

O/0104/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004000946

IN THE NAME OF ORIGINZ DMCC

TO REGISTER THE FOLLOWING TRADE MARK:



IN CLASSES 29 AND 30

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP000448450

BY GO SUPERFOODS LTD

BACKGROUND AND PLEADINGS

1. On 11 January 2024, Originz DMCC (“the applicant”) applied to register the trademark shown on the cover page of this decision in the UK. The application was accepted and published in the Trade Marks Journal on 5 April 2024 in respect of the following goods:

Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats.

Class 30: Coffee, tea, cocoa, and artificial coffee; rice, tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; ices; honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.

2. On 5 July 2024, GO Superfoods Ltd (“the opponent”) opposed the application under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against all goods in the application. The opponent relies upon the following mark:

Green Origins

UK Registration no. UK00913858626¹

Filing date: 20 March 2015

Date of registration: 03 July 2015

Relying upon the following goods:

Class 5: Alginate dietary supplements; Dietary and nutritional supplements; Dietary supplements for humans; Herbal dietary supplements for persons special dietary requirements; Nutritional supplements; Pollen dietary supplements; Protein dietary supplements.

Class 29: Whey; Coconut oil.

Class 30: Cocoa; Cocoa powder; Cocoa products; Cocoa [roasted, powdered, granulated, or in drinks].

¹ Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all rights holders with an existing EUTM. As a result of the opponent’s EUTM number being protected as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark now recorded on the UK trade mark register has the same legal status as if it had been applied for and registered under UK law and retains its original international registration date as its filing date.

Class 31: Algae for human or animal consumption; Bee pollen (Unprocessed -).

3. The opponent submits that there is substantial overlap between the goods at issue and that there is similarity between the marks. The opponent submits that due to these factors there is a likelihood of confusion between the marks, which includes a likelihood of association. The opponent submits that the average consumer will view the marks as a brand variation/extension, sub brand and rebrand of one another.²

4. The applicant filed a defence and counterstatement denying the claims made and put the opponent to proof of use of its marks.

5. The applicant is represented by DLA Piper UK LLP; the opponent is represented by Abion UK Limited. Both parties filed evidence during proceedings. Neither party requested a hearing nor filed submissions in lieu.

6. 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

7. The opponent filed evidence in chief in the form of the witness statement of Mr John Neophytou, dated 13 January 2025. Mr Neophytou is a Trade Mark Attorney at Abion UK Limited, representing the opponent. The witness statement is accompanied by exhibits JN1 – JN14. The evidence has been provided to demonstrate use of the opponent's mark.

8. The applicant filed evidence in chief in the form of the witness statement of Ms Julia King, dated 17 April 2025. Ms King is a Senior Associate at DLA Piper, representing the applicant. The witness statement is accompanied by exhibits JK1 – JK10. Ms King's evidence adduces the definition of the word 'Green' and use of the words 'Origin' and 'Origins' in relation to nutritional supplements, food and beverage products.

² Form TM7 & Statement of Grounds, Page 7

9. I do not intend to summarise the evidence or submissions any further at this stage. However, in reaching my conclusion, it should be noted that I have had careful consideration of all the evidence and submissions. I will refer to them throughout my decision where I deem it necessary to do so.

DECISION

Section 5(2)

10. The opposition is based upon section 5(2)(b) of the Act, which 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”.

11. Given its filing date, the opponent’s mark qualifies as an earlier trade mark under section 6 of the Act. The opponent’s mark completed its registration process more than five years before the application date of the application and, therefore, it is subject to the use conditions. The relevant period for the purposes of the proof of use assessment is the five-year period ending with the date of application for the applicant’s mark. It is therefore 12 January 2019 to 11 January 2024.

Proof of use

The law

12. The proof of use provisions are set out in section 6A of the Act, the relevant parts of which state:

“(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), (b) 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) 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.

...

13. Section 100 of the Act is also relevant, which reads:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

14. As the opponent’s mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

“7. (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) [...]

(3) Where IP completion day falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day –

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A to the United Kingdom include the European Union”.

15. 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 Bunderversvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I9223, 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 subcategory 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].”

16. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed 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” is not, therefore, genuine use

Form of the mark

17. Before considering whether the opponent has made genuine use of the mark and, if so, for what goods, I shall deal with the question of the form of the mark. The opponent’s registration can be seen below.

Green Origins

18. Alongside the use of the mark in the form of the word mark, the mark has also been demonstrated in the following form:



19. The example above is a figurative sign with a leaf that appears on all of the products demonstrated for sale in the opponent's evidence. I note that section 46(2) provides that use of a mark includes use in a variant form where the differences do not alter the distinctive character of the mark in the form in which it was registered. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Professor Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

“13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EUIPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 *CAPTAIN* (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still”.

20. The opponent’s mark is a word-only mark that is registered in black; such a registration protects use of the mark in any colour: see *Specsavers International Healthcare Limited & Ors v Asda Stores Limited*,³ and *J.W. Spear & Sons Ltd v Zynga, Inc.*⁴ The distinctive character of the opponent’s mark lies in the words ‘Green Origins’ as a whole. In the example above, the text appears in slightly stylised and in white. The slight stylisation will not alter the distinctive character of the mark.⁵ The image of the ‘leaf’ will be viewed as a decorative part of the mark, alongside the background behind the mark. I find that that these additional elements of the mark alter the distinctive character of the mark. ‘Green Origins’ will still be viewed as the indication of origin. Therefore, the mark shown above is an acceptable variant of the opponent’s mark.

³ [2014] EWCA Civ 1294, paragraph 5

⁴ [2015] EWCA Civ 290, paragraph 47.

⁵ *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19

Evidence of use

21. For use to be genuine, it must have been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the goods at issue in the relevant territory during the relevant five-year period. In making my assessment, I am required to consider all relevant factors, including:

- the scale and frequency of the use shown;
- the nature of the use shown;
- the goods for which use has been shown;
- the nature of those goods and the market(s) for them; and
- the geographical extent of the use shown.

22. 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 use by itself.⁶ I note that, as the opponent's mark is a comparable mark, it is possible for the opponent to rely on evidence of use in the EU as set out in Tribunal Practice Notice 2/2020.⁷

23. The opponent has provided evidence consisting of invoices, turnover figures, awards, sales figures and revenues. I note the following regarding the evidence:

a) Turnover figures

Year	Turnover (£)	Y-o-Y% Change
2019	£890,232	
2020	£1,620,592	80.04%
2021	£1,570,911.3	-3.06%
2022	£1,325,551.8	-15.61%
2023	£1,345,602.98	1.51%
2024	£679,530.36	-49.49%

b) Sales from three of the opponent's well known UK customers

⁶ *New York SHK Jeans GmbH & Co KG v OHIM*, T-415/09

⁷<https://www.gov.uk/government/publications/tribunal-practice-notice-2020-end-of-transition-period-impact-on-tribunal-proceedings/tribunal-practice-notice-2020-end-of-transition-period-impact-on-tribunal-proceedings> accessed 1/2/2022.

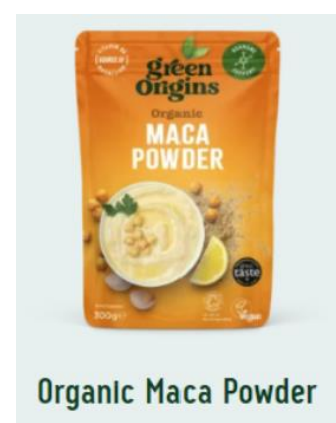
Year	Sales (£) Amazon UK	Sales (£) Holland & Barret International Limited	Sales (£) Ocado
2019	£10,433	£14,432	£50,468
2020	£38,624	£9,942	£39,002
2021	£44,567		£57,792
2022	£20,061	£21,871	£80,732
2023	£9,308	£27,653	£57,893
2024	£3,147	£11,855	£50,834

- c) Invoices dated during the relevant period in the name of 'Rainforest foods' and 'Go Superfoods' (which are both trading companies of the opponent) are for customers with geographic locations throughout the UK, including in Hertfordshire, Nottinghamshire, Staffordshire, London, Southampton and Suffolk.

