**BL O/0639/24**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF:**

**OPPOSITION No. 481108**

**IN THE NAME OF HENKEL AG & CO. KGaA**

**TO:**

**TRADE MARK APPLICATION No. 3693867**

**IN THE NAME OF LTWHP, LLC**

## DECISION

1. On 13 September 2021, LTWHP, LLC ("the Applicant") applied under number 3693867 to register the word **LIFE'S** as a trade mark for use in relation to an extensive range of goods and services in Classes 3, 21 and 35. On 17 February 2022, Henkel AG & Co. KGaA ("the Opponent") filed a Notice and Grounds of Opposition objecting to the application for registration, so far as relevant for present purposes, on the basis that use of the opposed mark would conflict with the rights to which it was entitled under s.5(2)(b) of the Trade Marks Act 1994 as proprietor of the earlier trade mark **LIVE** registered under number 3204627 in Class 3.

2. The goods and services in issue in the Opposition were as follows:

| **Opponent** | **Applicant** |
|---|---|
| Class 3: Preparations for treating, dyeing, colouring, bleaching, styling hair. | Class 3:<br>Perfume with the exception of hair dye products, essential oils except those for hair dyeing, cosmetics except those for hair dyeing, hair lotions with the exception of those for dyeing; Dentifrices; After-shave preparations; Almond milk for cosmetic purposes; Almond oil; Almond soap; Amber [perfume]; Antiperspirant soap; Antiperspirants [toiletries]; Aromatics; Astringents for cosmetic purposes; Badian |

| Opponent | Applicant |
| --- | --- |
| | essence; Bath salts, not for medical purposes; Baths (Cosmetic preparations for-); Cosmetic masks with the exception of those for hair dyeing; Bergamot oil; Boot cream; Bar soap; Cedarwood (Essential oils of-); Cleansing milk for toilet purposes; Cosmetic kits with the exception of products for hair dyeing; Cotton sticks for cosmetic purposes; Cotton wool for cosmetic purposes; Cosmetic creams; Creams for leather; Degreasers, other than for use in manufacturing processes; Deodorant soap; Deodorants for personal use; Depilatories; Detergents, other than for use in manufacturing operations and for medical purposes; Cologne; Emery; Essential oils except those for hair dyeing; Ethereal essences; Extracts of flowers [perfumes]; Flower perfumes (Bases for); Gaultheria oil; Geraniol; Incense; Ionone [perfumery]; Jasmine oil; Lavender oil; Lavender water; Essential oils of lemon; Lipstick; Lotions for cosmetic purposes with the exception of those for hair dyeing; Make-up; Make-up powder; Make-up preparations; Make-up removing preparations; Mascara; Mint essence [essential oil]; Mint for perfumery; Mouth washes, not for medical purposes; Musk [perfumery]; Moustache wax; Nail care preparations; Oils for cosmetic purposes except those for hair dyeing; Oils for perfumes and scents except those for hair dyeing; Oils for toilet purposes; Cosmetic pencils; Eyebrow pencils; Perfume; Petroleum jelly for cosmetic purposes; Pomades for cosmetic purposes with the exception of those for hair dyeing; Preservatives for leather [polishes]; Rose oil; Perfume water; Shampoo except those for hair dyeing; Shaving preparations; Shaving soap; Shoe polish; Shoe wax; Shoemakers' wax; Skincare cosmetics; Skin whitening creams; Soaps; Soap for foot perspiration; Sunscreen preparations; Tanning preparations; Talcum powder, for toilet use; Tissues impregnated with cosmetic lotions; Toilet water; Toiletry preparations except those for hair dyeing; Transfers (Decorative -) for cosmetic purposes; Wax (Depilatory -).<br><br>_____<br>Class 21: Combs and sponges except those for hair dyeing; Brushes, except paint brushes with the exception of those for hair dyeing; Brush goods except those for hair dyeing; Combs for the hair (Large-toothed -) except those for dyeing; Soap boxes; Toilet cases except for hair dyeing.<br><br>_____<br>Class 35: Retail services, wholesale services, mail order services and online sale services relating to perfumes, |

| Opponent | Applicant |
|---|---|
| | cosmetics, soaps with the exception of hair dye products and related accessories. |

3. The Opposition was rejected in its entirety for the reasons given by Ms Catrin Williams in a carefully considered Decision issued under reference BL O/0279/23 on 15 March 2023. The Opponent was ordered to pay the Applicant £1,000. in respect of its costs of the proceedings in the Registry.

