

**O-351-16**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF THE APPLICATION BY  
HILTON FOODS (IRELAND) LIMITED  
UNDER NO 3116098 FOR THE TRADE MARK**



**AND**

**IN THE MATTER OF OPPOSITION NO. 405351 THERETO BY  
HEIRLER CENOVIS GmbH**

## THE BACKGROUND AND THE PLEADINGS

1) On 2 July 2015 Hilton Foods (Ireland) Limited (“the Applicant”) filed application no. 3116098 to register the following mark:



The application was published for opposition purposes on 7 August 2015 in respect of the following goods:

**Class 29:** *Meat and meat products.*

2) On grounds under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) Heirler Cenovis GmbH (“the Opponent”) opposes the registration of the Applicant’s mark for all the goods for which the Applicant seeks registration.

3) For the purposes of its claim the Opponent relies on European Union Trade Mark (EUTM) No. 5480744 (“the earlier mark”) for the following word mark and goods:

## EDEN

**Class 29:** *Preserved, frozen, dried and/or cooked fruits and vegetables, in particular fruit pulp; fruit and vegetable sauces; jellies, in particular fruit jellies; jams, compotes, fruit spreads, fruit desserts, in particular red fruit jelly and apple sauce; other fruit preparations of all kinds, including in liquid form (included in class 29), in particular fruit sauces, fruit mixtures; fruit and/or vegetable salads, in particular sauerkraut and sauerkraut preparations; eggs, milk and milk products, in particular cheese, cheese preparations with added legumes and/or cereals; milk and yoghurt ferments; soup and/or bouillon, mainly containing fruit and/or vegetables, including in powder or cube form; edible oils and fats, and oleaginous fruit and oil seeds, in particular margarine, including the aforesaid goods being dietetic foods, not adapted for medical use.*

**Class 30:** *Coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; beverages with a base of artificial coffee, cocoa or chocolate, and preparations for making the aforesaid beverages; honey, including spiced and/or with added fruit; bread, in particular crispbread; products with a cereal, nut and/or honey base, being spreads (containing fats) and/or sandwich fillings; tofu; sauces (condiments), in particular tomato sauces; tomato products of all kinds, in particular ketchup, tomato puree, peeled, strained and chopped tomatoes; vinegar; bakery mixes, pastry, snacks, included in class*

*30; puddings; sweeteners (natural) for sweetening foodstuffs and beverages; cereal products with added fruit, in particular cereal flakes, cereal preparations, cereal snacks; vegetarian snacks, namely meat substitute products with a soya and/or cereal base, in particular vegetarian sausages, including as spreads, nuggets, vegetarian rissoles, vegetarian meat balls, schnitzels, ham; vegetarian prepared meals, namely soups and stews, mainly containing vegetables and/or meat substitute products; including all the aforesaid goods being dietetic foods, not adapted for medical purposes.*

4) The earlier mark was filed on the 9 November 2006 and registered on 23 October 2010. The significance of these dates is that (1) the earlier mark constitutes an “earlier mark” for the purposes of section 5(2)(b) of the Act, and (2) the proof of use provisions in section 6A of the Act do not apply in respect of the earlier mark, its registration procedure having been completed less than five years before the publication of the Applicant’s mark.

5) The Applicant filed a notice of defence and counterstatement, denying the grounds of opposition – in particular, that the goods of the Applicant’s mark are identical with, or similar to, those of the earlier mark.

7) The Applicant is represented by Ansons. The Opponent is represented by Squire Patton Boggs. Neither party filed evidence. Both parties filed written submissions both during the evidence rounds and in lieu of a hearing. Neither side requested a hearing. I therefore give this decision after a careful review of all the papers before me.

## **SECTION 5(2)(b)**

### **The law**

8) Section 5(2)(b) of the Act reads 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”.

9) I have taken into account the guidance provided by the Court of Justice of the European Union (“CJEU”) in a number of judgments. The following principles are gleaned from the decisions 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## Comparison of the goods and services

10) In the judgment of the Court of Justice of the European Union in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment 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”.

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 users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) 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;
- e) 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.

11) In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, (“*Meric*”) the General Court (“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 fur 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”.

