BL O/0330/26

TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NO. 4011883
IN THE NAME OF LUNA CORPORATE SPÓŁKA Z OGRANICZONĄ ODPOWIEDZIALNOŚCIĄ
AND OPPOSITION NO. 448770 THERETO
BY INTERCONTINENTAL GREAT BRANDS LLC

DECISION

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1. This is an appeal by the Opponent, Intercontinental Great Brands LLC, against a decision which partially upheld an opposition to registration of the following mark in classes 5, 32, 34 and 35:

2. The opposition was based on s.5(2)(b) Trade Marks Act 1994 and the Opponent's earlier mark LUNA registered in classes 29 and 30 for the following goods:

> Class 29 Soy-based food bars also containing grains, nuts and fruit.
> Class 30 Grain-based food bars also containing nuts and dried fruit.

3. In a decision dated 13 January 2026 the Hearing Officer, LA Bailey, allowed the opposition in respect of the following services in class 35: Retail services in relation to foodstuffs; Wholesale services in relation to foodstuffs.

4. The Opponent appeals in respect of the following goods and services ("the Appealed Goods"):

> Class 5: Food supplements, Nutritional supplements, Vitamin supplements; Vitamin and mineral supplements; Multi-vitamin preparations; Dietary and nutritional preparations; nutritional supplements; protein dietary supplements; dietary supplements for human beings; Food supplements for sportsmen; Food supplements; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Fitness and endurance supplements; Dietary supplements consisting of vitamins; Dietary supplements for humans not for medical purposes.
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> Class 35: Retail services in relation to dietary supplements; Wholesale services in relation to dietary supplements.

5. Before me at a hearing which took place on 20 April 2026 the Opponent was represented by Charlotte Blythe instructed by Wilson Gunn LLP. The Applicant/Respondent was not represented on this appeal.

Standard of Appeal

6. This is now well established. The principles are set out in the well-known cases of *Axogen v Aviv Scientific* [2022] EWHC 95 (Ch), *Lifestyle Equities v Amazon* [2024] UKSC 8 and *Iconix v Dream Pairs* [2025] UKSC 25. I summarised the approach in SOCIAL WORK NEWS (O/0050/24) at [13]:

> To paraphrase, an appeal should only be allowed where the decision of the lower court was "wrong". Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible". In the case of a multifactorial assessment and in the absence of a distinct error of principle, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere.

7. I have sought to apply those principles. It is not enough that a different tribunal might have reached a different conclusion; I must be satisfied that the Hearing Officer was wrong in the conclusions he reached.

Grounds of Appeal

8. Although split up into various individual criticisms, the thrust of the Opponent's appeal is that the Hearing Officer wrongly held that the Appealed Goods were dissimilar to the food bars in classes 29 and 30 for which its mark had been registered (Ground 1). If it is right about this, it also says that the same error befell the Hearing Officer's decision about the Class 35 services (Ground 2). Ms. Blythe

accepted that the Opponent needed to win on Ground 1 in order to succeed on Ground 2.

9. Ground 1 was split into five parts, which I can summarise as follows:

   (a) Too much weight given to the fact the goods were in different classes;

   (b) Wrong characterisation of class 5 as pharmaceutical/medical preparations;

   (c) Wrong distinction between foodstuff and supplements;

   (d) Wrong distinction between uses and users of goods;

   (e) Failure to take into account the Opponent's evidence.

10. It was also said that the Hearing Officer's conclusions were irrational and wrong.

11. Before me Ms. Blythe started with ground 1(b) – the alleged error by the Hearing Officer to characterise goods in class 5 as "pharmaceutical/medical preparations". Ms. Blythe conceded that this was a minor error, but submitted that it fed into ground 1(a).

