

BL O/0053/26

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NUMBER 4083145
BY DANIEL PAUL SYKES
TO REGISTER THE TRADE MARK:**

GYM JUICE ENERGY

IN CLASS 5

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 450966
BY THE CORNISH SCRUMPY CO LTD**

BACKGROUND AND PLEADINGS

1. On 2 August 2024, Daniel Paul Sykes (“the applicant”) applied to register in the UK the trade mark shown on the cover page of this decision, under number 4083145 (“the contested mark”). The contested mark was published in the Trade Marks Journal for opposition purposes on 23 August 2024 in respect of the following goods:

Class 5: Nutritional supplements; Fitness and endurance supplements; Dietary supplements promoting fitness and endurance; Powdered nutritional supplement drink mix.

2. On 25 November 2024, The Cornish Scrumpy Co Ltd, (“the opponent”) filed a notice of opposition, opposing the application in full, under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon its United Kingdom Trade Mark (“UKTM”) number 3915204 in respect of a series of two trade marks, namely:

i) **HEALEYS GYM JUICE**

ii) **HEALEY’S GYM JUICE**

Filing date: 24 May 2023

Registration date: 18 August 2023

Goods: For the purposes of these proceedings, the opponent relies upon on the following goods in its opposition, for which the mark is registered, namely:

Class 32: Non-alcoholic beverages; mineral and aerated waters; fruit beverages and fruit juices; syrups, cordials and other preparations for making non-alcoholic beverages; pure fruit juices; blended fruit juices; vegetable juices; vegetable juice beverages; smoothies; fruit smoothies; flavoured water.

3. In its notice of opposition, the opponent claims that the marks are visually and aurally highly similar and that the goods are similar. Furthermore, the opponent claims that the goods of the opposed mark will be seen as being complementary to, and a sub-category of, the goods of the earlier mark. And therefore, there exists a likelihood of confusion on the part of the public, including a likelihood of association.¹
4. The applicant filed a defence and counterstatement denying the grounds of the opposition.²
5. Given the filing dates, the opponent's mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods for which the earlier mark is registered without having to establish genuine use.
6. The opponent is represented by Bryers Intellectual Property Ltd and the applicant is not professionally represented. Neither party chose to file evidence but both parties filed written submissions during the evidence rounds. Both parties were given the option of an oral hearing but neither requested to be heard on this matter and neither party filed written submissions in lieu of a hearing. This decision is taken following a careful review of the papers before me, keeping all submissions in mind.

RELEVANCE OF EU LAW

7. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying

¹ Form TM7, question 9.

² Form TM8, paragraph 8.

assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

DECISION

Section 5(2)(b): legislation and case law

8. Section 5(2)(b) and 5A of the Act is as follows:

“5(2) A trade mark shall not be registered if because—

(a)...

(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.”

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

9. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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 greater 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 might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

10. Pursuant to section 60A of the Act, goods and/or services are not to be automatically regarded as being similar to each other on the ground that they appear in the same class, nor automatically regarded as dissimilar from each other on the ground that they appear in different classes.

11. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

“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.”

12. 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 uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) 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;

(f) 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.

13. Where the goods in the specification of one party are included in a broader term from the other party's specification, those goods are considered to be identical: See *Gérard Meric v OHIM*, Case T-133/05 at [29].

14. Further, in *Kurt Hesse v OHIM*,³ the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*,⁴ the General Court ("GC") stated that "complementary" means:

"82. ...there is 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."

15. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

³ Case C-50/15 P

⁴ Case T-325/06

“12. [...] 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) (IP TRANSLATOR)* [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.”

16. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode Trade Mark*:⁵

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

17. The competing goods are as follows:

Opponent's goods	Applicant's goods
Class 32: Non-alcoholic beverages; mineral and aerated waters; fruit beverages and fruit juices; syrups, cordials and other preparations for making non-	Class 5: Nutritional supplements; Fitness and endurance supplements; Dietary supplements promoting fitness and endurance; Powdered

⁵ BL O/399/10

alcoholic beverages; pure fruit juices; blended fruit juices; vegetable juices; vegetable juice beverages; smoothies; fruit smoothies; flavoured water.	nutritional supplement drink mix.
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Class 5

Nutritional supplements; Powdered nutritional supplement drink mix.

