

O-078-15

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 3010989  
BY LOVE IN A TUB LIMITED TO REGISTER THE TRADE MARK**

**LOVE IN A TUB**

**IN CLASSES 21, 29, 30, 32 AND 35**

**AND IN THE MATTER OF OPPOSITION  
THERE TO UNDER NO 401480  
BY S DANIELS PLC AND FARMHOUSE FARE LIMITED**

## BACKGROUND

1) On 21 June 2013, Love in a Tub Limited (“the applicant”) applied under the Trade Marks Act 1994 (“the Act”) for registration of the mark LOVE IN A TUB in respect of goods and services in classes 21, 29, 30, 32 and 35.

2) The application was advertised in the Trade Marks Journal on 4 October 2013 and on 3 March 2014, S Daniels plc and Farmhouse Fare Limited (“the opponents”) filed notice of opposition to the application. The opponents oppose all the goods and services of the mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of an earlier UK mark 2556455 LOVETUB in the name of S Daniels plc. It completed its registration procedure on 19 November 2010 which is less than five years before the applicant’s mark was published. The significance of this is that the opponents’ mark is not subject to the proof of use provisions contained in Section 6A of the Act and the opponents are entitled to rely upon all of the goods listed in the earlier registration. The following goods and services are relied upon in this opposition:

**Class 29:** *Preserved, dried and cooked fruits and vegetables; fruit sauces namely dessert toppings; milk and milk products namely milk shakes, smoothies and yoghurt beverages; milk beverages and milk shakes; yoghurt beverages; soups and preparations for making soups; desserts including fruit salads, compotes, coulis, dessert toppings and preparations for making desserts; prepared meals; snack foods including milk shakes, smoothies; yoghurt, milk beverages, fruit salads, snack bars.*

**Class 30:** *Bread, pastry and confectionery, prepared meals; snack foods including snack bars, snack bars containing dried fruit, snack bars containing dried fruit, nuts and grains; preparations for making desserts; dessert toppings, cooking sauces, pasta sauces, food dressings and pasta dressings.*

3) The opponents explain that S Daniels plc is the proprietor of the earlier mark and that Farmhouse Fare Limited is the exclusive licensee and a wholly owned subsidiary of S Daniels plc. They claim that the respective goods and services are identical or similar and that the marks are similar.

4) The opponents also claim that the application offends under Sections 5(3), 5(4)(a) and Section 3(6). It is not necessary for me to detail these further here.

5) The applicant subsequently filed a counterstatement denying the opponents’ claims and restricting its list of goods and services to:

**Class 30:** *Frozen sorbets containing fresh fruit; frozen yoghurt containing fresh fruit; ice cream containing fresh fruit.*

**Class 32:** *Beverages made with ice cream and fresh fruits.*

**Class 35:** *Advertising; and the bringing together, for the benefit of others, of frozen sorbets containing fresh fruit, ice creams containing fresh fruit, frozen yoghurt containing fresh fruit, frozen fruit desserts containing fresh fruit, enabling customers to conveniently view and purchase those goods.*

6) Only the opponents filed evidence in these proceedings. Both sides filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision. Both sides ask for an award of costs. No hearing was requested and, so, this decision is taken following a careful perusal of the papers.

### **Evidence**

7) The opponents' evidence takes the form of a witness statement by Joanne Kayes, Marketing Controller of the Hain Daniels Group, a related company to the opponents. Ms Kayes states that she is authorised to make the statement on behalf of the opponents.

