

O-112-20

TRADE MARKS ACT 1994

IN THE MATTER OF:

APPLICATION No. 3302004

BY AMBAR MEDLINE S.L.

TO REGISTER:



AS A TRADE MARK IN CLASS 36

AND

OPPOSITION THERETO (UNDER No 415512)

BY AVIVA BRANDS LIMITED

Background

1. The relevant details of the application the subject of these proceedings are as follows:



Mark:

Filing date: 2 October 2017

Publication date: 23 November 2018

Applicant: Ambar Medline S.L.

Class 36: All insurance services excluding, loan insurance, banking insurance, deposit insurance, credit insurance, mortgage insurance, credit risk insurance, insurance services related to credit, insurance against loss of credit, insurance services relating to pension funds, insurance services relating to credit cards, and insurance services relating to financial products.

2. Registration of the mark is opposed by Aviva Brands Limited (“the opponent”). Its grounds of opposition are based on sections 5(2)(b) & 5(3) of the Trade Marks Act 1994 (“the Act”). Under each ground, the opponent relies on the same three earlier marks: UK registrations 2278305B & 2480852, and European Union Trade Mark (“EUTM”) registration 15760085. All three of the opponent’s marks consist of the word **AVIVA**. I will come back to the goods and services for which the marks are registered later.

3. All of the opponent’s marks were filed before the applicant’s mark, so meaning that they qualify as earlier marks in accordance with section 6 of the Act. The opponent’s two UK registrations were registered before the period of 5 years ending on the date the applicant’s mark was filed, so meaning that the use conditions set out in section

6A apply. However, the opponent's EUTM was registered within that five-year period (not before) which means that the provisions do not apply, and, so, the earlier mark may be taken into account for its full specification without having to demonstrate use.

4. The opponent's claims under section 5(2)(b) read:

"As a result of the similarity of marks and identity/similarity of services, a likelihood of confusion exists between the marks. The likelihood of confusion is increased because the opponent has acquired enhanced distinctiveness in its mark through use."

5. The opponent's claims under section 5(3) are based on: i) damage caused by the relevant public assuming that there is an economic connection between the opponent and the applicant, and ii) even if this were not so, unfair advantage would arise because a link (between the marks) would still be made by consumers which would lead them to:

"....perceive and expect the services provided under the mark applied for to have the same high quality as the services provided under the opponent's mark. In these circumstances, the applicant will be deriving an unfair advantage; it will be unfairly benefitting from the investment the opponent has made building its reputation in its mark."

6. The reputation claimed to be enjoyed by the opponent is said to be in relation to: "Insurance and financial services; information and advisory services relating to the aforesaid."

7. The applicant filed a counterstatement denying the grounds of opposition. In particular, it:

- Denies the marks are similar;
- Denies that there exists a likelihood of confusion;

- Denies that a link will be established in the minds of consumers (because the marks are not similar); and
- Puts the opponent to proof of use of its two UK marks.

8. Only the opponent filed evidence. This will be assessed later, to the extent necessary. Neither side requested a hearing, but both provided written submissions in lieu of a hearing. The opponent has been represented by Venner Shipley LLP, the applicant by Baker & McKenzie LLP.

9. Before moving on to the substantive matters, I note that the applicant, in its written submissions, accepts that the evidence filed by the opponent demonstrates proof of use of the mark **AVIVA** in relation to insurance services; however, it does not accept that any form of reputation has been shown.

10. I begin this decision with the grounds of opposition under section 5(2)(b) of the Act, focusing, at least initially, on the opponent's UK registration 2278305B.

Section 5(2)(b)

11. 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.”

Further relevant law can be seen in section 5A, as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

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

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

(i) mere association, in the strict sense that the later mark brings 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.

Proof of use

13. The opponent made a statement of use in relation to:

“Insurance and financial services; information and advisory services relating to the aforesaid”

services which are covered by the class 36 specification of earlier mark 2278305B.