12. It is helpful at this stage to set out the entirety of §24 of the Hearing Officer's Decision (including the footnote), upon which this point turns (emphasis added):

> 24. The applicant's terms are types of nutritional and health food supplements in Class 5, which is defined by the Nice Classification as "Pharmaceuticals, medical and veterinary preparations; sanitary preparations for medical purposes; dietetic food and substances adapted for medical or veterinary use, food for babies; dietary supplements for human beings and animals…", whereas Classes 29 and 30 relate to foodstuffs, including "foodstuffs of animal origin as well as vegetables and other horticultural comestible products which are prepared for consumption or conservation" in Class 29 and "foodstuffs of plant origin prepared for consumption or conservation as well as auxiliaries intended for the improvement of the flavour of food" in Class 30. As per section 60A of the Act, goods and services are not to be regarded as being similar or dissimilar to each other on the ground that they appear in the same class under the Nice Classification (the converse may be true in different classes). **However, I consider that this is relevant in this instance, as the goods in Class 5 are pharmaceutical/medical preparations, which are specific**[4].
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> 4 Altecnic Ltd's Trade Mark Application [2002] RPC 34 (COA) - In Altecnic Ltd's Trade Mark Application the Court of Appeal decided that "the Registrar is entitled to treat the Class number in the application as relevant to the interpretation of the scope of the application"

13. As can be seen, the Hearing Officer correctly stated the definition of Class 5 at the beginning of the paragraph. When she referred back to it in the last sentence, she referred only to "pharmaceutical/medical preparations", perhaps as an abbreviation. Ms. Blythe pointed out that had she referred to, for example, "dietary supplements" here, the distinction she was seeking to draw may have been less clear.

14. I agree that the Hearing Officer's decision to refer only to "pharmaceutical/medical preparations" in this sentence was unfortunate when there were other goods within the Class 5 Nice definition which were closer to the goods in issue. However, without further consideration it is not possible to tell whether this was a material error or whether it is simply an example of a tribunal which could have expressed itself more fully (as we all can), for example by writing "pharmaceutical/medical preparations…etc" and/or indicating that this was an abbreviation for the full specification reproduced earlier in the paragraph. I therefore decline to place weight on ground 1(b) alone.

15. As for the substantive reasoning of the Hearing Officer on comparison of goods, this is contained in the following two paragraphs of the Decision, which read as follows:

> 25. The opponent's specification includes the terms soy-based food bars also containing grains, nuts and fruit in Class 29 and grain-based food bars also containing nuts and dried fruit in Class 30. Giving consideration to the fact that the goods fall within differing Nice Classes, and that the opponent's specification includes foodstuffs, whereas the applicant's goods are supplements, I find the uses of the goods are dissimilar, as are the users, as the consumer of the opponent's goods is likely to be seeking a snack, whereas the consumer of the applicant's goods will be seeking health supplements. The nature of the goods will also differ as the opponent's goods are food bars, whereas the applicant's goods are likely to be in the form of tablets, powder, drops or liquid.
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> 26. The opponent has submitted evidence in respect of trade channels, which it states is to establish whether "there was any truth in the Applicant's claim in its written submissions of 24 January 2025 that its contested goods and the Opponent's earlier goods are distributed and sold through different channels ie "food stores vs. pharmacies and specialized health stores". A number of exhibits are provided from various websites and photographs of the aisles of well-known supermarkets following which the opponent submits "there can be no doubt that the Applicant's contested goods and the Opponent's earlier goods may be distributed and sold through the same trade channels". As I have stated, the goods in this instance fall within different Nice Classes and have different uses, although both are consumable and directed at the general public, however, I do not consider that consumers will

believe these goods to be similar. Even if they happen to be sold by the same retail premises, they are unlikely to be on the same shelves; as snack bars would be displayed on separate shelves to supplements. Whilst the goods may well be sold in the same supermarkets/health shops and will thus on a very general level overlap in trade channels, this is insufficient in accordance with the caselaw[5]. I do not find competition, as I do not foresee that a consumer who is seeking nutritional supplements would purchase a food bar as an alternative, nor do I find complementarity. The fact that they are all goods which may be found in the same store is not enough for similarity. I therefore find the goods to be dissimilar.