8) Ms Kayes evidence can be summarised as follows:

- The following sales of desserts bearing the LOVETUB mark are provided:

<b>Month</b>	<b>Sales in units</b>	<b>Sales in £</b>	<b>Market share of chilled desserts</b>
November 2011	311,819	644,800	0.08%
November 2012	537,132	683,800	0.08%
November 2013	889,192	893,400	0.11%

- A website ([www.lovetub.co.uk](http://www.lovetub.co.uk)) was launched in October 2010 dedicated to the promotion of the LOVETUB brand. Screen shots are provided at Exhibit JK2;
- In addition, £200,000 has been spent promoting the brand over “the last three years” (the statement was signed on 14 July 2014). Several advertising campaigns have been run including sponsorship of the *Sky Movies Drama and Romance* channel. Exhibit JK3 consists of a screen shot from the Sky Movies website featuring an advertisement for LOVETUB chocolate pudding and a statement that it is the sponsor of the *Drama and Romance* channel;

- A launch of the LOVETUB range at Tesco stores was arranged with a promotional price of the products being one pound. The aim was to assist in gaining fast recognition for the brand. A screen shot from the Tesco website is shown at Exhibit JK4 showing “Lovetub Chocolate Pudding 300G” for sale at one pound, reduced until 30 November 2010 from the normal price of £2.99. In November 2012, the LOVETUB range was promoted in the entrances of stores where the product was being sold with large scale replicas of the packaging positioned at the entrance and visible to all customers as they entered the store. A photograph of one such display is provided at Exhibit JK6.
- In February 2012, approximately 300,000 promotional leaflets for the LOVETUB range of desserts were circulated in conjunction with advertising material for the “Lovefilm” subscription service. A copy of one of these leaflets is provided at Exhibit JK5.

## DECISION

### Section 5(2)(b)

9) I will begin by considering the ground based upon Section 5(2)(b) of the Act that reads:

“(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.”

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

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

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## **Comparison of goods and services**

11) In assessing the similarity of goods and services, it is necessary to apply the approach advocated by case law and all relevant factors relating to the respective goods and services should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23:

‘In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.’

12) Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, *British Sugar Plc v James Robertson & Sons Limited (TREAT)* [1996] RPC 281).

13) I also bear in mind the following guidance of the General Court (“the GC”) in *Gérard Meric v OHIM*, T-133/05:

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

14) Finally, in terms of understanding what a "complementary" relationship consists of, I note the judgment of the GC in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-325/06 where it was stated:

"It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking (see, to that effect, Case T-169/03 *Segio Rossi v OHIM - Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05 *P Rossi v OHIM* [2006] ECR I-7057; Case T-364/05 *Saint-Gobain Pam v*

OHIM - Propamsa (PAM PLUVIAL) [2007] ECR II-757, paragraph 94; and Case T-443/05 El Corte Ingles v OHIM - Bolanos Sabri (PiraNAN diseno original Juan Bolanos) [2007] ECR I-0000, paragraph 48)."

15) For ease of reference, the respective goods and services are:

<b>Opponents' goods</b>	<b>Applicant's goods and services</b>
<p><b>Class 29:</b> <i>Preserved, dried and cooked fruits and vegetables; fruit sauces namely dessert toppings; milk and milk products namely milk shakes, smoothies and yoghurt beverages; milk beverages and milk shakes; yoghurt beverages; soups and preparations for making soups; desserts including fruit salads, compotes, coulis, dessert toppings and preparations for making desserts; prepared meals; snack foods including milk shakes, smoothies; yoghurt, milk beverages, fruit salads, snack bars.</i></p> <p><b>Class 30:</b> <i>Bread, pastry and confectionery, prepared meals; snack foods including snack bars, snack bars containing dried fruit, snack bars containing dried fruit, nuts and grains; preparations for making desserts; dessert toppings, cooking sauces, pasta sauces, food dressings and pasta dressings.</i></p>	<p><b>Class 30:</b> <i>Frozen sorbets containing fresh fruit; frozen yoghurt containing fresh fruit; ice cream containing fresh fruit.</i></p> <p><b>Class 32:</b> <i>Beverages made with ice cream and fresh fruits.</i></p> <p><b>Class 35:</b> <i>Advertising; and the bringing together, for the benefit of others, of frozen sorbets containing fresh fruit, ice creams containing fresh fruit, frozen yoghurt containing fresh fruit, frozen fruit desserts containing fresh fruit, enabling customers to conveniently view and purchase those goods.</i></p>