14. As noted earlier, the applicant accepts that proof of use has been demonstrated in relation to insurance services. Even though the statement of use goes broader than

the applicant's concession, it is not necessary, for reasons that will become apparent, to analyse whether use has been shown for the broader terms.

Comparison of services

15. The applicant's specification is in class 36 and reads:

Class 36: All insurance services excluding, loan insurance, banking insurance, deposit insurance, credit insurance, mortgage insurance, credit risk insurance, insurance services related to credit, insurance against loss of credit, insurance services relating to pension funds, insurance services relating to credit cards, and insurance services relating to financial products.

16. As can be seen, the above specification covers insurance services only, with certain types of insurance being positively excluded.

17. The opponent's specification also covers insurance services, with the applicant accepting proof of use for that term. That the applicant has excluded certain types of insurance from its specification does not matter because the opponent's services are not limited in any way. The only finding that can be made is that the services are identical.

Average consumer and the purchasing act

18. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. 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.”

19. There is not much between the parties here. In its submissions, the opponent states that the level of attention displayed by the average consumer is likely to be “rather high”, with the applicant submitting that it ranges from “above average to high”, depending on what type of insurance is being considered (e.g. more consideration being deployed when selecting motor insurance compared to travel insurance). I agree that the degree of care deployed is likely to be within a range, depending on what is involved. However, even at its lowest, a reasonable (or as the opponent puts it, above average) level of care and consideration will be deployed. Again depending on what is involved, the average consumer could be a member of the public choosing a product for themselves or their family, or, alternatively, may be a business user purchasing a product for a business they represent.

20. In relation to the purchasing process, insurance services are, from my own experience, commonly selected from brochures, policy documents, websites etc, so the visual impression of the marks is likely to take on most significance. However, I do not discount aural similarity completely as it is possible for discussion about insurance products to take place via telephone hotlines, or in discussions with sales advisors and brokers. Thus, whilst visual impressions have slightly more significance in the assessment, aural considerations have a role to play too.

Comparison of marks

21. 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 the 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.”

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

The logo for Vivaz, featuring the word "vivaz" in a lowercase, sans-serif font. The letter "i" is stylized with a dot above it. Below the "v" and "i" is a curved orange line that forms a smile.

v

AVIVA

Overall impression

23. The opponent's mark comprises just one component, the word **AVIVA**. That component is, thus, the only thing that contributes to its overall impression.

24. In relation to the applicant's mark, it comprises what the average consumer is likely to see as the word **vivaz**, but presented in a way in which the first three letters of that word form a smiling face. I do not accept the applicant's submission that the

inclusion of the smiley face results in the only verbal element being AZ; this is not in my view how the average consumer will see it, as the letters V-I-V are quite clear. Given this, I will not refer to any of the applicant's further submissions to the extent they are based on the only verbal element being AZ.

Conceptual comparison

25. The opponent submits that a conceptual comparison is not possible because its mark comprises an invented word and, therefore, has no conceptual meaning; similarly, it submits that the applicant's mark (its refers to either AZ or VIVAZ) also has no concept.

26. The applicant submits that both marks, whilst invented, "have at their core the element "viva"", a recognised word which the average consumer will associate with the concept of life or long health¹.

27. I accept that VIVA is a word likely to be known by the average consumer, although, its meaning may vary somewhat, person to person. However, I do not accept that upon encountering either of the marks at issue the average consumer will think of that word. This is because the A at the beginning of the opponent's mark, and the Z at the end of the applicant's mark, serves to give each mark its own identity with the average consumer unlikely to analyse the marks in such a way so as to unpack the letters/word VIVA within them. Thus, notwithstanding that conceptual meanings can be based upon evocation or allusion², there is no conceptual similarity based upon the word VIVA. Consequently, upon the verbal elements of the marks, there is neither conceptual similarity or dissimilarity between them.

