

O/0095/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004124563

BY ARTISAN GROUP OF BRANDS LIMITED

TO REGISTER THE TRADE MARK:

Little Owl

IN CLASS 33

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 452248

BY DAUPHIN ENTWICKLUNGS-UND BETEILIGUNGS GMBH

BACKGROUND AND PLEADINGS

1. On 14 November 2024, Artisan Group of Brands Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 29 November 2024. The applicant seeks registration for the following goods under the above application:

Class 33 Wine; Grape wine; Sparkling grape wine; Sparkling wine; Red wine; Wines; White wine; Sparkling wines; Dessert wines; Low-alcoholic wine; Alcoholic wines; Still wine; Red wines; Sparkling red wines; White wines; Table wines; Sparkling white wines; Fortified wines; Rose wines; Sweet wines; Wine-based drinks; Natural sparkling wines; Naturally sparkling wines.

2. The application was opposed in full by Dauphin Entwicklungs-und Beteiligungs GmbH (“the opponent”) on 29 January 2025 based upon sections 5(2)(b) and 5(3) of the Trade Marks Act (“the Act”). The opponent relies upon the following trade mark:

BLUE OWL

Comparable UK trade mark (EU) registration no. UK00913527205¹

Filing date 3 December 2014; Registration date 17 March 2015.

Relying upon all of the goods for which the mark is registered, namely:

Class 33 Wine.

3. Under section 5(2)(b), the opponent claims that there is a likelihood of confusion because the marks are highly similar and the goods are identical.

¹ Following the end of the transition period of the UK’s withdrawal from the EU, all EU trade marks (“EUTM”) registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (EU)’ retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

4. Under section 5(3), the opponent claims that the marks are highly similar, the goods are identical, and thus the relevant public “will establish a link between the parties’ marks on the basis that the application will clearly bring to mind the registered mark given the shared distinctive “OWL” element. The opponent claims that the relevant public will believe that there is an economic connection between the parties, that the opponent has a “very strong and well-consolidated reputation” and the applicant’s mark will “take unfair advantage of and will be detrimental to, the distinctive character and repute” of their mark. The opponent claims that use of the “applicant’s highly similar sign will also allow them to free-ride on the strong reputation” of the opponent’s mark, diluting its distinctive character, which will cause damage to its reputation.

5. The applicant filed a counterstatement admitting that the goods covered by both of the parties marks include wine, but denied the rest of the claims made, and subject the opponent’s mark to proof of use.

6. The opponent is represented by Marks & Clerk LLP and the applicant is represented by Baron Warren Redfern. The opponent filed evidence in chief and the applicant filed submissions during the evidence rounds. The opponent also filed evidence in reply. Neither party requested a hearing, however, both parties filed submissions in lieu. I make this decision having taken full account of all the papers.

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 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.

EVIDENCE

8. The opponent’s evidence in chief consists of the witness statement of Jochen Ihring dated 11 June 2025. Mr Ihring is the CEO of the opponent, a position he has held since 3 August 2018. His statement is accompanied by 6 exhibits (EXH1-EXH6).

9. The opponent's evidence in reply includes the witness statement of Jochen Ihring dated 2 October 2025. Mr Ihring's statement is accompanied by three exhibits (exhibits 1-3).

10. The opponent's evidence in reply also includes the witness statement of Megan Rannard dated 6 October 2025. Ms Rannard is a Registered and Chartered Trade Mark Attorney at Marks & Clerk LLP, the representatives of the opponent. Ms Rannard's statement is accompanied by 3 exhibits (MR1-MR3).

11. Whilst I do not propose to summarise them here, I have taken all of the evidence and the parties' submissions into consideration in reaching my decision and will refer to them where necessary below.

DECISION

Section 5(2)(b)

12. Section 5(2)(b) reads 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.”

13. The opponent's mark qualifies as an earlier mark in accordance with section 6(1)(a) of the Act as its filing date is earlier than the filing date of the applicant's mark. As the opponent's mark has completed its registration process more than five years

before the filing date of the mark in issue, it is subject to proof of use pursuant to section 6A of the Act.

Proof of use

14. I will begin by assessing whether there has been genuine use of the earlier mark. The relevant statutory provisions are as follows:

15. Section 6A of the Act states:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

- (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes –

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

16. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier mark is the five years ending on the filing date of the applicants’ mark, i.e. 15 November 2019 to 14 November 2024. By virtue of paragraph 7 of Part 1, Schedule 2A of the Act, use within the EU is relevant for the entirety of the relevant period which falls prior to IP Completion Day (31 December 2020). After that date, only use in the UK will be relevant.

17. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable

number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation

has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

Evidence of use

18. Mr Ihring states that the Dauphin family (Friedrich-Wilhelm Dauphin, his wife Elke Dauphin and daughter Antje Dauphin)² are the founders and owners of the opponent, who own the Allée Bleue estate, which is two neighbouring farm estates combined. These estates were purchased separately in 1999 and 2014. Mr Ihring confirms that one of the wines produced by the Allée Bleue estate is “Blue Owl”, and that all sales of Blue Owl are made with permission of the opponent. The range is comprised of a Merlot 2017, a Pinotage 2021 and a Chardonnay 2023, with the Pinotage and Chardonnay depicted on the alleebileue.co.za website contained in **EXH1** as follows:



19. The alleebileue.co.za website also states that the estate “is now home to vineyards that produce some of the world’s most outstanding and award winning wines”, with the estate being home to exceptional wild life, including the owls that live in the old barn on the farm. This is how the “Blue Owl” wines were named. **Exhibit EXH1** also contains printouts from the dauphin-group.com website which confirms that the estate

² **Exhibit EXH1** page 5

is based in Franschhoek Valley, South Africa, and that the Allée Bleue Pinotage red wine won double gold at its first ever competition (Veritas Award 2002, South Africa).

