O/0340/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO.

3985356

BY CHRISTOPHER NEWELL & MATTHEW NEWELL
TO REGISTER THE TRADE MARKS:

HIVE

AND

Hive

(AS A SERIES OF TWO)

IN CLASSES 32 AND 33

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 446464

BY HIVE PRODUCTS LTD

BACKGROUND AND PLEADINGS

1. On 29th November 2023, Christopher Newell and Matthew Newell ("the applicants") applied to register the trade marks shown on the cover of this decision (as a series of two) in the United Kingdom. The application was accepted and published in the Trade Marks Journal on 15th December 2023 in respect of the following goods:

   Class 32: *Beers; non-alcoholic beverages; mineral and aerated waters; fruit beverages and fruit juices; syrups and other non-alcoholic preparations for making beverages; honey flavoured beers; Honey-based beverages (Non-alcoholic -); Flavored beer.*

   Class 33: *Alcoholic beverages, except beers; alcoholic preparations for making beverages; honey flavoured alcoholic beverages, except beers; Mead [hydromel].*

2. On 15th March 2024, Hive Products Ltd ("the opponent") opposed the application based on Section 3(6) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all the goods. The opponent claims that, following initial commercial discussions regarding a potential collaboration (which did not go on to fruition), the applicants filed the trade mark application to unfairly constrain the opponent's commercial activities. It asserts that the applicants' conduct departs from accepted standards of ethical behaviour or honest commercial and business practices.

3. The applicants filed a counterstatement denying the claims made and disputing the detail and timeline of events presented by the opponent. Further, it claims that their application for the 'HIVE/Hive' marks (which, for ease, I will simply reference as 'HIVE' going forwards) is a logical development of their existing 'HIVE MIND' brand.

4. In these proceedings, the opponent is represented by Ellis IP Ltd and the applicant by Amgen Law. Both parties filed evidence in these proceedings. No hearing was requested therefore this decision is taken following careful consideration of all the papers before me. I have not summarised the evidence or submissions in full but will refer to these to the extent that is necessary.

5. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE AND SUBMISSIONS

6. The opponent filed written submissions and evidence in the form of a witness statement, dated 12th August 2024, from James Rowlands. Mr Rowlands is the sole director of the opponent, which he founded as a limited company in February 2021. This is accompanied by 14 exhibits (Annexes 1-14), primarily detailing the interactions between Mr Rowlands and the applicants. This evidence includes email chains and Whatsapp messages from 2020, as well as a draft business agreement Mr Rowlands shared with the applicants. A second witness statement was filed in parallel in the name of Michael Ellis, the director of the opponent's representative, Ellis IP Ltd. This is accompanied by 6 exhibits which detail company information on the applicants' business and that of the opponent, as well as historical pages of both parties' websites, courtesy of the Wayback Machine internet archive.

7. The applicants filed evidence in the form of a witness statement of Christopher "Kit" Newell, dated 10th November 2024, which is accompanied by one exhibit (Exhibit CN1). Mr Kit Newell is one of the applicants of the contested mark and brother to Matthew Newell, the other named applicant. Together, they own and run Wye Valley Meadery Limited, based in Caldicot, South Wales. Mr Kit Newell's evidence covers correspondence with a graphic designer, images of one of the applicants' products, 'THE HIVE', and the registration certificate of the applicants' existing trade mark registration for 'HIVE MIND (and 'Hive Mind', as a series of two).

DECISION

8. Section 3(6) of the Act is as follows:

> "A trade mark shall not be registered if or to the extent that the application is made in bad faith."

9. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors* (Rev1) [2024] UKSC 36, the Supreme Court considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07, *Sky plc & Ors v Skykick UK Limited & Anor*, Case C-371/18, *AS v Deutsches Patent- und Markenamt,* Case C-541/18, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, *Koton Mağazacilik Tekstil Sanayi ve Ticaret AŞ,* Case C-104/18 P, *Hasbro, Inc. v European Union Intellectual Property Office*, Case T-663/19, *pelicantravel.com s.r.o. v OHIM*, Case T-136/11, and *Psytech International Ltd v OHIM*, Case T-507/08. Lord Kitchin summarised the general principles applicable to bad faith at [240] as follows:

> "(i) […]
>
> (ii) The date for assessing whether an application to register [a] trade mark was made in bad faith is the date the application for registration was made (*Lindt*, para 35).
>
> (iii) Bad faith in this context is an autonomous concept of EU law which must be given a uniform interpretation […], and must be interpreted in the context of Directive 89/104 in the same manner as in the context of Regulation 40/94 (*Malaysia Dairy*, para 29; *Sky CJEU*, para 73).
>
> (iv) While, in accordance with its usual meaning in everyday language, the concept of bad faith presupposes the presence of a dishonest state of mind or intention, the concept must also be understood in the context of trade mark law, which involves the use of marks in the course of trade. Further, it must have regard to the objectives of the […] law of trade marks, namely the establishment and functioning of […] a system of undistorted competition in which each undertaking must, in order to attract and retain customers by the quality of its

goods or services, be able to have registered as trade marks signs which enable consumers, without any possibility of confusion, to distinguish those goods or services from those which have a different origin (*Lindt*, para 45; *Koton*, para 45).

(v) Consequently, the objection will be made out where the proprietor made the application for registration, not with the aim of engaging fairly in competition but either (a) with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties; or (b) with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, and in particular the essential function of indicating origin (*Koton*, para 46; *Sky CJEU*, para 75).

(vi) The intention of the applicant is a subjective matter, but it must be capable of being established objectively by the competent administrative or judicial authorities having regard to the objective circumstances of the case (*Hasbro*, paras 39 and 40; *Koton*, para 47).

(vii) The burden of proving that an application for a registered mark was made in bad faith lies on the party making the allegation. But where the circumstances of the case may lead to a rebuttal of the presumption of good faith, it is for the proprietor of the mark to explain and provide a plausible explanation of the objectives and commercial logic pursued by the application for registration (*Hasbro*, paras 42 and 43).

(viii) Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all of the factors relevant to the particular case (*Lindt*, para 37).

(ix) The applicant for a trade mark is not required to indicate or to know precisely when the application is filed or examined, the use that will be made of it (*Sky CJEU*, para 76; *Deutsches Patent-und Markenamt*, para 22).

(x) Nevertheless, the registration by an applicant of a mark without any intention to use it in relation to the goods and services covered by the registration may constitute bad faith where there is no rationale for the application in the light of

the aims referred to in Regulation 40/94 and Directive 89/104 (*Sky CJEU*, para 77).

(xi) Such bad faith may, however, be established only where there are objective, relevant and consistent indicia tending to show that, when the application was filed, the applicant for registration had the intention either of undermining, in a manner inconsistent with honest practices, the interests of third parties, or of obtaining, without targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark (*Sky CJEU*, para 77).

(xii) It follows that the bad faith of the applicant cannot be presumed on the basis of a mere finding that, at the time of filing the application, the applicant had no economic activity corresponding to the goods and services referred to in the application (*Sky CJEU*, para 78).

(xiii) When the absence of an intention to use the mark in accordance with the essential functions of a trade mark concerns only certain goods or services referred to in the application for registration, that constitutes making the application in bad faith only in so far as it relates to those goods or services (*Sky CJEU*, para 81).

(xiv) If, at the end of the day, the court concludes that, despite formal observance of the relevant rules and conditions for obtaining registration, the purpose of the rules has not been achieved, and that there was an intention to take advantage of the rules by creating artificially the conditions laid down for obtaining the registration, this may amount to an abuse sufficient to find that the application was made in bad faith (see, for example, *Hasbro*, para 72).

(xv) Directive 89/104 does not preclude a provision of national law under which an applicant for registration must state that the mark is being used in relation to the goods or services in relation to which it is sought to register the mark, or that the applicant has a bona fide intention that it should be used, provided that infringement of such an obligation cannot constitute a ground for invalidity. It may, however, constitute evidence for the purposes of establishing possible bad faith on the part of the applicant when the application was filed (*Sky CJEU*, paras 86 and 87)."

