

BL O/0111/25

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK REGISTRATION NO.
UK0000325548
IN THE NAME OF ELBISCO INDUSTRIAL AND COMMERCIAL
FOODS S.A.

AND

APPLICATION CA504749
BY KERANGUS HOLDINGS LTD FOR A DECLARATION THAT
REGISTRATION UK00003255468 IS INVALID

AND

TRADE MARK APPLICATION UK00003651180
BY KERANGUS HOLDINGS LTD

AND

OPPOSITION 428814
BY ELBISCO INDUSTRIAL AND COMMERCIAL FOODS S.A.

AND

IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
BY KERANGUS HOLDINGS LTD AGAINST DECISION NO. BL
O/1012/23 DATED 30 OCTOBER 2023

Kerangus Holdings Ltd was represented by Marks & Clerk LLP by way of written
submissions.

Elbisco Industrial And Commercial Foods S.A. did not take part in the Appeal.

DECISION

Introduction


1. This is an appeal by Kerangus Holdings Ltd (“Kerangus”) against decision BL O/1012/23 of Mx N.R Morris, sitting as a Hearing Officer on behalf of the Registrar of Trade Marks, dated 30 October 2023.



2. Kerangus applied to register  on 4 June 2021 under No. UK00003651180 for various goods in classes 29 and 30 (“180”).


3. Elbisco Industrial and Commercial Foods S.A. opposed (OPP 428814) on 3 December 2021 under S. 5 (2) (b) of the Trade Marks Act 1994 (“the Act”), relying on its earlier trade mark registration No.



UK00003255468  dated 8 September 2017, covering goods in class 30 (“468”).

4. Kerangus defended the opposition. Furthermore it commenced an application (CA504749) for a declaration that ‘468 was invalid, having been registered contrary to Sections 47(2)(a) and 5(2)(b) of



the Act in the light of its still earlier registration No. UK00003700115  in classes 29 and 30, which has a priority date of 17 June 2016 (“115”).

5. The proceedings were consolidated. Both sides filed evidence and submissions in the evidence stage. Neither party sought a hearing. Kerangus alone filed written submissions in lieu of a hearing. The decision of the Hearing Officer was therefore made on the papers.

6. In brief, the Hearing Officer found as follows:

CA504749

- a) The vast majority of average UK consumers would not understand Greek characters and would deem Kerangus’s ‘115 mark to comprise the word element ‘ANNA’,

- b) In '468, that 'apla' will be readily articulable by the average UK consumer, whereas the word "απλά", would not be capable of articulation by a significant proportion of average UK consumers. The smaller English-language element 'apla' therefore made the greatest contribution to the overall impression of the earlier mark.
- c) '115 and '468 were:
 - i) Visually similar to only a very low level;
 - ii) Aurally similar to only a very low level;
 - iii) Conceptually different.
- d) The parties' goods varied in terms of identity/similarity/dissimilarity
- e) Seen as the English word/name ANNA, '115 was of medium inherent distinctive character.
- f) Despite the identity/similarity between the parties' respective goods, the visual, aural and conceptual differences between the marks were sufficient to prevent the average consumer from mistaking one party's mark for the other. Direct confusion was ruled out.
- g) The average UK consumer would not see or hear any common element between the marks. Neither mark was a logical extension of the other. There was no basis for a finding of a likelihood of indirect confusion.
- h) CA504749 therefore failed.

OPP 428814

- a) The overall impression of the earlier '468 mark was dominated by the English word "apla";
- b) The word APLA made the greatest contribution to the Contested Mark ;
- c) The parties' marks were:
 - i) Visually similar to a medium degree;
 - ii) Aurally identical;
 - iii) Conceptually neutral.
- d) The parties goods were found to be identical/similar/dissimilar to varying degrees;
- e) '468 had a high level of inherent distinctiveness, based on the presence of the invented word "apla".
- f) The visual differences between the marks negated a risk of direct confusion;
- g) However, the common word APLA was so distinctive that a significant proportion of average consumers might presume the marks to be variant marks relating to the same undertaking. Consequently there was a likelihood of indirect confusion.
- h) Elbisco's opposition to '180 succeeded for:

Class 29: Preserved, frozen, dried and cooked vegetables; Ready cooked meals made from meat, poultry, game, vegetables; Frozen meals consisting primarily of meat, poultry, game, vegetables; jams; Jellies.

