

O-283-14

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION NO. 1125995  
IN THE NAME OF  
D & G FRUCHTAGENTUR IMPORT-EXPORT GMBH  
IN RESPECT OF THE TRADE MARK



IN CLASSES 29, 31 AND 35

AND

THE OPPOSITION THERETO  
UNDER NO 40053  
BY  
SOCIETE COOPERATIVE AGRICOLE D'AMOU ET DES PRODUCTEURS DE  
KIWIFRUITES DE FRANCE

## Background and pleadings

1. D & G Fruchtagentur Import-Export GmbH (“the holder”) applied to protect the International Trade Mark (“IR”) shown below (number 1125995) in the UK on 13 June 2012 (with a German priority date of 6 June 2012).



2. The IR was accepted and published in the Trade Marks Journal on 1 February 2013 for the following goods:

Class 29: *Dried fruits and vegetables.*

Class 31: *Fresh fruits and vegetables.*

Class 35: *Wholesale and retail trading services connected with the sale of cherries, apricots, figs, grapes, pomegranates, quinces, peppers, cucumbers, zucchini, aubergine.*

3. Societe Cooperative Agricole D’amou Et Des Producteurs De Kiwifruits De France (“the opponent”) opposes the IR under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier Community Trade Mark (“CTM”) OSCAR (number 4007101). Although the CTM currently stands registered for “Fresh fruits”, the opponent’s statement of use on the statutory form giving notice of opposition (Form TM7) states that it has used the mark for “Fresh fruits, namely kiwi fruits and apples”. Furthermore, the opponent’s statement of case, attached to the notice of opposition, states that it has used the mark for kiwi fruits and apples (and does not refer to any other fruits), at paragraph 8. The effect of using the qualifier “namely” is that the claim is restricted to the goods which follow “namely”, as per the Registrar’s Manual of Trade Mark Practice<sup>1</sup>:

Note that specifications including “namely” should be interpreted as only covering the named Goods, that is, the specification is limited to those goods. Thus, in the above “dairy products namely cheese and butter” would only be interpreted as meaning “cheese and butter” and not “dairy products” at large. This is consistent with the definitions provided in Collins English Dictionary which states “namely” to mean “that is to say” and the Cambridge International Dictionary of English which states “which is or are”.

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<sup>1</sup> Classification Addendum, under the letter “I”, heading “Including, for example, namely, as well as, in particular, specifically i.e.”.

The use of “namely” in the statement of use, the interpretation of which is supported by the opponent’s statement of case, paragraph 8, means that kiwi fruits and apples are the goods which are relied upon in this opposition, and not fresh fruit at large.

4. The opponent argues that the respective goods are either identical or similar and that the marks are similar. In particular, the opponent argues that the IR’s dominant element is OSCAR, which represents the entirety of the opponent’s mark, and BLANCO would be understood by UK consumers as meaning ‘white’. The opponent submits that, therefore, Blanco would not be seen as having trade mark significance. It claims that there is a likelihood of confusion between the parties’ marks.

5. The holder filed a counterstatement denying the claims made and requesting that the opponent provide proof of use of its earlier trade mark.

6. Only the opponent filed evidence in these proceedings. The holder filed written submissions. No hearing was requested and so this decision is taken following a careful perusal of the papers.

## **Evidence**

7. The opponent’s evidence comes from Patrick Piquin, who has been the opponent’s General Director since 1996. His two statements are made from his own knowledge or from the opponent’s records, to which he has full access. Mr Piquin states that the purpose of his evidence is to provide the proof of use requested by the holder, the relevant period of which is the five year period ending on the date of publication of the IR (i.e. from 2 February 2008 to 1 February 2013). Mr Piquin states that as the opponent’s mark is a CTM, he provides evidence of use in a number of EU member states. The main points from his evidence are set out below.

- The first use of OSCAR by the opponent was in Germany in 1980, in France in 1980 and in Spain in 1981. This information is shown in Exhibit PPI, which is print from the opponent’s website about its history.
- Mr Piquin states that kiwi fruit and apples have been sold in the last five years<sup>2</sup> in Belgium, Denmark, France, Germany, Ireland, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, Sweden and in the UK.
- The turnover figures for 2006 to 2012 in Euros are:

2006 – 5,764,653  
2007 – 7,280,593  
2008 – 8,186,707  
2009 – 6,742,031  
2010 – 7,016,736,  
2011 – 5,854,570  
2012 – 6,059,080

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<sup>2</sup> His witness statement is dated 17 October 2013.

- Exhibit PP2 shows the turnover figures by country. I note that the UK figures from 2008 to 2013, in Euros, are:

2008 – 193,950  
2009 – 25,200  
2010 – 5,760  
2011 – 139,704  
2012 – 23,040  
2013 – 65,979

Belgium, Spain and France have much larger sales figures than the UK and the other countries listed above. Mr Piquin confirms in his second witness statement that the turnover figures relate exclusively to OSCAR branded kiwi fruits and apples.

