

O/0136/26

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NOS. UK00004090935,
UK00004106111, UK00004106104, UK00004090145,
UK00004106670, UK00004106666, UK00004106661,
UK00004106674

IN THE NAME JONATHAN MARK KENDRICK
TO REGISTER THE FOLLOWING TRADE MARKS:



Rokit Fuel Coffee

Rokit Fuel Energy

Rokit Fuel Gummies

Rokit Fuel Tea

Rokit Fuel Café

Rokit Fuel Boost

Rokit Fuel Laser

IN CLASSES 5 AND 30

**IN THE MATTER OF OPPOSITIONS THERETO
UNDER NOS. OP000450628, OP000450629,
OP000450630, OP000450631, OP000450632,
OP000450633, OP000450634 AND OP000450635
BY SCOTT MARKHAM**

Background and pleadings

1. Jonathan Mark Kendrick (“the Applicant”) applied to register in the UK the trade marks listed on the cover page of this decision (“the applications”). The applications were filed between 21 August 2024 and 01 October 2024, inclusive.

2. In respect of applications UK00004090935 and UK00004090145 the Applicant seeks protection for the following goods:

Class 5: Nutritional supplements; dietary and nutritional supplements; food supplements; health food supplements; fitness and endurance supplements; pastilles for pharmaceutical purposes; gelatin capsules for pharmaceuticals; pharmaceutical sweets.

3. In respect of applications UK00004106111, UK00004106104, UK00004106666, UK00004106661 and UK00004106674 the Applicant seeks protection for the following goods:

Class 30: Coffee; coffee substitutes; coffee based drinks; coffee pods; coffee capsules; coffee essences and extracts.

4. In respect of application UK00004106670 the Applicant seeks protection for the following goods:

Class 30: Tea; tea bags; loose tea; herbal teas; fruit teas; flavoured teas; fruit flavoured teas; tea extracts and essences.

5. On 07 November 2024, the applications were opposed by Scott Markham (“the Opponent”) on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The Opponent relies upon the following marks across the oppositions:

ROKIT

UK Trade Mark registration number UK00003848440

Filing date: 11 November 2022

Registration date: 03 February 2023

Relying on the goods and services registered in classes 30 and 35
("the First Earlier Mark")

Rokit Health

ROKIT HEALTH

UK Trade Mark registration number UK00003812540 (series of 2)

Filing date: 22 July 2022

Registration date: 25 November 2022

Relying on the goods and services registered in classes 30 and 35
("the Second Earlier Mark")

Rokit Coffee

ROKIT COFFEE

UK Trade Mark registration number UK00003649849 (series of 2)

Filing date: 01 June 2021

Registration date: 15 October 2021

Relying on the goods registered in class 30
("the Third Earlier Mark")

Rokit

UK Trade Mark registration number UK00003304254

Filing date: 16 April 2018

Registration date: 13 July 2018

Relying on the goods registered in class 30

("the Fourth Earlier Mark")

Rokit Teas

UK Trade Mark registration number UK00003556493

Filing date: 16 November 2020

Registration date: 26 March 2021

Relying on the goods registered in class 30

("the Fifth Earlier Mark")

6. The goods and services for which the earlier marks are registered are set out in the Annex to this decision. The Opponent claims that the marks are similar, and that the goods and services are identical or similar, with the result that there is a likelihood of confusion.
7. The Applicant filed separate counterstatements in all oppositions stating that the marks are clearly dissimilar phonetically, aurally and visually. In relation to opposition 450628 the Applicant denied that the goods are similar, however, in relation to the remaining seven oppositions (450629, 450630, 450631, 450632, 450633, 450634 and 450635) the Applicant agreed with the Opponent's claim on the similarity of the goods.
8. The Opponent is represented by Revomark, and the Applicant is represented by Nicholas Faieta. Neither party filed evidence, nor did they request a hearing or file submissions in lieu. I make this decision having taken full account of all the papers, referring to them as necessary.

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.

DECISION

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

10. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

[...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”

11. Section 5A of the Act states as follows:

“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.”