Class 30: Bread; Pastries; Bread rolls; filled bread rolls; Confectionery; Rusks; Crispbread snacks; Wholewheat crisps; Breadsticks; Croutons; Biscuits; Savory biscuits; Chocolate; Ice cream, sorbets and other edible ices; preparations made from cereals; potstickers, dumplings [sic].

7. Kerangus filed a Notice of Appeal under S. 76 of the Trade Marks Act 1994 (“the Act”), appealing against the Decision in both proceedings. No Respondent’s Notice was filed and Elbisco took no part in this appeal. Kerangus did not appear before me, relying instead on written submissions.

Standard of Review

8. An appeal is by way of review, not re-hearing. The Court of Appeal has recently summarised the test to be applied to appeals of this kind in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262, where Arnold LJ stated the position to be as follows at [110]:

110. It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable: *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2] (v) (Lewison LJ). Equally, it is common ground that, in so far as the appeals challenge multi-factorial evaluations by the judge, this Court is only entitled to intervene if the judge erred in law or principle: compare *Magmatic Ltd v PMS International Group plc* [2016] UKSC 12, [2016] Bus LR 371 at [24] (Lord Neuberger of Abbotsbury) and *Actavis Group PTC EHF v ICOS Corp* [2019] UKSC 15, [2019] Bus LR 1318 at [78]- [81] (Lord Hodge), and see *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [72]-[78] (McCombe, Leggatt and Rose LJ) which was cited with approval by the Supreme Court in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8 at [49] (Lord Briggs and Lord Kitchin).

9. The judgment of Joanna Smith J. in *Axogen Corporation v Aviv Scientific Limited* [2022] EWHC 95 (Ch) at [24] is an appropriate summation of the detail of the approach to be followed:

24. Although I was referred to numerous cases on the subject the approach of the appeal court to a statutory appeal under section 76(1) of the TMA is uncontroversial. I bear the following principles, relevant to the issues before me, firmly in mind:

- i) The appeal is by way of a review, not a rehearing;
- ii) The appeal court will allow an appeal where the decision of the lower court was "wrong" (see CPR 52.11). Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference;
- iii) The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible";
- iv) The approach required by the appeal court depends on a number of variables including the nature of the evaluation in question. There is a "spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision", with decisions of primary fact at one end of the spectrum and multi- factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum.
- v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions.
- vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible;
- vii) Another variable to be taken into account will be "the standing and experience of the fact-finding judge or tribunal". Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts.

viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; "The duty to give reasons must not be turned into an intolerable burden". The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted. The issues the resolution of which were vital to the judge's conclusions should be identified and the manner in which she resolved them explained.

ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account.

10.I also note BL O/0639/24 *LIFE'S* where at [11] Mr Geoffrey Hobbs KC stated:

...it is necessary in order to maintain the required distance between the role of decision taker at first instance and the role of decision taker on appeal for this Tribunal to proceed on the basis that the Decision below should stand unless the matters on which the Opponent relies are by force of what they reveal sufficient to establish ... that the Decision is vitiated by error."

11.I bear these principles in mind, and in addition remind myself that when it comes to disagreements about the precise 'weight' to be given to a factor in the overall assessment, this is something which the Courts have consistently rejected as a proper ground of Appeal¹.

The Appeal

12.The Grounds in the Notice of Appeal are divided into those relating to the Invalidity action and those relating to the Opposition. For convenience I have identified them as "CA" or "OPP" Grounds accordingly.



Grounds of Appeal – Invalidity Application CA504749 -

13.Kerangus appeals CA504749 on five Grounds.

¹ Per Iain Purvis KC sitting as the Appointed Person in BL O/106/20 *GREYBOX* at [23]

CA Ground 1: Flaws in the assessment of the overall impression of the marks

This ground is itself split into several elements.

