">Date of designating the UK: 19 March 2008</p>	<p data-bbox="871 1518 1011 1556">Class 35:</p> <p data-bbox="871 1581 1394 2018">Advertising, including promotion of goods and services and of competitive events, including competitive events of a sporting nature; arranging of advertising; distribution of goods for advertising purposes; layout services for advertising purposes; on-line advertising on a computer network; rental of advertising time on communication media; organization consultancy; business management;</p>

	business administration; office functions.
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5) In respect of the grounds based upon Section 5(3) of the Act, the opponent relies upon IR (UK) 961855, relevant details of which are as follows:

Mark details	Services relied upon
<p>IR (UK): 961855</p>  <p>Date of International registration: 19 March 2008 Date of designating the UK: 19 March 2008</p>	<p>Class 32:</p> <p>Non alcoholic beverages including refreshing drinks, energy drinks.</p>

6) The opponent claims that there exists a likelihood of confusion between its IR(UK) 971408 and the applicant's mark, due to the respective marks being similar and covering identical services and, as such, the application is contrary to Section 5(2)(b) of the Act. The opponent further claims that its IR (UK) 961855 enjoys a reputation in relation to the class 32 goods listed above and that the applicant's mark is similar to it.

7) Both of the opponent's marks are protected in the UK and therefore qualify as earlier marks under Section 6 of the Act. Further, both completed their registration procedure in the UK less than five years prior to the publication date of the contested mark and are therefore not subject to proof of use, in accordance with Section 6A of the Act.

8) The applicant filed a counterstatement denying the grounds of opposition.

9) Both parties filed evidence. Neither party requested to be heard. Only the opponent filed written submissions in lieu of a hearing. I therefore make this decision after conducting a thorough review of all the papers and giving full consideration to all submissions and evidence submitted by the parties.

Opponent's evidence

10) The combination of the opponent's evidence in chief and in reply is voluminous. The evidence in chief consists of three witness statements: the first is in the name of

Dr Volker Viechtbauer, General Counsel of Red Bull GmbH, dated 27 January 2012 and attaches exhibits VV1-VV12; the second is in the name of Jill Ardagh, Director General of The British Soft Drinks Association Ltd, dated 26 January 2012; the third is in the name of Richard Jackson, Chief Marketing Officer and CEO of Aroq Limited, dated 1 February 2012. The evidence in reply consists of a witness statement in the name of Jennifer Powers, Head of the IP Department of Red Bull GmbH, dated 11 June 2012 and exhibits JP1-JP3 thereto.

11) For reasons which will become apparent, I do not consider it necessary to summarise the opponent's evidence in any detail. It is sufficient to state here that the overwhelming majority of the evidence demonstrates use in relation to energy drinks and that much, if not all of this use, is in relation to a composite mark consisting of the words „RED BULL' and device of two red bulls in front of a circle.

Applicant's evidence

12) The applicant's evidence consists of a witness statement, dated 03 April 2012, in the name of Jonathan Bryan Thornes, the applicant in these proceedings (and founder of Cool Milk Limited and Cool Milk for Schools Limited („the companies')). The statement attaches exhibits JBT 1- JBT 3. In paragraph 5 of the witness statement Mr Thornes states that „the trademark' has been used continuously since the incorporation of the Companies in 1998 and has been presented consistently in the same stylised form as represented in the trade mark registrations listed in Exhibit JBT 1. Exhibit JBT 1 does not show the mark which is the subject of the instant application and nor do any of the other exhibits.

13) The applicant also submits four witness statements from third parties in the dairy industry. All of the third party witness statements attach a single exhibit consisting of a representation of the mark, the subject of the application. The first statement is in the name of Nick Everington, Chief Executive of the Royal Association of British Dairy Farmers, dated 2 April 2012. The second is in the name of Barbara Anne Griffiths, Managing Director of the DairyLink UK Limited, dated 31 March 2012. The third is in the name of Jane Elizabeth Parsons, Secretary and Agent of the National Farmers Union (“NFU”) and NFU Mutual Insurance Society, dated 2 April 2012. All three witnesses attest to associating the representation of the mark, the subject of the application, with Jonathan Bryan Thornes and/or the companies referred to above. In the fourth statement dated 03 April 2012, Mr Robert Metcalfe, owner of a dairy business and sheep farm named Manor House Farm, attests to never having seen the mark, the subject of the application before in the course of trade, and that he would not associate it with any one undertaking.

