O/0126/26

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NOS. 3722228 & 3722230
IN THE NAME OF THE COCA-COLA COMPANY
TO REGISTER THE FOLLOWING TRADE MARKS:

COCA-COLA CREATIONS

AND

IN CLASS 32

AND

IN THE MATTER OF OPPOSITIONS THERETO
UNDER NOS. 431586 & 431589
BY ROBINSONS SOFT DRINKS LIMITED

Background and pleadings

1. On 16 November 2021 and 17 November 2021, The Coca-Cola Company ("the applicant") applied to register the trade marks shown on the cover page of this decision in the UK (collectively, "the applicant's marks"). Both applications claim a priority date of 30 June 2021. Registration of both marks is sought in respect of the following goods:

> Class 32: Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.

2. Details of the applications were published for opposition purposes on 3 December 2021. On 3 March 2022, Robinsons Soft Drinks Limited ("the opponent") opposed the applications in full under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act").

3. The opponent relies on its UK trade mark no. 906503544, **FRUIT CREATIONS** ("the opponent's mark").[1] The opponent's mark was filed on 11 December 2007 and became registered on 30 September 2008 for goods in classes 5, 30 and 32. For the purposes of the opposition, only the following goods are relied upon:

> Class 32: Non-alcoholic beverages, aerated waters, table waters, mineral waters, fruit juices, fruit beverages, carbonated drinks; preparations for making beverages; syrups for beverages; malt-based preparations for making beverages; additives for beverages; beer, ale and porter; preparations for making beverages for medical use.[2]

4. Under section 5(2)(b), the opponent contends that the applicant's marks are similar to its mark and that the parties' respective goods are identical or similar. On this basis,

[1] The opponent's mark is a comparable UK trade mark based upon EU trade mark no. 6503544. This mark was automatically created on 1 January 2021 in accordance with Article 54 of the Withdrawal Agreement between the UK and EU.
[2] I note that the term *beer, ale and porter* is not relied upon under section 5(2)(b). It is only relied upon under section 5(3).

the opponent claims that there is a likelihood of confusion, including the likelihood of association.

5. Under section 5(3), the opponent claims that its mark enjoys a substantial reputation in respect of the goods relied upon. The opponent submits that its reputation is such that use of the applicant's marks, without due cause, would take unfair advantage of, and/or be detrimental to, the distinctive character and repute of its mark. The opponent also contends that the relevant public would believe there is an economic connection between the users of the competing marks.

6. The opponent's mark qualifies as an 'earlier trade mark' in accordance with section 6 of the Act. As it had completed its registration process more than five years before the priority date of the applicant's marks, it is subject to the use requirements specified in section 6A of the Act. In its statement of grounds, the opponent states that it has used its mark for all the goods relied upon.

7. The applicant filed counterstatements denying the grounds of opposition. It also indicated that it would require the opponent to provide proof of use of its mark.

8. Both parties filed evidence. A hearing was requested and held before me, by video conference, on 23 October 2024. The opponent was represented by Julius Stobbs of Stobbs. The applicant was represented by David Stone of A&O Shearman.

Relevance of EU law

9. 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

10. The opponent's evidence is given in the witness statement of Jody Tsigarides ("JT") and 23 exhibits (JT1-JT23). JT is Director of Legal/Associate General Counsel of Intellectual Property of the Britvic Group of companies ("Britvic"), which includes the opponent. They provide the opponent's evidence of use.

11. The applicant's evidence consists of the witness statement of Rocio Fernandez-Bujarrabal ("RFB") and 19 exhibits (RFB1-RFB19). RFB is Senior Director, Legal Counsel (Trademarks for Europe and the United Kingdom) at a wholly owned subsidiary of the applicant. Their evidence goes to the applicant's own activities, third-party use of the word 'CREATIONS', and the beverage sector.

12. The opponent filed evidence in reply in the form of a witness statement from Andrew Carver ("AC") and two exhibits (AC1-AC2). AC is a Chartered Trade Mark Attorney with the opponent's representatives. They provide evidence about how beverages are sold by supermarkets.

13. I have taken all the evidence into account in reaching my decision and will refer to it below where necessary.

Proof of use

14. The relevant statutory provisions are as follows:

> "6A – (1) This section applies where
>
> (a) an application for registration of a trade mark has been published,
>
> (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

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

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

(3) The use conditions are met if –

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

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

(4) For these purposes –

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

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

(5)-(5A) [Repealed]

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

15. Moreover, section 100 of the Act states that:

"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."

16. Pursuant to the above provisions, the relevant period of assessing whether, or the extent to which, there has been genuine use of the opponent's mark is the five-year period ending with the priority date of the applicant's marks, i.e. 1 July 2016 to 30 June 2021.

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

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze*

Frottierweberei GmbH v Verein Bremer Baumwollbörse [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

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

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

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

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

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

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an

outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

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

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

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

The evidence

18. JT gives evidence that one of Britvic's key brands is 'ROBINSONS'. They say that the brand was founded in 1823 and acquired by Britvic in 1995. According to JT, a sub-brand of 'ROBINSONS' is 'FRUIT CREATIONS', described as "premium tier

squash". JT says that it was launched in late 2017 and first sold in early 2018. This is confirmed in a history of the 'ROBINSONS' brand.[3] Various flavours of 'FRUIT CREATIONS' squash drinks can be seen in printouts of the robinsonsquash.co.uk website, obtained via the Wayback Machine and dated 26 December 2019 and 4 March 2021.[4] The words 'FRUIT CREATIONS' appear in plain font on the website and in the following format when applied to the bottle packaging:

19. In the UK, 'FRUIT CREATIONS' products are said to have been sold through supermarkets, convenience stores, wholesalers and online marketplaces. JT provides printouts from the Tesco, Waitrose and Iceland websites, which were obtained via the Wayback Machine and are dated between 1 April 2020 and 19 June 2021.[5] These clearly show 'FRUIT CREATIONS' squash drinks being offered for sale. Market share information from Kantar shows that, respectively, these supermarkets had the first, eighth and ninth biggest shares of the grocery market in Britain for the 12 weeks ending 26 January 2020.[6]

20. As for convenience stores, JT exhibits a range of printouts from social media of third parties promoting 'FRUIT CREATIONS' products during the relevant period, including Hardgate Co-operative via X (formerly Twitter) on 27 June 2017, Jones Convenience Stores via Facebook on 25 July 2019, Spar King's Lynn via Facebook on 22 February 2020 and Nisa Local via X on 29 March 2020.[7]

