

O-203-20

TRADE MARKS ACT 1994

IN THE MATTER OF:

**APPLICATION No. 3367113
BY SUPPERFARE UK LTD
TO REGISTER:**

SUPPERFARE

&

supperfare

AS A SERIES OF TRADE MARKS IN CLASSES 35, 41 & 43

AND

**OPPOSITION THERETO (UNDER No 416132)
BY DART INDUSTRIES INC.**

Background and pleadings

1. The relevant details of the opposed application are:

Marks: **SUPPERFARE & supperfare**

Filing date: 15 January 2019

Publication date: 25 January 2019

Applicant: Supperfare UK Ltd

Class 35: Advertising; Advertising, marketing and promotional services; Arranging of competitions for advertising purposes; Arranging of demonstrations for advertising purposes.

Class 41: Entertainment party planning; Entertainment relating to wine tasting; Entertainment services for children.

Class 43: Food preparation for others on an outsourcing basis; Personal chef services; Preparation of food and drink; Provision of information relating to the preparation of food and drink.

2. Registration is opposed by Dart Industries Inc., (“the opponent”) under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”)¹. The following three trade marks are relied upon:

Basic details of the earlier marks	Specification relied upon
TUPPERWARE	Class 35: Organisation of fairs and exhibitions for economic and advertising purposes, also in the internet; advertising, advertising consulting, publicity services; marketing, marketing consultancy; commercial and

¹ The opponent initially relied upon section 5(3) of the Act as an additional ground of opposition, but given that no evidence was filed in support, the ground was subsequently dropped.

<p>European Union Trade Mark ("EUTM") 1438670.</p> <p>Filing date: 23 December 1999</p> <p>Registration date: 20 February 2002</p>	<p>business consulting, organising and sale consulting; selling assistance, namely consultation in respect of sales techniques and programs; retails services through home party, retail sales and Internet.</p> <p>Class 41: Education, particularly cooking courses, training in the field of product presentation.</p>
<p>Tupperware</p> <p>EUTM registration 17892230</p> <p>Filing date: 25 April 2018</p> <p>Registration date: 6 September 2018.</p>	<p>Class 35: Advertising; marketing; promotion services; business management; business administration; business consulting; publicity services; organization of fairs and exhibitions for commercial and advertising purposes; consulting in sales techniques and sales programs; retail services in relation to cutlery; retail services in relation to cookware; retail services in relation to tableware; retail services in relation to food cooking equipment; retail services through home party and on the Internet of goods, namely knives, blocks for holding knives, knives sets in blocks for holding knives, household or kitchen utensils and containers, bake ware, glassware, porcelain, porcelain goods, bottles, games and playthings, non-electric kitchen apparatus and machines, in particular for chopping, grating, grinding, milling, pressing, cutting, kneading, emulsifying, whipping, mixing, beating or peeling foodstuffs; retail services through home party and on the Internet of goods, namely electric kitchen machines and tools, measuring instruments, particularly kitchen scales (electrical and mechanical), measuring jugs, measuring spoons, cups, and pitchers and seals therefor; retail services through home party and on the Internet of goods, namely multi-purpose, electric countertop food preparation apparatus for cooling, steaming, and frying food with integrated food processing and weighing functions; electric cooking pots; electric food steamers; electric rice cookers; electric sous vide cookers; electric fryers; electric hot pots; electric apparatus for vacuum cooking; electric cooking apparatus; electric containers for cooking; food and beverage cooking, heating, cooling and treatment equipment; cooking appliances; cooking utensils, electric; kitchen machines (electric-) for cooking;</p>

