

O-362-16

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3084328
BY JOSHUA ELLIS**

TO REGISTER:



AS A TRADE MARK IN CLASS 5

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 403989 BY NENCO HOLDING B.V.**

BACKGROUND & PLEADINGS

1. On 3 December 2014, Joshua Ellis (“the applicant”) applied to register the trade mark shown on the cover page of this decision for the following goods in class 5:

Nutraceuticals for use as a dietary supplement.

The application was published for opposition purposes on 19 December 2014.

2. The application is opposed by NENCO Holding B.V. (“the opponent”). The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all of the goods in the application. Although the opponent relies upon all the goods and services in the following International Registration (“IR”) designating the European Union, it is only necessary for me to refer to the goods shown below:

IR no. 1181543 for the trade mark:



which designated the EU on 27 May 2013 (claiming an international convention priority date of 28 November 2012 from an earlier filing in the Benelux) and for which protection was granted in the EU on 16 September 2014:

Class 5 - Dietetic food and dietetic substances adapted for medical use; gluten-free food for medical use; gluten-free dietetic food and gluten-free dietetic substances adapted for medical use; gluten-free food supplements.

The registration includes the following clauses:

“Colours claimed: Orange (pms 021) - nuances of orange, grey, white.”

“Trade mark type: Mark consists of colour or colours per se.”

3. As neither party filed evidence, requested a hearing or filed written submissions in lieu of attendance at a hearing, the only comments I have from them appear in their Notice of opposition and counterstatement respectively. Insofar as I consider these comments relevant, I have reproduced them at the appropriate point in the decision as they are presented.

4. In its Notice of opposition, the opponent states:

“3. The opponent submits that the mark PEAK SUPPS...is similar to the earlier trade mark. The application wholly contains the word “PEAK” which is highly similar to the word “PEAK’S” which forms the whole of the earlier trade mark, and as such the application mark must be deemed highly similar where the only other element of the application “SUPPS” is descriptive of “supplements” and non-distinctive in nature in relation to the trade mark specification of the application.

4. The application covers goods in class 5 that are identical and highly similar to the goods covered by the opponent’s earlier trade mark.”

5. The applicant filed a counterstatement in which he denies the basis of the opposition. In relation to the competing trade marks, he states:

“The application for PEAK SUPPS as a trade mark is for a two word logo. Both words are significant. Peak is a term referring to the “highest level” and Supps is an abbreviation of the word supplement, as used in the sports and fitness sector. The words supps has no official definition and is being used as a distinctive term.

The word Supps in conjunction with the word Peak takes its own clear distinction and importance in relation to the trade mark. Both words have equal importance to the brand and logo.

The opponent's trade mark is a single word Peak's. It is a noun, it implies ownership or plural.

The trade marks are very different and have no similarity. The application PEAK SUPPS is a green, white logo on a black background. The logo shows triangular mountain ranges (Peak) with sharp pointed edges.

The opposition logo Peak's is a single word logo set in a predominantly orange colour background with white text. The word Peak's is at the lower part of the logo with a soft curved border below. The overall shapes, colours and design of the trade marks are distinctly different..."

DECISION

6. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

"5 (2) A trade mark shall not be registered if because -

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

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

7. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“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) References 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.”

8. In these proceedings, the opponent is relying upon the trade mark shown in paragraph 2 above, which qualifies as an earlier trade mark under the above provisions. As the trade mark upon which the opponent relies had not been protected for more than five years at the date on which the application for registration was published, it is not subject to proof of use, as per section 6A of the Act. Although the opponent is, as a consequence, entitled to rely upon all of the goods and services it has identified, only the goods I have reproduced above are relevant to the matter before me.

Section 5(2)(b) – case law

9. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

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 greater degree of similarity between the marks, and vice versa;

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

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

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

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

Comparison of goods

10. The competing goods are as follows:

The opponent's goods in class 5	The applicant's goods
Dietetic food and dietetic substances adapted for medical use; gluten-free food for medical use; gluten-free dietetic food and gluten-free dietetic substances adapted for medical use; gluten-free food supplements.	Class 5 - Nutraceuticals for use as a dietary supplement.

11. In his counterstatement, the applicant states:

"I disagree that my trade mark application PEAK SUPPS is to be registered for identical and/or similar goods or services [to the opponent's trade mark in class 5].

“My application for PEAK SUPPS is to promote and distinguish my brand as being a high level supplement used in the sports, fitness and well-being sectors. I target customers in sport and keep fit sectors. I offer supplements to aid training and performance for individuals. I sell products in the form of powder, tablet and capsule in plastic bag style packaging. I sell dietary supplements and nutritional products such as vitamins, protein and minerals to help individuals achieve their own goals. Whether their goal is strength, increasing body mass, or the other end of the spectrum decreasing body mass and weight loss.

