

O/0539/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004045609

IN THE NAME OF JL DRINKS LTD

TO REGISTER THE FOLLOWING TRADE MARK:

UNLESHED

IN CLASS 33

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP000449510

BY MONSTER ENERGY COMPANY

Background and pleadings

1. On 29 April 2024, JL Drinks Ltd (“the Applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was accepted and published in the Trade Marks Journal on 07 June 2024 in respect of the following goods:

Class 33: Spirits; Spirits [beverages]; Distilled spirits; Shochu (spirits); Potable spirits; Digestifs [liqueurs and spirits]; Digesters [liqueurs and spirits]; Aguardiente [sugarcane spirits]; Korean distilled spirits (soju); Sorghum-based Chinese spirits; Distilled spirits of rice (awamori); Distilled rice spirits [awamori]; Gaolian-jiou [sorghum-based Chinese spirits]; Fermented spirit; Alcoholic essences; Aperitifs with a distilled alcoholic liquor base; Grain-based distilled alcoholic beverages; Baijiu [Chinese distilled alcoholic beverage]; Distilled beverages; Beverages (Distilled -); Cordials [alcoholic beverages]; Alcoholic energy drinks; Alcoholic wines; Liqueurs; Extracts of spiritous liquors; Flavored tonic liquors; Alcoholic cordials; Wine-based drinks; Wine-based beverages; Low alcoholic drinks; Sugarcane-based alcoholic beverages; Rum [alcoholic beverage]; Alcoholic cocktails; Wine coolers [drinks]; Coffee-based liqueurs; Chinese spirit of sorghum (gaolian-jiou); Beverages containing wine [spritzers]; Alcoholic fruit cocktail drinks; Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Naturally sparkling wines; Alcoholic carbonated beverages, except beer; Alcoholic beverages of fruit; Alcoholic fruit beverages; Flavored brewed alcoholic malt beverages, except beers; Whiskey [whisky]; Flavoured brewed alcoholic malt beverages, except beers; Herb liqueurs; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Beverages (Alcoholic -), except beer; Alcoholic bitters; Sparkling wines; Prepared wine cocktails; Alcoholic aperitifs; Nira [sugarcane-based alcoholic beverage]; Cachaca; Natural sparkling wines;

Pre-mixed alcoholic beverages, other than beer-based; Pre-mixed alcoholic beverages; Mulled wines; Rum-based beverages; Prepared alcoholic cocktails; Wines; Whisky; Alcoholic tea-based beverage.

2. On 06 September 2024, Monster Energy Company ("the Opponent") opposed the application in full under Section 5(2)(b) of the Trade Marks Act 1994 ("the Act").

3. The Opponent relies upon the following marks:

THE BEAST UNLEASHED

UK Registration no. UK00003816848

Filing date: 4 August 2022

Date of registration: 28 October 2022

Relying upon the following goods:

Class 32: Non-alcoholic beverages; non-alcoholic beverages, including carbonated and non-carbonated drinks, soft drinks, and energy drinks; syrups, concentrates, powders and preparations for making beverages; beer; brewed sugar-based beer.

Class 33: Alcoholic beverages; alcoholic malt beverages; flavored brewed malt beverages.

(The first earlier mark)



UK Registration no. UK00003873051

Filing date: 31 January 2023

Priority Date: 02 August 2022¹

Date of registration: 21 April 2023

Relying upon the following goods:

Class 32: Brewed sugar-based beer.

Class 33: Flavored brewed malt beverage.

(The second earlier mark)

FLAVOR UNLEASHED

UK Registration no. UK00003877453

Filing date: 13 February 2023

Priority date: 01 September 2022²

Date of registration: 12 May 2023

Relying upon the following goods and services:

Class 32: Non-alcoholic beverages.

Class 35: Retail store services in relation to beverages; online retail store services in relation to beverages.

(The third earlier mark)

4. By virtue of their earlier filing dates, the Opponent's marks constitute earlier marks within the meaning of section 6 of the Act. As the earlier marks have not completed their registration process more than five years before the filing date of the application in issue, they are not subject to the use provisions contained in section 6A of the Act. The Opponent can, therefore, rely upon all of the goods and services it has identified without having to demonstrate use.
5. The Opponent contends that the competing marks are similar, and that the goods and services at issue are identical or similar.
6. The Applicant filed a counterstatement within which it denied the grounds of opposition.