4. Shortly stated, the question raised by the objection to registration under s.5(2)(b) was whether there were similarities in terms of the marks in issue and the goods and services in issue which in September 2021 would have combined to give rise to the existence of a likelihood of confusion if the marks had been used concurrently in the United Kingdom for goods and services of the kind for which they were respectively registered and sought to be registered.

5. For reasons which will become apparent, I consider it necessary to emphasise the predominantly factual nature of the evaluative task that the Hearing Officer was required to undertake in order to resolve that question:

   (i) Both as between marks and as between goods and services, the evaluation of 'similarity' is a means to an end. It serves as a way of enabling the decision taker to gauge whether there is 'similarity of a kind and to a degree which is liable to give rise to perceptions of relatedness in the mind of the average consumer of the goods and services concerned.

   (ii) This calls for a realistic appraisal of the net effect of the similarities and differences between the marks and the goods or services in issue, giving the similarities and differences as much or as little significance as the relevant average consumer, who is taken to be reasonably well-informed and reasonably observant and circumspect, would have attached to them at the relevant point in time (in this case September 2021).

(iii) It is necessary to consider as part of that process how the interplay between the visual, aural and conceptual aspects of the marks in issue would affect the way they were liable to be perceived and remembered.

(iv) The factors conventionally taken to have a particular bearing on the question of 'similarity' between goods and services are referred to indicatively and not exhaustively in Case C-39/97 Canon KK v Metro-Goldwyn-Mayer EU:C:1998:442 at para. [23] and paras [44] to [47] of the Opinion of Advocate General Jacobs in that case (EU:C:1998:159).

(v) More than just the physical attributes of the goods and services in issue must be taken into account when forming a view on whether there is a degree of relatedness between the consumer needs and requirements fulfilled by the goods and services on one side of the issue and those fulfilled by the goods and services on the other.

(vi) The relatedness or otherwise of the trading activities involved in the comparison is ultimately a matter of consumer perception. That is recognised in the case law relating to 'complementarity' as an element to be considered in the context of the overall assessment of 'similarity'.

(vii) There is 'complementarity' when the goods or services in issue are closely connected in the sense that one is indispensable or important for the use of the other in such a way that consumers may think that the same undertaking is responsible for manufacturing those goods or providing those services.

6. The substance of the Hearing Officer's determination can be gathered from paras [72], [73] and [79] of her Decision:

> [72]. I have found the marks to be visually similar to a medium degree. In circumstances where both marks are pronounced with a "LIE" sound, I considered the marks to be aurally similar to a medium to high degree. In cases where the earlier mark is articulated as "LIV", I found the marks to be aurally similar to a low to medium degree. I found the marks to be conceptually similar to a low degree. I have found the earlier mark to have a medium degree of inherent distinctive character which has been enhanced to a high degree

> through use. I identified the average consumer to be a member of the general public or a professional who will select the goods and services predominantly by visual means, though I do not discount an aural element to the purchase. I have concluded that a medium degree of attention will be paid during the purchasing process by the general public whereas the professional consumer would pay at least a medium degree during the purchasing process. I have found the goods and services to range from being dissimilar to identical.
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> [73]. I acknowledge that the competing marks share the first two letters and as already outlined, as a general rule, the beginning of marks are considered to have more impact. I remind myself however, that differences may be more apparent in shorter marks and there are differences between the marks which are not negligible. To my mind, when the marks are considered as a whole, the differences previously identified would not be overlooked by consumers during the purchasing process, even when paying a medium level of attention. Although I found the earlier mark to have a high degree of enhanced distinctiveness, the distinctiveness lies in the word "LIVE" itself, which is distinct from the alternative word "LIFE'S" used by the applicant. Further, whilst I noted there is a low level of conceptual similarity between the marks by virtue of the etymology of the words, I found that the consumer will recognise their distinct meanings. In addition, it is my view that the fact each of these words has a distinct meaning and concept will assist the consumer with their recollection of the same, meaning it will be less likely to mistake one for the other. Consequently, notwithstanding the principles of imperfect recollection and interdependency, I do not consider there to be a likelihood of direct confusion.
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> …
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> [79]. I first note that this situation is not one that appears to fall into the categories set out in *L .A.Sugar* , however, I remind myself that they were not intended to be exhaustive. I have carefully considered if the marks may be perceived as a sub brand or brand extension of one another, or for them to be considered to represent economically linked undertakings and I can see no logical reason for this. I do not consider that "LIFE'S" would be indicative of a brand extension of "LIVE" or represent economically linked undertakings. Accordingly, I see no reason why the average consumer would believe that the marks originate from the same or economically linked undertakings, even when I have found the contested goods to be identical. Accordingly, I do not consider there to be a likelihood of indirect confusion.

