

O-114-16

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2643097
BY CORNISH TEA COMPANY LIMITED**

TO REGISTER THE TRADE MARK:

THE CORNISH CHINA TEA COMPANY

IN CLASS 30

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 400015**

BY CORNISH TEA & CORNISH COFFEE CO LTD

BACKGROUND

1. On 22 November 2012 Cornish Tea Company Limited (the applicant) applied to register the mark shown on the cover page of this decision in respect of the following goods:

Class 30

Apple flavoured tea [other than for medicinal use]; aromatic teas [other than for medicinal use]; artificial tea [other than for medicinal use]; beverages (tea-based-); beverages made of tea; beverages with tea base; fruit flavoured tea [other than medicinal]; fruit tea [other than for medical purposes]; herb teas, other than for medicinal purposes; herbal tea [other than for medicinal use]; iced tea; iced tea (non-medicated-); instant powder for making tea [other than for medical use]; instant tea [other than for medicinal purposes]; jasmine tea bags, other than for medicinal purposes; jasmine tea, other than for medicinal purposes]; mate [tea]; milk chocolate teacakes; orange flavoured tea [other than for medicinal use]; packaged tea [other than for medicinal use]; preparations composed of glucose for use in creaming tea; preparations for making beverages [tea based]; preparations for use in creaming tea [glucose syrup based]; preparations for use in creaming tea consisting predominantly of vegetable carbohydrate; preparations for use in creaming tea made from derivatives of corn syrup; preparations for use in whitening tea [vegetable based]; preparations with a coffee and tea base; rooibos [tea]; tea; tea (iced-); tea (non-medicated-); tea (non-medicated-) consisting of cranberry extracts; tea (non-medicated-) consisting of cranberry leaves; tea (non-medicated-) containing cranberry extracts; tea (non-medicated-) containing cranberry leaves; tea (non-medicated-) sold loose; tea bags (non-medicated-); tea bags for making non-medicated tea; tea based beverages (non-medicated-); tea beverages (non-medicated-); tea cakes; tea essence (non-medicated-); tea essences (non-medicated-); tea extracts (non-medicated-); tea products (non-medicated-); tea-based beverages; teas (non-medicated-); teas (non-medicated-) containing lemon; teas (non-medicated-) flavoured with lemon; tisanes made of tea (non-medicated-); tisanes made of tea [medicated]; all of the aforesaid either originating from or including ingredients originating from China.

2. Following the publication of the application on 28 December 2012, The Cornish Tea Co.(Looe) Ltd (the opponent) filed notice of opposition on a number of grounds, i.e. Sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (the Act). In relation to the grounds based on Sections 5(3) and 5(4)(a) of the Act, the opponent filed no evidence and the opposition based on these sections of the Act were deemed withdrawn. This was not challenged by the opponent. Consequently, I need only consider the opposition based upon Section 5(2)(b) of the Act. The opposition under this ground is directed against all of the goods in the application.

3. The opponent relies upon the two earlier marks shown below:

Mark's details	Goods relied upon
<p>UK No. 2627948</p> <p>The CORNISH TEA company Ltd</p> <p>Filing date 11 July 2012</p> <p>Registration date 11 April 2014</p>	<p>Class 30</p> <p><i>Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals, bread, pastry and confectionery, ices; honey, treacle; yeast, baking-powder; salt, mustard; vinegar, sauces (condiments); spices; ice; sandwiches; prepared meals; pizzas, pies and pasta dishes</i></p>
<p>UK No. 2640286</p> <p>CORNISH TEA</p> <p>Filing date 29 October 2012</p> <p>Registration date 26 June 2015</p>	<p>Class 30</p> <p><i>Rice, tapioca, sago, yeast, baking powder, salt, mustard, vinegar, spices, pizzas and pasta dishes.</i></p>

4. For the avoidance of doubt, I should say that, following the filing of the opposition, the opponent changed its name to Cornish Tea & Cornish Coffee Co Ltd. This was communicated to the Registry on 27 October 2014 and the details of the above registrations were amended accordingly.

5. The applicant filed a counterstatement in which it denies the basis of the opposition.

6. Both parties filed evidence. Neither side asked to be heard, but they both filed written submissions in lieu of attendance at a hearing. I do not intend to summarise the parties' submissions here but I will refer to them as necessary later in this decision. I make this decision following a review of all the material before me.