20. Mr Ihring states that he has provided a selection of invoices contained in **EXH2** showing the sale of Blue Owl wines to distributors in the UK. I note that there are only 2 “tax invoices” contained within this exhibit, dated 19 June 2024 and 9 September 2024, which are accompanied by their export certificates from the Republic of South Africa. The invoices are labelled as being from Allée Bleue Wines (Pty) Ltd. The 2 invoices are addressed to Hard to Find Wines based in Shropshire and Wine & Earth Limited based in Guilford, both of which list the 2021 Blue Owl Pinotage and 2023 Blue Owl Chardonnays in the invoice description. Under the “quantity” column of the Wine & Earth invoice, it lists the number “210.00” next to each wine, and under unit it states, “1 x 750ml”.³ This is supported by the accompanying export certificate which lists the following:

Number of cartons x bottles x volume	35 x 6 x 750ml
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21. This means that 35 cartons (otherwise known as cases) were sold, which contained 6 bottles each, being the volume of 750ml per bottle. This amounts to 210 bottles of each wine being sold, and as there are two wine types, the invoice shows a total sale of 420 bottles.

22. Under the “quantity” column of the Hard to Find Wines invoice, it lists the number “30.00” next to each wine, and under unit it states, “6 x 750ml”.⁴ This is supported by the accompanying export certificate which lists the following:

Number of cartons x bottles x volume	30 x 6 x 750ml
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23. This means that 30 cartons (otherwise known as cases) were sold, which contained 6 bottles each, being the volume of 750ml per bottle. This amounts to 180 bottles of each wine being sold, and as there are two wine types, the invoice shows a

³ This means that each unit is one bottle of 750ml wine.

⁴ This means that each unit is six bottles of 750ml wine.

total sale of 360 bottles. However, I note that the price of the bottles are redacted on both of the invoices (and no prices are listed on the export certificates) and therefore I am unable to determine what price these goods were sold for.

24. Mr Ihring states that **EXH4** contains examples of online listings of UK retailers for the Blue Owl range. This exhibit contains a proportion of screenshots from Wine & Earth and Hard to Find Wine's websites which only show the printout date of 28 May 2025 (falling after the relevant period). However, it also contains screenshots from both websites dated 8 September 2024 and 15 January 2025 which show the above Blue Owl Chardonnay 2023 and Blue Owl Pinotage 2021, being sold for £12 or £12.99.

25. As rightly noted by Mr Ihring (and the applicant in its written submissions), invoices from the EU predating IP Completion Day (31 December 2020) can be taken into account when determining whether the comparable mark has been used within the proof of use period. On this basis, he has provided example of invoices showing the sale of its Blue Owl wines in Denmark, the Czech Republic and the Netherlands contained in **exhibit EXH3**. I note that this exhibit contains 3 invoices (one addressed to each country) which are dated 22 November 2019, 25 November 2019 and 3 July 2020. The Denmark invoice shows the sale of 12 Blue Owl Merlots 2017. The Czech Republic invoice shows the sale of 60 Blue Owl Merlots 2017 and 30 Blue Owl Chardonnay's. The Netherlands invoice shows the sale of 240 Blue Owl Chardonnay 2019 and 360 Blue Owl Merlot 2018. Again, I note that the price of the bottles are redacted on all of the invoices and therefore I am unable to determine what price these goods were sold for. I also note that the invoices are labelled as being from ALLÉE BLEUE International GmbH & Co, and that all of the invoices clearly use the following marks:



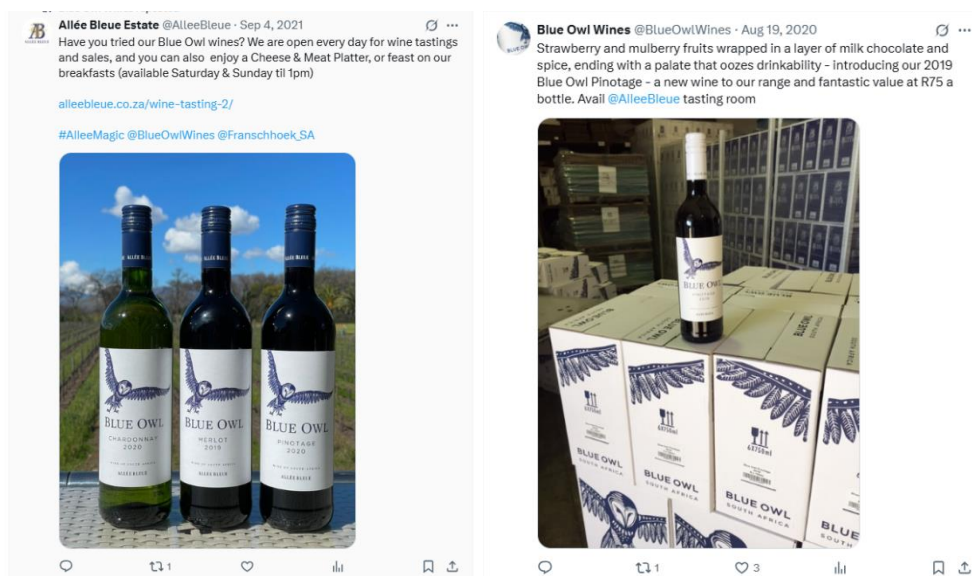
26. **Exhibit EXH5** contains an award brochure from 2021 by Veritas. In his witness statement, Mr Ihring confirms that the Veritas Awards “is the longest running and most prestigious wine and brand competition in South Africa”. The following awards are listed in the exhibit for the Allee Bleue wines:

ALLEE BLEUE WINES		
G	Allée Bleue Old Vine Pinotage	2018
SO	Allée Bleue L'Amour Toujours	2016
S	Allée Bleue Brut Rosé	2015
S	Allée Bleue Isabeau Chardonnay	2020
S	Allée Bleue Shiraz	2019
B	Allée Bleue Blue Owl Pinotage	2020
B	Allée Bleue Cap Classique Brut	2015
B	Allée Bleue Chenin Blanc	2020

27. G stands for gold award, SO stands for silver outstanding, S stands for silver and B stands for bronze.

28. I also note that the aforementioned screenshots dated 28 May 2025 in **EXH4** lists the Blue Owl Unwooded Chardonnay as being awarded the Veritas 2023 vintage bronze and the Blue Owl Pinotage 2021 being “awarded silver from the Veritas”.

29. **Exhibit EXH6** contains screenshots from the “Blue Owl” social media pages. The following posts again clearly depict the wine bottles/labels as show in paragraph 18 above:



Blue Owl Wines @BlueOwlWines · Jul 21, 2020

A beautiful Pinotage is joining our collection - we're labelling next week and can't wait to release it!

It will be available in select retail stores and via our home @AlleeBleue

#Pinotage #BlueOwlWines #ForReleaseSoon



0 1 2 1

Allée Bleue Estate @AlleeBleue · Oct 14, 2022

Treat yourself to some fantastic wines at great prices with our Case Specials including our Blue Owl Pinotage - valid for October & November while stocks last.

Order direct via sales@alleebleue.com or from our Tasting Room

For more details: alleebleue.co.za/buy-now-for-th...

0 1 2 1

30. The above screenshots show that 2 Twitter accounts were used to advertise the opponent’s wine, those being “Allée Bleue Estate” (@AlléeBleue) and “Blue Owl Wines” (@BlueOwlWines). In the undated screenshot of the “Blue Owl Wines” profile, it states that it is a part of the @AlléeBleue Wine Estate family, and it shows that the profile has 141 followers. I have also been provided with an undated screenshot of the “Allée Bleue Estate” page which confirms that it has 2,556 followers. On the basis that these screenshots are undated, I am unable to determine how many followers the pages had during the relevant period. Nevertheless, I also note that for all the Twitter posts for both pages, the maximum user engagement shown is 3 likes and one repost. On the Facebook page screenshots that have been provided within the same exhibit, user engagement is also low, with some of the posts either receiving none or only one like, for example:

31. The above post which is dated 7 November 2023 confirms that its Chardonnay and Pinotage have received the awards, albeit I have not been provided with any further information such as whether these South African awards are known to consumers in the EU and UK.

32. I bear in mind that the applicant filed written submissions during the evidence rounds criticising the opponent's evidence in chief. In regard to the invoice evidence, paragraph 3.6 states that;

“it is denied that the invoices in Exhibit 2 are probative for numerous reasons. Firstly, and most importantly, the invoices are from the company Allee Bleue Wines (Pty) Ltd., and not the Opponent. They cannot therefore constitute evidence of the use of the Opponent's Sign by the Opponent. Dr Ihring states in paragraph 4 that sales of Blue Owl wine produced at the Allee Bleue estate are made “with the permission of” his company. However, no evidence of any trade mark licence has been produced, and no information about the commercial relationship between the Opponent and Allee Bleue Wines (Pty) Ltd. has been provided. In the circumstances it would not be safe to consider that this evidence properly ties back to the Opponent itself. It is quite possible that the Opponent has not granted Allee Bleue Wines (Pty) Ltd. the proper authority to use the trade mark, as would be required for this evidence to be applicable.”

33. In addition to this, the applicant states that Allee Bleue Wines (Pty) Ltd is based in South Africa (as confirmed by the export certificates that accompany the invoices), and therefore “trade mark use in fact took place in South Africa, where the seller is situated and where the sale was actually made, and not in the UK as such”. Furthermore, the applicant has highlighted other deficiencies with the UK invoices such as;

- a) They do not represent the extent of sales required to demonstrate legitimate proof of use of a UK mark.
- b) While the first invoice relates to the sale of 360 bottles and the second relates to the sale of 420 bottles, the cost of the bottles of wine has been redacted.

- c) “The size of the market for wine in the UK is hard to determine, but estimates put it at around 1.2 to 1.4 billion bottles a year, with a value of approximately £14.5 billion. In this context a mere 780 bottles is negligible” and not enough to maintain a share in the market.
- d) The number of bottle sales is “so small in the context of the whole wine market as to be meaningless”.
- e) The invoices are only for two customers which “falls far short of demonstrating use in the UK as a whole” and the “territorial extent of this use is therefore grossly insufficient”.
- f) The two customers are wine wholesalers and there is no information about if these bottles of wine were sold onto the retail market to actual customers.
- g) The two invoices are dated June and September 2024 which is “a very narrow timeframe and demonstrates very infrequent use of the mark”.