18. In relation to the applicant's '*Nutritional supplements*', the opponent states in its submissions:

"... it is well known that fruit juices and vegetable juices are sources of vitamins and minerals. Accordingly, consumers will often drink vegetable-based and fruit-based beverages as nutritional supplements, to supplement their intake of vitamins and minerals from food".⁶

19. In relation to the applicant's '*Powdered nutritional supplement drink mix*', the opponent states in its submissions:

"It is well known that powdered nutritional supplement drink mixes are often flavoured with fruit, commonly orange-flavoured. Accordingly, these goods of the contested mark are encompassed by the terms 'non-alcoholic beverages' and 'other preparations for making non-alcoholic beverages' at least, of the earlier mark"⁷

20. Nutritional supplements, to my understanding, are products that are intended to supplement a person's diet by providing essential or additional nutrients that may be lacking due to deficiencies, dietary restrictions or a specific health condition.

⁶ Opponent's submissions filed 31 March 2025, paragraph 14.

⁷ Opponent's submissions filed 31 March 2025, paragraph 12.

They come in various forms such as tablets, liquids, gummies and powders that can be mixed with food or liquids. Whilst I agree with the opponent that the fruit juices and vegetable juices in the opponent's specification may be viewed as sources of vitamins and minerals, they are not marketed primarily as a nutritional supplement. In *Altecnic Ltd's* Trade Mark Application, the Court of Appeal ("COA") 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, for example, in the case of an ambiguity in the list of the specification of goods. Bearing in mind the Nice Classification is purely administrative⁸, aside from beers, class 32 essentially covers non-alcoholic beverages and preparations for making non-alcoholic beverages. Although both specifications include terms that relate to the preparation of non-alcoholic drinks, that being '*... other preparations for making non-alcoholic beverages*' in class 5 of the earlier marks and '*Powdered nutritional supplement drink mix*' in class 32 of the contested mark, they do not overlap in purpose, as the term in the opponent's specification is clearly not intended to be a nutritional preparation. Although, I note that there is some generic overlap in method of use between these goods, in that they can all be consumed orally, I find no overlap in nature. The earlier goods are specifically designed to quench thirst and provide hydration and the contested goods aim to maintain, increase or supplement the intake of a particular vitamin, mineral or other substance in the diet, therefore the goods also differ in purpose. I accept that the goods may overlap in trade channels as they may be sold by the same general retailers such as supermarkets but they would be displayed in different areas. Although the goods may be purchased by members of the general public they would be targeted towards a different audience, therefore, I do not consider this is sufficient for a finding of similarity. I see no reason why the competing goods would be in competition with each other or complementary.

21. Accordingly, I find the applicant's "*Nutritional supplements; Powdered nutritional supplement drink mix*" in class 5 to be dissimilar to each of the opponent's goods as relied upon in class 32. However, if I am wrong in my assessment, given the

⁸ See *Mould Pro* decision Case T-794/21 at [22-28].

submissions by the opponent, I would find a very low degree of similarity between the competing goods.

Fitness and endurance supplements; Dietary supplements promoting fitness and endurance.

22. The above goods are products designed to sustain energy, delay fatigue, enhance athletic performance and accelerate recovery during prolonged physical activities, providing specific nutrients to support endurance training. For the reasons provided above in paragraph [21] I note that there is some generic overlap in method of use however, I find no overlap in nature and they differ in purpose, as the earlier goods are specifically designed to quench thirst and provide hydration. Although the contested goods may be sold by fitness professionals through specialist outlets and retailers or online equivalents, the goods will overlap in trade channels as they are also likely to be sold by the same general retailers such as supermarkets, albeit displayed in different areas. The goods may be purchased by members of the general public, however, as considered previously, they are targeted at different audiences therefore I do not consider this is sufficient for a finding of similarity. I see no reason why the competing goods would be in competition with each other or complementary. Accordingly, I find the goods to be dissimilar. However, if I am wrong in my assessment, then I find a very low degree of similarity between these competing goods.