12) In *Boston Scientific Ltd v OHIM*, Case T-325/06 (“*Boston Scientific*”), the General Court 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”.

As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“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.

13) When it comes to understanding what terms used in specifications mean and cover, the guidance in the case-law is to the effect that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”<sup>1</sup> and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning<sup>2</sup>. I also note the judgment of Mr Justice Floyd in *YouView TV Limited v Total Limited* where he stated:

“..... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IPTRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of "dessert sauce" did not include jam, or because the ordinary and natural description of jam was not "a dessert sauce". Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

### **Comparison of the goods**

14) The Opponent relies on all its goods in classes 29 and 30. In summary, it submits that there is similarity between the Applicant's *meat and meat products* and goods of the Opponent's specification in class 29 because: they consist of foodstuffs purchased by the average consumer for human consumption, being produced by agriculture and sold through the same distribution channels and outlets, such as supermarkets; they are sold in very close proximity in supermarkets and farmers' markets; they have the same uses and users and can be complementary, meat usually being eaten with vegetables, and pork consumed with apple sauce, for example. Meat, it says, can be used with bread in the Opponent's class 30 to produce sandwiches or hot dogs. The Opponent further submits that *meat and meat products* are similar to *vegetarian snacks, namely meat substitute products with a*

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<sup>1</sup> *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281

<sup>2</sup> *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

*soya and/or cereal base, in particular vegetarian sausages, including as spreads, nuggets, vegetarian rissoles, vegetarian meat balls, schnitzels, ham; vegetarian prepared meals, namely soups and stews, mainly containing vegetables and/or meat substitute products* because: it submits that all are food items which can be purchased by the average consumer through outlets such as supermarkets for consumption as a snack, lunch or dinner; they are produced by manufacturers of food products; the “meat industry” competes with the “meat substitute industry”.

15) The Applicant drew attention to the different channels of trade through which fresh meat and the Opponent’s products respectively reach the retail outlet, and to the fact that they are sold from separate areas of freezers, shelves and counters. It denies that meat and meat products are similar to vegetarian snacks, namely meat substitute products with a soya and/or cereal base, these being of an entirely different nature. It argues that vegetarian consumers will avoid meat and, conversely, consumers who are meat-eaters will avoid vegetarian dishes, so that the products do not compete with each other.

### **Comparison with the Opponent’s goods in class 29**

16) I shall consider first: *preserved, frozen, dried and/or cooked fruits and vegetables, in particular fruit pulp; fruit and vegetable sauces; jellies, in particular fruit jellies; jams, compotes, fruit spreads, fruit desserts, in particular red fruit jelly and apple sauce; other fruit preparations of all kinds, including in liquid form (included in class 29), in particular fruit sauces, fruit mixtures; fruit and/or vegetable salads, in particular sauerkraut and sauerkraut preparations; eggs, milk and milk products, in particular cheese, cheese preparations with added legumes and/or cereals; milk and yoghurt ferments; edible oils and fats, and oleaginous fruit and oil seeds, in particular ma[r]garine, including the aforesaid goods being dietetic foods, not adapted for medical use.*

17) In coming to my assessment and findings on similarity, I begin with some general observations. Simply because the various items in the Opponent’s class 29 goods all fall into the category of food, this does not in itself make them all similar to the Applicant’s *meat* and *meat products*. The fact that, at the broadest level, all foods compete with one another in assuaging hunger, and share the purpose of being for human consumption, is too superficial a factor to result in the goods being similar – as is the fact that all the Opponent’s goods in class 29 ultimately have their origin in agriculture. Some closer link will be required. The average consumer is aware that food items such as fresh meat, meat products, dairy products, fruit and vegetables for example, are traditionally supplied to retail outlets through different channels of trade: fresh meat cuts through abattoirs, dairy products through dairy concerns, unprocessed fruit and vegetables through orchards, market gardens and wholesalers, processed meat, fruit and vegetable products through various producers who process these goods in various ways on an industrial basis and supply them; in short, the average consumer is used to idea that different types of food are produced and supplied to the retail outlet by different suppliers.