14) This concludes my summary of the evidence insofar as I consider it necessary. Both parties' evidence was also accompanied by submissions which I will bear in mind and refer to as and when appropriate in the decision which follows.

DECISION

Section 5(2)(b)

15) This section of the Act states:

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

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

Comparison of services

17) When comparing the respective services I note the judgment in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* where the ECJ stated:

“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.”

18) Guidance on this issue also comes from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 (“*British Sugar*”) where he highlighted the respective users and trade channels as being relevant.

19) In construing a word used in a trade mark specification, one is concerned with how the product or service is, as a practical matter, regarded for the purposes of the trade (*British Sugar*). I must also be conscious not to give a listed service too broad an interpretation; in *Avnet Incorporated v Isoact Limited* [1998] F.S.R. 16 (“*Avnet*”) Jacob J stated:

“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.”

20) Finally, when comparing the respective services, if a term clearly falls within the ambit of a term in the competing specification then identical services must be held to be in play (*Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)(OHIM) Case T-133/05*).

21) Turning to the instant case, the services to be compared are as follows:

Opponent's services	Applicant's services
<p>Class 35: Advertising, including promotion of goods and services and of competitive events, including competitive events of a sporting nature; arranging of advertising; distribution of goods for advertising purposes; layout services for advertising purposes; on-line advertising on a computer network; rental of advertising time on communication media; organization consultancy; business management; business administration; office functions.</p>	<p>Class 35: Business advisory services relating to the management of dairy farms and dairies; business advisory services relating to the organisation and operation of dairy farms and dairies; provision of business advice relating to accounting, marketing, franchising, all in relation to dairy farms and dairies.</p>

22) The opponent submits, inter alia, the following:

“...the Opponent maintains that its „organisation consultancy’ services encompass the „business advisory’ services relating to any field or industry, including the dairy industry.”

23) The applicant contends, inter alia, the following:

“The Applicant’s mark is intended to be used in connection with the provision of business advice to dairy farms and dairies relating to the operation and management of those dairies, as clearly indicated by the very narrow and specific nature of the specification of services covered by the Applicant’s mark.

By contrast, the Opponent is a manufacturer of energy drinks, this being an entirely unrelated, dissimilar field.

It is acknowledge that the Opponent’s Statement of Grounds was submitted prior to the restriction of the Class 35 specification originally covered by the contested application. However, the scope of the Applicant’s Class 35 specification of services has since been vastly restricted. Clear and precise wording provides legal certainty as to the exact nature of the Applicant’s

intended activities. We submit that the resulting restricted specification of services thereby serves to highlight the obvious dissimilarities between the Applicant's commercial field and that of the Opponent."

24) In relation to the applicant's submissions, I am mindful of the comments of Richard Arnold QC in *Oska's Ltd's trade mark* [2005] RPC 20, where he stated:

"56. The applicant argued before the hearing officer that (i) there had been no confusion in practice between its goods and those of the opponent and (ii) confusion was unlikely since its goods were aimed at a different market. As to (i)... as the hearing officer rightly held, whether there is a likelihood of confusion must be assessed on the basis of normal and fair use of the mark in relation to the goods specified in the application, which is not limited in any particular types of clothing nor to any particular market. As to (ii), even if it is assumed that the target market of the applicant's goods would not be confused, that does not negate the existence of a likelihood of confusion if the applicant's mark were to be used in other ways falling within the scope of normal and fair use..."

25) I must therefore consider normal and fair use by the opponent in relation to the services specified in its earlier registration, which I note have not been limited to any particular field of activity.

26) Whilst I am conscious that I must guard against giving a service an overly broad interpretation, the opponent's „*organization consultancy; business management; business administration*’ services nonetheless strike me as being broad descriptions covering a range of services whereby a business management/administration professional or consultant would work with a business on one or a variety of issues. Furthermore, as the opponent's specification has not been limited to specify the kind of business or organisation that the services relate to, it follows that they may relate to any kind of business (including to dairy farms and dairies). Further, I cannot see that there is any discernable difference between „*organisation consultancy*’ and „*business advisory services...; provision of business advice...*’. The term „*organisation*’ is a broad one which would include businesses and the very nature of a „*consultancy*’ service is that it is intended to offer professional *advice* to the customer. It follows that the opponent's ‘*organisation consultancy*’ is likely to include the provision of business advice relating to the same matters as specified in the applicant's specification.

