

**O/484/20**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003400546**

**BY**

**FARMHOUSE FARE LIMITED**

**TO REGISTER:**

**GUDPUD**

**AS A TRADE MARK IN CLASS 30**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO**

**UNDER NO. 417541 BY**

**MOLKEREI ALOIS MÜLLER GMBH & CO. KG**

## BACKGROUND AND PLEADINGS

1. On 20 May 2019, Farmhouse Fare Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 31 May 2019 and registration is sought for the following goods:

Class 30: Puddings; dessert puddings; ready-to-eat puddings; prepared desserts [confectionery]; farinaceous foods; non-medicated flour confections; frozen dairy confections; frozen confections; chocolate confections.

2. On 2 September 2019, the application was opposed by Molkerei Alois Müller GmbH & Co. KG (“the opponent”). The opposition was initially based on sections 5(2)(b), 5(3) and 5(4) of the Trade Marks Act 1994 (“the Act”).
3. In its written submissions, the opponent confirmed that it wished to withdraw its opposition based upon sections 5(3) and 5(4) of the Act and that the opposition would proceed based on section 5(2)(b) of the Act only. On 13 January 2020, the Tribunal wrote to the opponent confirming that:

“It is noted you wish to limit your opposition to the grounds of section 5(2)(b) only. The opposition will now proceed under section 5(2)(b). As no statement of use is claimed in your notice of opposition, the proceedings will continue.”

4. On the same date, the Tribunal wrote to the applicant confirming that the opponent had limited its opposition to the section 5(2)(b) grounds only.
5. The opponent relies on the following trade marks:

MÜLLER PUD

MÜLLER PÜD

(Series of 2)

UK registration no. 3140703

Filing date 5 December 2015; registration date 13 May 2016  
("the opponent's first registration")

MÜLLER CORNER PUD

MÜLLER CORNER PÜD

(Series of 2)

UK registration no. 3074162

Filing date 25 September 2014; registration date 6 February 2015

("the opponent's second registration")

Püd

EUTM no. 17040809

Filing date 26 July 2017; registration date 12 December 2017

("the opponent's third registration")

6. The opponent relies on those goods for which its registrations are registered as listed in the **Annex** to this decision. The opponent claims that there is a likelihood of confusion because the respective goods are identical or similar and the marks are similar.
7. The applicant filed a counterstatement denying the claims made.
8. The opponent is represented by Bronwyn Dennis and the applicant is represented by Stone King LLP. Only the applicant has filed evidence. During the evidence rounds, both parties filed written submissions. No hearing was requested and neither party filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

## **EVIDENCE**

9. The applicant has submitted evidence in the form of the witness statement of Gavin Lloyd Llewellyn, being the applicant's representative, dated 4 March 2020. The evidence focuses on the meaning of the word 'pud' within the parties' respective marks. The applicant contends that "the word 'pud' is a recognised term meaning

‘pudding’ in the English language”.<sup>1</sup> To support this, Mr Llewellyn has included print outs from three online dictionaries, being the Cambridge Online Dictionary, Wiktionary and Oxford Learners Dictionaries that show the word ‘pud’ being an informal meaning of ‘pudding’.<sup>2</sup> To further support this position, Mr Llewellyn has included two separate extracts from Jamie Oliver’s website and ‘Delicious’ that both contain recipes for different puddings, both of which use the informal term ‘pud’.<sup>3</sup>

## **DECISION**

### **Section 5(2)(b): legislation and case law**

10. Section 5(2)(b) of the Act reads as follows:

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

(a) ...

(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 or association with the earlier trade mark.”

11. Section 5A of the Act states as follows:

“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.”

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<sup>1</sup> Paragraph 4 of the Witness Statement of Gavin Lloyd Llewellyn

<sup>2</sup> Exhibit GLL1

<sup>3</sup> Exhibit GLL2

12. 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.”

13. Given their filing dates, the opponent’s registrations qualify as earlier trade marks under the above provisions. As the opponent’s registrations had not completed their registration process more than 5 years before the date of the application in issue, they are not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods for which the registrations are registered.

14. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (“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 great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

### **Comparison of goods**

15. As noted above, the opponent's specifications are set out in the annex to this decision.

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

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

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

- (a) The respective 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.

18. The General Court (“GC”) confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another or (vice versa):

“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 für 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”.

19. The opponent has provided detailed submissions in respect of the goods comparison. Whilst I do not propose to reproduce them in full here, I will refer to them below if necessary.