[3] Exhibit JT3
[4] Exhibit JT5
[5] Exhibit JT15; Printouts from Co-op, Sainsbury's, ASDA, Morrisons and Ocado have also been evidenced, though they are either not dated or are from after the end of the relevant period.
[6] Exhibit JT15
[7] Exhibit JT16

21. In respect of wholesalers, JT provides an article from *Wholesale Manager*, dated 6 February 2019, which refers to Britvic launching 'FRUIT CREATIONS' in the wholesale market that month.[8] In addition to this, printouts from Facebook are evidenced, which show posts from UK wholesalers, dated between 5 January 2019 and 23 June 2019, promoting 'FRUIT CREATIONS' products.[9]

22. Printouts from Amazon UK have also been provided.[10] These show product listings of various flavours of 'FRUIT CREATIONS' squash drinks, which contain reviews from 2018 and 2019 by UK purchasers.

23. JT provides the following figures for sales of 'FRUIT CREATIONS' products in the UK:[11]

Financial Year	Volume (litres)	Turnover (£)
2020	16,604,382	18,856,200
2021[12]	18,033,765	20,075,486

24. In support of these sales figures, JT provides sales schedules showing individual sales orders from these financial years.[13] The schedules demonstrate the sale of various flavours of "ROBS CREATIONS" to multiple third parties, including ASDA, Iceland, Morrisons, B&M, Ocado, Sainsbury's, Spar, Tesco, Waitrose, Co-op, Nisa, Amazon and wholesalers. Within their statement, JT says that 'FRUIT CREATIONS' enjoyed a 5.5% share of the UK squash market as of September 2022 and a 5.3% share as of September 2023.

25. JT says that considerable money and effort has been spent on advertising and promoting the 'FRUIT CREATIONS' brand in the UK. An article from *Marketing*

[8] Exhibit JT18
[9] Printouts from Instagram have also been provided, though these are from after the end of the relevant period.
[10] Exhibit JT17
[11] Exhibit JT19; Figures are also provided for the 2022 and 2023 financial years. However, these reflect sales achieved after the end of the relevant period.
[12] I bear in mind that a large proportion of the sale for this year may have been from after the end of the relevant period. This is on the basis of my understanding that the financial year frequently begins in April.
[13] Exhibit JT20

Communication News, dated 19 January 2018, describes a multimillion-pound brand campaign called 'Listen Up' which was released to coincide with its launch.[14] The campaign was created for Britvic by Saatchi & Saatchi, and centred around a TV and on-demand advert. A printout from the Ads of the World website shows a still of the advert, in which bottles of 'FRUIT CREATIONS' products can be seen.[15] To further support the release of 'FRUIT CREATIONS', JT says that Britvic hosted a launch event on 30 January 2018 and 31 January 2018 in London; the pop-up event involved a competition for 20 Facebook followers to attend the opening night alongside celebrities and influencers, before being opened to the public the following day. Printouts from the Robinsons Facebook page and the websites of third-party influencers show images from the event.[16]

26. In January 2019, JT says that, as part of a 'Dry January' campaign, Britvic sent packaged hampers containing various products, including 'FRUIT CREATIONS', to influencers and notable social media users. An article from *The Mirror*, dated 14 January 2019, shows that it also ran a campaign whereby 10 readers could win one of the hampers.[17] An influencer's Instagram post and an article from London Unattached, dated 5 February 2019 and 9 February 2019, respectively, have also been provided; these show 'FRUIT CREATIONS' products in the hampers.

27. During 2020, Britvic is said to have partnered with Heart Radio to release promotional videos for 'FRUIT CREATIONS'. Printouts from the Heart Radio X and Facebook accounts, dated 16 April 2020, 23 April 2020 and 7 May 2020, show videos featuring 'FRUIT CREATIONS'.[18] The evidence shows that the Heart Facebook page has 1.8million likes and 2.4million followers, whilst its X account has 148,400 followers.[19] As the printouts of the homepages are undated, I infer that these figures reflect the position at the date of JT's statement. An article from *Medium*, dated 10 July 2019, shows that Heart was the third-biggest radio station in the UK that year; this

[14] Exhibit JT7
[15] Exhibit JT7
[16] Exhibit JT8
[17] Exhibit JT10
[18] Exhibit JT10
[19] Exhibit JT10

was based upon radio listening figures from RAJAR, the body responsible for tracking such figures.[20]

28. In April 2021, Britvic is said to have launched another large-scale advertising campaign called 'Let There Be Fruit', which promoted the full range of 'ROBINSONS' products, including 'FRUIT CREATIONS'. JT says that the campaign cost £6.4million overall and ran across television, radio and digital, amongst other channels. Of the three television adverts, one specifically focused on a 'FRUIT CREATIONS' product. A press release from Britvic, dated 20 April 2021, confirms these details, and adds that the television promotion began on 9 April 2021.[21] A still of the second advert is also in evidence.[22]

29. In addition to the above, JT states that Britvic has consistently used various social media channels to promote the 'FRUIT CREATIONS' brand. Example posts from the 'robinsons_uk' Instagram account, the 'DrinkRobinsons' X account and the 'Robinsons' Facebook account featuring 'FRUIT CREATIONS' products are in evidence; insofar as they relate to the relevant period, they are dated between 16 April 2018 and 25 February 2021.[23] The Instagram account has 8,167 followers, the X account has 14,100 followers and the Facebook account has 46,000 likes/followers. Again, given that the printouts of the homepages are undated, I infer that they reflect the position at the date of JT's statement. A selection of third-party social media posts featuring 'FRUIT CREATIONS' products have been provided.[24] Some are from within the relevant period and the products appear to have been sourced from UK retailers.

30. JT has provided a selection of press releases from Britvic and third-party articles relating to 'FRUIT CREATIONS'.[25] These include an article from *The Grocer*, dated 20 October 2017, detailing the launch of the squash range; a press release from Britvic, dated 31 January 2018, which mentions the future launch into the grocery sector in Q2; a press release from Britvic, dated 26 September 2018, about an expansion of the

[20] Exhibit JT10
[21] Exhibit JT6
[22] Exhibit JT8
[23] Exhibit JT9
[24] Exhibit JT22
[25] Exhibit JT6

range following its successful launch; an article from *Talking Retail*, dated 6 February 2019, about the range entering the convenience sector; and a press release from Britvic, dated 11 February 2019, about 'FRUIT CREATIONS' winning the soft drinks category of the Product of the Year Awards 2019.