34. In regard to the EU invoices, the applicant highlights that these were made from a company called Allee Bleue International GmbH & Co KG in Germany, and not the opponent. Therefore, again, the applicant highlights that Dr Ihring makes no mention of the company Allee Bleue International GmbH & Co in his witness statement, and no evidence of any trade mark licence has been produced and thus it would not be safe to consider that this evidence properly ties back to the opponent itself. The applicant has also highlighted other deficiencies with the EU invoices, such as:

- a) While the first invoice shows the sale of 90 bottles of Blue Owl, the second shows 12 bottles and the third shows the sale of 600 bottles, the cost of these bottles have been redacted.
- b) An estimate size of the market “for wine in the EU is hard to determine, but estimates put it at about 21.5 billion bottles, with a value of approximately £170 billion. In this context a mere 702 bottles is negligible” and not enough to maintain a share in the market.
- c) The number of bottle sales is “so small in the context of the whole wine market as to be meaningless”.
- d) All of the sales are from “the company [based] in Germany. It is well-established that sales in just one EU member state do not constitute sufficient use of a trade mark in the EU as a whole”.

- h) All of the customers are wine wholesalers and there is no information about if these bottles of wine were sold onto the retail market (such as off-licences for example) to actual customers.
- e) While the invoices are dated between November 2019 and July 2020, “it spans a very narrow timeframe and demonstrates very infrequent use of the mark”.

35. While the applicant acknowledges that the aforementioned invoices were described as a “section” or “examples of”, it is highlighted that there is no overarching information about the total number of bottles of Blue Owl wine sold in the EU or UK.

36. In response to the applicant’s criticisms, Mr Ihring provided **exhibit 1** accompanying his second witness statement. He states that this contains an extract from the German commercial register for the company Allee Bleue International GmbH & Co KG to show that Mr Friedrich-Wilhelm Dauphin is a limited partner and director of this company. Antje Dauphin is also listed within the document as managing director. Furthermore, I have been provided with an extract from the German commercial register for the company ALLÉE BLEUE International GmbH & Co. KG in **exhibit MR2**. This lists Friedrich-Wilhelm Dauphin and Antje Dauphin as limited partners of the company.

37. Moreover, at paragraph 5 of Mr Ihring’s witness statement, he confirms that;

“All of the Allee Bleue Companies (which include all the relevant entities referenced in the 11 June Statement and the contents all corresponding exhibits) and Dauphin Entwicklungs- u. Beteiligungs-GmbH operate under common control and, for the avoidance of doubt, all sales of the Blue Owl product range by the Allée Bleue companies are made with the express permission of My Company.”

38. This is further supported by **exhibit MR1** of Ms Rannard’s witness statement. This contains a “register information sheet” which shows that Mr Friedrich Dauphin and Ms Antje Dauphin are Directors of Allée Bleue Wines (Pty) Limited and Allée Bleue Equity GmbH & CO KG is a shareholder of this company. Albeit I note that Ms Rannard has

not confirmed where this document comes from, and she only states that it is from the “relevant commercial register”.

39. Mr Ihring has also provided evidence at **exhibit 2** which contains a singular order and delivery report from Hard to Find Wines showing the sale of 3 bottles of Blue Owl Pinotage on 23 August 2024.⁵ The invoice is heavily redacted and therefore it does not show the price of the goods, nor the location of the customer.

40. Lastly, **exhibit 3** contains an itinerary from Wine & Earth dated “Thursday 24/10” and “Friday 25/10” which Mr Ihring confirms pertains to an event whereby Blue Owl products were exhibited to its retail customers in October 2024. He also states that the itinerary of the event shows the different customers across the UK who took part in the event. I note that the document lists the name of 7 “prospect” customers, with only two of their locations being listed, both of which were based in Surrey.

Assessment of genuine use

41. As far as the form of the mark is concerned, I am satisfied that the mark has been used as registered in the invoice and website evidence. For the sake of completeness, the evidence above also shows the words “BLUE OWL” presented in a standard navy typeface alongside a navy owl device element on the opponent’s bottle of wines. However, the stylisation is very minimal and does not alter the distinctive character of the opponent’s mark.⁶ The navy owl device simply depicts the meaning of the words “BLUE OWL” which are clearly visible and still continues to indicate origin.⁷ Therefore it is acceptable variant use.

42. I will now consider whether the evidence shows that the earlier mark has been genuinely used.

43. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows

⁵ It also shows the sale of 3 other wines but these are not labelled as Blue Owl.

⁶ *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19

⁷ *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, paras 31-35

use by itself.⁸ As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as “warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.

44. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

“22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

45. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed

⁸ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘*show*’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

46. The case law summarised in the passage from *easygroup* quoted above makes it clear that real commercial exploitation of the trade mark must be shown. Even in a case where the use is not sham, i.e. it is not use engineered solely to preserve the trade mark registration, the use must be more than trivial if it is to be considered genuine. An example of this can be seen in *Memory Opticians Ltd’s Application*, BL O/528/15, where the Appointed Person, Professor Ruth Annand, upheld the decision to revoke the protection of the mark STRADA on the grounds that it had not been put

to genuine use within the requisite 5-year period. There had in fact been sales of goods bearing the mark, but these were very low in volume (circa 40 pairs of spectacles per year) and all the sales were local, from 3 branches of an optician. There was no advertising of the goods under the mark, and the evidence indicated that they were only displayed in-store on occasion. The mark was said to have been applied to the goods via a sticker applied to the arms of a dummy lens. This level of use was held to be insufficient to create or maintain a market under the mark. Consequently, it was not genuine use.