20. The applicant has submitted that:

“It was already admitted in the TM8 Defence and Counter-Statement filed by the Applicant that the goods within the subject application are either identical or similar to the Class 30 goods falling within the Opponent’s registered marks relied upon.”



21. While I note that the applicant has admitted that its goods are either identical or similar to the opponent's goods, it has not specified those goods it considers identical and those goods it considers similar (and to what degree). I must therefore carry out my own assessment on the comparison of the goods and their degree of similarity.
22. Save for the inclusion of "dairy desserts" in the opponent's second registration, the opponent's first and second registrations share identical specifications. The opponent's third registration's specification is substantially different. Given that "dairy desserts" do not factor into the goods comparison, I will compare the opponent's first and second registrations' specifications with the applicant's specification first, before moving on to compare the opponent's third registration.

*The opponent's first and second registrations*

23. "Puddings" and "dessert puddings" in the applicant's specification have direct counterparts in class 30 in both the opponent's first and second registrations' specifications, although expressed in slightly different terms ("desserts and puddings"). These goods are identical.
24. "Ready-to-eat puddings" and "prepared desserts [confectionery]" in the applicant's specification will fall within the category of "desserts and puddings" in the opponent's first and second registrations' specifications. These goods are therefore identical under the principle outlined in *Meric*.
25. Farinaceous foods are foods consisting or made of starch.<sup>4</sup> Farinaceous foods can therefore cover a wide range of goods such as rice, pasta, noodles, tapioca and polenta. While "farinaceous foods" in the applicant's specification does not have a direct counterpart in the opponent's first and second registrations' specification, it will overlap in user, nature and purpose with "cereals and cereal preparations" in class 30 of the opponent's first and second registrations' specifications. This is because cereal and cereal preparations are foods that contain cereal grains that

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<sup>4</sup> <https://www.collinsdictionary.com/dictionary/english/farinaceous>

will be made from grains such as wheat, rice, oats and maize, all of which consist of starch. These goods will therefore be similar to at least a medium degree.

26. “Non-medicated flour confections” in the applicant’s specification describes confectionary that is made of flour. This can include cakes or pastries. While these goods have no direct counterpart in the opponent’s first and second registrations’ specifications, they will overlap in user, method of use and purpose with “chocolate products” and “snacks” in class 30. These goods will also have a competitive relationship in that a consumer may choose to purchase a flour confection over a chocolate product or another type of snack. These goods will also overlap in trade channels because an undertaking is likely to produce both flour confections, various types of chocolate products and other snacks. These goods will therefore be similar to a high degree.

27. “Chocolate confections” in the applicant’s specification falls within the broader category of “chocolate products” in class 30 of the opponent’s first and second registrations’ specifications. These goods will therefore be identical under the principle outlined in *Meric*.

28. “Ice cream”, “frozen yogurts” and “ices” in class 30 in the opponent’s first and second registrations’ specifications are all types of frozen confections. They will therefore fall within the category of “frozen dairy confections” and “frozen confections” in the applicant’s specification. Insofar as the applicant’s term covers these goods, they will be identical under the principle outlined in *Meric*. However, where the applicant’s term does not cover these goods, they will overlap in user, nature and purpose. They will also overlap in trade channels. These goods will be similar to a high degree.

#### *The opponent’s third registration*

29. “Puddings” in the applicant’s specification has a direct counterpart in class 30 in the opponent’s third registration. These goods are identical.

