

O-019-13

**IN THE MATTER OF APPLICATION NO 2597728
IN THE NAME OF MELLO DRINKS LTD**

AND

**OPPOSITION THERETO UNDER NO 102873 BY
ANTON RIEMERSCHMID WEINBRENNEREI UND LIKÖRFABRIK GMBH & CO KG**

Background

1. Application No 2597728 has a filing date of 13 October 2011 and seeks registration for a series of two marks:

cucu
CU-CU

2. The application stands in the name of Mello Drinks Ltd (“Mello”) and seeks registration for the following goods:

fruit drinks and fruit juices; mineral and aerated waters; non-alcoholic drinks; syrups for making beverages; shandy, de-alcoholised drinks, non-alcoholic beers and wines.

3. Following publication of the application in the *Trade Marks Journal* on 11 November 2011, notice of opposition was filed on 10 January 2012 by Anton Riemerschmid Weinbrennerei und Likörfabrik GmbH & Co KG (“ARWL”). ARWL opposes registration of the application on grounds under sections 5(2)(b) and 5(3) of the Act relying on the following community trade mark:

CTM No	Mark	Filing/Registration date	Specification of goods
463679	XUXU	7.2.1997/19.11.1998	Class 30 Coffee, tea, cocoa Class 32 Beers; non-alcoholic beverages, mineral waters, table waters, spring waters, fruit juices Class 33 Alcoholic beverages (except beers), spirits,

4. ARWL claims to have used the mark in relation only to alcoholic beverages (except beers) and spirits.

5. Mello filed a counterstatement in which, essentially, it denies the claims made. It also put ARWL to proof of use of its mark in relation to the goods on which use has been claimed.

6. Both parties filed evidence. Neither sought to be heard and therefore I give this decision after a careful review of the papers before me.

The objection under section 5(2)(b) of the Act

7. Section 5(2)(b) of the Act states:

—52) 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.”

8. 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~~ “earlier trade mark” means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) 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,

(b)

(c)

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

9. The mark relied on by ARWL under this ground is, given the dates set out at paragraph 3 above, an earlier mark within the meaning of section 6(1) of the Act which is subject to the requirements of section 6A of the Act. As indicated above, Mello requests that ARWL provide proof of use of its mark in relation to alcoholic beverages (except beers), spirits.

10. Section 6A of the Act reads:

—6A(1) This section applies where-

an application for registration of a trade mark has been published,

there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.

(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-

within the period of five years ending with the date of publication of the application 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 differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, 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)

(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.

(7)....”

11. Also of relevance is section 100 of the Act which states:

–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.”

12. In line with the requirements set out above and taking into account the date of publication of the application, the relevant period in which ARWL is required to prove use of its mark is 12 November 2006 to 11 November 2011.

13. The guiding principles to be applied in determining whether there has been genuine use of a mark are set out in *Ansul BV v Ajax Brandbeveiliging BV* [2003] RPC 40 and *Laboratoire de la Mer Trade Mark* [2006] FSR 5. From these cases it is clear that:

-genuine use entails use that is not merely token. It must also be consistent with the essential function of a trade mark, that is to say to guarantee the

identity of the origin of goods or services to consumers or end users (*Ansul*, paragraph 36);

- the use must be 'on the market' and not just internal to the undertaking concerned (*Ansul*, paragraph 37);

- it must be with a view to creating or preserving an outlet for the goods or services (*Ansul*, paragraph 37);

- the use must relate to goods or services already marketed or about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns (*Ansul*, paragraph 37);

- all the facts and circumstances relevant to determining whether the commercial exploitation of the mark is real must be taken into account (*Ansul*, paragraph 38);

- the assessment must have regard to the nature of the goods or services, the characteristics of the market concerned and the scale and frequency of use (*Ansul*, paragraph 39);

- but the use need not be quantitatively significant for it to be deemed genuine (*Ansul*, paragraph 39);

- an act of importation could constitute putting goods on the market (*Laboratoire de la Mer*, paragraph 25 referring to the earlier reasoned order of the ECJ);

- there is no requirement that the mark must have come to the attention of the end user or consumer (*Laboratoire de la Mer*, paragraphs 32 and 48);

- what matters are the objective circumstances of each case and not just what the proprietor planned to do (*Laboratoire de la Mer*, paragraph 34);

- the need to show that the use is sufficient to create or preserve a market share should not be construed as imposing a requirement that a significant market share has to be achieved (*Laboratoire de la Mer*, paragraph 44).

