

BL O/0116/26

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF THE TWO APPLICATIONS NOS 3687200 & 3687204

IN THE NAME OF NATALS, INC., DOING BUSINESS AS RITUAL

IN RESPECT OF THE TRADE MARKS

RITUAL

(“the Contested Word Mark”)

AND



(“the Contested Device Mark”)

IN CLASS 5

AND

THE CONSOLIDATED OPPOSITIONS THERETO UNDER NOS. 429785 & 429789

BY RITUALS INTERNATIONAL TRADEMARKS B.V

AND

IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON

BY NATALS, INC.

AGAINST A DECISION OF R LE BRETON (O/0860/25)

DATED 18 SEPTEMBER 2025

DECISION

Introduction

1. This is an appeal from a decision of R Le Breton acting for the Registrar, dated 18 September 2025 (“**the Decision**”), in relation to consolidated opposition proceedings brought by Rituals International Trademarks B.V. (“**the Respondent**”) against applications by Natals, Inc. (“**the Appellant**”) to register the two trade marks shown above in the United Kingdom, both in respect of the following goods (“**the Appellant’s Marks**”):

Class 5: *Vitamins, multi-vitamins, pre-natal vitamins, vitamin preparations, vitamin supplements, mineral supplements, dietary supplements, nutritional supplements, protein supplements, probiotic supplements, synbiotic supplements, and immunity supplements; powdered nutritional supplement drink mix containing protein and dietary fiber; powdered nutritional supplement drink mix; dietary supplement drink mixes.*

2. The Respondent opposed the applications under s.5(2)(b) of the Trade Marks Act 1994 (“**the Act**”), relying on the following earlier trade marks (together with two further earlier trade marks which are not relevant to this appeal):

UK comparable trade mark no. 801195700 (the “**First Earlier Mark**”)

For the mark:

RITUALS...

Relying on the following goods:

Class 3: *Perfumery, essential oils, cosmetics, eau de Cologne, eau de toilette, perfumed body sprays; cosmetic oils, creams and lotions for skin care; toiletries for bathing and showering; massage preparations (non medicated).*

International trade mark registration no. 1636040 (the “**Second Earlier Mark**”)

For the mark:



Relying on the following goods:

Class 5: *Vitamins and vitamin preparations; minerals and mineral preparations; homeopathic products and preparations; natural medicines; medicinal herbs and herbal preparations for medical purposes; food supplements and food additives not for medical purposes; dietary supplements not for medical purposes; food supplements made from herbs, not for medical purposes.*

3. The Respondent also relied on the First Earlier Mark only in respect of the oppositions against the Appellant’s Marks on the basis of s.5(3) of the Act.
4. Only the First Earlier Mark was subject to the proof of use requirements specified in s.6A of the Act.
5. Both sides filed evidence in these proceedings. The Appellant was represented at the hearing before the Hearing Officer by Jamie Muir Wood of Hogarth Chambers, instructed by Stevens & Bolton LLP, and the Respondent was represented by Aaron Wood of Novagraaf UK.

The Hearing Officer’s decision

6. The Hearing Officer found use of the First Earlier Mark had been shown in respect of:

Class 3: *Perfumery; cosmetics; cosmetic oils for skin care.*

7. The Hearing Officer found that the goods covered by the First Earlier Mark were similar to a medium degree to those covered by the Appellant’s Marks, with the exception of the following goods which were found to be dissimilar:

probiotic supplements, synbiotic supplements, and immunity supplements; pre-natal vitamins (“the Subset”)

8. With respect to similarity, the Hearing Officer found:
 - The First Earlier Mark to be visually, aurally and conceptually similar to a high degree to the Contested Word Mark.
 - The First Earlier Mark to be visually similar to a medium degree, and aurally and conceptually similar to a high degree, to the Contested Device Mark.
 - The Second Earlier Mark to be visually similar to a medium degree, and aurally and conceptually similar to a high degree, to the Contested Word Mark.
 - The Second Earlier Mark to be visually similar to between a low and medium degree, and aurally and conceptually similar to a high degree, to the Contested Device Mark.
9. The average consumer would primarily comprise members of the general public, although there would be some professionals who would purchase the goods for use in their jobs or on behalf of others. The general public would pay a medium degree of attention, with professionals paying a slightly above medium degree of attention. The purchasing process would be primarily visual, although aural considerations could not be completely disregarded.
10. The First Earlier Mark was found to have a just below medium degree of inherent distinctive character, which was enhanced through use to an above medium degree in respect of *cosmetics* and *cosmetic oils for skincare*
11. The Second Earlier Mark was found to have a medium inherent distinctive character, which was not enhanced through use.
12. The Hearing Officer’s conclusions under s.5(2)(b) in respect of the likelihood of confusion were as follows:
 - There **was** a likelihood of **direct** confusion between the First Earlier Mark and the Contested Word Mark in respect of **all of the goods save for the Subset** (in respect of which the s.5(2)(b) ground had to fail because the goods forming the Subset were dissimilar).