47. Firstly, as noted above, the applicant has highly criticised the UK and EU invoice evidence on the basis that they are from the companies Allée Bleue Wines (Pty) Ltd or ALLÉE BLEUE International GmbH & Co rather than being issued by the opponent. However, the opponent has provided sufficient evidence in response to this, to show that there is an economic connection between these companies and Mr Ihring has clarified in both of his witness statements that the companies listed on the invoices had the express permission from the opponent to make sales under the BLUE OWL mark. As highlighted by section 6A(3) of the Act, use of an earlier mark can be with the consent of the proprietor (in this case the opponent), and the narrative evidence confirms that the companies had permission from the opponent. Therefore the invoice evidence can be used to establish and show that sales were made by the opponent during the relevant period.

48. Secondly, where proof of use is required, it is typical to see evidence such as turnover figures and invoices showing the sale of its goods to distributors and/or UK customers. While I have clearly been provided with the above sample of invoices, I note that the applicant has argued that the trade mark use took place “where seller is situated and where the sale was actually made, and not in the UK as such”. In response to this, the opponent claims that while the opponent is based in South Africa, the invoices show that its sales were made to customers in the EU and UK which constitutes as genuine use in those regions. I agree with the opponent that as per the invoice evidence provided, it clearly shows that bottles of its Blue Owl Chardonnay and Pinotage were sold to distributors in the EU and UK. The words “Blue Owl” appear within the invoices themselves, and the dated social media and website evidence show that the bottles clearly affixed a variation of the Blue Owl mark to the goods.

However, I bear in mind that the invoice evidence itself is extremely limited. I have been provided with, in total, 5 invoices to distributors based in the UK (Shropshire and Guilford), Denmark, the Czech Republic and the Netherlands, which are dated between 22 November 2019 to 3 July 2020 and 19 June 2024 to 9 September 2024. The invoices as a collective show 1,482 bottles of wine had been sold, albeit the price of these goods were redacted on the invoices.

49. As noted above, the applicant stated that the territorial extent of use of the opponent's mark is "grossly insufficient". However, the opponent submits that the sale of its goods to UK-based distributors would result in sales to individual customers in the UK, and that "it would be commercially unreasonable to expect the Opponent to have distributors based in all regions of the UK". While I appreciate that the opponent's distributors may have sold its goods to customers geographically spread across the UK, I have no supporting evidence to show this. I have no narrative evidence to confirm if the distributors sold its goods to large supermarkets or small convenience stores located across or in only one region of the UK, albeit it appears from the opponent's aforementioned submissions that its distributors may have only sold its wine to "individual customers". This is supported by the singular invoice provided at **exhibit 2** showing the sale of its Blue Owl Pinotage, which, as noted above, has been heavily redacted. Consequently, I am only able to ascertain that 3 bottles were sold to one customer on 23 August 2024. While it may be reasonable to infer that it is a member of the general public purchasing this item rather than a distributor (due to the low quantity of bottles being purchased), all of their information is redacted, including the whole of their address, and thus I am unable to determine if this customer was based in the UK.

50. As highlighted by the applicant, I have not been provided with any sales figures (or a breakdown of such figures via the types of wine that they sell), which is plainly information that should have been available and relatively easy to provide. Moreover, as the EU and UK invoices are redacted, and I have not been provided with any price lists for the opponent's goods during the relevant period, I am unable to determine the turnover generated from the invoices before me. However, the only figure I am able to calculate is the turnover made from the 3 bottles of Pinotage sold by Hard to Find Wines, contained in the invoice dated 23 August 2024. This is on the basis that the

example online listings from Hard to Find Wines dated 8 September 2024 shows that “Blue Owl Pinotage 2021” was being sold for £12.99. It is therefore likely that the sale of the 3 bottles amounted to £38.97.

51. Taking all of the above into account, I find that there is very little evidence of activity in this case. I have not been provided with the opponent’s annual turnover or its marketing expenditure. I also note that the scale, frequency and territorial extent of the use of the opponent’s marks in the EU and UK (based on the invoice evidence) is clearly limited, and these are all vital factors in establishing genuine use. Albeit the invoices show that sales were made in Denmark, the Czech Republic and the Netherlands, there is only one invoice per country, and whilst the invoice evidence for the UK pertains to two locations, I still consider that the invoices as a whole are geographically limited. Furthermore, the opponent has not provided any market share figures. I note that whilst the applicant has provided an approximate market share for both territories in paragraph 33(c) and 34(b), even without this, I would have nevertheless concluded that the size of the wine market in both the UK and EU is very large. Therefore, based on the bottle numbers sold within the invoice evidence before me, that being 1,482, I find that the opponent’s share would only amount to a very small proportion of the wine market in both territories.

52. I also bear in mind that the other material filed by the opponent does not sufficiently show that there has been a real attempt to exploit the mark in the sector. The only evidence of marketing that I have been provided, namely the social media evidence, not only shows very low engagement, but I am unable to determine how many EU and UK users followed the pages or were exposed to the posts. Whilst the itinerary evidence shows that Wine & Earth engaged with 7 prospect customers in October 2024, there is no accompanying evidence to show whether the events resulted in any sales of Blue Owl wine. I therefore find that the remaining evidence lacks important details such as how many UK consumers were exposed to the goods and the mark.

53. Consequently, taking all of the above into account, I find that the evidence fails to show real commercial exploitation of the mark to create and maintain a share of the EU or UK market for the given goods. I find that the evidence is insufficient to

demonstrate genuine use, and therefore, the opponent is unable to rely upon its UK00913527205 as an earlier mark under section 5(2)(b).⁹

54. However, in the event I am wrong in my finding, and the sale of 1,482 bottles of wine in the EU and UK during the relevant period is enough to establish genuine use, I will proceed with the rest of the decision as if the opponent had established use for the full breadth of their specification, on the basis that its Chardonnay and Pinotage goods would clearly be described by the average consumer as “wine”.¹⁰

Section 5(2)(b) - case law

55. In making this decision, I bear in mind the following principles gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

⁹ Section 5(3) also relies on the opponent having an earlier trade mark. Therefore, as the opponent has failed to establish use of its earlier mark, UK00913527205 may not be relied upon under section 5(3) either. However, for the sake of completeness, I shall nevertheless deal with the matter of reputation later within the section 5(3) part of my decision.