**Class 30**

16) The opponents' best case lies with its confectionery that can include frozen confectionery and, consequently, when applying the guidance in *Meric*, will include all of the applicant's Class 30 goods. Also, the opponents' *desserts including fruit salads, compotes and yoghurt* listed in its Class 29 specification are all described as desserts. Similarly, the applicant's *frozen sorbets containing fresh fruit, frozen yoghurt containing fresh fruit and ice cream containing fresh fruit* can also be described as desserts. Consequently, they may be in competition with each other. The applicant's goods are all frozen whereas the opponents' goods are chilled (such as *yoghurt*) and those that may appear on ordinary shop shelves. The applicant argues that this difference is significant. Whilst this is a clear difference and may influence where its goods may appear

within a shop, they will both still appear in the respective “desserts” sections, and I don’t accept that this difference is particularly significant. I also dismiss the applicant’s unsubstantiated claim that the goods would not generally be found in the same outlets. On the contrary, merely because some goods are frozen whilst others are not does not prevent the goods from appearing in the same outlets. The frozen nature of the applicant’s goods will also result in the respective goods not being identical in nature. Nevertheless, they do have similarities, with both parties’ goods being dessert-type food. Further, their intended purpose is the same, namely to be eaten as a treat or as a dessert course of a meal. Taking all of this into account, I concur with the opponents that these goods share a good deal of similarity.

17) The applicant also argues that its goods are fresh, but the opponents’ goods are processed. This is not evident from the wording of the specifications, and it is this wording that I must compare. Further, the opponents’ goods may also be fresh. I therefore reject this argument. Even if I accepted it, it would not put much more distance between the goods, because they would still be desserts in competition with each other.

### **Class 32**

18) The opponents’ *milk products namely milk shakes, smoothies and yoghurt beverages; milk beverages and milk shakes; yoghurt beverages* listed in its Class 29 specification share a very similar nature to the applicant’s Class 32 goods, namely *beverages made with ice cream and fresh fruits*. The nature and intended purpose of all of these goods is the same, all being in the form of beverages for drinking. They are also likely to be in competition with each other and one may be selected over the other. They may also appear side by side in chiller cabinets. Taking all of this into account, these goods share a high level of similarity.

### **Class 35**

19) In respect of the applicant’s advertising, this is a service generally provided business to business and involves helping other businesses promote their goods or services. The respective trade channels of this service and the opponents’ goods are different, as is the nature, purpose and methods of use. Further, advertising services are not in competition with the opponents’ goods and neither is the service complementary in the sense explained in *Boston Scientific*. I conclude there is no similarity between advertising and the opponents’ goods.

20) The remaining services listed in the applicant’s specification can be collectively categorised as “retail services”. The GC in *Oakley v OHIM*, T-116/06 recognised that retail services for goods may be complementary and therefore similar to goods where those goods are identical to those being the subject of the retail services. The opponents also submit that these services have a very close relationship to its goods because the goods are indispensable or, at the very



least, important for the provision of the services so that the average consumer will think that the responsibility for the production of the goods and provision of the services lies with the same undertaking. It concludes that these goods and services are complementary. It relies upon the guidance of the GC in *O STORE*, Case T-116/06. The court, commented as follows:

52 Regarding, third, the complementary nature of the services and goods in question, found to exist by the Board of Appeal in paragraph 23 of the contested decision, it should be pointed out that, according to settled case-law, complementary goods are those which are closely connected in the sense that one is indispensable or important for the use of the other, so that consumers may think that the same undertaking is responsible for both (see, to that effect, *SISSI ROSSI*, paragraph 49 above, paragraph 60; *PAM PLUVIAL*, paragraph 49 above, paragraph 94; and *PiraÑAM diseño original Juan Bolaños*, paragraph 49 above, paragraph 48).

53 In that regard, it must be pointed out that the goods covered by the earlier mark, that is, clothing, headwear, footwear, rucksacks, all-purpose sports bags, travelling bags and wallets, are identical to those to which the applicant's services relate.