- 1 The Hearing Officer incorrectly assessed the overall impression of the relevant trade marks and the manner in which the average UK consumer will perceive the Appellant's trade mark and Respondent's trade mark.
- 2 The Hearing Officer incorrectly concluded that the word element of the Respondent's trade mark "απλά" will not be capable of articulation by a significant proportion of average UK consumers and that the "apla" element of the Respondent's mark will make the greatest contribution to the overall impression of the mark. The "απλά" element is rendered in a larger font and will be the first part of the mark that is perceived by the average consumer, regardless of their *understanding* of the "απλά" element.
- 3 The Hearing Officer should have found that the average UK consumer would immediately perceive the "απλά" element of the Respondent's trade mark as a foreign word, with the same characters as those present in the Appellant's trade mark, or alternatively that the elements would both be perceived as the English word "ANNA".
- 4 The Hearing Officer's assessment of the overall impression resulted in an incorrect assessment of the likelihood of confusion, on the basis that it was driven by the decision that the "απλά" element of the Respondent's trade mark is incapable of articulation.

CA Ground 2: Visual Comparison

The Hearing Officer incorrectly assessed the level of visual similarity between the trade marks. The Hearing Officer should have placed greater weight on the high level of visual similarity between the word element of the Kerangus's mark and the "απλά" element of the Respondent's mark, which should have led to a conclusion that the marks are highly similar to one another on a visual basis.

CA Ground 3: Aural Comparison

Driven by the incorrect assessment of overall impression, the Hearing Officer incorrectly assessed the level of aural similarity between the trade marks. The word element of the

Appellant's mark and the most prominent element of the Respondent's mark would both be pronounced in an identical manner as "ANNA". As a result the trade marks are highly aurally similar to one another.

CA Ground 4: Likelihood of Confusion

The Hearing Officer incorrectly assessed the likelihood of confusion. The Hearing Officer should have concluded that there is a high level of visual and aural similarity between the trade marks, which would lead to a likelihood of consumer confusion, both directly and indirectly.

CA Ground 5: The Hearing Officer erred in assessing the identity/similarity of certain goods (for economy of exposition, I shall deal with these below).



Grounds of Appeal – Opposition 428814 -

v

2. There are four Grounds of Appeal in relation to OPP428814, as follows.

OPP Ground 1: For the same reasons as set out in CA504749, the Hearing Officer's assessment of the overall impression of the Elbisco's trade mark was incorrect. "Απλά" is capable of articulation by the average UK consumer and plays a distinctive and dominant role in the Respondent's trade mark.

OPP Ground 2: The Hearing Officer incorrectly assessed the visual similarity of the trade marks. The distinctive and dominant role played by the "απλά" element of the Respondent's trade mark renders the trade marks visually dissimilar to one another. In the alternative, the presence of "apla" in both trade marks results in only a very low level of similarity.

OPP Ground 3: The Hearing Officer incorrectly assessed the aural similarity of the trade marks. The Hearing Officer did not give proper weight to the ability of the average UK consumer to articulate the "απλά" element of the Respondent's trade mark and the impact that articulation would have upon the level of aural similarity".

OPP Ground 4: The Hearing Officer made an incorrect assessment in relation to the likelihood of indirect confusion. The " *αλλά* " element of the Respondent's trade mark plays such a dominant and distinctive role in the trade mark as whole that consumers would not be indirectly confused merely because of the common element present in both marks.

Preliminary Matters

3. It is not in dispute that both marks contain the Greek word *αλλά*. In its submissions below, Kerangus submitted that there are two groups of average UK consumers;

(i) Greek, Cypriot, Bulgarian and Russian individuals/speakers resident in the UK (Consumer (i)) ;

(ii) English speaking and other language speakers living in the UK (Consumer (ii)).²

4. In their Decision, the Hearing Officer determined at [18] that:

“...the vast majority of average UK consumers would not understand Greek characters...”

