

O/031/12

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO 2 514 668

IN THE NAME OF BALLAROCK LTD

TO REGISTER IN CLASSES 32 AND 33 THE TRADE MARK: CELTIC MIST

AND

OPPOSITION THERETO UNDER NO 99 787

BY TJ CAROLAN & SON LTD

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The Background and Pleadings

1. Ballarock Limited (the applicants) applied to register the trade mark Celtic Mist on 27th April 2009. The application was published in the Trade Marks Journal on 21st August 2009 in respect of the following goods:

Class 32:

Beers; mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; syrups for making beverages; shandy, de-alcoholised drinks, non-alcoholic beers and wines.

Class 33:

Alcoholic wines; spirits and liqueurs, including cream liqueurs; alcopops; alcoholic cocktails.

2. TJ Carolan & Son Ltd (the opponents) oppose the registration of this application on the basis of the following earlier trade marks:
 - Community trade mark No 4 525 473 IRISH MIST, registered in respect of *alcoholic beverages (except beers)* in Class 33.
 - United Kingdom trade mark No 765 102, registered in respect of *Wines, spirits (beverages) and liqueurs* in Class 33.

3. The grounds upon which the opposition is based are as follows:
 - Under Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) in that the contested goods are identical and or similar to those of the earlier trade marks. Further, that the respective trade marks are similar. As such, there is a likelihood of confusion;
 - Under Section 5(3) of the Act in that the opponent has acquired a reputation in respect of IRISH MIST, at least in respect of *liqueurs*. By adopting a confusingly similar trade mark, the application will take unfair advantage of the reputation that the earlier trade mark has earned. Further, the quality of the goods available under the contested trade mark may be of inferior quality to those offered under the earlier trade mark and so a detrimental effect on the earlier trade mark could occur.
 - Under Section 5(4)(a) of the Act on the basis of the earlier right IRISH MIST which it is claimed has been used in respect of *liqueurs*. According to the opponent, it has thus acquired a goodwill and the contested trade mark is a misrepresentation of its earlier trade mark.
4. The applicants filed a counterstatement, denying the grounds of opposition. Specifically, it argues that CELTIC is not synonymous with IRISH; the element MIST is not particularly distinctive; the goods differ as earlier trade mark 765 102 has been used only in respect of *liqueurs*; that the goods are packaged and marketed in a manner which emphasizes the differences between them and so confusion will not occur. The applicants also request that the opponents prove use of its earlier trade mark 765 102. The counterstatement includes examples of the aforementioned packaging. I will return to this if and where appropriate during my decision. Both sides filed evidence and written submissions, all of which has been fully taken into account in reaching this decision. Neither side requested a Hearing and so this decision has been reached following a careful consideration of the papers.

The Opponents’ Evidence

5. This is a Witness Statement, dated 15th March 2011, from Urs Mueller, the General Manager and one of the Directors of the opponents. The following relevant information is contained therein:
 - The opponents first made use of IRISH MIST on a “whisky liqueur” in the UK in the 1950’s and use has been continuous since that date. Exhibit XX1 shows the variety of packaging that has been used on the liqueur bottles since 1950, together with a copy of the current packaging. Exhibit XX2 is a

print out taken from the www.irishmist.com website and provides the history of the IRISH MIST whisky liqueur. Exhibit XX3 is a print out taken from the Google search engine that provides links to retailers servicing the UK, that sell the IRISH MIST liqueur. Within the same exhibit is a print out from the website www.thedrinkshop.com that again provides a brief history of the liqueur, together with a consumer's review of the product dated 18th September 2009.

- Exhibit XX4 is a printout taken from www.comparestoreprices.co.uk which shows the price comparison for a bottle of IRISH MIST liqueur between UK retailers.
- Since 1999, the opponent has spent in the region of £229,000 in promoting and advertising the IRISH MIST whisky liqueur in the UK. The average retail price for a bottle of IRISH MIST whisky liqueur is £18. During 1999-2009, the opponent's turnover was in the region of £2.2 million. Exhibit XX5 is a selection of invoices and shipping notes showing sales and delivery of the IRISH MIST products into the UK.
- According to Urs Mueller, Ireland is one of six Celtic nations with its own Celtic language known as Gaelic and its own culture. A description of the history of the settlement of Celts is provided and Mr Mueller asserts that Irish music and decorative art originates from the Celtic influence and Exhibit XX6 is a selection of print outs taken from the internet that provides information about the history of Ireland and the relationship between the Irish and the Celts. Mr Mueller concludes that the words Irish and Celtic are interchangeable in many cases such as in respect of Celtic culture and Irish culture or Celtic art and Irish art. As such, in his view, the mark Celtic Mist will be viewed by the public already familiar with the Irish Mist brand as a variation and product of Ireland.

