

TRADE MARKS ACT, 1996

Decision in Hearing

IN THE MATTER OF an application for registration of Trade Mark No. 216609 and in the matter of an Opposition thereto.

GLANBIA PLC

Applicant

LINK INTERCHANGE NETWORK LIMITED

Opponent

The application

1. On 23 December, 1999, Glanbia plc, an Irish public limited company, of Glanbia House, Kilkenny, Co. Kilkenny made application (No. 1999/04513) to register the words AGRI-LINK as a trade mark in respect of the following specification of services:

Class 35: Business information services.

Class 36: Financial information services.

2. The application was accepted for registration and advertised accordingly under No. 216609 in Journal No. 1900 on 4 October, 2000.
3. Notice of Opposition to the registration of the mark pursuant to Section 43 of the Act was filed on 3 January, 2001 by Link Interchange Network Limited, a British company of Link House, Hornbeam Business Park, Harrogate, North Yorkshire, HG28PA, England. The Applicant filed a counter-statement on 11 April, 2001 and evidence was, in due course, filed by the parties under Rules 20, 21, 22 and 23 of the Trade Marks Rules, 1996.
4. The matter became the subject of a hearing before me, acting for the Controller, on 1 December, 2005. The parties were notified on 10 January, 2006 that I had decided to uphold the opposition and refuse registration of the mark in respect of the services in Class 36 but to dismiss the opposition and allow the application to

proceed to registration in respect of the services in Class 35. I now state the grounds of my decision and the materials used in arriving thereat.

Notice of Opposition

5. In its Notice of Opposition the Opponent claims that it is the proprietor of the trade mark LINK, which it has used extensively in respect of financial services, banking services, credit and debit cards, automatic teller machines and related goods and services and that it has a substantial reputation under the mark in Ireland. It states that it has applied to register the trade marks LINK and LINK logo¹ as Community Trade Marks under Nos. 198036 and 198002, respectively, both of which applications are dated 1 April, 1996². It then specifies its grounds of opposition to the present application for registration, namely, that the application offends against the provisions of the following Sections of the Act:

- Section 6(1) – not a trade mark as defined in the Act,
- Section 8(1)(b) – mark devoid of any distinctive character,
- Section 8(3)(b) – mark deceptive in nature,
- Section 8(4)(a) – use of mark prohibited by law,
- Section 8(4)(b) – application for registration made in bad faith,
- Sections 10(1) and 10(2) – mark similar to Opponent’s earlier mark and to be registered in respect of identical/similar services so that there exists a likelihood of confusion,
- Section 10(3) – use of mark would take unfair advantage of, or be detrimental to, the distinctive character or reputation of Opponent’s mark,
- Section 10(4)(a) – use of the mark liable to be prevented by law protecting an unregistered trade mark,
- Sections 37(2) and 42(2) – requirements for registration not met as Applicant does not have a *bona fide* intention of using the mark in relation to the specified services.

¹ See Appendix 1

² and both of which have since proceeded to registration

Counter-Statement

6. In its Counter-Statement the Applicant denies all of the grounds of opposition raised against its application. It states that it has been involved for many years in the business of manufacturer and producer of a wide range of food products and that it has used the trade mark AGRI-LINK in connection with a range of business and financial information services that it provides to its customers. It asserts that the Opponent's trade mark LINK consists of a word that has a direct reference to the services provided by the Opponent and that the opposition is an attempt by the Opponent to monopolise a generic term that is required for use by all traders in the particular area.

The evidence

Rule 20

7. Evidence filed by the Opponent under Rule 20 consisted of a Statutory Declaration (and Exhibits HA1-HA3), dated 28 October, 2001 of Howard Aiken who is described as the Card Scheme Director of Link Interchange Network Limited. He explains that the Opponent is a consortium, the membership of which includes most of the major U.K. banks and building societies and also includes the largest bank in Ireland, Allied Irish Bank. The Opponent is responsible for the organisation and administration of the LINK Automated Teller Machine (ATM) Network and it has used the trade mark LINK in relation to that network since 1985. The LINK network provides access to ATM facilities to the customers of the member companies of the consortium, and those of other financial institutions that have reciprocal arrangements with the member companies. The cards issued to customers by which they access ATM facilities bear the trade mark LINK. There are over 80 million such cards in circulation and their use runs to hundreds of millions of transactions annually (approximately 400,000 transactions by Allied Irish Bank customers annually). Mr. Aiken says that the Opponent has promoted the LINK network through television and media (*presumably print media*) advertising that is accessible and available in Ireland and that it spends STG£100,000 pre annum on advertising and promotion. He also refers to some articles, which he exhibits, from publications circulating in Ireland in which reference is made to the mark and he claims that, by virtue of the use made of the mark by consortium members, it enjoys a substantial reputation, particularly within the financial services sector. He exhibits a summary of the results of a

survey which, he says, found that 92% of the UK population recognised the LINK logo.