28. I will though bear in mind that the smiling face within the applicant's mark will provide that mark with a partial concept, something that will fix itself within the mind of the average consumer, an aspect which is not shared with the opponent's mark.

¹ Evidence is provided from the opponent, containing a dictionary reference for the word VIVA.

² See, for example, the General Court's judgment in *Usinor SA v OHIM*.

Visual similarity

29. The opponent submits that because its mark is a word only mark, it could be used in a similar script to that of the applicant, although it does not go so far (rightly in my view) to suggest that this extends to the staggering of the letters in the mark, as per the staggering of the first three letters in the applicant's mark. It also submits that marks are to be regarded as similar if they are at least partially identical as regards one or more of its components and, in terms of the degree of similarity, it points to: i) that both marks share the element VIVA which represents around 80% of each mark, ii) that VIVA is a recognised word and is therefore striking, iii) the words in both marks are five letters in length, iv) the visual impact of the VIVA element is emphasised by each marks' symmetry and v) whilst some consumers may recognise the smiley face in the applicant's mark, it is otherwise of limited visual effect. The opponent considers the marks to be similar to a medium to high degree.

30. One of the applicant's submissions is based upon the actual use of the opponent's mark (often in conjunction with a logo), which distinguishes the marks greatly. However, this submission must be rejected because it is only the marks (and their use) as set out above that the Tribunal can consider in the comparison. The rest of its submissions are based on the inherent differences between the component parts of the marks VIV v AVI and AZ v VA. It also submits that both the beginnings and the ends of the marks differ. The applicant submits that the marks are not similar.

31. Although I bear in mind that both marks do contain the letters V-I-V-A, in that order, the net effect of the additional Z/A at the end/beginning of the respective marks, plus the additional smiley face and differing orientation of the letters V-I-V, goes, in my view, a long way to outweighing any similarity based upon the shared letters. Further, I do not consider, as I have already mentioned, that VIVA stands out in any way. I consider any visual similarity to be very low between these marks. I should add that I have placed no real weight on the colour (of the smile) in the applicant's mark in terms of contributing to the very low level of visual similarity I have found.

Aural similarity

32. The opponent argues that its mark will be articulated as AH-VEE-VAH, with the initial AH element shortened, compared to the applicant's mark which it submits will be articulated (at least by a significant proportion of average consumers) as VEE-VAHS. It also makes a number of points about such articulations in the course of trade which, it says, impacts upon the likelihood of confusion (the S sound at the end of the applicant's mark potentially being heard as a pluralisation, and that the AH sound at the beginning of its mark being very similar to the letter A, and that one might ask for "a vivaz" product); I return to these points later. In relation to the articulation of the applicant's mark in the way it describes, this is based upon extracts from Collins Dictionary which not only provides a definition for the word VIVA, but also provides an explanation of pronunciation transcripts used in that dictionary.

33. The applicant submits that the opponent's mark will be articulated as AH-VEE-VUH, with no particular emphasis on any syllable, whereas its mark will be articulated as VEE-VAZ, with greater emphasis on the second, longer syllable. The applicant accepts that one syllable is shared phonetically (VEE) but this is in a different position in the two syllable/three syllable comparison. It also submits that the first syllable (where most attention will be paid) is entirely different and that the common syllable is subsumed within the centre of the opponent's mark; finally, it notes that the last syllables of each are distinguishable.

34. Whilst bearing in mind the dictionary evidence provided by the opponent, I also bear in mind that the average consumer will unlikely have a dictionary to hand to guide them in terms of how one should articulate certain words. In my view, the most probable articulation of the opponent's mark will be: UH-VEE-VUH, although, I accept that there will be variations on that theme, with other potential (and not insignificant) articulations of: AH-VEE,VAH, AH-VEE-VUH, UH-VEE-VAH.

35. In terms of the applicant's mark, in my view, the most probable articulation would be: VEE-VAZ. Again, there might be variations on that theme, with other possible articulations being VIV-AZ and VEE-VAS. I think it less likely that the average

consumer will articulate the mark as VEE-VAHS; this does not seem a natural form of articulation when the structure of the mark is considered.

