BL O/0228/26

TRADE MARKS ACT 1994
IN THE MATTER OF UK TRADE MARK NO. 4027622 IN CLASSES 5, 29, 30 AND 32
IN THE NAME OF APPLIED NUTRITION LIMITED
AND OPPOSITION NO 448351
BY THG NUTRITION LIMITED

DECISION

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1. This is an appeal against a failed opposition.

2. The Applicant/Respondent, Applied Nutrition Limited, sought registration of application No. 4027622 for the word mark FUEL YOUR MOMENT with a filing date of 18 March 2024 in respect of goods in classes 5, 29, 30 and 32 ("the Application").

3. The Opponent/Appellant, THG Nutrition Limited, opposed under s.5(2)(b) Trade Marks Act 1994, relying on its UK registration No. 909944752 for the word mark FUEL YOUR AMBITION with a registration date of 19 October 2011 for goods in Classes 5, 21, 25, 29, 30 and 32 ("the Earlier Mark").

4. In decision No. O/0976//25 of Hearing Officer Rosie Le Breton dated 20 October 2025 ("the Decision"), the opposition was rejected.

5. Before me at a hearing which took place on 15 March 2026 the Opponent/Appellant was represented by Ashton Chantrielle, instructed by HGF Limited. The Applicant/Respondent was represented by Alan Fiddes of Murgitroyd & Company. I am grateful to both of them for the assistance they provided.

Standard of Appeal

6. There was no dispute as to this. The principles are set out in the well-known cases of *Axogen v Aviv Scientific* [2022] EWHC 95 (Ch), *Lifestyle Equities v Amazon* [2024] UKSC 8 and *Iconix v Dream Pairs* [2025] UKSC 25. I summarised the approach in SOCIAL WORK NEWS (O/0050/24) at [13]:

> To paraphrase, an appeal should only be allowed where the decision of the lower court was "wrong". Absent an error of law, the appellate court would be justified in

> concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible". In the case of a multifactorial assessment and in the absence of a distinct error of principle, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere.

7. I have sought to apply those principles. It is not enough that a different tribunal might have reached a different conclusion; I must be satisfied that the Hearing Officer was wrong in the conclusions she reached.

The Hearing Officer's Decision

8. I adopt the Appellant's summary of the Decision as follows.

9. The Appellant was required to prove use of its own mark. The Hearing Officer addressed this at [15]-[68]. The Hearing Officer found that the Appellant had furnished proof of use in respect of goods that fall within the category of protein supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being in class 5.

10. At [69] to [71] the Hearing Officer summarised the relevant legislation and general case law relating to section 5(2)(b). At [72] to [76] she set out the case law relating more specifically to the assessment of similarity between goods and services.

11. At [77] to [107] the Hearing Officer dealt with the comparison between the goods. She found that some of the goods were identical, similar to varying degrees and dissimilar. At [89] she found that whey in class 29 was dissimilar to protein supplements, holding as follows.

> "Whilst I have considered that both the earlier goods and the above goods might provide the consumer with a source of protein, I do not consider the above goods to be similar in nature to the contested goods, nor do I consider their purpose to be shared. The purpose of protein supplements will be to add concentrated protein on top of the consumers normal diet, without the need to consume large volumes of food. The purpose of the above goods will be primarily to satiate hunger, and also provide nutrients generally. I do not consider the goods to be complementary or in competition. I note that both may be consumed, both may be sold in supermarkets, and that users by way of the general public may be shared, but I consider this all to be too general for a finding of similarity between the goods. Overall, I find the above goods to be dissimilar to the earlier goods relied upon."

12. At [108] to [115] the Hearing Officer dealt with the comparison between the marks. After setting out some of the relevant legal principles and facts she concluded that:

(a) there is between a medium and high degree of visual similarity between the marks;

(b) there is a medium degree of aural similarity between the marks; and

(c) there is a medium degree of conceptual similarity between the marks.