I believe the opposition trade mark is for a different area of business activity. The opposition trade mark Peak’s is registered/used for their brand of FOOD PRODUCTS FOR MEDICAL USE...GLUTEN FREE DIETETIC FOOD NOT isolated nutrients and dietary supplements. Their classification targets customers seeking a gluten free diet due to a medical condition of gluten intolerance. Their products and services are not similar or identical...

We target different customers and offer very different products in very different retail options.”

The correct approach to the comparison of goods

12. In *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P, the Court of Justice of the European Union (“CJEU”) stated that:

“59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.”

13. In his counterstatement, the applicant refers to the goods on which he uses his trade mark and the manner in which he conducts his trade in those goods. He also points to what he considers to be the goods of interest to the opponent. As the above case makes clear, however, that is not the correct approach. As the opponent's earlier trade mark is not subject to the proof of use provisions, what I am required to do in reaching a conclusion in these proceedings, is to compare the goods as they appear in the opponent's specification with the goods as they appear in the applicant's specification. The applicant's specification includes the word "Nutraceuticals". Both collinsdictionary.com. and oxforddictionaries.com define "nutraceuticals" as: another name for "functional food" which they further define as "a food containing additives which provide extra nutritional value" and "a food containing health-giving additives" respectively. It is on the basis of this definition that I will conduct the comparison.

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

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

As I mentioned above, the goods upon which the applicant actually uses his trade mark are not relevant. Comparing the words as they appear in the competing specifications (as I must), I find that the goods in the applicant's specification should be interpreted as meaning "food containing additives for use as a dietary supplement". Considered on that basis, I find that as such goods would include, for example, the opponent's "Dietetic food and dietetic substances adapted for medical use" and "gluten free food

supplements”, the competing specifications are to be regarded as identical on the principles outlined in *Meric*.

The average consumer and the nature of the purchasing act

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

16. The average consumer for the parties’ goods is either a member of the general public with special dietary needs or a professional user such as a dietician who advises those with such needs. Insofar as a member of the general public is concerned, as all of the goods at issue may, in my experience, be self-selected from, for example, the shelves of supermarkets or retail outlets specialising in such goods or from the websites of such undertakings, visual considerations are likely to dominate the selection process. However, as such goods may also (in my experience) be the subject of, for example, enquiries to sales staff in a bricks and mortar retail setting, aural considerations will also play their part, albeit, in my view, to a much lesser extent than visual considerations. I have no evidence as to how a professional user such as a dietician would select such goods but a review of trade-specific documentation (in both printed and electronic form)

and face-to-face discussions with those representing undertakings trading in such goods would seem likely and point to a mixture of visual and aural considerations being involved.

17. As to the degree of care that such average consumers will display, the goods at issue are likely to be purchased on a fairly regular basis and are unlikely to be terribly expensive. However, as such goods will be selected to cater for specific dietary needs and keeping in mind the potentially adverse consequences of selecting an unsuitable product, I am led to conclude that both sets of average consumers are likely to pay a high degree of attention to their selection.



Comparison of trade marks

18. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The 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.”

19. It would be wrong, therefore, artificially to dissect the trade marks, although, it is necessary to take into account their distinctive and dominant components and to give

due weight to any other features which are not negligible and therefore contribute to the overall impressions they create. The competing trade marks are as follows:

opponent's trade mark	applicant's trade mark
	

20. The opponent's trade mark consists of a number of components. The first, is the word "Peak's" presented in white in title case in a cursive script. Below this word, also in white, there appears a slightly upwardly curving line which acts as an underlining for the word "Peak's" which appears above it. The final component consists of a largely rectangular device which the applicant describes as "a predominately orange background...with a soft curved border below".

21. Although the orange device occupies a substantial part of the trade mark, I agree with the applicant that it is likely to be seen as a background; its distinctiveness and relative weight in the overall impression the trade mark conveys is, as a consequence, likely to be fairly limited. As to the device which acts as an underlining, given its size in the context of the trade mark as a whole, it is likely to go largely unnoticed. However, even if it is noticed, as such non-distinctive minor embellishments are common-place in trade marks, it will make very little if any contribution to the overall impression the trade mark conveys. That leaves the word "Peak's". Although the word "Peak" has a range of meanings, the applicant states that as presented it "implies ownership or plural". I agree with the applicant insofar as he refers to "ownership". In my view, the word "Peak's" will be understood by the average consumer as meaning originating from a person or undertaking called "Peak". Although the word "Peak's" appears at the bottom of the orange device, given my conclusion in relation to both this device and the underlining which appears in the trade mark, it is the word "Peak's" that is the most distinctive component of the opponent's trade mark and despite its size in relation to the trade

mark as a whole, it is this component that will make by far the most significant contribution to the overall impression the opponent's trade mark conveys.