Rule 21

8. Evidence filed by the Applicant under Rule 21 consisted of a Statutory Declaration (and Exhibits G1-G5) dated 21 August, 2002 of Siobhan Talbot, Company Secretary of Glanbia plc. She says that the Applicant is one of the largest food processing companies in the world, having grown significantly in the past 20 years as a result of a number of acquisitions. In 1999, the Applicant introduced, on a pilot basis, a service under the name AGRI-LINK whereby its customers (mainly farmers) could access information relating to their accounts with the Applicant via a secure internet website. The service was officially launched at the National Ploughing Championships in 2000 and it has since attracted 2000 subscribers. Ms. Talbot estimates the cost of the development, promotion and advertisement of the AGRI-LINK service at €150,000 and exhibits a promotional brochure and copies of some press advertisements and reporting related to the service. She also makes a number of criticisms of the Opponent's evidence, which I do not need to go into for the purposes of my decision.

Rule 22

9. Evidence filed by the Opponent under Rule 22 consisted of a further Statutory Declaration (and Exhibit H1) dated 11 August, 2003 of Howard Aiken, who replies to the criticisms made by Ms. Talbot and asserts that the use that the Applicant has shown in relation to the trade mark AGRI-LINK does not constitute use in relation to financial services and that the Applicant has failed to establish a *bona fide* intention of using the mark in relation to such services.

Rule 23

10. Evidence filed by the Applicant under Rule 23 consisted of a further Statutory Declaration, dated 6 November, 2003, of Siobhan Talbot, much of which is taken up with argument and opinion that I do not need to go over here. With regard the assertion that the Applicant does not use its trade mark in relation to financial services, she says that the AGRI-LINK service allows the Applicant's customers

to view their accounts and order supplies and that the Applicant is working on the expansion of the service to allow customers to pay their accounts via the website.

11. Evidence filed by the Opponent under Rule 23 consisted of a third Statutory Declaration (and Exhibit HA1), dated 22 March, 2004, of Howard Aiken, which does not, in my opinion, add anything of particular significance to the facts already in evidence in the case.

The hearing

12. At the hearing, the Opponent was represented by Mr. Paul Coughlan, BL instructed by Tomkins and Co., Trade Mark Agents and the Applicant by Mr. Jonathan Newman, BL instructed by F.R. Kelly and Co., Trade Mark Agents. At the outset, Mr. Coughlan stated that his submissions in support of the opposition would be limited to the ground of opposition raised under Section 10(2)(b) of the Act and, while they were not formally abandoned, there was no discussion whatsoever of the other grounds of opposition. In the circumstances, I am satisfied that it is appropriate for me to confine my decision to the objection to registration based on Section 10(2)(b); the other grounds of opposition are not supported by any or sufficient evidence and nor has any argument been advanced by the Opponent as to why any of them should be upheld. Messrs. Coughlan and Newman were *ad idem* as to the test to be applied in considering an objection under Section 10(2)(b)³ but were divided as to the result of the application of that test to the facts of the present case. I will not attempt to synthesise their very cogent and insightful submissions on the matter; I will, rather, address their opposing arguments in the context of my consideration of each of the specific elements of the relevant test.

Section 10(2)(b) –likelihood of confusion on the part of the public.

13. Section 10(2)(b) of the Act reads as follows:

“A trade mark shall not be registered if because –

.....

³ as set out by the European Court of Justice (ECJ) in several well-known cases including Case No. C342/97 Lloyd Schuhfabrik Meyer & Co. GmbH –v- Klijsen Handel BV paras 17-23 and 25-27

(b) it is similar to an earlier trade mark and would 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 of the later trade mark with the earlier trade mark.”

earlier trade marks

14. An “earlier trade mark” is defined in Section 11 of the Act as including, *inter alia*, a Community trade mark which has a date of application for registration earlier than that of the trade mark under consideration. Both of the Opponent’s Community trade marks cited in the Notice of Opposition (Nos. 198002 and 198036) meet this requirement and are, therefore, “earlier trade marks” as against the present application, a fact which Mr. Newman did not dispute at the hearing.