- A company called Prim'Land is a wholly-owned marketing subsidiary of the opponent. Exhibit PP4 shows 43 invoices from this company dating from January 2008 to 28 January 2013 in respect of sales to businesses in Germany, Belgium, Luxembourg, France, Netherlands, Spain, the UK, Lithuania and Sweden. The invoices refer to kiwi (fruits). Page 44 of the exhibit is an invoice to a UK customer totalling €28,440 on 6 December 2012. The other 42 invoices are to the remaining countries. OSCAR appears on the invoices, including the UK invoice, alongside varietal names of kiwi fruit.
- Exhibit PP5 shows 43 invoices from Prim'Land dating from 15 February 2008 to 28 January 2013. These invoices relate to sales to customers in Spain, Portugal, Luxembourg and Germany. The invoices refer to apples and OSCAR appears on the invoices, alongside varietal names of apples.
- Each year, 4-6 million kilos of kiwi fruits and apples were sold between 2008 and 2012. Advertising expenditure figures have fluctuated, but were €105,026 in 2012 (the year prior to the publication of the IR).
- Exhibit PP6 shows a selection of promotional leaflets bearing a copyright date of March 2010. There is a leaflet in English, and also leaflets in other European languages. The mark is shown like this on the leaflet:

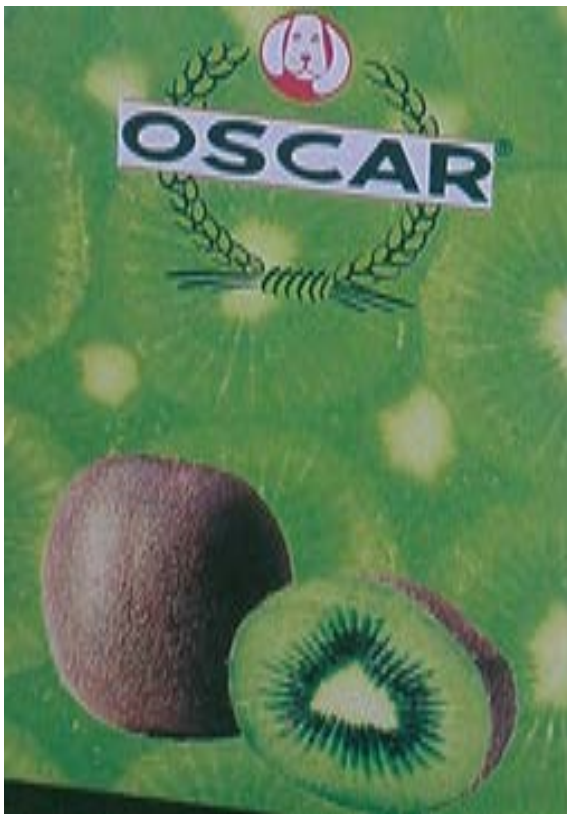


Mr Piquin's second witness statement suggests that this form of the mark was in use from 2010.

The mark is shown like this on a picture of a kiwi fruit:



- Pages 119 and 120 of exhibit PP7 show use on packaging like this:





All the marketing and packaging evidence shows use of pictures of kiwi fruit or slices of kiwi fruit.

- Exhibit PP8 shows approved label artwork dated 20 October 2012. Mr Piquin states that the label is still in use (at the date of his statement). The artwork is shown below:



The artwork is the same as the label shown above on a kiwi fruit.

8. Mr Piquin exhibits (PP13) a copy of a cancellation action taken by the holder against the opponent's earlier CTM. The relevant dates for proof of use in the CTM proceedings were 24 January 2008 to 23 January 2013, so almost identical to these proceedings, bar a few days. The decision was issued on 30 January 2014, revoking part of the opponent's previously wider specification<sup>3</sup> from 24 January

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<sup>3</sup> The specification of goods prior to partial revocation was "Class 29: Preserved, frozen, dried, and cooked fruits and vegetables; jams and jellies; Class 31: Fresh fruits and vegetables".

2013, allowing only “Fresh fruits” to remain registered. The date of revocation post-dates the date the holder requested protection in the UK, but is a few days before the IR was published in the UK. Although the wider specification was extant on the register on the date on which protection of the IR was requested, the opponent has made a statement of use which is limited to kiwi fruits and apples, and the holder has put the opponent to proof of that statement. As a consequence, kiwi fruit and apples are the only goods which may be relied upon by the opponent. The description of the evidence in the decision by the Office for Harmonisation in the Internal Market (“OHIM”) suggests that most of the evidence filed at OHIM is very similar to that filed in the current proceedings; however, there was more evidence filed in relation to apples at OHIM.