- There was **no** likelihood of **direct** confusion, but there **was** a likelihood of **indirect** confusion, between the First Earlier Mark and the Contested Device Mark in respect of **all of the goods save for the Subset**.
- There was **no** likelihood of **direct** confusion, but there **was** a likelihood of **indirect** confusion between the Second Earlier Mark and both the Contested Word Mark and the Contested Device Mark in respect of **all of the goods** applied for.

13. The oppositions therefore succeeded under s.5(2)(b) in respect of all of the goods applied for in respect of both of the Appellant's Marks.

14. With respect to s.5(3), the Hearing Officer found that that ground succeeded to the same extent as under the s.5(2)(b) ground in respect of the First Earlier Mark, so that it had no effect on the ultimate outcome of the oppositions.

The Appeal

15. The Appellant filed a Notice of Appeal to the Appointed Person under s.76 of the Act. At the hearing before me, the parties were represented by the same representatives who appeared before the Hearing Officer.

Standard of Review

16. It is well established that, in order to interfere with the decision of the Hearing Officer, I must be satisfied that there was a distinct and material error of principle in the decision or that the Hearing Officer was wrong. The relevant principles were set out in *Axogen Corporation v Aviv Scientific Limited* [2022] EWHC 95 (Ch) at [24]. An appeal is by way of review, not a rehearing. Neither surprise at a Hearing Officer's conclusion nor a belief that she or he has reached the wrong decision will justify interference. The decision of the lower court will be "*wrong*" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. In the absence of an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "*outside the bounds within which reasonable disagreement is possible*" (*Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 at [80]). In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of

principle. Special caution is required before overturning such decisions (*TT Education v Pie Corbett Consultancy* [2017] RPC 17 at [52(iv)], *REEF Trade Mark* [2003] RPC 5 at [28] and *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11 at [50]-[51]).

17. In the judgment of the Court of Appeal in *Lidl Great Britain Ltd v. Tesco Stores Ltd* [2024] EWCA Civ 262, Arnold LJ said at [110]:

“It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable: Volpi v Volpi [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2](v) (Lewison LJ).”

18. The Supreme Court recently restated the approach to appeals of this kind in its judgment in *Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc* [2025] UKSC 25 at [94] to [95] as follows:

“94. It is perhaps obvious, and certainly an inevitable conclusion drawn from experience, that reasonable minds, and in particular reasonable judicially trained minds, each faithfully applying the relevant law and principles, will come to different conclusions about the answer to these multifactorial questions. While of course the decision of an appellate court trumps that of the court below, the law has imposed structured constraints designed to prevent a free for all in a higher court whenever a party (with the necessary resources) wishes to challenge the first instance decision of the trial judge. The reasons for these constraints are set out in a string of well-known authorities including, in the intellectual property context, Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ at para 114. The reasons there set out relevantly include the following:

- (i) *The trial is not a dress rehearsal. It is the first and last night of the show.*
- (ii) *Duplication of the trial judge’s role on appeal is a disproportionate use of the limited resources of an appellate court.*
- (iii) *In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*

95. In *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8; [2024] Bus LR 532 this court reviewed those constraints in a trade mark context. After citing from the *Fage* case this court in a joint judgment said, at paras 49- 50:

*“49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re**

Sprintroom Ltd [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

50. On the other hand, it is equally clear that, for the decision to be 'wrong' under CPR r 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation."

