o/0790/24

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF THE DESIGNATION OF INTERNATIONAL REGISTRATION NOS WO1677714 & WO1677715

BY ANTEOTECH LTD

FOR PROTECTION OF THE FOLLOWING TRADE MARKS

IN THE UK IN CLASS 1:

AnteoX

AnteoLink

AND

IN THE MATTER OF OPPOSITIONS THERETO

UNDER NO. 438690 & 438691

BY BOREALIS AG

BACKGROUND AND PLEADINGS

1. International trade mark nos. 1677714 ('the first contested mark') and 1677715 ('the second contested mark') shown on the cover page of this decision were registered by AnteoTech Ltd ('the holder') with effect from 17 March 2022. The holder claims a priority date of 27 October 2021. The holder designated the UK as a territory in which it seeks to protect the contested marks under the terms of the Protocol to the Madrid Agreement on the same date. The holder seeks protection for the following goods for both marks:

> Class 1: Battery fluid being acidulated water for recharging batteries; preparations for enhancing battery life being cross-linking agents for cross-linking in battery electrodes to enhance battery life; chemical preparations for use in the manufacture of surface coatings in relation to batteries; industrial chemicals for use in coating film; coating agents, other than paint being industrial chemicals; coating compositions, other than paint being industrial chemicals; coatings for the finishing of surfaces being water-based compounds for forming binders in battery electrodes; filler materials for coating compositions namely, being water-based compounds for forming binders in battery electrodes; raw materials for use as coatings namely, water-based compounds for forming binders in battery electrodes; none of the aforesaid being packaging or packaging materials or for the manufacture of packaging or packaging materials.

2. The request to protect the contested marks was published on 3 November 2022. On 19 January 2023, Borealis AG ('the opponent') opposed the protection of the contested marks in the UK based upon section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). The opponent relies upon the following trade mark:

UK913659321[1]

Anteo

Filing date: 20 January 2015
Registration date: 11 May 2015

Relying upon the following goods:[2]

> Class 1: Artificial and synthetic resins, unprocessed; plastics, unprocessed; raw plastics in the form of pellets; polyethylene; polypropylene, polyolefins (raw material).

3. The opponent claims that the marks all contain the component 'Anteo' and that the elements 'X' and 'LINK' are descriptive/allusive. They also claim that the goods at issue are identical or highly similar. It is their claim that there is a "high likelihood of confusion whether direct or indirect".

4. The holder filed a counterstatement in which they denied the opponent's grounds of opposition and said the marks and goods are dissimilar. They also put the opponent to proof of use of their mark.

5. Only the opponent filed evidence. A hearing was held before me on 14 March 2024. The holder was represented by Ms Sylvia Tate of Maguire Boss and the opponent was represented by Ms Barbara Cookson instructed by Lucas & Co. I make this decision having taken full account of all the papers and the oral submissions made at the hearing, referring to them below as necessary.

[1] Following the end of the transition period of the UK's withdrawal from the EU, all EU trade marks ("EUTM") registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (EU)' retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

[2] In the Form TM7 the opponent selected the box stating they relied upon all of their goods and services. However, in the hearing and skeleton arguments it was confirmed that they were solely relying on their class 1 goods as listed above.

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Evidence

7. The opponent's evidence in chief consists of a witness statement dated 6 June 2023 by Peter Voortmans who has the position of "Director, Global Commercial, Flexibles by Borealis". This was accompanied by one exhibit which he referred to in his witness statement as being "a bundle of documents".

8. The holder filed written submissions during the evidence rounds and the opponent provided a witness statement in reply by Mr Voortmans dated 21 November 2023 with one further exhibit. The main purpose of the opponent's evidence is to show proof of use of their mark.

9. It is noted that Mr Voortmans provided hyperlinks within his witness statements. However, as per section 4.8.4 of the Trade Marks Manual, evidence containing references to website links are not acceptable as the Hearing Officer will not undertake any independent research. Therefore, I have not considered these website links any further.