The applicant's evidence

7. This takes the form of a witness statement by Kevin Hicks, the founder and director of the applicant, attached to which is Exhibit KH1. Mr Hicks includes submissions in his statement that I will summarise here only to the extent that I consider it necessary, but I shall keep them all in mind in reaching a conclusion. Mr Hicks states that the applicant registered its company's name 'Cornish Tea Company Limited' in 2006, well before the opponent applied for the mark 'The CORNISH TEA company Ltd' in July 2012. He also refers to a request filed by the applicant at Companies House which sought a change to the opponent's original company name i.e. The Cornish Tea Co Ltd, on the basis that it was too similar to the name of the applicant. Although the applicant was successful, it has no bearing upon my decision. Trade mark and company name registrations are entirely separate, governed by different statutes and the registration of a company name does not offer any trade mark (or priority) rights *per se*.

8. Most of Mr Hicks' evidence refers to the CORNISH TEA mark only. He claims that the opponent's mark is used "with distinctive branding which is highly different than that intended for the applicant's mark" and provides two exhibits in support. He also claims that the opponent experienced difficulties in registering the mark CORNISH TEA, which demonstrates "an intention by the UKIPO not to allow the opponent a monopoly right to the use of CORNISH and TEA in respect of tea products marketed by Cornish companies". To support this he provides a print out of the CORNISH TEA mark's case history from the IPO website (pages 3 and 4) showing that the registered specification did not include some of the goods originally applied for i.e. tea. These submissions (and the supporting evidence) are irrelevant. This is because in considering the opposition I must compare the marks as they have been registered and applied for and not in whatever form they might actually have been used. Likewise, the comparison must be conducted between the parties' specifications as registered (by the opponent) and as applied for (by the applicant).

The opponent's evidence in reply

9. This takes the form of a witness statement by Tom Pennington, a director of the opponent. Mr Pennington provides information on events relating to the parties' company name registrations in reply to the information provided by Mr Hicks. As I have outlined in the preceding paragraph, these facts are not pertinent, therefore, I will say no more about them.

DECISION

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

"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".

11. An earlier trade mark is defined in Section 6(1) of the Act, which states:

"6.-(1) In this Act an "earlier trade mark" means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) Reference in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

12. Given their dates of filing, the opponent's marks constitute earlier marks in accordance with Section 6 of the Act. The earlier marks had not been registered for more than five years at the date on which the applied for mark was published meaning that the proof of use provisions contained in Section 6A do not apply. The opponent, as a consequence, can rely upon all of the goods it has identified.

Section 5(2)(b) case law

13. 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.

The principles

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

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

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

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

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

14. The opponent relies upon two earlier marks. However, it is clear that it would be in no better position in relying on the second mark either from a comparison of marks, goods or both. Thus, I intend to limit my comparison to the first mark relied on by the opponent (UK 2627948)

Comparison of goods

15. The goods to be compared are as above.

16. In its counterstatement, the applicant states that “only “tea” is covered by the applicant’s mark and therefore it is not appropriate for the opponent to rely on all of its goods”, a statement that is clearly inaccurate as other goods in the applicant’s specification are also covered by the opponent’s registration. Nevertheless, it concedes that the goods covered by its application “are identical to and/or similar to some (but not all) of the goods specified in the opponent’s mark”. Apart from *tea*, for which it admits there is identity, the applicant does not say in respect of which goods it considers there is identity or similarity thus, for the avoidance of doubt, I will compare the competing goods.

17. When making the comparison, all the relevant factors relating to the goods must be taken into account. In the judgment of the Court of Justice of the European Union (CJEU) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

18. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

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.

19. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (GC) stated that “complementary” means:

“...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”.

20. In *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, Case T- 133/05, the GC stated that:

“29. ...goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM-Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark”.

21. Most of the applicant’s goods consist of *tea(s)*, which the applicant admits are identical to the opponent’s *tea*. The same can be said for *tea-based beverage, preparations for making tea(s), tea essences and tea extracts*. In accordance with *Meric*, these goods are all encompassed by the general term *tea* in the opponent’s specification and so are identical.

22. *Preparations for use in creaming and whitening tea(s)* in the applied for specification are used as an additive to tea and are intended to be a non-dairy substitute for milk or cream. Thus, there is some similarity with *tea* in the opponent’s specification in the sense that the respective users and trade channels coincide and such goods may be found in the same aisle of supermarkets. Further, there is a degree of complementarity, as customers may think that the responsibility for the goods lies with the same undertaking. Overall, I consider that there is a medium degree of similarity with *tea* in the opponent’s specification.

23. This leaves *preparations with a coffee base*¹, *milk chocolate teacakes* and *teacakes* in the applied for specification. *Preparations with a coffee base* are included in the term *coffee* in the opponent's specification and so they are considered identical. *Milk chocolate teacakes* and *teacakes* clearly fall within the term *confectionery* in the opponent's specification and so too they are considered identical.

The average consumer and the nature of the purchasing act

24. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue; I must then determine the manner in which these goods will be selected in the course of trade.