19. I have borne those principles firmly in mind.

Grounds of Appeal

20. The Appellant set out a single ground of appeal in its original Grounds of Appeal.

However, four working days before the hearing before me, the Appellant's representatives wrote to me, copying in the representatives for the Respondent, with Amended Grounds of Appeal. The amendment was said to correct what had been said about the outcome of a successful appeal. The original Grounds of Appeal had said that if the appeal was successful, the Contested Device Mark would be allowed in respect of **the Subset**, whereas in fact what they should have said was that the Contested Device Mark would be allowed in respect of **all** of the goods covered by the Contested Device Mark. The Appellant's representatives described this as an "*administrative amendment*" and added "*we do not believe that this amounts to a change to the nature of the appeal: it is merely to indicate what should be the logical outcome of that part of the appeal, if it succeeds.*".

21. Given the short period of time before the hearing, and in order to give the Respondent an opportunity to be heard in respect of the amendments, I directed that I would hear submissions from both parties at the start of the hearing on the issue of whether I should allow the amendment to the Grounds of Appeal.

22. The single ground of appeal set out in the Grounds of Appeal (which was not subject to the proposed amendments) read as follows:

"2. The Hearing Officer erred by inconsistently and wrongly applying the law on indirect confusion in respect of her multifactorial analysis of the likelihood of confusion between:

- a. the first contested mark and the second earlier mark (\$127);*
- b. the second contested mark and the first earlier mark (\$134); and*

c. the second contested mark and the second earlier mark (§1348) [sic].

3. At §123 of the Decision, the Hearing Officer states:

*'I note for completeness, that in my view if the consumer were to **notice and recollect** the differences between these marks, particularly the use of the "S" in the earlier mark and the omission of this in the contested mark, this is not a difference that lends itself to a logical brand extension or sub brand, and on this basis, I would not find a likelihood of indirect confusion between the marks.'* [emphasis added]

4. She was right to do so.

5. At §127, §134 and §138, however, she approached the question of indirect confusion on the wrong basis, i.e. imperfect recollection rather than on the basis that the differences are noticed and recalled but the average consumer undertakes a mental process, compares the differences and still assumes some form of economic connection (see §16 of L.A. Sugar Ltd v. Back Beat Inc (BL O/375/10)). She variously says:

a. 'it would be easy for this element to be misremembered by the consumer' (§127);

b. 'the addition or omission...will easily go unnoticed or be misremembered' (§134);

and

c. 'the consumer would easily forget the addition or omission of the "S"' (§138).

6. This was both inconsistent with §123 and wrong in law."

23. As the Appellant did not appeal the finding of direct confusion in relation to the First Earlier Mark and the Contested Word Mark, the proposed Amended Grounds of Appeal concluded that the Hearing Officer should not have found direct or indirect confusion in respect of **the Subset** for the Contested Word Mark, and no direct or indirect confusion in respect of **any** of the goods covered by the Contested Device Mark. The original Grounds of Appeal had mistakenly limited the effect of a finding of no indirect confusion to just the Subset for both of the Appellant's Marks.

24. It was clear from the Respondent's skeleton arguments that they had struggled to understand the ground on which the appeal was being raised. They put forward three alternative options as to the ground on which they believed the Appellant was relying on, none of which turned out to be the primary ground advanced on behalf of the Appellant at the hearing before me.

25. Anyone reading the Grounds of Appeal would have been justified in assuming that the Appellant was seeking to argue that imperfect recollection had no part to play in indirect

confusion, and that that was the error of law which the Appellant was saying the Hearing Officer had made in the extracts from the Decision which appeared in paragraph 5 of the Grounds of Appeal. However, when I asked Mr Muir Wood to confirm whether that was the Appellant's case, he said that it was not, and (rightly) accepted that imperfect recollection is relevant to both direct and indirect confusion. It was therefore open to the Hearing Officer to find that some elements of the Earlier Marks, such as the letter 'S' on the end of the word "RITUAL", and the ellipsis, would not be recalled, whereas other elements, such as the stylisation, would be. Having made that finding, it was then appropriate for the Hearing Officer to take that into account when considering the likelihood of indirect confusion.

26. As a result, at this stage of the hearing, I was at a loss to understand what the Appellant was seeking to argue in its Grounds of Appeal. I therefore invited Mr Muir Wood to make his submissions on the ground of appeal he sought to advance before me so that both I and Mr Wood could understand them. I explained that I would then be in a position to assess whether or not I should allow the amendment to the Grounds of Appeal. I explained that, if necessary, I would give the Respondent the opportunity of making written submissions after the hearing if I felt that the Respondent had been taken by surprise by the arguments presented at the hearing by the Appellant and required time to consider and respond to them.