14. I must also keep in mind the guidance in *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32, in relation to determining what constitutes a fair specification, namely:

—Pinfrey J in *Decon* suggested that the court's task was to arrive at a fair specification of goods having regard to the use made. I agree, but the court still has the difficult task of deciding what is fair. In my view the task should be carried out so as to limit the specification so that it reflects the circumstances of the particular trade and the way that the public would perceive the use".

15. In *Animal Trade Mark* [2004] FSR 19, Jacob J held:

—The reason for bringing the public perception in this way is because it is the public which uses and relies upon trade marks. I do not think there is anything technical about this: the consumer is not expected to think in a pernickety way because the average consumer does not do so. In coming to a fair description the notional average consumer must, I think, be taken to know the purpose of the description. Otherwise they might choose something too narrow or too wide. Thus, for instance, if there has only been use for three-holed razor blades imported from Venezuela (Mr T.A. Blanco White's brilliant and memorable example of a narrow specification) "three-holed razor blades imported from Venezuela" is an accurate description of the goods. But it is not one which an average consumer would pick for trade mark purposes. He would surely say "razor blades" or just "razors". Thus the "fair description" is one which would be given in the context of trade mark protection. So one must assume that the average consumer is told that the mark will get absolute protection ("the umbra") for use of the identical mark for any goods coming within his description and protection depending on confusability for a similar mark or the same mark on similar goods ("the penumbra"). A lot depends on the nature of the goods—are they specialist or of a more general, everyday nature? Has there been use for just one specific item or for a range of goods? Are the goods on the High Street? And so on. The whole exercise consists in the end of forming a value judgment as to the appropriate specification having regard to the use which has been made."

16. Also of relevance are the comments of the Court of First Instance in *Reckitt Benckiser (España) SL v OHIM*, Case T-126/03 where it said:

—It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or sub-categories to which the goods or services for which the trade mark has actually been used belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations

of the goods concerned by the registration. Consequently, the concept of ‘part of the goods or services’ cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.”

17. I also note the comments of Mr Geoffrey Hobbs Q.C. sitting as the appointed person, in *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited* BL O/345/10, where he stated:

“However, that does not appear to me to alter the basic nature of the required approach. As to that, I adhere to the view that I have expressed in a number of previous decisions. 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.”

The evidence

18. ARWL has filed evidence in the form of witness statements from Linda Bray, dated 29 May 2012 and Frank Barwinski dated 18 July 2012. Ms Bray is a partner and Trade Mark attorney with Wildbore & Gibbons, ARWL’s legal representatives in these proceedings. Mr Barwinski has been the Executive Officer for ARWL since 2001.

19. Ms Bray states that ARWL is a manufacturer of liqueurs and spirits. The company was founded in 1835 and, since 1996, it has been part of the Underberg group. She states it manufactures a drink under the mark XUXU containing strawberries (66% fruit) and vodka (15% by volume) with lime juice. She states the drink can be “served on its own, mixed with sparkling wine, blended with fruit juices into cocktails or used as a dessert topping”. She states that in 2011, ARWL commenced the sale of line extension of the XUXU brand under the mark XUXU 10 which has 50% fruit content and 10% alcohol by volume.

20. Ms Bray states that ARWL “has effected sales in the United Kingdom of the XUXU products since at least as early as 2003. Since the beginning of sales on the UK market in 2003 approximately 80,000 litres were sold which equates to about 160,000 bottles”.