54 Clearly, in the present case, the relationship between the retail services and the goods covered by the earlier trade mark is close in the sense that the goods are indispensable to or at the very least, important for the provision of those services, which are specifically provided when those goods are sold. As the Court held in paragraph 34 of *Praktiker Bau- und Heimwerkermärkte*, paragraph 17 above, the objective of retail trade is the sale of goods to consumers, the Court having also pointed out that that trade includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction. Such services, which are provided with the aim of selling certain specific goods, would make no sense without the goods.

55 Furthermore, the relationship between the goods covered by the earlier trade mark and the services provided in connection with retail trade in respect of goods identical to those covered by the earlier trade mark is also characterised by the fact that those services play, from the point of view of the relevant consumer, an important role when he comes to buy the goods offered for sale.

56 It follows that, because the services provided in connection with retail trade, which concern, as in the present case, goods identical to those covered by the earlier mark, are closely connected to those goods, the relationship between those services and those goods is complementary within the meaning of paragraphs 54 and 55 above. Those services

cannot therefore be regarded, as the applicant claims, as being auxiliary or ancillary to the goods in question.

57 Thus, notwithstanding the incorrect finding of the Board of Appeal to the effect that the services and goods in question have the same nature, purpose and method of use, it is indisputable that those services and goods display similarities, having regard to the fact that they are complementary and that those services are generally offered in the same places as those where the goods are offered for sale.

58 It therefore follows from all of the foregoing that the goods and services in question resemble each other to a certain degree, with the result that the finding in paragraph 24 of the contested decision that such a similarity exists must be upheld.

21) More recently, Mr Geoffrey Hobbs, sitting as the Appointed Person in *MISS BOO* Trade Mark, BL O-391-14, considered the same issue in the context of clothing and shoes and the retailing of the same. After reviewing the case law, including the GC's judgement in *O STORE*, he commented as follows:

25. ... the assessment of 'similarity' had to proceed substantively upon the premise that the Listed Services in Class 35 could not simply be characterised as dealing in goods of the kind to which they were linked. On the contrary, they had to be seen as involving real and significant performance of the functions of selecting an assortment of goods offered for sale and offering a variety of retail services aimed at inducing consumers to purchase goods of the kind specified. And then, from that perspective, it was necessary to give effect to the propositions noted in paragraph [19] above and to do so on the basis that there is no rule that 'complementarity' always or necessarily equals 'similarity' for the purposes of Section 5(2)(b). In evaluating whether and, if so, to what degree retail services across the spectrum covered by the Listed Services were 'similar' to 'handbags' in Class 18 and 'shoes for women' in Class 25, it was necessary, in keeping with the principle of proportionality, to consider the greater or lesser likelihood that a single economic undertaking would naturally be regarded as responsible for providing not only goods of that kind, but also retail services of the kind in question. The degree to which retail services within the spectrum were found on evaluation to be 'similar' to such goods would be a co-variable with the degree of 'similarity' between the signs in the overall assessment of the existence or otherwise of a likelihood of confusion.

22) Ms Anna Carboni, sitting as the Appointed Person in *GIANT Trade Mark*, BL O-264-14 considered whether the hearing officer in that case was correct to rely upon *Oakley* when finding similarity between clothing (that includes clothing for cycling) and the retailing of bicycles. As Ms Carboni noted, at paragraph 27, that

the GC had held that in respect of the “retail of clothing” on the one hand and “clothing” on the other, that the nature, purpose and method of use were different and that any finding of similarity would rest on different factors. Further, at paragraph 31, Ms Carboni observed that in this modern age, retail outlets, particularly online outlets sell “almost anything” and cautioned the tribunal in giving undue weight to the existence of an overlap in channels to distribution.