5 The case of 2nine Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-363/08 stated as follows in relation to the similarity goods:
"40. It must, moreover, be pointed out that the fact that the goods in question may be sold in the same commercial establishments, such as department stores or supermarkets, is not particularly significant, since very different kinds of goods may be found in such shops, without consumers automatically believing that they have the same origin (PiraÑAM diseño original Juan Bolaños, paragraph 30 above, paragraph 44; see also, to that effect, Case T[1]8/03 El Corte Inglés v OHIM – Pucci (EMILIO PUCCI) [2004] ECR II-4297, paragraph 43)."

16. Ground 1(a) criticised the Hearing Officer for giving consideration to the fact that the goods lie in different Nice classification classes. Ms. Blythe submitted that in accordance with the legislation and the authorities, the Hearing Officer should only have relied on class differences to resolve an ambiguity or where the same term is used in different classes (e.g. "valve"). Instead, she submitted that the Hearing Officer failed to follow her own advice and failed to abide by the requirements of s.60A(1) Trade Marks Act (which she had referred to in §24) and which reads as follows:

60A Similarity of goods and services

(1) For the purposes of this Act goods and services—

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification;

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

17. For the discussions in the authorities about the classification system, Ms. Blythe referred me to *Pathway IP Sarl v Easygroup Ltd* [2018] EWHC 3608 (Ch), [2019] FSR 8 at [79]-[80] and *Multi-Access Limited v Guanghzhou Wong Lo Kat Great Health Business Development Co Ltd* [2019] EWHC 3357 (Ch), [2020] FSR 16 at [84]-[86], as well as *Altecnic Ltd's Trade Mark Application* [2002] RPC 34 cited by the Hearing Officer.

18. I also note the commentary in *Kerly* 17th Edition 2023 at §6.10-6.13 and the reference there to the discussion by Anna Carboni sitting as the Appointed Person in *SK.4* TM Application BL O-176-08 at [31]-[40] where she concluded (albeit prior to the incorporation of s.60A into the Act):

> All this goes to show that it is necessary to examine the particular goods in issue, albeit bearing in mind the class in which they are listed, in order to determine similarity.

19. Phillip Johnson sitting as the Appointed Person dealt with the effect of s.60A in *Gravity Products LLC v Senso-Rex Ltd* O/557/21 where he explained:

> 28. This section means that simply because a good is in the same class as another does not make those goods similar and likewise being in a different class does not mean those goods are dissimilar. Accordingly, in this case the fact that the proprietor's goods are in Class 10 and those of the earlier mark are in Class 24 does not mean in itself that the goods are dissimilar. However, it is also apparent that the classification of a good (or service) can be used to help the tribunal construe the meaning of the words in the specification and this may be material to the assessment of similarity.

20. I agree that it may be the case that the classification can be used to help the tribunal construe the individual goods or services. The specific class may give a "flavour" to the goods which is missing if the description is shorn of its class. But that requires some specific context to be given to the classification – merely pointing out that the goods or services are in the same or different classes does not help, and is inconsistent with s.60A.

21. Ms. Blythe listed the Hearing Officer's references to class number in the Decision in her skeleton as follows:

(a) The final sentence of Decision/§24 which states "… I consider that [the different Nice Classes] is relevant in this instance, as the goods in Class 5 are pharmaceutical/medical preparations, which are specific."

(b) The second sentence of Decision/§25 which states "Giving consideration to the fact that the goods fall within differing Nice Classes and that the opponent's specification includes foodstuffs, whereas the applicant's goods are supplements, I find…"

(c) The third sentence of Decision/§26 which states "As I have stated, the goods in this instance fall within different Nice Classes and have different uses, although both are consumable and directed at the general public, however, I do not consider that consumers will believe these goods to be similar…"

22. s.60A mandates that decisions about similarity or dissimilarity should not be made on class number alone. The authorities I have cited above make clear that it may nevertheless be relevant to refer to class number where some additional light is shed on the nature of the goods by the particular class in which they are found.