27. As will be seen below, the arguments which the Appellant did present at the hearing did take both me and the Respondent by surprise to such an extent that I will also need to consider whether or not I should dismiss the appeal on the basis that neither the original nor the Amended Grounds of Appeal specifically identified the actual errors of principle on which the Appellant sought to rely.

The grounds of appeal submitted at the hearing before me

28. I set out below the paragraphs from the Hearing Officer's decision which were said in the Grounds of Appeal to contain errors made by the Hearing Officer:

"127. I consider again all of the factors relevant to the comparison between these two marks. I note this example does not fit neatly into one of the categories set out in L.A. Sugar, but I remind myself that these are not exhaustive. I note again that the RITUALS/RITUAL element is, in my view, the most dominant and distinctive element in each mark. I consider it would be easy for this element to be misremembered by the consumer, with the addition or omission of the "S" and the ellipsis being the subject of imperfect recollection. I therefore consider it would be easy for the consumers to see these marks both as a RITUAL or

RITUALS mark, one with the additional decorative square and stylisation. Considering the identical goods, it is my view it would be likely on this basis that consumers would make the assumption that the marks derive from the same economic entity, with one mark simply being a more stylised/decorative version of the other. On this basis, I consider there to be a likelihood of indirect confusion between the marks in respect of all of the goods applied for.

...

134. I consider that, in respect of the second contested mark, the word element RITUAL plays an independent distinctive role within the same. It is the only word element in the second contested mark, and will, in my view, be considered by the consumer as an independent indicator of economic origin within the mark. Further, it is my view that, as with the other marks, the addition or omission of "S..." in the marks at the end of the coinciding element, and the slight difference in font, will easily go unnoticed or be misremembered. It is therefore my view that the consumer will likely believe the second contested mark to be the earlier contested mark complete with the addition of a device on top of the same, and the marks will therefore simply be considered as the use of the same mark with or without an additional logo. Considering all the factors, including the medium level of similarity between the goods, it is my view that the consumer is therefore likely to believe the marks derive from the same economic origin, and there is a likelihood of indirect confusion between the marks on this basis, for all goods found to be similar.

...

138. I have previously set out the relevant case law relating to indirect confusion. I keep this in mind as I make my assessment, and although I note this case does not fit directly into one of the categories set out in L.A. Sugar, I remind myself again that they are not exhaustive. Again, it is my view that, with respect to the coinciding elements, those being RITUAL/RITUALS, the consumer would easily forget the addition or omission of the "S" (and the ellipsis that follows in the earlier mark) and would consider these coinciding elements to comprise the same word. I found this element to hold just below a medium degree of distinctive character inherently, but also to be the most dominant and distinctive element in each mark. I also remind myself in this instance that the goods are identical. Considering all of these factors, it is my view that should the consumer of vitamins for example, having purchased these under the contested mark, go back to make a repeat purchase and come across these goods under the second earlier mark, it would be likely in the circumstances for the consumer to be primarily relying on the coinciding elements RITUAL/RITUALS for the purpose of identifying the economic origin of the goods. Upon seeing the contested mark for those identical goods, I find it would be perfectly logical, and indeed likely, that the consumer would assume this was simply a slight rebrand of the mark using an alternative stylisation. I consider this to be the more likely outcome in this scenario, than one where the average consumer puts the corresponding element down to coincidence, and relies solely on the additional decorative/device elements to differentiate between the economic entity responsible for the two sets of goods. I also find it just as likely this scenario would be the same should the consumer come across the contested mark prior to the earlier mark. Overall, I find there to be a likelihood of indirect confusion between these marks, in respect of all of the goods applied for."

29. Mr Muir Wood first referred me to the following well-known passage from Arnold LJ's judgment in *Liverpool Gin Distillery Ltd and Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207:

"10. It is well established that there are two main kinds of confusion which trade mark law aims to protect a trade mark proprietor against (see in particular Case C-251/95 Sabel BV v Puma AG [1997] ECR I-6191 at [16]). The first, often described as "direct confusion", is where consumers mistake the sign complained of for the trade mark. The second, often described as "indirect confusion", is where the consumers do not mistake the sign for the trade mark, but believe that goods or services denoted by the sign come from the same undertaking as goods or services denoted by the trade mark or from an undertaking which is economically linked to the undertaking responsible for goods or services denoted by the trade mark.