21. Attached to Ms Bray’s witness statement are a number of exhibits. At Exhibit 2 there is what she says are two promotional leaflets. One bears no date whereas the other shows a copyright date of 2009. Each shows a bottle of a strawberry and vodka drink, each bottle bearing the mark XUXU. I am given no information of whether or where these leaflets might have been published but note that each contains a website address www.xuxu.de which I take to be a German website (I note that ARWL is based in Germany). At Exhibit 3 there is a similar leaflet showing the XUXU¹⁰ product and which bears a copyright date of 2011. Again I am given no information of whether or where this leaflet might have been published but note it contains the same website address as the earlier exhibit. At Exhibit 4 are three

pages which Ms Bray states were taken from the xuxu.de website –giving representative examples of promotion of the XUXU product”. The pages appear to have been downloaded on 29 May 2012 and show a bottle bearing the mark alongside a shot glass of the product. The text on the first page is in English and German. The third page invites readers to click on links to various recipes using the drink.

22. In his witness statement, Mr Barwinski states that he has seen Ms Bray’s evidence and confirms the accuracy of the statements she has made and the authenticity of the exhibits. Mr Barwinski states that since 2003, more than 157,800 bottles of the XUXU beverage, each containing 0.5 litres, have been sold in the UK and, at FB1, he exhibits photocopies of invoices which he says relate to those sales. The exhibit consists of some seventeen pages, each on Underberg headed paper and which make up 10 invoices. None of the copy invoices show any prices for any of the goods listed upon them. Four of them date from before the relevant period. Of those dating from within the relevant period, each is addressed to the same distillery in Liverpool. The first five of these (dated between 28 November 2006 and 17 September 2010 with one invoice for each year 2006-2010) include reference to 780 bottles of what is described on the invoices as —XUXU Int./ZA”. The last invoice, dated 24 November 2011, refers to 780 bottles described as —XUXU GB” but is from after the relevant period.

23. Although a few pages downloaded from ARWL’s website have been filed, there is no evidence that any advertising has taken place in the UK, whether within the relevant period or otherwise. Total UK sales from some unspecified date in 2003 to (it appears) May 2012 (the date of Ms Bray’s witness statement) are said to amount to approximately 160,000 half litre bottles. Whilst I have no evidence of the size of the relevant market, given the number of outlets in every town and village across the country that sell such goods, these figures are highly likely to amount to no more than a tiny proportion of that market and are somewhat suggestive of test marketing. I do not know how many bottles may have been sold during the relevant period though for each of the relevant years a single invoice has been provided each showing sales of some 780 bottles though no sales prices are shown on those invoices. Each of those invoices is addressed to the same distillery on an industrial estate in Liverpool. They list the products as XUXU Int/ZA whereas the invoice dating from after the relevant period lists the product as XUXU GB which may or may not be some sort of indication of the source or end customer of the goods, with the distillery acting as an intermediary, however, they are claimed to be sales and, in any event, nothing rests on this.

24. I bear in mind the comments of Mr Richard Arnold Q.C. sitting as the appointed person in *Extreme* BL O/161/07. Whilst the evidence filed suffers from a number of flaws and is far from extensive, I find that the evidence is not —obviously incredible”. Neither has that evidence been challenged by Mello. In all the circumstances, I am prepared to proceed on the basis that genuine use has been made of the mark.

25. Whilst the product sold under the mark is said to have a number of potential uses (e.g. as a dessert topping), I am concerned only with the use in relation to the specification of goods for which use has been claimed: i.e.” “Alcoholic beverages (except beers), spirits”. The evidence shows a single product which is an alcoholic

beverage containing vodka and fruit. In my view, *alcoholic beverages containing vodka and fruit* is a reasonable description of the goods on which use has been made of the mark and is one likely to be used by the average consumer of such goods. It is one which I shall take into account when considering the objection under section 5(2)(b) of the Act.

The objection under section 5(2)(b) of the Act

26. In his decision in *La Chemise Lacoste SA v Baker Street clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs Q.C. expressed the test under this section (by reference to the CJEU cases mentioned) on the basis indicated below:

The CJEU cases

Sabel BV v Puma AG [1998] RPC 199; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77; *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-6/01; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04; *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P.