The applicant's evidence

6. This is a Witness Statement, dated 18th June 2011, from Adrian Costaine, a Director of the applicants. The statement provides details of the launch of the applicant's product, a cream liqueur in May 2009. Mr Costaine explains that the product has been referred to universally by its full title "BALLAROCK'S CELTIC MIST". The product has been on sale in the Isle of Man since May 2009 and in one outlet of Tesco, one outlet of Nisa and five outlets of Bargain Booze, all in Merseyside since July 2009. The remainder of the statement describes the history of the Isle of Man which, according to Mr Constaine, influenced the choice of imagery for BALLAROCK'S CELTIC MIST cream liqueur; further the statement describes how the product packaging was based on the work of an Isle of Man artist and its Celtic influences. Mr Constaine argues that the Isle of Man and its cultural heritage is distinct and there is a clear distinction between the different Celtic peoples. As such, Celtic and Irish cannot be said to be interchangeable. Finally, Mr Constaine argues that the applicant's product is clearly an Isle of Man (Manx) product as demonstrated by its labelling as it is described as a "Manx cream liqueur" and is presented in packaging entirely in keeping with its provenance. According

to Mr Constaine, these characteristics differentiate BALLAROCK'S CELTIC MIST substantially from products of the opponent and so the risk of this product being viewed by the public already familiar with the opponent's brand as a variation and product of Ireland is zero.

Preliminary Remarks

7. Firstly, I note that in its evidence, the applicant seeks to differentiate between the respective trade marks according to differences in packaging and the fact that in the marketplace, the applicant's products are sold under the complete title "BALLAROCK'S CELTIC MIST". I therefore stress that I am required to consider a notional question as to the likelihood of confusion between the respective trade marks and services of the parties'. What this means is that my decision must consider the similarity of the respective trade marks and the respective specifications as they are applied for and are protected on the trade marks register, then bringing these together in an assessment of the overall likelihood of confusion rather than according to any actual differences in the marketplace. Support for this approach can be found in the decision of the Court of Justice in the European Union in Case C-171/06P *T.I.M.E Art v OHIM and Devinlec Development Innovation Leclerc*, at paragraph 59:

"59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks".

8. The trade mark applied for in these proceedings is "Celtic Mist" and the earlier signs are IRISH MIST. The comparison to be made between the trade marks must therefore be on this basis only.
9. Secondly, I note that the opponent claims that it has a reputation in respect of its earlier trade marks, at least in respect of *liqueurs*. In my view, though the evidence filed is certainly sufficient to demonstrate that the marks have been used in respect of these goods, it falls short of convincing me that there is also a relevant reputation. The material that has been submitted does not provide any indication as regards the degree of recognition of the trade mark among the relevant public. Furthermore, there are no indications as regards the market share of the trade. As a result the evidence does not show that the trade mark is known by a significant part of the relevant public. The opponent has therefore failed to demonstrate that its trade mark has a relevant reputation in respect of *liqueurs*. Further, bearing in mind my view on the evidence of use filed, namely that it demonstrates use only in respect of

liqueurs, it seems to me that the opponent's best case rests upon its earlier Community trade mark No 4 525 473 IRISH MIST, which is registered in respect of the wider term *alcoholic beverages (except beers)* in Class 33. This earlier trade mark has a registration date of 3rd July 2006 and so was less than five years old as at the date of publication of the contested trade mark (21st August 2009). As such, it is not subject to the proof of use provisions and so can be considered in respect of its entire specification as registered.