22. The applicant's trade mark also consists of a number of components. By the applicant's own admission, the square presented in black merely acts as a "background"; I agree and as a consequence, it has little or no distinctiveness and will have little or no relative weight in the overall impression the trade mark conveys. The trade mark also contains devices presented in green and white which the applicant states represent "triangular mountain ranges with sharp pointed edges". In my view, the presence of the word "PEAK" in the applicant's trade mark is likely to lead the average consumer to construe the device elements in the manner suggested. These distinctive devices occupy a significant part of the trade mark and will make an important contribution to the overall impression it conveys.

23. As to the words "PEAK SUPPS" these are presented in upper case in white and appear below and within the confines of the device components. As I mentioned earlier, the word "PEAK" has a range of meanings with the applicant pointing to it referring to the "highest level". However, as I also mentioned above, the presence of the device elements is most likely to lead the average consumer to construe the word "PEAK" as relating to a mountain with a pointed summit; as a consequence, it is a distinctive component of the applicant's trade mark, albeit not a dominant one. The final component is the word "SUPPS". The opponent submits that this component is "descriptive of "supplements" and non-distinctive". In his counterstatement, the applicant states that "Supps is an abbreviation of the word supplement, as used in the sports and fitness sector." Although he goes on to argue "the word supps" has no official definition and is being used as a distinctive term", in my view, the word "SUPPS" is, as the applicant initially admits, most likely to be seen as an "abbreviation" for supplements; as a consequence, it is likely to lack distinctive character and will make very little if any contribution to the overall impression the trade mark conveys. Considered, overall, the distinctiveness and overall impression of the applicant's trade mark is likely to result from the symbiotic relationship between the device elements and the word "PEAK".

24. I shall feed these conclusions into my assessment of the degree of visual, aural and conceptual similarity between the competing trade marks.

Visual similarity

25. Although the competing trade marks are presented in different colours and although the opponent claims “orange...nuances of orange, grey and white” as a feature of its trade mark, as notional and fair use of the applicant’s trade mark would allow it to present its trade mark in, at the very least, the same colour orange as that which appears in the opponent’s trade mark, the fact that the applicant’s trade mark is presented in black, white and green is not a point which assists him. Although both trade marks contain the words “Peak’s”/“PEAK”, the size and positioning of, inter alia, the devices in the applicant’s trade mark results, in my view, in a fairly low degree of visual similarity between them.

Aural similarity

26. It is well established that when a trade mark consists of a combination of words and figurative components, it is most likely that the average consumer will refer to the trade mark by the word component(s). Proceeding on that basis, the opponent’s trade mark will be verbalised as “Peak’s” and the applicant’s trade marks as either “PEAK SUPPS” or, as “SUPPS” is descriptive and non-distinctive, by the word “PEAK” alone. It is self-evident that any aural distinction between “Peak’s”/“PEAK” is wafer thin and if verbalised in this manner, if not aurally identical, the competing trade marks are aurally similar to the highest degree. However, even if the applicant’s trade marks is articulated in full i.e. as “PEAK SUPPS”, as the word “PEAK” would be verbalised first, there is still a high degree of aural similarity between them.

Conceptual similarity

27. In view of my earlier conclusions, it follows that the opponent's trade mark will be construed as surnominal whereas the applicant's trade mark will be construed as relating to mountains; the competing trade marks are conceptually different.

Distinctive character of the earlier trade mark

28. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered 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.

29. As the opponent has filed no evidence of the use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. Earlier in this decision I found that although the opponent's trade mark consisted of a number of components, it is the word "Peak's" (which I have concluded will be construed as surnominal) that is the most distinctive component and which will, despite its relative size, make the most important contribution to the overall impression the trade mark conveys. Although Peak is relatively well-known as a surname in this country, surnames are, of course, one of the most well-established types of trade marks. Considered on that basis, the opponent's trade mark is, in my view, possessed of an average degree of inherent distinctive character.

Likelihood of confusion

30. 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 trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more distinctive this trade mark is, the greater the likelihood of confusion. 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 trade marks and must instead rely upon the imperfect picture of them he has retained in his mind. Earlier in this decision, I concluded that:

- the competing goods are to be regarded as identical;
- the average consumer is either a member of the general public or a professional user such as a dietician;
- while visual considerations are likely to dominate the selection process, aural considerations must not be overlooked;
- the average consumer can be expected to pay a high degree of attention to the selection of the goods at issue;
- the competing trade marks are visually similar to a fairly low degree, aurally similar to at least a high degree and conceptually different;
- insofar as it is material (see below) the opponent's earlier trade mark is possessed of an average degree of inherent distinctive character.