The principles

—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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

The respective goods and the nature of the purchasing process

27. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade.

28. The goods at issue in these proceedings are all beverages of one sort or another or goods for making beverages. The average consumer for such goods will be the public at large, albeit insofar as those goods which have an alcoholic content in excess of 0.5% are concerned, the average consumer will be over the age of 18.

29. All of the goods at issue may be sold through a range of channels, including retail premises such as supermarkets and off-licences (where the goods are normally displayed on shelves and are obtained by self selection) and in public houses (where the goods are displayed on, for example, shelves behind the bar and where the trade marks will appear on dispensers at the bar etc.). When the goods are sold in, for example, public houses the selection process is likely to be an oral one, however, there is nothing to suggest that the goods are sold in such a manner as to preclude a visual inspection.

30. In *Simonds Farsons Cisk plc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-3/04, the Court of First Instance (now the General Court) said:

—In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in

such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.”

31. Consequently, while the goods may be ordered orally in public houses or restaurants, it is likely to be in the context of, for example, a visual inspection of the bottles containing the goods or a listing on a menu prior to the order being placed. Considered overall, the selection process is likely to be predominantly a visual one, although I accept that aural considerations will also play their part. Turning now to the level of attention the average consumer will display when selecting the goods, given that for the most part the cost of the goods is likely to be relatively low, but bearing in mind that the average consumer will wish to ensure they are selecting the correct type, flavour, strength etc. of beverage, they are, in my view, likely to pay at least a reasonable level of attention to the selection of the goods at issue.

Comparison of the respective goods

32. For ease of reference, the goods to be compared are:

ARWL’s goods	Mello’s goods
alcoholic beverages containing vodka and fruit	Fruit drinks and fruit juices; mineral and aerated waters; non-alcoholic drinks; syrups for making beverages; shandy, de-alcoholised drinks, non-alcoholic beers and wines

33. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 28, Jacob J gave advice as to how similarity should be assessed. He identified the following factors to be taken into account:

- (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.”

34. Subsequently, in *Canon Kabushiki Kaisha v MGM Inc* the CJEU stated:

—23In assessing the similarity of the goods or services concerned.....all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, intended purpose and their method of use and whether they are in competition with each other or are complementary.”

35. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-325/06 the General Court stated:

—82It is true that goods are complementary if 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 (see, to that effect, Case T-169/03 *Sergio Rossi v OHIM- Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60, upheld on appeal in Case C-214/05P *Rossi v OHIM* [2006] ECR I-7057; Case T-364/05, *Saint-Gobain Pam v OHIM –Promamsa (PAM PLUVIAL)* [2007] ECR II-757, paragraph 94; and Case T-443/05 *El Corte Inglés v OHIM –Bolaños Sabri (PiraÑam diseño original Juan Bolaños)* [2007] ECR-1-0000, paragraph 48).”

36. In *Gérard Meric v OHIM*, Case T-133/05, the General Court said:

—29In 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 the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T- 10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

37. *Fruit drinks and fruit juices; mineral and aerated waters; syrups for making beverages; non-alcoholic drinks* are all soft drinks or products which are used, with other ingredients, to make a soft drink. They are similar to ARWL’s goods to the extent that they are each drinks, however, the purpose of the respective goods differs. Whilst ARWL’s goods may contain even a large proportion of fruit, they are alcoholic drinks. Such goods are used for their alcoholic content to enliven or, contrarily for relaxation. Soft drinks are used to provide hydration and, potentially, nutrition. The average consumer for each of the respective goods is the general public albeit, in the case of alcoholic drinks, those who have attained the age of 18. Whilst the distribution channels of each of the goods may coincide, in that each category of goods can be sold, for example, in a supermarket, off licence or public house, they are not in direct competition with each other and one would not be used as a substitute for the other. Taking all matters into account I find the respective goods to be similar to a low degree.