The average consumer and the nature of the purchasing act

23. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

24. The average consumer for many of the goods at issue will be members of the general public. However, I recognise that for some of the goods, the average consumer may also include health and fitness professionals. The goods are likely to be selected from the shelves of a retail store or their online or catalogue equivalents. Visual considerations are, therefore, likely to dominate the selection process. However, I recognise that for some of the goods, they may be purchased after an aural consultation with a health or fitness professional. Consequently, I do not discount that aural considerations will also play a role in the purchasing process.

25. The goods are likely to be reasonably priced and purchased relatively frequently. When purchasing the general consumer goods, factors such as flavour and nutritional properties will still be a consideration. Accordingly, I find that the average consumer will pay a medium degree of attention when purchasing these goods. I recognise that for some of the goods that target specific nutritional deficiencies or goods that enhance fitness performance, the level of attention may be higher than medium due to the health and fitness benefits for the end user.

Comparison of marks

26. It is clear from *Sabel* that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU states at paragraph 34 of its judgment in *Bimbo*, 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 relevant 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.”

27. 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 trade 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.

28. The trade marks to be compared are as follows:

Earlier marks (series of two)	Contested mark
i) HEALEYS GYM JUICE ii) HEALEY'S GYM JUICE	GYM JUICE ENERGY

Overall impression

29. The opponent's mark has been registered as a series of two marks, pursuant to section 41(2) of the Act, comprised of the words (i) 'HEALEYS GYM JUICE' and (ii) 'HEALEY'S GYM JUICE', presented in black upper case letters without any stylisation. The only difference between the two marks is the possessive

apostrophe present only in the second mark. I do not consider that this largely impacts the overall impression of the marks, and my comments refer equally to both marks in the series, unless stated otherwise. The opponent submits that the dominant component of the earlier mark is the term 'GYM JUICE'⁹. I am inclined to disagree with the opponent and find that, the word 'HEALEYS/HEALEY'S' has the most impact. This is because it appears at the beginning of the marks and has no descriptive or allusive qualities. There is a general rule of thumb that the beginnings of marks make more of an impact on consumers than the endings¹⁰. The word "GYM" is not descriptive or allusive of the goods relied upon but given its position in the middle of the mark, it will play a lesser role. The word 'JUICE' is descriptive of some of the relied upon goods, and as such will have less impact and play a much lesser role. However, in my view, it is likely that a significant proportion of consumers will not see the words 'GYM' and 'JUICE' as individual words but as forming a unit. There are no other elements to contribute to the overall impression of the marks.

30. The contested mark consists of the words 'GYM JUICE ENERGY', presented in black, bold upper case letters without any stylisation. There are no other elements to contribute to the overall impression of the mark, which resides in the words themselves.

Visual Comparison

31. Visually, the marks coincide insofar as they share the identical words, 'GYM JUICE', albeit in different positions within the respective marks, positioned at the beginning of the contested mark and at the end of the earlier marks. However, the marks differ in that the contested mark contains the word 'ENERGY' placed at the end of the contested mark and the earlier marks contain the word 'HEALEYS/HEALEY'S' positioned at the beginning of the earlier marks. Accordingly, weighing up the similarities with the differences, I find the respective marks to be visually similar to no more than a medium degree.

⁹ Opponent's submissions filed 31 March 2025, Paragraph 5.

¹⁰ El Corte Ingles, SA v OHIM, cases T-183/02 and T 184/02

Aural Comparison

32. Aurally, the earlier mark would be articulated as 4 syllables, while the contested mark would be voiced as 5 syllables, with the “GYM JUICE” element present in both marks being pronounced identically, in the ordinary way. The marks differ aurally by way of the additional word “HEALEYS/HEALEY’S” present only in the earlier mark and the word “ENERGY” which would be articulated at the end of the applicant’s mark. Considered overall, I find the respective marks to be aurally similar to no more than a medium degree.

