

The General Court (GC) has confirmed a decision of OHIM's fourth Board of Appeal (BoA) invalidating a CTM registration for AYUR which included coverage of the following goods and services:

- Class 3:** Cosmetics, non-medicated herbal skin care preparations, non-medicated herbal hair care preparations, non-medicated body care lotions; laundry bleach.
- Class 5:** Herbal preparations for skin treatment, weight control, weight loss and treatment of diabetes; vitamin and mineral preparations and substances; health care products; vitamin preparations, mineral preparations for skin treatment, weight loss and treatment of diabetes.
- Class 44:** Beautician services; massage services; hairdressing; health farm services; beauty SPA services; beauty treatment services; manicuring services; provision of sauna facilities; provision of solarium facilities; consultancy services in the field of herbal remedies, nutrition, health and beauty care.

Following its registration on 24 October 2008, the intervener (MH), applied to invalidate the CTM on the basis of two earlier Benelux trade mark registrations for AYUS covering *herbal products for medicinal use* in Class 5, *herbs for non-medicinal use* in class 30, *herbs and fresh plants* in class 31, and *herbal products for medicinal use, mineral based food supplements, medicinal herbs* in class 5, *food supplements* in class 29, *herbal products for non-medicinal use, herbs, and food supplements* in class 30 respectively.

On the basis of the earlier Benelux trade mark registrations, Three-N-Products Private Ltd's (TNP) CTM registration was found to be invalid by OHIM's Cancellation Division, and this was confirmed by the BoA.

TNP appealed against this decision to the GC. The GC dismissed the appeal, finding that the BoA and the Cancellation Division had been correct to invalidate TNP's registration.

Relevant Public

The GC confirmed that a likelihood of confusion would be found between two marks when the average consumer believed that goods and/or services bearing the contested mark were economically linked to the earlier mark(s) in question. This assessment was to be made taking a global appreciation of all relevant factors, from the perspective of the relevant public.

The GC confirmed that the relevant territory was the Benelux countries, as this was the territory in which the earlier marks were registered. The GC confirmed that the relevant public would be the average consumer of the products, who would be reasonably circumspect and well-informed. It also confirmed that where the products covered by the marks were medicinal, the average consumer would have an elevated degree of attention. However, it dismissed TNP's argument that, given that all of the goods and services covered by the contested registration concerned the consumer's well-being, hygiene and physical appearance, the average consumer would have an elevated level of attention. Instead, it agreed with the BoA's assessment that the relevant public would pay a normal level of attention to the goods and services covered by the contested application, except for those relating to medicinal care.

Goods and Services Comparison

The GC confirmed the decision of the BoA that the goods and services covered by the marks were either identical or highly similar.

The GC also confirmed that when assessing the similarity of goods and services, all relevant factors must be taken into account, including the nature of the goods and services, their destination, their use, whether they were complementary and whether they were distributed through the same channels.

In particular, the GC indicated that for goods and/or services to be found complementary, one must be necessary or important for the use of the other. Where goods and/or services are aimed at, or used by different consumers, they would not be complementary.

The GC dismissed TNP's argument that the BoA had incorrectly found that the goods and services were highly similar and/or identical.

TNP argued that:

- The goods covered by the earlier Benelux marks in class 5, and the goods and services covered by the contested registration in classes 5 and 44 were not identical or highly similar, on the basis that the BoA had erred in not comparing the products covered by the contested registration and those covered by the earlier marks, but instead had made a comparison of the categories of products in class 5 covered by the contested mark. However, notwithstanding that the BoA had erred in this assessment, the GC found that the BoA intended to endorse the Cancellation Division's finding that the goods covered by the marks in class 5 were identical or highly similar, which it believed was correct.

The Cancellation Division considered that herbal products for medicinal use included the herbal products covered by the earlier Benelux marks, and the goods were therefore identical. Equally, the health supplements for medical use, included products covered by the earlier Benelux marks.

- ii. When comparing the goods covered by the earlier Benelux mark in class 5 with the services covered by the contested registration in class 44, the goods were not complementary, were different in nature and had different distribution channels. The GC disagreed, finding that due to the nature of the goods and services, they were clearly similar. In particular the GC found that the goods and services were complementary, as consultancy services in the field of herbal remedies could only exist on the basis that there were herbal remedies, which were covered by the Benelux mark in class 5. This was supported by the GC and BoA view that the goods and services shared the same distribution channels, as herbal remedies are often sold by consultants.

TNP did not contest the BoA's decision that the goods in classes 3 and 5 were similar, on the basis of the nature of the goods in question.

The GC therefore confirmed the BoA's decision that the goods and services covered by the marks were either identical or highly similar.

Comparison of the Marks

The GC confirmed that when making an assessment of the similarity of marks, their overall impression, including visual, aural and conceptual similarity should be taken into account.

The BoA had found that there was moderate visual and aural similarity between the marks, and that neither mark had a conceptual significance.

TNP argued that AYUS had a meaning, originating from the Sanskrit word, meaning *life* or *longevity* which would be understood by the relevant public. TNP also argued that relevant case law stated that when comparing short word marks, the beginning and end of the marks was of particular importance. Given that the concluding element of the marks differed by a letter, and that the relevant consumer would make a conceptual assessment of the marks, understanding TNP's mark to have a specific meaning, the similarity between the marks significantly decreased.

However, the GC disagreed, finding that given that both words were of the same length, had two syllables, and were identical insofar as the first three letters were concerned, this did not impact on the moderate level of aural and visual similarity between the two.

Insofar as the conceptual assessment was concerned, the GC found that it was unlikely that the relevant public would immediately perceive AYUS as having a meaning, not being familiar with Sanskrit. No evidence had been submitted to demonstrate that the average consumer understands, or has an appreciation of Sanskrit.

However, even if TNP's argument, that the average consumer of the goods and services covered by the marks are well versed in alternative medicines, were acceptable, both terms would be interpreted as alluding to the Sanskrit term, the stem of which is used for the term "AYURVEDA". Therefore, this would mean that the marks were conceptually similar, increasing the similarity between the marks.

Likelihood of Confusion

Making a global appreciation, including the interdependence of the factors such as the similarity between the marks and the goods and services, the GC confirmed the BoA's finding that there was a likelihood of confusion.

TNP argued that the earlier marks did not have a distinctive character for a substantial proportion of the relevant public given the meaning of AYUS, the relevant public would perceive the visual and aural differences between the marks, especially because they were relatively short and the conceptual differences between the marks (in that the later registered mark had a meaning) would counter balance the visual and aural similarities.

However, the GC rejected these arguments. It agreed with the BoA that the marks were moderately similar, and the goods and services were identical and highly similar, the average consumer would have a reasonable level of attention, which would only be elevated where the goods concerned medicinal products and that any conceptual consideration concerning the marks would not affect the similarity between the marks.

On this basis, the GC confirmed the decision of the BoA, finding that there was a likelihood of confusion between the marks, and that the CTM registration for AYUS was invalid.

This decision confirms the importance of all of the relevant factors when making an assessment of likelihood of confusion. In particular, it provides a clear indication of where an assessment of complementarity between marks is applicable. Equally, it indicates that even where a mark has a meaning, it may not necessarily be relevant to a conceptual assessment, where that meaning is not commonly known.

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