38. *De-alcoholised drinks* is a broad categories of goods which may include and be marketed as alternatives to the equivalent products which contain alcohol. The end user and channels of distribution of the respective goods will coincide. I consider these to be reasonably similar goods.

39. *Shandy* is also a beverage. As far as I am aware, and I have no evidence to the contrary, shandy is not made with spirits and is most likely be seen as akin to a soft drink containing a small amount of beer or lager. I do not consider that these respective goods are in direct competition with each other and one would not be used as a substitute for each other but the respective users coincide as do the respective channels of trade. Any similarity between these respective goods is one of a very low degree.

40. The remaining goods are *non-alcoholic beers and wines*. Again, they are similar to ARWL's goods to the extent that they are each drinks. The average consumer for each of the respective goods is the general public albeit, in the case of alcoholic drinks, those who have attained the age of 18. Whilst the distribution channels of each of the goods may coincide, in that each category of goods can be sold, for example, in a supermarket, off licence or public house, they are not in direct competition with each other and one would not be used as a substitute for the other. Taking all matters into account I find the respective goods to be similar to a low degree.

Comparison of the respective marks

41. It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, the average consumer rarely has the chance to make direct comparisons between trade marks but must, instead, rely on the imperfect picture of them he may have kept in mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must go on to compare the respective trade marks from the visual, aural and conceptual perspectives.

42. I set out below the marks to be compared:

Earlier mark	Mark applied for
XUXU	cucu cu-cu

43. In her witness statement Ms Bray submits:

—The opponent's trade mark XUXU is pronounced —ZUZU". The mark applied for, whether pronounced in the manner —GOO COO" or —GHOO CHOO", is very similar orally to the opponent's mark. The marks **xuxu** and **cucu** are clearly very similar visually. I am not aware of any meaning of either of the words —xuxu" or "cucu" and hence the marks must be identical conceptually."

44. In written submissions filed in lieu of a hearing, Ms Bray slightly amends her position and submits:

—The marks XUXU and CUCU and also CU-CU are visually, aurally and conceptually similar. The respective marks are word marks. Both marks consist of four letters and are both in the same phonetic order namely —consonant vowel/consonant vowel”. In both cases, the vowel is the letter “U”. We say that the simultaneous coincidence in the sequence of consonant and vowel leads to a similar overall impression.

Furthermore, the marks are aurally very similar. Both marks have two syllables, two consonants and two vowels respectively, and consist of two identical word halves (one consonant and one vowel). Both marks contain the vowel “U” twice. Therefore, the cadence of pronunciation and sequence of vowels are identical. Both consist of the combination of a consonant and the vowel “U” twice. The length of the words is the same.”

45. For its part, Mello submits, in the witness statement of Rose Aldean, its Director:

—The trademark “eu-cu” is not phonetically similar (the cu sound is as in the word “cup”) and it is not pronounced in the same way as XUXU, thus it would not cause aural confusion.”

46. Referring to a decision itself referred to in Mr Barwinski’s evidence between ARWL against a third party Bacardi & Company Limited whereby the former sought a declaration of invalidity of a Lichenstein trade mark ZUZU based on the mark XUXU, Ms Aldean goes on to say:

—...it is clear that this decision was made due to the identical phonetic pronunciation of this mark to the opponents.

The only similarity between the two marks “eu-cu” and “XUXU” is the repetition of the vowel “u”. The decision made in the case against Bacardi & Company clearly stated that the confusion between the marks XUXU and ZUZU was related to the fact that “The letters X and Z are visually very similar. Both letters do not have any curved lines (B,C,O etc.) and have a diagonal line from bottom left to top right. The strong similarity of typefaces enhances the likelihood of aural confusion.

The trademark “eu-cu” *does* contain a letter with curved lines and the properties of the letter C are entirely different from the letter X. There is no visual similarity between the two letters and in turn, there is very little room for confusion between the two marks.

The Opponent has clearly stated that the trademark “XUXU” has no meaning and has no related meaning to the product. However, the mark “eu-cu” has a very significant meaning to our products; —cu” is the latin name of the melon fruit, of which the juice we will be producing. The official plant name for melon fruit is “*eucumis melo*” and we have derived the name of our product from this.”