30. “Dessert puddings” in the applicant’s specification will fall within the category of “puddings” in the opponent’s third registration’s specification. These goods are therefore identical under the principle outlined in *Meric*.
31. “Ready-to-eat puddings” in the applicant’s specification will fall within the category of “puddings” in the opponent’s third registrations’ specification. These goods are therefore identical under the principle outlined in *Meric*.
32. “Prepared desserts [confectionery]” in the applicant’s specification is a very broad term that can cover various type of prepared confectionery desserts. Without any submissions to the contrary, I am of the view that these goods can include various desserts such as frozen yogurt, rice pudding, mousses, jelly, ice cream and ice lollies. Insofar as the applicant’s term covers these goods, they will be identical on the principle outlined in *Meric* with “frozen yoghurt [confectionery ices]”, “rice puddings”, “mousse confections”, “chocolate mousse”, “semolina pudding”, “puddings”, “jellies”, “ice cream”, “edible ices”, “sherbets [ices]” in class 30 in the opponent’s third registration’s specification. However, where the applicant’s term does not cover these goods, they will overlap in user, nature and purpose. They will share a competitive relationship in that an average consumer may choose one prepared confectionery dessert over another. They will also overlap in trade channels in that an undertaking may sell a wide range of various prepared confectionery desserts. These goods will therefore be similar to a high degree.
33. Save for any submissions to the contrary, I find that “muesli preparations, mainly consisting of sour cream, buttermilk, sour milk, yoghurt, kefir, quark, including with added prepared fruits and/or cereals” in class 29 of the opponent’s third registration’s specification describes a dessert that consists of separate chambers, one being muesli with fruit and/or cereals) and the other being a yoghurt pot (or other dairy product listed within the opponent’s term). Given that these goods will contain muesli and possibly cereals, they will include foods consisting of starch. Given that that “farinaceous foods” in the applicant’s specification describes foods consisting of starch, there will be a limited overlap between these goods in user, method of use and nature. While such a limited overlap is not normally sufficient on its own for a finding of similarity, I note that the applicant has admitted that there

is some degree of similarity between its own and the opponent's goods. It has not, however, submitted to what degree it considers "farinaceous foods" to be similar to any of the goods in the opponent's third registration's specification. In light of this, I will proceed on the basis that these goods are similar to a very low degree.

34. "Non-medicated flour confections" in the applicant's specification also has no direct counterpart in the opponent's third registration's specification. However, these goods will overlap in user, method of use and purpose with "mousse confections" in class 30. These goods will therefore be similar to a medium degree.

35. "Mousse confections" in the opponent's third registration's specification will commonly describe a small piece of confectionary that contains a mousse filling. While a mousse confection may contain chocolate, this in itself does not give rise to a finding of similarity (see *Les Éditions Albert René v OHIM*, Case T-336/03). However, while these goods are not identical with "chocolate confections" in the applicant's specification, they will overlap in user, nature and purpose. These goods may also have a competitive relationship. Additionally, they will also overlap in trade channels because an undertaking is likely to produce both mousse and chocolate confectionary. These goods will therefore be similar to a high degree.

36. "Ice cream", "edible ices", "sherbets [ices]" and "frozen yoghurt [confectionery ices]" in class 30 of the opponent's third registration's specification are all types of frozen confections. They will therefore fall within the category of "frozen dairy confections" and "frozen confections" in the applicant's specification. Insofar as the applicant's term covers these goods, they will be identical under the principle outlined in *Merix*. However, where the applicant's term does not cover these goods, they will overlap in user, nature and purpose. They will also overlap in trade channels. These goods will be similar to a high degree.

### **The average consumer and the nature of the purchasing act**

37. 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 decide 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.”

38. I have no submissions from the opponent regarding the average consumer. The applicant has submitted that “the relevant public is the average member of the public at large of such goods within the UK.” I agree with the applicant’s submissions and find that the average consumer is a member of the general public of the UK.

39. These goods are generally sold through a range of retail shops, such as supermarkets and their online equivalents. In retail premises, the goods at issue will be displayed on shelves, where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a webpage. The selection of the goods at issue will, therefore, be primarily visual, although I do not discount that aural considerations may play a part in the form of word of mouth recommendations or advice from a shop assistant.

40. The goods at issue are low in value and will be reasonably frequent purchases. When selecting the goods, the average consumer is likely to consider such things as dietary requirements, flavour and/or nutritional information. For the majority of the goods, the average consumer is likely to pay a medium degree of attention during the selection process. However, I recognise that some of the goods will be very casual purchases (such as confectionery or snacks selected at a checkout),

and for those goods I find that the average consumer is likely to pay a lower degree of attention.

### **Distinctive character of the earlier registrations**

41. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. 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).

23. 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).”

42. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it.

43. The opponent has not pleaded that its registrations have acquired enhanced distinctive character through use, nor has it filed any evidence to support such a claim. I have, therefore, only the inherent position to consider.
44. Given that the opponent's registrations all consist of or contain the word Püd/'PUD'/'PÜD', I will first make a finding regarding the distinctiveness of that word. This finding will then apply to my assessments of the distinctive character of each of the opponent's registrations.
45. Firstly, while I consider that the umlauts above the letters 'U' in the opponent's registrations will be noticed, I do not consider that they will alter the word's meaning to the average consumer in the UK. The applicant has submitted evidence of various online dictionaries and online recipes regarding the meaning of the word 'pud'. I agree with the evidence submitted and find that the average consumer in the UK would view the word 'pud' as being short for 'pudding'. I find that the word 'pud' will be descriptive of the opponent's goods that were subject to the above goods comparison. I make this finding because the average consumer in the UK will see the word 'pudding' to mean the dessert or sweet course of a meal<sup>5</sup> and not a specific type of dessert. Therefore, the word 'pud', regardless of its presentation, will not contribute to the distinctiveness of the opponent's registrations.

