

O/0899/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK3942725

BY LDN NOOTS LTD

TO REGISTER THE TRADE MARK:

FLOW

IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 445079

BY O POSITIV, INC.

Background and pleadings

1. LDN Noots Ltd (“the applicant”) applied to register the trade mark shown on the front page on 7 August 2023. The mark was published on 6 October 2023.

2. The goods applied for were as follows:

Class 5: Nutritional supplements consisting of fungal extracts being beverage blends; Dietary preparations, namely functional adaptogen powder mixes being beverage blends.¹

3. O Positiv, Inc. (“the opponent”) opposes the trade mark application. The opposition was filed on 5 January 2024. The opposition is on the basis of section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) against all applied for goods.

4. The following mark is relied upon for the opposition:

UK918274718²

FLO

Filing date: 20 July 2020

Registration date: 12 November 2020

Relying on the following goods:

¹ During the proceedings, the applicant filed a TM21B form in order to amend the goods they had applied for. This was accepted but the proceedings remain in place, and these are now the goods under opposition.

² On 1 January 2021 the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UKIPO created comparable UK trademarks for all right holders with an existing EUTM. As a result of the opponent’s EUTM number 18274718 being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark now recorded on the UK trade mark register has the same legal status as if it had been applied for and registered under UK law and the original EUTM filing date remains.

Class 5: Vitamin and mineral supplements; vitamins; dietary and nutritional supplements; gummy vitamins; herbal supplements; natural dietary supplements; natural herbal supplements.

5. The opponent argues that the marks are “almost identical” visually and identical phonetically and conceptually. Further they state that the goods are identical or similar and the close overlap will lead to a likelihood of confusion.

6. The applicant filed a counterstatement denying the claims.

7. Both parties filed evidence and submissions in lieu of a hearing. I therefore make this decision following careful consideration of the papers.

8. The applicant is represented by Panoramix Limited, and the opponent is represented by Murgitroyd & Company.

9. 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

10. The opponent provided evidence in chief in the form of a witness statement from Anna Teresa Spzek, who is a Chartered Trade Mark Attorney from Murgitroyd & Company, dated 1 July 2024 and accompanied by 10 exhibits. The evidence relates to the types of goods at issue in various stores in the marketplace.

11. The applicant’s evidence is a witness statement from Zain Peer, who has been a director of LDN Noots Ltd since 30 August 2019. The statement is dated 23 August 2024 and is accompanied by 5 exhibits. Some of the evidence relates to other marks

using the letters 'FLO' and screenshots relating to them. The rest of the evidence shows their own products in the marketplace.

12. The opponent filed evidence in reply in the form of a further witness statement from Anna Teresa Szpek dated 23 October 2024 and being accompanied by 4 further exhibits. This evidence again relates to the goods in question.

13. I have reviewed all of the above evidence and will refer to the relevant parts where necessary throughout the decision.

Decision

14. Section 5(2)(b) is being relied upon and is as follows:

“5(2) A trade mark shall not be registered if because-

[...]

(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”.

15. 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 –

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;”

16. In these proceedings, the opponent is relying upon the trade mark shown in paragraph 4, which qualifies as an earlier trade mark under the above provisions. As the trade mark had not completed its registration process more than 5 years before the filing date of the application in suit, it is not subject to proof of use, as per section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods they have identified.

Case law

17. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other

components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of Goods

18. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

19. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

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

20. 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.

21. 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 General Court (“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”.

22. 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”.

23. For the purposes of considering the issue of similarity of goods and services, 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).

24. The goods at issue are as follows:

Applicant's goods	Opponent's goods
Class 5: Nutritional supplements consisting of fungal extracts being beverage blends; Dietary preparations, namely functional adaptogen powder mixes being beverage blends.	Class 5: Vitamin and mineral supplements; vitamins; dietary and nutritional supplements; gummy vitamins; herbal supplements; natural dietary supplements; natural herbal supplements.

25. I note that there is significant mention in the evidence and submissions of both parties as to what their goods actually are and where they are found within the market. While I have noted this evidence, as there is no proof of use element to this matter, I must make a notional evaluation of the goods as they are registered/applied for.

Nutritional supplements consisting of fungal extracts being beverage blends

26. The opponent has 'dietary and nutritional supplements' within the specification which I consider encompasses the above term from the applicant's specification and therefore, I find these goods identical under the *Meric* principle.

Dietary preparations, namely functional adaptogen powder mixes being beverage blends

27. I consider that dietary preparations are usually food or drink that has been modified or prepared to enhance the nutritional value or make them more convenient to consume. In this case, the preparations are specifically powders for beverages. 'Dietary and nutritional supplements' from the opponent's specification are more likely to be concentrated sources of nutrients or the like that are taken or used to supplement the diet. Therefore, I consider that the purposes and method of use differ. However,

there could be an overlap in user- as it is likely to be consumers who are looking to improve their health and wellbeing that use these goods and I consider that both could come in the form of powders to be mixed into liquids and therefore, there is an overlap in nature. I consider there could be an overlap in trade channels, it is possible that some types of powder beverage mixes could be found in the near vicinity of dietary supplements. I do not find them to be in competition nor are they complementary. I therefore find these goods to be similar to a medium degree.

Average consumer and the purchasing act

28. 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.

29. 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.”

30. The average consumer for the above goods will primarily be the general public. There could also be a proportion of professional consumers who will purchase the goods to sell in pharmacies, health stores and supermarkets. I consider that the purchasing process will primarily be visual but cannot discount an aural element such as word-of-mouth recommendations or consultation with professionals or sales assistants.