23) In the current case, the retail services applied for all relate to frozen sorbets, frozen yogurts and ice cream. The opponents, on the other hand, rely on goods that include *desserts including fruit salads, compotes, dessert toppings, yoghurt and fruit salads*. Here, the similarity goes beyond the respective goods and services being provided merely from a common retail environment. It is common for traders to provide both frozen, chilled and room temperature desserts and I see no consequence of the applicant’s specifications only listing frozen goods. A retail outlet offering desserts relies on the supply of the goods themselves and, therefore, in the current case, I conclude that there is also complementarity between the respective goods and services. Further, the provider of dessert products may operate its own retail outlets to retail its own goods. Therefore, the distribution channels may also be the same. The consumer may, therefore, consider that a single undertaking is responsible for both the goods and the services. Taking all of this into account, I conclude that the applicant’s *bringing together, for the benefit of others, of frozen sorbets containing fresh fruit, ice creams containing fresh fruit, frozen yoghurt containing fresh fruit, frozen fruit desserts containing fresh fruit, enabling customers to conveniently view and purchase those goods* shares some similarity with the opponents’ goods identified at the beginning of this paragraph. However, I accept that the nature, intended purpose and method of use are different and that, consequently, the similarity is not of the highest.

### ***The average consumer***

24) Matters must be judged through the eyes of the average consumer (*Sabel BV v. Puma AG*, paragraph 23), who is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*, paragraph 27). The degree of care and attention the average consumer uses when selecting goods and services can, however, very depending on what is involved (see, for example, the judgment of the GC in *Inter-Ikea Systems B.V. v. OHIM*, Case T-112/06).

25) The goods are generally of a relatively low cost and will be purchased in a retail environment, café or specialist milk bar or similar. The purchase will be a combination of visual and aural, with labels and other marks often being visible at the point of purchase. The respective goods are generally of low value and there is unlikely to be circumstances that would lead to a conclusion that the degree of care and attention is enhanced. Therefore, there is no more than an average degree of care and attention. In respect of the applicant’s “retail” services the

considerations are similar in that such services relate to everyday grocery purchases where the level of care and attention and, as such, the purchasing act will involve the same or similar level of attention as the goods.

### **Comparison of marks**

26) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

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

<b>Opponents' mark</b>	<b>Applicant's mark</b>
LOVETUB	LOVE IN A TUB

28) The applicant's mark consists of four words creating the phrase LOVE IN A TUB. The distinctive character resides in the complete phrase rather than in any one or more elements. That said the words LOVE and TUB have greater distinctive character than the words IN A that function to link the first and last words. The opponents' mark consists of the two words LOVE and TUB conjoined. Once again, these words create a phrase that "hangs together" so that the distinctive character resides in the combination.

29) In its counterstatement, the applicant submitted that the marks are not visually similar arguing that the length, structure and number of words are all different. I do not agree. Both marks begin with the word LOVE and end with the word TUB. This creates visual similarity. There are differences, namely, that in the opponents' mark, the two words are conjoined, but the words in the applicant's mark are not. Further the applicant's mark has the additional two words "IN A" that appear in the middle of the mark. Taking all of this into account, I conclude that there is a reasonable amount of visual similarity.

30) In respect of aural considerations, the applicant submits that importance is placed on the number of syllables present in each mark and claims that the marks have more dissimilar syllables than they do similar syllables. This latter point is not correct because both marks share two identical syllables (the first and last) and the applicant's mark has two additional syllables in the middle of the mark that are absent in the opponents' mark. The applicant relies upon two cases of the GC to support its view that the differences in some syllables result in aural dissimilarity. The first of these is *Laboratorios RTB, SL v OHIM*, T-156/01 where the court found that because the marks GIORGIO AIRE and GIORGI only shared one of four syllables (GIORGI) this was insufficient to find aural similarity. Firstly, I observe that the court was not setting down a rule but rather making a consideration of similarity based on the marks in that case. Secondly, the marks being considered by the court related to a person's name and that any similarity resulted from one of these names being contained within the second, longer name. In the current case, two full dictionary words consisting of single syllables are shared by both marks. The considerations are therefore different.

31) The second case referred to is *Polaclip Trade Mark* [1999] RPC 282. Here the Hearing Officer merely observed the guidance in *Sabel BV v Puma AG* (that the average consumer normally perceives marks as a whole) when considering a claim that the first part of a word (in that case POLA in the word mark POLAROID) was, in itself, distinctive of the trader's goods and that the proposition should be treated with caution. This is not the case in the current proceedings. In the current case, it is the common occurrence of both the word LOVE and the word TUB in both marks that the opponents claim creates the similarity, both aural and otherwise. Further, and as the Hearing Officer observed in the *Polaclip* case; "every case turns on its own facts".