*The opponent's first registration*

46. The opponent's first registration is a series of two marks that consist of the words 'MÜLLER PUD' in the first mark of the series and "MÜLLER PÜD" in the second mark. The word 'MÜLLER' will have no obvious meaning to the average consumer in the UK and is likely to be seen as a surname of foreign origin. I have found above that the word 'PUD'/'PÜD' will not contribute to the distinctiveness of the opponent's first registration. When taken together, the words will be seen as an entity called 'MULLER' that produces puddings and other types of desserts. Overall, I consider the opponent's first registration to have between a low and medium degree of inherent distinctive character.

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<sup>5</sup> <https://www.collinsdictionary.com/dictionary/english/pudding>

### *The opponent's second registration*

47. The opponent's second registration is a series of two marks that consist of the words 'MÜLLER CORNER PUD' in the first mark of the series and "MÜLLER CORNER PÜD" in the second mark. The word 'CORNER' will be attributed its ordinary dictionary meaning and will form a unit in combination with the word 'PUD'/'PÜD'. The words 'CORNER PUD' will be seen as a specific type of pudding and will not, therefore, change the meaning of the word 'PUD'. 'CORNER PUD' will not contribute to the distinctiveness of the registration. When taken as a whole, the opponent's second registration will be seen as an entity called 'MÜLLER' that produces 'corner puddings'. Overall, I consider that the opponent's second registration to have between a low and medium degree of inherent distinctive character.

### *The opponent's third registration*

48. The opponent's third registration consists of the word 'Püd'. While the word 'PUD' will be descriptive of the goods at issue, I bear in mind the decision of *Formula One Licensing BV v OHIM*, Case C-196/11P wherein the CJEU found that a registered trade mark must be assumed to have at least some distinctive character. As a result, any distinctive character the third registration may possess will be, at very best, low.

### **Comparison of marks**

49. It is clear from *Sabel 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.

50. 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.”

51. 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.

52. The respective trade marks are shown below:

Opponent's registrations	Applicant's mark
<p style="text-align: center;">MÜLLER PUD MÜLLER PÜD (Series of 2) ("the opponent's first registration")</p> <p style="text-align: center;">MÜLLER CORNER PUD MÜLLER CORNER PÜD (Series of 2) ("the opponent's second registration")</p> <p style="text-align: center;">Püd ("the opponent's third registration")</p>	<p style="text-align: center;">GUDPUD</p>

53. The parties have provided detailed submissions in respect of the comparison of marks. Whilst I do not propose to reproduce them in full here, I will refer to them below if necessary.

### Overall Impression

#### *The applicant's mark*

54. The applicant's mark is a word only mark that consists of the word 'GUDPUD'. I find that the average consumer will break the mark down into two words, being 'GUD' and 'PUD'. 'GUD' will be seen as an obvious misspelling of the word 'good' and, as I have found above, 'PUD' will be seen as a short version of the word 'pudding'. The word 'GUD' will be considered laudatory of the quality of goods for which the applicant seeks to protect. Further, given that the goods at issue are puddings, desserts and various types of confections, the word 'PUD' will be seen as descriptive of the goods offered by the applicant. While the mark can be broken down into two separate words, the mark will still be viewed as one word. The overall impression of the applicant's mark, therefore, lies in the word 'GUDPUD' itself.

#### *The opponent's first registration*

55. The opponent's first registration consists of two marks, the first being the words 'MÜLLER PUD' and the second being the words 'MÜLLER PÜD'. I have found above that the word 'PUD' does not contribute to the distinctiveness of the registration. While I consider that the umlauts in the marks will be noticed, they will play a lesser role in the overall impression of the mark. I therefore find that the word 'MÜLLER' plays a greater role in the overall impression of the registration with the word 'PUD' and the umlauts playing a lesser role

#### *The opponent's second registration*

56. The opponent's second registration consists of two marks, the first being the words 'MÜLLER CORNER PUD' and the second being the words 'MÜLLER CORNER PÜD'. I have found above that the words 'CORNER PUD' will be seen as a unit

and will not contribute to the overall distinctiveness of the registration. The findings I have made regarding the umlauts at paragraph 55 above will also apply to the opponent's second registration. I therefore find that the word 'MULLER' will play a greater role in the overall impression of the registration with the words 'CORNER PUD' and the umlauts playing lesser roles.