31. According to JT, Britvic has been involved in sponsorships and supported various high-profile events which have featured the 'FRUIT CREATIONS' brand, perhaps the most notable being Wimbledon tennis tournament. They say that sponsorship of the event by 'ROBINSONS' began in 1935 and that 'FRUIT CREATIONS' products have been showcased there since their launch. Various press releases from Britvic about its sponsorship are in evidence, including that of 31 July 2018 which specifically mentions 'FRUIT CREATIONS'.[26] A selection of images from social media of 'ROBINSONS' at Wimbledon have been provided.[27] They are dated between 15 June 2018 and 25 June 2021; 'FRUIT CREATIONS' products can be seen throughout. Information from Britvic and Wimbledon shows that around 500,000 people attend the championships each year.[28]

32. In support of the contention that 'FRUIT CREATIONS' is recognised by consumers throughout the UK, JT provides a graph from a commissioned study conducted by Kantar.[29] The graph shows the prompted awareness of UK consumers of different brands in the "better & best" squash category. During the relevant period, 'Robinsons Fruit Creations' appears to have had between 35% and 60% prompted awareness, being roughly 50% from 2018 onwards. Whilst these figures are significant, this evidence is of low probative value at best. Firstly, JT says that the survey involved only 1,200 individuals, which I do not consider to be representative of the average consumer. Moreover, as the evidence shows, 'prompted awareness' is a measure of whether someone is aware of a given brand, i.e. they are asked directly whether they are aware of brand X.[30] From the evidence, it is difficult to ascertain what proportion of the respondents would have been aware of 'FRUIT CREATIONS', rather than 'Robinsons Fruit Creations'. The prompts have not been provided. Given that the

[26] Exhibit JT12
[27] Exhibits JT13 and JT14
[28] Exhibit JT12
[29] Exhibit JT21
[30] Exhibit JT21

results in the graph are for 'Robinsons Fruit Creations', it is likely that this was the named brand.[31] Therefore, the study does not conclusively show what percentage of the respondents were aware of the 'FRUIT CREATIONS' brand, separate from the existing 'ROBINSONS' brand.

33. Finally, JT says that the 'FRUIT CREATIONS' brand and associated products have been widely recognised within the industry and have received awards. Evidence of awards have been provided, including squash 'Product of the Year', the Food and Drink Federation's 'Brand Launch of the Year', and 'Marketing Campaign of the Year' at the CIM Marketing Excellence Awards (all 2019).[32]

Forms of the mark

34. At the hearing, Mr Stone contended that the opponent has failed to demonstrate genuine use of its mark because there is no use of the mark on its own. I acknowledge that the evidence does show use of the words 'FRUIT CREATIONS' alongside Britvic's 'Robinsons' brand; there is very little (if any) independent use. For instance, use on the opponent's website and social media accounts is in conjunction with the word 'Robinsons' or on pages which are adorned with 'Robinsons' branding. The word is presented underneath the word 'Robinsons' on the bottle packaging and when used elsewhere in figurative format. Third parties, too, appear to have consistently referred to the mark in conjunction with the word 'Robinsons' on their websites, in articles and in social media posts. The awards were given in relation to 'Robinsons Fruit Creations', rather than 'Fruit Creations' solus. However, in my view, none of this is fatal to the opponent's case on genuine use.

35. In *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union ("CJEU") found that:

[31] Although I do not place undue weight on this point, this would explain how the brand was already at around 35-40% awareness upon launch; the respondents may have already been aware of Britvic's existing 'ROBINSONS' brand.
[32] Exhibit JT23

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35 Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at

issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1).”

36. To my mind, using the words ‘FRUIT CREATIONS’ alongside or below the word ‘Robinsons’ constitutes acceptable variant use of the mark as registered. The words ‘FRUIT CREATIONS’ are unaltered and continue to be an indicator of origin, even if they are not the only element of the evidenced mark that fulfils that function. JT says that ‘FRUIT CREATIONS’ is a sub-brand of ‘Robinsons’ and, in my view, that is how the mark will be perceived when these elements are used in conjunction with one another.

37. As noted above, the words ‘FRUIT CREATIONS’ are also used in the following figurative format:

38. In this mark, the words ‘FRUIT CREATIONS’ are presented in a slightly stylised font. However, the opponent’s mark is registered in word-only format and, as such, it is protected for the words themselves, not the form in which they are presented. As such, the font in the evidenced mark must not be taken into account.[33] In my view, as was the case with the plain word use discussed above, the mark as registered is present and unaltered. Whilst it is presented under the ‘ROBINSONS’ banner, it continues to be an indicator of origin, albeit that it is likely to be perceived as a sub-brand. The words ‘EST 1823’ are informative as to when the ‘ROBINSONS’ business commenced and are, therefore, non-distinctive. I find the evidenced mark to be acceptable variant use of the mark as registered.

[33] See *La Superquimica v EUIPO*, Case T-24/17, *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19, and *PW Branding, Inc v Zabou Group Limited*, BL O/0234/25.

39. These considerations also apply to use of the opponent's mark on the bottle packaging, as in the below example:

40. As can be seen in the above, additional elements on the packaging include a colour background, imagery of fruit, and the words 'EST 1823', 'TWICE THE REAL FRUIT', 'Exotic', 'NO ADDED SUGAR', and 'PINEAPPLE, MANGO & PASSION FRUIT'. None of these elements alters the mark as registered. In addition, they are all also descriptive, decorative or informative. This is also use upon which the opponent may rely.

41. Mr Stone also argued that, when used in conjunction with the word 'Robinsons', the opponent's mark is entirely descriptive and is not, therefore, being used as a trade mark. I accept that, for use to be genuine, it must be use in accordance with the essential function of a trade mark, that is, to guarantee the identity of the origin of the goods or services; where a term is used in a purely descriptive manner, it is not capable of performing that function and, therefore, such use cannot be accepted as genuine.[34] Nevertheless, I do not consider that to be the case here. Although the words 'FRUIT CREATIONS' strongly allude to goods which are made with or from fruit (such as the opponent's squash product) they do not strike me as being directly descriptive of a characteristic of those goods.