36. Given the above, one is left with a three syllable articulation compared to two. The first syllables differ, the end syllables have some (low) similarity, the last but one syllable is identical or highly similar. Overall, I consider that this equates to there being some aural similarity, but only of a low degree.

Overall similarity

37. The applicant submits that the marks should be considered dissimilar overall, with the consequence that the grounds under both sections 5(2)(b) and 5(3) must fail (because mark similarity is a pre-requisite). However, whilst I agree with the applicant that any similarity between the marks overall is certainly at the lower end of the spectrum, I would not go so far as to say there is no similarity at all. I must therefore proceed with the rest of my decision.

Distinctive character of the earlier trade mark

38. Having compared the marks, it is necessary to determine the distinctive character of the earlier mark, in order to make an assessment of the likelihood of confusion. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, the CJEU stated that:

“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).

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).”³

39. From an inherent perspective, the AVIVA mark, as an invented word, is already highly distinctive. In addition to this, the opponent submits that the mark’s distinctiveness has been enhanced through use. Evidence in support was filed by Ms Sarah Barnard, legal counsel at Aviva Plc. It is abundantly clear from the evidence that the opponent is a leading player in the insurance market. AVIVA is its primary brand and features heavily in the various documents provided as exhibits, which include annual reports, webpages and policy documents. In 2017 it had an 18% share of the life insurance market and a 10% share of the general insurance market. In the same year it had 15.6 million customers. Also listed are a number of awards it won between 2014 and 2017. There are also various high-profile sponsorship activities demonstrated in the evidence, including sponsoring UK Athletics, Premiership Rugby, Norwich Football Club and Cycling’s Tour of Britain.

40. I do not consider it necessary to delve any further into the evidence. It is clear to me, and I find it difficult to see how it could be argued differently, that the opponent’s AVIVA mark has a high level of enhanced distinctiveness through use in relation to insurance services. Before concluding, there are three points to mention. First, the applicant highlights that the use of AVIVA is more often than not accompanied by a particular logo. This, in my view, does not matter because AVIVA is a self-standing independent component to which enhanced distinctiveness accrues. Second, I note that the evidence does not show use in relation to every conceivable form of insurance, however, this does not matter because it is clear that AVIVA is known as an insurance provider. Third, I note that the specification relied on by the opponent is wider than just

³ C-342/97, paras. 22-23

insurance, however, given that the evidence is strongest in relation to insurance, and that the services of the applicant are identical to insurance, enhanced distinctiveness in relation to anything else is neither here nor there.

Likelihood of confusion

41. 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. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same, but puts the similarity that exists between the marks/services down to the responsible undertakings being the same or related). In terms of indirect confusion, this was dealt with by Mr Iain Purvis QC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 where he noted that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark”.

42. I begin by considering direct confusion. This is a true multifactorial decision. The services are identical, although, an above average degree of consideration will go into

their selection. The earlier mark is highly distinctive both as a result of its inherent qualities and through its use, although, there is only a very low/low degree of similarity between the marks. In my view, weighing all these factors, the balance comes out in favour of a finding that there is no likelihood of confusion. The overall impressions I have described, together with the inherent differences between the marks I have identified, means that the average consumer will not mistake one mark for the other. I accept that confusion can be more likely when one is dealing with invented words, because the average consumer has no specific connotation to fix the mark in the memory. However, I consider the nature of the marks to be sufficiently distinct (and different) that they would unlikely be misrecalled or misremembered as each other. In reaching this finding I have, of course, taken into account the smiley face as part of the applied for mark, but, for clarity, even without this, I would have found the same on the basis of the words themselves.