DECISION

Likelihood of Confusion – Section 5(2)(b)

10. Section 5(2)(b) of the Act reads:

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

(a)

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

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

11. In reaching my decision I have taken into account the guidance provided by the Court of Justice of the European Union (“CJEU”) in a number of judgments: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77, *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723, Case C-3/03 *Matrazen Concord GmbH v GmbGv Office for Harmonisation in the Internal Market* [2004] ECR I-3657 *Medion AG V Thomson multimedia Sales Germany & Austria GmbH* (Case C-120/04) and *Shaker di L. Laudato & Co. Sas* (C-334/05). In *La Chemise Lacoste SA v Baker Street Clothing Ltd* (O/330/10) Mr Geoffrey Hobbs QC, sitting as the Appointed Person, quoted with approval the following summary of the principles which are established by these cases:

"(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;

(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 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion."

The average consumer and the purchasing act

12. The case-law informs me that the average consumer is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). The degree of care and attention the average consumer uses when selecting goods or services can, however, vary depending on what is involved (see, for example, the judgment of the General Court ("GC") in *Inter-Ikea Systems BV v OHIM* (Case T-112/06)).

13. In relation to alcoholic drinks the average consumer will be the general public, albeit those of drinking age. In relation to the non-alcoholic equivalents as included in the contested specification, the average consumer will be the same. Whilst there may be no prohibition on the sale of the goods to those who are below the legal drinking age, the nature of the goods lends themselves to being purchased, in the main, by the same average consumer of the alcoholic equivalents as an alternative to the alcoholic version. Although the respective goods are not the most expensive of products, they are still purchased with at least a reasonable degree of attention given that taste, and to some extent brand loyalty, play a part in the selection process. However, this does not equate to the purchasing act being undertaken with the highest degree of attention or consideration, a medium degree of care and attention is likely to be utilised. The remaining goods are those that can rightfully be classified as soft drinks and so the average consumer is the public at large. These goods are likely to be purchased frequently, with a low to medium degree of attention displayed (bearing in mind that taste and brand loyalty may again be factors at play during the selection process). All of the goods can be purchased via self selection from, for example, supermarket shelves or may also be requested orally. As such, both visual and aural considerations are important.

Comparison of goods

14. In terms of the comparison to be made, all relevant factors relating to the goods in the respective specifications should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the CJEU stated at paragraph 23 of its judgment:

“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.”

15. Guidance on this issue has also come from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 where the following factors were highlighted as being relevant when making the comparison:

“(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.”

16. In relation to understanding what terms used in specifications mean/cover, the case-law informs me that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”¹ and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning². Finally, when comparing the respective goods, if a term clearly falls within the ambit of a term in the competing specification then identical goods must be considered to be in play³ even if there may be other goods within the broader term that are not identical.

17. The earlier goods are:

Class 33:

Alcoholic beverages (except beers)

The contested goods are:

Class 32:

Beers; mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; syrups for making beverages; shandy, de-alcoholised drinks, non-alcoholic beers and wines.

Class 33:

Alcoholic wines; spirits and liqueurs, including cream liqueurs; alcopops; alcoholic cocktails.

¹ See *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281

² See *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

³ See *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs)(OHIM)* Case T-133/05 (“Gérard Meric”).

Contested goods in Class 33:

18. The earlier broader term includes all of the contested terms. They are self-evidently identical.

Contested goods in Class 32:

19. The contested *beers* is a beverage containing alcohol and which is expressly excluded by the earlier term. However, this does not prevent them from being self-evidently highly similar. The contested *shandy* is a beverage that contains a “token” amount of alcohol, normally a very small amount. However, it is likely to be seen as akin to a very weak beer type product. As such, I consider it to be similar to the earlier goods.
20. The contested *non-alcoholic drinks; de-alcoholised drinks, non-alcoholic beers and wines* are all those which can be commonly marketed as alternatives to the equivalent products that contain alcohol. They will coincide in end user, producer and distribution channels. They are therefore similar to the earlier goods.
21. The remaining contested goods are *mineral and aerated waters; fruit drinks and fruit juices; syrups for making beverages*. These are all soft drinks or products which enable the creation of a soft drink, that is, by adding water or other liquid. They are similar to the earlier goods in the abstract in that they are all drinks. However, the purpose of each in reality is quite different. These contested goods are to provide hydration and potentially nutrition. The purpose of the earlier goods is to enable relaxation and potentially, intoxication. It is true that the distribution channels may coincide in that each category of drinks can be sold in a, for example, supermarket or a public house. However, they are not in direct competition with one another. It is also true that the end users may coincide, though as all the items are consumables, this is not a definitive point of similarity in my view. I conclude therefore that though they have points in common, there is only a low degree of similarity between them.