Decision

Section 5(2)(b)

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

> "5(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 of association with the earlier trade mark."

Section 5A of the Act is as follows:

"5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

11. 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 or international trade mark (UK) 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.

…"

12. The opponent's mark qualifies as an earlier mark, in accordance with the above provision. The earlier mark is subject to proof of use requirements as it has been registered for five years or more before the priority date of the contested mark, as per section 6A of the Act. The holder has requested that the opponent provides proof of use for the mark.

Proof of use

13. I will begin by assessing whether there has been genuine use of the earlier registration.

14. Section 6A:

> "(1) This section applies where
>
> (a) an application for registration of a trade mark has been published,
>
> (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
>
> (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.
>
> (1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.
>
> (2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.
>
> (3) The use conditions are met if –
>
> (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
> (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.
>
> (4) For these purposes –

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

15. As the earlier mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

“7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union".

16. Section 100 of the Act states that:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

17. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier mark is the five-year period ending with the priority date of the contested mark i.e. 28 October 2016 to 27 October 2021. This is a comparable mark and so, in accordance with paragraph 7(3) of Part 1 of Schedule 2A of the Act, the assessment of use shall take into account any use of the corresponding EUTM prior to IP Completion Day, being 31 December 2020.

18. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009]

ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at[36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the

sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

Evidence

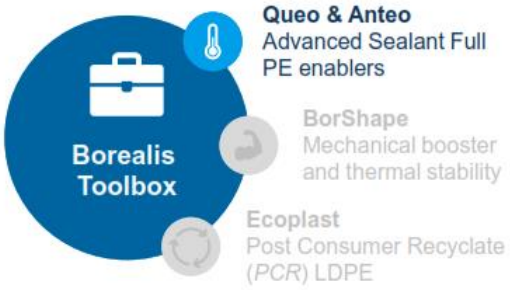
19. The first witness statement of Mr Voortmans claims that the "ANTEO brand is used on a range of innovative plastics material sold by Borealis as raw materials". Further, he states that the ANTEO product has been "promoted and sold widely in the European Union", including two marketing events in Lyon, France and Darmstadt, Germany in 2018.

20. Mr Voortmans states that the opponent is "primarily concerned with the manufacture of packaging" and that the ANTEO product has been supplied since 2017. The press release, which Mr Voortmans confirms was published on 25 October 2017, relating to the launch was provided in the evidence. However, I have not been provided with information as to how this press release was circulated. It references the following places: Vienna, Austria/Abu Dhabi, UAE/Shanghai, China as where the launch is happening.

21. Mr Voortmans references pages 29 and 30 of Exhibit A which show UK sales figures. For 2017, these are in KG and in subsequent years they are in metric tons. In 2017 the total volume sold in the UK is stated as being 1,395,780kg. This appears to have been made in four separate transactions. Between 2018 and 2022, 7325 tons were sold. However, most of the identifying information has been redacted so it is not possible to ascertain how many different buyers there were, nor their geographical spread. Mr Voortmans states in the witness statement that UK sales over the period supplied in the table exceeds €14 million.

22. The opponent has provided a presentation which was shown to commercial consumers and made available on their website (although no figures were provided regarding how many consumers this was shown to). It mainly references the 'Borealis' company details but there are a few mentions of 'ANTEO' on some slides as follows:

Product name	MFR 190°C/2.16kg (g/10min)	MFR 190°C/5kg (g/10min)	MFR 190°C/21.6kg (g/10min)	Density (kg/m³)	Melting temp. (°C)	AO
Anteo™						
FK1820	1.5			918	122	yes
FK1828	1.5			918	122	yes



23.The opponent has supplied a summary data sheet for their products which they state were published in October 2019. I do not have any information regarding where or how this was published and who the information was available to/for how long. However, as mentioned in the hearing, it does show what the ANTEO product is and its applications as follows:

PRODUCT DATA SHEET

POLYETHYLENE ANTEO™ FK1820

BORSTAR® BIMODAL TERPOLYMER LLDPE FOR HIGH PERFORMANCE FLEXIBLE PACKAGING

DESCRIPTION

Anteo™ FK1820 is produced using the proprietary **Borstar®** bimodal terpolymer technology combining outstanding sealing performance with easy processabilty, good optics and superior mechanical properties. Film made with **Anteo™ FK1820** exhibits unique combination of low seal initiation temperature (SIT), high hot tack force and excellent puncture and tear properties. **Anteo™ FK1820** used in combination with **Borstar® PE / BorShape™ PE / LDPE / PP** products offers best in class high performance transparent flexible packaging solution with potential for down gauging.
Anteo™ FK1820 contains Antioxidant and processing Aid (PPA).

APPLICATIONS

Heavy duty shipping sacks (HDSS)
Lamination
Stand up Pouches
Agriculture Film
Multilayer Packaging Film
Stretch Cling Film
Stretch Hood
Frozen Food Packaging
Form Fill Seal (FFS)
Transparent Film
Impact modifier
Liner
Food Packaging
Artificial Grass
Lamitube
Protection Film

24. Regarding use on the product itself, the opponent has stated that the following design is used on pillow packs which are used as samples to prospective customers:

25. Other than the statement that this has been used since 2017, I have no information about how widespread the use of these packs is and how many consumers might have had sight of them. The opponent goes on to confirm that when the goods are sold commercially, the packaging that is actually used is as follows:

Analysis

Form of the mark/how the mark is used

26. The mark, as registered, has been shown on the presentation and the sample packaging. I note that throughout the evidence it is usually accompanied by either 'FK1820' or 'FK1829'. However, the word 'ANTEO' retains an independent distinctive role in the mark and therefore, this is acceptable use.[3]

Conclusions from the evidence on genuine use

27. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the comparable mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant territory during the relevant five-year period. This is the EU for the part of the period up to 31 December 2020 and the UK thereafter. In making this assessment, I am required to consider all relevant factors, including:

- The scale and frequency of the use shown;
- The nature of the use shown;
- The goods and services for which has been shown;
- The nature of those goods/services and the market(s) for them; and
- The geographical extent of the use shown.

28. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[4]

29. The General Court ('GC') restated its interpretation of *Leno Merken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case

[3] *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12, paras 31-35
[4] *New Yorker SHK Jeans GmbH & Co KG v OHIM,* T-415/09

concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union.

30. The opponent has provided the total UK sales figures for 2017 to 2022 as being in excess of €14 million. On the product data sheet in the evidence provided, there are a list of applications for the product which include: heavy duty shipping sacks, lamination, food packaging and stretch cling film (as shown in paragraph 23 above).

31. The opponent has not provided me with any marketing or expenditure figures. I have, however, seen advertising in the form of a press release from 25 October 2017 (a few days outside the relevant period). I have no further information as to how this press release was published and possible readership numbers. Mr Voortmans further confirmed there were marketing events in Lyon and Darmstadt in 2018 together with the pillow packs as samples and the webinar.

32. I have been shown the mark on both the sample packaging and the larger sacks together with the product literature. Even though the mark is on the side of the larger packaging, in my view, the average consumer will still perceive it as indicating the trade origin of the goods.

33. Taking into account all of the above, I find that the opponent has shown genuine use of its mark in relation to polyethylene. The goods appear to be highly specialist and show a significant amount of sales within the relevant period. The evidence is clear that the ‘ANTEO’ mark is used on a single product that comes in two grades. On the product information sheet and the packaging itself it is clearly labelled as polyethylene.

Fair Specification

34. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited,* BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

> "In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

35. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch)*,* Mr Justice Carr summed up the law relating to partial revocation as follows (at [47]):

> "iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].
>
> iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].
>
> v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Pl*c [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

36. As a reminder, the opponent claims to have used their mark on the following goods:

Class 1: Artificial and synthetic resins, unprocessed; plastics, unprocessed; raw plastics in the form of pellets; polyethylene; polypropylene, polyolefins (raw material).