27) Similar considerations apply to the opponent's ‘*business management; business administration*’ services. A professional carrying out business management/administration services is also likely to offer advisory services in the day-to-day management of a business. This advice may be on any number of issues related to the successful management of a business including those matters specified in the applicant's services.

28) Even if I am wrong in the conclusions that I have drawn thus far in that the opponent's ‘*organisation consultancy; business management; business administration*’ would cover the applicant's services, the respective services are still highly similar due to the significant overlap in their nature, intended purpose, users

and that they are likely to be in competition in the marketplace. I therefore find that the opponent's '*organisation consultancy; business management; business administration*' services are highly similar, if not identical, to all of the applicant's services.

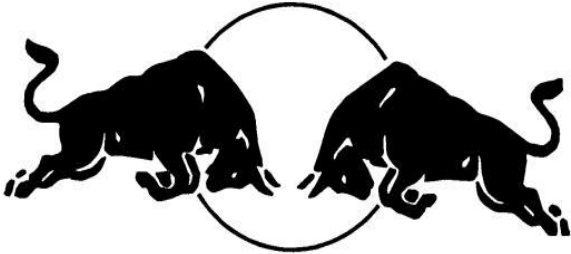

Average consumer and the purchasing process

29) It is necessary to consider these matters from the perspective of the average consumer of the services at issue (*Sabel BV v. Puma AG*). The average consumer is deemed to be reasonably well informed and observant and circumspect, but his/her level of attention is likely to vary according to the category of services.

30) The average consumer for both parties' services will primarily be businesses. In the applicant's case, the services will be provided to dairy farmers and dairies. The opponent has not limited their specification and accordingly, the services it relies upon may be offered to any business, including dairy farms and dairies. It follows that the average consumer for the respective services can be considered to be identical. The respective services are likely to be, on the most part, reasonably costly and the consumer may engage in some sort of dialogue with the service provider to ensure that the services are tailored to their exact requirements. The purchasing act for the respective services is therefore likely to be a considered one affording a reasonable level of care and attention but not the highest level. In seeking out a provider of the relevant services, the average consumer is likely to do so mainly by means of the internet or trade directories and therefore the visual aspect is important however I do not discount that aural considerations may come into play as the service provider may sometimes also be identified through word of mouth.

Comparison of marks

31) For ease of reference, the respective marks are:

Opponent's mark	Applicant's mark
	

32) In making a comparison between the marks, I must take account of the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components (*Sabel BV v. Puma AG*). However, I must not engage in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

Distinctive and dominant components

33) The opponent's mark is a figurative one consisting of two bulls and a circular device. The circular device takes up a large proportion of the mark and appears to play a pivotal role as a central focal point, drawing all of the elements of the mark together. The upper half of each bull's body intercepts the circular device such that the bulls appear to be in front of the same. The bulls are presented head on with their heads lowered and their horns facing downwards appearing to jump towards each other in combat. The body shape, size and stance of the bulls are identical; they appear to be mirror images of one another. To my mind, the mark cannot reasonably be described as a composite one. The mark in its totality is distinctive, with no one element being dominant.

34) The applicant's mark is a composite one consisting of words and a figurative element. The figurative element consists of a blue circular device element, in front of which are two cows which appear to be jumping up towards each other with their front legs outstretched. Udders are visible on the underside of both cows. The body shape, size and stance of the cows are identical and they appear as mirror images of one another. The figurative elements constitute a large proportion of the mark as a whole and, notwithstanding that images of cows are somewhat suggestive of the nature of applicant's services (which all relate to the dairy industry), I consider the combination of the striking symmetry of the two cows and the eye-catching and prominent circular device, to be a distinctive element of the mark overall. Beneath the figurative elements are the words „Cool Cow' in a blue font. Underneath the two 'o' letters of the word „Cool' is an arc shape, also in the colour blue. The words and the arc shape have the appearance of being hand-written. The word „cow' hints towards the nature of the applicant's services but, in light of the combination with the word „Cool', the resultant phrase „Cool Cow' is a distinctive phrase for the services at issue. On viewing the mark as a whole, there are two independently distinctive components; the phrase „Cool Cow' is one distinctive element and the combination of the cows and the circle device is the other. In terms of dominance, to my mind, it is the figurative element of the cows and circle which is the most dominant element. This is because it takes up a slightly larger proportion of the mark as a whole (than the words „Cool Cow') and furthermore, it is a natural instinct to read from left to right and top to bottom, and accordingly, given its prominent positioning at the top of the mark, and its large size, it is the figurative element which first strikes the eye. That said, the words „Cool Cow' are clearly visible and distinctive, and of only slightly less dominance, and must therefore be given due consideration in the overall assessment of the likelihood of confusion.