23. In the present case the Hearing Officer did not rely on class number alone. As can be seen from the quotes above, although she referred to the class number on each occasion, she went on to make specific findings about the differences between the goods. Yet it is puzzling that she referred to class numbers at all, and repeatedly so, particularly in the light of her reference to s.60A. It is difficult to see what relevance the class number had on her reasoning, other than by her repeated reference to the differences between them – which s.60A prohibits.

24. For this reason I cannot be sure that she did not fall into error in the sense that she may have wrongly placed weight on mere differences in class number. At the very least, the way the Decision is written gives cause for concern. The Hearing Officer gives no other relevant reason for referring to class number, and there are no other issues of interpretation of goods which might arise (once the full summary of goods in class 5 is taken into account – see ground 1(b) above). Further, the doubt that I have expressed about the correctness of her references to class number mean that there is also reason to doubt whether the last sentence of §24 was merely an abbreviation. If the Hearing Officer was using the "flavour" of class 5 to distinguish between classes 29/30, she may have been using the wrong flavour. So, I conclude that with this further context she might have misdirected herself here too.

25. For this reason I consider that I need to reconsider the question of similarity of goods afresh.

26. In light of the express direction in s.60A, it is probably safer for tribunals not to refer to differences in class number at all unless there is a specific point arising which falls within the discussions in the authorities I have referred to above. It is right that goods in the same class are more likely to be similar to each other and goods in different classes more dissimilar, but s.60A prohibits that alone from being a material consideration because the classification system is administrative and not substantive. The only test which matters is whether the goods are similar or dissimilar in the eyes of the notional consumer and the notional consumer is not expected to be aware of the Nice classification system.

27. Before turning to the question afresh, I should also deal with the other grounds of appeal in case they impact on the assessment I have to make.

28. Ground 1(c) criticises the Hearing Officer's decision that food bars are dissimilar to food supplements for further reasons going beyond the class point. In analysing this argument I need to take into account the evidence before the Hearing Officer and the uses and users of the goods in accordance with the *Treat* factors. So this also encompasses grounds 1(d) and 1(e).

29. In the course of her submissions Ms. Blythe focussed on the second half of §25 of the Decision. She criticised in particular the finding that the nature of the goods will differ because the applicant's goods are "in the form of tablets, powder, drops or liquid" and pointed to the evidence that some vitamins and minerals are sold as chewy "gummies" and are therefore more similar to food stuffs or snacks.

30. I take the point that there was evidence to support this, but Ms. Blythe overstated the criticism before me. What the Hearing Officer actually found is that the applicant's goods were "likely" to be in the form of tablets, powder, drops or liquid. She was entitled to make this finding which is supported by the evidence and by common sense. This specific criticism therefore fell flat.

31. I was also unimpressed by the suggestion that the Hearing Officer had failed to take into account the evidence. The Opponent elected to put in no evidence in chief. The only evidence it relied on was a witness statement of its attorney, Mr Rundle, filed in reply which was expressly stated to be for the following purpose:

> 3. I conducted searches of the internet via Google for references to establish whether there was any truth in the Applicant's claim in its written submissions of 24 January 2025 that its contested goods and the Opponent's earlier goods are distributed and sold through different channels ie "food stores vs. pharmacies and specialized healthstores".
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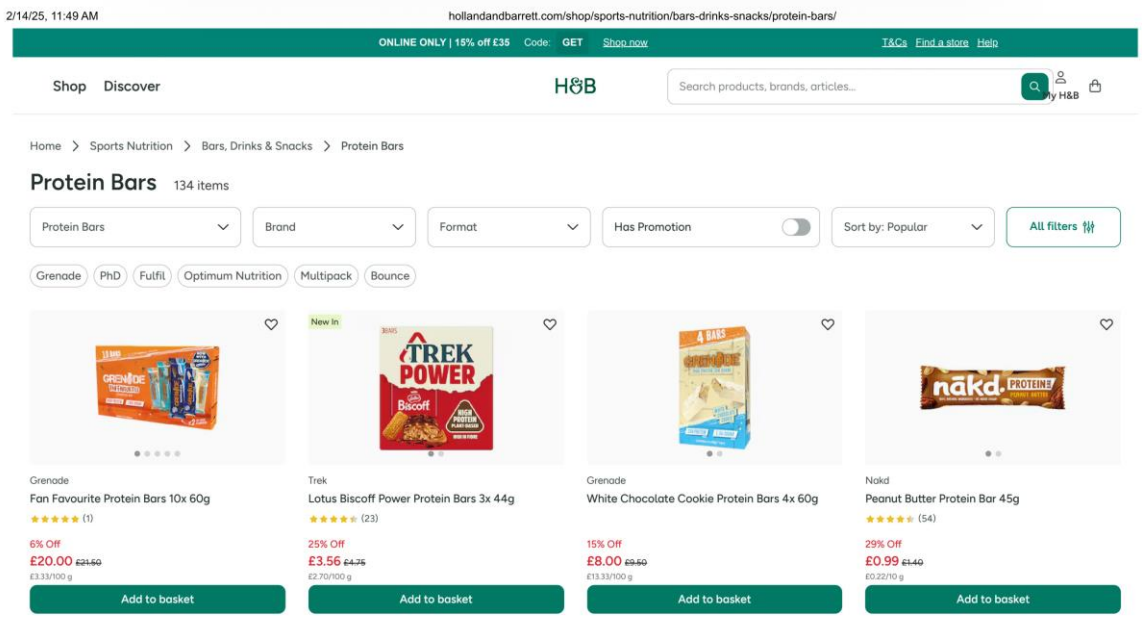
> 4. Some of the results of the internet searches are found in the following exhibits produced and shown to me:

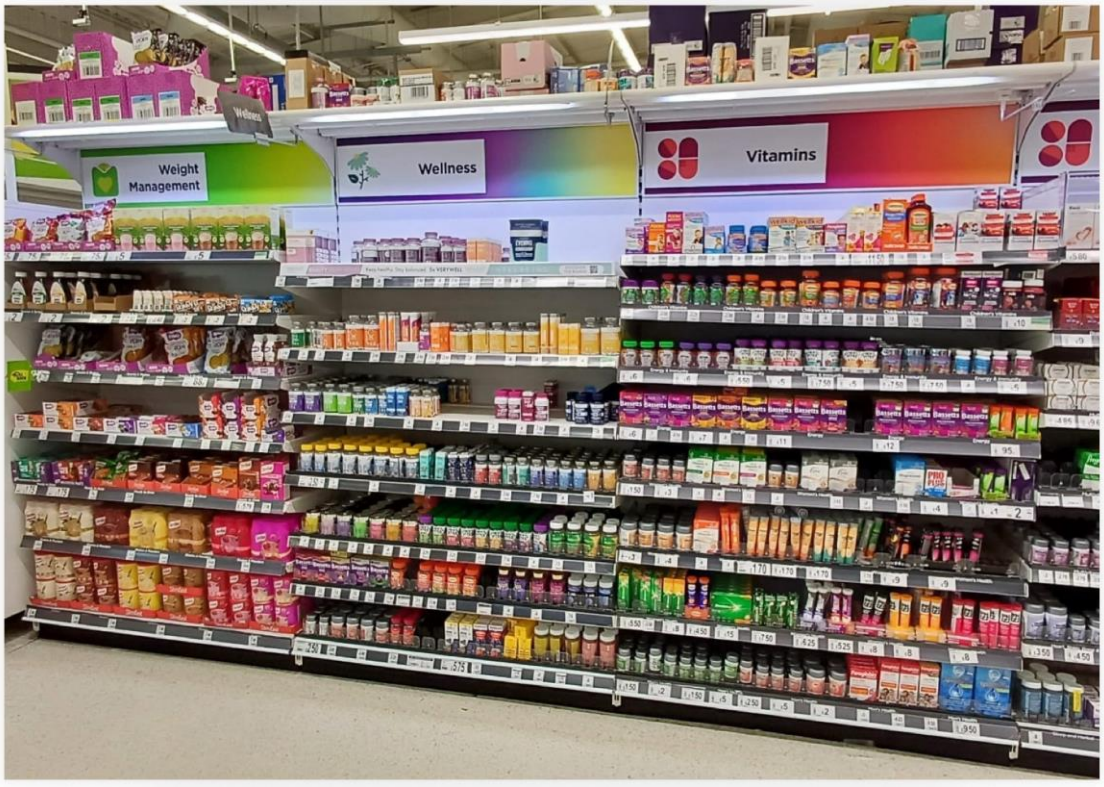
32. Thus the evidence and the exhibits, which were presented without further explanation, were expressly said only to go to the issue of trade channels, and not uses more generally. This was repeated in the written submissions submitted to the Hearing Officer (there being no contested hearing).