The invoices demonstrate sales in relation to the following goods bearing in the opponent's mark in its description:⁸ Psyllium husk powder, Organic bee pollen, Acerola powder, wheatgrass powder, organic shelled hemp seeds, chia seeds, cacao powder, baobab powder, hemp protein powder, coconut sugar, maca powder, spirulina powder, organic royal quinoa grain, organic acai berry powder, cacao nibs, organic chlorella powder, matcha green tea powder, cacao butter, turmeric powder, barley grass powder, maca root powder, Organic extra virgin coconut oil, organic rice protein powder, organic pea protein powder, organic vitamin c capsules, Organic super mushroom blend, organic super green blend, moringa powder, organic super berry blend, chlorella and spirulina tablets, organic plant protein powder, strawberry and Acerola plant protein superboost, Fruity Green fruit and veg superboost, Berry burst fruit and veg superboost, coffee and vanilla plant protein, orange and mango fruit and veg superboost. Some of these goods for sale have been demonstrated in the opponent's on Amazon, Ocado, Dolphin Fitness and its own webpages all dated in the relevant period.⁹ Some of the goods bearing the opponent's mark are shown below:

⁸ Exhibit JN14

⁹ Exhibits JN5, JN6, JN7 and JN8.



One of the invoices, whilst in the relevant period, as it is purchased by a customer in Madrid and dated 17/06/2020 is outside of the transition period and cannot be relied upon as evidence of use within the EU.

- d) The opponent won a number of UK awards for its products, one of which is dated 2016, which is outside of the relevant period. However, the opponent was the Winner of the Queen's Awards for International Trade (2018).¹⁰ The opponent's evidence also demonstrates that the opponent was Great Taste Winner (2023) for organic royal quinoa, organic raw incan berries, organic raw blueberry powder, organic coconut sugar, organic banana powder, organic shelled hemp seeds (raw) and organic extra virgin coconut oil. The opponent was also Great Taste Winner (2024) for various goods, however, I note that those goods bear the name 'Sevenhills Wholefoods' which does not align with the opponent's mark.¹¹ I have no evidence as to whether this award is known by the relevant public nor that it was reported in the UK press.
- e) The opponent has invested circa £500,000 in marketing the 'Green Origins' brand in the UK over the last five years.¹² Advertising and marketing activities are demonstrated in the form of website traffic to third parties and the opponent's website.¹³ As mentioned previously, I have seen examples of the third parties and the opponent's website in evidence.¹⁴

¹⁰Exhibit JN9

¹¹ Exhibit JN10

¹² Witness Statement of John Neophytou, paragraph 25

¹³ Exhibit JN4

¹⁴ Exhibits JN5, JN6, JN7 and JN8.

The opponent's website traffic information from October 2024 is outside of the relevant period, the evidence demonstrates that of the 1,250 hits, 100% of the traffic originates from the UK.

- f) The opponent's goods are sold to many retailers in the UK, inclusive of Amazon, bodykind, Ocado and Dolphin fitness.¹⁵ The evidence demonstrates that websites, such as Amazon and Ocado, have dedicated 'Green Origins' sections on their website.¹⁶ Ocado and Amazon have customer reviews dated throughout the relevant period; 2021 to 2020 for Amazon reviews and 2021 to 2025 for Ocado reviews, in relation to various products bearing the opponent's mark.
- g) The Newspaper article¹⁷ that originates from "Rotherham Business News" dated 17 May 2022 addresses the sale of the opponent, who trades as 'Green Origins', 'Rainforest Foods' and 'Puirá', to the 'Humble Group' for the value of £17 million; demonstrating the value that another company was willing to pay to purchase the company.

Assessment of genuine use

24. I also note Mr Alexander Q.C.'s comments in *Guccio Gucci SpA v Gerry Weber International AG*, Case BL O/424/14. He stated:

"The Registrar says that it is important that a party puts its best case up front – with the emphasis both on "best case" (properly backed up with credible exhibits, invoices, advertisements and so on) and "up front" (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just "use it or lose it" but (the less catchy, if more reliable) "use it – and file the best evidence first time round – or lose it"" [original emphasis]

25. 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:

¹⁵ Exhibit JN5

¹⁶ Exhibit JN8

¹⁷ Exhibit JN13

“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 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.”