Visual Comparison

35) Points of visual difference are the presence of the words „Cool Cow' (and arc shape) in the applicant's mark and absence of the same in the opponent's mark. The similarities between the marks lie in the figurative elements. Both marks contain a circular device element in a prominent central position. The circular device in the applicant's mark is filled with the colour blue. However, colour is immaterial where the earlier mark is registered in black and white (*Specsavers International Healthcare Limited & Others v Asda Stores Limited* [2011] FSR 1(High Court)). Both marks contain two bovines in front of the circular device which have the appearance

of jumping towards each other. However, in the applicant's mark, the bovines are cows with udders whereas in the opponent's mark they are bulls with horns and a muscular body. The stance of the bulls differs from that of the cows as the former have their heads lowered, front legs folded underneath the body and tails pointing upwards whereas the latter have their heads upright facing one another, front legs pointing forwards towards each other and tails protruding straight out behind the body. That said, the overall construction of the respective figurative elements are strikingly similar, by virtue of both marks containing two bovines presented in mirror images, pointing towards each other, in front of a circular device. Taking into account all of the aforementioned differences and similarities, and comparing the visual impact of both marks as a whole, it is my conclusion that the respective marks are visually similar to a reasonably high degree.

Aural Comparison

36) The opponent's mark is devoid of any word elements; it is a figurative mark. Hence, the aural comparison does not come into play. In this regard, I refer to the comments of the General Court in *Dosenbach-Ochsner AG Schuhe und Sport v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T- 424/10:

“45 The fact none the less remains that, contrary to what the applicant submits, a phonetic comparison is not relevant in the examination of the similarity of a figurative mark without word elements with another mark (see, to that effect, Joined Cases T-5/08 to T-7/08 Nestlé v OHMI – Master Beverage Industries (Golden Eagle and Golden Eagle Deluxe) [2010] ECR II-1177, paragraph 67).

46 A figurative mark without word elements cannot, by definition, be pronounced. At the very most, its visual or conceptual content can be described orally. Such a description, however, necessarily coincides with either the visual perception or the conceptual perception of the mark in question. Consequently, it is not necessary to examine separately the phonetic perception of a figurative mark lacking word elements and to compare it with the phonetic perception of other marks.”

Conceptual Comparison

37) Turning to the conceptual comparison between the respective marks, they differ with regard to the concept portrayed by the words „Cool Cow' present in the applicant's mark and absent from the opponent's mark. The word „cow' will be perceived as a female bovine. The word „cool' has a variety of definitions depending on the context in which it used. Collins English Dictionary (*Collins*) defines „ool' as, inter alia, the following:

“adjective

1. moderately cold: a cool day.

...

4. able to conceal emotion; calm: a cool head.

5. lacking in enthusiasm, affection, cordiality, etc.: a cool welcome.

6. calmly audacious or impudent.

...

8. (of a colour) having violet, blue, or green predominating; cold.

...

10. Informal- sophisticated or elegant, especially in an unruffled way.

11. Informal- excellent; marvellous.”¹

38) To my mind, the immediate concept portrayed by the words „Cool Cow’ will be that of a cow that is sophisticated, calm and collected (i.e. unruffled) or „trendy’. The arc underneath the two „o’ letters in the word „Cool’ appears to combine with the aforementioned to form a smiley face. I do not consider that this smiley face detracts from the concept portrayed by the words. The marks also differ in that the figures in the opponent’s mark will be perceived as bulls whereas in the applicant’s mark they will be perceived as cows. However, given that cows and bulls are the females and males respectively, of the same species, there nonetheless remains a certain level of conceptual consistency in that both marks consist of two bovines jumping towards each other. Turning to the circular device, the opponent contends:

“Visually, both devices contain the silhouettes of two bovine animals facing each other in front of a circle; whether this circle is defined as a sun or moon is not of huge importance to the case since the public is unlikely to analyse the meaning of the circle devices within the marks in detail. It can be said that either circle might just be considered a moon as a sun.

