

O-310-14

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION 2608384
BY MI BRANDS (GB) LIMITED
TO REGISTER THE FOLLOWING TRADE MARK IN CLASS 32:**



AND

OPPOSITION THERETO (NO. 400720) BY BRITISH SUGAR PLC

The background and the pleadings

1) The protagonists to this dispute are MI Brands (GB) Limited (the “applicant”) on the one hand and British Sugar Plc (the “opponent”) on the other. Put simply, the opponent opposes the registration of the applicant’s trade mark under section 5(2)(b) of the Trade Mark Act 1994 (“the Act”), claiming a likelihood of confusion with an earlier trade mark it owns. The competing marks are:

The application	The earlier mark
<p data-bbox="250 562 781 594">UK application 3000231 for the mark:</p>  <p data-bbox="250 747 613 779">Registration is sought for:</p> <p data-bbox="250 821 808 1108">Class 32: Aerated fruit juices; Aerated juices; non-aerated fruit juices; non-aerated juices; mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; Smoothie drinks; Mineral and carbonated waters; Fruit flavoured non-alcoholic drinks; Carbonated non-alcoholic drinks</p> <p data-bbox="250 1150 808 1253">The application was filed on 2 April 2013 and published in the Trade Marks Journal on 17 May 2013.</p>	<p data-bbox="829 562 1369 594">UK registration 2608384 for the mark:</p> <p data-bbox="829 667 1130 730">CRUSHA</p> <p data-bbox="829 772 1369 846">The mark is relied upon in so far as it covers the terms:</p> <p data-bbox="829 877 1369 1087">Class 32: Minerals and aerated waters and other non-alcoholic drinks; preparations for making beverages, syrups for making milkshakes; fruit drinks and fruit juices.</p> <p data-bbox="829 1129 1369 1234">The mark was filed on 26 January 2012 and it completed its registration process on 27 April 2012.</p>

2) The opponent claims that the goods are the same or similar. It claims that the marks are highly similar given that they start with the same five letters and that beginnings of marks are generally more important. It claims that the stylisation in the applied for mark is minor and does not assist in distinguishing. The opponent considers that because of all this, there is a likelihood of confusion. The opponent also pleaded a ground under section 5(4)(a), but this ground was deemed withdrawn because no evidence was filed in support of it.

3) Given the date the earlier mark completed its registration process, it is not subject to the requirement to prove genuine use¹, with the consequence that the earlier mark may be relied upon for all of the goods for which it is registered/relied upon. The applicant filed a counterstatement denying the claim. The applicant states:

¹ Proof of use is only required if the earlier mark completed its registration process more than five years prior to the date of publication of the applicant’s mark; section 6A of the Act refers.

Crushd is a fruit smoothie drink made from 100% whole fruit

Crushd is sold in the chilled counter with other fruit juices and nowhere near chilled milk or milk-based drinks, so there is no possibility that consumers would be confused between the two brands or types of products.

Crusha Milk Shake is a syrup mix-based product and not a ready-to-consume product

Crusha Milk Shake is an ambient bottled product not a chilled pouched product

Crusha is one syllable not two syllables

Crusha Jelly Pots are an ambient product and have been delisted from the major-multiples and are not classed in a similar product category

4) Neither side filed evidence. Neither side requested a hearing. The opponent filed written submissions in lieu of a hearing, the applicant did not.

The legislation and the leading case-law

5) Section 5(2)(b) of the Act states that:

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

.....

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

6) The Court of Justice of the European Union (“CJEU”) has issued a number of judgments which provide guiding principles relevant to this ground. In *La Chemise Lacoste SA v Baker Street Clothing Ltd* (O/330/10), Mr Geoffrey Hobbs QC, sitting as the Appointed Person, quoted with approval the following summary of the principles which are established by these cases¹:

“(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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(k) if the association between the marks causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion."

The average consumer

7) The average consumer is deemed to be reasonably observant and circumspect. However, the degree of care and attention the average consumer uses when selecting goods and services can vary depending on what is involved. The goods involved are various forms of non-alcoholic beverage. These are low cost items purchased fairly frequently by members of the general public. They are not specialist products. This suggests a fairly casual approach in terms of selection. The goods will most often be self-selected from supermarket (etc) shelves or online equivalents, so suggesting that the visual impact of the marks is most important. The aural impact will not, though, be completely ignored because

the goods could be ordered (in bars or restaurants) although, the marks will also likely be seen in this environment too.

Comparison of goods

8) The applicant seeks registration for the following goods in class 32:

Aerated fruit juices; Aerated juices; non-aerated fruit juices; non-aerated juices; mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; Smoothie drinks; Mineral and carbonated waters; Fruit flavoured non-alcoholic drinks; Carbonated non-alcoholic drinks

9) These are all non-alcoholic beverages. The opponent's specification covers various types of specific non-alcoholic beverage, but also:

"..and other non-alcoholic drinks"

10) When comparing goods, if a term clearly falls within the ambit of a term in the competing specification then identical goods must be considered to be in play as per the decision of the General Court in *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)(OHIM)* Case T-133/05 The opponent's mark is protected in relation to all types of non-alcoholic drink and, so, it notionally covers all of the goods the applicant wishes to register. The goods must therefore be considered identical.