similar marks

15. Nor can there be any question but that there is some similarity between the trade mark AGRI-LINK and the earlier trade marks LINK and LINK logo. The occurrence in each mark of the word “link” and the significance of that word in identifying each mean that the marks could not be called dissimilar and, so, the second requirement of the objection to registration under Section 10(2)(b) is fulfilled. Of course, the degree of similarity between the respective marks is significant in determining whether there is a likelihood of confusion between them and, in this regard, Mr. Newman argued that the visual and aural similarities between the respective marks resulting from the occurrence in each of the word “link” was mitigated considerably by the fact that the Applicant’s mark contains the prefix “agri” and has, as a consequence, an agricultural connotation whereas the Opponent’s marks have no such meaning. Mr. Coughlan accepted that the “agri” element of the Applicant’s mark would convey an agricultural connotation but asserted that such a prefix serves only to qualify the word “link”, which remains the primary element of the mark insofar as its overall identity is concerned.

16. For my part, I would agree that the comparisons between the respective marks in this case as regards visual and aural criteria are far less significant in terms of the likelihood of confusion between them than is the comparison on conceptual grounds. The message conveyed by the respective words would, in my opinion, be decisive in determining the mental image that consumers would have of products marketed under them and, so, the distinctive and dominant component of each of the marks LINK and AGRI-LINK is its meaning rather than its look or its sound.
17. In comparing the marks as regards their conceptual significance, I think it is necessary to consider whether the prefix “agri” in the Applicant’s mark has the effect of fundamentally altering the meaning of the word “link” or whether, as Mr. Coughlan contended, it simply qualifies that word but does not create a new and distinct concept. In my view, the latter is the case. The word “link” evokes concepts such as “connection” and “network” and, when prefixed with “agri”, it continues to convey that essential message, except that it now specifically suggests “agricultural connection” or “agricultural network”. The concept evoked by the Applicant’s mark is, therefore, merely a subset of that evoked by the Opponent’s marks. In contrast, I would suggest that the word “link” evokes a concept that is fundamentally altered by the addition to it of the word “chain” because “chain-link” has an independent meaning and signification (a form of fencing) that is separate and distinct from that of “link” alone. The same cannot be said of LINK and AGRI-LINK and, for that reason, I regard the marks as more similar than dissimilar from a conceptual aspect and, as a consequence, more similar than dissimilar overall.
18. I do not, of course, mean to suggest that the average consumer would be likely to subject trade marks to such close scrutiny as to the subtleties of their respective meanings. Indeed, the opposite is the case and it is often the first impression created by a mark that determines the consumer’s image of it and his propensity to recall and identify it on a subsequent occasion. For that very reason, however, it is necessary when comparing marks to identify the distinctive features of them which give them their overall identity and to make a judgement as to whether those distinctive features correspond or differ. As I have indicated, I believe that

the distinctive and memorable feature of each of the trade marks LINK and AGRILINK is the concept that each conveys and I regard those concepts as closely related.

identical or similar services

19. The next requirement of the objection under Section 10(2)(b) is that the services in respect of which the Applicant's mark is to be registered are identical with or similar to those for which the earlier trade mark is protected. The services in respect of which the Applicant seeks registration are "*business information services*" (Class 35) and "*financial information services*" (Class 36). The earlier trade marks are protected for the services in respect of which they are registered as Community trade marks, namely, "*banking services for the dispensing of cash; funds transfer and payment services; financial information services*" (Class 36).

20. As regards the term "*financial information services*", which is included in the specification of services covered by both the application for registration and the Opponent's earlier registrations, it appears that the requirement for identity of services is fulfilled. At the hearing, Mr. Newman suggested that the comparison was not quite so straightforward and that the particular import of the appearance of the broad term "*financial information services*" in the respective specifications of services should be construed by reference to the discrete fields of activity of the parties, each of which may offer specific services within that general category. That was necessary, he argued, to identify the normal paradigm of usage that would be made of the respective marks so that the practical likelihood of confusion between them could be properly assessed. In the present case, the Applicant is a major food processing company whereas the Opponent is a consortium of banks and the nature of the financial information services that each is likely to offer is entirely different. The evidence shows that the Applicant's services are directly related to its relationship with its main customers and account-holders (farmers) and the financial information services that the Applicant will offer should, therefore, be understood as being services by which its account-holders may access information as to the status of their accounts with the Applicant. The Opponent's services, on the other hand, are traditional banking services whereby customers of banks may access information, and transact

business, on their bank accounts via ATM's. In practice, such services are not in any way in competition with those offered by the Applicant, notwithstanding that both may fairly be described as "financial information services"⁴.