7. I can see from the Decision that the Hearing Officer directed herself correctly as to the applicable legal principles and applied them to the facts of the case consonantly with the considerations I have referred to in para. [5] above.

8. Her Decision is not liable to be set aside by this Tribunal on appeal unless it can be regarded as rationally insupportable, whether by reason of an identifiable flaw in the treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account a material factor, which undermines the cogency of the conclusion, or for being contrary to principle or plainly wrong: Lifestyle Equities CV v Amazon UK Services Ltd [2024] UKSC 8 at paras [46] to [50] per Lord Briggs and Lord Kitchin SCJJ (with whom Lord Hodge, Lord Hamblen and Lord Burrows SCJJ agreed); Volpi v Volpi [2022] EWCA Civ. 464 at paras [2], [3] per Lewison LJ (with whom Males and Snowden L.JJ agreed).

9. The Opponent appeals under s.76 of the 1994 Act contending that the Hearing Officer's Decision was wrong and should be set aside for error on the Grounds put forward in its Form TM55P Notice of Appeal filed on 12 April 2023 in the following terms (with "**Goods**" referring to the Class 3 goods covered by the earlier trade mark registration and "**G&S**" referring to the goods and services in Classes 3, 21 and 35 covered by the opposed application for registration) :

> **The Decision**
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> 5. The Hearing Officer made the following findings:
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> a. certain of the G&S were identical to the Goods (§§20 to 23);
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> b. certain of the G&S were highly similar to the Goods (§§24 and 25);
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> c. certain of the G&S had a medium degree of similarity to the Goods (§28 and 42 to 43);
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> d. certain of the G&S had a low degree of similarity to the Goods (§§27, 30 and 40);
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> e. certain of the G&S were dissimilar to the Goods (§§26, 29 and 31 to 39 and 41);
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> f. the average consumer will be the general public or the professional public paying a medium or above medium degree of attention to the G&S (§46);

g. visual and aural considerations are relevant in respect of the G&S (§§47 and 48);

h. the Sign and the Earlier Mark are visually similar to a medium degree (§54);

i. the average consumer will, however, notice both the difference between the letters 'F' and 'V' and the inclusion of the apostrophe and letter 'S' and these differences will have more of an impact on the likelihood of confusion (§54);

j. the Sign and the Earlier Mark are aurally similar to a high degree, if pronounced LIE-V and LIE-FS (§55);

k. the Sign and the Earlier Mark are aurally similar to a low to medium degree, where the Earlier Mark is pronounced LIV (§55);

l. the Sign and the Earlier Mark are conceptually similar to a low degree, albeit they derive from the same etymological origin (§56);

m. the Earlier Mark has a medium degree of inherent distinctiveness (§60);

n. the Earlier Mark has a high degree of distinctiveness arising through use (§60);

o. the Application would not be directly confused with the Earlier Mark (§73); and

p. the Application would not be indirectly confused with the Earlier Mark (§79).