This focus on the perception of consumers unfamiliar with Greek was repeated throughout the various steps of the global assessment, culminating at [67] in relation to the assessment of the likelihood direct confusion where the Hearing Officer said:

“I have found that the average UK consumer will not understand Greek”

5. From this, it is clear that the Hearing Officer had elected to approach the matter only from the perspective of the group of consumers who do not understand Greek, in effect, English-speakers only (Kerangus’s Consumer (ii)).

6. Reading the Grounds of Appeal, it was not clear to me whether this approach was itself a subject of the appeal. I therefore issued a direction seeking clarification.

7. On 17 January 2025 Kerangus’s attorneys responded that:

² Kerangus’s submissions of 30/1/23 at [11].

“...the Appellant does not appeal the Hearing Officer’s conclusion that they need have regard to the perception of English-speaking consumers only.”³

8. I shall therefore approach this appeal on that basis.
9. I also note in passing that, along with that clarification, the Appellant’s attorneys took the opportunity to make further submissions. These submissions were not invited by my direction. I shall ignore them.
10. The Hearing Officer noted at [15] that they would deal with the invalidation first, since ‘468 was relied on by Elbisco in its opposition and the fate of ‘468 would therefore have a bearing on the outcome of OPP428814. That applies equally on this appeal and I shall proceed in the same way, returning to deal with any remaining matters as may be necessary.



Merits - Invalidity Application CA504749 -

v

CA Ground 1 – Overall Impression

11. Taking the various elements of Ground 1 together, it is clear that Kerangus seeks to challenge the Hearing Officer’s factual findings as to the overall impression of the parties’ respective marks. I can only interfere with those findings if they are rationally insupportable. Furthermore, I am constrained by the scope of the pleaded grounds of appeal.
12. The key paragraphs in the Decision are at [18-19], where the Hearing Officer said:

Overall impression of the marks

18. It is not disputed that the word element of the earlier mark is, in fact, a Greek word. Kerangus has submitted that there are two groups of average UK consumers; one group who will understand the Greek alphabet and another group who will not. Mr Murray’s Witness Statement introduces a BBC article published in 2021 according to which there

³ Kerangus’s submissions of 17 January 2025, [4]

are said to be ‘more than a hundred Greek communities across the UK’. The article states that the most significant settlement is in London where there are between 150,000 and 180,000 Greek speakers. Whilst I accept that there is a significant Greek presence in London, and I have no reason to doubt that there may be Greek communities in other parts of the UK, it is my view that, as a proportion of the general population of UK consumers, this group of consumers will be relatively small. I must be prudent not to ascribe a greater knowledge to the UK average consumer than is warranted (Fn6). I consider that the vast majority of average UK consumers would not understand Greek characters and would deem the earlier mark to comprise the word element ‘ANNA’, followed by an exclamation mark, in a minimally stylised typeface, set against a solid black background edged in a white surround. The third character resembles an inverted ‘v’ but would, in my view, be presumed to be an ‘n’ by the average UK consumer. In my view, the central word element plays the greater role in the overall impression of the mark, owing to its size, while the background and border play a much lesser role.

6 In *Wunderkind Trade Mark* [2002] R.P.C. 45, the registrar refused to attribute knowledge of the German meaning of the word ‘Wunderkind’ to UK consumers, despite evidence of a small number of uses of that word in UK press articles, a decision which was upheld by the High Court

19. The contested mark comprises two word elements set against a grainy blue background featuring a white border, which is in turn surrounded by what might be described as stylised foliage. The word element ‘απλά’ appears in a larger font relative to the word element ‘apla’. Although the element ‘απλά’ is rendered in a larger font, it is my view that it is the smaller element ‘apla’ to which the average UK consumer’s eye will be drawn first. I consider that ‘apla’ will be readily articulable by the average UK consumer, whereas the word “απλά”, for reasons provided above, will not be capable of articulation by a significant proportion of average UK consumers. I therefore find that ‘apla’ will make the greatest contribution to the overall impression of the mark. The border and colours are, to my mind, purely decorative and would make a lesser contribution to the overall impression.