[34] *Henkell & Co Sektkellerei KG v EUIPO*, Case T-20/15

42. As can be seen from the example above at paragraph 39, the words ‘FRUIT CREATIONS’ appear at the centre of the label. They are presented in the largest font, and in white against a coloured background. The word ‘ROBINSONS’ is presented at the top of the label. Given its placement, as well as the fact that it is more distinctive than the words ‘FRUIT CREATIONS’, it is my view that the word ‘ROBINSONS’ is likely to be viewed as the house brand. Nonetheless, that does not prevent the words ‘FRUIT CREATIONS’ performing the essential function of a trade mark, albeit as a secondary identifier of origin. To my mind, when the product is selected by consumers, they would immediately notice the words ‘FRUIT CREATIONS’, albeit whilst perceiving the words ‘ROBINSONS’ as the primary identifier of origin. The eye will be naturally drawn to them on the basis of their relative size and positioning. The placement of the words is typically where one would expect to find a trade mark.

43. Mr Stone highlighted that the opponent’s evidence shows several other sub-brands of ‘Robinsons’ which use descriptive language. I accept that it does. For example, ‘Mini’ is used for its range of miniature bottles of squash and ‘Fruit Cordial’ is used for its range of fruit-flavoured cordials. However, the use of descriptions on other product ranges does not have any impact on whether the words ‘FRUIT CREATIONS’ are being used descriptively. Neither does it automatically mean that consumers would view them as such, notwithstanding what I have said above about their relative size and position.

44. Taking all of the above into account, I find that the opponent’s use of ‘FRUIT CREATIONS’ is in accordance with the essential function of a trade mark. I reject the proprietor’s argument that the opponent has only used its mark in a descriptive sense.

Sufficient use

45. The evidence has its limitations. For instance, whilst the social media evidence from the opponent shows that the ‘FRUIT CREATIONS’ mark featured in posts during the relevant period, there is no evidence of how many followers its pages had at any point during the same, or how many of them were based in the UK. There is also no evidence as to the impact of the involvement of the social media influencers in the

opponent's Dry January campaign. In addition, the problems with the brand awareness study have already been discussed.

46. Nevertheless, an assessment of genuine use is a global assessment, which involves looking at the evidential picture as a whole.[35] The evidence shows that 'FRUIT CREATIONS' was launched towards the beginning of the relevant period, and various flavours of the squash product were shown on the 'Robinsons' UK website throughout the relevant period. The squash product was sold through major UK supermarkets during the relevant period. Social media evidence has been provided which also shows that the squash product was sold through convenience stores and wholesalers in the UK during the relevant period. In addition, the evidence shows that the squash product was listed on Amazon UK, with verified reviews suggesting that goods were sold through this channel.

47. The unchallenged turnover figures suggest that over £38million was accrued through the sale of nearly 35million litres of 'FRUIT CREATIONS' in the UK during 2020 and 2021. Although figures have only been provided for two years, and a proportion of those figures are likely to relate to sales achieved after the end of the relevant period, these remain significant figures, even in the context of what I understand is a very large market. I acknowledge that the market share information does not reflect the position during the relevant period. However, 'FRUIT CREATIONS' held over 5% of the squash market in the UK in the two years immediately following the relevant period. This is clearly significant, in what I understand to be a large and competitive market. In my view, such a share is unlikely to have materialised overnight.

48. I note that no specific expenditure figures have been provided in connection with the promotion of goods bearing the mark. Nevertheless, it is sufficiently clear that such activities took place during the relevant period. This is evident from the details of the multimillion-pound 'Listen Up' television/on-demand advertising campaign, the pop-up event in London, the partnership with Heart Radio (the third largest station in the UK in 2019), and the 'Let There Be Fruit' campaign. Goods bearing the mark also received

[35] *New Yorker SHK Jeans GmbH & Co KG v OHIM*, Case T-415/09

press coverage from several third parties during the relevant period, albeit that no circulation or readership figures are available. The opponent has sponsored the Wimbledon tennis tournament for an extended period, and the evidence shows that 'FRUIT CREATIONS' was promoted at the same during the relevant period. Whilst it is not possible to accurately ascertain the number of attendees who would have encountered the mark at the tournament, the evidence shows that around 500,000 people attend each year, which is not insignificant. Finally, whilst most of the awards appear to reflect industry recognition, rather than recognition by the average consumer, the fact that the 'FRUIT CREATIONS' squash product attained a number of awards in the relevant period adds further support to the notion that there has been real commercial exploitation of the mark.

49. In light of all this, it is clear that the opponent attempted to create and maintain a market in the UK for its 'FRUIT CREATIONS' squash product during the relevant period.

Fair specification

50. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834, Kitchin LJ (as he then was) set out the approach to be followed when considering partial revocation of a trade mark. The same approach is relevant when framing a fair specification. He said:

> "245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.
>
> 246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. […] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark is registered."

51. This approach was endorsed by the Supreme Court in *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, subject to the proviso that it must be seen in light of more recent guidance by the CJEU:

"261. […] First, there can be no doubt that an application to register a mark in respect of a broad category of goods or services may be made partly in bad faith in so far as the broad description includes distinct sub-categories of goods or services in relation to which the applicant never had any intention to use the mark, whether conditionally or otherwise. In my view, that emerges clearly from the decision of the CJEU in this case. The approach to be adopted in such a

case was explored and explained by the Court of Appeal in *Merck KGaA v Merck Sharp & Dohme Corp* [2017] EWCA Civ 1834; [2018] ETMR 10, at paras 241-2491 and, so far as I am aware, that approach has proved workable and appropriate and has stood the test of time, save that it must now be seen in light of the more recent guidance given by the CJEU in, for example: *Ferrari SpA v DU* (Joined Cases C-720/18 and C-721/18) EU:C:2020:854; [2021] Bus LR 106, at paras 36- 53. There the CJEU explained, at para 40, that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods or services capable of being viewed independently is their purpose and intended use."

52. The opponent's original pleading was that it had used its mark in respect of all the goods set out at paragraph 3. However, Mr Stobbs' position at the hearing was that the evidence establishes genuine use in relation to *fruit beverages*. Mr Stone contended that any use of the opponent's mark has been limited to squash only.