#### *The opponent's third registration*

57. The opponent's third registration consists of the word 'Püd'. I find that the word 'Pud' plays a greater role in the overall impression of the registration with the umlauts playing a lesser role.

#### Visual Comparison

##### *The opponent's first registration and the applicant's mark*

58. Visually, the marks coincide in the word 'PUD'. The marks differ in the presence of 'GUD' in the applicant's mark, which is absent in the opponent's first registration. Further, the word 'MULLER' and the umlauts that are present in the opponent's first registration are absent in the applicant's mark. While I have found that the umlauts play a lesser role in the overall impression of the second mark in the opponent's first registration, they will still constitute a visual difference between the marks. I have also found that the word 'MULLER' plays a greater role in the overall impression of the opponent's first registration. Further, given that the average consumer tends to give more focus to the beginning of marks,<sup>6</sup> I find that the marks are visually similar to no more than a medium degree.

##### *The opponent's second registration and the applicant's mark*

59. Visually, the marks coincide in the word 'PUD'. The marks differ in the presence of 'GUD' in the applicant's mark, which is absent in the opponent's second registration. Further, the words 'MULLER' and 'CORNER' and the umlauts that are

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<sup>6</sup> *El Corte Inglés, SA v OHIM* Cases T-183/02 and T-184/02

present in the opponent's second registration are absent in the applicant's mark. While I have found that the word 'CORNER' and the umlauts play a lesser role in the overall impression in the opponent's registration, they will still constitute a visual difference between the marks. Further, given that the average consumer tends to give more focus to the beginning of marks, I find that the marks are visually similar to between a low and medium degree.

#### *The opponent's third registration and the applicant's mark*

60. Visually, the marks coincide in the word 'PUD'/'Pud'. The marks differ in the presence of 'GUD' in the applicant's mark, which is absent in the opponent's third registration. The umlaut that is present in the opponent's third registration is absent in the applicant's mark. While I have found that the umlaut will play a lesser role in the overall impression of the third registration, it will still constitute a visual difference between the marks. The difference, being the presence of the word 'GUD, is at the beginning of the mark, which is where the average consumer tends to focus. Further, the opponent's third registration is a short mark meaning that the differences may have a greater impact.<sup>7</sup> As a result, I am of the view that the differences between the marks will stand out more. Overall, I find that the marks are visually similar to a medium degree.

#### Aural Comparison

61. Each of the opponent's registrations contains an umlaut. An umlaut is commonly used in Germanic languages to alter the pronunciation of a vowel. As the applicant has pointed out in its submissions, the umlaut is used in English in some adopted words (such as naïve). However, while it may be recognised by some average consumers in the UK, I do not consider that a significant proportion of average consumers in the UK will alter their pronunciation of the word due to the presence of an umlaut. Therefore, I find that the umlaut in the opponent's registrations will have no aural effect on the registrations' pronunciations.

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<sup>7</sup> *Robert Bosch GmbH v Bosco Brands UK Limited*, BL O/301/20

62. Aurally, the applicant's mark consists of two syllables that will be pronounced 'GOOD-PUUD'. This will apply to each of the comparisons below.

*The opponent's first registration and the applicant's mark*

63. Aurally, the opponent's first registration consists of three syllables that will be pronounced 'MUHL-ER-PUUD'. The last syllable of the marks are identical, however, the first syllable of the applicant's mark and the first two syllables of the opponent's first registration are dissimilar. Overall, I find the marks to be aurally similar to a medium degree.

*The opponent's second registration and the applicant's mark*

64. Aurally, the opponent's second registration consists of five syllables that will be pronounced 'MUHL-ER-COR-NER-PUUD'. The last syllable of the marks are identical, however, the first syllable of the applicant's mark and the first four syllables of the opponent's second registration are dissimilar. Overall, I find the marks to be aurally similar to a low degree.

*The opponent's third registration and the applicant's mark*

65. Aurally, the opponent's third registration consists of one syllable that will be pronounced 'PUUD'. The similarities between these marks form the entirety of the aural element of the opponent's third registration and half of the aural element of the applicant's mark. I have set out above that due to the opponent's third registration being a short mark, the differences may have a greater impact. Overall, I find the marks to be aurally similar to a higher than medium degree.