## **Decision**

### **Proof of use**

9. Section 6A of the Act states:

6A. - (1) This section applies where -

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if -

- (a) within the period of five years ending with the date of publication of the application the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
- (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

- (a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

10. The enquiry under section 6A of the Act is essentially identical to that set out under section 46. In *Stichting BDO and others v BDO Unibank, Inc and others* [2013] EWHC 418 (Ch), Arnold J commented on the case law of the Court of Justice of the European Union (“CJEU”) in relation to genuine use of a trade mark:

“In *SANT AMBROEUS Trade Mark* [2010] RPC 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159 and Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759 (to which I have added references to Case C-416/04 P *Sunrider v OHIM* [2006] ECR I-4237):

“(1) Genuine use means actual use of the mark by the proprietor or a third party with authority *Ansul*, [35] and [37].

(2) The use must be more than merely 'token', which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider*, [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional



items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22]-[23]; *Sunrider*, [70]-[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]"

11. The assessment can only be made on the basis of the evidence filed by the opponent, because Section 100 of the Act states:

"If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

12. The correct approach to assessing the opponent's collection of exhibits and the witness statements is to view the picture as a whole, including whether individual exhibits corroborate each other. In Case T-415/09, *New Yorker SHK Jeans GmbH & Co. KG v OHIM*, in relation to the need to get a sense from the overall picture of the evidence, notwithstanding that individual pieces may not, of themselves, be compelling, the General Court ("GC") said:

"53 In order to examine whether use of an earlier mark is genuine, an overall assessment must be carried out which takes account of all the relevant factors in the particular case. Genuine use of a trade mark, it is true, cannot be proved by means of probabilities or suppositions, but has to be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned (*COLORIS*, paragraph 24). However, it cannot be ruled out that an accumulation of items of evidence may allow the necessary facts to be established, even though each of those items of evidence, taken individually, would be insufficient to constitute proof of the accuracy of those facts (see, to that effect, judgment of the Court of Justice of

17 April 2008 in Case C-108/07 P *Ferrero Deutschland v OHIM*, not published in the ECR, paragraph 36).<sup>4</sup>

13. The opponent has provided various types of evidence. There are eighty or so invoices which show the mark in its registered (word only) form in relation to kiwi fruits and apples, in major EU countries. As the earlier mark is a CTM, its use in the Community which must be assessed. This is not limited to UK use<sup>5</sup>. The invoices span the relevant period, are regular in frequency, and are for significant amounts. This is backed by Mr Piquin's turnover figures, which he confirms are in respect of OSCAR branded kiwi fruits and apples. They are further backed by the figures showing the volume sold by weight. The turnover figures and the volume sold by weight figures are on a scale which is more than sufficient to establish the preservation or creation of a market for the goods, and the invoices demonstrate that sales have been frequent and regular in nature, during the relevant period, across a number of member states.

14. In *Il Ponte Finanziaria SpA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-234/06 P, the CJEU stated:

“73 The question whether use is sufficient to maintain or create market share for the goods or services protected by the mark thus depends on several factors and on a case-by-case assessment. The frequency or regularity of the use of the trade mark is one of the factors which may be taken into account (see *Sunrider v OHIM*, paragraph 71; see also, to that effect, *La Mer Technology*, paragraph 22).

74 By stating, at paragraph 35 of the judgment under appeal, that the evidence is very limited with regard to 1994 and non-existent for the period from 1996 to 1999, the Court of First Instance did not in any way require the appellant to establish continuous use of the trade mark THE BRIDGE (No 642952) throughout the whole of the period in question. In accordance with the Court's case-law cited in paragraphs 72 and 73 of the present judgment, the Court of First Instance examined whether that trade mark had been put to genuine use during that period. To that end, the Court of First Instance assessed, at paragraphs 32 to 36 of the judgment under appeal, whether the scale and frequency of use of that mark were capable of demonstrating that it was present on the market in a manner that is effective, consistent over time and stable in terms of the configuration of the sign.”

15. This brings me to consider the configuration of the sign used. The images in the evidence show the word OSCAR with additional matter. The Cancellation Division at OHIM, in the decision referred to earlier, said the following about the way in which the mark appeared (although the reproduction of the images in the OHIM decision

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<sup>4</sup> See also the comments of Mr Geoffrey Hobbs QC, sitting as the appointed person in *Brandconcern BV v Scooters India Limited* (“Lambretta”) BL O/065/14, referring to this case from the GC.

<sup>5</sup> *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11: “Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to ‘genuine use in the Community’ within the meaning of that provision.”

are not particularly clear, it can be seen that the images in the OHIM evidence are those in the evidence adduced in the current proceedings):

'Nature of use' in the context of Rule 22(3) CTMIR further requires evidence of use of the mark as registered, or of a variation thereof which, pursuant to Article 15(1)(a) CTMR, does not alter the distinctive character of the contested Community trade mark.

The purpose of Article 15(1)(a) CTMR, which avoids imposing strict conformity between the form of the trade mark used and the form in which it was registered, is to allow its proprietor, on the occasion of its commercial exploitation, to make variations in the signs which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned (see judgment of 23/02/2006, T-194/03, 'Bainbridge', paragraph 50).