10. In the same case, Lord Kitchin also considered the question of what amounts to bad faith. He underlined that the categories of bad faith and the circumstances which may constitute bad faith are not closed, and continued:

> "152. In seeking to identify the relevant principles, it is necessary to have in mind two fundamental aspects of trade mark law to which I have already referred: first, it is concerned with the use of marks in trade to denote the origin of goods and services. Secondly, the aim of the trade mark regime is to contribute to a system of undistorted competition in which businesses are able to attract and retain customers by the quality of their goods and services, and for that purpose are able to have registered signs which enable consumers to distinguish the goods and services of one undertaking from those of another. Such a system must also provide an incentive and protection for the investment by a brand owner in the quality and other beneficial aspects of its goods and services, and so allow it to develop a goodwill in its business relating to their sale and supply.
>
> 153. Against this background, the essence of the objection that an application to register a mark was made in bad faith may be understood: it is that the motive or intention of the applicant was to engage in conduct that departed from accepted principles of ethical behaviour or honest commercial practices having regard to the purposes of the trade mark system which I have described. Whether the conduct was undertaken with that motive or intention and did indeed depart from such ethical behaviour or honest commercial practices must be assessed having regard to all the objective circumstances of the case: see, for example, *Koton Mağazacilik Tekstil Sanayi ve Ticaret AS v European Union Intellectual Property Office (EUIPO)* (C-104/18) EU:C:2019:724 ("*Koton*"), paras 46 and 47 […]."

11. An allegation of bad faith is a serious allegation which must be distinctly proved, but in deciding whether it has been proved, the usual civil evidence standard applies (i.e. balance of probability). This means that it is not enough to establish facts which are as consistent with good faith as bad faith.[1] The caselaw shows that

[1] *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited [2012] EWHC 1929 (Ch)*

the initial evidential burden falls upon the opponent to demonstrate that the facts surrounding the application establish a prima facie case of bad faith. It is, however, also clear following the Supreme Court's judgment in *SkyKick* that, if a prima facie case of bad faith is established, the burden shifts to the applicant to provide a plausible explanation of the rationale underlying the application. With this in mind, I turn to the opponent's evidence. It is necessary to ascertain what the applicant knew at the relevant date, i.e. 29th November 2023, the application date of the contested marks.[2] I bear in mind that evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date.[3]

12. The evidence provided by the opponent establishes that[4]:

- 29th May 2020: Mr Rowlands makes first contact with the applicants via the Wye Valley Meadery website. He states he is a member of "Black Lakes", a band based in Chepstow, and is interested in collaborating to "create a mead beverage for our brand [sic]" and has a "reasonable budget".

- 6th July 2020: Mr Rowlands contacts the applicants to update that he has decided upon "HIVE" as the product name and shares his label designs created in conjunction with his designer. The labels refer to the drink as a "cold distilled honey liqueur". I have reproduced two examples below:

[2] *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch)
[3] *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others,* [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16)
[4] This is not a full summary of all the discussions and meetings which took place, but instead some of the key interactions between Mr Rowlands and the applicants.

- 15th July 2020: Mr Kit Newell contacts Mr Rowlands stating he has been "looking into how we can make a 35-40% honey spirit" which appears possible, but that a licence is required, which has been applied for.

- 25th July 2020: Mr Rowlands contacts the applicants regarding his desire for an initial run of 100 (50L) bottles, with 30 bottles already earmarked for friends and family.

- 29th July 2020: Mr Kit Newell contacts Mr Rowlands agreeing quantities "sound sensible for a first batch". He mentions rules for labelling and suggests the addition of a "small meadery logo" (which Mr Rowlands agrees to via later correspondence). He also offers his assistance in 3D printing a stamp design.

- 3rd August 2020: Mr Rowlands expresses desire to "flesh out, in writing, our working relationship".

- 7th September 2020: Mr Kit Newell confirms that they are "moments away" from acquiring the necessary spirit licence. There is discussion on determining a recipe: mixing "different honey blend strengths with different base spirits and see what we prefer". He also offers for Mr Rowlands to order bottles and keep them at the meadery until needed. In terms of a timeline, he suggests "our goal is to get this done and dusted by the end of October so you have November / December to sell them".

- 16th September 2020: Mr Rowlands sends the applicants the HIVE logo being used for the wax seal and on "other media/merch". In terms of quantities, he wishes to increase to 150 units.

- 6th October 2020: Mr Kit Newell shares the 3D model designs that he has been working on based upon the HIVE logo previously shared by Mr Rowlands.