53. I agree with Mr Stone that the evidence shows use of the mark (or acceptable variants thereof) in connection with fruit-flavoured squash. However, the exercise to be undertaken in determining a fair specification is not to define the particular examples of goods for which there has been genuine use but, rather, the particular categories of goods they should realistically be taken to exemplify.[36] The task is not to describe the use made in the narrowest possible terms, unless that is what the average consumer would do.[37]

54. I also note that RFB has provided extracts from the website of the British Soft Drinks Association,[38] which show that 'dilutables' (such as squashes and cordials) is a category of soft drinks. However, as Arnold LJ stated in *EasyGroup Limited v Easy Live (Services) Limited & Ors* [2025] EWCA Civ 946:

[36] *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited,* BL O/345/10
[37] *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch). See, for example, *Pan World Brands v Tripp Ltd (Extreme Trade Mark)* [2008] RPC 2 where it was held that use in relation to holdalls justified a registration for luggage generally.
[38] Exhibit RFB19

> “82. As the Court of Justice made clear in *ACTC* and *Ferrari*, the essential criteria which must be applied in determining whether a category of goods or services can be divided into independent subcategories are purpose and intended use. It is not sufficient that different goods may be aimed at different publics or sold in different shops or that different goods or services belong to different market segments. […]
>
> 83. As the Court of Justice made clear in Ferrari at [43], the ultimate question is "whether a consumer who wishes to purchase a product or service falling within the category of goods or services covered by the trade mark in question will associate all the goods or services belonging to that category with that mark".”

55. The evidence shows that the opponent has used its mark in connection with fruit squash. In light of the case law cited above, it is my view that a fair specification for such goods would be *fruit beverages*. The purpose and intended use of fruit squash is the same as that of other fruit-flavoured beverages.

Section 5(2)(b)

Legislation and case law

56. Sections 5(2)(b) and 5A of the Act state as follows:

> “5(2) A trade mark shall not be registered if because -
>
> […]
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

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

57. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor* [2025] UKSC 25:[39]

> (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, in certain circumstances, be dominated by one or more of its components;

[39] Having previously been found in numerous decisions of the EU courts.

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

(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

58. Some of the applied-for goods, such as *fruit drinks […]* and *[…] non-alcoholic drinks* are identical to the opponent's *fruit beverages*, either because they describe the same goods or encompass one another.[40] Therefore, I will proceed on the basis that all the goods at issue in these proceedings are identical. If the opposition fails where the goods are identical, it follows that the opposition will fail where the goods are only similar.

[40] See *Gérard Meric v OHIM,* Case T- 133/05, paragraph 29

Average consumer

59. As the authorities indicate, I must determine who the average consumer is for the parties' goods and how they are likely to select those goods. The average consumer is deemed to be reasonably well informed, observant and circumspect.[41]

60. In *Iconix*, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

> (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
>
> (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
>
> (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
>
> (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;

[41] *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), paragraph 60

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

61. The average consumer of the goods at issue is an ordinary member of the general public. Mr Stobbs contended that the average consumer will pay a low degree of attention since the goods are inexpensive consumer goods that will be purchased on a very frequent (if not daily) basis. On the other hand, Mr Stone argued that the average consumer is likely to pay at least an average level of attention because the goods are potable products which will be consumed. Whilst I acknowledge both submissions, I am of the view that a fair position is likely to be somewhere in between. The goods are likely to be purchased relatively frequently for the purposes of refreshment. The purchasing act will not involve an overly considered thought process as the goods are generally inexpensive. It will be more casual than careful, though the average consumer is still likely to consider ordinary factors such as taste and nutritional content. In light of this, I find that the average consumer will demonstrate between a low and medium level of attention during the purchasing process.

62. The goods are typically sold in retail outlets and their online equivalents. They will be self-selected by the average consumer after being viewed on shelves, in chilled cabinets or in images on websites. Therefore, the purchasing process will be predominantly visual in nature. However, I do not discount aural considerations, given that the average consumer may seek advice from sales assistants or receive word-of-mouth recommendations. There is also the possibility for verbal orders being placed for some of the goods in hospitality settings, though the selection process would still be in the context of a visual inspection of a drinks list, for example, prior to the order being placed. In such circumstances, although aural considerations will play their part, visual considerations will still be most important.[42]

[42] *Simonds Farsons Cisk plc v OHIM,* Case T-3/04

Distinctive character of the earlier mark

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

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases 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)."

64. Registered trade marks possess varying degrees of inherent distinctive character. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

65. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis QC, sitting as the Appointed Person, pointed out that the level of distinctive character is only likely to increase the likelihood of confusion to the extent that it resides in the elements of the marks that are identical or similar. He said:

> "38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that 'the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion'. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.
>
> 39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it."

66. The opponent's mark is in word-only format and consists of the words 'FRUIT CREATIONS'. The words combine to form a unitary phrase. This is due to the formulation of the mark in which the word 'FRUIT' naturally qualifies the type of 'CREATIONS'. The distinctiveness of the mark lies in the resulting combination. Due to this, and for reasons which will become apparent, I do not consider it necessary to determine whether the evidence of third-party use of the word 'CREATIONS' provided by RFB establishes that the word in the opponent's mark solus lacks distinctive character, as submitted by Mr Stone.[43]

67. Mr Stobbs submitted that the mark is unusual in the context of the goods relied upon. This was on the basis that the word 'CREATIONS' has implications in terms of imagination, novelty and artistic talent. The word 'creation' refers to the act of creating or the thing that is created.[44] Whilst I accept that to 'create' refers to making something new,[45] I do not agree that the word is unusual in the context of beverages or particularly remarkable from a trade mark perspective. It is not uncommon for beverage producers to bring together different, potentially new, flavour combinations, and I do not consider the word to be naturally limited in direct relevance to 'creative' contexts in the way Mr Stobbs suggested. In my view, the mark as a whole strongly alludes to goods which

[43] RFB, paragraphs 14-20, and Exhibits RFB9-RFB18
[44] https://dictionary.cambridge.org/dictionary/english/creation
[45] https://dictionary.cambridge.org/dictionary/english/create

are made from/with fruit, such as the opponent's *fruit beverages*. On this basis, I find that the opponent's mark possesses a low level of inherent distinctive character.