32) Both syllables of the opponents' mark are present in the applicant's mark. Whilst they are separated by two short syllables in the applicant's mark, in my view there is a reasonably high level of aural similarity.

33) Conceptually, the applicant submits, in the opponents' mark the word LOVE is used in an adjectival way to the word TUB, whereas in the applicant's mark the word LOVE is used as the form of a verb to describe what is in the TUB. Whilst I agree that this technical analysis is correct, because of the rather nonsensical nature of both marks, the average consumer is likely to perceive a very similar, if not identical concept. This is because the opponents' mark can be perceived as relating to a tub containing "love" (in the same sense as, for example, an "ice cream tub" will be understood as a tub containing ice cream) or being the tub itself. The former perception is identical to the concept created by the applicant's mark.

### ***Distinctive character of the earlier trade mark***

34) I must consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use the greater the likelihood of confusion (*Sabel BV v Puma AG* [1998] RPC 199). The distinctive character of the earlier trade mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public (*Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91).

35) The applicant submits that the opponents' mark has a very low level of distinctiveness. I dismiss this. The mark LOVETUB has at least an average level of distinctive character in respect of the goods claimed. Whilst the goods may be packaged in tubs, the combination of LOVE and TUB creates a mark that is not descriptive of any characteristic of the goods and any allusion created is of a very tangential nature.

36) In respect of the issue of enhanced distinctive character, the relevant date in these proceedings is the filing date of the contested application, namely 21 June 2013. The opponents disclose sales figures but it is not clear to me whether these relate to the months of November 2011, November 2012 and November 2013 or whether it relates to the year ending with these months. If it is the former then the figure for November 2013 is after the relevant date. If it is the latter, then the final figure will include sales both before and after the relevant date. When considering how to interpret these figures in light of this uncertainty, I note that the opponents have also provided figures in respect of the market share for the same periods that its goods enjoy within the chilled dessert sector. These are given as 0.08%, 0.08% and 0.11% respectively. This illustrates that the opponents' mark has established a presence in the sector. However, taking everything into account, I conclude that such a small market share is not sufficient to result in an enhanced level of reputation. Consequently, I conclude that the inherent level of distinctive character is not enhanced through the use of the mark.

### ***Likelihood of confusion***

37) I must adopt the global approach advocated by case law and take into account that marks are rarely recalled perfectly with the consumer relying instead on the imperfect picture of them he has in kept in his mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). I must take into account all factors relevant to the circumstances of the case, in particular the interdependence between the similarity of the marks and that of the goods or services designated (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*)

38) The applicant submits that it intends to sell its goods in small outlets that are "far removed" from the supermarkets in which the opponents' goods are sold. As the opponents have pointed out, such an approach is incorrect. I am required to

undertake a notional analysis of the respective goods and services and because the way a party intends to market goods may change over time, this is not a relevant consideration. I am guided by case law against doing this and, in particular, I am mindful of the following comments of the GC in *Oakley, Inc v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-116/06:

“76 Consideration of the objective circumstances in which the goods and services covered by the marks in dispute are marketed is fully justified. The examination of the likelihood of confusion which the OHIM authorities are called on to carry out is prospective. Since the particular circumstances in which the goods covered by the marks are marketed may vary in time, and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, that is, that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions, whether carried out or not – and which are naturally subjective – of the trade mark proprietors (QUANTUM, paragraph 75 above, paragraph 104, and T.I.M.E. ART/Devinlec v OHIM, paragraph 75 above, paragraph 59).”

39) I also dismiss the applicant’s submission that the respective marks differ sufficiently because use of a non-distinctive element or prefix cannot lead to a later mark, containing the same element, being confusingly similar. The applicant cites the GC judgment in *Castellani*, T-149/06 to support this view. Whilst the general principle is correct, it does not apply to the facts of the current case. Whilst the word “tub” is considered non-distinctive for foodstuffs sold in tubs, the similarity between the respective marks arises not from this word alone but its combination with the word LOVE and the combination of the words LOVE and TUB is not non-distinctive. Therefore, as the opponents submit, the guidance provided in *Castellani* does not apply to the current case.