Conceptual Comparison

66. Conceptually, the applicant's mark will be seen by the average consumer as a reference to a 'good pudding'. Further, I do not find that the umlauts in the opponent's registrations will carry any conceptual meaning. This will apply to each of the comparisons below.

*The opponent's first registration and the applicant's mark*

67. On the goods at issue, the opponent's first registration will be seen to indicate a pudding that is produced by a person or entity named 'Müller'. While the marks are conceptually similar in that they refer to puddings, there is a conceptual difference in the meaning of words 'Müller' and 'GUD'. The marks are therefore conceptually similar to between a medium and high degree.

*The opponent's second registration and the applicant's mark*

68. The finding regarding the concept of the words 'MÜLLER' and 'PUD'/'PÜD' that I have made above will also apply to the opponent's second registration. However, the inclusion of the word 'CORNER' will result in 'CORNER PUD' being seen by the average consumer as a reference to a specific type of pudding. Despite this, both marks still refer to puddings, however, there will be conceptual differences in the presence of the words 'Müller' and 'GUD' and the reference to a specific type of pudding. The marks are therefore conceptually similar to a medium degree.

*The opponent's third registration and the applicant's mark*

69. The only conceptual difference between the marks will be the meaning of the word 'GUD'. The marks are therefore conceptually similar to a high degree.

**Likelihood of confusion**

70. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the services and the nature of the purchasing process. In doing so, I must be alive to 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 that he has retained in his mind.

71. I have found the goods at issue to range from identical to similar to a very low degree. I have found that the average consumer will be a member of the general public who will purchase the goods primarily by visual means, but I do not discount an aural component. I have concluded that the average consumer will pay a medium degree of attention during the selection process, but I do acknowledge that this may be lower for some of the goods. I have found the opponent's first and second registrations to have between a low and medium degree of distinctive character and the opponent's third registration to have a low degree of distinctive character.

72. I have found the opponent's first registration and the applicant's mark to be visually similar to no more than a medium degree, aurally similar to a medium degree and conceptually similar to between a medium and high degree. I have found the opponent's second registration and the applicant's mark to be visually similar to between a low and medium degree, aurally similar to a low degree and conceptually similar to a medium degree. I have found the opponent's third registration and the applicant's mark to be visually similar to a medium degree, aurally similar to a higher than medium degree and conceptually similar to a high degree.

73. 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 said:

“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.”

74. 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. The distinctiveness of the opponent’s marks lies in the word ‘MULLER’ in the opponent’s first and second registrations and the word ‘Pud’ in the opponent’s third registration.

75. The common element of the marks is the word ‘PUD’, which I have found to be descriptive. As a result, greater weight will be attributed to the other parts of the marks. Therefore, I consider that the visual and aural differences between the opponent’s registrations and the applicant’s mark are sufficient to ensure that they will not be misremembered or mistakenly recalled as each other. Notwithstanding the principle of imperfect recollection, and taking all of the above factors into account, I am satisfied that there is no likelihood of direct confusion between the applicant’s mark and the opponent’s registrations, even on goods that I have found to be identical.

76. It now falls to me to consider whether there is a likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10.



“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.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI”, etc.). BL O/375/10 Page 15 of 16
- (c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

77. I have borne in mind that the examples given by Mr Purvis QC are not exhaustive. Rather, they were intended to be illustrative of the general approach.<sup>8</sup>

78. I note that the opponent has submitted that the applicant's mark will be mistaken for being a member of its family of marks. In *Il Pone Finanziaria SpA v OHIM*, Case C-234/06, the CJEU stated:

“62. While it is true that, in the case of opposition to an application for registration of a Community trade mark based on the existence of only one earlier trade mark that is not yet subject to an obligation of use, the assessment of the likelihood of confusion is to be carried by comparing the two marks as they were registered, the same does not apply where the opposition is based on the existence of several trade marks possessing common characteristics which make it possible for them to be regarded as part of a ‘family’ or ‘series’ of marks.

63 The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see *Alcon v OHIM*, paragraph 55, and, to that effect, *Canon*, paragraph 29). Where there is a ‘family’ or ‘series’ of trade marks, the likelihood of confusion results more specifically from the possibility that the consumer may be mistaken as to the provenance or origin of goods or services covered by the trade mark applied for or considers erroneously that that trade mark is part of that family or series of marks.