It is appropriate to consider whether the form of the trade mark used contains differences which affect its distinctive character or whether, despite the differences, the mark used and the contested CTM have the same distinctive character. Firstly, it is necessary to clarify the distinctive character of the contested CTM. Secondly, it must be considered whether or not the mark as used alters this distinctive character.

The evidence shows that the CTM was used in the invoices and leaflets as a word

mark (i.e. as it is registered) and in a figurative form like



[REDACTED]



[REDACTED]

or combined with other descriptive words such as GOLDRUSH, POMME, RUBINETTE or KIWI on the packaging or in some leaflets or advertisements. These terms do not alter the distinctive character of the mark in accordance with Article 15 CTMR, since they are descriptive and widely used to designate apple varieties or simply kiwifruits.

The Cancellation Division considers that the figurative elements do not alter the distinctiveness of the CTM and do not visually dominate the word, having mainly a decorative role.

Consequently, since the word 'OSCAR' is clearly legible, its stylisation being none or minimal, and still the only distinctive verbal element of the signs, the Cancellation Division considers that the criterion *nature of use of the mark as registered* is fulfilled.

16. In *Bud/Budweiser Budbrau* [2003] RPC 25, Lord Walker of Gestingthorpe said:

“43 ...The first part of the necessary inquiry is, what are the points of difference between the mark as used and the mark as registered? Once those differences have been identified, the second part of the inquiry is, do they alter the distinctive character of the mark as registered?

....

45 ... It is for the registrar, through the Hearing Officer's specialised experience and judgment, to analyse the “visual, aural and conceptual” qualities of a mark and make a “global appreciation” of its likely impact on the average consumer, who “normally perceives a mark as a whole and does not proceed to analyse its various details.”

17. Mr Richard Arnold QC, sitting as the Appointed Person in *REMUS* (BL O/061/08) stated:

“35. I do not consider that the subsequent developments discussed above undermine the correctness of the view which I articulated in *NIRVANA*<sup>[6]</sup> as follows:

‘33. .... The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

‘34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all.’”

18. In *OAQ “Alfa-Bank v Alpha Bank A.E.* [2011] EWHC 2021 (Ch), although Briggs J cautioned against elevating *NIRVANA* to a statutory test, observing that there are bound to be occasions where the addition of a word or words would not alter the distinctive character of the mark as registered, he stated that the *NIRVANA* formula was:

“a perfectly sound and authoritative unpicking of the test laid down in section 6(A)(4)(a) of the Act”.

19. In making my assessment of whether the use shown in the evidence complies with section 6(A)(4)(a), I will follow the *NIRVANA* formula which is, in essence, the enquiry articulated by Lord Walker. I need to ascertain the differences between the marks and evaluate whether the differences alter the distinctive character of the mark as registered. In order to answer that question, I also need to determine the distinctive character of the mark in its registered form. This will be my starting point.

20. The registered mark is OSCAR, which is a well-known male forename. OSCAR, for fruit, is not allusive or descriptive in any way and has a good degree of distinctive character (although not the highest level because it is a personal name).

21. The next point in the enquiry is to establish the differences between the mark used and the mark in the form in which it is registered. These can be seen in the table below:

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<sup>6</sup> BL O/262/06

Mark registered	Variant marks used
<p>OSCAR</p>	<p>1.</p>  <p>2.</p>  <p>3.</p>  <p>4.</p> 

22. All of the marks used have OSCAR in a prominent position, some with a dog's face, some with variations on a laurel wreath, and sometimes including references to kiwi fruits. I note that the top mark in the table is the least altered from the registered form and is also the mark which appears on the actual goods, as a label affixed to the kiwi fruits. The words "kiwi fruits" and the number will be seen as purely descriptive or non-distinctive matter, without trade mark significance. Putting the word OSCAR in an oval and underlining it does not alter the distinctive character of the mark in its registered form. This constitutes the sort of variation envisaged by the CJEU in *Bernhard Rintisch v Klaus Eder* Case C-533/11:

"21 The purpose of art.10(2)(a) of Directive 89/104 , which avoids imposing a requirement for strict conformity between the form used in trade and the form in which the trade mark was registered, is to allow the proprietor of the mark, in the commercial exploitation of the sign, to make variations in the sign,

which, without altering its distinctive character, enable it to be better adapted to the marketing and promotion requirements of the goods or services concerned.”