	presentation of goods and services; demonstration of goods and services by electronic means, also for the benefit of the so-called teleshopping and home shopping services.
<p>TUPPERCARE</p> <p>EUTM registration 13904537</p> <p>Filing date: 1 April 2015</p> <p>Registration date: 3 August 2015.</p>	<p>Class 35: Presentation of goods (for others), for sales purposes; demonstration of goods; organization of fairs and exhibitions for economic and advertising purposes, also in the Internet; advertising, advertising consulting, publicity services; marketing, marketing consulting; commercial and business consulting, organisation and sale consulting; selling assistance, namely consultation in respect of sales techniques and programs; retail services especially through home party, retail sales and Internet, namely household or kitchen utensils, containers for house and kitchen use including covers for those containers, children's cutlery, spoons for feeding babies, plates for use by children, garlic presses, fruit presses, vegetable presses, potato presses, freezing containers for household and kitchen use, tableware, cookware or bakeware, combs and brushes; retail services especially through home party, retail sales and Internet, namely glassware, porcelain and earthenware, tumblers, bottles, drink and juice bottles, cutlery, including forks and spoons, kitchen and table cutlery (also made of plastics), hand operated cutting tools, knives, table knives, pen knives, kitchen knives, vegetable slicers, vegetable knives and parts and fittings of the aforementioned goods.</p>

3. All of the opponent's marks were filed before the applicant's application, so meaning that they qualify as earlier marks in accordance with section 6 of the Act. EUTM 1438670 was registered before the period of 5 years ending on the date the application was filed, so meaning that the use conditions set out in section 6A apply, with the consequence that use needs to be demonstrated (unless the applicant does not require it) in order for that mark to form a basis for this opposition. The other two EUTMs were, though, registered within (not before) that five-year period, so they may be relied upon without having to prove use.

4. The applicant filed a counterstatement denying the grounds of opposition. In particular, I note that it:

- Does not put the opponent to proof of use in relation to EUTM 1438670.
- States that its name derives from the services it wishes to offer ie. SUPPER [an evening meal] and FARE [a range of food of a particular type].
- That members of the public have said that the names sound different and that it has no connotation with TUPPERWARE/TUPPERCARE.

5. Neither side filed evidence. Neither side requested a hearing, although the opponent did file written submissions in lieu. The opponent has been represented by Haseltine Lake Kempner LLP. The applicant has represented itself.

Section 5(2)(b)

6. The relevant parts of the Act read:

“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. 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.”

8. 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.

Comparison of services

9. All relevant factors relating to the services should be taken into account when making the comparison. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the Court of Justice of the European Union (“the CJEU”), Case C-39/97, stated at paragraph 23 of its judgment:

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

10. Guidance on this issue has also come from Jacob J where, in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, the following factors were highlighted as being relevant:

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

11. In terms of being complementary (one of the factors referred to in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*), this relates to close connections or relationships that are important or indispensable for the use of the other. In *Boston Scientific Ltd v OHIM* Case T- 325/06, it was stated:

“It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking..”

12. In its submissions, the opponent provided a table identifying where its services were similar to those of the applicant. I will go through the applicant's services class by class.

Class 35

13. The applicant seeks registration for:

Advertising; Advertising, marketing and promotional services; Arranging of competitions for advertising purposes; Arranging of demonstrations for advertising purposes.

14. All three of the opponent's earlier marks cover services in class 35, including the broad term "advertising", as well as terms such as "marketing" and "publicity". I consider all of the applied for terms to fall within the ambit of one or other of these terms. To the extent that they are not identical, they are similar to the very highest degree.

Class 41

15. The applicant seeks registration for:

Entertainment party planning; Entertainment relating to wine tasting; Entertainment services for children.

16. The opponent submits that terms covered by its earlier marks such as: "organisation of fairs and exhibitions for economic purposes", "retail services through home party", and "education, particularly cooking courses" are similar to the applied for services because event organisers habitually provide a range of events. Most of the submissions are based upon the same entity possibly organising all of them, although it also submits that the nature is the same and that the consumer would expect the range of services set out to be offered by the same business.