11. In *LA Sugar Ltd v Back Beat Inc (O/375/10)* Iain Purvis QC sitting as the Appointed Person said:

*"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'. [emphasis added]*

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).”

12. *This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition. For example, one category of indirect confusion which is not mentioned is where the sign complained of incorporates the trade mark (or a similar sign) in such a way as to lead consumers to believe that the goods or services have been co-branded and thus that there is an economic link between the proprietor of the sign and the proprietor of the trade mark (such as through merger, acquisition or licensing).*

13. *As James Mellor QC sitting as the Appointed Person pointed out in Cheeky Italian Ltd v Sutaria (O/219/16) at [16] “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Mr Mellor went on to say that, if there is no likelihood of direct confusion, “one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion”. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion.*

14. *“Likelihood of confusion” usually refers to the situations described in paragraph 10 above. As this Court held in Comic Enterprises, however, it also embraces situations where consumers believe that goods or services denoted by the trade mark come from the same undertaking as goods or services denoted by the sign or an economically-linked undertaking (sometimes referred to as “wrong way round confusion”).”*

30. In particular, Mr Muir Wood relied on Mr Purvis’ use of the words “*another brand*” which I have emphasised at the end of paragraph 16 from *L.A. Sugar* above to argue that indirect confusion only applies where the average consumer assumes that the contested trade mark relates to “*another brand*” of the owner of the earlier trade mark e.g. a sub-brand or a brand extension, rather than the same brand. Mr Muir Wood therefore submitted that the Hearing Officer erred in paragraph 127 by finding that the average consumer would believe that the Second Earlier Mark was simply “*a more stylised/decorative version*” of the Contested Word Mark, e.g. a stylised or decorative version of the **same** brand. The same criticism was made in respect of the Hearing Officer’s finding in paragraph 134 that “*the consumer will likely believe the [Contested Device Mark] to be the [First Earlier Mark] complete with the addition of a device on top of the same, and the marks will therefore simply be considered as the use of the same mark with or without an additional*

logo.”. Mr Muir Wood submitted that the same error was made in paragraph 138 when the Hearing Officer found that, when coming across the Second Earlier Mark, the average consumer would assume it “*was simply a slight rebrand of the [Contested Device Mark] using an alternative stylisation.*”.

31. I do not consider that this is a correct conclusion to draw from paragraph 16 of *L.A. Sugar*. Firstly, as Arnold LJ made clear in paragraph 12 of his judgment in *Liverpool Gin Distillery*, the examples given by Mr Purvis in *L.A. Sugar* were not exhaustive. I do not believe that Mr Purvis intended to rule out the possibility of indirect confusion where the average consumer assumes the respective marks both relate to the same brand, and the Appellant has given an over-literal reading to the reference to “*another brand*” in the final sentence of paragraph 16 of his decision. I note the use of the words “*something along the following lines*” in the same sentence which makes it clear that Mr Purvis was not laying down an absolute definition in that sentence within which all cases must fall.
32. Secondly, a trader may use a figurative mark which is similar to a registered figurative trade mark, but where the differences between the two marks are such that the average consumer notices the differences and realises that they are two different marks. In that situation, there would be no likelihood of direct confusion. Nevertheless, the average consumer could still conclude that goods branded with the respective marks came from the same or an economically linked undertaking on the basis that the contested mark was an adaptation or new version of the registered figurative trade mark. In that example, the average consumer would conclude that they were two different **marks** for the same **brand**. I can see no good reason why that should never result in a finding of indirect confusion as Mr Muir Wood suggested. On the contrary, it could fall squarely within the definition of indirect confusion set out by Arnold LJ in paragraph 10 of his judgment in *Liverpool Gin Distillery*, namely “*where the consumers do not mistake the **sign** for the **trade mark**, but believe that goods or services denoted by the **sign** come from the same undertaking as goods or services denoted by the **trade mark** or from an undertaking which is economically linked to the undertaking responsible for goods or services denoted by the **trade mark***” (emphasis added). The word ‘*brand*’ does not appear in that definition at all.
33. Furthermore, Arnold LJ’s co-branding example as another situation which could lead to a finding of indirect confusion suggests that the average consumer is perceiving the **same**

brand being used in conjunction with another third party brand, rather than the creation of “another brand”.