37. I note the holder submitted at the hearing that any fair specification should be limited by the use for packaging; however, as shown above within the evidence, there is a list of possible uses for the goods which goes further than simply packaging.

38. I consider the opponent's specification above has resins and plastics at large, whereas their evidence has shown that 'Anteo' is used specifically on the opponent's polyethylene product. Considering the specialist nature of the goods in question and their differing applications, I consider the average consumer of these goods would likely identify them by their specific terms.

Regarding the term ‘polyolefin’, the evidence points to the fact that polyethylene is a type of polyolefin together with polypropylene, I take the below quotation from page 4 of Exhibit A:

“Borouge produces high quality polyolefin (polyethylene and polypropylene) solutions for packaging, infrastructure, energy, mobility, agriculture and healthcare applications…”

39. As I have said above, the evidence provided by the holder only shows use for the mark on polyethylene and that the average consumer is likely to be specific in their naming of these goods, therefore, I consider that the holder has not demonstrated a use of the more general category.

40. Therefore, I consider a fair specification to be as follows:

> Class 1: Artificial and synthetic resins, namely polyethylene, unprocessed; plastics, namely polyethylene, unprocessed; raw plastics, namely polyethylene, in the form of pellets; polyethylene.

Section 5(2)(b)

41. In making this decision, I bear in mind the following principles 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 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

42. In the judgment of the 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".

43. 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.

44. In *Gérard Meric v Office for Harmonisation in the Internal Market* (OHIM) ('Meric'), Case T-133/05, the GC stated that:

"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".

45. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that 'complementary' means:

"[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking".

46. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as 'complementary' and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of

examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C., sitting as the Appointed Person, noted in *Sandra Amalia Mary Elliot v LRC Holdings Limited* BL O/255/13:

> "It may well be the case that wine glasses are almost always used with wine and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes", whilst on the other hand:
>
> "[…] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together".

47. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

48. The Parties' respective specifications are:

Contested Goods	**Opponent's Goods**
Class 1: Battery fluid being acidulated water for recharging batteries; preparations for enhancing battery life being cross-linking agents for cross-linking in battery electrodes to enhance battery life; chemical preparations for use in the manufacture of surface coatings in relation to batteries; industrial chemicals for use in coating film; coating agents, other than paint being industrial	Class 1: Artificial and synthetic resins, namely polyethylene, unprocessed; plastics, namely polyethylene, unprocessed; raw plastics, namely polyethylene, in the form of pellets; polyethylene.

chemicals; coating compositions, other than paint being industrial chemicals; coatings for the finishing of surfaces being water-based compounds for forming binders in battery electrodes; filler materials for coating compositions namely, being water-based compounds for forming binders in battery electrodes; raw materials for use as coatings namely, water-based compounds for forming binders in battery electrodes; none of the aforesaid being packaging or packaging materials or for the manufacture of packaging or packaging materials.	

49. In making my assessment, I note that both specifications use the word “namely” for some terms. The Classification Addendum Section of the Trade Marks Manual states that specifications which include the wording ‘namely’ should be interpreted as covering only the named goods within that specification.

50. Further, I note that the contested goods are all limited as “none of the aforesaid being packaging or packaging materials or for the manufacture of packaging or packaging materials”. However, the fair specification for the opponent does not have a limitation on the use of their goods.

Battery fluid being acidulated water for recharging batteries;

51. I can see no overlap in the *Treat* factors between the above goods from the holder’s specification and the opponent’s remaining good and therefore, I consider them to be dissimilar.