23. In relation to the second, third and fourth variants in the table, the word OSCAR is the dominant element in all of them, being positioned centrally. In the third and fourth variant, OSCAR is superimposed upon the wreath, extending either side of the ‘circle’ of the mark. This puts me in mind of the configuration considered in *GW Padley Vegetables Limited v Societe Nationale Des Chemins De Fer Francais SNCF* (“Orient Express”), a decision by Ms Anna Carboni, sitting as the Appointed Person<sup>7</sup>. In that case, the registered mark was ORIENT EXPRESS, whereas the use being considered was:



24. The device was found not to alter the distinctive character of the mark in its registered, word-only form, but the additional words Venice Simplon did alter the mark’s distinctive character. However, in the present case, apart from descriptive words, the only word in variants two, three and four is OSCAR. These variants are still “OSCAR” marks. The word OSCAR has the same level of distinctive character when used in the way it appears as part of the more complex marks in the table. The devices do not alter the distinctive character of the mark in its registered form. Consumers will see the variant marks as belonging to the opponent. This conclusion is supported by the CJEU’s ruling in Case C-252/12, *Specsavers International Healthcare Ltd, Specsavers BV, Specsavers Optical Group Ltd, Specsavers Optical Superstores Ltd v Asda Stores Ltd*:

“22. For a trade mark to possess distinctive character for the purposes of Regulation No 207/2009, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (see, to that effect, Joined Cases C-468/01 P to C-472/01 P *Procter & Gamble v OHIM* [2004] ECR I-5141, paragraph 32; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-311/11 P *Smart Technologies v OHIM* [2012] ECR I-0000, paragraph 23).

23. That distinctive character of a registered trade mark may be the result both of the use, as part of a registered trade mark, of a component thereof and of the use of a separate mark in conjunction with a registered trade mark. In both cases, it is sufficient that, in consequence of such use, the relevant class of persons actually perceive the product or service at issue as originating from a given undertaking (see, by analogy, Case C-353/03 *Nestlé* [2005] ECR I-6135, paragraph 30).”

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<sup>7</sup> BL O/299/08

25. Even without the use of the second, third and fourth variants in the table shown above, I nevertheless consider that variant number one falls squarely within the ambit of section 6(A)(4)(a) of the Act as an acceptable variant. The use of variant number one, and the word-only use on invoices and the website, are sufficient to qualify as genuine use of the mark in the form in which it was registered. This is particularly so when it is considered that variant one appears on the goods themselves; use of a mark on goods is clear use in relation to the goods.

26. I note that the opponent's submissions dated 10 March 2014, drawing my attention to the OHIM decision, point out that the opponent has proved use on "fresh fruits" in that case. However, for the reasons given earlier in this decision, the opponent may only rely upon its earlier mark for kiwi fruits and apples, which is how it has framed its statement of use. Although there is more evidence about kiwi fruits, the 43 invoices in exhibit PP5 are solely in relation to apples. The opponent has demonstrated genuine use of its mark in the EU in relation to kiwi fruits and apples.

### **Section 5(2)(b) of the Act**

27. Section 5(2)(b) of the Act states:

"(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."

28. The leading authorities which guide me in relation to section 5(2)(b) of the Act are from the CJEU: *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) C-334/05 P (LIMONCELLO)*. It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors; *Sabel BV v Puma AG*,

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v Puma AG*,

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v Puma AG*,

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

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

(g) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

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

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

(j) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v Puma AG*,

(k) further, the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; *Marca Mode CV v Adidas AG and Adidas Benelux BV*,

(l) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*.

#### Average consumer and the purchasing process

29. The average consumer is reasonably well informed and reasonably circumspect and observant, but his level of attention is likely to vary according to the category of goods or services. Although I bear in mind that there may be an aural aspect to the purchasing process (although it is more likely that the fruits, rather than the mark, will



be asked for, such as in a greengrocer's), the goods will be purchased primarily visually after examination of the fruits themselves, and of packaging, shelving labels, websites and advertisements. These are not expensive goods. Fruit is an everyday, or at least a weekly, purchase. The fruit may be examined to make sure that it is fresh enough and not blemished, but there will not be a great deal of attention paid to the purchase.

### Comparison of goods

30. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

“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.”

31. ‘Complementary’ was defined by the General Court (“GC”) in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-325/06*:

“82 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...”

32. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] R.P.C. 281 are:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) 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;
- e) 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.

33. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

"... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

34. The table below sets out the parties' competing specifications:

<b>Opponent</b>	<b>Holder</b>
Class 31: <i>Kiwi fruits and apples</i>	Class 29: <i>Dried fruits and vegetables.</i>  Class 31: <i>Fresh fruits and vegetables.</i>  Class 35: <i>Wholesale and retail trading services connected with the sale of cherries, apricots, figs, grapes, pomegranates, quinces, peppers, cucumbers, zucchini, aubergine.</i>

35. As per the judgment of the GC in *Gérard Meric v OHIM* Case T-133/05, goods and services can be considered as identical when the goods and services of the earlier mark are included in a more general category, included in the specification of the trade mark application. Vice versa, if the goods or services of the application are included in a more general category included in the specification of the earlier mark, they must be identical. Applying this to the parties' specifications, the holder's *fresh fruits* are identical to the opponent's goods.