34. Finally, I remind myself of the importance of the global assessment of a likelihood of confusion and the need for the average consumer to make a connection between the marks and assume that the goods or services in question are from the same or economically linked undertakings (see, for example, paragraph 81 of Case BL O/547/17 *Duebros Limited v Heirler Cenovis GmbH*, paragraph 29 of BL Case O/601/19 (*Miss Dope*) and paragraph 22 of Case O-024-20 *Kingsley Beverages FZCO v Crown Melbourne Limited*).
35. Mr Muir Wood submitted that what the Hearing Officer described in paragraph 127 was a potential finding of direct rather than indirect confusion because she found that consumers would see both the Contested Word Mark and the Second Earlier Mark as a RITUAL mark, where one has the additional square and stylisation. In support of this assertion, he relied on the judgment of Arnold J (as he then was) in *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), which considered the line of cases leading up to the Court of Justice of the EU’s decision in Case C-591/12 P *Bimbo SA v OHIM* [EU:C:2014:305]. The result of those authorities is that in certain circumstances where a composite mark shares a common component with an earlier mark, there can be a likelihood of confusion where that common component plays an independent distinctive role in the composite mark.
36. The Hearing Officer in the case before me set out in paragraph 133 of her Decision the following conclusions reached by Arnold J in *Whyte & Mackay*:

“18 The judgment in Bimbo confirms that the principle established in Medion v Thomson is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In Medion v Thomson and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

37. *Whyte and Mackay* concerned an application for the word mark JURA ORIGIN, and an opposition based on two earlier word marks, the most similar of which was for the word ORIGIN, and an earlier figurative mark for a logo that included the words ORIGIN WINE. The Hearing Officer concluded that the ORIGIN element of the JURA ORIGIN mark was an independent and distinctive element of the composite mark, representing a sub-brand, with the JURA component representing the house mark, such that consumers would directly confuse it with the earlier ORIGIN word mark. He reached the same conclusion with respect to the earlier figurative mark. He also went on to find that, if the average consumer did not mistake the marks for each other, there was a likelihood of indirect confusion in respect of both the word and figurative marks, as consumers would believe that the parties were economically linked and that goods produced under the mark applied for would have a common origin to those produced under the earlier marks.
38. Arnold J found that the Hearing Officer had made a number of errors, most notably that he had been wrong to find that the word ORIGIN played an independent distinctive role in the mark applied for, and therefore re-assessed the likelihood of confusion. He concluded that there was no likelihood of confusion. The relevance of the judgment in *Whyte and Mackay* is explained in the following paragraphs.

Contested Word Mark and the First Earlier Mark

39. In the case before me, the Hearing Officer correctly summarised the law on the likelihood of confusion in paragraphs 116 to 118 of her Decision, including the difference between direct and indirect confusion. In paragraph 121 she found that there was a likelihood of direct confusion between the Contested Word Mark and the First Earlier Mark (for all the goods except the Subset) on the basis that the average consumer, taking

into account their imperfect recollection, would not notice or fail to recall the differences between the marks. That finding was not subject to the appeal before me.

Contested Word Mark and Second Earlier Mark

40. In paragraph 124 of her decision, the Hearing Officer found that there was no likelihood of direct confusion between the Contested Word Mark and the Second Earlier Mark, stating:

“Considering the visual differences between the marks, and its overall presentation which I consider to be outside of the normal and fair use of the word mark itself, it is my view that these are unlikely to go unnoticed or be forgotten entirely by the consumer, and there is therefore no likelihood of direct confusion between these marks.”

41. She then set out paragraph 17 from *L.A. Sugar*. Mr Muir Wood criticised her for not also setting out paragraph 16 from that decision, but she had already referenced the decision in a footnote in paragraph 117 of her Decision, and summarised the gist of paragraph 16, so there is no reason to believe that she did not have the contents of that paragraph in mind when she undertook her assessment. In paragraph 126 of her Decision, she referenced Arnold LJ’s judgment in *Liverpool Gin Distillery* where he pointed out the need for a “*proper basis*” for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion.

42. She then reached her conclusion that there was a likelihood of indirect confusion between the Contested Word Mark and the Second Earlier Mark as set out in paragraph 127 of her Decision (set out in paragraph 28 above).