¹⁰ *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834

- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public 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

56. The applicant's goods are listed in paragraph 1, and the opponent's goods are listed in paragraph 54 of this decision.

57. In *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM)*, Case T-133/05, the General Court ("GC") stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

58. All of the applicant's goods fall within the broader category of "wine" in the opponent's specification. Therefore, the parties' goods are identical on the principle outlined in *Merici*.

The average consumer and the nature of the purchasing act

59. 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 (as he then was) 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.”

60. The average consumers for the goods will be adult members of the general public over the age of 18. The cost of the goods in question is likely to vary considerably, however, overall it is likely to be relatively low. The majority of the goods will be purchased relatively frequently. The average consumer will take various factors into consideration such as the origin of the goods, the cost, flavour and alcohol percentage. I therefore find that a medium degree of attention will be paid during the purchasing process.

61. The goods are likely to be purchased by self-selection from the shelves of retail outlets such as supermarkets and off-licences, and their online equivalents. They are also likely to be purchased at wine retailers or wholesalers. Wine can also be sold in bars and restaurants, being displayed behind the counter or on a drink’s menu. Visual considerations are, therefore, likely to dominate the selection process. However, I do not discount that there will also be an aural component to the purchase given that the goods could be verbally ordered at a table or bar, or if stocked behind a counter, the average consumer may have to ask the sales assistant for them.

Comparison of the trade marks

62. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) 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 stated, at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall

impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

63. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

64. Therefore, the respective trade marks are shown below:

Opponent's mark	Applicant's mark
BLUE OWL	Little Owl

65. The opponent's word mark consists of the ordinary dictionary words "BLUE OWL". The applicant's word mark consists of the ordinary dictionary words "Little Owl". In its submissions in lieu, the opponent states that the word "OWL" is the distinctive and dominant element of both marks on the basis that the words "BLUE" and "Little" are widely used adjectives in the English language, and are less likely to be considered by consumers to indicate a source of commercial origin. The opponent also submits that they play a lesser role on the basis that these elements describe a characteristic of the owl. To support this, the opponent has referred to a previous case of the Tribunal whereby a Hearing Officer found that "MARY" played a slightly more dominant role in the marks "LOST MARY" and "LOVE MARY", as the words lost and love described the state that Mary was in.¹¹

66. I bear in mind that I am not bound by the decisions of previous Hearing Officers, and in this instance, I do not agree that the word "OWL" plays a greater role in the overall impression of the mark. Whilst it is clear the words "BLUE" and "Little" describe

¹¹ BL O/0747/25

a characteristic of the owl, I do not believe that it logically follows that they should play a slightly lesser role. This is on the basis that both elements form a unit that are imperative to one another, it conveys to us that “the owl is the colour blue” or that “the owl is little”. While I appreciate that the words blue and little are “describing” the owl, it is important to make a distinction between this and if the words “BLUE” and “Little” were descriptive of the goods themselves. If the words “BLUE” and “Little” were descriptive of wine, then they would consequently play a lesser role in the overall impression and would not be indicative of commercial origin. However, to describe the owl (whether it is blue or little) is an integral part of the mark, which contributes to it visually, aurally and indeed conceptually. I also bear in mind that the beginning of the mark is a position to which the average consumer usually pays more attention.¹² Therefore, taking all of the above into account, I find that the overall impression of the parties marks lies in the combination of the elements BLUE and OWL/ Little and Owl.

67. Visually, the marks coincide in the word “OWL” at the end of the marks. This clearly acts as a visual point of similarity. However, the opponent’s mark starts with the word “BLUE” and the applicant’s mark starts with the word “Little”, neither of which are visually similar and therefore act as visual points of difference. Consequently, I find that the marks are visually similar to a medium degree.

68. Aurally, the words “BLUE” and “Little” at the beginning of the parties’ marks will be given their ordinary dictionary pronunciation. These words are aurally dissimilar. However, the marks will overlap in the identical pronunciation of the word “OWL” at the end of the marks. I therefore find that the marks are aurally similar to a medium degree.

69. Conceptually, the opponent’s mark evokes the meaning of an owl (which is a bird of prey) that is the colour blue. The applicant’s mark evokes the meaning of an owl that is small in size (as denoted by the word “little”). Therefore as the marks overlap in the concept of an owl, I consider that they are conceptually similar a medium degree. However, I note that the words “BLUE” and “Little” act as a conceptual point of difference.

¹² *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

Distinctive character of the earlier trade mark

70. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, 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 promotion of 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).”

71. 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 services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

72. I note that within its counterstatement, the applicant states that they had undertaken an assessment of the UK Trade Marks Register, in particular looking at the number and scope of registrations in class 33 which use the word OWL. The

applicant states that a search of the register shows that “there are some 32 registrations in total which include the word OWL for alcoholic beverages (which includes wine/wines) (including the Earlier Mark and the Mark) and of these registrations, 11 make specific reference to wine and wines”. A list of these are included in a table at paragraph 9 of the applicant’s counterstatement, which include the marks “Snow Owl”, “White Owl” and “Laughing Owl”, for example. The applicant states that this search supports their position that “the word OWL does not serve to indicate the source of origin” because multiple marks on the register contain the word “OWL” for wine goods.