36. In relation to *fresh vegetables*, these are not strictly of the same nature as the opponent's goods, but they are both fresh produce for eating, they share trade channels and users, and they are sold cheek by jowl in supermarkets, in greengrocers' shops and on market stalls. They are not in competition and are not complementary. There is a modest degree of similarity between the holder's *fresh vegetables* and the opponent's goods. There is no similarity between the opponent's kiwi fruits and apples and the holder's *dried vegetables*. They do not share the same nature and are, generally, not sold nearby to one another in supermarkets (and it is not my experience that dried vegetables are routinely sold by greengrocers). Dried vegetables, such as sun-dried tomatoes and mushrooms, tend to be sold in packets with other ranges of preserved ingredients. They are not in competition with the opponent's goods and are not complementary.

37. There is a good degree of similarity between the opponent's goods and the holder's *dried fruits*. These are in competition (e.g. the choice to buy apple flakes in a packet or a fresh apple), they share users, purpose, trade channels and are frequently sold near to one another in supermarkets (such as snacking packets/boxes of raisins, and boxes of dates).

38. The issue of similarity between retail services and goods was considered by the GC in *Oakley, Inc v OHIM*, Case T-116/06. The court's judgment in this cancellation action dealt with the similarity between goods and a retail services specification which was both unrestricted and restricted in scope. The conflict was between an earlier mark which was registered for goods in classes 18 and 25 and a later mark which had been registered for "Retail and wholesale services, including on-line retail store services; retail and wholesale of eyewear, sunglasses, optical goods and accessories, clothing, headwear, footwear, watches, timepieces, jewellery, decals, posters, athletic bags, backpacks and knapsacks, and wallets'. The Court said:

"49 Contrary to what is claimed by the applicant, the fact that the retail services are provided at the same sales points as the goods is a relevant criterion for the purposes of the examination of the similarity between the services and goods concerned. In that regard, it should be pointed out that the Court has held, in paragraph 23 of Canon, paragraph 16 above, that, in assessing the similarity of the goods and services in question, all the relevant factors characterising the relationship between the goods or services should be taken into account. It stated that those factors include their nature, purpose, method of use, and whether they are in competition with each other or are complementary, meaning that it did not in any way regard those factors are the only ones which may be taken into account, their enumeration being merely illustrative. The Court of First Instance therefore concluded from this that other factors relevant to the characterisation of the relationship which may exist between the goods or services in question may also be taken into account, such as the channels of distribution of the goods concerned (Case T-443/05 *El Corte Inglés v OHIM– Bolaños Sabri (PiraÑAM diseño original Juan Bolaños)* [2007] ECR II-0000, paragraph 37; see also, to that effect, Case T-169/03 *Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 65, upheld on appeal in Case C-214/05 *P Rossi v OHIM* [2006] ECR I-7057; and Case T-364/05 *Saint-Gobain Pam v OHIM – Propamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 95).

50 Furthermore, contrary to the applicant's assertion, which is moreover unsubstantiated, that, as the majority of the goods are sold in supermarkets, consumers do not attach too much importance to the point of sale when making up their mind whether goods share a common origin, it must be held that, as contended by OHIM, the manufacturers of the goods in question often have their own sales outlets for their goods or resort to distribution agreements which authorise the provider of the retail services to use the same mark as that affixed to the goods sold.

51 It was therefore correct, in paragraph 22 of the contested decision, to take into account, when comparing the goods and the services covered by the trade marks in dispute, the fact that those goods and services are generally

sold in the same sales outlets (see, in that regard, SISSI ROSSI, paragraph 49 above, paragraph 68, and PiraÑAM diseño original Juan Bolaños, paragraph 49 above, paragraph 37).

...

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.

...

62 It follows from all of the foregoing that the Board of Appeal was right to consider that services consisting of 'retail and wholesale of clothing, headwear, footwear, athletic bags, backpacks and knapsacks and wallets', and 'retail and wholesale services, including on-line retail store services', are similar to the goods covered by the earlier trade mark."

39. In *Major League Baseball Properties, Inc v Giant UK Limited* ("Giant"), BL O/264/14, Ms Anna Carboni, sitting as the Appointed Person, considered *Oakley* in the context of a case involving the comparison of the retailing of bicycles against clothes. She said:

"30. Mr Onslow submitted that these paragraphs were predicated on identity between the goods of the earlier mark and the goods covered by the retail services of the later mark and that paragraph 49, in particular, is *obiter* and wrong, or is limited to cases of identical goods. While it is true that this was

the scenario facing the General Court, there is nothing in the *Oakley* decision that persuades me that it is wrong to consider the channels of distribution and sales outlets through which the relevant goods and services are provided in the absence of identity. Indeed, the authorities cited in paragraph 49 of *Oakley* do not all involve identity. Further, as Mr Gymer pointed out, and as set out in *Oakley* itself, the CJEU in *Canon* and subsequent cases has made it clear that, in assessing the similarity of the goods and services in question, all the relevant factors characterising the relationship between the goods or services should be taken into account.

31. Having said this, in the modern age of retail stores, particularly on-line retailers, that sell almost anything one can envisage wanting to buy, trade mark tribunals have to be careful not to give undue weight to the existence of an overlap in the channels of distribution and sales outlets, particularly in the absence of any specific evidence on the point.