25. 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.”

26. The average consumer is a member of the general public. The goods are inexpensive every day purchases and will be selected with no more than an average level of care and attention. The purchase is likely to be primarily visual as it is likely to be made from a supermarket shelf or from the pages of a website. That said, there is potential for aural considerations, as I do not exclude the possibility that such goods may, for example, be ordered over the phone.

Comparison of marks

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

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

¹ As part of the phrase “preparations with a coffee and tea base”.

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

29. The respective marks are shown below:

Opponent's mark	Applicant's mark
The CORNISH TEA company Ltd	THE CORNISH CHINA TEA COMPANY

Overall impression

30. The opponent's mark consists of the phrase 'The CORNISH TEA company Ltd' written in normal typeface with the words 'The' and 'Ltd' presented in title case, the words 'CORNISH TEA' in upper case and the word 'company' in lower case. Although individual words within the mark may be descriptive/non-distinctive, and notwithstanding that the words 'CORNISH TEA' are presented in upper case, the mark contains no dominant components; rather, its distinctive character resides in the combination the words create rather than the individual elements of which it is composed.

31. The applied for mark consists of the words 'THE CORNISH CHINA TEA COMPANY' in plain block capitals. No element of the mark stands out. Once again there are, in my view, no dominant elements, the distinctiveness of the mark lying in its totality.

Visual similarity

32. Both marks are made up of five words of which four are THE/The, CORNISH, TEA and COMPANY/company'. Whilst there is a difference in casing, I do not place any weight on the capacity of the casing to differentiate between the marks. This is because both marks are word marks so what is protected is the word or combination or words itself. Notional and fair use of the applied for mark includes use in different scripts, such as, for example, a format comparable to that used by the opponent's mark².

33. The word 'CHINA' in the applied for mark and the abbreviation 'Ltd' in the opponent's mark lead to some visual differences. That said, owing to their positioning in the middle of and at the termination of the marks respectively, their visual impact is limited. Overall, I find the marks visually similar to a high degree.

Aural similarity

34. The competing marks are aurally similar to the extent that they share the common words THE/The, CORNISH, TEA and COMPANY/company. As each of the

² Case T-346/04, *Sadas SA v OHIM*, paragraph 47

words are well known to the average consumer, the pronunciation of the marks is highly predictable. The word 'Ltd' is a commonly used abbreviation and it is possible that it may not be pronounced at all, leading to a further similarity. The main difference between the marks rests in the word 'CHINA' and overall I find that the level of aural similarity is fairly high.

Conceptual similarity

35. Insofar as conceptual similarity is concerned, the applicant states:

“ the [...] marks are conceptually different. The applicant's mark conveys a materially different message –that the applicant is a Cornish company offering Chinese tea. The opponent's mark at least theoretically conveys the sale of tea from Cornwall, ...

36. The opponent's states:

“[...] the marks are conceptually identical, both referring to tea and Cornwall. The addition of the word China does not suffice to distinguish the marks given it is descriptive and non-distinctive.”

37. In my view, the opponent's mark is likely to be understood by the average consumer as indicating a company that offers tea grown, blended or packaged in Cornwall or a company that offers a particular blend of teas associated with or sold in Cornwall.

38. In relation to the applied for mark, the word 'CHINA' is likely to be seen by the average consumer as a reference to the country of China. However, I agree with the applicant that the word 'CHINA' is used adjectively in the context of the mark and so will be seen as qualifying the word 'TEA'. Accordingly, the mark will be understood as indicating a Cornish company that offers Chinese tea(s).

39. Whilst I do not discount the presence of the word 'CHINA' within the applied for mark, the conceptual difference it introduces is not significant. As I said in the preceding paragraph, the word 'CHINA' is descriptive when associated with tea and the slightly different concepts conveyed by the marks do not detract from the fact that they convey the common message of a Cornish company offering tea products. Overall, I find that there is a medium degree of conceptual similarity between the marks.

Distinctive character of the earlier mark

40. In determining the distinctive character of a trade mark it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify its goods as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger Joined Cases C-108/97 and C-109/97* [1999] ETMR 585.

41. I have no evidence of use to consider so I only need to make a finding in respect of the inherent distinctiveness of the opponent's mark.

42. In assessing the distinctiveness of the phrase 'The CORNISH TEA company Ltd', I bear in mind that a registered mark must be assumed to have 'at least some distinctive character'³. That said, registered marks may be endowed with varying degrees of distinctive character, ranging from the very low to the very high, depending on whether they are, inter alia, suggestive or allusive of a characteristic of the goods, or, alternatively, completely fanciful or invented. The opponent's mark is made up of words which individually describe the opponent's business. As such, the mark is possessed of only a low degree of inherent distinctive character in relation to tea and an average degree of distinctive character in relation to the other goods covered by the specification.