- 22nd October 2020: A Whatsapp group between the applicants and Mr Rowlands is created called “Black Lakes Honey Rum”.

- 3rd November 2020: Mr Rowlands confirms he is ready to progress with bottle ordering, label production, procurement of ingredients to start production, but requests a written agreement before going further, “so that both parties are protected and understand what is expected of each other”.

- 4th November 2020: Mr Rowlands shares a draft agreement and seeks feedback.

- 7th November 2020: Mr Rowlands chases feedback from the applicants on the agreement. Mr Kit Newell replies to apologise for delay and confirms their intention of looking at it later that day.

- 20th November 2020: Mr Rowlands briefly references some meetings he’s had with distilleries and producers and ‘checks in’ on the applicants. This appears to be the last contact between the two parties regarding the collaboration.

13. With this summary in place, I find it apt to highlight here that I have some difficulties with the applicants’ evidence, in particular Mr Kit Newell’s assertion in his witness statement that: “It was not until it became clear to us when we received the proposed agreement from the Opponent (although we had misgivings before then) that he wanted to make a commercial honey spirit under the name HIVE based in our town…”.[5] In addition, his statement that “the clear impression that the Opponent gave us was that his mead, Black Lakes was to be band merchandise produced in very small runs and not a typical commercial product”.[6] It is clear from the evidence summarised above that the applicants were already aware of many (if not all) of these things much earlier than the 4th November 2020 (the date upon which the draft agreement was shared by Mr Rowlands), yet the applicants appear to continue to actively engage and encourage the project, such as offering storage

[5] Paragraph 8 of Mr Kit Newell’s witness statement
[6] Ibid. Paragraph 6.

space and organising tastings. I will quickly address each in turn as these discrepancies have a bearing later in my findings:

- On the name: Mr Rowlands indicated his intention to use the HIVE name on 6th July 2020 and this is already admitted elsewhere by Mr Kit Newell (at paragraph 7 of his witness statement).
- On Mr Rowlands' geographical proximity to the applicants, i.e. his being based in Chepstow: this was clear from his initial contact on 29th May 2020 and I note several in-person meet-ups took place between the parties.
- On the intention to produce a spirit product and the quantities: the alcohol licence required to make a spirit was mentioned by Mr Kit Newell on 15th and 29th July 2020 and details for an initial quantity were articulated by Mr Rowlands on 25th July 2020.
- On whether this was for a commercial product: on 7th September 2020 it was Mr Kit Newell's suggested timeline which raised a completion date of the end of October, so Mr Rowlands would have November and December to sell them.

14. The opponent's case is that the applicants, though their "extensive commercial discussions" with Mr Rowlands "had special insight into his plans to launch his honey spirit under the brand HIVE"[7]. It notes that the applicants did not dispute that HIVE was Mr Rowlands' intellectual property when the draft agreement was shared in 2020. However the timing of the contested application, "only a matter of weeks after the launch of the Opponent's HIVE-branded honey spirit" in 2023, it claims, is indicative of the applicants filing with the primary objective of disrupting the business and trade of Mr Rowlands (and the opponent) in a manner that is contrary to and departs from the accepted standards of ethical behaviour or honest commercial practices.[8] In particular, it highlights that an email (Annex 14 to Mr Rowlands' witness statement) was sent to the opponent by Mr Kit Newell within a matter of weeks following the application for the contested marks, inviting Mr Roland to rethink his brand name before a formal cease and desist letter.

[7] Paragraphs 14 and 15 of written submissions.
[8] Ibid.

15. I am satisfied that the applicants were indeed aware of Mr Rowlands' intention to use the HIVE mark prior to filing the contested marks and that the interactions between the two sides confirm that the applicants had insight into Mr Rowlands' plans to launch a honey-based spirit under the name HIVE. I also note the passing of time between their last interaction in 2020 and the commercial launch of the opponent's business, as covered by the online news article dated 3rd November 2023 and stated: "He [Mr Rowlands] will be bottling and selling his first honey spirit product from October this year".[9]

16. However, although it may be a relevant factor, I must keep in mind that the mere fact that an applicant knows that another party is intending to use (or even is already using) a trade mark in the UK does not establish bad faith. In *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others* [2009] RPC 9 (approved by the COA in [2010] RPC 16), Arnold J. (as he then was) stated that:

> "189. In my judgment it follows from the foregoing considerations that it does not constitute bad faith for a party to apply to register a Community trade mark merely because he knows that third parties are using the same mark in relation to identical goods or services, let alone where the third parties are using similar marks and/or are using them in relation to similar goods or services. The applicant may believe that he has a superior right to registration and use of the mark. For example, it is not uncommon for prospective claimants who intend to sue a prospective defendant for passing off first to file an application for registration to strengthen their position. Even if the applicant does not believe that he has a superior right to registration and use of the mark, he may still believe that he is entitled to registration. The applicant may not intend to seek to enforce the trade mark against the third parties and/or may know or believe that the third parties would have a defence to a claim for infringement on one of the bases discussed above. In particular, the applicant may wish to secure exclusivity in the bulk of the Community while knowing that third parties have local rights in certain areas. An applicant who proceeds on the basis explicitly

[9] Annex 13 which accompanied Mr Rowlands' witness statement.

provided for in Article 107 can hardly be said to be abusing the Community trade mark system."[10]

17. As already summarised from *SkyKick*, the crux of the matter comes down to the motivation of the applicants in applying for the contested marks. I recall that that the opponent's case centres upon the applicants filing the contested application, only a matter of weeks after the opponent's launch, with the primary objective of disrupting the business and trade of Mr Rowlands and his company. On this, I turn to the applicants' counterstatement which states:

> "the Applicants aver that the Opponent's sole product, a honey spirit (Class 33), is branded HIVE DRINKS CO. This mark was not mentioned to the Applicants at any point during their association and so the Opponent's claim that this application is made in bad faith is rejected – the Applicants were wholly unaware of the Opponent's brand HIVE DRINKS CO."

I agree that there is nothing in the evidence to suggest the applicants were aware of the opponent's intention to use the name "HIVE DRINKS CO" during their interactions in 2020, only HIVE. However, there is some ambiguity in the counterstatement. If the applicants' suggestion is that they were unaware of the opponent's business HIVE DRINKS CO prior to filing the contested marks, this appears to be contradicted by Mr Kit Newell's witness statement where he states that: "we only heard about him [Mr Rowlands] in November 2023 when one of our retailers alerted us to HIVE DRINKS CO believing it to be someone mimicking our brand" and later on that "we decided to apply to register HIVE as a logical progression of our business and…we believed the Opponent's brand to be HIVE DRINKS CO and no conflicting marks were registered with the IPO".[11] Therefore, taking this explanation into account, it appears the applicants did have the opponent in mind when embarking on the application but, satisfied that the opponent's mark was HIVE DRINKS CO (not HIVE), and there being no other conflicting marks already registered, they were content to proceed with an application.

[10] See also *Koton* (paragraph 55).
[11] Paragraphs 8 and 13, respectively.

18. As already detailed above, the fact that the applicants knew that the opponent was intending to use the term HIVE does not render its application for the contested marks as bad faith. Knowledge alone is not enough. However, returning once again to paragraph 240(x) and (xi) of *SkyKick*, if the applicants only applied for the mark with the intention of using it to interfere with the opponent or of obtaining an exclusive right for purposes other than those falling within the functions of a trade mark, this would constitute bad faith.

19. The applicants' evidence is extremely scarce. Their arguments regarding the origins of the HIVE name and their motivation for applying for the contested marks appear to oscillate between:
    - That their mark originated as HIVE and developed into HIVE MIND; but they applied for the contested marks "as there were no registered trade marks for HIVE and we intend to develop drinks with that branding".[12]
    - That their mark is HIVE MIND but HIVE is a logical development of this to "allow for the strengthening of their brand and the expansion of their range."[13]
    - That their application for the contested marks was specifically to protect "a beer called "THE HIVE" which they had already launched and wanted to "ensure it was protected".[14]

20. The evidence which accompanies the opponent's second witness statement deals with events post-2020 and provides helpful background, namely that:
    - The opponent, Hive Products Limited, was incorporated on 27th February 2021 with Mr Rowlands as the sole director.
    - The applicants' Wye Valley Meadery website features HIVE MIND products for sale by 23rd April 2021. (These products did not feature on the site on 1st or 7th November 2020)
    - The opponent's website hivedrinks.com was live in so far as a holding page at 27th January 2022. (I do not have any screenshots or evidence showing the website after it had fully launched but Mr Rowlands' witness statement confirms the opponent made its first sales in December 2023).