...

33. I accept Mr Gymer's submissions and the hearing officer's finding of a potential overlap between the retail outlets for clothing covered by the Earlier Mark (particularly a sub-set comprising clothing for cycling) and those through which retail services for bicycles and bicycle accessories are provided, and I reject Mr Onslow's submission that this overlap is irrelevant. However, I consider that this is only a weak indicator of overall similarity in the light of the obvious differences between goods and retail services highlighted above.

...

44. I reject Mr Onslow's suggestion that complementarity can only be found where there is identity of goods with the subject goods of retail services, and only in those circumstances can the relevant goods and retail services be found to be similar. In my view, it must be a question of fact to be assessed in each case, as the Courts have done in countless cases, including the General Court in *Oakley* itself."

40. Retailing of fruit and fruit itself do not share nature, intended purpose or method of use. However, the one is indispensable for the other. Retailing of fruit is similar to fruit because the goods and services are complementary and share similar trade channels, particularly in the case of greengrocers and market stalls, which specialise in the retailing of fruit (and vegetables). Such a trade is removed from the sort of trade (especially online trade) envisioned in *Giant* (paragraph 31), such as Amazon. I bear in mind that the list of fruits retailed in the holder's class 35 specification does not specifically include kiwi fruits and apples. Nevertheless, these are all common fruits which would be sold in the same, common retail environment. Bearing in mind all the relevant factors characterising the relationship between the opponent's goods and the holder's services which should be taken into account, there is a reasonable degree of similarity between the opponent's goods and with the holder's *wholesale and retail trading services connected with the sale of cherries, apricots, figs, grapes, pomegranates and quinces*. Retail of vegetables is part and parcel of the fruit and

veg trade. Unlike the comparison between retail of bicycles and clothing, where the goods themselves are very different, there is some level of similarity between the opponent's goods and vegetables, which are the subject of the holder's retail service. Again, the nature, intended purpose and method of use between the service and the goods are different. This time, there is not the complementary relationship between the goods and the service. The high point of similarity is the fact that, as explained above, there is a close connection in terms of channels of trade and proximity in retail between fruit and vegetables. I bear in mind that in the *Giant* case an overlap in trade channels was considered to be only a weak indicator of similarity when all other points of the *Canon* test pointed the other way. However, as indicated in *Giant*, all relevant factors should be taken into account. In the specific circumstances of the way in which the trade in fruit and vegetables is carried out, I consider that there is a low degree of similarity between the opponent's goods and the holder's *wholesale and retail trading services connected with the sale of peppers, cucumbers, zucchini and aubergine*.

Comparison of trade marks

41. The marks to be compared are:

Earlier mark	IR
OSCAR	

42. The authorities cited earlier in this decision direct that, in making a comparison between the marks, I must compare each mark's visual, aural and conceptual characteristics. I have to decide which, if any, of their components I consider to be distinctive and dominant, without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details, as per *Sabel BV v Puma AG*, paragraph 23:

“That global appreciation of the visual, aural or conceptual similarity of the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their dominant and distinctive components.”

43. The opponent's mark is reproduced as the dominant element of the holder's mark. OSCAR is dominant because (i) it is emboldened compared to BLANCO; (ii) OSCAR is considerably larger than BLANCO and (iii) OSCAR is the first word which will be read in the mark because of its position. There is a good degree of visual similarity owing to the size and prominence of OSCAR in the IR, notwithstanding the additional word BLANCO, because BLANCO is more subordinate. The shading and the lined border in the IR are negligible. The font style of OSCAR in the IR is unremarkable and does not create any distance between the marks. In any event, the GC, in case T-346/04, *Sadas SA v OHIM*, stated that nothing prevents a word mark from being used in any script. Aurally, there is a reasonable degree of similarity because it is OSCAR which will be heard first when the IR is spoken. Both marks share the concept of the male forename OSCAR, although there is an added

concept in the IR as a result of BLANCO, which is either likely to evoke something which is white, or will be seen as an invented word. BLANCO is not linked in meaning to OSCAR so, whether or not it will be seen as evoking white, there is a reasonable level of conceptual similarity between the marks owing to both marks containing the name OSCAR.

#### Distinctiveness of the earlier mark

44. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*<sup>8</sup> 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).”

45. Although the opponent’s evidence shows a healthy level of turnover in the EU, where the UK is concerned, the figures are not as substantial as they are for e.g. France, Germany and Spain. It is from the UK consumer’s perspective that I must assess the distinctive character of the opponent’s mark. The evidence only shows one invoice to a UK customer and the turnover figures for the UK fluctuate quite considerably (figures are in Euros):

2008 – 193,950  
2009 – 25,200  
2010 – 5,760  
2011 – 139,704  
2012 – 23,040  
2013 – 65,979

46. I conclude from the evidence that the opponent is not entitled to claim an enhanced level of distinctive character through use of the mark in the UK. OSCAR does not allude to or describe the goods. It is not at the highest level of

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<sup>8</sup> Case C-342/97

distinctiveness because it is a not uncommon personal name (personal names are frequently used as designators of origin). However, OSCAR is inherently distinctive for kiwi fruits and apples to a good degree.

