

O/211/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003369572

BY SHENZHEN WANNA TEC. CO., LTD

TO REGISTER THE TRADE MARK:

VEIK

IN CLASS 34

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 416216 BY

PHILIP MORRIS PRODUCTS S.A.

BACKGROUND AND PLEADINGS

1. On 24 January 2019, Shenzhen Wanna Tec. Co., Ltd (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 1 February 2019 and registration is sought for the following goods:

Class 34 Tobacco pipes; electronic cigarettes; Liquid nicotine solutions for use in electronic cigarettes; flavourings, other than essential oils, for use in electronic cigarettes; oral vaporizers for smokers; flavourings, other than essential oils, for tobacco; herbs for smoking; cigar cases; cigarettes containing tobacco substitutes, not for medical purposes; cigarette holders; spittoons for tobacco users; lighters for smokers; cigarette filters; matches; matchboxes; Cigarette tubes; Filter-tipped cigarettes; Mouthpieces for cigarettes; snuff boxes; tobacco jars.

2. On 1 May 2019, Philip Morris Products S.A. (“the opponent”) opposed the application based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies on the following trade marks:

VEEV

IR designating the EU no. 1305642
Date of designation of the EU 18 May 2016
Date protection granted in the EU 20 January 2017
Priority date 8 February 2016 (Kazakhstan)
 (“the First Earlier Mark”)

VEEV

UK registration no. 3164844
Filing date 16 May 2016
Registration date 19 August 2016
Priority date 8 February 2016 (Kazakhstan)
 (“the Second Earlier Mark”)

VEEVS

EUTM no. 15915581

Filing date 13 October 2016

Registration date 1 March 2017

Priority date 13 April 2016 (Kazakhstan)

("the Third Earlier Mark")



IR designating the EU no. 1343304

Date of designation of the EU 23 January 2017

Date of protection granted in the EU 9 November 2017

Priority date 26 July 2016 (Kazakhstan)

("the Fourth Earlier Mark")



IR designating the EU no. 1346482

Date of designation of the EU 24 January 2017

Date of protection granted in the EU 5 February 2018

Priority date 26 July 2016 (Kazakhstan)

("the Fifth Earlier Mark")

3. The goods upon which the opponent relies are set out in paragraph 20 below.
4. The opponent claims that there is a likelihood of confusion because the marks are similar, and the goods are identical or similar.
5. The applicant filed a counterstatement denying the claims made. The applicant filed annexes with its counterstatement, which relate to the products actually sold by the

parties. This was not filed in the correct format, but in any event, I return to the relevance of this below.

6. Neither party filed evidence. A hearing took place before me on 9 March 2020, by video conference. The opponent was represented by Ms Patricia Collins of Bird & Bird LLP and the applicant was represented by Mr Rupert Beloff of Counsel, instructed by JMR Solicitors Ltd.

DECISION

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

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

(a) [...]

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

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

8. The trade marks upon which the opponent relies qualify as earlier trade marks because they were applied for at an earlier date than the applicant’s mark pursuant to section 6 of the Act. Although the applicant requested proof of use in its Counterstatement, as the opponent’s marks had not completed their registration process more than 5 years before the filing date of the application in issue, they are not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods it has identified.

Section 5(2)(b) – case law

9. 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 greater 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 to mind the earlier mark, 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 trade marks

10. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union (“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.”

11. It would be wrong, therefore, to artificially dissect the trade 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.

12. At the hearing, Ms Collins accepted that my focus should be upon the opponent’s word marks, rather than the device marks. The opponent’s submissions with regard to the Fourth and Fifth Earlier Marks focused upon the possibility that the horizontal lines in the those marks could be viewed as a letter ‘E’ when incorporated into a word. In my view, that line of argument is entirely without merit. My assessment must focus upon a comparison of the marks before me and notional and fair use of those marks. In order to make the opponent’s device marks into the word ‘VEEV’, it would be necessary to add the letter ‘V’ at the start and end of the Fourth and Fifth Earlier Marks, plus the addition of a further letter ‘E’ to the Fourth Earlier Mark. This cannot be considered notional and fair use of the marks as registered, and neither can the addition of any other letters to make the device marks into any other recognisable word.