13. In essence, then, the Hearing Officer considered that ‘115’s word element ΑΠΛΑ would be perceived as ANNA⁴, whereas ‘468 would be perceived (by reason of the presence of the English characters) as APLA, notwithstanding the larger Greek letters απλά.

⁴ An interpretation put forward by Kerangus itself at [19] in its submissions to the Hearing Officer on aural similarity: “Consumer (ii) will either pronounce the common element as “ANNA” as it will perceive the Greek letters as containing letters from the Latin alphabet.”

14. To counter this, Kerangus submitted:

- a) The Hearing Officer should have placed greater weight on the role played by the larger element *απλά* in the overall impression of the Respondent's mark.
- b) the average UK consumer would recognise *απλά* as a foreign word based on its presentation. Thus, the Hearing Officer's conclusion that 'apla' will make the greatest contribution to the overall impression of the mark must be incorrect. Even if the average UK consumer does not actively pronounce the element they will still perceive it visually and note its prominence in the Respondent's mark and that it is a foreign word.
- c) In the alternative, even if the average UK consumer would not perceive the *απλά* element of the Respondent's trade mark as a foreign word, they would still perceive it visually, given its unusual presentation, and note its prominence in the Respondent's mark.
- d) the negation of the role played by the *απλά* element of the Respondent's mark during the assessment of its overall impression is contrary to the requirements of the assessment of overall impression. That assessment must bear in mind the "distinctive and dominant components" of a mark in accordance with C-251/95 *'Sabel'* para 23.
- e) Furthermore, the Hearing Officer erred in their conclusion in paragraph 18 that the average UK consumer would deem the earlier mark to comprise the word element "ANNA" even though they admitted that the third character resembles an inverted 'v'. The Appellant submitted that the visual impact of the letters present in the Appellant's mark will be perceived by the average UK consumer and they will view the mark as APLA from a visual perspective, even if they pronounce it as ANNA.

15. The difficulty here is that these submissions amount to no more than a disagreement with the Hearing Officer's factual findings or the weight to be given to the various elements. The Appellant's view is no more or less tenable than that of the Hearing Officer. The fact that an appellate court might arrive at different conclusions to the Hearing Officer does not, without more, make these findings "wrong" or "rationally unsupportable".

16. Having reviewed paras [18-19] within the constraints of the appeal previously identified, I am unable to identify any mistake or error that would justify appellate interference.

17. CA Ground 1 is therefore dismissed.

CA Ground 2 – Visual Similarity

18. Once again, the Appellant’s argument is primarily directed to the weight and interpretation given to the element *απλά* in ‘468. In particular, it was submitted that:

“...the Hearing Officer should have placed greater emphasis on the clear visual similarities between the word element of the Appellant’s mark, which would be viewed by the average UK consumer as ΑΠΛΑ and is highly similar to the *απλά* element of the Respondent’s mark accordingly.”

19. Whilst Kerangus clearly argued below that both ΑΠΛΑ and *απλά* would be perceived as ANNA, given the visual differences between the two words it was entirely open to the Hearing Officer to conclude to the contrary in [20], as they did, that:

“Both marks feature word elements of four characters beginning and ending in ‘a’, i.e. ‘ANNA’ versus ‘*απλά*’ and ‘*apla*’...The ‘ANNA’ element in the earlier mark comprises a different combination of characters as compared to the elements *απλά*’ and ‘*apla*’ in the contested mark;”

And, in conjunction with other factors, that the marks were visually similar to only a low degree.

20. Whilst it is possible to reach a different conclusion, the one the Hearing Officer reached is certainly not a view which is rationally insupportable.

21. CA Ground 2 is dismissed.

CA Ground 3 - Aural Similarity

22. Much the same point is advanced as regards aural similarity. Kerangus submitted that the non-English characters in both marks would be pronounced ANNA (so that the aural comparison was ANNA versus ANNA APLA).