64 As the Advocate General stated at paragraph 101 of her Opinion, no consumer can be expected, in the absence of use of a sufficient number of trade marks capable of constituting a family or a series, to detect a common element in such a family or series and/or to associate with that family or series another trade mark containing the same common element. Accordingly, in order for there to be a likelihood that the public may be mistaken as to whether the

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<sup>8</sup> *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10

trade mark applied for belongs to a 'family' or 'series', the earlier trade marks which are part of that 'family' or 'series' must be present on the market.

65 Thus, contrary to what the appellant maintains, the Court of First Instance did not require proof of use as such of the earlier trade marks but only of use of a sufficient number of them as to be capable of constituting a family or series of trade marks and therefore of demonstrating that such a family or series exists for the purposes of the assessment of the likelihood of confusion.

66 It follows that, having found that there was no such use, the Court of First Instance was properly able to conclude that the Board of Appeal was entitled to disregard the arguments by which the appellant claimed the protection that could be due to 'marks in a series'."

79. The case law above sets out that in order to rely upon a family of marks, the marks in question must be present on the market. I have no evidence from the opponent regarding the presence on the market of any of the registrations. As a result, I am unable to consider the family of marks argument put forward by the opponent. I will, therefore, proceed to assess likelihood of indirect confusion of the opponent's registrations in the ordinary way.

80. I must now consider the possibility of indirect confusion and whether average consumers would believe that there is an economic connection between the marks or that they are variant marks from the same undertaking as a result of the shared element of the marks. I bear in mind that a finding of indirect confusion should not be made merely because the two marks share a common element. It is not sufficient that a mark merely calls to mind another mark. This is mere association, not indirect confusion.<sup>9</sup> Further, it is clear from the judgment of the CJEU in *Lloyd* (cited above), that descriptive matter should be given less weight when comparing trade marks.

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<sup>9</sup> *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

81. The differences between the marks are: (i) the presence of the umlaut in the opponent's registrations, (ii) the words 'MÜLLER' and 'MÜLLER CORNER' in the opponent's first and second registrations and (iii) the word 'GUD' in the applicant's mark. The common element between the marks is the word 'PUD', which I have found to be descriptive of the goods at issue.

82. In my view, if the average consumer recognises the difference between the marks, I see no reason why they would assume that the marks come from the same or economically linked undertakings. The common element of the marks is descriptive of the goods at issue and I do not think that the consumer would have any reason to believe that only one undertaking would use the word 'PUD' in relation to the type of goods offered by the parties. If the umlauts are noticed by the average consumer, this will serve to further differentiate between the marks. I find that the consumer is more likely to view the different beginnings of the opponent's first and second registrations, being the presence of the word 'MÜLLER', to indicate a different undertaking specialising in the same type of goods rather than indicating that the marks originate from the same or linked undertakings.

83. I note that the opponent's third registration does not contain the word 'MÜLLER'. However, I do not consider that the differences between the applicant's mark and the opponent's third registration would be seen as a logical brand extension for one another, nor do I consider that the average consumer would view the marks as variants of each other. This is particularly the case given the low distinctive character of the opponent's third registration and the descriptive nature of the common element of the marks. I do not, therefore, consider there to be a likelihood of indirect confusion between the opponent's registrations and the applicant's mark, even on goods that are identical.

## **CONCLUSION**

84. The opposition has been unsuccessful in its entirety and the application will proceed to registration.

## **COSTS**

85. As the applicant has been successful, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the applicant the sum of **£1,000** as a contribution towards its costs. The sum is calculated as follows:

Preparing a statement and considering the opponent's statement:	£200
Preparing evidence:	£500
Preparing written submissions in lieu:	£300
<b>Total:</b>	<b>£1,000</b>

86. I therefore order Molkerei Alois Müller GmbH & Co. KG to pay Farmhouse Fare Limited the sum of £1,000. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 30th day of September 2020**

