

O-239-18

**TRADE MARKS ACT 1994**

**IN THE MATTER OF THE APPLICATION BY  
STIRLING BOSCH LTD  
UNDER NO 3216617 FOR THE TRADE MARK**



**AND**

**IN THE MATTER OF OPPOSITION NO. 409271 THERETO**

**BY**

**SPENDRUP BRANDS AB**

## Background and pleadings

1) Stirling Bosch Ltd (“the Applicant”) applied to register the following trade mark (“the opposed mark”) in the UK on 4 March 2017, with a priority date of 3 March 2017:



It was accepted and published for opposition purposes in the Trade Marks Journal on 17 March 2017 for the following goods:

**Class 32:** *Energy drink containing caffeine.*

2) The application is opposed by Spendrup Brands AB<sup>1</sup> (“the Opponent”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), for the purposes of which it relies upon the following earlier EU trade mark (“EUTM”) registrations:

**EUTM 3987302** was filed on 17 August 2004 and completed its registration procedure on 14 November 2005 for the following sign:

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<sup>1</sup> The Opponent's former name, as stated on its Notice of Opposition, was Spendrup International AB. A straightforward change of name to Spendrup Brands AB occurred on 19 October 2016, as confirmed in an extract from the Swedish Companies Registration Office.)

# LOKA

The goods relied on by the Opponent under EUTM 3987302 are *mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages* in Class 32.

**EUTM 12751897** was filed on 1 April 2014, and completed its registration procedure on 12 August 2014 for the following sign:



The goods relied on by the Opponent under EUTM 12751897 are *beer; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages* in Class 32.

**EUTM 12750791** was filed on 1 April 2014, and completed its registration procedure on 13 August 2014 for the following sign:



The goods relied on by the Opponent under EUTM 12750791 are *beer; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages* in Class 32.

3) The significance of the above dates is that all the marks relied on by the Opponent constitute earlier marks in accordance with section 6 of the Act. Only EUTM 3987302 is subject to the proof of use conditions contained in section 6A of the Act, however; this is because its registration procedure was completed more than five years before the publication of the Applicant's mark.

4) The Opponent claims that because of similarity between the opposed mark and the earlier marks and identity or similarity between the goods of the opposed mark and those of the respective earlier marks there exists a likelihood of confusion. The Applicant filed a counterstatement, in which it denied that the requirements of section 5(2)(b) of the Act are satisfied. It also put the Opponent to proof of use of EUTM 3987302 in respect of the goods relied on under that mark. The Opponent filed evidence during the evidence rounds. Neither side requested a hearing. The Applicant filed written submissions in lieu of attendance at a hearing. I therefore give this decision after a careful review of all the papers before me. The Opponent is represented by Haseltine Lake LLP. The Applicant was initially represented by Womble Bond Dickinson (UK) LLP, but the Applicant itself assumed responsibility for the conduct of these proceedings before filing written submissions in lieu of a hearing.

#### **The Opponent's best case and the evidence of proof of use**

5) EUTM 3987302 for the mark LOKA represents the Opponent's best case, both other earlier marks containing, in addition to the word LOKA, figurative material which takes them further from the opposed mark. Proof of use is required in respect of EUTM 3987302, and the Opponent filed evidence accordingly. In the interests of procedural economy, however, I shall assume for the purposes of my assessment that genuine use in the EU of EU 3987302 has been shown for *mineral and aerated waters and other non-alcoholic drinks*. I shall discuss any possible bearing the evidence might have on the conceptual content of the word LOKA for the average UK consumer, and

on the possibility of distinctiveness enhanced through use, later in this decision. At this point, therefore, it is sufficient to record that the evidence filed relates to sales made under the earlier marks in Sweden, and to the history of, and goods and services provided at, the Loka Brunn Hotel and spa in Sweden.