18) Nor, in an age of retail outlets selling very wide ranges of goods, does the mere fact that the Opponent’s goods in class 29 are all available from supermarkets

necessarily mean that they are similar to the Applicant's. This is why, in the case of self-serve items such as those under consideration, the case law indicates the significance of where in practice they are respectively likely to be found in supermarkets and, in particular, whether they are likely to be found on the same or different shelves

19) Similarly, the fact that one product can be an ingredient in others does not necessarily result in similarity<sup>3</sup>. Some closer link will be required. The mere fact that vegetables and salads are commonly eaten together with meat or meat products in meals does not make them complementary in the sense explained in *Boston Scientific*. The Opponent submits that apple sauce is complementary with pork. It may well be regarded by many as complementing pork in a culinary sense, but this is a matter of individual taste in the preparation or selection of a meal rather than of being "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". Something more would be required. Their nature is different and they would be found on different shelves.

20) I find no appreciable level of similarity between the Applicant's *meat* and *meat products* and any of the Opponent's goods listed above in paragraph 16. Though their users include the great mass of the general public, they fulfil different purposes and uses in the creation of meals or selection of snacks; they compete with, or complement, one another only on the most general and diffuse level; and they are found in different parts of the retail outlets through which they are sold.

21) *Soup and/or bouillon, mainly containing fruit and/or vegetables, including in powder or cube form*: I consider that meat soups and bouillon fall within the ambit of the Applicant's *meat products*, that they share the same basic nature as the Opponent's vegetable-based soups and bouillon, and that, apart from vegetarians and vegans, there will be a large degree of overlap between their users and uses. There will also be a degree of competition between meat-based and vegetable-based soups and bouillon, and they will be sold together in the same parts of stores. There is at least a moderate degree of similarity.

### **Comparison with the Opponent's goods in class 30**

22) I turn now to comparison of the Applicant's *meat* and *meat products* with the following goods of the Opponent: *coffee, tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; beverages with a base of artificial coffee, cocoa or chocolate, and preparations for making the aforesaid beverages; honey, including spiced and/or with added fruit; bread, in particular crispbread; products with a cereal, nut and/or honey base, being spreads (containing fats) and/or sandwich fillings; tofu; bakery mixes, pastry, puddings, sweeteners (natural) for sweetening foodstuffs and beverages; cereal products with added fruit, in particular cereal flakes, cereal preparations, cereal snacks*. These are all foodstuffs of agricultural origin, consumed by the general public, and available through supermarkets. My remarks

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<sup>3</sup> See *Les Éditions Albert René v OHIM*, Case T-336/03, para 61 and *Enosi Mastichoparagogon Chiou v OHIM*, Case T-309/13



in paragraphs 17-18 regarding the inadequacy of such superficial factors to ground any appreciable similarity apply equally here. On any but the most general level their nature is different from that of the Applicant's *meat* and *meat products*, channels of trade are different, and they would be found on different shelves. I find no similarity with the Applicant's products.

23) The mere fact that *sauces (condiments), in particular tomato sauces; tomato products of all kinds, in particular ketchup, tomato puree, peeled, strained and chopped tomatoes; vinegar* are commonly eaten together with meat or meat products in meals and snacks does not make them complementary in the sense explained in *Boston Scientific*. My remarks on this in paragraph 19 apply by analogy here. On any but the most general level their nature is different from that of the Applicant's *meat* and *meat products*, channels of trade are different, and they would be found on different shelves. I find no similarity between these and the Applicant's products.

24) With regard to *vegetarian prepared meals, namely soups and stews, mainly containing vegetables and/or meat substitute products* my comments in paragraph 21 in respect of the Opponent's *soups and/or bouillon* apply by analogy; I consider that there will be at least a moderate degree of similarity with meat soups and bouillon falling within the ambit of the Applicant's *meat products*.

25) *Snacks, included in class 30* could cover snacks containing meat ingredients. With regard to *vegetarian snacks, namely meat substitute products with a soya and/or cereal base, in particular vegetarian sausages, including as spreads, nuggets, vegetarian rissoles, vegetarian meat balls, schnitzels, ham*, there is an obvious correspondence between the meat-substitute-based sausages, rissoles, meat balls, schnitzels and ham of the Opponent's products and corresponding prepared meat-based items falling within the Applicant's *meat products*. In the Opponent's specification these are all qualified as snacks. The essence of a snack is that it is prepared and ready to eat either cold or heated up.