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

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

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

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

My Approach

13. I consider it appropriate to begin by considering the likelihood of confusion between the Opponent's First Earlier Mark (3848440) and each of the Applicant's marks. This is because this mark covers the broadest specification in classes 30 and 35 and is also the only mark relied upon by the Opponent in all of the oppositions. However, I will return to compare the other marks relied upon under section 5(2)(b) later, should it be necessary to do so.

Comparison of goods and services

14. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the “Nice Classification” means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

15. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

16. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

17. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Albingia SA v Axis Bank Limited*, BL O/253/18, a decision of the Appointed Person, Professor Phillip Johnson, at paragraph 42).
18. The Opponent submits that the goods and services relied upon are identical or similar to the highest degree. It states that where its retail or wholesale services are concerned, the goods being sold are identical or similar (to the highest degree) to those listed in the Applicant's specifications.
19. As Stated previously, the Applicant claims that there are clear differences between the goods covered by its mark and those relied upon by the Opponent in opposition 450628. However, in all other oppositions the Applicant agrees with the Opponent's claim as regards the similarity of the goods. I take on board

these concessions by the Applicant and will go on to consider the remaining goods and services where similarity is not admitted. Therefore, I will only continue to compare the goods and services from opposition 450628 and will proceed on the basis that the Applicant accepts that the goods and services in the remaining oppositions are similar to at least a high degree.

20. The goods and services to be compared in opposition 450628 are:

The Opponent's services	The Applicant's goods
<p>Class 35: Retail and/or wholesale services connected with the sale of herbal teas for medicinal purposes, medicinal tea, herbal beverages for medicinal use, herbal supplements, nutritional supplements, dietary supplements, plant and herb extracts for medicinal purposes; none of the aforesaid retail and/or wholesale services for use in connection with goods containing fruit or being fruit related products.</p>	<p>Class 05: Nutritional supplements; dietary and nutritional supplements; food supplements; health food supplements; fitness and endurance supplements; pastilles for pharmaceutical purposes; gelatin capsules for pharmaceuticals; pharmaceutical sweets.</p>

Nutritional supplements; dietary and nutritional supplements; food supplements; health food supplements; fitness and endurance supplements.

21. In *Oakley, Inc v OHIM*, Case T-116/06, the General Court held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

22. In *Tony Van Gulck v Wasabi Frog Ltd ("Miss Boo")*, BL O/391/14, Mr Geoffrey Hobbs, sitting as the Appointed Person, cautioned that "selling and offering to

sell goods does not, in itself, amount to providing retail services in Class 35". The objective of retail services, as set out in *Oakley*, "includes, in addition to the legal sales transaction, all activity carried out by the trader for the purpose of encouraging the conclusion of such a transaction" and "those services play, from the point of view of the relevant consumer, an important role when he comes to buy the goods offered for sale." On the basis of the European courts' judgments in *Sanco SA v OHIM* ¹, and *Assembled Investments (Proprietary) Ltd v. OHIM* ², upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd* ³, Mr Hobbs concluded that:

- i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;
- ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;
- iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;
- iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

¹ Case C-411/13P

² Case T-105/05, at paragraphs [30] to [35] of the judgment

³ Case C-398/07Pout

23. I take from these authorities that, in comparing retail services against goods, there may be some similarity based upon complementarity and shared trade channels; the goods do not have to be identical to the subject goods of the retail service; and, that the level of similarity may be weak depending on the presence or absence of the other *Canon* factors.
24. The Applicant's goods are self-evidently different in nature to retail services. The intended purpose of the Applicant's goods is, broadly, to supplement the user's diet by providing concentrated sources of vitamins, minerals, herbs or other nutrients that may be deficient. The intended purpose of the Opponent's retail services is to encourage the sale of various goods (listed above), which means that the purpose of the goods/services is different. The goods are not in competition with the services, and their method of use also differs.
25. Nevertheless, I find that the Opponent's retail services are complementary to the Applicant's goods because the Applicant's goods are either reproduced identically in the list of goods being retailed by the Opponent or are contained as part of a larger group. For example, "food supplements", "health food supplements", and "fitness and endurance supplements" would all be contained within "nutritional supplements" or "dietary supplements". The goods are indispensable to the retail services relating to them. In addition to the complementary relationship between the goods and the retailing thereof, there is an overlap in the trade channels through which the goods and services reach the average consumer. I find that there is a medium degree of similarity between the Applicant's "nutritional supplements; dietary and nutritional supplements; food supplements; health food supplements; fitness and endurance supplements", and the Opponent's retail services.

pastilles for pharmaceutical purposes; gelatin capsules for pharmaceuticals; pharmaceutical sweets.