13. Further, at the hearing, Ms Collins suggested that the stylisation of the horizontal lines making up the device marks mean they are rounded in nature and are, therefore, similar to some of the elements in the applicant’s mark. She also suggested that, if they were to be pronounced, they would be pronounced as the letter ‘E’. Firstly, any similarity created by the rounding of the lines in the opponent’s device mark is so tenuous as to make, in my view, no impact upon the average consumer taking account of the applicant’s mark as a whole. Secondly, as device marks, I see no reason why the average consumer would attempt to pronounce the Fourth and Fifth Earlier Marks as the letter ‘E’ in the absence of them being incorporated into a word (which as noted above is not notional and fair use of the marks as registered). To my mind, those marks are clearly dissimilar to the applicant’s mark. I will, therefore, focus my assessment on the opponent’s word marks, as suggested by Ms Collins, as they represent the opponent’s best case. The respective marks are, therefore, as follows:

Opponent's trade marks	Applicant's trade mark
<p style="text-align: center;">VEEV ("the First Earlier Mark")</p>	<p style="text-align: center;">VEIIK</p>
<p style="text-align: center;">VEEV ("the Second Earlier Mark")</p>	
<p style="text-align: center;">VEEVS ("the Third Earlier Mark")</p>	

14. The First and Second Earlier Marks consist of the word VEEV. There are no other elements to contribute to the overall impression which lies in the word itself. Similarly, the Third Earlier Mark consists of the word VEEVS and the overall impression of the mark lies in that word. The applicant's mark consists of the word VEIIK, presented in a slightly stylised font. It is the word itself which plays the greater role in the overall impression, with the stylisation playing a lesser role.

Visual Comparison

The First and Second Earlier Marks and the Applicant's Mark

15. Visually, the marks all overlap to the extent that they begin with the letters VE-. However, the endings of the marks act as a point of visual difference, with the earlier marks ending in -EV and the applicant's mark ending in -IIK. I recognise that, generally, the beginnings of marks tend to make more of an impact than the ends. Overall, I consider the marks to be visually similar to no more than a medium degree.

The Third Earlier Mark and the Applicant's Mark

16. Visually, the same points apply as for the First and Second Earlier Marks, with the added point of visual difference being the letter -S at the end of the Third Earlier Mark. I consider the marks to be visually similar to a lower than medium degree.

Aural Comparison

The First and Second Earlier Marks and the Applicant's Mark

17. Aurally, the earlier marks will be pronounced VEE-VVV. In my view, the applicant's mark will be pronounced VAY-KKK. I consider the marks to be aurally similar to a low degree.

The Third Earlier Mark and the Applicant's Mark

18. Aurally, the earlier mark will be pronounced VEE-VZZ. The applicant's mark, as noted above, will be pronounced VAY-KKK. I consider the marks to be aurally similar to a low degree.

Conceptual Comparison

19. All of the marks are invented words with no particular meaning. The parties agree that a conceptual comparison is not, therefore, possible and the conceptual position will be neutral.

Comparison of goods

20. The specification for the First Earlier Mark is in French. I have no translation before me. However, the opponent claims that this has the same meaning as the specifications for the other earlier marks (which are identical). In any event, as the First Earlier Mark and Second Earlier Mark are identical, this will make no difference to the outcome of the opposition. The competing goods are, therefore, as follows:

Opponent's goods	Applicant's goods
<p><u>Class 34</u></p> <p>Wired vaporizer for electronic cigarettes and electronic smoking devices; tobacco, raw or manufactured; tobacco products; including cigars, cigarettes, cigarillos, tobacco for roll your own cigarettes, pipe tobacco, chewing tobacco, snuff tobacco, kretek; snus; tobacco substitutes (not for medical purposes); smokers' articles, including cigarette paper and tubes, cigarette filters, tobacco tins, cigarette cases and ashtrays, pipes, pocket apparatus for rolling cigarettes, lighters; matches; tobacco sticks, tobacco products for the purpose of being heated, electronic devices and their parts for the purpose of heating cigarettes or tobacco in order to release nicotine-containing aerosol for inhalation; liquid nicotine solutions for use in electronic cigarettes; electronic smoking devices; electronic cigarettes; electronic cigarettes as substitute for traditional cigarettes; electronic devices for the inhalation of-nicotine containing aerosol; oral vaporising devices for use by smokers, tobacco products and tobacco substitutes; smoker's articles for electronic cigarettes; parts and fittings for the aforesaid products included in class 34; extinguishers for heated</p>	<p><u>Class 34</u></p> <p>Tobacco pipes; electronic cigarettes; Liquid nicotine solutions for use in electronic cigarettes; flavourings, other than essential oils, for use in electronic cigarettes; oral vaporizers for smokers; flavourings, other than essential oils, for tobacco; herbs for smoking; cigar cases; cigarettes containing tobacco substitutes, not for medical purposes; cigarette holders; spittoons for tobacco users; lighters for smokers; cigarette filters; matches; matchboxes; Cigarette tubes; Filter-tipped cigarettes; Mouthpieces for cigarettes; snuff boxes; tobacco jars.</p>

cigarettes and cigars as well as heated tobacco sticks; electronic rechargeable cigarette cases.	
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21. In the *Treat* case, [1996] R.P.C. 281, Jacob J. (as he then was) identified the following factors for assessing similarity:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

22. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“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 trade mark application (Case T-388/00 *Institut for 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.”