31. Having concluded that the competing trade marks are conceptually different, I remind myself of the comments of the CJEU in *The Picasso Estate v OHIM*, Case C-361/04 P, where it held that:

“20. By stating in paragraph 56 of the judgment under appeal that, where the meaning of at least one of the two signs at issue is clear and specific so that it can be grasped immediately by the relevant public, the conceptual differences observed between those signs may counteract the visual and phonetic similarities between them, and by subsequently holding that that applies in the present case, the Court of First Instance did not in any way err in law.”

In relation to conceptual similarity, the comments of the GC in *Nokia Oyj v OHIM*, Case T-460/07 are also relevant. The court stated:

“Furthermore, it must be recalled that, in this case, although there is a real conceptual difference between the signs, it cannot be regarded as making it possible to neutralise the visual and aural similarities previously established (see, to that effect, Case C-16/06 P *Éditions Albert René* [2008] ECR I-0000, paragraph 98).”

32. I also remind myself that in *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He stated:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.'

40. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask 'in what does the distinctive character of the earlier mark lie?' Only after that has been done can a proper assessment of the likelihood of confusion be carried out''.

33. The only similarity between the competing trade marks stems from the presence in the applicant's trade mark of the word "PEAK" which I have concluded is a distinctive but not dominant component of that trade mark. Although the competing goods are to be regarded as identical, as the average consumer will pay a high degree of attention when selecting the goods at issue (thus making them less prone to the effects of imperfect recollection), I am satisfied that when considered from a visual perspective, the presence of, inter alia, the distinctive and dominant devices in the applicant's trade mark combined with the differing conceptual messages the competing trade marks will convey are more than sufficient to mitigate against a likelihood of either direct confusion (where one trade mark is mistaken for the other) or indirect confusion (when the average consumer assumes the goods come from the same or economically linked undertakings). For the avoidance of doubt, I should make it clear that I would have reached the same conclusion even if I had found that that the competing trade marks were similar to an average degree and that the consumer would pay only a low to average degree of attention during the selection process (making them more prone to the effects of imperfect recollection).

34. I now turn to consider the position from the aural perspective, in relation to which I concluded the competing trade marks were similar to at least a high degree and

potentially aurally identical. In doing so, I remind myself that in *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“28...it is possible that mere aural similarity between trade marks may create a likelihood of confusion...”

Although I have concluded that aural considerations are relevant, my own experience (as a member of the general public) tells me they are likely to be a much less significant feature of the selection process than visual considerations, which I concluded are likely to dominate the process; given my earlier findings and absent any evidence or submissions to assist me, I see no reason why the same would not be true of a professional consumer.

35. In *J.W.Spear & Sons Ltd and Others v Zynga Inc.* [2015] EWCA Civ 290 Floyd L.J. summing up the Court of Appeal’s earlier judgment in *Interflora Inc. and another v Marks and Spencer plc* [2014] EWCA Civ 1403 stated:

“37. In relation to what the court described as the crucial question, namely whether the average consumer, as a hypothetical person, necessarily has a single reaction and so precludes a consideration of the perceptions of a proportion of the relevant public the court in *Interflora* identified the following propositions:

- i) the average consumer test provides the court with a perspective from which to assess the particular question it has to decide, for example whether a statement is liable to mislead purchasers.
- ii) a national court may be able to assess this question without the benefit of a survey or expert evidence.

iii) a national court may nevertheless decide, in accordance with its own national law, that it is necessary to have recourse to an expert's opinion or a survey for the purpose of assisting it to decide whether the statement is misleading or not.

iv) absent any provision of EU law dealing with the issue, it is then for the national court to determine, in accordance with its own national law, the percentage of consumers misled by the statement that, in its view, is sufficiently significant in order to justify banning its use.”

36. I accept that there may be some average consumers who will select the goods at issue by oral means which, in turn, may lead to a likelihood of confusion. However, in the absence of evidence or submissions to assist me, I am not persuaded that the number of average consumers who will select the goods at issue by this method alone is likely to be “sufficiently significant” to justify refusing the application. Having already concluded that there is no likelihood of confusion when the purchase is made visually, it follows that the opposition fails where the goods are subject to an oral purchase.

Conclusion

37. The opposition has failed and, subject to any successful appeal, the application will proceed to registration.

Costs

38. As the applicant has been successful, he is entitled to an award of costs in his favour. Awards of costs are governed by Tribunal Practice Notice (TPN) 4 of 2007. Using that TPN as a guide but bearing in mind that the applicant has not been professionally represented, I award costs to him on the following basis:

Preparing a statement and considering the opponent's statement: £100

Total:

£100

39. I order NENCO Holding B.V. to pay to Joshua Ellis the sum of **£100**. 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 1st day of August 2016

**C J BOWEN
For the Registrar
The Comptroller-General**