26. However, in relation to the above remaining goods from the Applicant's specification I find there to be a low degree of similarity to the Opponent's retail services. I find this similarity on the basis that these goods are sufficiently

closely connected to “nutritional supplements”, “dietary supplements” and “plant and herb extracts for medicinal purposes”. Such similarity as I find is again based on complementarity, shared trade channels and shared users.

The average consumer and the nature of the purchasing act

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

28. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

29. I have no submissions from either the Opponent or the Applicant on the identity of the average consumer or nature of the purchasing act.

30. The contested applications include goods ranging from supplements, and pharmaceutical sweets, pastilles and capsules in class 05, to consumable coffee and tea related goods in class 30. Whilst at a general level these goods

are all purchased by members of the general public, there are likely to be different considerations made when purchasing these different sets of goods.

31. In respect of the applications that include the class 05 goods, the average consumer will primarily comprise members of the general public, although there will also be professionals who work in specialist nutrition retail outlets or pharmacies, who may also purchase the goods for use in their jobs or on behalf of others. The consumer will consider factors such as the ingredients, the types of benefits offered versus their own requirements, in addition to the quality of the goods. For the most part where health matters are concerned, a medium degree of attention will be paid by the general public in respect of the goods. However, I find that the professional consumer will pay a higher level of attention, that being slightly above medium, due to the liability and responsibility involved with offering the goods to customers.
32. The goods will, for the most part, be subject to self-selection from the shelves of retail establishments, including specialist nutrition outlets, or pharmacies, as well as their online or catalogue equivalents. Consequently, the goods will likely be primarily purchased visually, however they may be subject to verbal recommendations, and verbal assistance from retail staff may be sought. Further, in the case of professional consumers, orders may be placed over the phone. I therefore cannot completely disregard the aural consideration.
33. In respect of the applications that include the goods in class 30, these goods are all consumable tea/coffee products, all of which would be purchased and consumed by the general public. These are typically inexpensive goods purchased through primarily visual means, most often selected from shops or supermarket shelves or on their online equivalents. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a webpage. Whilst the average consumer will predominantly purchase them following a visual inspection, I do not discount aural recommendations. Given the low cost of the goods, the level of care and attention paid when purchasing them will be no more than a medium degree as

the average consumer is likely to consider dietary requirements, flavour and/or nutritional information.

Comparison of trade marks

34. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgement in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

37. The Opponent submits that there are significant visual, aural and conceptual similarities between its mark and all of the Applicant's marks. It states that all of the marks contain the identical word 'ROKIT' which is inherently unique and distinctive and is also the dominant element of each mark.

38. The Applicant simply states that the Opponent's mark is clearly dissimilar phonetically, aurally and visually.

39. As stated above, I will compare the Opponent's First Earlier Mark (3848440) to each of the Applicant's marks and will only return to compare the remaining marks should it become necessary to do so.
40. For convenience this is the Opponent's First Earlier Mark:

ROKIT

41. The Opponent's mark is a figurative mark that consists of the word 'ROKIT'. The letter 'O' is presented in a larger font than the rest of the letters which are all shown in a minimally stylised typeface. I find that the word element of the mark is the dominant element and that the simple stylisation will have little impact on the overall impression of the mark.

Comparison with UK00004090935



42. This mark is a figurative mark consisting of the words 'ROKIT FUEL GUMMIES'. The word 'ROKIT' is presented in a larger font, with the words 'FUEL GUMMIES' appearing next to it in a smaller font. The letter 'O' is stylised in the word 'ROKIT', and all of the other letters appear in an unremarkable typeface. The whole mark is presented at an almost vertical angle, such that the consumer would read it from bottom to top, however, this does not impact the overall impression to any significant degree. Due to its size and position the word 'ROKIT' dominates the mark, with the words 'FUEL GUMMIES' playing a much lesser role due to their non-distinctive nature and relative size and placement.