47. The earlier mark consists of the four letters XUXU presented in plain block capitals. As no part of the mark is highlighted or emphasised in any way, there are no distinctive and dominant elements: the distinctiveness of the mark rests in its totality.

48. The application seeks registration for a series of two marks: cucu and cu-cu. In respect of the first mark in the series, and for the same reasons as above, I find the distinctiveness of the mark rests in its totality. The latter of the series has a hyphen in the middle of it. In my view this does nothing more than separate, in a natural way, the two syllables from which the mark is made, highlighting the fact that each is identical. Because of this, neither is dominant and again, the distinctiveness of the mark rests in its totality.

49. Each of the respective marks is made of up of four letters. In each case, the first letter of each mark is the same as the third letter; in the earlier mark this is a letter X, in the mark applied for, a letter C. The second and fourth letters of all marks is the letter U.

50. In *Inter-Ikea Systems BV v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-112/06* the General Court stated:

—54As regards the visual comparison between the verbal element of the contested mark and the earlier word marks, the applicant claims that the only difference between them is the presence of the letter d in the contested mark and the letter k in the earlier word marks. However, the Court has already held in Case T-185/02 *Ruiz-Picasso and Others v OHIM–DaimlerChrysler(PICARO)* [2004] ECR II-1739, paragraph 54) that, in the case of word marks which are relatively short, even if two marks differ by no more than a single consonant, it cannot be found that there is a high degree of visual similarity between them.”

51. In my view, there are some visual similarities between each of the respective marks both because of the repetition of letters and the commonality of the letter U within each mark. There are also strong visual differences between them in that the letters X and C within the marks differ greatly, not least because one is made up of two straight crossed lines whilst the other is made up of a single curve. Whilst not dominant, the letter X is a strongly visual letter within a word especially when presented at the start of a word and even more so when another letter X appears elsewhere within the word, highly likely to be an unusual occurrence in the English language. A letter C, whether singly or in combination, is a much more commonly used letter. Taking matters as a whole, I find that the marks are visually similar to a low degree.

52. As indicated above, Ms Bray submits that the earlier mark is pronounced in a way that I take to be the equivalent to the English words zoo zoo. Whilst I do not rule this out, words which begin with an X followed by a letter U is a combination of letters which is somewhat unusual to an English speaker and likely to give him pause for thought as to how to pronounce it, particularly when the same combination of letters follow. For this reason it is likely that some may choose to pronounce it as

individual letters. The mark applied for is easy on the tongue and is likely to be pronounced, as Ms Aldean submits, with a hard C as in KOO KOO. To the extent that each of the respective marks share the same vowel sounds within them, there is a moderate degree of aural similarity between them when the earlier mark is spoken as a word.

53. As far as I am aware, the word XUXU is an invented word. That being the case it is unlikely that it will bring any particular image to mind. Ms Aldean, as set out above, has stated that the mark applied for derives from the Latin name of the melon. Whilst this may be true, there is nothing before me to suggest the average consumer will know this or even be aware of the Latin name for that fruit. In my view, the average consumer will see the mark as an invented word (whether presented as a single word or hyphenated). That being the case, the position from the conceptual perspective is neutral.

The distinctive character of the earlier mark

54. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which it has been acquired and, secondly, by reference to the way it is perceived by the relevant public (see *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings (see *Windsurfing Chiemsee v Huber and Attenburger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585).

55. In my view the mark has a fairly high degree of inherent distinctive character. As I indicated above, the evidence filed of the use which has been made of the mark suffers from a number of flaws. Whilst I have found the evidence to be sufficient, just, to enable me to proceed on the basis that the mark as registered has been used, I cannot be satisfied that the use made of it has had any material effect on the level of distinctiveness of the mark. There is no evidence of any advertising having taken place in the UK and the level of sales claimed, amounting to some 160,000 bottles over the ten years between 2003 and 2012, to a single address, can in no way be said to be of any significance in what is undoubtedly a market of immense size and certainly is not enough to lead to a reputation in these goods.