26) I accept that vegetarians will seek out vegetarian products and avoid meat-based ones. However, while I accept that meat-eating consumers will tend to seek the meat-based products with which they are familiar, I do not accept that they will all necessarily avoid vegetarian ones. Many will include both meat-based and meat-substitute-based foods among the range of foods they eat. Their reasons for doing so might include, for example, provision of dietary variety or avoidance, for health reasons, of too great a proportion of meat in their diet. Consumers may also include those shopping for both vegetarian and meat-eating family members.

27) The Applicant's *meat products* includes meat-based sausages, meatballs, etc. sold prepared to be eaten as snacks or in ready meals. I have no doubt that for at least a significant proportion of the relevant consumers there will be, for the reasons explained above, a significant degree of competition between these products and the Opponent's snack products in class 30. Although the meat-based items may be sold on different shelves from the vegetarian products, they share the specific nature and purpose of prepared meals and snacks. There is a medium degree of similarity between the Applicant's *meat products* and the Opponent's *snacks, included in class 30; vegetarian snacks, namely meat substitute products with a soya and/or cereal*

*base, in particular vegetarian sausages, including as spreads, nuggets, vegetarian rissoles, vegetarian meat balls, schnitzels, ham.* The Applicant's *meat* is a broad term including within its ambit the meat products discussed above. It follows that here too, therefore, there is a medium degree of similarity with the snack products of the Opponents which I have just considered.

### **Limited specification**

28) In case I should find any meat product covered by the Applicant's specification to be similar to any of the Opponent's goods, the Applicant in its written submissions puts forward as a fall-back position the limited specification *fresh meat*, which I shall now consider. The nature and purpose of fresh meat is quite different from that of prepared snacks, soups and bouillons. While the latter are pre-prepared for the purpose of convenient consumption, the purpose fresh meat is to serve as an ingredient for the preparation from scratch of meat dishes and as a component in the planning, cooking and preparation of a meal or snack. I have already observed that the fact that one product can be an ingredient in others need not result in similarity. Not only will fresh meat be sold from separate counters or separate shelves or freezer compartments from those of prepared meals, soups, bouillons, and snacks but the average consumer will normally assume that it arrives at the retail outlet through different channels of trade from those products. Fresh meat will be assumed to reach the store via abattoirs and meat packers. Prepared meals, soups, bouillons, and snacks will normally be manufactured by producers who process, cook, prepare and package such foods on an industrial basis, ranging in size from large-scale concerns to cottage industry. The expectation that such foods may have the same commercial origin will not extend to fresh meat. I see no similarity between *fresh meat* and the products which constitute the Opponent's best case: *soup and/or bouillon, mainly containing fruit and/or vegetables, including in powder or cube form; snacks, included in class 30; vegetarian snacks, namely meat substitute products with a soya and/or cereal base, in particular vegetarian sausages, including as spreads, nuggets, vegetarian rissoles, vegetarian meat balls, schnitzels, ham; vegetarian prepared meals, namely soups and stews, mainly containing vegetables and/or meat substitute products.*

### **The average consumer and the purchasing process**

29) 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*. 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. 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 words “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 of foodstuffs will normally be a member of the general public, though businesses such as restaurants and caterers also purchase foodstuffs. The food items in the Applicant’s and Opponent’s respective specifications are not particularly costly, nor are they infrequent purchases. Overall, consumers will normally pay a reasonable degree of attention, neither higher nor lower than the norm, when selecting these goods. The goods may include impulse purchases, and there is scope for imperfect recollection. Consumers will, for the most part, select the goods themselves from a range of retail outlets such as supermarkets, convenience stores and butchers. The purchasing process for foodstuffs is a predominantly visual one, but oral communication may also play a part.

### **Comparison of the marks**

31) In its counterstatement the Applicant is silent on the issue of similarity of marks, contenting itself with observing that the opposition is based on the claim that the competing goods are identical and/or similar, and denying that this is so. In its submissions the Applicant accepts that the competing signs are similar, though not identical. However, since it is not fully explicit about the degree of similarity, it is appropriate for me to provide briefly a more explicit assessment on this issue.