### **Section 5(2)(b)**

6) Section 5(2)(b) of the Act reads as follows:

“5(2) A trade mark shall not be registered if because – [...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

7) The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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

8) In assessing whether there is a likelihood of confusion I must make my comparison of the goods on the basis of the principles laid down in the case law. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

9) In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05 (“*Meric*”), the General Court (“the GC”) stated that:

“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 fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark (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)”.

10) When it comes to understanding what terms used in specifications mean and cover, the guidance in the case-law is to the effect that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical

matter, regarded for the purposes of the trade”<sup>2</sup> and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning<sup>3</sup>. The Applicant’s *energy drink containing caffeine* manifestly falls within the ambit of the term *mineral and aerated waters and other non-alcoholic drinks* in the specification of the earlier mark. The goods are identical.

### **The average consumer and the purchasing process**

11) The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

12) The average consumer of non-alcoholic drinks in class 32 is a member of the general public. The goods in question are sold through a range of channels, including retail premises such as supermarkets and off-licences (where they are normally displayed on shelves and obtained by self-selection), online (where the consumer will also select the goods visually) and in bars, public houses and restaurants (where they will be displayed on, for example, shelves behind the bar and where the trade marks

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<sup>2</sup>*British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281

<sup>3</sup>*Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267



will appear on drinks lists, menus etc.). When the goods are sold in bars, public houses and restaurants, there will be an oral component to the selection process. In considering this point I bear in mind the comments of the Court of First Instance (now the General Court) in Case T-3/04 *Simonds Farsons Cisk plc v OHIM*:

“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.”

13) Even though the purchase of these goods in a bar may involve an aural element, therefore, their selection process is primarily a visual one, though I do not discount an aural element. They are generally low cost items and are likely to be fairly frequent purchases. Nevertheless, the average consumer will wish to ensure that he or she is selecting the correct type and flavour of beverage, and quite possibly to check for such ingredients as caffeine, so I consider that a reasonable level of attention will be paid to their selection.


### **Comparison of the marks**

14) 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.”

15) It would be wrong, therefore, to dissect the trade marks artificially, 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.

16) The marks to be compared are shown below:

<b>The opposed mark</b>	<b>The earlier mark</b> <b>EUTM 12750791</b>
 The logo for LOCO energy drink features the word "LOCO" in large, bold, blue letters with a white outline, set against a black background. Below "LOCO" is the text "energy drink" in a smaller, white, sans-serif font. The background is decorated with various white hexagonal patterns, including a large circle and several smaller circles and clusters of hexagons.	<b>LOKA</b>

17) The distinctive element of the earlier mark is the word LOKA, this being the mark's sole component. The opposed mark consists of the word LOCO in plain capitals presented in light blue with a lighter edging, the letters L and O being joined at the bottom. Beneath the word LOCO appear the much smaller, but still fairly prominent, words ENERGY DRINK in plain white lower case. All are shown against a black background on which stylised bubbles are represented by variously sized circles with a mesh pattern. The words ENERGY DRINK, being descriptive of the goods, would be accorded little distinctive weight by the consumer, though by virtue of their size and position they do make some contribution to the overall impression of the mark. Similarly, bubbles are a commonplace and descriptive image when applied to aerated drinks, though I consider that the element of stylisation adds a touch of distinctiveness. They too contribute to the overall impression of the mark. The distinctive weight of the mark, however, clearly lies heavily on the word LOCO, which manifestly constitutes its dominant element.

18) I bear in mind that since the earlier mark is a word mark not limited to colour, it may be used in any colour<sup>4</sup>, so that colour is not a significant factor in the comparison. I have already noted the commonplace and descriptive nature of the bubble motif in the opposed mark. Though stylised and fairly prominent, this figurative element's contribution to the overall visual impression of the opposed mark is a relatively minor one. The minor significance of the descriptive words ENERGY DRINK is reflected in their relative size. Although not negligible in the overall visual impression of the mark, they will receive limited attention when the mark is encountered visually, the focus lying on the distinctive and prominent word LOCO.