73. In *Zero Industry Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-400/06 the General Court (“GC”) stated that:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR II-4865, paragraph 68, and Case T-29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II-5309, paragraph 71).”

74. The mere fact that there may be multiple marks that contain the word “OWL” being used in the UK for class 33 wine goods is not relevant to my assessment. I have no evidence of how (if at all) these marks have been used in practice. This submission, therefore, does not assist the applicant.

75. I will now assess the inherent distinctive character of the opponent’s mark. As highlighted above, the opponent’s mark is comprised of the ordinary dictionary words

“BLUE OWL”. This evokes the meaning of an owl that is the colour blue. It is neither allusive or descriptive of the goods and therefore I find that it is inherently distinctive to a medium degree.

76. I will now assess whether the evidence filed by the opponent is sufficient to demonstrate enhanced distinctiveness. The relevant market for assessing this is the UK market.

77. As noted above, the opponent’s evidence is limited. I have not been provided with any annual turnover figures or marketing expenditure. While I have been provided with two invoices from the opponent to its distributors to show the sale of 780 bottles of wine in the UK, I note that the amount generated from these sales have been redacted. I also note that these sales are not geographically spread as they were only distributed to Shropshire and Guilford, and I have not been provided with any information in regard to any onward sales of the wines. Moreover, the only evidence which can be used to generate a sales figure for the opponent is the invoice dated 23 August 2024 from its distributor Hard to Find Wines. While the customers information (including their location) is redacted, it shows the sale of 3 bottles of Blue Owl Pinotage 2021. The invoice amount is also redacted. However, using the example online listings from Hard to Find Wines dated 8 September 2024 and 15 January 2025, which shows this wine for sale at £12.99, I am able to determine that the invoice was likely to amount to £38.97. The remaining evidence such as the social media screenshots which are dated before the relevant date has shown very low engagement (with the most likes generated on a post being 3), and I am unable to determine how many UK users were exposed to, or liked the posts. The opponent has also not provided evidence of its market share, and based on the sales figures I have deduced, I find that it would only amount to a very small proportion of the wine market (which I consider to be a large sector). Therefore, taking all of the above into account, I do not consider the evidence sufficient to establish enhanced distinctiveness.

Likelihood of confusion

78. 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 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 trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact 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.

79. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually, aurally and conceptually similar to a medium degree.
- I have found the opponent's earlier mark to be inherently distinctive to a medium degree.
- I have identified the average consumer as adult members of the general public who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process for the wine goods.
- I have found the parties' goods to be identical.

80. Taking all of the above factors listed in paragraph 79 into account, and even bearing in mind the principle of imperfect recollection, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other.

81. As noted above, the beginning of the marks tend to make more of an impact than the ends, and the average consumer will be paying a medium degree of attention when

selecting the goods. Therefore, I do not consider that the average consumer would misremember the words “BLUE” or “Little” at the beginning of the parties’ marks, which not only contributes equally to their overall impressions (alongside the word “OWL” at the end of the marks), but are visually, aurally and conceptually different to one another. Consequently, I do not consider there to be a likelihood of direct confusion between the parties’ marks, even in respect of its identical goods.

82. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C. sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10:

“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 sub-brand 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)".

83. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor Q.C. (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.

84. As highlighted above, Mr Purvis Q.C. in *L.A. Sugar Limited* sets out that there are three main categories of indirect confusion, and that indirect confusion 'tends' to fall in one of them. I note that in its submissions in lieu, the opponent has stated that "there is a clear risk of indirect confusion given that the marks in question share the identical distinctive "OWL" element. I therefore find that they are referring to category (a).

85. Category (a) is where indirect confusion might arise where the common element is so strikingly distinctive that the average consumer would assume that no-one else, but the brand owner, would be using it. However, in this instance, I do not consider that the ordinary dictionary word, OWL, which has a recognisable meaning to the average consumer, is so strikingly distinctive that the average consumer would think that no-one else but the opponent would use it. As established above, the opponent's mark is inherently distinctive to a medium degree, which has not been enhanced. Therefore, category (a) is not satisfied.

86. For the sake of completeness, I will also assess whether indirect confusion might arise under categories (b) and (c).

87. Category (b) from *L.A. Sugar* is where the later mark simply adds a non-distinctive element to the earlier mark. For this category to be satisfied, the opponent's mark as a whole, that being "BLUE OWL", would need to be reproduced, with an addition of a non-distinctive element. However, in this case, it is not. Therefore, this category is also not satisfied.

88. Lastly, category (c) is where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension. In this case, the word "OWL" in both marks are preceded with either the words "BLUE" or "Little". I do not consider that changing the word "BLUE" to "Little", or vice versa, is logical, nor consistent with a brand extension. Firstly, as highlighted above, the words "BLUE OWL" and "Little Owl" play an equal role in the overall impressions of the parties' marks. Secondly, whilst the words "BLUE" and "Little" are both used to describe the "owl", they are different types of descriptors; one is commenting on the colour of the owl and the other is commenting on the size. I therefore consider that the applicant's mark is a step too-far removed from being an obvious or logical brand extension, or a logical sub-brand of the opponent's mark. I therefore do not consider that the third category is satisfied.

89. I bear in mind that the examples above set out by Mr Purvis Q.C. are not exhaustive. However, I do not consider that there are any other logical examples of how the applicant's mark could be indirectly confused with the opponent's and the opponent has not suggested any. I consider that having noticed that the trade marks are different, I see no reason why the average consumer would assume that they come from the same or economically linked undertakings. As highlighted above, the marks are not natural variants or brand extensions of each other. Consequently, I consider there is no likelihood of indirect confusion.