With regard to the Applicant’s comments regarding the version of the Opponent’s mark in use, it should also be pointed out that the Opponent’s rights are not limited to colour and so use in any colour combination should be considered.”

39) The applicant contends in its counterstatement:

“...the Applicant’s mark conceptually portrays two cows jumping over a moon, which may bring to mind the well-known children’s nursery rhyme “Hey Diddle Diddle””.

40) The applicant further submits:

“A full moon is often described as a “blue moon” and the term “blue moon” is also commonly used colloquially to mean a “rare event”. It follows that the blue circular device within the Applicant’s mark will immediately portray the concept of a blue moon to the consumer, not a sun. Visually and conceptually this further removes the Applicant’s mark from the Opponent’s bull and sun device and therefore absolutely is of importance when conducting the requisite visual and conceptual comparison of the marks.”

41) I agree with the opponent. Firstly, the opponent’s earlier mark, which is relied upon for the purpose of this opposition, is not limited to any particular colour(s) and

¹ ‘cool’ 2000, in *Collins English Dictionary*, Collins, London, United Kingdom, viewed 08 August 2012, <from <http://www.credoreference.com/entry/hcengdict/cool>>

accordingly, notional and fair use of the opponent's mark must be borne in mind, which includes use in any colour combination, including the colours in the applicant's mark. Secondly, to my mind, the circular devices in both marks are absent of any stylisation or embellishments which would indicate that they are either a moon or a sun; they are clearly circles but nothing else. With regard to the applicant's comments regarding the nursery rhyme „Hey Diddle Diddle', I do not consider that the figurative element in the applicant's mark would be immediately perceived as a cow jumping over a moon; this is because the mark does not show a single cow jumping over the circle but rather it contains two cows jumping towards each other in front of the circle and moreover, the circle in the applicant's mark is not, to my mind, clearly a moon. Accordingly, I do not think that the circular devices in the respective marks evoke any immediately graspable concept, although, if I am wrong, I accept that both *may* be perceived as a celestial body such as the sun or moon shining down on the bulls/cows, given the silhouette-like appearance of the latter. Accordingly, insofar as the circular devices in both marks may be perceived as anything other than a circle, it is likely to be a concept which is the same or similar. Taking into account all factors, I conclude that there is a moderately high degree of conceptual similarity overall.

42) In summary, I have found that the respective marks share a reasonably high degree of visual similarity, and a moderately high degree of conceptual similarity. Aural considerations do not come into play. Overall there is a moderately high degree of similarity between the respective marks.

Distinctive character of the earlier mark

43) I must consider the distinctive character of the opponent's mark. The more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). The distinctive character of a trade mark must be assessed by reference to the goods or services in respect of which registration is sought and by reference to the way it is perceived by the relevant public (*Rewe Zentral AG v OHIM (LITE) Case T-79/00 [2002] ETMR 91*).

44) I consider the opponent's mark to be possessed of a reasonable degree of inherent distinctive character and this is so notwithstanding that certain of the opponent's services (given their broad scope) may be aimed at businesses relating to farming or other activities involving bulls. This is due to the overall distinctive impression of the mark as a whole and, bearing in mind the striking symmetry and stylisation of the bulls and the large and prominent circular device.

45) The opponent contends that the earlier mark enjoys an enhanced level of distinctive character in relation to its class 35 services, in particular, „*Advertising, including promotion of goods and services and of competitive events, including competitive events of a sporting nature; arranging of advertising; distribution of goods for advertising purposes; layout services for advertising purposes; on-line advertising on a computer network; rental of advertising time on communication media*’, as a consequence of the use made of it. Earlier in this decision, I concluded that the opponent's strongest case lies with its „*organization consultancy; business management; business administration*’ services as these are highly similar, if not identical to, all of the applicant's services. The opponent's evidence does not show

any use of its earlier mark in relation to „*organisation consultancy; business management; business administration*’ and accordingly, I have only the inherent distinctiveness of the mark to consider in relation to these services, which, as I have already stated is, in any event, of a reasonable degree.