43. A lot of what I have said above factors upon the visual impression of the marks. However, my finding is, likewise, that there is no likelihood of confusion from an aural perspective either. Whilst the opponent has made submissions on the propensity to confuse because one may ask for “a” vivaz product, and that the Z or S sound at the end of vivaz could be heard as a pluralisation of VIVA, this in my view is just hypothesis and does not represent a likelihood of confusion occurring upon that basis.

44. In relation to indirect confusion, I can see no logical reason why the average consumer would put the low degree of similarity that exists between the marks down to the responsible undertakings being the same or related. There is no indirect confusion either.

45. The ground under section 5(2)(b) based on this earlier mark is refused.

Other earlier marks

46. There are two other earlier marks to consider. However, in its submissions the opponent accepts that its two UK marks present a better case than its EUTM (a submission with which I agree), so I will say no more about the EUTM. In relation to

the opponent's other UK mark, this is for the same earlier mark and covers the same identical services. The opposition would still fail.

Section 5(3)

47. The relevant law prevents the registration of:

“5(3) A trade mark which-

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark.

Further relevant law can be seen in section 5(3A) and 5A, as follows:

“(3A) Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

and

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

48. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, [1999] ETMR 950, Case 252/07, *Intel*, [2009] ETMR 13, Case C-408/01, *Adidas-Salomon*, [2004] ETMR 10 and C-487/07, *L’Oreal v Bellure* [2009] ETMR 55 and Case C-323/09, *Marks and Spencer v Interflora*.

49. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; General Motors, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; General Motors, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; Adidas Saloman, paragraph 29 and Intel, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; Intel, paragraph 42.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; Intel, paragraph 68; whether this is the case must also be assessed globally, taking account of all relevant factors; Intel, paragraph 79.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; Intel, paragraphs 76 and 77.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; Intel, paragraph 74.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; L'Oreal v Bellure NV, paragraph 40.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oreal v Bellure).

Reputation

50. I have already touched on the evidence in relation to the enhanced distinctiveness test under section 5(2)(b). The test here is somewhat different, but, nevertheless, I am more than satisfied that the earlier mark (focusing, again, on UK mark 2278305B) has a reputation in the UK in relation to insurance services, a strong reputation at that.

The link

51. As stated above, the existence of a link requires a global assessment. Some of those factors go in favour of the opponent. The services are identical and the earlier

mark has a strong reputation. Nevertheless, I am not persuaded that a link will be made. Whilst the level of similarity required to create a link can be less than that required to cause confusion, the level of similarity is so small that I do not consider that the relevant public will bring the AVIVA mark to mind when the applicant's mark is encountered. The ground fails at this hurdle.

52. Even if I were wrong on the above, any bringing to mind is what I would describe as a fleeting reminiscence. If this were to occur, the question that follows is whether any of the heads of damage would arise. The first claim from the opponent is that damage would arise on the basis that the applicant would benefit from the relevant public assuming that there is an economic relationship, however, given my earlier finding under direct/indirect confusion, this would not apply. As an alternative, the opponent also argues that a simple bringing to mind would result in the applicant's customers expecting services sold under the applied for mark to be of a similar high quality to its services i.e. an image transfer of quality. However, I see no reason to come to such a view. The relevant public, even if they brought the earlier mark to mind, would simply see them as alternative brands, with a very small degree of reminiscence, and there is no reason that I can see for them making the assumption put forward. The ground under section 5(3) would be dismissed for this reason also.

53. The grounds of opposition fail under section 5(3). This also applies to the other two marks.

Conclusion

54. The opposition fails. As such, and subject to appeal, the applied-for mark may proceed to registration.

Costs

55. I have determined these proceedings in favour of the applicant. It is, therefore, entitled to an award of costs.

56. I award the applicant the sum of £1400 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the statement of case and filing a counterstatement: £300

Considering evidence: £500

Preparing and filing written submissions: £600

57. I therefore order Aviva Brands Limited to pay Ambar Medline S.L., the sum of £1400. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 21st day of February 2020

Oliver Morris

For the Registrar

the Comptroller-General