17. Earlier in its submissions the opponent argued that the applicant's explanation in its counterstatement as to the services it offered was not relevant because matters must be judged on the basis of the specifications applied for. I agree with this. However, from that perspective, I find it difficult to see why party planning should be considered similar to fairs and exhibitions for economic purposes. I can see a better argument for some similarity with "retail services through home party" as at least such activities are in a party setting, and both can be a form of enjoyable activity to be undertaken in one's home; these services have what I feel is a low degree of similarity. I do not consider that cooking courses are any more similar to party planning, in fact, I consider any similarity to be lower.

18. In relation to entertainment relating to wine testing, again, I find no similarity to the trade fairs. I find a low degree of similarity to retail through home party because they (the home party) could also potentially relate to wine. I also find a low degree of similarity to cooking courses as there is some overlap between learning to cook and learning to appreciate wine.

19. In relation to entertainment services for children, I find no overlap with the opponent's class 35 services. This is because the nature of children's entertainment, even if provided via a party, is quite different. It is possible for children's entertainment to be focused on cooking; I find a low degree of similarity here.

Class 43 specification

20. The applicant seeks registration for:

Food preparation for others on an outsourcing basis; Personal chef services; Preparation of food and drink; Provision of information relating to the preparation of food and drink.

21. In my view, the notional interpretation of the above terms focus on a specific service for the provision of food (and information relating to food). I find no similarity with any of the opponent's terms in class 35. There may be a degree of

complementarity with cooking courses in class 41, but only a slight degree resulting in only a low level of similarity.

Average consumer and the purchasing act

22. 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.”

23. The respective services are varied, and most could be aimed at both the general public or business people. Either way, I do not consider that any of the services have a particularly heightened degree of care and consideration in their selection, although none would be described as a casual selection either. The services could be encountered by Internet research, brochures, leaflets and advertisements, suggesting that the visual impact of the marks is likely to be significant in the assessment. However, the aural similarity of the marks must still be taken into account.

Comparison of marks

24. 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.”

25. 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 they create. Although the applicant has filed for a series of two marks, the differences between them are immaterial. They differ only in that one is presented in uppercase, the other lowercase. Therefore, the notional use of one covers the other. I will, therefore, refer to the applied for marks in the singular, from this point on. The respective marks are set out below, focusing, for the time being, on the opponent’s plain word versions of its earlier marks:

SUPPERFARE v TUPPERWARE

and

SUPPERFARE v TUPPERCARE

Overall impression

26. The average consumer is likely to notice that all of the marks comprise two words that have been conjoined: SUPPER and FARE; TUPPER and WARE/CARE. In no

case is either of those words presented in a way which makes it stand out compared to the other word in the mark. Notwithstanding that the word TUPPER² in the earlier marks is invented and, thus, more distinctive (and memorable) than what will be perceived as the much less distinctive word WARE/CARE, the respective words in each of the earlier marks still have significance in the overall impression they create. The same applies to the applied for mark, although, here, both SUPPER and WARE lack any real distinctiveness, so neither word is more memorable than the other.

Visual and aural similarity

27. The opponent submits that the marks are of the same length (10 letters/three syllables), that they share eight of those 10 letters, that the different seventh letter in the competing marks may be overlooked, that the different initial letters creates only a minor point of difference, and that the marks sound similar, based on articulations of [S/T]UPPER and [F/W/C]AIR. The opponent submits there is a medium to high level of aural and visual similarity.

28. There is clearly some similarity given the overall length and the sharing of letters, together with the rhyming quality of the marks. However, I do not agree that the S for a T is only a minor point of differentiation, nor that the difference in the seventh letter will be completely overlooked. I agree that there is a degree of visual and aural similarity slightly above medium, but not of a high degree of similarity.

Conceptual comparison

29. In its submissions, the opponent accepts that the applied for mark is made up of two readily understandable English words. In relation to the earlier marks, the opponent refers to the meanings of WARE/CARE, but highlights that TUPPER is a surname with no attributed meaning. It submits that given that the earlier marks as a whole have no identifiable meaning, the opposed mark does not differentiate from them conceptually.