68. I am now required to consider whether the opponent has demonstrated that its mark had an enhanced level of distinctive character at the relevant date, that being 30 June 2021. I have already assessed the evidence above. Whilst I will not repeat that assessment here, I remind myself that 'FRUIT CREATIONS' squash was sold through major UK supermarkets, as well a range of other retail outlets (both in store and online), prior to the relevant date. I also remind myself of the significant turnover accrued prior to the relevant date. Moreover, whilst no market share information is available for any period before the relevant date, 'FRUIT CREATIONS' held a significant share of the squash market in the UK in the following two years. The evidence also shows that 'FRUIT CREATIONS' was the subject of multimillion-pound advertising campaigns across various media formats and was promoted at events sponsored by Britvic and 'Robinsons', including Wimbledon, prior to the relevant date. Finally, 'FRUIT CREATIONS' was referred to in social media posts and in third-party articles prior to the relevant date. Taking all the evidence into account, I am satisfied that the distinctive character of the opponent's mark had been enhanced at the relevant date. However, given its low level of inherent distinctiveness, and the limitations with the evidence already discussed, I find that the enhancement results in the distinctiveness of the opponent's mark being at no more than a medium level overall. Although all the use relates to fruit squash, I will proceed on the basis that this finding extends to *fruit beverages*.

Comparison of trade marks

69. It is clear from *Sabel BV v Puma AG*, Case C-251/95, that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*, Case C-591/12P, that:

"[…] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

70. Therefore, it would be wrong to dissect the trade marks artificially, though it is necessary to take into account the distinctive and dominant components of the marks; due weight must be given to any other features which are not negligible and hence contribute to the overall impressions created by the marks.

71. The marks to be compared are as follows:

<table>
<tr><th>The opponent's mark</th><th>Application no. 3722228</th></tr>
<tr><td rowspan="3">FRUIT CREATIONS</td><td>COCA-COLA CREATIONS

("the applicant's word mark")</td></tr>
<tr><td>Application no. 3722230</td></tr>
<tr><td> 

("the applicant's figurative mark")</td></tr>
</table>

Overall impressions

72. The opponent's mark is in word-only format and consists of the words 'FRUIT CREATIONS'. As previously explained, the words combine to form a unitary phrase. As such, the overall impression lies in the combination of the two words.

73. The applicant's word mark comprises the words 'COCA-COLA CREATIONS'. As it is more distinctive and appears at the beginning of the mark, it is my view that the 'COCA-COLA' element dominates the overall impression of the mark. The word 'CREATIONS' also provides a contribution but plays a lesser role.

74. The applicant's figurative mark consists of the words 'Coca-Cola' and 'CREATIONS', separated by a curved line or band. The words 'Coca-Cola' are presented in a stylised, cursive font, whilst the word 'CREATIONS' is presented in a standard font. All the elements are presented in white on a black background. As they are more distinctive and appear at the top of the mark, to my mind, the words 'Coca-Cola' dominate the overall impression. The word 'CREATIONS', whilst still contributing, plays a lesser role. The curved line/band device, the fonts and the background will be perceived as decorative and, therefore, play much lesser roles.

Visual comparisons

The opponent's mark and the applicant's word mark

75. The competing marks are visually similar to the extent that they share the word 'CREATIONS'. This word plays a co-dominant role in the opponent's mark (along with the word 'FRUIT') but a lesser role in the applicant's mark. This point of similarity appears at the ends of the competing marks. The competing marks are visually different in their remaining elements, i.e. 'FRUIT' in the opponent's mark and 'COCA-COLA' in the applicant's mark. The former plays a co-dominant role and the latter a dominant one. These differing elements also appear at the beginning of the marks, a position which tends to have more visual impact.[46] Bearing in mind my assessment of

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

the overall impressions, I find that there is between a low and medium degree of visual similarity between the competing marks.

The opponent's mark and the applicant's figurative mark

76. The visual similarities and differences discussed above at paragraph 75 also apply here. However, the applicant's figurative mark has additional presentational elements. I do not consider the font of the word 'CREATIONS' or the use of black and white in the applicant's mark constitute points of significant visual difference between the competing marks; this is because fair and normal use of the opponent's word-only mark would cover being presented in the same way. The curved line/band device and the stylisation of the words 'Coca-Cola', whilst playing much lesser roles in the applicant's mark, do constitute an additional point of visual difference. All in all, I find that there is a low degree of visual similarity between the competing marks.

Aural comparisons

77. None of the presentational elements in the applicant's figurative mark effects the way the mark will be articulated. As such, both of the applicant's marks consist of seven syllables. The opponent's mark comprises four syllables. The competing marks are aurally similar in that they share the word 'CREATIONS', which will be pronounced in the ordinary way. This point of aural similarity appears at the ends of the competing marks. The competing marks aurally differ due to their remaining elements. The shared word is preceded by the one syllable of the word 'FRUIT' in the opponent's mark and the four syllables of the words 'COCA-COLA' in the applicant's marks. These differing elements dominate (or at least co-dominate) the respective overall impressions and appear at the beginning of the marks, a position which tends to have more aural impact. Overall, I find that there is between a low and medium degree of aural similarity between the competing marks.

Conceptual comparisons

78. As the presentational elements in the applicant's figurative mark do not have any semantic content, I will consider both of the applicant's marks together here. The

applicant's marks are comprised of the words 'COCA-COLA' and 'CREATIONS'. The word 'COCA' is defined as being the name of a South American evergreen bush or small tree.[47] However, it is my view that the average consumer is not likely to be aware of this meaning. The word 'COLA' will be understood as a reference to a type of sweet, fizzy soft drink.[48] When this element is viewed as a whole, Mr Stone contended that the average consumer will make an association with the applicant's business. This was on the basis of the evidence provided by RFB regarding the reputation of 'COCA-COLA' in the UK.[49] Whilst there are exceptional cases where an extensive reputation has evolved into a conceptual meaning,[50] for reasons that will become apparent, I do not consider it necessary to determine this point. In my view, 'COCA-COLA' is not likely to convey any immediately obvious concept, aside from perhaps alluding to some sort of cola drink. As outlined above, the word 'creation' is defined as the act of creating something, or the thing that is created. In the context of the applicant's marks, it will be understood as referring to the products (i.e. the creations) sold under the 'COCA-COLA' brand. As previously outlined, the opponent's mark conveys the concept of things made with/from fruit. The competing marks conceptually overlap in the shared presence of the word 'CREATIONS' but differ in all other respects. Bearing in mind my assessment of the overall impressions, I find that there is between a low and medium degree of conceptual similarity between the competing marks.