26. There are clearly limitations with the opponent’s evidence, for example, no evidence has been provided of the market share concerning the goods at issue and so it is hard to contextualise the turnover and sales figures. However, in my view, the opponent has provided evidence of a substantial number of sales throughout the relevant period. I am satisfied that the sales are not demonstrative of one-off sales but are repeated throughout the relevant period. The sales are geographically spread throughout the United Kingdom to consumers located in the South East, South West and the Midlands. The opponent has also demonstrated sales to its key UK suppliers; Ocado, Amazon and Holland and Barrett. The opponent has invested in advertising and has spent circa £500,000 on advertising over the five-year relevant period. The opponent’s invoices show the sale of many of the goods in the opponent’s

specification, as listed above in paragraph 23, which, when cross referenced to the opponent's and its customers website pages, clearly demonstrate that the products referenced bear the opponent's mark. The opponent's mark has clearly been displayed on the opponent's goods that are sold to its customers. Taking all of this into account, the evidence has demonstrated the sale of the opponent's goods to customers throughout the UK. I consider that the opponent has demonstrated genuine use of its mark.

27. The opponent's evidence demonstrates use in relation to the goods listed above in paragraph 23(c), which I do not intend to repeat here. Whilst the opponent has provided turnover figures, as they are not broken down in terms of the goods sold, I must be cautious not to take a broad-brush approach. From cross referencing with the turnover figures and website pages from the opponent and its retailers/customers, I consider that the average consumer would interpret the goods displayed by the evidence as:

Class 5: Dietary and nutritional supplements for humans; pollen dietary supplements; protein dietary supplements.

Class 29: Coconut oil

Class 31: Algae for human consumptions; Bee pollen (unprocessed).

28. I wish to specifically address my finding that no use has been proven in relation to "*Cocoa; Cocoa powder; Cocoa products; Cocoa [roasted, powdered, granulated, or in drinks]*" (in class 30). I note that as listed in paragraph 23(c) cacao in the form of powder and nibs has been demonstrated to have been sold by the opponent. However, it is my understanding that cacao and cocoa, whilst they originate from the same the same bean, are different goods. This is on the basis that cacao is from the raw bean and receives minimal processing, whereas cocoa is a processed good that is made from roasted cacao beans. Therefore, they are not demonstrative of the same good and I cannot find any other use of cocoa in the evidence provided. Hence, my finding of a fair spec is not inclusive of these goods.

DECISION

29. The following principles are 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;

(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; Page 8 of 20

(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

30. The goods for comparison are as follows:

Applicant's goods	Opponent's goods
<p>Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats.</p> <p>Class 30: Coffee, tea, cocoa, and artificial coffee; rice, tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; ices; honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice.</p>	<p>Class 5: Dietary and nutritional supplements for humans; pollen dietary supplements; protein dietary supplements</p> <p>Class 29: Coconut oil</p> <p>Class 31: Algae for human consumptions; Bee pollen (unprocessed).</p>

31. In *Gérard Meric v OHIM*, Case T-133/05, the General Court (“GC”) stated that:

“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”.

32. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

“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.

33. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- 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.

34. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the (“GC”) stated that “complementary” means:

“82. ...there is a 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”.

35. The opponent submits that the applicant’s class 29 and 30 goods are identical or similar to the opponent’s goods in classes 5, 29, 30 and 31. The opponent submits that the goods are similar as they share the same consumers, distribution channels and nature. Further, the opponent submits that the goods are complementary as they share the same areas of trade and are offered to the same relevant public. However, I note that the opponent has not identified the specific goods that it considers to be most similar. In these circumstances, I remind myself of the case of *Abus August Bremicket Sohne KG v Muhammad Ali (O/0911/24)* Mr Iain Purvis K.C., sitting as the Appointed Person, found that:

“28. [...] it is for the Opponent to put forward the combinations of goods on which it relies for similarity (or identity). If it fails to identify a particular combination, it cannot expect the Hearing Officer to do the job for it. [This] approach [...] would place an intolerable burden on Hearing Officers in cases of this nature in which there will be thousands of potential combinations of goods which could be relied on, and for each combination a slightly different argument for similarity could be made. Furthermore, such an approach would be unfair on the Applicant for the mark, since they will have had no opportunity to address points on similarity taken by the Hearing Officer if those points are not first raised by the Opponent.”

36. Therefore, I will proceed by only comparing the goods that I consider offer the best prospect of a finding of similarity.

