

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3,561,974 IN THE NAME OF PANGAIA MATERIALS SCIENCE LIMITED

AND IN THE MATTER OF THE OPPOSITION UNDER NUMBER 425,040 IN THE NAME OF PANGAEA LABORATORIES LIMITED

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF ARRAN COOPER (O/382/23) DATED 25 APRIL 2023

DECISION

Introduction

1. This is an appeal from the decision of Mr Arran Cooper, for the Registrar, dated 25 April 2023 (O/382/23). Pangaea Laboratories Ltd opposes the application of Pangaia Material Science Limited to register the trade mark PANGAIA (No 3,561,973).
2. Pangaia Material Science applied to register the word mark PANGAIA in classes 3, 5, 9, 14, 16, 18, 20, 22, 24, 28, 30, 32, 35 and 40. Pangaea Laboratories Ltd opposed this application in relation to Class 3 only based on its earlier trade marks PANGAEA (No 2,368,933 and Int Reg 926,265). The opposition was made under section 5(2)(b), but it was found that the mark had not been used at all before the relevant date (29 May 2020) and so the opposition failed. Pangaea Laboratories Ltd appeals.

Standard of appeal

3. The standard of appeal is by way of review. Neither surprise at a Hearing Officer's conclusion nor a belief that he or she has reached the wrong decision will suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was wrong. The principles to be applied were summarised by Joanna Smith J in *Axogen Corporation v Aviv Scientific Ltd* [2022] EWHC 95 (Ch) at [24]. When considering this appeal, and applying these principles, it is important to remember the high bar set.

Grounds of appeal

4. The Appellant raises two grounds of appeal. First, the Appellant submits that the Hearing Officer erred in concluding that the use of PANGAEA when it was part of an address was not trade mark use. Secondly, the Appellant argues that the Hearing Officer erred by not inferring use before 16 June 2020, which is the date when the 'fluidnotgel' product was listed on Amazon.

Ground 1: Whether use as a trade mark

5. The first ground of appeal is quite simple. The Hearing Officer found that the average consumer would consider the mark used on the Appellant's products to be Medik8 and any use of the word Pangaea on the back of the box and on the bottle itself was not trade mark use. An example of the relevant presentation of the word PANGAEA is demonstrated in the pictures below (these are taken from Exhibit EI4, page 34):



6. The Hearing Officer correctly explained what he had to find at paragraph 44:

...I must be satisfied that upon selecting the goods at issue the consumer or end user would see the opponent's mark on the back of the products and, if they did, whether they would use it to identify the origin of those goods (be that primary or secondary).

7. He went on to conclude that most consumers would ignore the back of the packaging and many of those who looked would not notice the word PANGAEA. But he accepted that the word would be seen by at least a significant proportion of average consumers as he explained in paragraph 50:

That being said, I cannot fully discount the fact that 'PANGAEA' would be seen by at least a significant proportion of average consumers. However, I am of the view that even if it was noticed, the average consumer would not believe that 'PANGAEA' was intended to have a trade mark function and would not consider it as a badge of origin. I say this based on the fact it is only referenced once on the packaging and its size and placement is such that the consumer would not give it any serious consideration, especially to the point where it would be viewed as something that is intended to be indicative of the origin of the goods. Even if the consumer was to consider it further, I still do not think that it would be viewed as a trade mark on the basis that the average consumer would expect any trade mark to feature more noticeably elsewhere on the packaging. On this point, I also note that the reference to 'PANGAEA' is immediately beneath a reference to 'Medik8' being the registered trade mark. In such circumstances, I am of the view that the average consumer would expect 'PANGAEA' to also be referred to as a registered trade mark on the packaging if it was meant to be viewed as one.

8. Mr Muir Wood, for the Appellant, submits that the Hearing Officer failed to consider the “end user” in this explanation. He goes on to submit, in essence, that the Hearing Officer failed to explain how the average consumer or end user would understand the word PANGAEA if it was not seen as a trade mark.
9. Ms Michaels, for the Respondent, submits that the end user and average consumer are synonyms. She goes on to submit that the Hearing Officer only needed to consider whether the use of the word PANGAEA was trade mark use.
10. Mr Muir Wood presented no authority supporting the proposition that the end user and average consumer are different. He also presented no cases where the end user has been found to view the mark differently from the average consumer. In my view, the reference to the end user in relation to the average consumer is included to help distinguish which purchaser in the chain is treated as the average consumer. In some instances, the end user will be a business and this business will be the average consumer (eg sound production services) in other instances the end user will be an individual consumer (eg baked beans). In both cases, there may be intermediaries between the trade mark proprietor and the end user. These intermediaries are not usually treated as the average consumer as they are not the end user. I therefore reject Mr Muir Wood’s criticism that the Hearing Officer failed to consider the end user. He considered the average consumer who is also the end user.
11. Mr Muir Wood’s second point is that the Hearing Officer failed to explain how the average consumer would view the word PANGAEA on the packaging (if it is not seen as a trade mark). His point is a simple one, namely that once the word PANGAEA has been noticed and considered it must be given a meaning. Mr Muir Wood suggests the only possible way the word PANGAEA could be seen in “PANGAEA: 730, WD6 3SZ, UK” is as a trade mark. So, he submits, it was not open to the Hearing Officer to conclude the word was not being used as a trade mark because that is the only way it could have been viewed.
12. On this point he fails, the word PANGAEA is used as part of a short form address (building number, post code). It seems possible to me, for instance, that PANGAEA could be the name of a building at that address (even though there is a colon immediately afterwards). But in any event, this is immaterial. This is because even where a sign is considered by the average consumer it may be that ultimately the consumer ends up wondering what the sign means without ever reaching a satisfying answer. Put simply, the average consumer should not be assumed to conclude that in the absence of an alternative explanation a sign is being used as a trade mark.
13. This is why I agree with Ms Michaels. The Hearing Officer was required to determine whether the Appellant’s use of PANGAEA was use as a trade mark. His reasoning in this regard was impeccable. Once he had concluded it was not seen as a trade mark, he was not required to determine how the average consumer – after thinking about it – would view the word PANGAEA.

14. I therefore reject the first ground of appeal.

Ground 2: Preparation for launch

15. The Appellant’s second ground of appeal was not pursued very vigorously at the Hearing. In short, the Hearing Officer found that the mark PANGAEA had been used on the “fluidnotgel” products, but that these products were first listed on Amazon on 16 June 2020, which was after the relevant date.

16. Mr Muir Wood submits that the Hearing Officer should have inferred that there was use prior to 16 June 2020 in preparation for the launch. He does this without any evidence whatsoever as to what those preparations were or how the mark might have been used during such preparations. As internal use does not count as genuine use, the Hearing Officer would have had to speculate about what might have been expected to happen before the relevant date (29 May 2020). This would have been entirely improper. If the Appellant had wanted to rely on use of PANGAEA on fluidnotgel before the relevant date there would need to be evidence to support it. It is not appropriate for a Hearing Officer to speculate or infer what might have happened earlier in the absence of any evidence. Accordingly, this ground of appeal is also dismissed.

Conclusion

17. I have rejected the appeal in its entirety. The application can therefore go on to be registered in full.

18. I order the Appellant to make a contribution of £1,000 towards to the costs of the Respondent. This to be paid within 14 days of the date of the decision.

PHILLIP JOHNSON
8 January 2024

Representation

Jamie Muir Wood (instructed by Wedlake Bell LLP) for the Appellant

Amanda Michaels (instructed by Bonum IP Limited) for the Respondent