Likelihood of confusion

79. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. One such factor is the interdependency principle, i.e. a lesser degree of similarity between the competing marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and the nature of the purchasing process. In doing

[47] https://dictionary.cambridge.org/dictionary/english/coca
[48] https://dictionary.cambridge.org/dictionary/english/cola
[49] RFB, paragraphs 4-11, and Exhibits RFB1-RFB7.
[50] See the comments of Mr Philip Harris, sitting as the Appointed Person, in *Retail Royalty Company v Harringtons Clothing Limited,* BL O/593/20, paragraphs 74-76, where he refers to the CJEU's judgements in *Claude Ruiz-Picasso and Others v OHIM*, Case C-361/04 P, and *EUIPO v Lionel Andrés Messi Cuccittini* and *J.M.-E.V. e hijos SRL v EUIPO*, Joined Cases C-449/18 P and C-474/18 P.

so, I must be mindful that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

80. Confusion can be direct or indirect. At the hearing, Mr Stobbs conceded that there would be no direct confusion between the competing marks, a type of confusion which involves the average consumer mistaking one mark for the other. Therefore, I need only consider whether there is a likelihood of indirect confusion.

81. Indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Purvis, again 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 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)."

82. These three categories are not exhaustive. Rather, they were intended to be illustrative of the general approach.[51] However, indirect confusion has its limits; such a finding 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.[52] It has also been emphasised that, where there is no direct confusion, there must be a proper basis for finding indirect confusion.[53]

83. Having proceeded on the basis that the parties' goods are identical, I further concluded that:

- The average consumer is a member of the general public, who will pay between a low and medium level of attention during the purchasing process;

- The purchasing process will be predominantly visual in nature, though aural considerations have not been discounted;

[51] As was confirmed by the Court of Appeal in *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, paragraph 12.
[52] *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17
[53] See the Court of Appeal's comments in *Liverpool Gin Distillery*, paragraph 13.

- The opponent's mark possesses a low level of inherent distinctive character, which has been enhanced to a medium level through use;

- The overall impression of the opponent's mark lies in the combination of the words 'FRUIT CREATIONS';

- The overall impression of the applicant's word mark is dominated by the words 'COCA-COLA', whilst the word 'CREATIONS' plays a lesser role;

- The words 'Coca-Cola' dominate the overall impression of the applicant's figurative mark, whilst the word 'CREATIONS', the device, fonts and background play lesser roles;

- The opponent's mark and the applicant's word mark are visually, aurally and conceptually similar to between a low and medium degree;

- The opponent's mark and the applicant's figurative mark are visually similar to a low degree, and aurally and conceptually similar to between a low and medium degree.

84. In support of the opponent's case on indirect confusion, Mr Stobbs referred me to the following passages of *Bimbo*:

> "24. […] it is possible that an earlier mark used by a third party in a composite sign that includes the name of the company of the third party retains an independent distinctive role in the composite sign. Accordingly, in order to establish the likelihood of confusion, it suffices that, on account of the earlier mark still having an independent distinctive role, the public attributes the origin of the goods or services covered by the composite sign to the owner of that mark […]
>
> 25. […] a component of a composite sign does not retain such an independent distinctive role if, together with the other component or components of the sign,

that component forms a unit having a different meaning as compared with the meaning of those components taken separately […]

[…]

34. […] it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.

35. The determination of which components of a composite sign contribute to the overall impression made on the target public by that sign is to be undertaken before the global assessment of the likelihood of confusion of the signs at issue. Such an assessment must be based on the overall impression produced by the trade marks at issue, since the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details, as has been stated in paragraph 21 above. Therefore, this does not involve an exception, that must be duly substantiated, to that general rule."

85. It was submitted that the word 'CREATIONS' plays an independent distinctive role in the applicant's marks and is the dominant part of the opponent's mark. On this basis, Mr Stobbs argued that the average consumer will believe that the competing marks are related or that there is an economic connection between the parties.

86. In *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J (as he then was) considered the impact of the CJEU's judgment in *Bimbo* on its earlier judgment in *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04. The judge said:

"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."

87. I have found that the word 'CREATIONS' in the opponent's mark combines with the word 'FRUIT' to form a unitary phrase, and it is in that phrase that the distinctiveness of the mark lies. The word 'CREATIONS' does not have a distinctive significance which is independent of the significance of the whole. I do not believe that the average consumer would perceive the opponent's mark as consisting of two signs.

The *Medion* principle does not apply here and, therefore, I dismiss this line of argument.

88. I now turn to consider the issue of indirect confusion more generally. Having regard to all the aforementioned factors and principles, I do not believe that the average consumer will assume that the opponent and the applicant are economically linked undertakings on the basis of the competing marks. I am not convinced that the average consumer will assume a commercial association, collaboration or licencing agreement between the parties merely because of the shared word 'CREATIONS'. This common element is not so strikingly distinctive that the average consumer would assume that only the opponent would be using it in a trade mark. Whilst the opponent's mark is factually distinctive to a medium level, the distinctive character of the mark lies in the phrase 'FRUIT CREATIONS'; the average consumer would not dissect the common word from the mark as a whole. In addition, I do not consider the differences between the competing marks to be simple additions/removals of non-distinctive elements. Whilst the word 'FRUIT' solus may not be distinctive in respect of beverages, the words 'COCA-COLA' comprise the dominant and distinctive element of the applicant's marks. Moreover, the differences between the competing marks do not appear to be consistent with any logical brand extensions with which the average consumer would be familiar. For example, whilst the addition of decoration (such as the presentational elements in the applicant's figurative mark) may indicate the use of an alternate or variant mark, I can see no reason why an undertaking would remove the dominant and distinctive element of their mark, namely 'COCA-COLA', and replace it with the word 'FRUIT', or vice versa. Rather, it is my view that the average consumer would perceive the shared use of the word 'CREATIONS' as purely coincidental. In light of all this, I conclude that there is no likelihood of indirect confusion, even in respect of identical goods.

Conclusion

89. The opponent's claims under section 5(2)(b) are dismissed.

Section 5(3)

Legislation and case law

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

> "(3) A trade mark which-
>
> is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier trade mark".