13. In relation to conceptual similarity, she held at [115]:

> "Conceptually, the earlier mark as a whole conveys a message instructing consumers to provide themselves with the "fuel" or sustenance for their ambition to grow or thrive. The contested mark as a whole conveys a message to the consumers about providing the "fuel" or sustenance to enjoy or enhance the moment they are in. To the extent that both marks convey to the consumer the idea of "fuel" or sustenance, they overlap conceptually. Overall, I consider the marks to be conceptually similar to a medium degree."

14. At [116] to [121] the Hearing Officer turned to the question of the average consumer and the purchasing process. At [121] the Hearing Officer found that goods will primarily be purchased visually.

15. The distinctive character of the Earlier Mark was considered at [122] to [125]. The Earlier Mark was held to have a relatively low degree of inherent distinctiveness in the context of the goods. The Hearing Officer considered that there was not enough evidence sufficient to establish enhanced distinctiveness for the Earlier Mark.

16. At [126] to [137] the Hearing Officer turned to the question of the likelihood of confusion. In this regard she concluded that that there was no likelihood of direct confusion, and no likelihood of indirect confusion.

The Appeal

17. Although expressed as six grounds of appeal in the TM55, at the hearing the Appellant focussed on the following four points.

18. First, it was said that the Hearing Officer erred in her assessment of whether the Earlier Mark benefitted from an enhanced distinctive character. It was said that she failed to take into account all of the relevant evidence and instead relied on evidence that was not from within the relevant period.

19. Second, the Appellant alleged that the Hearing Officer erred by finding that whey in class 29 was dissimilar to the goods covered by the Earlier Mark. It was said that the Applicant had admitted that whey was similar to the goods for which the earlier

mark was registered and that the Hearing Officer failed to consider the evidence that whey is commonly used as a protein supplement.

20. Third, in relation to whether there was a likelihood of direct confusion, the Hearing Officer was said to have erred for three reasons:

    (a) First, based on the error in relation to enhanced distinctive character; and/or

    (b) Second, because she failed to apply her findings on the levels of similarity between the marks and placed too much importance on conceptual counteraction; and/or

    (c) Third, she failed to carry out an analysis in respect of each of the different levels of identity/similarity between the goods and their impact on whether there was a likelihood of confusion.

21. Fourth, it was said that the Hearing Officer erred in her assessment of the likelihood of indirect confusion because of the error on enhanced distinctive character.

22. I will take these points in turn.

Ground 1

23. This was the main ground. It focussed on the evidence adduced by the Opponent and the Hearing Officer's assessment of it. It was said that she misinterpreted the evidence and the explanation of it given to her at the hearing. Had she properly understood the evidence it was said that she would have made a finding of enhanced distinctiveness.

24. The issue arose in the following context. The Earlier Mark is a strapline or slogan. It is used alongside the Opponent's other Myprotein mark. The Opponent's witness Mark Foster described the position as follows in his witness statement:

> 3. Myprotein.com was established in 2004. The company began using the mark FUEL YOUR AMBITION in 2016 for the above-mentioned goods and services. The company has continued to expand at an incredible rate and is now considered one of the UK and Europe's leading online sports nutrition brand. Now shown to me at **Exhibit MF3** is an article taken from www.foodchainid.com that describes Myprotein as *being "the number one sports nutrition brand in Europe with the majority of its products manufactured at its state-of-the-art manufacturing site in Warrington."*

25. As for use of the Earlier Mark (as opposed to use of Myprotein), Mr Foster explained as follows:

Goods sold under the Mark FUEL YOUR AMBITION

8. The Opponent sells over 2000 products on our website https://www.myprotein.com/ and various other UK websites. The mark is used on a variety of products such as, but not limited to, clothing, protein bars, snacks and drinks, protein supplements such as protein powder, accessories such as shakers and clothing. **Exhibit MF7** shows examples of the mark on these goods, some with timestamps.

9. The mark was first used on the Opponent's website in 2016. The mark has been used as a banner on their website meaning customers will see the mark straight away and attribute it to the Opponent. It also appears on the products themselves, for example, on the side of protein powders and on the front of protein shakers. Therefore, consumers will be aware that the products come directly from the Opponent, THG Nutrition. Now produced and shown to me at **Exhibit MF8** are screenshots taken from the internet archive tool 'Wayback Machine' from as early as 2016.