19) There is a rough rule of thumb in the settled case law that the consumer normally attaches more importance to the beginnings of word marks. This is no more than a rule of thumb. Each case must be considered on its merits. My assessment must take account of the overall impression created by the marks<sup>5</sup>. Moreover, according to settled case-law the shorter the signs are, the easier it is for the general public to

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<sup>4</sup> See Kitchen LJ at paragraph 5 in *Specsavers International Healthcare Ltd & Ors v ASDA Stores Ltd & Anor* [2014] EWCA Civ 1294

<sup>5</sup> See Case T-438/07 *Spa Monopole, compagnie fermière de Spa SA/NV v OHIM* at paragraph 23.

perceive clearly the differences between them<sup>6</sup>. Both the dominant LOCO of the opposed mark and the LOKA of the earlier mark are short words, the first halves of which are visually the same and the second halves of which are different. Viewed overall, there is a moderate degree of visual similarity between the marks.

20) The figurative elements of the opposed mark will not normally be expressed orally. I also think it unlikely that the words ENERGY DRINK in the opposed mark will be used when the product is ordered orally. Even if they are used, this will be by way of describing the product, rather than specifying the brand. In the course of trade the opposed mark will be expressed orally as LOCO. The initial syllables of the words LOCO and LOKA in the respective marks are aurally identical. Their pronunciation will correspond to that of the word LOW. The concluding syllables of the respective marks both begin with a sound which corresponds to a hard C, as in CAT. The final vowels, however, are quite different. The final O in LOCO echoes the long vowel of the first syllable, whereas I consider that the average UK consumer will pronounce the final A in LOKA as a truncated short vowel, so that the word will rhyme with POKER. The degree of aural similarity between the marks lies between medium and high.

21) The bubble motif and the words ENERGY DRINK in the opposed mark add conceptual elements not present in the earlier mark but, both being descriptive of the product, their impact on the attention of the consumer will be very limited in comparison with the heavily dominant and distinctive word LOCO. In its submissions the Applicant describes the word “loco” as “meaning crazy in Spanish but recognised globally”. *Oxford Living Dictionaries* online gives two main meanings of the word: “(British informal) a locomotive”; “(informal) crazy”. *Collins Dictionary* online gives “informal short for locomotive” and “slang, mainly US: insane”. The Cambridge Dictionary online reverses the order, giving “crazy” (“mainly US slang”) as the first meaning and “informal for locomotive” as the second. In my experience both these meanings will be familiar to the average UK consumer. Neither meaning is descriptive of the product, though either might be seen as vaguely allusive of the effects of boosting energy. Used in connection with energy drinks, I consider that for the average consumer in the

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<sup>6</sup> See Case T-118/16 *Deutsche Post v EUIPO* at paragraph 65 and Case T-272/13 *Max Mara Fashion Group v OHIM* at paragraphs 46 to 47.

UK one or other of these meanings (and, for some, both meanings) will certainly be immediately brought to mind.

22) I note here that although the evidence filed by the Opponent included a screen print from the “Loka Brunn” website describing in English the history of the Loka Brunn springs in Sweden, there is no evidence whatever that this website has targeted UK consumers to promote the hotel and spa services and goods available at this location. In the absence of any evidence as to whether the website is in fact visited by consumers in the UK to any material extent, no inference as to the acquaintance of UK consumers with the content of this website can be drawn from the mere fact that it contains material in English accessible from the UK. Nor does the evidence filed by the Opponent indicate that any sales of the relevant goods have been effected, or any marketing of them undertaken, under any of the earlier marks in the UK – let alone that the average UK consumer has been educated to associate the word “Loka” with the location of a natural spring in Sweden.