23. The Hearing Officer dealt with this at [22]:

“I must make my aural comparison from the standpoint of the average consumer in the UK. I note from the decision of the European Union Intellectual Office (‘EUIPO’) in ‘opposition No B 2 928 177’, exhibited at GM8 to Mr Graeme’s Witness Statement, which

24.

relates to the marks in issue in the instant proceedings, that the elements ‘απλά’ and ‘apla’ are aurally identical for consumers who understand the Greek language. However, as noted earlier at [18], I consider the group of average consumers who understand the Greek language to be a relatively small proportion of UK consumers as a whole. In my view, the average UK consumer will articulate the earlier mark as ‘ANNA’. I find that the first element of the contested mark, ‘απλά’, will, for the average UK consumer, be inarticulable. The only element that will be articulated will, in my view, be the ‘apla’ element. I therefore find the marks will likely be articulated as ‘ANNA’ versus ‘APLA’. The aural differences between these elements will, in my view, be particularly apparent due to both being short marks. I find the parties’ marks to have a low level of aural similarity.”

25. The upshot, then, is that the Appellant’s submission is no more than a difference of opinion with the Hearing Officer, especially as any consideration of the perception of Greek-speaking consumers is excluded from the scope of the appeal. Absent some identifiable error, I cannot intervene.

26. CA Ground 3 is dismissed.

CA Ground 4: Likelihood of Confusion

27. Kerangus’s position on “likelihood of confusion” was dependent on the success of Grounds 1-3. Those having failed, CA Ground 4 must also fail.

CA Ground 5: Errors in the Comparison of Goods

28. Kerangus appeals the findings of dissimilarity etcetera for various goods, arguing that they should have been found to be identical/highly similar, as the case may be, not least because the goods selected for comparison were wrongly chosen:

Elbisco’s Goods	HO’s comparison	Kerangus’s Appeal
Snack food products made from rusk flour	Dissimilar to all of Kerangus’s goods [41]	Identical/highly similar to “preparations made from wheat and cereals; honey-sesame candy bars; biscuits”

Confectionery chips for baking	Not clear as no specific finding made, but inferentially dissimilar to “chocolates” [48]	Highly similar to “Baking powder, yeast, All types of dough, dough flour, corn flour”.
Malted bread mix; cookie mixes	low level of similarity to “bakery goods” [38]	Identical/highly similar to “All types of dough”
Muesli desserts	low level of similarity to “muesli” [39]	Highly similar to muesli
Tortilla shells; taco shells	Low level of similarity to “pancakes” [42]	Highly similar to “Preparations made from cereal”
Foods with a cocoa base	Low level of similarity with “cocoa drinks” [56]	Identical to “Bakery goods, pancakes, biscuits, ice-creams, chocolates”

29. On even a cursory glance there are matters here which, taken in isolation, would merit further consideration.

30. However, I do not need to decide these matters in order to determine the appeal in respect of CA504749. The Hearing Officer reminded themselves of the relevant principles of interdependence at [65-66]. The Hearing Officer made it clear at [67] that their findings as to the likelihood of confusion were driven by their conclusions as to the lack of similarity between the marks, even allowing for interdependence and the fact that a greater degree of similarity between goods may be offset by a lesser degree of similarity between the marks, and vice versa:

Despite the identity and similarity that I have identified between the parties’ respective goods, my view is that the net effect of the visual, aural and conceptual differences between the marks is sufficient to prevent the average consumer from mistaking one party’s mark for the other. I have found the marks to have only a very low level of visual similarity and a low level of aural similarity. I have found that the average UK consumer will not understand Greek and that the larger word element of the applied-for mark,

‘απλά’, will therefore be inarticulable. The only articulable elements of the marks will be ‘Anna’ versus ‘Apla’. There will be no conceptual nexus between the marks; ‘Anna’ being perceived as the female name and ‘apla’ being perceived either as a made-up word or a non-English word whose meaning is unknown. I find that there is no likelihood of direct confusion.

31. That being so, additional findings of identity/high similarity of goods will put the Appellant in no better position than it was for goods for which such findings have already been made. The Appellant’s failure on CA Grounds 1-4 means that there is no benefit in considering or determining CA Ground 5. I therefore decline to decide this any aspect of this Ground.