26. Some of the pictures of the goods show how the Earlier Mark appears on them (in this example apparently targeted to the UK and within the relevant period):

27. In other words, the product has primary branding "MYPROTEIN" but also shows the Earlier Mark in a strapline along the side.

28. The debate about the Hearing Officer's interpretation of the evidence turned on the two paragraphs of Mr Foster's witness statement which dealt with turnover. I set these out below:

13. The annual turnover (£'s) under the FUEL YOUR AMBITION Mark between 2017 and 2021 in the UK are set out below:

Turnover (£'s)	2017	2018	2019	2020	2021
United Kingdom	£41,004,701	£43,738,309	£47,473,825	£60,420,178	£73,532,927

15. In addition to the sales above, below are the sales of individual sales categories broken down into Units sold and Gross Revenue (£'s) between the date range of 1st January 2019 to 2024:

All product category figures:

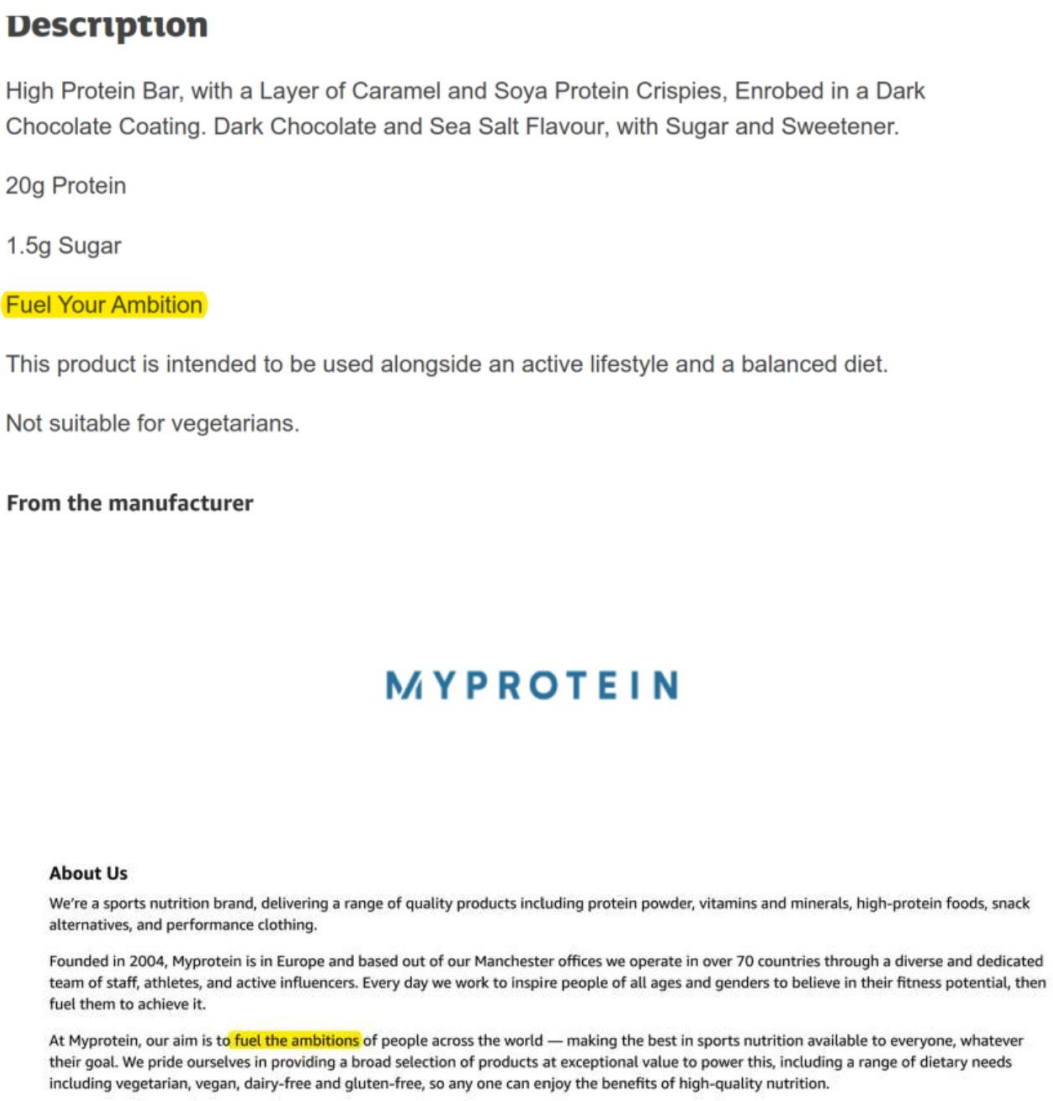
Region	Units Sold	Gross Revenue
2020	35,958	£432,613
2021	42,305	£405,257
2022	2,480	£37,480
2023	182	£2,412
2024	-	£0
Grand Total	**80,925**	**£877,762**