31. I find that the price of the goods will vary but are unlikely to be particularly expensive. Professionals are likely to purchase the goods more frequently than the general public. The level of attention taken by the general consumer will be influenced by their own requirements and users are likely to consider the suitability of the goods for either a specific minor health concern or for general wellbeing. I am also of the view that when consuming a product, especially orally, it is very likely that a consumer will pay an increased level of attention during the selection process. Therefore, I consider that the general public will pay a medium level of attention during the selection process. Professional consumers are likely to pay a higher level of attention when selecting the goods and along with the above considerations, such as suitability, they will be aware of their increased liability when passing or recommending these goods onto the end user, along with further considerations relating to the quality of the goods and the impact goods of a poor quality can have on the reputation of a business. Consequently, I consider that professional consumers will pay a higher than medium level of attention during the selection process.

Comparison of the marks

32. 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.”

33. 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.

Contested Mark	Earlier Mark
FLOW	FLO

34. The earlier mark is a word mark comprising of one word and the overall impression therefore lies in that word. The same can be said for the contested mark also.

35. Visually, the letters of the earlier mark are entirely contained within the contested mark. The contested mark contains a further letter at the end of the mark, 'W', that has no counterpart in the earlier mark. Therefore, I find the marks to be visually similar to a high degree.

36. Turning next to the aural comparison, the contested mark will have its ordinary everyday pronunciation. I consider that the earlier mark will be pronounced in the same way as the contested mark and have been provided with no submissions to say otherwise. I therefore find them to be aurally identical.

37. The opponent has submitted that the contested mark would be understood to mean "a steady stream of something such as liquid, electricity, people etc." Further, they stated that 'FLO' could either be understood as a short form of the same word, making them conceptually identical or it could be understood to be a female name or shortening of a female name which would make the marks conceptually dissimilar. I agree that a significant proportion of consumers will see 'FLO' as a shortening/misspelling of 'FLOW' and therefore, attribute the same meaning to it. For those consumers, the marks will be conceptually identical.

Distinctive Character of the Earlier Mark

38. 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).”

39. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and/or services, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it. The opponent has not provided evidence of use. However, the applicant has provided evidence relating to other goods which use ‘FLO’. Usually, as per *Zero Industry Srl v OHIM*, Case T-400/06, the mere fact that other marks exist on the register relating to the goods at issue is not enough to

establish that the distinctive character of that element has been weakened. I note that the applicant has gone a step further and shown website extracts for some of the marks they have identified.³ They have provided extracts from 11 websites. I note three of those screenshots relate to the same company, being 'Life-Flo' who from those screen shots appear to sell health related oils and sprays. Two of the extracts refer to marks which contain or consist of 'FLOW' rather than 'FLO' as per the earlier mark. This means there are 7 products/companies they have shown with 'FLO' in their mark or name. For the most part the goods appear to be types of supplements (although for one or two of the goods it isn't entirely clear). However, I consider that the market for supplements/vitamins and the like is potentially a fairly large one and I have no evidence before me regarding market share or sales of any of the goods which would allow me to find that the distinctiveness of the earlier mark has been lowered in anyway. If I am wrong in this finding, then I consider that any impact of these other marks on the market would be very small.

40. The earlier mark is comprised of the word 'FLO' which, as I have found above, is likely to be seen as a misspelling or shortening of the word 'FLOW' or a female name/shortening. I do not believe the mark is allusive or descriptive of the goods it is registered for and, therefore, I find the earlier mark to be inherently distinctive to a medium degree. If, as I have said above, there is any impact on the distinctiveness by the other marks provided in evidence, I consider this would only slightly reduce the distinctiveness of the earlier mark to between a low and medium degree.

Likelihood of confusion

41. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and 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

³ Exhibit LNDN5

principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and 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 goods and 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.

42. The following factors must be considered to determine if a likelihood of confusion can be established:

- The earlier mark is a word mark comprising of one word and the overall impression therefore lies in that word. The same can be said for the contested mark also.
- I have found the marks being compared visually similar to a high degree and aurally identical. In relation to the conceptual comparison, I have found that a significant proportion of consumers will consider the marks conceptually identical although, there may be some consumers who believe the marks to be conceptually dissimilar.
- I have found the earlier mark to be inherently distinctive to a medium degree (with the caveat that if the evidence provided by the applicant does decrease the level of distinctiveness, this would be to between a low and medium degree).
- I have identified the average consumer is likely to be the general public but could also be professionals. The purchasing process is likely to be predominantly visual.
- I have concluded that the general public will pay a medium level of attention and professionals will pay a higher than medium level of attention during the purchasing process.
- I have found the services to range between identical and similar to a medium degree.

43. Given the high visual similarity, the aural identity and the levels of similarity of the goods at issue, I consider that the average consumer paying a medium level of attention is likely to misremember the marks and, through imperfect recollection, mistake one for the other. Even where a consumer views the marks as differing conceptually, I find that this will not be enough to neutralise the visual and aural similarities.⁴ This finding extends to where the distinctiveness of the earlier mark is between a low to medium degree. Therefore, I consider there to be a likelihood of direct confusion.

Conclusion

44. The opposition succeeds in its entirety and registration is refused, subject to any appeal.

Costs

45. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023 as these proceedings commenced after 1 February 2023. I award the opponent the sum of **£1100**, calculated as follows:

Official fees	£100
Preparing the Notice of opposition and considering the counterstatement	£250
Preparing evidence and considering the other side's evidence	£400 ⁵
Preparation of submissions in lieu	£350
Total	£1100

⁴ *Nokia Oyj v OHIM*, Case T-460/07

⁵ I have reduced this to below the scale minimum as the opponent's own evidence was light and limited in use.

46. I therefore order LDN Noots Ltd to pay O Positiv, Inc. the sum of £1100. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 26th day of September 2025

L Nicholas

For the Registrar