43. Mr Muir Wood did not explain how his submissions on *Whyte and Mackay*, which I consider in the paragraphs below in respect of the Contested Device Mark and the First Earlier Mark, would apply as between the Contested Word Mark and the Second Earlier Mark since the Contested Word Mark is not a composite mark.

Contested Device Mark and the First Earlier Mark

44. The Hearing Officer found no likelihood of direct confusion between the Contested Device Mark and the First Earlier Mark, saying:

“132. Having considered all of the relevant factors, and particularly noting the circle and line device present in the [Contested Device Mark] which I found to make a significant impact visually, it is my view that this element will not go unnoticed or be forgotten entirely by the consumers when making a visual purchase. For this reason, I do not believe that consumers will directly mistake

one mark for the other, and there is therefore no likelihood of direct confusion between the same.”

45. She then went on to consider the likelihood of indirect confusion, and at this point set out paragraphs 18 to 21 from *Whyte and Mackay*, which I set out in paragraph 36 above. Her conclusion was set out in paragraph 134 of her Decision, which I set out in paragraph 28 above.
46. Mr Muir Wood submitted that, in light of the Hearing Officer’s finding that the RITUAL element played an independent distinctive role in the Contested Device Mark, and that the average consumer would not notice or misremember the “S...” in “RITUALS...” and the slight difference in font, it was open to the Hearing Officer to have found a likelihood of direct confusion. However, since she did not find direct confusion, and that was not the subject of any cross-appeal, Mr Muir Wood said that I should overturn her finding of a likelihood of indirect confusion on the basis that where the average consumer does not notice the difference between the words, but only notices the figurative device elements, that is direct rather than indirect confusion in accordance with *Whyte and Mackay*.
47. I reject that submission. Indirect confusion applies where *“the consumer has actually recognized that the later mark is different from the earlier mark”* ([16] of *L.A. Sugar*). While the Hearing Officer found that the average consumer would not notice or misremember the “S...”, such that the word elements were the same, or the slight difference in font, she clearly found that they would notice *“the large circular device with a bold line underneath”*, which she found in paragraph 97 of the Decision *“makes a significant visual impact”*. The Hearing Officer therefore found that *“the consumer will likely believe the second contested mark to be the earlier contested mark* [she meant to refer to the First Earlier Mark here] ***complete with the addition of a device on top of the same***” (emphasis added). The authorities cited above emphasise the importance of carrying out a global assessment taking into account all relevant factors when considering the likelihood of confusion. For that reason, the Hearing Officer was entitled to reject the likelihood of direct confusion but reach her conclusion that there was a likelihood of indirect confusion for the reasons she gave.
48. Needless to say, it was a highly unattractive submission to suggest that the Hearing Officer might have been correct to find that there was a likelihood of confusion, but that finding should be overturned because it was expressed to have been on the basis of indirect rather than direct confusion. This is particularly so in light of the Appellant’s submissions that I should allow the amendments to its Grounds of Appeal on the basis

that it is the result that matters, and the fact that the original Grounds of Appeal misstated the correct result of a successful appeal was merely an administrative error.

The Contested Device Mark and the Second Earlier Mark

49. Once again, the Hearing Officer rejected the likelihood of direct confusion between the two figurative marks, saying:

“137. In this instance, considering the significant visual differences between the marks, it is my view there will be no likelihood of direct confusion between the same. I find it unlikely the consumer will directly mistake one for the other, and entirely misremember the differences in the layout and the additional features in each.”

50. Her conclusion that there was a likelihood of indirect confusion on the basis that the average consumer would assume that the Second Earlier Mark was “*simply a slight rebrand of the mark using an alternative stylisation*”, and vice versa, was set out in paragraph 138 of her Decision, which appears at paragraph 28 above. The Hearing Officer gave an example of a consumer going back to a shop to make a repeat purchase and coming across goods branded with the Second Earlier Mark having previously purchased goods branded with the Contested Device Mark. She found that it was both logical and likely that the consumer would assume that this was a slight rebrand of the mark using an alternative stylisation. Mr Muir Wood submitted that this was an error as this was describing direct confusion rather than indirect confusion, because the consumer thought that they were buying the same thing and, rather than any mental process taking place, as required by *L.A. Sugar*, the consumer had simply mistaken one mark for the other. However, that is not an accurate description of the Hearing Officer’s example. The consumer had not mistaken one mark for the other, as they had noticed that they were different marks. They had then undertaken a mental process which led them to conclude that the figurative differences that they had noticed, which led them to realise that they were different marks, were due to the mistaken belief that that the goods came from the same or an economically linked undertaking, but had been rebranded. The Hearing Officer’s conclusion that this amounted to a likelihood of indirect confusion was one she was entitled to reach for the same reasons I gave above in relation to the Contested Device Mark and the First Earlier Mark.