29. The complaint is that the Hearing Officer used the §15 figures for turnover to assess enhanced distinctiveness, when it is said that she should have used the §13 figures.

30. This came about in the following way. The Hearing Officer rejected the figures in §13 as being representative of sales for relevant goods using the Earlier Mark. She had firm basis for this, because, as she found (which is not challenged on appeal) only sales of protein supplements were relevant, and §13 did not break down the sales of these products from any others. But she also rejected the §13 figures because she observed that much of the evidence of use was either outside the relevant period, could not be linked to use in the UK or showed products to which it was not clear that the Earlier Mark had been applied. For example, the Hearing Officer recorded that Exhibit MF14 showed the gymnast Max Whitlock holding a protein shaker showing the Earlier Mark, but in other shots of him holding a protein powder the Earlier Mark is not clearly visible.

31. At [55] she dealt with the Opponent's Myprotein sales through Asda, explaining as follows:

55. In his witness statement, Mr Foster explains that the opponent's products are available to purchase in major supermarkets across the UK, including Asda and Sainsburys, as well as via Amazon. He also confirms that "three years ago" they launched their Myprotein area within Asda. At Exhibit MF24, images are provided showing a number of products for sale in the UK. However, most of the goods shown do not display the earlier mark on the same, or the images are too small to confirm whether they do. I note some of the listings do reference the earlier mark in the description of the products, or notes "from the manufacturer" for example as shown below, but it is my view this does not constitute use as a trade mark. This use does not appear to be such that the consumer would use the wording FUEL YOUR AMBITION to indicate the economic origin of the goods:



Description

High Protein Bar, with a Layer of Caramel and Soya Protein Crispies, Enrobed in a Dark Chocolate Coating. Dark Chocolate and Sea Salt Flavour, with Sugar and Sweetener.

20g Protein

1.5g Sugar

Fuel Your Ambition

This product is intended to be used alongside an active lifestyle and a balanced diet.

Not suitable for vegetarians.

From the manufacturer

MYPROTEIN

About Us

We're a sports nutrition brand, delivering a range of quality products including protein powder, vitamins and minerals, high-protein foods, snack alternatives, and performance clothing.

Founded in 2004, Myprotein is in Europe and based out of our Manchester offices we operate in over 70 countries through a diverse and dedicated team of staff, athletes, and active influencers. Every day we work to inspire people of all ages and genders to believe in their fitness potential, then fuel them to achieve it.

At Myprotein, our aim is to fuel the ambitions of people across the world — making the best in sports nutrition available to everyone, whatever their goal. We pride ourselves in providing a broad selection of products at exceptional value to power this, including a range of dietary needs including vegetarian, vegan, dairy-free and gluten-free, so any one can enjoy the benefits of high-quality nutrition.

32. As between the two sets of figures provided by Mr Foster in §13 and §15, the Hearing Officer explained at [60] and [61] that Ms. Chantrielle had clarified at the hearing that the §15 figures related to goods which had the Earlier Mark "with the

name in the title". Mr Foster went on to list these later in his statement. The Hearing Officer then found at [61]:

> 61. I accept this explanation; however, I do not find it to be entirely clear what Mr Foster himself will consider goods sold "under" the earlier mark to include where this is not actually on the packaging of the goods themselves. It may refer to, for example, the sales of goods in ASDA, where the goods themselves may not include the earlier mark but where there is an advertisement nearby which does make reference to the same. However, if this is the sort of scenario Mr Foster is referring to, it is not clear from the evidence that this mark will always be viewed by the consumer when buying the goods. Further, it may include scenarios such as those shown in evidence, where the earlier mark is shown in the product description, in a manner that I do not consider to necessarily be use as a trade mark. Either way, I do not consider the extent to which the very large sales figures may be strictly attributed to goods sold under the earlier mark to be clear, for the purposes of finding genuine use of the earlier mark in relation to the same. I am not inclined to disbelieve Mr Foster, however, considering how large the discrepancy is between these figures and those which Ms Chantrielle submits relate to goods actually bearing the earlier mark in the UK, I find it appropriate to take only the latter figures into account in this instance, whilst noting there will likely also be some additional sales of goods next to advertisements which bear the mark which may also count towards the picture of genuine use in this instance.

33. At the hearing before me, Ms. Chantrielle criticised this finding. She said the Hearing Officer should not have rejected the §13 figures in favour of the §15 figures. She said the latter were clearly far too narrow – being only those goods with the Earlier Mark as part of the product title. She said this was explained to the Hearing Officer and she was wrong to characterise these goods as "goods actually bearing the earlier mark in the UK".

34. Instead, Ms. Chantrielle said the Hearing Officer should have used the §13 figures as the starting point, discounting them by an unspecified amount to cover only protein supplements and also taking into account the findings that the mark was sometimes used in the non trade mark sense, e.g. in relation to some of the sales at Asda. She suggested that even if the sales were only a quarter or a half of the figure in §13, that was still more than enough to establish enhanced distinctiveness.

35. I reject this approach as it has no basis in the evidence. As Mr Fiddes submitted and Ms. Chantrielle accepted, the burden is clearly on the opponent in cases such as the present to establish prior use of the mark. The Hearing Officer conducted a careful review of the evidence before her and there were numerous reasons to reject

much of it as being relevant to sales of relevant goods by reference to the mark when used in the trade mark sense within the UK and in the relevant period. Further, it was clear that the reference in §13 by Mr Foster to sales "under" FUEL YOUR AMBITION was intended to include non protein supplement sales and sales such as those on the website under the banner or in Asda where the Earlier Mark was not visible on the goods.

36. Yet further, the very nature of the Opponent's strapline slogan means that the primary mark under which the goods are sold is MYPROTEIN, and it is not at all clear to what extent consumers would see the Earlier Mark as being used in the trade mark sense, if at all. This was exemplified by the remainder of the Asda evidence.

37. Having found correctly that she could not rely on the figures in §13 as properly representing protein supplement goods sold in the UK by reference to the mark when used as a trade mark, the only other figures available to the Hearing Officer were those in §15 of Mr Foster's statement. She was therefore entitled to use those figures instead – and contrary to the submissions before me it is clear that she understood Ms. Chantrielle's explanation of what they were as she reiterated this in [125]. It may be that there were additional sales of relevant goods which did not have the mark as part of the product name and where the mark was used in the trade mark sense, but the volume of such sales was not before the Hearing Officer and neither she nor I could be expected to estimate this volume in the absence of any supporting evidence. She could only do the best she could with the material which the Opponent had elected to adduce before her.

38. Further, it would be wrong to accept Ms. Chantrielle's submission before me that even a significant discount to the figures in §13 of Mr Foster's statement would still result in substantial sales. This is because there is simply no way of telling what sort of discount should apply. Even then there remains a significant question as to whether any of the sales had actually taken place in circumstances where the Earlier Mark was being used in a trade mark sense to indicate origin. So even substantial sales might not have resulted in enhanced distinctiveness in the trade mark sense.

39. So I reject the first and main ground of appeal. The Hearing Officer was entitled on the evidence before her to conclude that there was no enhanced distinctiveness attributable to use of the Earlier Mark as a trade mark.

Ground 2

40. This can be dealt with very briefly, as both sides agreed it did not really advance matters. The issue was whether whey is similar to protein supplements. The Hearing Officer found that it was not. However the Opponent pointed to the Applicant's Defence and Counterstatement supplied with its TM8 where it admitted that it was.