43. Turning to the comparison, visually the marks share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Applicant's mark is visually different from that of the Opponent's letter O, and the letter I is in upper case in the opponent's mark and lower case in the applicant's mark. The words 'FUEL GUMMIES' creates another point of difference. Bearing in mind the overall impression of the marks, I find there to be a medium to high degree of visual similarity.
44. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Given their limited significance in the overall impression, it is unlikely the words 'FUEL GUMMIES' will be articulated and therefore the marks are aurally identical. However, if they are, I consider there to be a medium degree of aural similarity because of the additional words being pronounced.
45. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic equivalent. This is even more so the case for the Applicant's mark where it includes the word 'FUEL'. Consequently, I consider the common concept of referring to something to do with a rocket is shared between both marks. However, the additional word 'GUMMIES' in the Applicant's mark is a point of conceptual difference, although not a distinctive one, as it describes the goods concerned. In my view, the marks are conceptually similar to between a medium and high degree.

Comparison with UK00004090145 - Rokit Fuel Gummies

46. This mark is a word only mark consisting of the three words 'Rokit Fuel Gummies'. There are no other elements in the mark to contribute to its overall impression, which lies in the words themselves. Due to its descriptive nature the word 'Gummies' plays a lesser role than 'Rokit Fuel', which in my view forms a unitary phrase. That being said, the 'Rokit' element of the mark still plays an

independent, impactful role in and of itself due to its placement at the beginning of the mark and its unusual spelling.

47. Turning to the comparison, visually the marks again share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Opponent's mark is a visual point of difference, as are the additional words 'Fuel Gummies'. Bearing in mind the overall impression of the marks, I find there to be a medium degree of visual similarity.
48. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Unlike the Applicant's figurative mark, I consider that the average consumer is likely to articulate the word 'Fuel' in this mark in accordance with its dictionary definition, however, I find that they are still unlikely to pronounce 'Gummies' due to its descriptive nature. Consequently, I find there to be a medium degree of aural similarity between the marks.
49. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic equivalent. This is even more so the case for the Applicant's mark where it includes the word 'Fuel'. However, as stated above, I consider the words 'Rokit Fuel' in the Applicant's mark to form a unitary phrase in this instance, and thus there is a slight conceptual difference. Again, the additional word 'Gummies' is another point of conceptual difference, although not a distinctive one as it describes the goods concerned. Notwithstanding this, the marks share the common concept of referring to something to do with a rocket and as a result I find there to be between a low and medium degree of conceptual similarity.

Comparison with UK00004106104 - Rokit Fuel Coffee

50. This mark is a word only mark consisting of the three words 'Rokit Fuel Coffee'. There are no other elements in the mark to contribute to its overall impression,

which lies in the words themselves. Due to its descriptive nature the word 'Coffee' plays a lesser role than 'Rokit Fuel', which in my view forms a unitary phrase. That being said, the 'Rokit' element of the mark still plays an independent, impactful role in and of itself due to its placement at the beginning of the mark and its unusual spelling.

51. Turning to the comparison, visually the marks again share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Opponent's mark is a visual point of difference, as are the additional words 'Fuel Coffee'. Bearing in mind the overall impression of the marks, I find there to be a medium degree of visual similarity.
52. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Again, I consider that the average consumer is likely to articulate the word 'Fuel' in this mark in accordance with its dictionary definition, however, I find that they are unlikely to pronounce the word 'Coffee' due to its descriptive nature. Consequently, I find there to be a medium degree of aural similarity between the marks.
53. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic equivalent. This is even more so the case for the Applicant's mark where it includes the word 'Fuel'. However, as stated above, I consider the words 'Rokit Fuel' in the Applicant's mark to form a unitary phrase in this instance, and thus there is a slight conceptual difference. The additional word 'Coffee' is another point of conceptual difference, although not a distinctive one as it describes the goods concerned. Notwithstanding this, the marks share the common concept of referring to something to do with a rocket and as a result I find there to be between a low and medium degree of conceptual similarity.