[12] As per paragraphs 5 and 14(f) of Mr Kit Newell's witness statement.
[13] As per counterstatement.
[14] As per paragraph 13 of Mr Kit Newell's witness statement.

- The website hivemindmead.com had not yet launched at 17th April 2023 (a GoDaddy holding page was in place at this date) but is active by 9th July 2023.

21. Of particular note, the opponent's evidence (Annex 4 to Mr Ellis' witness statement) confirms that the applicants were selling HIVE MIND products online via the Wye Valley Meadery website by 23rd April 2021 with two products available: HIVE MIND "BIG SMOKE" SMOKED HONEY PORTER and HIVE MIND HONEY CITRA IPA. The applicants' HIVE MIND trade mark application follows chronologically on 30th June 2023. The registration certificate for this is submitted at page 3 of the applicants' Exhibit CN1. Additionally, Annex 5 to Mr Ellis' witness statement dated 9th July 2023 shows the www.hivemindmead.com website with further products in the HIVE MIND range, including HIVE MIND HONEY PILSNER and HIVE MIND 'GOLDEN HOUR' GOLDEN HONEY ALE.

22. As already summarised at paragraph 19 above, one of the reasons provided by Mr Kit Newell in his witness statement for making the contested application is in relation to a specific beer that they were already producing. An image of this beer (part of their HIVE MIND range) is provided at Exhibit CN1 (page 2), a HONEY CITRA IPA called "THE HIVE". The picture is undated and the only context provided is in the narrative evidence from Mr Kit Newell that it was "already launched" when they decided to apply for the contested marks. [15] I note, the image provided is in isolation and therefore does not appear to show the mark in use, e.g. as part of a listing on the applicants' website, a promotional brochure or any other customer facing publication. I also note that this bottle provided in Exhibit CN1 is near identical to that which appears within Annex 4 and Annex 5 of the exhibits accompanying Mr Ellis' witness statement for the opponent, albeit in those instances the product does not feature the name "THE HIVE".[16] Therefore, the evidence before me shows only the unnamed product being sold online at 23rd April 2021, 9th July 2023 and 2nd August 2023, i.e. under the HIVE MIND brand but without the specific "THE HIVE" name.

[15] Paragraph 13 of witness statement

[16] Unfortunately, these annexes are not clearly paginated. However the products appear on the 23rd page of Annex 4 and the 5th (partially obscured but majority of label in shot) and 13th pages of Annex 5.

23. While this is not wholly incompatible with Mr Kit Newell's claims that the HONEY CITRA IPA beer was already launched using "THE HIVE" mark by 29th November 2023 (i.e. the application date of the contested marks) it does cast some uncertainty on the timeline and rationale presented by the applicants. It is not clear why the applicants' HONEY CITRA IPA appears to have been sold online without any reference to "THE HIVE" name yet, according to Mr Kit Newell, later acquires that branding. To reconcile Mr Kit Newell's claims with the evidence before me, this would have to have occurred sometime between 2nd August 2023 and 29th November 2023. I have nothing in the applicants' evidence to help explain this discrepancy but even more so, since the image at Exhibit CN1 is undated and with limited context, I have nothing to confirm the product was ever publicly branded in this manner and to substantiate (in the face of the opponent's evidence pointing elsewhere) Mr Kit Newell's claims that the HONEY CITRA IPA product was sold under "THE HIVE" name. In my view, such evidence could have been easily provided if this was indeed the case.

24. However, this is not the end of the matter, the other two reasons given by the applicants (as summarised in paragraph 19) are that the contested marks are to "allow for the strengthening" of their HIVE MIND brand and the "expansion of their range" and/or that they intend to "develop drinks" with the HIVE branding in the future. These motivations are more general and forward looking. This leaves me to consider whether I am satisfied that the applicants had an intention to use the mark on this basis when submitting their application.