41. For my own part, I consider that whey is similar to protein supplements. This is supported by the Applicant's pleading. If it had been necessary, I would have taken it into consideration in re-applying the global test. However, as the Hearing Officer applied the test to identical goods, and still found no likelihood of confusion, the Opponent accepted that this ground was of limited value.

Ground 3

42. Ground 3 seeks reassessment of the global test. I have rejected the argument that this should be done by reason of any error on enhanced distinctiveness. However, I must address the alternative basis argued by the Opponent, namely that the Hearing Officer placed too much weight on the conceptual difference and should have found a likelihood of confusion based on her perceived aural and visual similarities.

43. Ms. Chantrielle referred me to the Petsure/Vetsure case, *TVIS Limited v Howserv Services Limited & Ors* [2024] EWCA Civ 1103. In particular she pointed to §41 where Arnold LJ observed:

> Although the judge does not in terms refer to it in his judgment, it can be seen from Howserv's closing submissions at trial that Howserv relied upon the principle of "conceptual counteraction" established in the jurisprudence of the CJEU. This principle is that a conceptual difference between a sign and a trade mark can counteract visual and aural similarities in the assessment of likelihood of confusion. Conceptual counteraction is "exceptional", however, and can only occur where "at least one of the signs at issue has, from the perspective of the relevant public, a clear and specific meaning which can be grasped immediately by that public": see Case C–328/18 P *European Union Intellectual Property Office v Equivalenza Manufactory SL* [EU:C:2020:156] at [74]-[75]. In this Court counsel for Howserv accepted that this requirement was not satisfied in the present case. It follows that there can be no question of conceptual counteraction.

44. She submitted that the same set of circumstances arose in the present case where the Hearing Officer placed undue weight on the conceptual differences she had found between the marks. Had she born in mind that conceptual counteraction is "exceptional", she would have gone on to make a finding of likelihood of confusion,

particularly where she had made findings that was a medium to high degree of visual similarity between the marks and a medium degree of aural similarity.

45. Again, I do not consider that the Hearing Officer fell into error in her assessment. She was entitled to and did balance the various comparisons she had to make between the marks, and it cannot be said that she placed undue weight on the conceptual differences or that she was wrong to make a finding of no likelihood of confusion. Further, §41 of Petsure has to be read alongside §35, where Arnold LJ also observed (emphasis added):

> 35. The second and more fundamental reason is that, while it is conventional for first instance tribunals in trade mark cases to articulate their assessment of the degree of visual and aural similarity between signs and trade marks using words such as "high", "medium" or "low", there is no legal requirement for tribunals to do so. All that is required is for the tribunal to assess the nature and extent of any similarities. **This is because what matters is not the verbal label that is applied to the assessment, but whether the similarities in conjunction with the other factors which must be taken into account lead to a likelihood of confusion. It is possible for there to be no likelihood of confusion despite a relatively high degree of visual and aural similarity. Equally it is possible for there to be a likelihood of confusion despite a relatively low degree of visual and aural similarity. It depends on the other factors that are in play.**

46. So overall I decline to interfere.

Ground 4

47. For similar reasons I reject Ground 4. Ms. Chantrielle argued that the notional consumer would consider that the mark applied for was a slogan for a sister brand or a brand extension of the Earlier Mark. This was particularly if the consumer misremembered the final word, Ambition or Moment. She reminded me that more attention is paid by a consumer to beginning of a mark.

48. The Hearing Officer addressed this in [135]. I cannot discern any error in her analysis and in the absence of any other relevant errors I decline to interfere. She was entitled to reject a likelihood of indirect confusion too.

Costs

49. I uphold the decision of the Hearing Officer. The mark can proceed to registration.

50. The Hearing Officer awarded the Applicant £1600 below based on the scale in TPN 1/2023.

51. The Applicant is entitled to an additional sum in respect of this appeal. Taking into consideration the written rounds and the hearing which took place before me on 15 March 2026, I award an additional £1400.

52. Accordingly I order that the Opponent/Appellant pays to the Applicant/Respondent the sum of £3000, to be paid within 21 days of the date of this decision, by 4pm on Wednesday 8 April 2026.

Thomas Mitcheson KC
The Appointed Person
18 March 2026