37. I remind myself that Section 60A of the Act sets out that goods are not to be considered similar simply because they appear in the same classes. Alternatively, section 60A also states that goods are not to be considered dissimilar simply because they appear in different classes.

38. For the purposes of considering the issue of similarity of the goods and services, it is permissible to consider groups of terms collectively where appropriate: *Separode Trade Mark*, BL O-399-10.

Class 29

Edible oils and fats

39. The broad term “*edible oils and fats*” in the applicant’s specification encapsulates the term “*coconut oil*” in the opponent’s specification, which is an edible oil. Therefore, I find these goods to be identical on the principle outlined in *Meric*.

Meat, fish, poultry and game; meat extracts; jellies, jams, compotes; eggs, milk and milk products; preserved, dried and cooked fruits and vegetables.

40. Due to the lack of a specific comparator being provided by the opponent, I shall compare the applicant’s goods with the closest comparator that I could identify in the opponent’s specification being “*dietary and nutritional supplements*”(in class 5) and “*coconut oil*” in class 29. The fact that the applicant’s goods and the opponent’s goods are all foodstuffs is not sufficient for a finding of similarity. I note that the opponent submits that the parties’ goods are complementary on the basis that they are sold in the same areas of trade and are offered by the same companies to the relevant product. Firstly, this is not the definition of complementarity as outlined in the case of *Boston Scientific*. Also, even if the goods are all sold through the same stores, which I do not consider that they would be as I consider dietary supplements will be sold through specialist stores, it is my view that they would be offered at different parts of the store. The mere fact that they both have the aim of satisfying human nutritional needs is a very general purpose, and I consider that these goods cannot be said to meet the same or similar nutritional needs. Despite this, I consider that there may be a general overlap in user. Although the goods under comparison can be used as ingredients in the process of preparing various dishes, such a psyllium husk which may be added to smoothies and baked goods/snacks, the mere fact that they are needed for the preparation of a foodstuff will generally not be sufficient in itself to show that the goods are similar. Furthermore, they are not likely to coincide in nature and producers. Despite a general overlap in user and general purpose, I do not consider that these overlaps are sufficient to substantiate similarity between the goods. Therefore, the contested goods are dissimilar to the opponent’s goods.

Class 30

41. I also consider that the reasoning in paragraph 39 applies to the applicant’s goods below in class 30, which I also find to be dissimilar to the opponent’s goods:

Rice, tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; ices; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice; [...] treacle.

Coffee, tea, cocoa, and artificial coffee

42. I shall proceed to compare the above goods with the closest comparators in the opponent's specification being "*dietary and nutritional supplements*" (in class 5) and "*coconut oil*" in class 29. The mere fact that food supplements may have an ordinary nutritional function in addition to their medical function in the broad sense of compensating for nutritional deficiencies, does not warrant being considered as beverages (as in the applicant's term) or foodstuffs. These secondary aspects do not alter the fact that the average consumer does not consume nutritional supplements or even coconut oil as ordinary food or to quench thirst. There may be a very general overlap in user. I also consider that the goods have a different purpose, although I do recognise that some supplements may be presented in the form of a liquid. The goods are not usually prepared by the same producers and the opponent's goods will be sold separately from general foodstuffs/ beverages. They are also not complementary and are not in competition because of the characteristics and specialised nature of the opponent's goods. I consider that the similarity in nature and very general overlap in user, is insufficient to substantiate similarity. In light with the above, I find that all the contested goods above are dissimilar to the opponent's goods.

Honey [...]

43. I consider that this good is similar to "*Bee pollen (unprocessed)*" (in class 31) in the opponent's mark. This is because both goods are products of the apiary industry, either from the foraging, transformation and storage of pollen by worker bees (bee pollen) or the collection, transformation, evaporation and storage via worker bees (honey). Both of these products are collected by the same producers, i.e. apiarists. I also consider that these goods will be distributed via the same trade channels. The nature of the goods will differ, as pollen will often be sold as granules or capsules whereas the forms honey exists in, whilst varied, does not include granules. The purpose of the goods will also differ, as bee pollen is often used for its rich nutrient profile for health benefits whereas honey is primarily used as a natural sweetener. The goods will differ in their method of use. There may be a general overlap in the users. Taking all the above into account, I find the goods to be similar to a low degree.