Likelihood of confusion

56. In determining whether there is a likelihood of confusion, a number of factors have to be borne in mind. The first is the interdependency principle whereby a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. I also have to factor in the distinctive character of the earlier mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparisons between trade

marks and must instead rely on the imperfect picture of them he has retained in mind.

57. Earlier in this decision I found that the purchase of the relevant goods is primarily a visual one. I found that the respective goods ranged from those of very low similarity to those which are reasonably similar. I found the respective marks to have a low degree of visual similarity and a moderate degree of aural similarity with the position neutral from the conceptual perspective. I found the earlier mark to have a fairly high degree of inherent distinctive character which has not been enhanced through use. I found that at least a reasonable level of attention would be paid to the purchase of the goods. Taking all matters into account, I consider there is no likelihood of confusion between the respective marks. In my view, the differences between them far outweigh the similarities even where similar goods are concerned.

58. The opposition based on section 5(2)(b) of the Act fails.

The objection under section 5(3) of the Act

59. In view of my findings as regards the use made of the mark and the consequent absence of reputation, the objection under this section cannot hope to succeed and I decline to deal with it.

Summary

60. The opposition fails.

Costs

61. Mello has succeeded and is entitled to a contribution towards the cost of the time it has spent on these proceedings. The Registrar usually operates on a published scale of costs, however, since Mello has not been professionally represented during the proceedings, an award made from the published scale might be larger than its actual expenditure.

62. In BL O/160/08 *South Beck*, Mr Richard Arnold Q.C., sitting as the appointed person, stated:

—32Secondly, counsel for the opponent submitted that, if CPR r. 48.6 was applicable, the hearing officer had misapplied it. In support of this submission he pointed out that CPR r. 48.6(4) provides:

The amount of costs to be allowed to the litigant in person for any item of work claimed shall be-

(a) where the litigant can prove financial loss, the amount that he can prove he has lost for time reasonably spent on doing the work;

(b) where the litigant cannot prove financial loss, an amount for the time reasonably spent on doing the work at the rate set out in the practice direction.

The Part 48 Practice Direction provides at paragraph 52.4 that the amount which may be allowed to a litigant in person under rule 46.8(4) is £9.25 per hour. Counsel submitted that the hearing officer appeared to have awarded the applicant two-thirds of the scale figure which he would have awarded a represented party, and that this could not be justified since the opponent had not proved any financial loss and was very unlikely to have spent over 160 hours on the matter.....

36. In my judgment the approach which should be adopted when the Registrar is asked to make an award of costs in favour of a litigant in person is as follows. The hearing officer should direct the litigant in person pursuant to r. 57 of the 2000 Rules to file a brief schedule or statement setting out (i) any disbursements which the litigant claimed he has incurred, (ii) any other financial losses claimed by the litigant and (iii) a statement of the time spent by the litigant in dealing with the proceedings. The hearing officer should then make an assessment of the costs to be awarded applying by analogy the principles applicable under r. 48.6, but with a fairly broad brush. The objective should be to ensure that litigants in person are neither disadvantaged nor overcompensated by comparison with professionally represented litigants.”

63. Under the current practice direction, the amount allowed to a litigant in person is £18 per hour.

64. In line with the above, Mello should produce an estimate of its costs, including the number of hours spent on these proceedings, broken down by category of activity, i.e. reviewing the notice of opposition, completing its counterstatement, reviewing ARWL's evidence and preparing evidence. **This estimate should be filed within 21 days of the date of this decision and should be copied at the same time to ARWL who will have 14 days from receipt of it to provide written submissions.** I will then review those papers and issue a supplementary decision covering the costs of these proceedings.

65. The period for any appeal against this decision will run concurrently with the appeal period for the supplementary decision on costs and so will not commence until the supplementary decision is issued.

Dated this 15th day of January 2013

**Ann Corbett
For the Registrar
The Comptroller-General**