40) I have found that the respective marks share a reasonable amount of visual similarity, a reasonably high level of aural similarity and that whilst technically the conceptual identities are different, I have observed that the average consumer may perceive the concepts as being identical. I have also found that the respective goods are identical or share a good deal of similarity and that the applicant’s services (with the exception of *advertising*) and the opponents’ goods share some similarity. Further, I have found that, in respect of all of the parties’ goods and services, with the exception of the applicant’s *advertising*, there is no more than an average degree of care and attention paid by the consumer during the purchasing act. Finally, I have found that the opponents’ mark is endowed with an average level of inherent distinctive character.

41) Taking all of this into account, and having particular consideration that marks are rarely recalled perfectly and that the consumer relies instead on an imperfect picture of them, I conclude that there is a likelihood of direct confusion where the consumer is likely to confuse one mark with the other. Even if I am wrong and the consumer may spot the difference between the marks, there is a likelihood of indirect confusion where the consumer will assume that the goods and services sold under the marks originate from the same of linked undertaking. These findings apply to all of the applicant's goods and services, with the exception of its *advertising* in Class 35.

42) The opposition, insofar as it is based upon Section 5(2)(b) of the Act, succeeds against the whole of the applicant's application except *advertising* in its Class 35 specification.

### **Sections 3(6), 5(3) and 5(4)(a)**

43) The application has survived the Section 5(2)(b) case in respect of *advertising*. I will comment briefly on the other grounds, but only in respect of these services. In respect of the pleading of bad faith under Section 3(6), it is claimed that the applicant had knowledge of the opponents' prior goodwill. This goodwill is in the area of *dessert* foodstuffs. As I have already found, there is no similarity between the services of *advertising* and such goods and consequently, I cannot see how a claim of bad faith can succeed. Any trader should be free to use a mark in respect of goods or services that are dissimilar to those of a similar mark unless the earlier mark has a reputation that results in the necessary enhanced protection extending to those dissimilar goods. As will be seen from my comments below, this is not the case here. The Section 3(6) grounds must fail.

44) The opponents' case is no stronger (in respect of *advertising*) under Section 5(3) of the Act. The opponents' submission is that the consumer would perceive the goods and services provided by the applicant as originating from the opponents of an economically linked undertaking and that this would lead to unfair advantage and would amount to free riding on the opponents' goodwill and reputation. Such a reputation in respect of desserts does not extend to advertising services and even if a link was made with the opponents' mark in the mind of the consumer, this would be only weak and insufficient to lead to any advantage or free riding. For the same reasons, the opponents' submissions that the opponents' reputation will be tarnished and diluted are also dismissed.

45) Finally, in respect of the grounds based on Section 5(4)(a) of the Act, the opponents rely upon the same arguments put forward in respect to Section 5(2)(b), namely, that the marks are highly similar and that the goods and services at issue are similar such that there is a strong likelihood of confusion. Consequently, its case is no stronger under Section 5(4)(a) than under Section



5(2)(b) and this ground of opposition, insofar that is targeted at the applicant's advertisements, must also fail.

### **Conclusions**

46) The opposition is successful against all of the applicant's goods and services except *advertising* in Class 35.

### **COSTS**

47) The opponents have been largely successful and is entitled to a contribution towards its costs, according to the published scale in Tribunal Practice Notice 4/2007. I take account that the opponents filed evidence and that both sides filed written submissions in lieu of attending a hearing. I award costs on the following basis:

Preparing a statement and considering the counterstatement	£300
Opposition fee	£200
Evidence	£500
Written submissions	£250
<b>Total:</b>	<b>£1250</b>

48) I order Love in a Tub Limited to jointly pay S Daniels plc and Farmhouse Fare Limited the sum of £1250 which, in the absence of an appeal, should be paid within seven days of the expiry of the appeal period.

**Dated this 18th day of February 2015**

**Mark Bryant  
For the Registrar,  
the Comptroller-General**