23) I have found that the word “loco” will have a definite and immediate conceptual content for the average consumer. By contrast, the word “Loka” will not evoke any concept in the mind of the average UK consumer, who will perceive it either as an invented word, or as an unfamiliar one (probably foreign) the meaning of which is unknown to him or her, or as an unfamiliar (probably foreign) name of some kind. There is an obvious semantic gap between the definite conceptual content of “loco” and the absence of such content in “Loka”.

### **The distinctiveness of the earlier mark**

24) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, either on the basis of inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an

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

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

25) The Opponent has not expressly claimed that any of its earlier marks have acquired enhanced distinctiveness through use in the UK, but I think it appropriate to note that the evidence filed would not in any case support such a claim. I have already pointed out (at paragraph 22) that there is no evidence whatever that any sales have been effected, or marketing undertaken, of the relevant goods under any of the earlier marks in the UK (which is the market on which any likelihood of confusion is to be assessed). There is therefore no evidence of enhanced distinctiveness through use to be considered. This leaves the question of inherent distinctive character. The word LOKA will not evoke any concept in the mind of the average UK consumer, who will simply assume that it is either an invented word or an unknown foreign word. On this basis I consider that the earlier mark EUTM 3987302 has a somewhat higher than average degree of inherent distinctiveness

## Likelihood of Confusion

26) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

27) I make my assessment on the basis that the goods of the opposed mark are identical to the goods relied on by the Opponent, that a reasonable level of attention will be paid to their selection, and that the purchasing process is primarily a visual one (though I do not discount an aural element). I have found the earlier mark EUTM 3987302 to have a somewhat higher than average degree of inherent distinctiveness. I have found that the marks have a moderate degree of visual similarity and that the degree of aural similarity between them lies between medium and high.

28) I have also found that there is an obvious semantic gap between the definite and immediately apparent conceptual content which the word “loco” will have for the average consumer, and the absence of such content in “Loka”. I bear in mind that although conceptual differences may counteract visual and aural similarities<sup>7</sup>, they do not always do so<sup>8</sup>, and that, for there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately<sup>9</sup>. In this case, however, “loco” is a word which will be immediately recognised, and forms a strong conceptual hook which will tend to counteract imperfect recollection. Balancing all these factors, I do not consider that there is a likelihood that the marks will be confused, even for identical goods. Nor, having noticed the difference between LOCO and LOKA, is there any reason why the consumer might see the marks as variant

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<sup>7</sup> See the judgment of the CJEU in *The Picasso Estate v OHIM*, Case C-361/04 P at paragraph 20.

<sup>8</sup> See the judgment of the General Court in *Nokia Oyj v OHIM*, Case T 460/07 at paragraph 66.

<sup>9</sup> See the judgment of the CJEU in *Mühlhens GmbH & Co KG v OHIM*, Case C-206/04P at paragraph 11, noting the judgment of the Court of First Instance at paragraph 49. See also Case T-292/01 *Phillips-Van Heusen v OHIM – Pash Textilvertrieb und Einzelhandel (BASS)* at paragraph 54.

marks of the same or a related undertaking. There is no likelihood of either direct or indirect confusion.

## **Outcome**

29) **The opposition fails in its entirety.**

## **Costs**

30) The Applicant has been successful and is entitled to a contribution towards its costs. The Applicant was professionally represented for the greater part of these proceedings, assuming responsibility itself only in terms of filing written submissions in lieu of a hearing. I take this into account in making the award of costs and estimate that it would have taken the applicant three hours to prepare its submissions. Under the Civil Procedure Rules the amount which may be allowed to a self-represented litigant is currently set at a rate of £19 per hour. I bear in mind that the pleadings were straightforward and brief.

31) I hereby order Spendrup Brands AB to pay Stirling Bosch Ltd the sum of £557. This sum is calculated as follows:

Preparing a statement and considering the other side's statement	£200
Considering the other side's evidence	£300
Written submissions	£57

This sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 18<sup>th</sup> day of April 2018**

**Martin Boyle  
For the Registrar,  
The Comptroller-General**