Conceptual Comparison

33. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

34. The earlier marks contain the word ‘HEALEYS/HEALEY’S’, which may be understood by some consumers to be a surname, albeit not a common one, followed by the words “GYM JUICE”. The contested mark comprises the words “GYM JUICE ENERGY”. The marks therefore coincide by way of the shared elements ‘GYM JUICE’. These are both ordinary dictionary-defined words that will be well-known to the average consumer. While I consider that the word ‘GYM’ solus will be immediately recognised as an abbreviation of the word gymnasium, and that the word ‘JUICE’ would be recognised as a liquid obtained from or present in fruit or vegetables, in my view, the two word combination would be seen as a unit by a significant proportion of the average consumer. When combined, consumers will perceive the words as referring to liquids that promote physical fitness and health. This shared element in both marks is therefore conceptually identical. I find the additional word “ENERGY” in the contested mark to reinforce the message that the “GYM JUICE” element will support the strength and vitality

required for sustained physical or mental activity, i.e. a liquid which provides the user with energy.

35. Accordingly, the competing marks overlap in the common meaning of the words 'GYM JUICE', but differ, in particular, in the additional word "HEALYS/HEALY'S" which is present only in the earlier mark, resulting in a medium degree of conceptual similarity overall.

Distinctive character of the earlier mark

36. In *Lloyd Schuhfabrik Meyer*, 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 Alternberger* [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)."

37. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it.
38. As the opponent has not filed any evidence to show that the distinctiveness of its mark has been enhanced through use, I have only the inherent position to consider.
39. The earlier series of marks are comprised of the words 'HEALEYS GYM JUICE' and 'HEALEY'S GYM JUICE'. As mentioned previously, the word 'HEALEYS/HEALEY'S' is likely to be understood by a significant proportion of consumers as a surname, although I acknowledge that other consumers may see this element as an invented word. In my view, the HEALEYS/HEALEY'S element is likely to be seen as the 'house' mark, with the less distinctive 'GYM JUICE' element alluding to the goods as liquids that promote physical fitness and health. The word 'HEALEYS/HEALEY'S' is not descriptive or allusive of the goods relied upon, and in my view, even when perceived as a surname, it is still reasonably distinctive.¹¹ Given its relative position in the marks it is my view that the distinctive character of the marks predominantly lies in the word 'HEALEYS/HEALEY'S'. Overall, I find that the earlier marks possess a medium level of inherent distinctive character.

Likelihood of confusion

40. In determining whether there is likelihood of confusion, I must take all of the above factors into account and consider if there is a likelihood of confusion for the average consumer.
41. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. While indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that

¹¹ *Harman International Industries, Inc v OHIM*, Case C-51/09 P

exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective goods and services may be offset by a greater degree of similarity between the marks and vice versa. I must bear in mind the distinctive character of the earlier marks, the average consumer for the goods and services and the nature of the purchasing act. To do so, I must recognise that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

42. Earlier in this decision, I concluded that:

- All of the contested goods were dissimilar to the opponent's goods with the proviso that if this finding was wrong, the respective goods will be similar to only a very low degree;
- Relevant consumers are likely to include members of the general public as well as health and fitness professionals;
- The general public will pay a medium degree of attention during the purchasing process;
- Health and fitness professionals are likely to demonstrate a higher than medium degree of attention during the purchasing process;
- I have concluded that the purchasing process is likely to be visual but do not discount aural considerations;
- The earlier marks enjoy a medium level of inherent distinctive character.
- The overall impression of the earlier marks predominantly lies in the word 'HEALEYS/HEALEY'S', while 'GYM JUICE' plays a lesser role.
- I have found the marks to be visually and aurally similar to no more than a medium degree and in relation to the conceptual comparison, I have found the marks to be conceptually similar to a medium degree.