Preparations for enhancing battery life being cross-linking agents for cross-linking in battery electrodes to enhance battery life;

52. I have not been provided with any detail as to what the above goods from the holder's specification might be. Therefore, on the basis of the literal meaning of the words in the term, I consider them to be additives of sorts that are added to batteries to improve their battery life. I cannot then see any overlap in use, user or purpose along with any overlap with any of the other *Treat* factors when comparing to the opponent's good. The opponent's submissions from the hearing was that there is a very general overlap in trade channels as the goods are raw materials used in manufacturing, however, I consider the following from *Unicorn Studio INC v Veronese (Société par Actions Simplifiée)* [2024] EWHC 1098 (Ch) where Mr Purvis KC stated:

> "23. …the overall purpose of considering similarity should not be forgotten. That purpose is to identify similarities which might be relevant to the question of likelihood of confusion. It seems to me the greater level of generality at which some similarity under *Canon* factors can be found (ie both goods are '*sold in large department stores'* or both goods are '*used by ordinary people*') the less relevant could it be to any question of confusion, and any assessment of similarity of goods should take that into account."

Therefore, I consider the fact that they are both raw materials used in manufacturing is a very general overlap and this on its own is not enough for a finding of similarity. I therefore find them to be dissimilar.

Chemical preparations for use in the manufacture of surface coatings in relation to batteries; industrial chemicals for use in coating film;

53. It is possible that there is an overlap in trade channels, use and user between the above goods and the opponent's as both parties' goods are chemicals used in manufacturing goods (and the opponent's goods could be used in manufacturing surface coatings). They are not complementary nor are they in competition. I therefore consider them to be similar to a medium degree.

Coating agents, other than paint being industrial chemicals; coating compositions, other than paint being industrial chemicals;

54. I believe there could be an overlap in use, purpose and trade channels between the above goods and the opponent's. I know from the evidence that the opponent's goods can be used to make films. The holder's goods are the coatings themselves opposed to chemicals that can be manufactured into coatings so the nature is different. They are not in competition nor are they complementary and I therefore find the goods to be similar to between a low and medium degree.

Coatings for the finishing of surfaces being water-based compounds for forming binders in battery electrodes; filler materials for coating compositions namely, being water-based compounds for forming binders in battery electrodes; raw materials for use as coatings namely, water-based compounds for forming binders in battery electrodes;

55. I do not find the opponent's submissions at the hearing that there is no reason why polyethylene should not be dispersed in waters to be persuasive (and I was not provided any evidence on this point). I do not believe there to be an overlap in nature and use between the above goods, which are intended to form binders in battery electrodes, and the opponent's. These goods of the holder are water based and not a type of plastic. There might be an overlap in purpose but I have not been provided with any evidence to show this and on it's own, this is not enough to find similarity. I cannot see an overlap in user or trade channels. They are not complementary nor are they in competition. I therefore consider them to be dissimilar.

56. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

> "49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to

be considered but it is unnecessary to interpose a need to find a minimum level of similarity."

57. I have found no similarity for the following contested goods and therefore the oppositions fail in relation to them:

> Class 1: Battery fluid being acidulated water for recharging batteries; preparations for enhancing battery life being cross-linking agents for cross-linking in battery electrodes to enhance battery life; coatings for the finishing of surfaces being water-based compounds for forming binders in battery electrodes; filler materials for coating compositions namely, being water-based compounds for forming binders in battery electrodes; raw materials for use as coatings namely, water-based compounds for forming binders in battery electrodes;

58. The oppositions will continue in respect of the following goods:

> Class 1: chemical preparations for use in the manufacture of surface coatings in relation to batteries; industrial chemicals for use in coating film; coating agents, other than paint being industrial chemicals; coating compositions, other than paint being industrial chemicals; none of the aforesaid being packaging or packaging materials or for the manufacture of packaging or packaging materials.

Average consumer and the purchasing act

59. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

60. 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. (as he then was) 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 word "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

61. I agree with the opponent's submissions that the average consumer of the remaining goods at issue will likely be professional purchasers such as manufacturers of goods who would be selecting materials to use in the manufacturing process or, in the case of the opponent's goods only, subsequent packaging of the goods. The purchaser would be paying attention to the suitability, quality, and cost of the goods and whether they meet the technical requirements for the use. Therefore, I consider the level of attention to be paid would be between medium and high.