Comparison of the marks

11) The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The visual, aural and conceptual similarities of the marks must be assessed by reference to their overall impressions, bearing in mind their distinctive and dominant components. The marks to be compared are:



CRUSHA

12) Whilst the applicant's mark has an arrow device above and towards the end of CRUSHD, it is clearly CRUSHD which constitutes the dominant and distinctive element of the mark, although, the arrow device will need to be factored into the comparison. The opponent's mark has only one element, CRUSHA, so this is its dominant and distinctive element.

13) From a visual perspective, both marks are of similar length, both being made up of six letters. The first five letters of each mark are the same: CRUSH-. This creates an obvious and clear aspect of similarity. The fact that this point of similarity is at the beginning of the marks is another factor which is important in this case. Although this is just a rule of thumb, I feel it is an applicable rule of thumb here. However, there are also some differences: the D for the A as the last letter in the marks and the arrow device. There is also some stylisation to the letters in the applicant's mark, but I agree with the opponent that the stylisation does not greatly assist in distinguishing because it is pretty unremarkable. Furthermore, any distinguishing capacity the stylisation does have is diminished when one takes into account that the opponent's mark could, notionally speaking, be used in a similar form of stylisation. Overall, whilst the differences are borne in mind, they do not in my view outweigh the similarities. I consider there to be a reasonably high (but not the highest) level of visual similarity.

14) The opponent's mark will be articulated as CRUSH-AH or CRUSH-UH. Whilst the applicant's mark could potentially be pronounced as CRUSH-DEE (the letter D being separated off and pronounced separately), this is unlikely to be the usual way in which it is articulated. I consider it far more likely that CRUSHD will be articulated as the word CRUSHED. As the applicant pointed out in its counterstatement, this means that there are two syllables rather than one, but the beginning sound is still the same. I consider there to be a reasonable level of aural similarity.

15) The concepts of both marks are based on the word CRUSH or CRUSHED. Even though the words in the respective marks are not actual dictionary words, they are so close to CRUSH/CRUSHED that this will form the concept that the average consumer will perceive. There is a high degree of conceptual similarity.

The distinctiveness of the earlier mark

16) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark (based either on inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). No use of the earlier mark has been presented, so I have only the inherent qualities of the mark to consider. From that perspective, I have already stated that the concept of the word CRUSHA will be based upon the word CRUSH. This is in line with the opponent's view on how its mark will be perceived, but I disagree with the opponent's subsequent view that this equates to the earlier mark having a high level of inherent distinctive character. In my view the word has some allusive qualities because the goods in question could contain fruit which has been crushed. However, the brevity of the mark, together with the additional A, still gives it at least a moderate degree of inherent distinctive character.

Likelihood of confusion

17) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. I should stress at this point that many of the points made in the applicant's counterstatement are not pertinent in relation to section 5(2)(b). This is because the applicant refers to the actual goods that are sold by the respective parties and the manner in which they are actually sold. The reason why this is not pertinent is because the goods of the parties (including the opponent) are much wider than as referred to by the applicant. For example, the applicant refers to the opponent selling milkshake, but as already observed when I compared the goods, the opponent's specification covers all non-alcoholic drinks. The respective marks must be considered on a notional basis in respect of the goods applied for/registered. In terms of how the goods are sold, I have already held that the goods covered are identical and, consequently, it is possible that the way in which they are sold are also identical.

18) An important factor to consider in this case is that the point of similarity between the marks (CRUSH-) is not greatly distinctive, thus, it could be said that the average consumer will place more attention on the other aspects of the respective marks, the things that make the marks different. I bear this in mind, however, I consider that the similarities between the marks as I have assessed will nevertheless lead to a likelihood of confusion given that the goods are identical, goods which are selected in a fairly casual way and which may be selected quickly without a great deal of care, thus, the differences may not be noticed. Furthermore, the marks could easily be misremembered or misrecalled due to the imperfect picture of them the average consumer keeps in mind. **There is a likelihood of confusion and the opposition, therefore, succeeds.**

Costs

19) The opponent has succeeded and is entitled to a contribution towards its costs. My assessment is as follows:

Official Fee - £200

Preparing a statement and considering the other side's statement - £300

Filing written submissions - £400

Total - £900

20) I hereby order MI Brands (GB) Limited to pay British Sugar Plc the sum of £700 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 16th day of July 2014

**Oliver Morris
For the Registrar,
The Comptroller-General**

ⁱ The leading judgments are: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 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, Case C-3/03 *Matrazen Concord GmbH v GmbGv Office for Harmonisation in the Internal Market* [2004] ECR I-3657 *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05).