### Likelihood of confusion

47. In deciding whether there is a likelihood of confusion between the marks, I must weigh the various factors I have identified. This includes keeping in mind the whole mark comparison, because the average consumer perceives trade marks as wholes and rarely has the opportunity to compare marks side by side, relying instead upon the imperfect picture he has of them in his mind. It also includes the principle of interdependency, whereby a lesser degree of similarity between the goods/services may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*). In these proceedings, I have found that the parties' goods/services are either not similar, or range from identical to similar to a low degree. Where goods/services are not similar, there can be no likelihood of confusion (*Canon*, paragraph 22). Accordingly, the opposition fails in respect of *dried vegetables*.

48. A factor which I should consider is the 'beginnings of marks' rule of thumb, which allows for the propensity of the average consumer to notice, particularly, the beginnings of marks because that is what is seen or heard first<sup>9</sup>. It is a rule of thumb, and it does not always follow, but, in the current case, the position and size of OSCAR in the holder's mark is important because it will be the first element seen or spoken.

49. The holder's mark is different to the opponent's mark but it has the identical dominant and distinctive element in common: OSCAR. I, of course, bear in mind that the assessment means that I should not simply take just this component of the holder's mark and compare it with the opponent's mark. It is an assessment of the whole mark. I disagree with the opponent's claim that Blanco would not be given trade mark significance; it may not be recognised as meaning white and, even if it is, it is unclear how Blanco might describe the goods so directly that it would cause no attention to be paid. The two halves of the holder's mark, OSCAR and BLANCO, represented in different fonts and in different sizes, on different lines, do not 'hang together' as a composite phrase; rather they are two separate words. It seems to me that the OSCAR has a significance which is independent of BLANCO in the holder's mark. In *Aveda Corporation v. Dabur India Limited* [2013] EWHC 589 (Ch), Arnold J said, at paragraph 45:

"I entirely accept the basic proposition which the Court of Justice has repeated many times, namely that the assessment of likelihood of confusion must be made by considering and comparing each of the signs as a whole. As the Court of Justice recognised in *Medion v Thomson*, however, there are situations in which the average consumer, while perceiving a composite sign as a whole, will recognise that it consists of two signs one or both of which has a significance which is independent of the significance of the composite whole. Thus when the well-known pharmaceutical company Glaxo plc

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<sup>9</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02.



acquired the well-known pharmaceutical company Wellcome plc, the average consumer of pharmaceutical goods confronted with the composite sign GLAXO WELLCOME or GLAXOWELLCOME would perceive the significance of both the whole and its constituent parts and conclude that this was an undertaking which combined the two previously separate undertakings (see *Glaxo Group Ltd v Glaxowellcome Ltd* [1996] FSR 388). The essence of the Court of Justice's reasoning in *Medion v Thomson* is that an average consumer of leisure electronic products confronted with the composite sign THOMSON LIFE could perceive both the whole and its constituent parts to have significance and thus could be misled into believing that there was a similar kind of connection between the respective undertakings.

50. In my view, the factors I have assessed throughout this decision lead to a conclusion that the average consumer is likely to believe that the goods and services derive from companies which are linked economically, or that BLANCO denotes an extension to the OSCAR brand, which is distinctive inherently to a good level. This means that there is a likelihood of confusion ('indirect confusion'). I say this even in relation to the opponent's goods and the holder's vegetable retailing service, where I found a low degree of similarity, because of the close relationship between retailing of vegetables, retailing of fruit and the goods which are the subject of the retailing. I consider this to be the case for all the goods and services, which are purchased or used without a great deal of attention. That is not to say that the marks will be imperfectly recalled, but the lower level of attention means that there will not be a pause on the part of the average consumer to wonder whether there is a connection. A connection will be assumed. The opposition succeeds in full.

## Outcome

**51. The opposition succeeds except in relation to *dried vegetables*. The request for protection in the UK is refused for all goods except for *dried vegetables*. The IR may proceed to protection for *dried vegetables*.**

## Costs

52. The opponent has been largely successful. It is entitled to the following contribution towards its costs, according to the published scale in Tribunal Practice Notice 4/2007, with a set-off to take account of the goods for which the opposition did not succeed, which accounted for about 20% of the holder's specification:

Preparing a statement and considering the counterstatement	£300
Opposition fee	£200
Evidence and considering the holder's written submissions	£600
Off-set @ 20%	-£220

**Total:**

**£880**

53. I order D & G Fruchtagentur Import-Export GmbH to pay Societe Cooperative Agricole D'amou Et Des Producteurs De Kiwifruits De France the sum of £880. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 25th day of June 2014**

**Judi Pike  
For the Registrar,  
the Comptroller-General**