43. I am reminded that it is the distinctiveness of the common element that is important. In *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, Mr Iain Purvis Q.C.(as he then was), sitting as the Appointed Person said:

“39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

44. Despite the identical words ‘GYM JUICE’ appearing in the respective marks, the earlier marks contain the additional word ‘HEALEYS/HEALEY’S’, which I have found dominates the overall impression of the marks and which is not replicated in the applicant’s mark. I find that when perceiving the respective marks, it is unlikely that consumers will mistake them for each other as the visual differences between the competing marks are more noticeable, given their very different beginnings. This is an important factor, considering that I am of the view that the purchasing process for the goods at issue would be predominantly visual in nature. Furthermore, the visual differences between the marks are further compounded by the presence of the word ‘ENERGY’ at the end of the applicant’s mark, which is not replicated in the earlier marks. Consequently, even in circumstances where the goods may be purchased aurally, it is unlikely that consumers would mistake the marks ‘HEALEYS/HEALEY’S GYM JUICE’ and ‘GYM JUICE ENERGY’ for one another when hearing them or making orders or enquiries. Accordingly, taking all these factors into account, I find that the differences between the competing trade marks are likely to be sufficient to prevent customers, paying at least a medium degree of attention, from mistaking the applicant’s mark for the earlier marks or vice versa. Even when factoring in the principles of imperfect recollection and interdependency, I do not find there to be a likelihood of direct confusion.

45. As I have found no likelihood of direct confusion, I will now go on to consider indirect confusion.

46. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, by Iain Purvis Q.C. (as he then was), as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a subbrand or brand extension (terms such as ‘LITE’, ‘EXPRESS’, ‘WORLDWIDE’, ‘MINI’ etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (‘FAT FACE’ to ‘BRAT FACE’ for example)”.

47. Further, in *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

48. In order to find indirect confusion in this case, it would be necessary to conclude that the average consumer will notice the common elements ‘GYM JUICE’ present in the respective marks, while also recalling the differences between them and assume the marks are from the same or related undertaking. Keeping in mind the global assessment of the competing factors in my decision, and in particular the finding of, at best, only a very low degree of similarity between the goods, it is my view that it is unlikely that the average consumer would assume that there is an economic connection between the parties. I acknowledge that the categories listed by Mr Iain Purvis Q.C. (as he then was) in *L.A. Sugar* are not exhaustive, but I do not see anything which would lead the average consumer into believing that one mark is a brand extension of the other. I consider this to be the case even where the average consumer attaches the same conceptual identity to the “GYM JUICE” element present in both marks. Although I have said that the “HEALEYS/HEALEY’S” element might be seen by some consumers as the “house” mark, to my mind, the consumer would put the inclusion of the same words “GYM JUICE” appearing in different marks on the respective goods at hand down to mere coincidence. Consequently, I find that there is no likelihood of indirect confusion.

Conclusion

49. The opposition under Section 5(2)(b) of the Act has been unsuccessful. Subject to any successful appeal, the application will proceed to registration.

Costs

50. As the applicant has been successful, it is, in principle, entitled to a contribution towards its costs. For parties without professional representation, such costs would be based on £19 per hour,¹² reflecting the number of hours spent on the different stages of the opposition. In a letter to the parties dated 22 April 2025, the Tribunal invited the unrepresented applicant to indicate whether it wished to make a request for an award of costs and, if so, to complete and return the costs pro-forma by **20 May 2025**. The letter stated that “If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded. You must include a breakdown of the actual costs, including accurate estimates of the number of hours spent on each of the activities listed and any travel costs”. As the pro-forma was not returned, and as no official fees have been incurred in defence of the application, I make no order as to costs in this case.”

Dated this 27th day of January 2026

Mrs Joanne Roberts

For the Registrar

¹² As set out in The Litigants in Person (Costs and Expenses) Act 1975 (as amended).