62. I would expect the goods to be selected mainly visually from product brochures or websites however, word of mouth recommendations and information from sales representatives might also play a role. Further, it is possible the goods might be ordered over the phone. Therefore, I consider the visual aspect will be the more significant.

Comparison of the marks

63. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The

CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> ".....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

64. 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.

65. The respective trade marks are shown below:

Contested mark	**Earlier mark**
AnteoX AnteoLink	Anteo

66. The earlier mark is a singular word mark and therefore, that is where the overall impression lies.

67. Both contested marks are also word marks. I find that the average consumer will see the marks and believe they are two elements joined together – 'Anteo' and 'X' or 'Link'. I believe the average consumer would see 'Anteo' as an invented term. I note that the opponent submitted that both 'X' and 'Link' are descriptive of the goods

however, as pointed out by the holder, they have not provided me with any evidence showing this and I cannot say that I believe a significant proportion of consumers would view them as such. As I believe 'Anteo' would be seen as an invented term and it is found at the beginning of the mark, I believe it will play a greater role in the overall impression.

68. Visually, all of the marks contain the element 'ANTEO' at the beginning and the earlier mark is entirely contained within the contested marks. The 'AnteoX' mark only has one additional letter on the end of the mark and therefore, I consider them to be highly similar. 'AnteoLink' contains a further word adjoined to the initial element with four further letters that have no counterpart in the earlier mark. I therefore find that mark to be visually similar to the opponent's to between a medium and a high degree.

69. I agree with the holder that the opponent's mark will be 3 syllables. Further, I find that those three syllables will be pronounced identically to the same element in the contested marks which is at the beginning of them both. I note that both contested marks have further elements, 'X' and 'Link' which will be given their ordinary everyday pronunciations, and which have no counterpart in the earlier mark. I therefore consider the marks to be aurally similar to a medium degree.

70. Both parties agree that 'ANTEO' is an invented term that has no meaning. The opponent submits that 'X' and 'LINK' are both descriptive of the goods it is registered for whereas the holder submits that this is not the case and that 'LINK' will be 'a reference to a relationship between two things or situations'. As mentioned above, I have not been provided with any evidence regarding the descriptiveness of the terms 'X' and 'LINK' in relation to the goods in question and I do not believe a significant proportion of consumers would make this connection. In respect of the 'AnteoX' mark, this appears to be entirely invented and therefore, in comparison with the opponent's mark, they are conceptually neutral. 'AnteoLink' contains an ordinary dictionary term which has conceptual meaning that is not found within the opponent's mark and therefore, they are conceptually dissimilar.

Distinctive Character of the Earlier Mark

71. 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)."

72. The opponent has submitted evidence regarding use of its marks which I have summarised above. The opponent has submitted that the distinctive character of the earlier marks is 'at least normal'. I will review the evidence to see whether it shows that use of the marks can be said to have enhanced the distinctiveness of the earlier mark.

73. In order to do this, first I must consider the level of inherent distinctiveness the earlier marks have. For the most part, words that are descriptive or allusive of the character of the goods and services provided are on the lower end of the scale of

distinctiveness whereas invented terms are likely to possess the highest level of distinctiveness.

74. As mentioned above, and agreed by the parties, 'ANTEO' is an invented term with no meaning and no link to the goods at issue. As such, I agree with the opponent's submissions that the earlier mark is highly distinctive.

75. It is the UK market that is relevant to an assessment of enhanced distinctiveness. I note again that Mr Voortmans states in the witness statement that UK sales over the relevant period supplied in the table exceeds €14 million. However, in light of the limited information on how the goods are marketed to the consumer together with this level of sales together with a local of information on the spread of sales within the UK, I do not believe that they have shown enhanced distinctiveness in the UK market and therefore the distinctive character of the earlier mark remains at its inherent level.