54. This mark is a word only mark consisting of the three words 'Rokit Fuel Tea'. There are no other elements in the mark to contribute to its overall impression, which lies in the words themselves. Due to its descriptive nature the word 'Tea' plays a lesser role than 'Rokit Fuel', which in my view forms a unitary phrase. That being said, the 'Rokit' element of the mark still plays an independent, impactful role in and of itself due to its placement at the beginning of the mark and its unusual spelling.
55. Turning to the comparison, visually the marks again share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Opponent's mark is a visual point of difference, as are the additional words 'Fuel Tea'. Bearing in mind the overall impression of the marks, I find there to be a medium degree of visual similarity.
56. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Again, I consider that the average consumer is likely to articulate the word 'Fuel' in this mark in accordance with its dictionary definition, however, I find that they are unlikely to pronounce the word 'Tea' due to its descriptive nature. Consequently, I find there to be a medium degree of aural similarity between the marks.
57. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic equivalent. This is even more so the case for the Applicant's mark where it includes the word 'Fuel'. However, as stated above, I consider the words 'Rokit Fuel' in the Applicant's mark to form a unitary phrase in this instance, and thus there is a slight conceptual difference. The additional word 'Tea' is another point of conceptual difference, although not a distinctive one as it describes the goods concerned. Notwithstanding this, the marks share the common concept

of referring to something to do with a rocket and as a result I find there to be between a low and medium degree of conceptual similarity.

Comparison with UK00004106666 - Rokit Fuel Café

58. This mark is a word only mark consisting of the three words 'Rokit Fuel Café'. There are no other elements in the mark to contribute to its overall impression, which lies in the words themselves. Due to its descriptive nature the word 'Café' plays a lesser role than 'Rokit Fuel', which in my view forms a unitary phrase. That being said, the 'Rokit' element of the mark still plays an independent, impactful role in and of itself due to its placement at the beginning of the mark and its unusual spelling.
59. Turning to the comparison, visually the marks again share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Opponent's mark is a visual point of difference, as are the additional words 'Fuel Café'. Bearing in mind the overall impression of the marks, I find there to be a medium degree of visual similarity.
60. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Again, I consider that the average consumer is likely to articulate the word 'Fuel' in this mark in accordance with its dictionary definition, however, I find that they are unlikely to pronounce the word 'Café' due to its non-distinctive nature in respect of the goods concerned. Consequently, I find there to be a medium degree of aural similarity between the marks.
61. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic equivalent. This is even more so the case for the Applicant's mark where it includes the word 'Fuel'. However, as stated above, I consider the words 'Rokit Fuel' in the Applicant's mark to form a unitary phrase in this instance, and thus

there is a slight conceptual difference. The additional word 'Café' is another point of conceptual difference, although not a distinctive one. Notwithstanding this, the marks share the common concept of referring to something to do with a rocket and as a result I find there to be between a low and medium degree of conceptual similarity.

Comparison with UK00004106104 - Rokit Fuel Energy

58. This mark is a word only mark consisting of the three words 'Rokit Fuel Energy'. There are no other elements in the mark to contribute to its overall impression, which lies in the words themselves. Due to its weakly distinctive nature, the word 'Energy' plays a lesser role than 'Rokit Fuel', which in my view forms a unitary phrase. That being said, the 'Rokit' element of the mark still plays an independent, impactful role in and of itself due to its placement at the beginning of the mark and its unusual spelling.
59. Turning to the comparison, visually the marks again share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Opponent's mark is a visual point of difference, as are the additional words 'Fuel Energy'. Bearing in mind the overall impression of the marks, I find there to be a medium degree of visual similarity.
60. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Again, I consider that the average consumer is likely to articulate the word 'Fuel' in this mark in accordance with its dictionary definition, however, I find that they are unlikely to pronounce the word 'Energy' due to its weakly distinctive nature in respect of the goods concerned. Consequently, I find there to be a medium degree of aural similarity between the marks.
61. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic

equivalent. This is even more so the case for the Applicant's mark where it includes the word 'Fuel'. However, as stated above, I consider the words 'Rokit Fuel' in the Applicant's mark to form a unitary phrase in this instance, and thus there is a slight conceptual difference. The additional word 'Energy' is another point of conceptual difference, although not a highly distinctive one. Notwithstanding this, the marks share the common concept of referring to something to do with a rocket and as a result I find there to be between a low and medium degree of conceptual similarity.