² I note that in the opponent's submissions it states that TUPPER is a surname, however, in my view it will more likely be perceived as an invented word.

30. According to the case-law, a meaning possessed by one mark which is not shared by the other can constitute a conceptual difference; see, for example the CJEU's judgment in Case C-361/04 P *Claude Ruiz Picasso v. OHIM*. Furthermore, concepts can be created via evocative meanings; see, for example, the General Court's judgment in *Usinor SA v OHIM*.

31. The applied for mark comprises two known words conjoined. In combination, they evoke something which relates to a range of food (fare) for one's supper. I accept that the meaning is not as precise as a known, grammatically correct, combination of words, but nevertheless they still form a conceptual hook.

32. The word TUPPER in the earlier marks will be perceived as an invented word. As a whole, the earlier marks have no concept. The best that one can say is that the average consumer may recall that it has something to do with wares, or caring. Whatever way the earlier marks are interpreted, there is a conceptual difference with the applied for mark.

33. For sake of completeness, I remind myself that the earlier mark which is stylised could, potentially, have a different assessment. However, the stylisation is so minimal that it makes no difference to the aural, visual and conceptual comparisons I have made. I also record here that the applicant's points in its counterstatement that it sought the opinions of members of the public has not assisted it – this is because little information has been provided about those opinions, and how they were gathered.

Distinctive character of the earlier trade mark

34. 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

35. No evidence has been filed so I have only the inherent characteristics of the marks to consider. Whether TUPPERWARE or TUPPERCARE, the inclusion of what will be regarded by the average consumer as the invented word TUPPER provides the marks with a high degree of inherent distinctiveness. The inclusion of the word WARE/CARE neither reduces or increases this to any material extent. Similarly, the stylisation of the stylised form of TUPPERCARE neither reduces or increases distinctiveness to any material extent.

Likelihood of confusion

36. 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

³ C-342/97, paras. 22-23

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”.

37. Notwithstanding that the opponent refers in its submissions to the principle of imperfect recollection, it nevertheless exemplifies how confusion might arise by suggesting that the average consumer might see the applied-for mark as a “playful twist” and, hence, “brand extension” of the earlier mark. If the argument is that the average consumer sees the applied for mark as a playful twist, it follows that they have seen that the marks are not the same. Therefore, the opponent’s argument seems to be more about indirect confusion than it is about direct confusion. However, even if I have misinterpreted the submission, I come to the view that the average consumer will not be directly confused. Even from the perspective of the identical services in class 35, the average consumer is unlikely to misrecall/misremember the marks as each other, given not only the visual and aural differences between them, but also because of the conceptual hook that the applicant’s mark has in contrast to that of the opponent’s marks. There is no likelihood of direct confusion.

38. In terms of indirect confusion, this requires the average consumer, having appreciated, as Mr Purvis put it in the case-law above, that “[t]he later mark is different from the earlier mark, but also has something in common with it” will conclude, via a “mental process of some kind”, that the commonality between them is indicative that “it is another brand of the owner of the earlier mark”. The mental process as submitted by the opponent is described above, a playful twist leading to an assumption of brand extension. I do not agree. At best, the average consumer will notice that the marks have the same construction (two words conjoined) and syllabic form, which also rhymes. However, it is a step too far to suggest that this will lead the average consumer to assume that the services offered under SUPPERFARE come from the same or economically linked undertaking as TUPPERWARE/CARE. There is no likelihood of indirect confusion.

Conclusion

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

Costs

40. I have determined these proceedings in favour of the applicant. At the end of the proceedings, the applicant was sent a pro-forma to complete if it wished to claim any costs associated with these proceedings. The pro-forma was not returned. In line with what was said by the Tribunal in its accompanying letter with regard to the consequences of not completing the pro-forma, I make no award of costs.

Dated this 31st day of March 2020

Oliver Morris

For the Registrar

the Comptroller-General