Likelihood of Confusion

76. 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 services 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 services and vice versa. 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.

77. In *L.A. Sugar Limited v Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

78. I have found as follows:

a) The remaining goods at issue are similar to either between a low and medium degree or a medium degree.

b) The average consumer is likely to be a professional consumer, probably in manufacturing. The average consumer will be paying between a medium and high degree of attention.

c) The purchasing process will be predominantly visual, although I do not discount an aural component to the purchase.

d) The average consumer will either view the earlier marks as an invented term. or as two words conjoined. The 'Anteo' element will play a greater role in the overall impression of the contested marks.

e) I consider that the ‘AnteoX’ mark will be highly visually similar to the opponent’s mark and the ‘AnteoLink’ mark will be similar to between a medium and high degree. The marks are aurally similar to a medium degree.

f) I consider that the ‘AnteoX’ mark will be conceptually neutral to the opponent’s mark. For the ‘AnteoLink’ mark I consider that the ‘Link’ element makes the marks conceptually dissimilar.

g) The earlier mark is inherently distinctive to a high degree.

79. In relation to the ‘AnteoX’ mark I note that the marks share the first 5 letters and only differ by one extra letter at the end of the holder’s mark. The marks are conceptually neutral and the high level of inherent distinctiveness will balance the lower similarity of the goods at issue. I believe that the average consumer might imperfectly recall the marks and not remember the additional ‘X’ on the end and therefore I believe that there is a likelihood of direct confusion. In the event that I am wrong, then I will also consider indirect confusion for this mark.

80. For the ‘AnteoLink’ mark, the marks are further apart visually, which is the predominant method of purchase and I do not think that the average consumer, paying a medium to high degree of attention will overlook this nor will they imperfectly recall the presence of an extra dictionary word. I therefore believe there is no likelihood of direct confusion.

81. I will now go on to consider the possibility of indirect confusion. Again, I take guidance from Mr Purvis in *L.A. Sugar Limited* where he stated:

> “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.).

(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)".

82. These examples are not exhaustive but provide helpful focus as was confirmed by Arnold LJ in *Liverpool Gin Distillery Limited & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207:

> "This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition."[5]

83. I consider that both the 'AnteoX' and 'AnteoLink' marks will fall within category (a) of the *L. A. Sugar* categories. I have found the earlier mark, 'Anteo' to be inherently highly distinctive and this is the shared element between all of the marks. Even though that element is now joined with further matter, particularly a dictionary term in the latter case, I believe that the average consumer would think that 'Anteo' is so highly distinctive that it would only be the brand owner using it. Therefore, I consider there to be a likelihood of indirect confusion for both marks.

Conclusion

84. The opponent has been successful in relation to the following goods, subject to any appeal:

[5] Paragraph 12

Class 1: chemical preparations for use in the manufacture of surface coatings in relation to batteries; industrial chemicals for use in coating film; coating agents, other than paint being industrial chemicals; coating compositions, other than paint being industrial chemicals; none of the aforesaid being packaging or packaging materials or for the manufacture of packaging or packaging materials.

85. The opposition has failed in relation to the following goods, subject to any appeal:

Class 1: Battery fluid being acidulated water for recharging batteries; preparations for enhancing battery life being cross-linking agents for cross-linking in battery electrodes to enhance battery life; coatings for the finishing of surfaces being water-based compounds for forming binders in battery electrodes; filler materials for coating compositions namely, being water-based compounds for forming binders in battery electrodes; raw materials for use as coatings namely, water-based compounds for forming binders in battery electrodes.

Costs

86. The guidance for awards of costs are set out in TPN 2/2016.

87. On reviewing the matters at hand, I consider that both parties have had some level of success and some failure. It is my view that on this occasion, the fairest basis to deal with costs is for each party to bear their own in this matter.

88. I therefore make no award of costs in this matter.

Dated this 16th day of August 2024

L Nicholas

For the Registrar