Likelihood of confusion

46) In determining the likelihood of confusion, I must take the global approach advocated by case law (*Sabel BV v. Puma AG*). I also take account that the average consumer only rarely has the chance to make a direct comparison between the different marks but must place his trust in the imperfect picture of them that he has kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*).

47) The opponent submits:

“Whilst the Applicant maintains that its trade mark is distinctive of its own services in view of its earlier use of part of the word element within the mark, the evidence supplied by the Applicant in the form of witness statements from various individuals in the dairy industry does not support its contentions that there exists no likelihood of confusion. Indeed, the witnesses do not make a specific comparison between the Applicant’s trade mark and the Opponent’s earlier mark.”

48) I agree that the witness statements from third parties are of no assistance to the applicant. The evidence in no way shows that a significant proportion of average consumers of the relevant services have been exposed to *both* marks in the marketplace and have been able to distinguish between them. Indeed, the applicant’s evidence does not show any use of the subject application in the course of trade and, in his witness statement of 03 April 2012, Mr Thornes appears to confirm that there has, as of the date of his statement, been no such use, as he states (my emphasis added):

“... *It is my intention to provide such advisory services in connection with the Cool Cow (+ device) trademark in the subject application.*”

49) Furthermore, the opponent has shown no use of its earlier mark in relation to the relevant services of ‘*organisation consultancy; business management; business administration*’ which will form the basis of my considerations as to the likelihood of confusion. Accordingly, for all of the aforementioned reasons, the evidence submitted by the applicant is of no assistance.

50) In determining the likelihood of confusion in the instant case, I bear in mind that it is not permissible to take one part of a composite mark and compare that one component with another mark. However, it can be taken into account that one or more of the components within a composite mark may dominate that mark’s overall impression. In this regard I refer to the comments made in *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04:

“29 In the context of consideration of the likelihood of confusion, 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. On the contrary, 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 (see Matratzen Concord, paragraph 32).”

51) In the instant case, I have found that the applicant’s mark contains two independently distinctive components, namely the words „Cool Cow’ and the combination of the two cows and circular device, and that the latter of the two components is the most dominant. I have also found that the marks share a reasonably high level of visual similarity, a moderately high level of conceptual similarity and that aural considerations do not come into play. Overall, the marks share a moderately high degree of similarity. I have concluded that the applicant’s services are highly similar, if not identical, to the opponent’s services and that the opponent’s mark has a reasonable degree of inherent distinctive character. The average consumer will be businesses. The purchasing act will be mainly visual but aural considerations have not been discounted and the purchase is likely to be a considered one affording a reasonable level of attention, but not the highest level.

52) Having taken into account all of the above factors, it is my conclusion that the differences between the marks militate against a likelihood of direct confusion in the sense that one mark will be mistaken for the other. However, I do not consider that the differences are sufficient to avoid any confusion at all. In light of the striking visual similarity of the respective figurative elements (each being a dominant and distinctive element in the respective marks), and the highly similar, if not identical, nature of the services, I find that there is a likelihood that the average consumer will, nevertheless, assume that the services emanate from the same, or linked, undertaking(s). This is so, notwithstanding the respective services being a considered purchase, and having consideration for all relevant factors in the global assessment. I find that there is a likelihood of indirect confusion.

53) The ground of opposition based upon Section 5(2)(b) of the Act is, therefore, successful in its entirety.

Section 5(3)

54) In light of the opponent having been successful in its opposition under Section 5(2)(b) grounds it is not necessary for me to go on to consider the grounds under Section 5(3).

COSTS

55) The opposition having been successful, Red Bull GmbH is entitled to a contribution towards its costs. In determining the award of costs, I take account that the large volume of evidence filed by the opponent did not assist me in reaching my decision. I award costs on the following basis:

Preparing notice of opposition (including the official opposition fee) and considering other side’s counterstatement	£500
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Preparing and filing evidence and considering the other side's evidence	£500
Written Submissions	£300
TOTAL	£1300

56) I order Jonathan Bryan Thornes to pay Red Bull GmbH the sum of £1300. This sum 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 28th of August 2012

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