Likelihood of confusion

43. In determining whether there is a likelihood of confusion, 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 marks may be offset by a greater degree of similarity between the respective goods and vice versa. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has retained in his mind.

44. I remind myself of what I consider to be the key conclusions I have reached:

- Most of the respective goods are identical, while some goods are similar to a medium degree;
- The respective marks are visually similar to a high degree, aurally similar to a fairly high degree and conceptually similar to a medium degree;
- The earlier mark has a low degree of inherent distinctive character in relation to tea and an average degree of distinctive character in relation to the other goods;
- The goods are purchased following a visual inspection - although I do not discount aural considerations - with no more than an average level of care and attention being paid to the purchase.

45. I bear in mind that in *L'Oréal SA v OHIM*, Case C-235/05 P, the CJEU found that:

"43 It must therefore be held that the applicant has misconstrued the concepts which govern the determination of whether a likelihood of confusion between two marks exists, by failing to distinguish between the notion of the distinctive character of the earlier mark, which determines the protection afforded to that mark, and the notion of the distinctive character which an element of a complex mark possesses, which is concerned with its ability to dominate the overall impression created by the mark.

³ *Formula One Licensing BV v OHIM*, Case C-196/11P

....

“45. The applicant’s approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

46. In reaching a conclusion, I have already accepted that the opponent’s mark has a low degree of inherent distinctive character in relation to the goods of principle interest to the parties, i.e. tea. However, given, inter alia, the identity/medium degree of similarity in the competing goods, the degree of similarity in the competing marks (particularly the high degree of visual similarity) and the fact that the goods at issue will be selected with no more than an average degree of attention (thus making the average consumer more prone to the effects of imperfect recollection), I have no doubt that there is likelihood of direct confusion i.e. the applicant’s mark will be mistaken for that of the opponent.

47. For the avoidance of doubt, I should say that I have not overlooked the applicant’s argument that the opponent has failed to provide examples of instances of confusion between the marks at issue. The absence of actual confusion in the marketplace does not assist the applicant for the reasons provided in Tribunal Practice Notice (“TPN”) 4/2009, which states:

“6. Parties are also reminded that claims as to a lack of confusion in the market place will seldom have an effect on the outcome of a case under section 5(2) of the Act.

7. In *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 Laddie J held:

"22. It is frequently said by trade mark lawyers that when the proprietor's mark and the defendant's sign have been used in the market place but no confusion has been caused, then there cannot exist a likelihood of confusion under Article 9.1(b) or the equivalent provision in the Trade Marks Act 1994 ("the 1994 Act"), that is to say s. 10(2). So, no confusion in the market place means no infringement of the registered trade mark. This is, however, no more than a rule of thumb. It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used.

Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place."

8. In *Rousselon Freres et Cie v Horwood Homewares Limited* [2008] EWHC 881 (Ch) Warren J commented:

"99. There is a dispute between Mr Arnold and Mr Vanhegan whether the question of a likelihood of confusion is an abstract question rather than whether anyone has been confused in practice. Mr Vanhegan relies on what was said by Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at paragraphs 22 to 26, especially paragraph 23. Mr Arnold says that that cannot any longer be regarded as a correct statement of the law in the light of *O2 Holdings Ltd v Hutchison 3G Ltd* [2007] RPC 16. For my part, I do not see any reason to doubt what Laddie J says..."

9. In *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283 Millett LJ stated:

"Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

48. Finally, I do not accept the applicant's submissions to the effect that I should take into account the fact that it had incorporated the company 'Cornish Tea Company Limited' before the opponent applied for the mark 'The CORNISH TEA company Ltd'. As mentioned earlier, registering a company name gives no trade mark protection and the applicant's registration at Companies House does not assist it in these proceedings.

CONCLUSION

49. The opposition succeeds in full under section 5(2)(b) of the Act.

Costs

50. As the opponent has been successful, it is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (TPN) 4 of 2007. I bear in mind that the opponent is legally represented and that although the opposition was initially based on more than one ground, attracting a fee of £200,

some of the grounds were deemed withdrawn because it failed to file evidence in support of them. Using that TPN as a guide, I award costs to the opponent on the following basis:

Official fee: £100

Preparing a statement and considering the other side's statement: £200

Preparing evidence and considering other side's evidence: £200

Written submissions: £200

Total: £700

51. I order Cornish Tea Company Limited to pay Cornish Tea & Cornish Coffee Co Ltd the sum of £700 as a contribution towards its costs. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case, if any appeal against this decision is unsuccessful.

Dated this day 12th of January 2016

**Teresa Perks
For the Registrar
The Comptroller - General**