Comparison of the marks

22. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) 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. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into

account any distinctive and dominant components. The respective trade marks are displayed below:

| | |
|--------------------|----------------------|
| IRISH MIST | Celtic Mist |
| Earlier trade mark | Contested trade mark |

23. Visually, the trade marks coincide entirely in respect of the element MIST which appears in the same position within each. They differ as regards the elements IRISH and CELTIC respectively. I consider there to be a low to moderate degree of visual similarity.
24. Aurally, there is little to add to the visual analysis. They coincide entirely as regards the respective third and final syllable and differ as regards the first and second. There is a low to moderate degree of aural similarity.
25. In respect of conceptual similarity, the parties have each advanced particular submissions. The opponent is of the view that the elements IRISH and CELTIC are interchangeable or synonymous as a result of Ireland essentially making the most of its celtic connections and influences. This, in the view of the opponent, leads to conceptual identity. The applicant disputes this. In this respect, I bear in mind the guidance in the decision of Mr Geoffrey Hobbs QC, sitting as the Appointed Person in BL O/100/09 FOREX, which permits me to check a dictionary. Upon checking the Oxford English Dictionary, I note the following definition of “Celtic” appears: “relating to the Celts or their languages, which constitute a branch of the Indo-European family and include Irish, Scottish Gaelic, Welsh, Breton, Manx, Cornish, and several extinct pre-Roman languages such as Gaulish”. This definition corresponds with my own understanding of the term, which I believe to be in sync with the level of understanding of the UK public. The term Celtic will be understood to include but not be limited to Irish. Rather it is broader and will also include Welsh, Scottish, Manx etc. This is so, in my view, irrespective of whether or not Ireland and the Irish people have in reality made more “use” of its Celtic connections than other peoples.
26. Bearing in mind the aforesaid, I must therefore assess its impact on the conceptual comparison to be made. I have already accepted that the element Celtic includes Irish and though they are not synonymous, there is a degree of similarity. The element MIST in each will be understood as referring to a cloud of water droplets. I conclude therefore that there is conceptual similarity between the signs, the degree of which I consider to be moderate.

Distinctive and Dominant components

27. To my mind, there is no clear dominant, that is, visually outstanding, feature in either of the marks. They will each be appreciated as a whole instantly.
28. As regards distinctive elements, the applicant argues that the element MIST is not distinctive when applied to alcoholic beverages in general. In support of this assertion, it describes a number of trade marks including the word MIST in classes 32 and 33 which are present on the United Kingdom Trade Marks Register. I note that the existence of several trade mark registrations is not *per se* particularly conclusive, as it does not necessarily reflect the situation in the market. In other words, on the basis of data concerning a register only, it cannot be assumed that all such trade marks have been effectively used. It follows that the evidence filed does not demonstrate that consumers have been exposed to widespread use of, and have become accustomed to trade marks which include MIST. Under these circumstances, the applicant's claims must be set aside.
29. To my mind, the element IRISH in the earlier trade mark is likely to communicate to consumers a geographical origin message. Similarly, the element CELTIC could do the same, despite the fact that this can mean more than one location. Alternatively, it may be viewed to indicate Celtic styles or influences on the end product. To my mind, the element MIST in each of the signs does not communicate anything other than a trade mark message. As such, in my view, it is the most distinctive element of each of the signs. The result therefore is that the signs coincide in respect of their most distinctive elements. As such, I consider them to be similar to a moderate degree.
30. The degree of distinctiveness of the earlier trade mark must also be assessed. This is important because the more distinctive the earlier mark(s) (based either on inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). I have already made a finding as regards the distinctiveness of the element MIST. To my mind, IRISH MIST is meaningless in respect of alcoholic beverages. I note that I have already found the evidence filed as regards reputation to be inadequate for the task. I consider therefore that the earlier trade mark has, *prima facie*, at least an average degree of distinctiveness.

Global Assessment – Conclusions on Section 5(2)(b)

Parallel trading

31. The applicant has provided evidence of use. I take this to mean that the applicant wishes to suggest that this use is such that it demonstrates the

applicant and opponent have distinct trades and so this is a factor that should be considered in determining whether there is a likelihood of confusion.