Inconsistency

51. The Appellant also argued that the Hearing Officer’s conclusions in paragraphs 127, 134 and 138 of her Decision were inconsistent with her findings in paragraph 123 (set out in

paragraph 22 above). I do not consider that there is any inconsistency, regardless of the fact that her comments in paragraph 123 had no bearing on the outcome since she had already found direct confusion based on imperfect recollection in paragraph 121, and that finding is not subject to this appeal. In paragraph 123, she stated that **if** the average consumer were to notice the differences between the marks, particularly the presence or absence of the “S”, then **those** differences were not the sort that lend themselves to a logical brand extension or sub-brand. However, in paragraphs 127, 134 and 138, she proceeded on the basis that the average consumer would not notice or recollect **those** differences, but would notice **other** differences (namely the figurative elements) which could suggest a re-brand etc. I therefore reject the Appellant’s submissions regarding any inconsistency.

52. For the reasons given above, had I allowed the Appellant to rely on the grounds of appeal which were put to me by Mr Muir Wood at the hearing, I would have rejected any suggestion that the Hearing Officer misapplied the law in relation to her findings of indirect confusion.

53. However, I consider below the extent to which those submissions appeared in the original Grounds of Appeal, the proposed Amended Grounds of Appeal and the Appellant’s skeleton arguments.

The Original and Amended Grounds of Appeal

54. I set out the single ground of appeal from the original Grounds of Appeal in paragraph 22 above. There was no mention of the Appellant’s argument that indirect confusion only applied where the average consumer believed that the respective marks related to different brands, rather than the same brand, or that there could be no likelihood of indirect confusion where the only relevant differences between the marks were figurative elements. Neither were these arguments sought to be included in the Amended Grounds of Appeal. Nor were they mentioned in the Appellant’s skeleton arguments, which focused on the sole argument that the Hearing Officer misapplied the law by “*referring to misremembering and imperfect recollection*” which “*strayed into the language of direct confusion*” when she had ruled out direct confusion.

55. As I explained in paragraph 20 above, the proposed amendments to the Grounds of Appeal were said to only relate to an administrative error as to the overall effect of a reversal of the Hearing Officer’s findings on indirect confusion had the appeal

succeeded. However, at the hearing before me Mr Muir Wood explained that that effect included a reversal of the Hearing Officer's findings in relation to the ground of opposition under s.5(3) of the Act as well as the ground under s.5(2). Although the Respondent accepted that a reversal of the findings in relation to indirect confusion would have had a knock on effect on the findings under s.5(3) because of the way the Respondent had pleaded its case, I was concerned to see no mention whatsoever of s.5(3) in the Amended Grounds of Appeal or the skeleton arguments. In order to allow the Respondent and me to prepare for the hearing this issue also ought to have been included in the Grounds of Appeal, or at the very least in the Amended Grounds of Appeal, and in the skeleton arguments.

56. Accordingly, irrespective of my findings set out above, I also reject the Appeal on the basis that it was not open to the Appellant to rely on the grounds relied on at the hearing before me because they did not appear in the Grounds of Appeal or the Amended Grounds of Appeal.

Conclusion

57. The appeal fails for the reasons given above.

Costs

58. Since the Appellant has failed in its appeal, I order the Appellant to pay to the Respondent the sum of £1,600 in respect of its costs of the Appeal. The Hearing Officer ordered the Appellant to pay £2,900 towards the Respondent's costs of the consolidated opposition proceedings. Accordingly, I order that the Appellant shall pay the sum of £4,500 to the Respondent within 21 days of the date of this decision.

Simon Clark
The Appointed Person
12 February 2026

Representation:

Appellant: Jamie Muir Wood, instructed by Stevens & Bolton LLP

Respondent: Aaron Wood of Novagraaf UK