91. Section 5(3A) states:

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

92. The relevant case law can be found in the following judgments of the CJEU: *General Motors*, Case C-375/97, *Intel*, Case 252/07, *Adidas-Salomon*, Case C-408/01, *L'Oréal v Bellure*, Case C-487/07, *Marks and Spencer v Interflora*, Case C-323/09, and *Environmental Manufacturing LLP v OHIM*, Case C-383/12P. The law appears to be as follows:

> (a) The reputation of a trade mark must be established in relation to the relevant section of the public as regards the goods or services for which the mark is registered; *General Motors, paragraph 24.*
>
> (b) The trade mark for which protection is sought must be known by a significant part of that relevant public; *General Motors, paragraph 26.*

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

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

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

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

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

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

(i) The advantage arising from the use by a third party of a sign similar to a mark with a reputation is an unfair advantage where it seeks to ride on the coat-tails of the senior mark in order to benefit from the power of attraction, the reputation and the prestige of that mark and to exploit, without paying any financial compensation, the marketing effort expended by the proprietor of the mark in order to create and maintain the mark's image. This covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation (*Marks and Spencer v Interflora, paragraph 74 and the court's answer to question 1 in L'Oréal v Bellure).*

93. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that its mark is similar to the applicant's marks.[54] Secondly, the opponent must show that its mark has achieved a level of knowledge, or reputation, amongst a significant part of the public. Thirdly, the opponent must establish that the public will make a link between the marks, in the sense of its mark being brought to mind by the applicant's marks. Finally, assuming the foregoing conditions have been met, section 5(3) requires that one or more types of damage claimed by the opponent will occur. It is not necessary for the purposes of section 5(3) that the goods are similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between the marks.

94. The relevant date for the assessment under this ground is the priority date claimed by the applicant's marks, namely 30 June 2021.

[54] Given my findings at paragraphs 75-78, this condition is satisfied.

Reputation

95. In *General Motors*, the CJEU held that:

> "25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.
>
> 26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.
>
> 27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.
>
> 28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout' the territory of the Member State. It is sufficient for it to exist in a substantial part of it."

96. I have already found that the opponent's evidence was sufficient for the purposes of establishing that the distinctive character of the opponent's mark had been enhanced at the relevant date. Whilst I acknowledge that reputation and enhanced distinctive character are different, the nature, factors, and evidence used to prove them are the same.[55] For the same reasons as given at paragraph 68, I am satisfied that the opponent's mark had a moderate reputation in the UK at the relevant date. Although the opponent's evidence shows use in respect of fruit squash, I shall proceed on the basis that this reputation extends to *fruit beverages*.

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

97. I cannot place the opponent's reputation at any higher a level because use of the mark has not been particularly longstanding. In this regard, I reiterate that that 'FRUIT CREATIONS' squash was launched in late 2017/early 2018 (less than four years before the relevant date) and turnover figures have only been provided for 2020 and 2021. Moreover, although the market share information for 2022 and 2023 can cast light backwards to a certain extent, I have no such figures which accurately reflect the position at any point before the relevant date. The evidence is also limited in other ways. For example, there is no evidence as to how many UK-based social media followers the 'FRUIT CREATIONS' accounts had, how many members of the public would have been exposed to the advertising campaigns, or the readership of any of the third-party publications in which the mark has featured.

Link

98. As noted above, my assessment of whether the public will make the requisite mental 'link' between the competing marks must take into account all relevant factors. The factors identified at paragraph 42 of *Intel* are:

> The degree of similarity between the competing marks
>
> I have found that there is between a low and medium degree of visual, aural and conceptual similarity between the opponent's mark and the applicant's word mark.
>
> I have found that the opponent's mark and the applicant's figurative mark are visually similar to a low degree, and aurally and conceptually similar to between a low and medium degree.
>
> The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

The parties' goods are assumed to be identical. As outlined previously, the goods will be purchased by the general public. Between a low and medium level of attention will be exhibited during the purchasing process. Visual considerations will dominate, though aural considerations have not been excluded.

The strength of the earlier mark's reputation

I have found that the opponent's mark has a moderate reputation.

The degree of the earlier mark's distinctive character, whether inherent or acquired through use

I have found that the opponent's mark possesses a low level of inherent distinctive character, which has been enhanced to a medium level in respect of the reputed goods.

Whether there is a likelihood of confusion

Direct confusion having not been pursued, I have found that there is no likelihood of indirect confusion. I acknowledge that the provisions of section 5(3) offer additional protection to take into account the repute and distinctiveness of earlier trade marks. However, I do not believe that the relevant public will believe that the user of the applicant's marks is economically connected to the user of the opponent's mark. The reputation in the opponent's mark is not such that the differences between the marks will be outweighed.

99. I acknowledge that the opponent's mark has a moderate reputation, that it is moderately distinctive overall, that the parties' goods are assumed to be identical, and that the competing marks share the word 'CREATIONS'. Nevertheless, it is my view that the opponent's mark will not be brought to mind by the applicant's mark. Rather, the relevant public is likely to perceive the word 'CREATIONS' in each mark as a reference to the respective goods sold under those marks. In the opponent's mark, the word forms part of the unitary phrase 'FRUIT CREATIONS', which will be perceived

as a strongly allusive reference to the opponent's fruit beverages. When confronted with the applicant's marks, it is considered that the relevant public will think of the meaning of the word 'CREATIONS' itself, rather than the opponent's mark; in the context of the mark, it will be perceived as a reference to products sold under the 'COCA-COLA' brand. As such, the shared use of the word 'CREATIONS' is likely to be attributed to coincidence. In light of all this, I find that the relevant public, even paying a lower level of attention, will not make a mental link between the competing marks, even in relation to identical goods. If the opponent's mark is brought to mind, it is my view that such a link will be too fleeting to result in any damage.

Conclusion

100. The opponent's claims under section 5(3) are dismissed.

Overall outcome

101. The oppositions under section 5(2)(b) and 5(3) of the Act have been unsuccessful. Subject to any appeal against this decision, the applicant's marks will proceed to registration in the UK.

Costs

102. As the applicant has been successful, it is entitled to a contribution towards its costs. At the hearing, Mr Stone asked for the issue of costs to be determined after my substantive decision is issued. This was on the basis that a "without prejudice save as to costs" offer has been made; Mr Stone said that the applicant may wish to rely on it, but this is dependent on the outcome of the opposition. Mr Stobbs confirmed that the opponent was content with this approach.

103. The substantive matters now having been determined, the parties are invited to file written submissions on the issue of costs within **14 days** of the date of this decision. Once the parties' submissions have been received, or after the expiry of the 14-day period, a supplementary decision dealing with the matter of costs will be issued.

104. I confirm that the appeal period for this decision, as well as any decision on costs, will run from the date of the supplementary decision.

Dated this 17th day of February 2026

James Hopkins
For the Registrar