23. At the hearing, Mr Beloff accepted that there was some similarity of goods, but sought to rely upon the following submissions set out in the applicant’s Counterstatement:

“The Opponents product “VEEV” refers to a pre-sealed e-liquid cap, which has been launched by the company named Phillip Morris Products, which is a cigarette and tobacco manufacturing company, please see Annex 3. As can be seen from Annex 3, the only place on the website that the trademark “VEEV” is mentioned, is in the description of the pre-sealed e-liquid cap. Therefore, the product “VEEV” does not represent the name of the company or the website.

However, the Applicant is a professional e-cig manufacturer, who operates a website selling e-cigarettes, please see Annex 4.

Therefore, there is a clear distinction in that the Opponents products is simply a pre-sealed e-liquid cap without a website under this trademark name as the opponents website trademarks under the name of Phillip Morris Products, whereas the Applicants trademark is the name of the company and the name incorporated on the company’s website selling e cigarettes.”

24. As noted above, the applicant’s Counterstatement was accompanied by annexes which addressed the actual goods sold by the parties. For the avoidance of doubt, my assessment must consider all the ways in which the parties’ respective marks could be used by reference to the goods for which they are registered. Any differences between the specific products sold by the parties in practice are not relevant to that assessment. This line of argument does not, therefore, assist the applicant.

25. “Tobacco pipes” in the applicant’s specification is self-evidently identical to “pipes” in the opponent’s specification.

26. “Electronic cigarettes” and “Liquid nicotine solutions for use in electronic cigarettes” appear identically in both the opponent’s specification and the applicant’s specification.

27. “Flavourings, other than essential oils, for use in electronic cigarettes” in the applicant’s specification will overlap in user and trade channels with “electronic cigarettes” in the opponent’s specification. There will be a degree of complementarity between them. I consider these goods to be similar to at least a medium degree.

28. “Oral vaporizers for smokers” in the applicant’s specification is self-evidently identical to “oral vaporising devices for use by smokers” in the opponent’s specification.

29. “Flavourings, other than essential oils, for tobacco” in the applicant’s specification falls within the broader category of “tobacco products” in the opponent’s specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

30. “Herbs for smoking” in the applicant’s specification falls within the broader category of “tobacco substitutes (not for medical purposes)” in the opponent’s specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

31. “Cigar cases” in the applicant’s specification falls within the broader category of “smokers’ articles” in the opponent’s specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*. If I am wrong in this finding then “cigar cases” in the applicant’s specification will overlap in method of use, nature, trade channels and user with “cigarette cases” in the opponent’s specification and the goods will be highly similar.

32. “Cigarettes containing tobacco substitutes, not for medical purposes” in the applicant’s specification will overlap in trade channels, use and user with “tobacco substitutes” in the opponent’s specification. These goods may share a degree of complementarity and there may also be a degree of competition between them, as users may choose to either purchase the tobacco substitutes themselves to make up

their own cigarettes, or purchase ready-made cigarettes containing tobacco substitutes. I consider these goods to be similar to at least a medium degree.

33. "Cigarette holders" in the applicant's specification is self-evidently identical to "cigarette cases" in the opponent's specification. If I am wrong in this finding, then they will overlap in user, use, method of use, nature and trade channels and will be highly similar.

34. "Spittoons for tobacco users" in the applicant's specification falls within the broader category of "smokers' articles" in the opponent's specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

35. "Lighters for smokers" in the applicant's specification is self-evidently identical to "smokers' articles, including [...] lighters" in the opponent's specification.

36. "Cigarette filters" and "matches" appear identically in both the applicant's specification and the opponent's specification.

37. "Matchboxes" in the applicant's specification will overlap in user and trade channels with "matches" in the opponent's specification. The goods are also complementary. I consider the goods to be similar to at least a medium degree.

38. "Cigarette tubes" in the applicant's specification falls within the broader category of "cigarette paper and tubes" in the opponent's specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

39. "Filter-tipped cigarettes" in the applicant's specification falls within the broader category of "cigarettes" in the opponent's specification. These goods can, therefore, be considered identical on the principle outlined in *Meric*.

40. "Mouthpieces for cigarettes" in the applicant's specification will fall within the broader category of "parts and fittings for the aforesaid products included in class 34" in the opponent's specification, which includes parts and fittings for cigarettes. I consider these goods to be identical on the principle outlined in *Meric*.

41. “Snuff boxes” and “tobacco jars” in the applicant’s specification overlap in purpose, user, nature, method of use and trade channels with “tobacco tins” in the opponent’s specification. There will be a degree of competition between them. I consider the goods to be highly similar.