90. The opposition under section 5(2)(b) fails.

Section 5(3)

91. Section 5(3) of the Act states:

“5(3) A trade mark which –

(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

92. Section 5(3A) of the Act states:

“Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected.”

93. The relevant case law can be found in the following judgments of the CJEU: Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Adidas-Salomon*, Case C-487/07, *L’Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora* and Case C383/12P, *Environmental Manufacturing LLP v OHIM*. The law appears to be as follows.

a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors*, paragraph 24.

(b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors*, paragraph 26.

(c) It is necessary for the public when confronted with the later mark to make a link with the earlier reputed mark, which is the case where the public calls the earlier mark to mind; *Adidas Saloman*, paragraph 29 and *Intel*, paragraph 63.

(d) Whether such a link exists must be assessed globally taking account of all relevant factors, including the degree of similarity between the respective marks and between the goods/services, the extent of the overlap between the relevant consumers for those goods/services, and the strength of the earlier mark's reputation and distinctiveness; *Intel, paragraph 42*.

(e) Where a link is established, the owner of the earlier mark must also establish the existence of one or more of the types of injury set out in the section, or there is a serious likelihood that such an injury will occur in the future; *Intel, paragraph 68*; whether this is the case must also be assessed globally, taking account of all relevant factors; *Intel, paragraph 79*.

(f) Detriment to the distinctive character of the earlier mark occurs when the mark's ability to identify the goods/services for which it is registered is weakened as a result of the use of the later mark, and requires evidence of a change in the economic behaviour of the average consumer of the goods/services for which the earlier mark is registered, or a serious risk that this will happen in future; *Intel, paragraphs 76 and 77* and *Environmental Manufacturing, paragraph 34*.

(g) The more unique the earlier mark appears, the greater the likelihood that the use of a later identical or similar mark will be detrimental to its distinctive character; *Intel, paragraph 74*.

(h) Detriment to the reputation of the earlier mark is caused when goods or services for which the later mark is used may be perceived by the public in such a way that the power of attraction of the earlier mark is reduced, and occurs particularly where the goods or services offered under the later mark have a characteristic or quality which is liable to have a negative impact of the earlier mark; *L'Oreal v Bellure NV, paragraph 40*.

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation

and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora*, paragraph 74 and the court's answer to question 1 in *L'Oreal v Bellure*).

94. The conditions of section 5(3) are cumulative. Firstly, the opponent's and applicant's mark must be identical or similar, and I have discussed their level of similarity in paragraphs 67 to 69 above. Secondly, the opponent must show that its earlier mark has achieved a level of knowledge/reputation amongst a significant part of the public. Thirdly, it must have established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the opponent's mark being brought to mind by the later mark. Fourthly, assuming that the first, second and third conditions have been met, section 5(3) requires that one or more types of damage claimed will occur. It is unnecessary for the purposes of section 5(3) that the goods be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks. The relevant date for the assessment under section 5(3) is the date of application of the applicant's mark i.e. 14 November 2024.

Reputation

95. In *General Motors*, Case C-375/97, the CJEU held that:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

96. In determining whether the opponent has demonstrated a reputation for the goods in issue, it is necessary for me to consider whether its mark will be known by a significant part of the public concerned with the goods. In reaching this decision, I must take all of the evidence into account including "the market share held by the trade mark, the intensity, geographical extent and duration of use, and the size of the investment made by the undertakings in promoting it."

97. Earlier in my decision, I found that the distinctive character of the opponent's mark had not been enhanced through use. I recognise that reputation is not the same as enhanced distinctive character, but the same factors are to be taken into account in both assessments.¹³

98. I have not been provided with any annual turnover figures or marketing expenditure. From the opponent's evidence I am only able to ascertain that they sold 780 bottles of wine to 2 distributors in the UK (Shropshire and Guilford). One of its UK distributors made a sale of 3 bottles of wine, on 23 August 2024, likely totalling £38.97. However, their customer's location is unknown. Therefore, based on the limited evidence before me, I find that their sales are clearly not geographically spread, nor are they significant. I also bear in mind that I have not been provided with any evidence of market share, but again, based on the minimal sales figure I have deduced, I find

¹³ *O2 Worldwide Limited v CX02.COM (UK) Limited*, BL O/393/19, paragraph 39

that it would only amount to a very small proportion of the wine market (which I consider to be a large sector).

99. The remaining evidence shows that the opponent had a presence on social media which I note had very low engagement before the relevant date. I am also unable to determine how many UK users were exposed to, or liked the posts. Lastly, in regard to the Veritas awards won for its wine, Mr Ihring highlights that this is “is the longest running and most prestigious wine and brand competition in South Africa”. I have no evidence before me to show that these awards are well known and regarded by UK consumers, and I note that Mr Ihring has not provided any examples of UK awards won by the opponent for its “BLUE OWL” wines.

100. Therefore, the evidence is, for the reasons set out above, insufficient to establish a reputation in the UK. On this basis, without having found a reputation, the opposition based upon section 5(3) fails.

CONCLUSION

101. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

102. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicant the sum of **£1,300** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Considering the Notice of opposition and preparing a counterstatement	£300
Considering the opponent’s evidence	£600
Preparing and filing written submissions during the evidence rounds and in lieu	£400

Total

£1,300

103. I therefore order Dauphin Entwicklungs-und Beteiligungs GmbH to pay Artisan Group of Brands Limited the sum of £1,300. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 4th day of February 2026

L FAYTER

For the Registrar