21. I reject completely the argument advanced on behalf of the Applicant on this point. Apart altogether from the fact that it requires that two identical descriptions of services be construed as having different meanings(!), it fails to take into account the essential purpose and effect of the trade mark registration system, whereby protection is afforded in respect of the specification of goods or services for which a mark is *registered*, rather than simply those in respect of which it is used. Nor is it appropriate to look only at the use that a particular applicant for registration has made of a mark in the past in order to identify the normal paradigm of use of a trade mark in relation to the specified services; regard must also be had to other forms of use in relation to the relevant services that would be regarded as normal and fair use and, indeed, to the legitimate use that a subsequent proprietor of a registration of the mark might make of it in the future.

22. If the Applicant wished its application to be considered in the context of specific services offered to its account-holders only and relating only to its customers' accounts, as opposed to "financial information services" generally, then it was open to it to specify those services accordingly in its application for registration; similarly, if the Applicant contends that, although registered in respect of "financial information services" generally, the Opponent's earlier trade marks should be regarded as protected only in respect of the provision of such services via an ATM network, then it should have sought cancellation of the earlier registrations in respect of all but those specific services. The Applicant has done neither and I am left with the simple fact that certain of the services covered by the application, namely, financial information services, are identical with those for which the earlier trade marks are protected. To take a different view and to construe descriptions of goods or services in the subjective manner advocated on

⁴ I should record that Mr. Newman's submissions on this point prompted a request from Mr. Coughlan for a short adjournment for consultation between the parties, following which Mr. Newman formally put on record the fact that the Applicant did not anticipate ever engaging in the provision of ATM services. Mr. Coughlan, for his part, noted that the Applicant was not ruling out the provision of electronic funds transfer and payments services.

behalf of the Applicant would be to introduce an element of uncertainty into the registration process that would result in chaos.

23. As to the other services covered by the application for registration, namely business information services in Class 35, I regard these as similar to financial information services in the sense that the provision of business information services could be expected to include some assessment of, and reporting on, relevant financial factors. The overall purposes of the two services are different, the one being for the purpose of accessing information affecting all aspects of business, including matters as diverse as market trends, customer profiles, regulatory environment, etc., and the other being for the specific purpose of accessing financial information only. However, the two areas can and do overlap and, to that extent, they are similar services for the purposes of the application of Section 10(2) of the Act.

criteria for assessing likelihood of confusion

24. The basic ingredients of an objection to registration under Section 10(2)(b) of the Act – *existence of earlier mark, similarity of marks, identity or similarity of services* – are present in this case. It does not necessarily follow, however, that the combination of those ingredients will result in a likelihood of confusion on the part of the public. That is a separate question which must be decided by reference to the established principles, including the following –

- the likelihood of confusion must be appreciated globally, taking into account all of the relevant factors,
- a global assessment of likelihood of confusion implies some interdependence between the relevant factors and, in particular, between the extent of the similarity of the respective marks and that of the respective services,
- a lesser degree of similarity between the respective marks may be offset by a greater degree of similarity between the respective services, and vice versa,
- the more distinctive the earlier mark, the greater will be the likelihood of confusion resulting from the use of a similar mark,

- in determining the distinctive character of the earlier mark, an overall assessment must be made as to its capacity to identify the relevant services and distinguish them from those having a different origin,
- in making that assessment, account must be taken of the inherent characteristics of the mark and also of the distinctiveness it may have acquired through use,
- the global appreciation of the likelihood of confusion must, as regards the visual, aural or conceptual similarities of the respective marks, be based on the overall impression likely to be created by them in the mind of the average consumer having regard to their distinctive and dominant components,
- for the purposes of that assessment, the average consumer of the services is deemed to be reasonably observant and circumspect but account must be taken of the fact that the average consumer rarely has the chance to make a direct comparison of the respective marks and must rely on his imperfect recollection of them.