33. So I would not have upheld the additional criticisms of the Hearing Officer based on grounds 1(c) to (e). But as noted above, I do have to reassess the issue of similarity anyway.

Similarity of Goods

34. Addressing the issue afresh, Ms. Blythe used the exhibits to Mr Rundle's statement to support the argument that food supplements can be in the form of protein bars, and that these were commonly sold alongside more conventional supplements in leading health food stores such as Holland and Barrett. She also pointed to an exhibit showing the sale of bars alongside supplements in Asda. Examples of some of these materials are shown below.





35. Standing back, and bearing in mind the guidance in *Treat*, whilst I would not have interfered with the conclusion of the Hearing Officer in the absence of any error (and therefore reject the suggestion that the conclusion was irrational), I consider that this is one of those cases where reasonable tribunals can come to different conclusions. Further, although it is not usually open to parties to improve their arguments on appeal (the first instance decision normally being "the first and last night of the show", per Lewison LJ in *FAGE v Chobani* [2014] EWCA Civ 5 at §114), in the light of the error made by the Hearing Officer I benefited from the more focussed submissions made on uses and users than seems to have been made at first instance.

36. For all those reasons I find that there is sufficient overlap between the uses and users of the food supplements listed in class 5 to consider that they are not dissimilar goods to the food bars which are the subject of the Opponent's prior registration. I rely in particular on the fact, as shown in the evidence, that the following goods in the Appealed Goods can be delivered in the form of or are at least similar to food bars: food supplements, nutritional supplements; protein dietary supplements; food supplements for sportsmen; fitness and endurance supplements; dietary supplements for humans not for medical purposes. The evidence shows protein bars being sold in Holland and Barrett, and dietary protein bars being sold in Asda. Further, as Ms. Blythe submitted, there has been encouragement in recent years to consume more protein, and protein bars have become a popular way of supplementing protein intake.

37. Having said that I consider that there is more distance between e.g. vitamin and mineral supplements (as opposed to protein or more general nutritional supplements) and food bars. There was no evidence that vitamins or minerals (as opposed to other supplements) are sold in the form of bars. Ms. Blythe pointed to the use of gummies to deliver vitamins or minerals but these sweet-like products are different to the types of food supplement I have referred to above which are much more likely to be delivered in bar form. I consider that there is sufficient difference in the uses, users, nature, method of presentation and channels of trade such that the following of the Appealed Goods are still dissimilar to the food bars the subject of the Opponent's registration:

> Vitamin supplements; Vitamin and mineral supplements; Multi-vitamin preparations; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Dietary supplements consisting of vitamins.

Likelihood of Confusion

38. The Opponent submitted that if I made a finding about similarity then I should go on and assess the likelihood of confusion based on the other findings of the Hearing Officer, rather than remitting the case to first instance. In the absence of any representation from the Applicant, I agree. It would be much less efficient to remit the issue and raise the prospect of another appeal.

39. As to the other factors, I have no reason to disagree with any of the additional findings of the Hearing Officer, which can be summarised as follows:

    (a) the medium to high visual similarity of the marks: Decision §42;

    (b) the aural identity or high level of similarity of the marks: Decision §43;

    (c) the high degree of conceptual similarity of the marks: Decision §44;

    (d) the medium degree of attention to detail of the average consumer: Decision §34;

    (e) the medium degree of inherent distinctiveness of the Earlier Mark Decision §48;

40. I also bear in mind that for the goods which she did find similar, the Hearing Officer found that there was a likelihood of both direct and indirect confusion: Decision §54.