Comparison with UK00004106661 - Rokit Fuel Boost

62. This mark is a word only mark consisting of the three words 'Rokit Fuel Boost'. There are no other elements in the mark to contribute to its overall impression, which lies in the words themselves. Due to its weakly distinctive nature, the word 'Boost' plays a lesser role than 'Rokit Fuel', which in my view forms a unitary phrase. That being said, the 'Rokit' element of the mark still plays an independent, impactful role in and of itself due to its placement at the beginning of the mark and its unusual spelling.
63. Turning to the comparison, visually the marks again share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Opponent's mark is a visual point of difference, as are the additional words 'Fuel Boost'. Bearing in mind the overall impression of the marks, I find there to be a medium degree of visual similarity.
64. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Again, I consider that the average consumer is likely to articulate the word 'Fuel' in this mark in accordance with its dictionary definition, however, I find that they are unlikely to pronounce the word 'Boost' due to its weakly distinctive nature in respect of the goods concerned. Consequently, I find there to be a medium degree of aural similarity between the marks.

65. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic equivalent. This is even more so the case for the Applicant's mark where it includes the word 'Fuel'. However, as stated above, I consider the words 'Rokit Fuel' in the Applicant's mark to form a unitary phrase in this instance, and thus there is a slight conceptual difference. The additional word 'Boost' is another point of conceptual difference, although not a highly distinctive one. Notwithstanding this, the marks share the common concept of referring to something to do with a rocket and as a result I find there to be between a low and medium degree of conceptual similarity.

Comparison with UK00004106674 - Rokit Fuel Laser

66. This mark is a word only mark consisting of the three words 'Rokit Fuel Laser'. There are no other elements in the mark to contribute to its overall impression, which lies in the words themselves. In my view the word 'Laser' plays a lesser role than 'Rokit Fuel', which forms a unitary phrase. That being said, the 'Rokit' element of the mark still plays an independent, impactful role in and of itself due to its placement at the beginning of the mark and its unusual spelling.
67. Turning to the comparison, visually the marks again share the identical word 'ROKIT'. The minor stylisation of the letter 'O' in the Opponent's mark is a visual point of difference, as are the additional words 'Fuel Laser'. Bearing in mind the overall impression of the marks, I find there to be a medium degree of visual similarity.
68. Aurally, the Opponent's mark consists of two syllables 'ROCK-IT' and will be pronounced in the same way as the readily understood dictionary word 'Rocket'. This element will be identically articulated in the Applicant's mark. Again, I consider that the average consumer is likely to articulate the word 'Fuel' in this mark in accordance with its dictionary definition. However, unlike in the Applicant's other marks where the additional words are descriptive/weakly distinctive, the word 'Laser' may be pronounced in this mark and would be done

so in the ordinary way. Consequently, I find there to be between a low and medium degree of aural similarity between the marks.

69. Conceptually, the word 'ROKIT' is essentially an invented word and whilst some consumers may view it as such, a significant proportion would perceive it as a misspelling of the dictionary word 'Rocket' due to it being the phonetic equivalent. This is even more so the case for the Applicant's mark where it includes the word 'Fuel'. However, as stated above, I consider the words 'Rokit Fuel' in the Applicant's mark to form a unitary phrase in this instance, and thus there is a slight conceptual difference. The additional word 'Laser' is another point of conceptual difference. Notwithstanding this, the marks share the common concept of referring to something to do with a rocket and as a result I find there to be between a low and medium degree of conceptual similarity.

Distinctive character of the Opponent's mark

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

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

71. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it. The Opponent has not claimed that its mark has acquired an enhanced degree of distinctiveness and has not filed any evidence to that effect. As such, I have only the inherent position to consider.
72. The Opponent’s mark consists of the word ‘ROKIT’ where the letter ‘O’ appears in a larger font than the rest of the mark. Notwithstanding that the word ‘ROKIT’ is the phonetic equivalent of the ordinary dictionary word ‘Rocket’, it is an invented word which is neither descriptive nor allusive in relation to the goods concerned. Further, whilst the stylisation present in the mark is considered minimal, it does add a slight degree of distinctive character to the mark as a whole. Therefore, the earlier mark is, in my view, inherently distinctive to an above average degree.