¹ United States of America (US) 97/530751.

² United States of America (US) 97/575770.

7. Only the Opponent has filed evidence during these proceedings. A hearing was requested by the Opponent and held before me, by video conference on 20 May 2026. At the hearing the Opponent was professionally represented by Mr Milligan of Bird & Bird LLP; the Applicant has been represented throughout these proceedings by Withers & Rogers LLP, however, prior to the hearing Withers and Rogers LLP confirmed they were no longer acting for the Applicant. Following receipt of which the Tribunal wrote to the Applicant to confirm the time and date of the scheduled hearing, however, neither the Applicant nor any representative on its behalf attended the hearing. This decision is taken following a careful consideration of the papers and the oral arguments made during the hearing.

Relevance of EU law

8. 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

9. The Opponent filed evidence in the form of the witness statement of Sharon Mutizira, of Bird & Bird LLP, signed and dated 28 January 2025. The witness statement is accompanied by exhibits SM1 - SM43.
10. The evidence seeks to show the exact nature of the goods at issue, in particular, non-alcoholic goods, and trade channels through which they reach the market.

DECISION

Sections 5(2) and 5A

11. Sections 5(2)(b) and 5A of the Act state:

“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”.

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

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

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

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

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

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing

in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa; Page 8 of 20

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

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

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

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

Approach to this decision

13. At the hearing Mr Milligan sensibly took the position that the Opponent's strongest case rested in the first and third earlier marks. He agreed that if the Opponent did not succeed in relation to the first earlier mark, the word only mark THE BEAST UNLEASHED with a wider specification relied upon, then it would not succeed in

relation to the second earlier mark, a figurative mark containing the same words but with an emphasis on BEAST which is not found in the applied for mark, and with a narrower specification. Equally, if the Opponent is successful in relation to either the first or third earlier marks then there is no need for me to go on to assess similarity between the applied for mark and the second earlier mark.

Comparison of goods and services

14. All relevant factors relating to the goods and services should be taken into account, which include, inter alia:³

- the physical nature of the goods and services;
- their intended purpose;
- their method of use / uses;
- who the users of the goods and services are;
- the trade channels through which the goods and services reach the market;
- in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and
- whether they are in competition with each other (taking into account how those in trade classify the goods and services, for instance whether market research companies put them in the same or different sectors)

or

- whether they are complementary to each other. Complementary signifying that “there is a close connection between them, in the sense that one is

³ See *Canon*, Case C-39/97, paragraph 23; and *British Sugar PLC v James Robertson & Sons Ltd.*, [1996] R.P.C. 281 – the “*Treat*” case.

indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods and services lies with the same undertaking”.⁴ It is noted that complementarity means that there is an autonomous criterion capable of being the sole basis for the existence of similarity.⁵

15. When interpreting the terms in a specification, I bear in mind that it is necessary to focus on the core of what is being described and that trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. Nevertheless, the principle should not be taken too far and where words or phrases in their ordinary and natural meaning are apt to cover the category of goods and services in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods or services in question.⁶

16. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin set out the proper approach to considering terms in specifications:

“365. [...] The correct approach, as a matter of principle, in considering a specification of services which is defined by terms which are not clear or precise, is to confine the terms used to the substance or core of their possible meanings: see, for example, *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159; [2004] RPC 40, at para 43. So too, if a specification of goods is defined by terms which are ambiguous, then it should be confined to those goods which are clearly covered. These principles are consistent with first, the requirement that the specifications of goods and services must be clear and precise so that others know what they can and cannot do; and secondly, general fairness because any ambiguity is the responsibility of the owner of the mark. If despite this, the words used are still unclear so that they cannot be interpreted, then it is

⁴ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82, see also *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL O/255/13

⁵ *Kurt Hesse v OHIM*, Case C-50/15 P, see also *Sanco SA v OHIM*, Case T-249/11

⁶ *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), paragraphs 11 - 12

permissible to disregard them. But, in my opinion, that will rarely be the case.”