25. On this, I note that is not a requirement that an applicant has, prior to the date of the application, used a sign as a trade mark in order apply to register a trade mark in the UK. I also note that when applying for a trade mark in the UK, the applicant is required to give a statement that it has the bona fide intention to use the mark on the goods and/or services applied for. However this statement, even if untrue, is not sufficient by itself to justify the refusal or cancellation of a registration.[17]

26. With respect to intention to use and the applicants' claimed motivation regarding the contested marks to "allow for the strengthening" of their HIVE MIND brand, I

[17] As per paragraph 86 of *Sky Plc v SkyKick UK Ltd* (C-371/18).

am mindful that Lord Kitchin as part of the *SkyKick* judgment, reviewed *Target Ventures Group Ltd v EUIPO* (Case T-273/19), where the question being addressed was whether an organisation using the mark TARGET PARTNERS, had acted in bad faith when it applied to register the contested mark TARGET VENTURES.[18] Lord Kitchin summarised as follows:

> "237. …It emphasised, at para 35, that although an applicant for the registration of a trade mark is not required to indicate or even know precisely, on the date the application is filed, the use that he or she will make of the mark, and (ii) although he or she has a period of five years for beginning actual use consistent with the essential function of a trade mark, the registration of this mark by the intervener without any intention of using it in connection with the goods and services covered by the registration did constitute bad faith. This was because there was no rationale for the application in the light of the aims referred to in Regulation 207/2009. The court continued, at paras 36–42, that it was apparent from objective, relevant and consistent indicia that the intention of the intervener had not been to put the contested mark to a use falling within the functions of a trade mark but instead to try to protect its own mark TARGET PARTNERS which was the only mark under which it offered its services."

Therefore an application for a trade mark merely for the purposes of "strengthening" an existing mark or as some form of defensive measure to artificially expand the protection already acquired via an existing right does not fall within the essential functions of a trade mark. Mr Thomas Mitcheson (KC) acting as the Appointed Person commented on a similar case, *Legaltech ApS v Thelawyer.com Limited* (BL O/0025/26) at paragraph 33:

> "… Under established trade mark law, the registration of marks purely for defensive purposes is not permitted. The rationale for this is that registered trade marks already have a penumbra of protection around them, given by the provisions of ss.10(2) and (3) of the Trade Marks Act 1994 and their European counterparts, which allow protection from the use of similar or even dissimilar marks. The registers would get completely clogged up with applications if it was

[18] It had only used the latter mark as part of domain names purely set up to redirect to is main TARGET PARNERS site.

permissible for parties to apply not only for the marks they intended to use, but also for marks which are similar to those marks".

27. Turning to the evidence before me in relation to this and the applicants' other claim that the contested marks are intended so they can "develop drinks" using HIVE branding in the future, I have nothing to suggest the applicants have used HIVE solus or to suggest expansion plans and/or preparations for selling products using HIVE. I recall that this alone is not sufficient for a finding of bad faith, as per paragraph 240(ix) of *SkyKick*, as an applicant is not required at the point of filing to indicate or know precisely the use that will be made of it. However, as per points (x) and (xi) of the same paragraph, if the applicants only applied for the mark with the intention of using it to interfere with the opponent or of obtaining an exclusive right for purposes other than those falling within the functions of a trade mark, this would constitute bad faith. Therefore, I would expect to see something in the applicants' evidence to support and enable me to understand the commercial logic pursued by their application and therefore confirm that the application for registration of the marks is in pursuit of a legitimate objective. As Mr Alexander said, in *Accessible Labs Ltd v Rui Qu (Shanghai) Enterprise Management Consulting Company Limited,* BL O/0534/25 (my emphasis):

"46. *SkyKick* therefore reinforced the importance of a satisfactory explanation for making a UK trade mark application in circumstances where an inference that the mark was applied for in bad faith appeared justified, prima facie. Key questions are therefore (a) whether an explanation was provided at all and (b) whether the hearing officer had sufficient basis to find that the explanation provided was unconvincing with respect to motivation in applying for the mark and in particular intention to use it in the UK, taking the evidential picture as a whole.

47. As to that, the case law from the Court of Appeal prior to *SkyKick* suggests that where, in principle, evidence from those with knowledge of intention is available, it is reasonable to expect it to be adduced to rebut a prima facie case of bad faith. That proposition is supported by *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where Arnold LJ said

at [180] of one of the grounds of appeal (namely that it was not realistic for the judge to expect that either witness testimony or documentary evidence would be available to explain Lidl's intentions) that despite the passage of time, the applicants for registration were best placed to explain their intentions. The court expected a proper explanation.