44. As some degree of similarity between the goods is necessary to engage the test for a likelihood of confusion, my findings above mean that the opposition aimed against those goods

I have found to be dissimilar will fail.¹⁸ For ease of reference, the opposition fails against the following goods in the opponent's specification:

Class 29: Meat, fish, poultry and game; meat extracts; jellies, jams, compotes; eggs, milk and milk products; preserved, dried and cooked fruits and vegetables.

Class 30: Coffee, tea, cocoa, and artificial coffee; rice, tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; ices; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); spices; ice; [...] treacle.

AVERAGE CONSUMER AND THE PURCHASING ACT

45. It is necessary for me to determine who the average consumer is for the goods in question; I must then determine the manner in which the goods are likely to be selected by the average consumer in the course of trade.

46. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*. 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:

"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 words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

47. The average consumer of the goods at issue is a member of the general public and businesses such as restaurants. The goods at issue will typically be offered by retailers or


¹⁸ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

their online equivalents. I consider that the selection process will be primarily visual, although I do not discount an aural element.

48. The average cost of the goods is relatively low, and the frequency of the purchase is high. When selecting the goods, I consider that the average consumer will consider factors such as taste and calorific and nutritional contents. In addition, I consider that consumers with medical issues and/or dietary requirements will give more thought to the selection of the goods. Accordingly, taking all of the above into consideration, the average consumer will pay a medium level of attention to the purchasing process of the goods.

COMPARISON OF THE MARKS

49. The respective trade marks for comparison are shown below:

Opponent's trade mark	Applicant's trade mark
Green Origins	

50. The opponent's mark is comprised of the words 'Green Origins', in a standard black font and title case. The applicant submits that in this mark, no element is more dominant. I agree with the applicant as I consider that there are no other elements that contribute to the overall impression of the mark. I note that the opponent submits that 'Origin' is the dominant element in both marks. However, I consider that, for the reasons that I will come to discuss below, the word 'origin' is not highly distinctive and therefore is not the dominant and distinctive element of the mark.

51. The applicant's mark is comprised of the word 'ORIGINZ' presented in a slightly stylised lower-case text below what the applicant describes as "a flower petal device", which I consider that the average consumer will interpret to be a plant/collection of leaves device. Although the eye is naturally drawn to the element of the mark that can be read, given the size and positioning of the plant/collection of leaves device, which is the biggest part of the mark, I consider that it plays a roughly equal role in the overall impression with the word "originz", with the stylisation playing a lesser role.

52. Visually, the marks coincide in the word 'origin'. This acts as the visual point of similarity. However, the opponent's mark begins with the word 'Green', the applicant's mark is slightly stylised and also has a 'plant/collection of leave' device and the presence/absence of the letters S/Z. These all act as visual points of difference. I also bear in mind that the average consumer tends to pay more attention to the beginning of the marks.¹⁹ I note that as the opponent's mark is a word-only mark it can be used in any standard typeface, form and colour,²⁰ including the font and colour used in the applicant's mark. Consequently, I consider that the marks are visually similar to between a low and medium degree.

53. Aurally, the opponent's mark will be given its ordinary pronunciation (OR-RIDGE-IN). The applicant's mark will be pronounced as OR-RIDGE-INZ (the collection of leaves/plant device will not be articulated). As submitted by the opponent, the marks will overlap in the pronunciation of 'OR-RIDGE-IN'. I consider that the average consumer will find that there may be a slight difference in the end of the pronunciation of 'Origins'/'Originz.' The marks will also differ in the word 'Green' that appears at the beginning of the opponent's mark. Taking all of the above into account, I consider the marks are aurally similar to a medium degree.

54. Conceptually, the words 'Green' and 'Origins' are ordinary dictionary words with recognisable meanings. I consider that in the context of the opponent's goods, the words 'Green Origins' could be indicative that the goods are sustainable or good for the environment, as submitted by the applicant, or that they are organic/natural in origin.

55. The device in the applicant's mark will be recognised by the average consumer as a plant/collection of leaves device. I note that the device symbolises nature, and therefore, could indicate to the average consumer that the mark as a whole means that the goods originate from nature, or are naturally sourced. The word 'Originz' will be seen by the average consumer as a misspelling of 'Origins' and so associated with the same meaning.