Outcome - Invalidation Application CA504749

32. The Appeal in CA5054749 has failed. Elbisco’s mark UK00003255486 therefore survives to be relied upon as an earlier mark in Opp 428814, to which appeal I now turn.



Merits – Opposition 428814 -

v

OPP Ground 1 – Overall Impression

33. I have already set out the ground of appeal. The only argument submitted to support it was this:

“For same reasons as set out above (*i.e. in relation to CA504749*), the Hearing Officer’s assessment of the overall impression of the Respondent’s trade mark was incorrect. The Appellant submits that greater weight should have been placed upon the απλά element of the Respondent’s mark.”

34. Suffice to say, for the same reasons as I set out above in relation to the appeal in CA504749, the Hearing Officer was entitled to reach the conclusion they did, set against the perception of English-speaking consumers.

35. Ground OPP 1 is dismissed.

OPP Ground 2 – Visual Similarity

36. Kerangus submitted that the presence of *απλά* in '468 was sufficient to render the parties' marks visually dissimilar or "In the alternative, ... that the presence of "apla" in both trade marks results in only a very low level of similarity."
37. Once again this is a mere disagreement with the Hearing Officer's conclusion, and it accordingly fails in both respects. Ground OPP 2 is dismissed.

OPP Ground 3 – Aural similarity

38. Essentially this revisits the Appellant's argument in CA 504747 that the Hearing Officer was wrong to conclude that *απλά* was incapable of articulation. The repetition of it does not improve its viability.
39. Ground OPP 3 is dismissed.

OPP Ground 4 – Likelihood of Indirect Confusion

40. Kerangus submitted that the element *apla* in '468 was wrongly identified as the dominant and distinctive element, negating the effect/impact of the larger element *απλά*. However, without more, this is mere disagreement and the Hearing Officer's assessment was correct for the reasons that they gave. Indeed, the Hearing Officer did give credit for the impact of the larger element *απλά* in dismissing the prospect of direct confusion at [94]:

"I consider that the presence of the element 'απλά' will nevertheless be registered visually, owing to its positioning and larger size relative to the element 'apla', even though it will not be understood by the vast majority of average UK consumers. I find that there is no likelihood of direct confusion."

41. As to indirect confusion, having set out the principles correctly at [95] the Hearing Officer reasoned thus at [96]:

Although it might be said that the 'apla' element of the earlier mark is not dominant in the mark, owing to its much smaller size relative to 'απλά', it is the distinctive element. The marks are aurally identical. The 'apla' element common to the parties' marks will have a high level of inherent distinctive character because it will be perceived by the average UK consumer as a made-up word. I consider that a significant proportion of average

consumers might presume the marks to be variant marks relating to the same undertaking. For example, it might be presumed that the 'απλά' is simply a rendering of the brand name 'apla' in non-English characters. If the average consumer recognises that the marks are different by virtue of the Greek letters, they are, in my view, likely to assume that the mark says the same thing in another language. I find that there is a likelihood of indirect confusion between the parties' marks. I find this to be the case for all contested goods that I have found to have a level of similarity of 'fairly low' and above. I do not consider there to be a likelihood of confusion in respect of contested goods that I have found to have a 'very low' level of similarity to Elbisco's goods.

42. From this it is clear the Hearing Officer carried out the appropriate evaluative multifactorial balancing exercise. I must show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. I cannot discern anything in the assessment which would surmount that threshold and displace my required reluctance to intervene.

43. Ground OPP 4 is dismissed.

Outcome – Opposition 428814

44. The appeal against the Decision in Opposition 428814 has failed in its entirety.

Overall Outcome of this Appeal

45. The Appeal is dismissed in all respects.

Costs

63. The Appeal having been dismissed Elbisco is, in principle, entitled to its costs. However, it took no part in the Appeal so I award it no costs.

64. Below, the Hearing Officer awarded Elbisco £500. This award stands and is to be paid within 21 days of the date of this Decision.

Philip Harris

Appointed Person

11 February 2025