48. In light of these authorities, where there is evidence from which it is proper to infer that an application for registration has been made in bad faith (on the basis that it was not applied for to protect one or more of the legitimate functions of a trade mark) an applicant can reasonably be expected to provide a sufficiently coherent explanation for the application specifically in the UK including as to its scope. An applicant may be able to justify the application (including its scope) on the basis of credible evidence as to its purposes in making it, for example by reference to the width of the underlying business, actual or reasonably contemplated, which the trade mark is intended to protect. If no adequate or sufficiently credible explanation is provided or one which justifies the UK application, there may be a proper basis for a finding of bad faith in whole or in part."

28. It is on this basis that I find the applicants' defence and evidence lacking. As per my summary at paragraph 19, there is a lack of consistency in the rationale provided by the applicants for their application with their arguments alternating between, seemingly, three different reasons, none of which are provided any support by the evidence, and one of which (relating to THE HIVE product) proving very difficult to reconcile with the documentary evidence already produced by the opponent. I am mindful that, on the facts of the *SkyKick* case, Lord Kitchin found as follows (my emphasis):

"251 Here I am persuaded by the reasoning in the decisions of the CJEU to which I have referred that for a person to make an application to register a mark for goods and services for some purpose which is not contemplated by the legislation and in relation to which that person had no intention (conditional or otherwise) to use the mark as a badge of origin constitutes an abuse – that is to say, a misuse of the system.

252. I recognise that such an applicant, when given an appropriate opportunity, may provide a reasonable explanation and justification for its actions and in that way answer and dispel any inference that it made the application in bad faith. If, however, it fails to do so, it is in my view open to the tribunal to find that the application was indeed made in bad faith in respect of those goods and services

29. Taking these circumstances into account, the evidentiary picture as a whole and on the balance of probabilities, I am unable to conclude that the applicants' intentions when applying for the mark were in relation to the launch of a product called THE HIVE or more general contemplated plans to use HIVE solus. The applicants have not provided any cogent evidence (be that prior to the relevant date or after) or to substantiate the claims that their business was expanding or even reasonably planning to expand in this direction. Instead, the evidence points towards the applicants' branding being focussed upon HIVE MIND, a name for which I am satisfied they have demonstrated clear intentions to use from as early as 2019 (as per page 1 of Exhibit CN1) and use of from at least 23rd April 2021 (as per page 21 of Mr Ellis' Annex 4). With a trade mark registration already in place for HIVE MIND, I have nothing which supports the applicants' assertions that it applied for the contested marks as a logical next step. I am also mindful of the inconsistencies in Mr Kit Newell's recording of events, which I have already detailed above (paragraphs 13 and 19). Some of these inconsistencies alone are not fatal to the applicants' claims of good faith, since the applicants' awareness of the opponent's intentions to use HIVE is not sufficient for a finding of bad faith. It does, however, cast some doubt regarding the reliability of the Mr Kit Newell's assertions and where this extends to his account of the applicants' motivation for applying for the contested marks is critical to the opponent's claims for bad faith. I therefore consider this objective, relevant and consistent indicia that, at the time of filing, the applicants applied for the mark, not with the intention of using it in the course of trade, in accordance with the functions of a trade mark, and engaging fairly in competition but instead, on seeing the opponent entering the market, seeking to disrupt the opponent's business in a manner inconsistent with honest business intentions. Therefore, the applicants have not rebutted the prima facie inference of bad faith.

CONCLUSION

30. The applicants have not rebutted the prima facie inference of bad faith, the contested marks (series of two) are, therefore, declared as being filed in bad faith and the opposition hereby succeeds in full.

COSTS

31. The opponent has been successful and is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. I award the opponent the sum of £1100, calculated as follows:

Preparing a statement and considering the other side's statement	£300
Preparing evidence and considering the other side's evidence	£800
Total	**£1100**

32. I therefore order Christopher Newell and Matthew Newell to pay Hive Products Ltd the sum of **£1100.00**. This sum should 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.

Dated this 23rd day of April 2026

C IRELAND

For the Registrar