¹⁹ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

²⁰ *LA Superquímica v EUIPO*, Case T-24/17, at paragraph [39]

56. Regardless, as both marks share the concept of “origin” and that the word ‘Green’ and collection of leaves/plant devices may share the concept of being natural, from nature or naturally sourced, I consider the marks to be conceptually similar to a high degree.

DISTINCTIVE CHARACTER OF THE EARLIER TRADE MARK

57. The distinctive character of a trade mark can be appraised only, first, by reference to the goods and services in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In *Lloyd Schuhfabrik*, 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 Attenberger* [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).”

58. Registered trade marks possess varying degrees of inherent distinctive character, being lower where 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 distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. I will first assess the inherent distinctive character before considering the evidence filed in the context of any enhanced distinctive character.

59. As highlighted above, the opponent's mark is comprised of the words 'Green Origins'. I consider that the words 'Green Origins' are indicative that the opponent's goods are of sustainable, environmentally friendly or organic origin.

60. As per the case of *Formula One*,²¹ the earlier mark must be considered to have at least some distinctive character. Consequently, I consider that the distinctiveness of the opponent's mark lies in the combination of the words 'Green' and 'Origins'. I note that the words are not slightly stylised and there is nothing further to add to the distinctiveness of the mark. Therefore, as the opponent's mark, as a whole, is highly allusive of the opponent's goods, I consider that it is inherently distinctive to a low degree.

61. Moving onto consider any enhanced distinctive character; while my findings on genuine use are noted, I remind myself that the requirement for a finding of enhanced distinctive character is considerably more onerous than that of genuine use. I say this on the basis that use need not be quantitatively significant in order for it to be genuine. On the contrary, a finding of an enhanced degree of distinctive character requires use at such a level that is capable of pointing to the fact that a proportion of consumers would identify the goods as originating from a particular undertaking. The opponent has failed to provide evidence of the market share and about 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. The opponent has demonstrated sales of £890,232 (2019), £1,620,592 (2020), £1,570,911 (2021), £1,325,551 (2022), £1,345,602 (2023) and £679,530 (2024) over the relevant period. Whilst these sales are geographically widespread throughout the UK, with sales to customers in the South West, South East and the Midlands, in particular for customers located in Hertfordshire, Nottinghamshire, Staffordshire, London, Southampton and Suffolk. The figures are low in relation to foodstuffs and supplements and I note that no breakdown of the sales has been provided. I note that the opponent has also stated that in the past 5 years they have spent circa £500,000 on advertising, however, other than the evidence in relation to access to the opponent's webpage, further demonstration of advertising efforts has not been displayed. I also note that the opponent has won a number of awards including Queen's Awards for International Trade in 2018 and the Great Taste Winner in 2023 for a number of products. However, I have no evidence as to whether this award is known by the relevant public nor that it was reported in the UK press. Taking all of the above into account, I consider that the opponent has failed to meet the higher standard (than proof of use) required to demonstrate enhanced distinctiveness.

²¹ Case C-196/11P

LIKELIHOOD OF CONFUSION

62. I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*); ii) the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and; iii) the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*).

63. There are two types of confusion that may occur. Direct confusion is where the average consumer mistakes one mark for the other, while indirect confusion is where the average consumer recognises that the marks are different, but for some reason assumes that the later mark also identifies the goods of the owner of the earlier mark, or that the two undertakings are related: see *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, paragraph 16.

64. I have found the goods to vary from identical to similar to a low degree. I have found the marks to be visually similar to a low to medium degree and aurally similar to a medium degree. I have found the marks to be conceptually similar to a high degree. The average consumer are the general public and businesses. The purchasing process is primarily visual although I do not discount aural considerations. The average consumer will spend a medium degree of attention when selecting the goods. The distinctive character of the opponent's mark has been enhanced to a medium degree.

65. I take into account the decision *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another*²² in which the court confirmed that if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion.

66. Therefore, taking all of the above case law into account, I consider that it is important to ask, 'in what does the distinctive character of the earlier mark lie?' Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

²² [2015] EWHC 1271 (Ch)

67. As established above, the average consumer does not dissect the mark. The marks will be viewed as a whole. The opponent's mark, as a whole, is composed of the words 'Green Origins,' which is highly allusive of the opponent's goods.