Likelihood of confusion

73. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related.
74. 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 (see *Sabel*, C-251/95, para 22). The first is the interdependency principle i.e., a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa (see *Canon*, C-39/97, para 17). It is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the goods and services, and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

75. Whilst conducting a global assessment of the likelihood of confusion I must be aware of the fact that not all aspects of the respective marks will necessarily have the same impact. For example, the importance of the respective visual, aural and conceptual aspects will be dependent on factors such as the way the goods and services at issue are marketed, and in which type of store/platform they are made available.
76. Throughout the course of this decision, I have determined that:
- The respective goods and services range from being similar to a low degree to at least a high degree (based on the Applicant's concession).
 - The average consumer will vary depending on the goods concerned but includes both the general public and professional consumer who will demonstrate between a medium and slightly above medium level of attention during the purchasing process.
 - The purchasing process would be a combination of visual and aural considerations.
 - The Opponent's mark possesses an above average degree of inherent distinctive character.

- UK00004090935 is visually similar to between a medium and high degree, aurally identical (or similar to a medium degree if the descriptive element 'FUEL GUMMIES' is articulated), and conceptually similar to between a medium and high degree to the Opponent's 'UK00003848440' mark.
- UK00004090145, UK00004106104, UK00004106670, UK00004106666, UK00004106104, UK00004106661 are all visually similar to a medium degree, aurally similar to a medium degree, and conceptually similar to between a low and medium degree to the Opponent's 'UK00003848440' mark.
- UK00004106674 is visually similar to a medium degree, aurally similar to between low and medium degree, and conceptually similar to between a low and medium degree to the Opponent's " UK00003848440' mark.

77. The Opponent's mark consists of the word 'ROKIT' presented in a minimally stylised form. The word 'ROKIT' is also the dominant and distinctive element of the Applicant's UK00004090935 figurative mark. It is therefore considered that the element of the Opponent's mark which gives it its distinctive character is contained wholly within the Applicant's mark. As indicated in *Kurt Geiger v A-List Corporate Limited* BL O-075-13, the likelihood of confusion is increased if the distinctive character resides in the element of the marks that are identical or similar. Thus, considering the overall levels of visual, aural, and conceptual similarity between these particular competing marks, I am of the view that the differences created by the minimal stylisation, as well as the descriptive words 'FUEL GUMMIES' which are presented in a much smaller font, are likely to be insufficient to distinguish the Applicant's goods from the Opponent's retail services. Considering imperfect recollection, it is entirely foreseeable that the consumer, even when demonstrating a slightly above average level of attention during the purchasing process, may not recall the respective marks with sufficient accuracy to differentiate between them. Instead, I consider it likely that the consumer will retain and recall the word 'ROKIT', and, upon seeing the

Applicant's goods, the consumer may think that it is the Opponent's mark, or vice versa. Consequently, I find that there is a likelihood of direct confusion between the Opponent's UK00003848440 mark and the Applicant's UK00004090935 figurative mark. This finding applies even where the goods and services in question are only of low similarity.

78. However, I do not consider the same to be true of the remaining contested marks. I acknowledge that each of these marks contain the identical word 'Rokit' at their beginnings, a position where the attention of consumers is usually directed.⁴ However, the marks differ in that the addition of the word 'Fuel' in these marks, creates a unitary phrase that is unlikely to be overlooked. Therefore, despite the overlap created by the commonality of the word 'ROKIT' in the marks, in my view this will be outweighed by the differences. Consequently, it is unlikely that the competing marks will be mistaken or misremembered for one another. Rather, the aforementioned differences are likely to be sufficient to enable consumers to differentiate between them. In my judgement, taking all the above factors into account, the differences between the competing trade marks are likely to enable consumers, even those paying a medium level of attention, to avoid mistaking the marks for one another, notwithstanding the principles of imperfect recollection and interdependency. As a result, I find that there is no likelihood of direct confusion between the Opponent's UK00003848440 mark and the Applicant's UK00004090145, UK00004106104, UK00004106670, UK00004106666, UK00004106104, UK00004106661 and UK00004106674, even in relation to goods that are similar to high degree.