**A COOPER**

**For the Registrar**

## ANNEX

### The opponent's first registration

- Class 29: Yogurt, desserts comprising of yogurt and honey, yogurt and fruit, yogurt and nuts, yogurt and cereals, yogurt and chocolate, yogurt and sweets, all made wholly or principally of yogurt; yogurt drinks, drinks containing yogurt and fruit juice; drinks containing yogurt and fruit puree; dairy products; dairy desserts; preparations all for use as desserts and puddings; milk; milk products; milk beverages; jellies; jelly desserts; jams; fruit purees; fromage frais; spreads; dairy spreads; margarine; dips; semi-skimmed milk; skimmed-milk; cream and yogurt; edible oils and edible fats; cream; butter; cheese; cottage cheese; cheese spread; soya milk; flavoured milk; milk drinks; beverages consisting principally of milk; beverages made from milk; long life milk; milk based drinks; beverages with a milk element; beverages derived from milk; drinks made wholly or principally with milk.
- Class 30: Desserts, all made wholly or principally of rice; desserts and puddings; ice cream; frozen yogurts; chocolate products; chocolate desserts; snacks; snack dips; biscuits; cookies; cereals and cereal preparations; cereal bars; ice; ices; chocolate beverages with milk; cocoa beverages with milk; coffee beverages with milk; iced tea; sorbets; syrups and other preparations for stiffening whipped cream; fruit sauces.
- Class 32: Non-alcoholic drinks; fruit drinks, fruit juices; drinks containing fruit juice and yogurt; mineral and aerated waters and other non-alcoholic drinks; water; mineral water; spring water; carbonated water; bottled water.

## The opponent's second registration

- Class 29: Yogurt, desserts comprising of yogurt and honey, yogurt and fruit, yogurt and nuts, yogurt and cereals, yogurt and chocolate, yogurt and sweets, all made wholly or principally of yogurt; yogurt drinks, drinks containing yogurt and fruit juice; drinks containing yogurt and fruit puree; dairy products; dairy desserts; preparations all for use as desserts and puddings; milk; milk products; milk beverages; jellies; jelly desserts; jams; fruit purees; fromage frais; spreads; dairy spreads; margarine; dips; semi-skimmed milk; skimmed- milk; cream and yogurt; edible oils and edible fats; cream; butter; cheese; cottage cheese; cheese spread; soya milk; flavoured milk; milk drinks; beverages consisting principally of milk; beverages made from milk; long life milk; milk based drinks; beverages with a milk element; beverages derived from milk; drinks made wholly or principally with milk; dairy desserts.
- Class 30: Desserts, all made wholly or principally of rice; desserts and puddings; ice cream; frozen yogurts; chocolate products; chocolate desserts; snacks; snack dips; biscuits; cookies; cereals and cereal preparations; cereal bars; ice; ices; chocolate beverages with milk; cocoa beverages with milk; coffee beverages with milk; iced tea; sorbets; syrups and other preparations for stiffening whipped cream; fruit sauces.
- Class 32: Non-alcoholic drinks; fruit drinks, fruit juices; drinks containing fruit juice and yogurt; mineral and aerated waters and other non-alcoholic drinks; water; mineral water; spring water; carbonated water; bottled water.

## The opponent's third registration

- Class 29: Milk and milk products; Whey; Butter; Cheese products; Cream cheese; Cream [dairy products]; Smetana [sour cream]; Condensed milk; Yoghurt; Buttermilk; Smetana [sour cream]; curd; Curd; Kephir [milk beverage]; Powdered milk for food purposes; Non-alcoholic milk beverages and mixed-milk beverages (milk predominating); Non-alcoholic milk beverages and mixed-milk beverages (milk predominating) containing caffeine; Fat-containing mixtures for bread slices; Casein and milk powder, all for food; RO permeate (whey products); Muesli preparations, mainly consisting of sour cream, buttermilk, sour milk, yoghurt, kefir, quark, including with added prepared fruits and/or cereals; Prepared desserts of milk, yoghurt, quark and cream, including with added herbs and/or prepared fruits and/or cereals.
- Class 30: Coffee; Coffee-based beverages; Cocoa; Cocoa-based beverages; Drinking chocolate; Cocoa beverages with milk; Coffee beverages with milk; Chocolate beverages with milk; Rice puddings; Mousse confections; Chocolate mousse; Semolina pudding; Puddings; Hominy; Jellies; Jellies; Ice cream; Edible ices; Sherbets [ices]; Frozen yoghurt [confectionery ices].
- Class 32: Waters [beverages]; Mineral water [beverages]; Table waters; Soda water; Seltzer water; Aerated water; Non-alcoholic beverages; Lemonades; Isotonic drinks; Energy drinks; Whey beverages; Sherbets [beverages]; Fruit beverages and fruit juices; Fruit nectars, non-alcoholic; Vegetable juices [beverages].