The average consumer and the nature of the purchasing act

42. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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.”

43. The average consumer for the goods will be a member of the general public (aged over 18 in relation to tobacco and e-cigarette products). The cost of the purchase is likely to be fairly low, and the goods are likely to be purchased reasonably frequently. However, the average consumer will still take various factors into account for many of the goods such as nicotine content and flavour. Consequently, I consider that a medium degree of attention will be paid during the purchasing process for most of the goods. However, I recognise that for some of the goods, such as matches, a lower degree of attention is likely to be paid.

44. Many of the goods will be stored behind a counter and to purchase them, the average consumer will need to request them from a shop assistant. For these

purchases, the purchasing process will be predominantly aural. However, once the request has been made, the average consumer will still have sight of the packaging at the point of purchase, and so visual considerations cannot be discounted. I also recognise that some of the goods can be purchased by self-selection. For these purchases, as well as those placed with online retailers, visual considerations will play a greater role in the selection process. However, as advice may still be sought from a sales assistant, aural components cannot be discounted.

Distinctive character of the earlier trade marks

45. 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-2779, 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).”

46. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of the marks can be enhanced by virtue of the use that has been made of them.

47. The opponent has not pleaded that its marks have acquired enhanced distinctiveness through use and has filed no evidence to support such a claim. Consequently, I have only the inherent position to consider. The words VEEV and VEEVS are both invented, with no particular meaning. They are not related to the goods for which the opponent's marks are registered. Consequently, I consider the earlier marks to be inherently distinctive to a high degree.

Likelihood of confusion

48. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade marks, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

49. As it is the First and Second Earlier Marks which share the greatest degree of similarity with the applicant's mark, I will consider the likelihood of confusion on the basis of these marks as they represent the opponent's best case. I have found the

marks to be visually similar to no more than a medium degree and aurally similar to a low degree. I have found the conceptual position to be neutral. I have found the earlier marks to have a high degree of inherent distinctive character. I have identified the average consumer to be a member of the general public (who is over the age of 18 for some of the goods) who will purchase the goods by both visual and aural means. I have concluded that a medium degree of attention will be paid during the purchasing process for most of the goods, but I recognise that a low degree of attention will be paid for some goods. I have found the parties' goods to vary from being identical to similar to a medium degree.

50. Taking all of the above factors into account, I consider that the visual and aural differences between the marks are sufficient to avoid them being mistakenly recalled or misremembered as each other, notwithstanding the principle of imperfect recollection. In my view, these differences are sufficient to counteract the high degree of distinctive character of the earlier marks. I consider this to be the case even where the average consumer is paying only a low degree of attention and the marks are used on identical goods. I do not consider there to be a likelihood of direct confusion.

51. Having recognised the differences between the marks, I can see no reason why the average consumer would conclude that they originate from the same or economically linked undertakings. They are not natural variants or brand extensions of each other. I do not, therefore, consider there to be a likelihood of indirect confusion.

Final Remarks

52. There was some dispute between the parties as to how the applicant's mark would be pronounced. The opponent suggests that it may be pronounced VEE-KKK. I have considered this submission in reaching the above conclusions but, on the balance of probabilities, I consider this pronunciation unlikely. The pronunciation of invented words will, of course, always be open to interpretation. However, the assessment of likelihood of confusion must take into account the way in which a disputed mark is likely to be pronounced by a significant proportion of average consumers. I have no evidence to support the opponent's submission that the applicant's mark would be

pronounced VEE-KKK. Nonetheless, I accept that there may be some average consumers who would pronounce the applicant's mark that way.

53. However, in my view, this would not amount to a significant proportion of average consumers. This does not, therefore, affect my findings regarding the likelihood of confusion above. Even if I am wrong, the pronunciation of the applicant's mark as VEE-KKK would, in my view, lead to no more than a medium degree of aural similarity with the earlier marks. This is because the ending -KKK creates a much harsher sound than the ending -VVV. That being the case, I consider that there will still be sufficient aural differences between the marks to prevent them being mistakenly recalled or misremembered as each other. Further, I see no reason why this pronunciation would lead to one mark being viewed as a brand extension or variant of the other. I do not, therefore, consider there to be a likelihood of direct or indirect confusion.

CONCLUSION

54. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

55. The applicant has been successful and is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In making this award, I have taken into account the fact that, although there was a hearing, it was very short. In the circumstances, I award the applicant the sum of **£800** as a contribution towards the costs of the proceedings. This sum is calculated as follows:

Considering the Notice of opposition and preparing a Counterstatement	£200
Preparing for and attending the hearing	£600
Total	£800

56. I therefore order Philip Morris Products S.A. to pay Shenzhen Wanna Tec. Co., Ltd the sum of £800. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 3rd day of April 2020

S WILSON

For the Registrar