distinctiveness of the earlier marks

25. In assessing whether the basic ingredients of the Section 10(2)(b) objection are present in this case, I have already touched on some of the foregoing matters, in particular, the question of the degree of similarity between the respective marks and that between the respective services. I must also address the question of the distinctiveness of the Opponent's earlier marks and whether they should be regarded as highly distinctive for the purposes of the assessment of likelihood of confusion. This question is commented upon at length in the evidence filed in these proceedings and was also the subject of some debate at the hearing. Mr. Newman observed that the Opponent's word mark consists of an ordinary dictionary word – link - which has a certain technical meaning in the context of computer technology, including such technology used to support an ATM network of the kind operated by the Opponent. He asserted that the evidence filed by the Opponent established use of the mark only in relation to an ATM network, that such evidence did not establish recognition of the mark amongst consumers in this jurisdiction and that any distinctiveness that the mark might be claimed to have acquired through use must be regarded as limited to services provided via an ATM network as opposed to the full range of services in respect of which the mark

stands registered as a Community trade mark. For his part, Mr. Coughlan argued that the word “link” has no obvious connection with banking and financial information services and that it was perfectly apt to function as a distinctive trade mark in respect of such services, a finding with which OHIM had concurred in proceedings relating to the mark⁵. He also referred to the fact that the Opponent’s word mark LINK registered as a Community trade mark under No. 198036 was registered on the basis of distinctiveness acquired through use and that it can only be assumed that OHIM was satisfied that the mark had been used, and had acquired distinctiveness, in relation to the full range of services in respect of which it granted registration.

26. It is apparent that there are two distinct matters to be addressed in relation to this aspect of the case; firstly, whether the Opponent’s earlier trade marks are inherently distinctive marks in relation to the services for which they are protected and, secondly, to what extent can those marks be said to have acquired distinctiveness in relation to those services by virtue of the use that has been made of them. As to the first question, I am satisfied that the earlier marks, LINK and LINK logo, are perfectly distinctive trade marks for banking services for the dispensing of cash, funds transfer and payment services and financial information services. While the word “link” is not an invented word, neither is it a word that has any direct application or relevance to the services in question. I regard it as a word that the average consumer of the relevant services would perceive as indicating the services of a single service-provider only and that it would be likely to be easily remembered and recalled by the average consumer such that he would certainly be able to identify and distinguish the services provided by the Opponent by reference to that word alone. That is the level of distinctiveness required of a mark in order to qualify for registration and, in my opinion, the Opponent’s marks are not open to the charge that they lack inherent distinctiveness.

27. As to the other aspect, namely, factual distinctiveness, the present case is interesting insofar as one of the earlier marks cited by the Opponent has been registered on the basis of having acquired distinctiveness through use and a question arises as to what significance, if any, I should attach to that fact in

⁵ OHIM Decision No. 2427/2003, exhibited with Mr. Aiken’s Statutory Declaration of 22/03/04

assessing the extent of the factual distinctiveness of the mark for the purposes of these proceedings. In that regard, I think that I must keep in mind that a finding that a trade mark has acquired distinctiveness by virtue of the use made of it is a finding of fact and is, therefore, confined to the factual context in which it is made. I do not know what evidence was before OHIM which led it to find that the Opponent's trade mark LINK had acquired distinctiveness; I do not know whether the evidence in question showed use of the mark in this State or in some other part(s) of the Community; and I do not know whether the evidence showed use in relation to some or all of the services for which the mark stands registered. In the circumstances, and as a matter of general principle, I think that I can attach no significance to OHIM's finding that the word mark LINK had acquired distinctiveness in assessing the factual distinctiveness of the mark in this jurisdiction for the purpose of my decision. I must, rather, make that assessment on the basis only of the evidence that the Opponent has adduced in these proceedings.

28. That evidence establishes very widespread and intensive use of ATM facilities operated by the members of the consortium of which the Opponent is composed. It also shows that the Opponent has invested in the promotion of the LINK trade mark and that, in addition, the LINK network has been the subject of certain reports in the financial press. In my opinion, it does not, however, establish a likelihood of recognition of the trade mark by consumers in this jurisdiction. While I am satisfied that there are huge numbers of transactions on the ATM network operated or maintained by the Opponent, there is insufficient evidence to establish that consumers using those ATM facilities are exposed to the trade mark on the occasion of each such transaction in a manner that is likely to cause them to perceive the mark and to associate it with the relevant services. Nor is it clear from the evidence as to the extent to which the mark has penetrated the market here as opposed to in the United Kingdom or the extent to which the mark may be known to consumers generally as opposed to persons in the financial services sector only. For these reasons, I do not think that the Opponent's evidence provides a basis for finding that its earlier marks have acquired any additional or factual distinctiveness by virtue of the use that may have been made of them. Nevertheless, as I have already said, I regard the marks as inherently distinctive

and I treat them accordingly for the purposes of assessing the likelihood of confusion.