79. I turn now to consider a likelihood of indirect confusion. In respect of such, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

⁴ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

“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.).

(a) 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)”.

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

81. Additionally, 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*, Case C-591/12P, on the court’s earlier judgment in *Medion v Thomson*. 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.”

82. Taking all of the above into consideration, particularly the shared use of the identical element ‘ROKIT’, the above-average distinctiveness of this element, and the independent distinctive role it retains within the respective marks, together with the fact that the differences between the marks arise from elements that are less distinctive than the shared component, I consider there is a likelihood of indirect confusion between the Opponent’s UK00003848440 mark and the Applicant’s UK00004090145, UK00004106104, UK00004106670, UK00004106666, UK00004106104, UK00004106661 and UK00004106667 marks. Further, I consider that the additional elements present in the Applicant’s marks i.e., ‘Fuel’ plus a descriptive/weakly distinctive word, would be considered an entirely plausible brand extension. This finding applies even where the goods and services in question are only of low similarity, and even where the consumer is paying a slightly above average level of attention.

Conclusion

83. The opposition under Section 5(2)(b) of the Act has succeeded in full based upon the Opponent’s UK00003848440 mark and therefore I do not consider it

necessary to consider the Opponent's other earlier marks as they do not put the Opponent in any stronger position. Subject to any successful appeal, all of the applications will be refused for all of the goods concerned.

Costs

84. As the Opponent has been successful, it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice ("TPN") 1/2023. In the circumstances, I award the Opponent the sum of £1,750, calculated as follows:

Official Fee (x8):	£800
Preparing the notice of oppositions and considering the counterstatements ⁵ :	£950
Total:	£1,750

85. I therefore order **Jonathan Mark Kendrick** to pay **Scott Markham** the sum of £1,750. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

⁵ The Opponent filed 8 notices of opposition in these consolidated proceedings and had to consider 8 counterstatements, however, the pleadings were broadly identical for each opposition, as were the counterstatements. For this reason I have awarded the Opponent costs under the minimum scale (£100) for each of the preparation of the 7 subsequent notices of opposition and counterstatements following the preparation and consideration of the initial documents.

Dated this 20th day of February 2026

**Oliver Rose'Meyer
For the Registrar**

Annex

The earlier marks are registered for the following goods and services:

UK00003848440 & UK00003812540 (the First & Second earlier marks)

Class 30

Coffee; Preparations for making beverages [coffee based]; Tea; Preparations for making beverages [tea based]; Tea pods; Tea capsules; Tea beverages; Tea mix powders; Herbal tea; Coffee pods; Coffee capsules; Coffee beverages; Coffee mix powder; none of the aforesaid containing fruit or being fruit related products.

Class 35

Retail and/or wholesale services connected with the sale of coffee, preparations for making beverages [coffee based], tea, preparations for making beverages [tea based], tea pods, tea capsules, tea beverages, tea mix powders, herbal tea, coffee pods, coffee capsules, coffee beverages, coffee mix powder, herbal teas for medicinal purposes, medicinal tea, herbal beverages for medicinal use, herbal supplements, nutritional supplements, dietary supplements, plant and herb extracts for medicinal purposes; none of the aforesaid retail and/or wholesale services for use in connection with goods containing fruit or being fruit related products.

UK00003649849 (the Third earlier mark)

Class 30

Coffee; coffee drinks; coffee beverages; coffee bags; coffee pods; coffee capsules; instant coffee; flavoured coffee; coffee beans; coffee mixtures; ground coffee; Preparations for making beverages [coffee based]; none of the aforesaid containing fruit or being fruit based products.

UK00003304254 & UK00003556493 (the Fourth and Fifth earlier marks)

Class 30

Coffee; Preparations for making beverages [coffee based]; Tea; Preparations for making beverages [tea based]; Tea pods; Tea capsules; Tea beverages; Tea mix powders; Coffee pods; Coffee capsules; Coffee beverages; Coffee mix powder; none of the aforesaid containing fruit or being fruit related products.