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 Court of Justice of the European Union 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.”

It would be wrong, therefore, to dissect the trade marks artificially, 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.

33) The marks to be compared are shown below. (Both earlier marks relied on consist of an identical word mark, though since I have confined my comparison of

the Applicant's goods to those of the Opponent's EUTM, my comparison of the marks is technically also similarly confined to that mark).

The opposed mark	The earlier mark
	<p data-bbox="1002 544 1206 607"><b>EDEN</b></p>

34) The earlier mark consists exclusively of the word mark EDEN which, by virtue of being the sole component of the mark, constitutes its dominant and distinctive element. I bear in mind that since the earlier mark is a word mark, notional and fair use of it would include use in a variety of fonts.

35) The opposed mark consists of the word EDEN in block capitals, shown in white against a dark background with a slight shadow effect, giving the letters a mildly three-dimensional appearance. Above the word is a row of five small stars, also white against the dark background, decreasing in size from the central star. The graphical presentation and figurative components – the white/dark contrast, slight shadowing and stars – do make a contribution to the overall visual impression of the mark, adding an element of embellishment and balance, but they are not particularly striking or unusual. It is clearly the prominent word EDEN which constitutes the dominant and distinctive element of the opposed mark.

36) The average consumer is likely to associate the word EDEN with the biblical Garden of Eden, perhaps also seeing it as a name. The stars of the opposed mark might be said to add a conceptual element lacking in the earlier mark; but I have already found their role in the overall visual impression of the mark to consist rather in an embellishing and balancing function, and I do not consider that their conceptual content will make much, if any, impression. The marks are either conceptually identical or very nearly so. Overall, there is a high degree of visual similarity between the marks. The figurative elements of the opposed mark will not be pronounced; the competing marks will be pronounced identically as the word EDEN.

**The distinctiveness of the earlier mark**

37) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark (on the basis either of inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel*

*BV v. Puma AG*, paragraph 24). 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).”

38) I have no evidence of acquired distinctiveness to consider. This leaves the question of inherent distinctive character. The word EDEN is likely to be seen by the average consumer as a reference to the biblical Garden of Eden or as a name. The Applicant submits that “EDEN is a weak mark in the sense that it connotes a garden”. I cannot agree. Given the narrative of the biblical story, I suppose EDEN may be thought to have vague, general overtones of unspoilt simplicity and purity, qualities which one might wish to associate with foodstuffs, particularly, perhaps, those of a vegetable or fruit origin. However, the word is not descriptive or allusive in any obvious way of any of the goods of the earlier mark. It has a normal degree of inherent distinctiveness.

### **Likelihood of confusion**

39) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

40) I have found that the competing marks will be pronounced identically, that they are either conceptually identical or very nearly so, that there is a high degree of visual similarity between the marks, and that the earlier mark has a normal degree of distinctiveness. I have found a medium degree of similarity between some of the Opponent’s products and the Applicant’s *meat and meat products*. Accordingly, bearing in mind the interdependency principle and my findings on the average

consumer and the purchasing process, I find that there is a likelihood of confusion in respect of the Applicant's *meat and meat products*. I have found no similarity between any of the Opponent's goods and the Applicant's proposed limited specification of *fresh meat*, considering that the different nature and purpose of the respective goods, and their different trade channels, will mean that there is no likelihood of confusion. Accordingly, the opposition succeeds in respect of *meat and meat products*, but fails in respect of *fresh meat*.

### **Outcome**

41) The application may not proceed to registration in respect of *meat and meat products*. **The application may proceed to registration in respect of *fresh meat* only.**

### **Costs**

42) The Opponent has been largely successful and is entitled to a contribution towards its costs, but the Applicant has also succeeded in defending the limited specification proposed by it, and this is reflected in my award. I hereby order Hilton Foods (Ireland) Ltd. to pay Heirler Cenovis GmbH the sum of £900. This sum is calculated as follows:

Opposition fee	£100
Preparing a statement and considering the other side's statement	£400
Written submissions	£400

The above sum should be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 21st day of July 2016**

**Martin Boyle  
For the Registrar,  
The Comptroller-General**