the average consumer

29. Another factor that I have not previously considered is the perception of the average consumer and the extent to which the circumstances of the trade in the relevant services increase or reduce the likelihood of confusion between the respective marks, in practice. As regards business information services, I think it is correct to say that such services must normally be directed to the business sector and that the average consumer of them should be regarded as the average business or commercial undertaking. As I have already noted, business information services may include the provision of information on a wide range of different subjects and it is difficult to describe a standard or normal model of use of a trade mark in relation to the provision of such services. However, I am inclined to think that, by their nature, the acquisition of such services and the selection by the average consumer of a service provider is likely to involve some structured consideration and evaluation of different options, etc., so that the effect of a similarity of trade marks as between two service providers would be less likely to result in confusion than would be the case, say, in relation to inexpensive goods or services of the kind that might be purchased on impulse or frivolously.

30. Financial information services, on the other hand, include services that are offered to consumers generally as is evident from the Opponent's activities, which include the provision of information via ATM's to bank-account holders as to the balances on their accounts and details of transactions on them, etc. While I do not suggest that such services are acquired on impulse or frivolously by the average consumer, the fact is that they are availed of by consumers generally in the ordinary course of their everyday lives and, in many instances, their selection and use is not subject to particular care or attention on the part of the consumer. To that extent, there is an increased likelihood of confusion arising if similar trade marks are used by different undertakings providing those services.

likelihood of confusion

31. In light of all of the foregoing factors, I have considered whether there is a likelihood of confusion on the part of the public if the mark for which the Applicant seeks registration is used in a normal and fair manner in relation to the services covered by the application. In the case of the services in Class 35, namely, business information services, I take the view that there is an insufficient likelihood of confusion to warrant refusal of the application under Section 10(2)(b). In my opinion, the use of AGRI-LINK in relation to business information services is not likely, on the balance of probabilities, to cause consumers to think that the services in question have the same commercial origin as financial information services offered under the trade marks LINK or LINK logo. The process by which business information services would normally be acquired by the average consumer combined with the, admittedly slight, difference between the respective marks are sufficient to obviate the *likelihood* of confusion and to sway the assessment in favour of allowing the mark to proceed to registration in respect of those services.

32. In the case, however, of the services in Class 36, given that those services are identical with those in respect of which the Opponent's trade marks are protected and that the Applicant's mark is not significantly different from those of the Opponent as regards its meaning, I think confusion on the part of the public is likely. In particular, I think it reasonable to assume that consumers who were once exposed to financial information services offered under the trade mark LINK would, if encountering the same services branded as AGRI-LINK, conclude that the services in question emanated from the same undertaking or, at the very least, from economically linked undertakings. It seems quite likely that the average consumer would assume that AGRI-LINK financial information services were one and the same as LINK financial information services, albeit that the former were aimed specifically at the agricultural sector. Association of the respective services in that way constitutes the kind of confusion that Section 10(2)(b) seeks to avoid and I find, therefore, that the application is objectionable under that Section insofar as the services in Class 36 are concerned.

no evidence of actual confusion

33. Before concluding, I must briefly address the point made on behalf of the Applicant at the hearing to the effect that, notwithstanding the fact that the Applicant has used the mark AGRI-LINK since 1999, it has not become aware of any instance of actual confusion between its services and those provided by the Opponent under its trade mark LINK⁶. Mr. Newman submitted that the absence of evidence of actual confusion between the respective marks was a significant factor to be taken into account in assessing whether confusion was likely and, as a statement of general legal principle, that cannot be denied. However, the particular circumstances of this case are that the Applicant has used the mark AGRI-LINK in the promotion of a service that is offered to its existing customers and account-holders such that there can be no doubt in the minds of the relevant persons but that the service in question is a service of the Applicant alone. That is not in any way relevant to the question of whether confusion would be likely if the Applicant were to offer financial information services under the trade mark AGRI-LINK to consumers generally, i.e., not limited only to its own existing customers. For the reasons set out in paragraphs 21 and 22 above, I think it correct to assess the likelihood of confusion in the context of the specification of services covered by the application and not by reference to the use that the Applicant has made of the mark in the past.

Conclusion

34. The opposition is successful as far as the services in Class 36 are concerned but not as regards those in Class 35. The application may proceed to registration subject to the Applicant restricting (under section 44 of the Act) the services covered by it to those in Class 35 only.

Tim Cleary
acting for the Controller
23 January, 2006

⁶ para. 11 of Statutory Declaration dated 21 August, 2002 of Siobhan Talbot

Opponent's Community Trade Mark No. 198002