**The grounds of appeal**

6. The Appellant does not appeal the findings at (a) to (g), (j), (k), (m) and (n) above. The Appellant does, however, appeal the findings at (h), (i), (l), (o) and (p). The Appellant contends that the Hearing Officer erred in the following four ways, namely:

**Ground 1**: she erred in the significance she placed on the visual differences between the Sign and the Earlier Mark and thus in her finding of visual similarity;

> **Ground 2**: she erred in her assessment of the conceptual similarity between the Sign and the Earlier Mark and thus in her finding in relation to conceptual similarity;
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> **Ground 3**: she erred in concluding, despite her findings at (a) to (g), (j), (k), (m) and (n) above and regardless of whether Ground 1 and/or Ground 2 succeed, that there would be no direct confusion between the Application and the Earlier Mark; and
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> **Ground 4**: she erred in concluding, despite her findings at (a) to (g), (j), (k), (m) and (n) above and regardless of whether Ground 1 and/or Ground 2 succeed, that there would be no indirect confusion between the Application and the Earlier Mark.
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> 7. Had she not so erred, she would have found that the Application should have been refused for the G&S which were identical or at least similar to the Goods (i.e. those at (a) to (d) above).

10. In this way, the Opponent has singled out parts of the Hearing Officer's Decision with which it disagrees and criticised them for being under or over stated evaluations of the factual matters to which they relate. If the points raised by the Opponent's criticisms were all to be considered afresh, the Decision would end up being in large measure re-taken by this Tribunal under the guise of reviewing it for error.

11. However, 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 — to the standard indicated in para. [8] above — that the Decision is vitiated by error.

12. I have reviewed the Decision in the light of the Opponent's criticisms of the Hearing Officer's evaluations. Having done so, I am satisfied that none of the points relied on reveal any substantive mistakes on her part and therefore cannot be taken, individually or together, to establish that the Decision under s.5(2)(b) is liable to be set aside.

13. It was submitted on behalf of the Opponent at the hearing before me that the differences between **LIVE** and **LIFE'S** are likely to go unnoticed and unremembered to the extent

that on considering the interplay between the visual, aural and conceptual aspects of them they should have been regarded as quasi-identical and thus liable to become tangled up with one another in the perceptions and recollections of the relevant average consumer (as envisaged in sections c. and e. of the non-binding decision of the EUIPO Opposition Division issued on 25 August 2023 in Opposition No. B 2 975 616 between the same parties as are now before me on this Appeal).

14. I accept that this is a tenable position to adopt. But so is the position to the contrary adopted by the Hearing Officer in paras. [49] to [56], [72] and [73] of the Decision under appeal. Since there is room for more than one view on this, I must recognise that for the Hearing Officer's position to be characterised as "wrong" it is *"not enough to show, without more, that the appellate court might have arrived at a different evaluation"*: Lifestyle Equities (above) at para. [50]. In my view, there is nothing more. The position she adopted therefore falls to be regarded as correct for the purposes of this Appeal

15. In Butler v Bankside Commercial Ltd [2020] EWCA Civ. 203 Lewison LJ (with whom David Richards and Asplin L.JJ agreed) repeated at para. [19] what Mummery LJ (with whom Rimer and Underhill L.JJ agreed) had said in Neumans LLP v Andronikou [2013] EWCA Civ. 916 at para. [38] (in the context of paras [36] to [40] under the heading "Lord Wilberforce and appeals from impeccable judgments"): "*If the judgment in the court below is correct, this court can legitimately adopt and affirm it without any obligation to say the same things over again in different words. The losing party will be told exactly why the appeal was dismissed: there was nothing wrong with the decision appealed or the reasons for it.*"

16. Adopting that approach, I dismiss the Opponent's Appeal against the Hearing Officer's Decision under s.5(2)(b) on the basis that her Decision was correct for the reasons she gave.

17. The Applicant filed written submissions but did not participate in the hearing before me. Having regard to what I consider to have been the amount of effort and expenditure that is likely to have been reasonably and productively incurred by it in resisting the Opponent's Appeal and adopting the approach to quantification indicated in paras [12]

to [14] of my decision in AMARO GAYO COFFEE Trade Mark BL O/257/18 (25 April 2018), I direct the Opponent to pay £1,200. to the Applicant in respect of its costs of the dismissed Appeal. That sum is to be paid within 21 days of the date of this Decision. It is payable in addition to the sum of £1,000. awarded to the Applicant by the Hearing Officer in respect of its costs of the proceedings at first instance.

Geoffrey Hobbs KC
8 July 2024

Mr Jamie Muir Wood instructed by D. Young & Co. LLP appeared on behalf of the Opponent (Appellant).

Mr Robert Furneaux of Sipara Ltd filed written submissions on behalf of the Applicant (Respondent).