

**No life in appeal of VITA+VERDE application before General Court
European Union - Elkington & Fife LLP**

Registration

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In *The Cookware Company Ltd v OHIM* (Case T-535/14, January 14 2016), the General Court has upheld a decision of the Office for Harmonisation in the Internal Market's (OHIM) Second Board of Appeal to refuse

registration of the mark **VITA+VERDE** due to a successful opposition on the basis of an earlier word mark, VITAVIT, covering identical goods.

Facts

In June 2011 The Cookware Company Ltd filed a Community trademark (CTM) application for the above mark under Application 010073054. The goods for which registration was sought were "household or kitchen utensils and containers, namely cooking pots, non-electric cooking utensils and recipients for preparing, preserving, keeping warm and serving food products and drinks" in Class 21.

In November 2011 Fissler GmbH opposed the application. The opposition was in respect of all goods and based on the earlier word mark VITAVIT (international registration designating the CTM). The earlier mark was registered in respect of, among other things, "Household or kitchen utensils and containers". The opposition was based on Article 8(1)(b) of the EU CTM Regulation.

In April 2013 the Opposition Division rejected the opposition in its entirety on the basis that the marks at issue were not similar. In particular, the Opposition Division found that the marks were "strikingly different" in their length and structure because the contested mark was "broken down into two separate, independent and clearly recognisable elements", each of which had its own meaning, as opposed to the earlier mark, which consisted of a single element that had no clear meaning.

In June 2013 Fissler appealed the decision of the Opposition Division.

In April 2014 the Second Board of Appeal upheld the appeal and annulled the decision of the Opposition Division. The appeal board found that there was a likelihood of confusion between the marks because they were phonetically similar and, to a certain extent, visually and conceptually similar. Its assessment was that the marks began with the same sequence of letters: 'V', 'i', 't' and 'a', followed by the letter 'V'. It disagreed with the Opposition Division's finding that the marks differed in their structure, as in its view the light-green '+' sign would be perceived as a merely decorative element. The appeal board also found that, to a certain extent, there was conceptual similarity for the part of the relevant public which would be able to understand the word element 'vita'.

In July 2014 the applicant appealed to the General Court.

The applicant argued that the appeal board had erred in finding that the level of attention of the relevant public was not higher than average and that there was similarity between the marks. Specifically in relation to the second point, it argued that there were significant visual, phonetic and conceptual differences between the marks resulting from the presence in its mark of the elements '+' and 'verde'. It also argued that the element 'vita' was "weakly distinctive" and that the appeal board had not taken this into account.

Decision

Relevant public

The applicant argued that the relevant public had an above-average level of attention because the price and quality of household or kitchen utensils may vary considerably and these products are bought only very occasionally, rather than being everyday purchases. It also argued that consumers of these products tend to be very brand loyal. Finally, it argued that professionals who are part of the relevant public would, by definition, display a higher level of attention than the average consumer.

The court disagreed with this assessment. It noted that the appeal board had referred to the fact that the goods covered by the marks at issue were intended for both the general public and specialist consumers in the catering sector. The court further pointed out that it is settled case law that the section of the public with the lowest level of attention is taken into account when assessing a likelihood of confusion. It also considered that the applicant's arguments that cookware products are purchased only occasionally and that consumers of these are particularly brand loyal were unsubstantiated.

Comparison of marks

The court agreed with the appeal board's assessment that the marks were visually similar on the basis of the coincidence of the letters 'V', 'i', 't' 'a' and 'V'. In relation to the '+' symbol, the court found that this was "not prominent" in the applicant's mark and, although "not negligible", was insufficient to create the "visual split" that the applicant had argued. Overall, the court concluded that there was a certain degree of visual similarity.

The court also agreed with the appeal board that the marks were phonetically similar. Its assessment was based on the coincidence of the letters 'V', 'i', 't' 'a' and 'V', and the fact that the '+' symbol was insufficient to create a pause in pronunciation between the two word elements of the applicant's mark.

Conceptually, with regard to the applicant's mark, the court agreed that the Italian, Spanish, French, German, Portuguese and Romanian public would understand the term '*vita*' as a reference to the concept of 'life' or 'vitality'. It also agreed that the part of the public that speaks Italian, Spanish, Portuguese and Romanian would understand the word element '*verde*' as meaning 'green'.

The court further agreed that, although the earlier mark was in principle meaningless, it was likely to be understood by the part of the relevant public that understood the element '*vita*' as a reference to the concepts of 'life' or 'vitality', on account of the presence of that element at the beginning of that mark. Overall, the court considered the marks conceptually similar for at least some of the relevant public.

In view of the visual, phonetic and conceptual similarities for at least some of the relevant public, the court held that the marks were similar. When coupled with the identity of the goods at issue, the court held that the relevant public could "possibly believe that the goods at issue come from the same undertaking or from economically-linked undertakings", and that Article 8(1)(b) therefore applied.

In relation to the applicant's argument that the '*vita*' element was weak (and that it had been held previously that the word '*vita*' may evoke a positive quality generally, attributable to a large range of different goods (*Vitakraft-Werke Wührmann — Johnson's Veterinary Products v OHIM (VITACOAT)*, T-277/0412, paragraph 54)), the court held that the absence of any direct relationship between the word and the goods covered by the marks at issue made it a distinctive feature of both marks. The court also did not consider that the large number of registrations to which the applicant referred assisted its position, as the applicant did not detail the relationship between any of these marks and the goods or services covered.

Comment

While The Cookware Company may feel aggrieved at the outcome, given what appear on first impression to be quite significant differences between the marks, the decision reinforces a number of existing principles in relation to the assessment of a likelihood of confusion under Article 8(1)(b):

- When the goods or services at issue may be targeted at different sections of the relevant public simultaneously, it is the section of the public with the lowest level of attention that is taken into account for the purposes of assessment (see also *Kido v OHIM — Amberes (SCORPIONEXO)*, T-152/08, paragraph 40).
- When a composite mark consists of both word and figurative elements, the former will in principle be considered more distinctive than the latter (see also *NewSoft Technology v OHIM — Soft (Presto! Bizcard Reader)*, T-205/06, paragraph 54).
- Insofar as marks consisting of or containing word elements are concerned, consumers generally pay greater attention to the beginning of a mark than to the end (see also *Esge v OHIM — De'Longhi Benelux (KMIX)*, T-444/10, paragraph 27; *Hultafors Group v OHIM — Società Italiana Calzature (Snickers)*, T-537/11, paragraph 41)).
- In a comparison of marks containing word elements, the existence of several letters in the same order may be of some importance in the assessment of the visual similarities between those marks (see also *Kaul v OHIM — Bayer (ARCOL)*, T-402/07, paragraph 83).
- If an applicant is attempting to argue that an earlier mark (or a decisive part of an earlier mark) is weak or non-distinctive, it will not suffice simply to point to the fact that the mark or element has been the subject of many prior registrations. A clear relationship between the mark or element and the goods or services at issue must be evidenced.

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