41. Taking all of this into account, I therefore conclude that there is a likelihood of direct and/or indirect confusion for all of the Appealed Goods which I have held to be similar in class 5.

42. That leaves me with the services in Class 35: Retail services in relation to dietary supplements; Wholesale services in relation to dietary supplements.

43. The Hearing Officer found that retail services in relation to foodstuffs was too similar to food bars to avoid a finding of likelihood of confusion. Although there is more distance between retail services for dietary supplements and food bars, the fact that I have found that there is a likelihood of confusion for the supplements in class 5 means that based upon the Hearing Officer's findings on services (with which I agree) there is also a likelihood of confusion for the goods I have found similar with class 35. Ground 2 of the appeal therefore succeeds.

Result

44. I therefore find that the Applicant's mark may proceed to registration as set out by the Hearing Officer in her Annex 1, but with the amended entries in classes 5 and 35 as follows:

Class 5 Class 32 Nicotine sachets for use as a smoking cessation aid; Dietetic beverages adapted for medical purposes; Dietary supplemental drinks; Vitamin supplements; Vitamin and mineral supplements; Liquid vitamin supplements; Nicotine gum for use as an aid to stop smoking; Mineral dietary supplements; Mineral dietary supplements for humans; Mineral nutritional supplements; Powdered fruit-flavored dietary supplement drink mix; Dietary supplement drink mixes; Powdered nutritional supplement drink mix; Multi-vitamin preparations; Effervescent vitamin tablets; Dietary supplemental drinks; Vitamin drinks; Albumin dietary supplements; Anti-oxidant food supplements; Glucose dietary supplements; Food supplements in liquid form; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Dietary supplements consisting of vitamins; Oral pouches containing taurine; Oral pouches containing caffeine; Oral pouches containing vitamins.

Class 35 Retail services in relation to articles for use with tobacco; Wholesale services in relation to articles for use with tobacco; Retail services in relation to non-alcoholic beverages; Retail services in relation to tobacco products; Retail services in relation to tobacco; Retail services in relation to electronic cigarettes; Retail services in relation to electronic cigarette liquid [e-liquid] comprised of flavorings in liquid form used to refill electronic cigarette cartridges; Retail services in relation to cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; Retail services in relation to chemical flavorings in liquid form used to refill electronic cigarette cartridges; Wholesale services in relation to tobacco products; Wholesale services in relation to tobacco; Wholesale services in relation to electronic cigarettes; Wholesale services in relation to electronic cigarette liquid [e-liquid] comprised of flavorings in liquid form used to refill electronic cigarette cartridges; Wholesale services in relation to cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; Wholesale services in relation to chemical flavorings in liquid form used to refill electronic cigarette cartridges; Retail services in relation to the following goods: Oral nicotine pouches; Retail services in relation to the following goods: Oral energy pouches; Retail services in relation to the following goods: Oral pouches containing taurine; Retail services in relation to the following goods: Oral pouches containing caffeine; Retailing of the following

goods: oral pouches containing vitamins; wholesale services for: Oral nicotine pouches; wholesale services for: Oral energy pouches; wholesale services for: Oral pouches containing taurine; wholesale services for: Oral pouches containing caffeine; wholesale services for: Oral pouches containing vitamins.

Costs

45. As for costs, the Applicant was awarded the sum of £1200 below to reflect its greater measure of success. This award should be set aside in the light of the Opponent's success on appeal. In the end the Opponent has been partially successful but not to the full extent it wished. Further, it brought some of the difficulties on itself, for example by electing only to file limited evidence in reply at first instance. On the appeal, the Applicant has taken no part.

46. Doing the best I can to reflect all these factors both below and on appeal, overall I consider that there should be no order as to costs.

Thomas Mitcheson KC
The Appointed Person
21 April 2026