32. Evidence of parallel trading is a factor which could, potentially, assist in deciding whether there exists a likelihood of confusion. This is because if the evidence establishes that the respective marks have actually been put to use in the same market without the consumer being confused regarding economic origin, then this can inform the tribunal's decision. Alan Steinfield QC, sitting as a deputy judge of the High Court, in *Fiorelli Trade Mark* [2007] RPC 18 gave weight to an absence of confusion in the marketplace. However, this approach must also take in account the decisions which advise caution about the circumstances in which it is appropriate to give these factors weight (see the Court of Appeal in *The European Ltd v. The Economist Newspaper Ltd* [1998] FSR 283 at page 291, Laddie J in *Compass Publishing BV v. Compass Logistics Ltd* [2004] RPC 41 at 809 and the Court of Appeal in *Phones 4U Ltd v. Phone 4u.co.uk Internet Ltd* [2007] RPC 5 at paragraphs 42 to 45). In the first of these cases, Millet LJ stated:

“Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark.”

33. Some evidence of use has been provided to this tribunal, which I have already summarised. Bearing in mind the case-law referred to above, for concurrent trading to play a meaningful role in the assessment of the likelihood of confusion I must be satisfied that the parties have traded in circumstances that provide consumers the opportunity for exposure to both marks and, further that they have been able to differentiate between them without confusion as to trade origin. There has been no evidence to this effect here. Not only has the applicants' trade mark been used with the distinctive word BALLAROCK'S, the geographical scope of the use has been quite limited. As a result, this factor can be given no weight in determining whether or not there is a likelihood of confusion as a result of the use of CELTIC MIST alone.

34. In considering the likelihood of confusion therefore, it is clear that the factors assessed have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17) and that a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

35. In considering the contested Class 33 goods first of all, I note that these are identical. Further, the marks are similar to a moderate degree overall and have no features which could safely and accurately distinguish them. Indeed,

they create a similar overall impression. I also bear in mind the principle of imperfect recollection. In considering all of the aforementioned, I conclude that there is clearly a likelihood of confusion in respect of these goods. These factors also lead me to conclude that there the consumer is likely to be confused in respect of the goods in Class 32 which have been found to be highly similar and similar.

36. The remaining goods, namely the soft drinks or those which create soft drinks have been found to be only similar to a low degree. Further, the marks are similar only to a moderate degree. To my mind, for the low degree of similarity of goods to be effectively counteracted and for confusion to then be likely, either the marks would need to be identical or so highly similar as to be almost identical or the earlier trade mark would need to have acquired an enhanced distinctive character. Neither is present in this case and this absence, in my view, weighs against there being a likelihood of confusion.

37. The opposition under section 5(2)(b) therefore succeeds in respect of the following goods:

Class 32:

Beers; non-alcoholic drinks; shandy, de-alcoholised drinks, non-alcoholic beers and wines.

Class 33:

Alcoholic wines; spirits and liqueurs, including cream liqueurs; alcopops; alcoholic cocktails.

and fails in respect of *mineral and aerated waters; fruit drinks and fruit juices; syrups for making beverages.*

38. The opponent also bases its opposition upon Section 5(3) of the Act. I have already found that it failed to demonstrate the relevant earlier trade mark has the necessary reputation and so this ground of opposition clearly fails. In respect of Section 5(4)(a), I fail to see how the opponent can be in any better position than under Section 5(2)(b) above. If there is no confusion in respect of these signs and *mineral and aerated waters; fruit drinks and fruit juices; syrups for making beverages* as against the earlier *alcoholic beverages (except beers)*, it is difficult to see how there can be a misrepresentation when comparing the same signs and these soft drinks against *liqueurs*. The opposition therefore also fails under this ground.

COSTS

39. The opponent has been successful for the most part and is entitled to a contribution towards its costs. Neither party sought costs off the normal scale and I am of course mindful that neither party sought a hearing. In the

circumstances I award the opponent the sum of £1000 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Statutory fee for filing opposition - £200

Filing notice of opposition and considering counterstatement- £300

Filing evidence and submissions and considering the applicant's evidence - £500

Total - £1000

40. The above sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful

Dated this day of January 2012

Louise White

For the Registrar,

The Comptroller-General