In this instance, the common elements between the marks, the word "origins"/"originz", is low in distinctiveness, as it simply alludes to the "origin" of the goods. Therefore, even bearing in mind the principle of imperfect recollection, the differences between the two marks will take on a greater significance for the average consumer than they might have otherwise.²³ The stylisation in the applicant's mark, may not be very remarkable, however, it is a visual point of difference. I also note that the beginning of marks tends to make more of an impact than the ends. I, therefore, do not consider that the average consumer would overlook the word 'Green' at the beginning of the opponent's mark. I also do not consider that the average consumer would overlook the collection of leaves/plant device, which is big in size, placed centrally within the applicant's mark.

68. The marks' conceptual similarity is higher than its visual and aural similarity. However, again, this is because the marks share a common element which is low in distinctiveness. It is therefore clear that the marks, as a whole, are not identical. I note that the purchasing process is primarily visual, although I do not discount an aural element. Therefore, the visual aspect of the mark will play a more important role, and I note that I have found the marks to be visually similar to only a low to medium degree. This in itself is insufficient for consumers to mistakenly recall/misremember the marks. As highlighted above, the marks have distinguishing features between them which become more significant due to the shared element in both of the marks being lower in distinctiveness. Therefore, taking all of the above into account, I do not consider that there is a likelihood of direct confusion. This finding also applies to the goods that I have found to be identical.

69. Indirect confusion was described in the following terms in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis QC, (as he then was) sitting 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

²³ *Nicoventures Holdings Ltd v. The London Vape Co Ltd* [2017] EWHC 3393 (Ch) Paragraph 36

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).”

70. Furthermore, in *Liverpool Gin*,²⁴ 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.

71. Mr Purvis KC 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. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal. I recognise that a finding of indirect

²⁴ *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.²⁵ I note that the opponent submits that a substantial number of consumers would believe that the applicant's mark is an extension, variation, new sub brand or rebrand of the opponent's mark and vice versa. However, I note that the opponent has failed to explain why that would be the case.

72. Having noticed that the competing trade marks are different, I see no reason why the average consumer would assume that they come from the same or economically linked undertakings. Even though the marks share the common element; 'Origin', as highlighted above, this element is highly allusive of the parties applied for/registered goods. Therefore, I do not think that the common element is of such a level of distinctiveness that the average consumer would believe that only one undertaking would use it in relation to dietary supplements or foodstuffs. It is more likely to be viewed as a coincidence, especially, and as highlighted above, the average consumer does not dissect the mark, it will be viewed as a whole. Consequently, I do not consider that the average consumer would think that the applicant's trade mark was connected with the opponent, or vice versa. Even if the opponent's mark is brought to mind, this is mere association, not confusion: see *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81. Further, I see no reason why consumers would consider it logical for an undertaking that uses the mark 'Green Origins' to remove the word 'Green', add a collection of leaves/plant device and change the letter 'S' to 'Z'. Conversely, I am of the view that the same applies when consumers consider the opponent's mark first. These changes do not align themselves to a striking element, brand extension or rebranding as outlined in the categories put forward in *L.A. Sugar*. While I have set out above that the categories in *L.A. Sugar* are not exhaustive, the opponent has not provided any additional arguments in respect of the instances where indirect confusion would occur and, without such, I am not willing to formulate the opponent's argument on its behalf. Instead, I will simply say that if any additional scenarios existed then it was for the opponent to argue as such. Taking all of this into account, I find that there exists no likelihood of indirect confusion, even when the marks are considered on identical goods.

CONCLUSION

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

²⁵ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

COSTS

74. The applicant has been successful and is entitled to an award of costs. The relevant scale is contained in Tribunal Practice Notice (“TPN”) 1/2023. Applying the guidance in the TPN, I consider the following to be fair:

Preparing a statement and considering the other side’s statement	£250
Preparing evidence and considering and commenting on the other side’s evidence	£600
Total:	£850

75. I therefore order Go Superfoods Ltd to pay ORIGINZ DMCC the sum of £850. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 10th day of February 2026

A KLASS

For the Registrar