17. I am minded that in *Avnet Incorporated v Isoact Limited* [1998] FSR 16, Jacob J (as he then was) said at [19]:

“[...] definitions of services ... are inherently less precise than specifications of goods. [...] In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

18. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode Trade Mark*.⁷

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

19. Further, in *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-133/05, the General Court (“GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

⁷ BL O/399/10

20. The goods and services for comparison are as follows:

Opponent's specification for its first earlier mark	Applicant's specification
<u>Class 32:</u> Non-alcoholic beverages; non-alcoholic beverages, including carbonated and non-carbonated drinks, soft drinks, and energy drinks; syrups, concentrates, powders and preparations for making beverages; beer; brewed sugar-based beer. <u>Class 33:</u> Alcoholic beverages; alcoholic malt beverages; flavored brewed malt beverages.	<u>Class 33:</u> Spirits; Spirits [beverages]; Distilled spirits; Shochu (spirits); Potable spirits; Digestifs [liqueurs and spirits]; Digesters [liqueurs and spirits]; Aguardiente [sugarcane spirits]; Korean distilled spirits (soju); Sorghum-based Chinese spirits; Distilled spirits of rice (awamori); Distilled rice spirits [awamori]; Gaolian-jiou [sorghum-based Chinese spirits]; Fermented spirit; Alcoholic essences; Aperitifs with a distilled alcoholic liquor base; Grain-based distilled alcoholic beverages; Baijiu [Chinese distilled alcoholic beverage]; Distilled beverages; Beverages (Distilled -); Cordials [alcoholic beverages]; Alcoholic energy drinks; Alcoholic wines; Liqueurs; Extracts of spiritous liquors; Flavored tonic liquors; Alcoholic cordials; Wine-based drinks; Wine-based beverages; Low alcoholic drinks; Sugarcane-based alcoholic beverages; Rum [alcoholic beverage]; Alcoholic cocktails; Wine coolers [drinks]; Coffee-based liqueurs; Chinese spirit of sorghum (gaolian-jiou); Beverages containing wine [spritizers]; Alcoholic fruit cocktail drinks; Alcoholic

	beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Naturally sparkling wines; Alcoholic carbonated beverages, except beer; Alcoholic beverages of fruit; Alcoholic fruit beverages; Flavored brewed alcoholic malt beverages, except beers; Whiskey [whisky]; Flavoured brewed alcoholic malt beverages, except beers; Herb liqueurs; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Beverages (Alcoholic -), except beer; Alcoholic bitters; Sparkling wines; Prepared wine cocktails; Alcoholic aperitifs; Nira [sugarcane-based alcoholic beverage]; Cachaca; Natural sparkling wines; Pre-mixed alcoholic beverages, other than beer-based; Pre-mixed alcoholic beverages; Mulled wines; Rum-based beverages; Prepared alcoholic cocktails; Wines; Whisky; Alcoholic tea-based beverage.
Opponent's specification for its third earlier mark	
<u>Class 32</u> Non-alcoholic beverages. <u>Class 35</u> Retail store services in relation to beverages; online retail store services in relation to beverages.	

21. I will first proceed to compare the goods in the Opponent's first earlier mark with that of the Applicant's specification.

22. At the hearing Mr Milligan suggested that the opposed goods would be identical to those in class 33 of the first earlier mark, or in the alternative highly similar to beer-based goods found in the Opponent's class 32. In relation to *Alcoholic essences; Extracts of spiritous liquors; Alcoholic bitters*, Mr Milligan's position was that these were similar to class 33 goods within the Opponent's first earlier specification.

Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Beverages (Alcoholic -), except beer.

23. The above terms are **identical** to the Opponent's earlier term "*Alcoholic beverages*" they are merely expressed in an alternative way.

Spirits; Spirits [beverages]; Distilled spirits; Shochu (spirits); Potable spirits; Digestifs [liqueurs and spirits]; Digesters [liqueurs and spirits]; Aguardiente [sugarcane spirits]; Korean distilled spirits (soju); Sorghum-based Chinese spirits; Distilled spirits of rice (awamori); Distilled rice spirits [awamori]; Gaolian-jiou [sorghum-based Chinese spirits]; Fermented spirit; Aperitifs with a distilled alcoholic liquor base; Grain-based distilled alcoholic beverages; Baijiu [Chinese distilled alcoholic beverage]; Distilled beverages; Beverages (Distilled -); Cordials [alcoholic beverages]; Alcoholic energy drinks; Alcoholic wines; Liqueurs; Flavored tonic liquors; Alcoholic cordials; Wine-based drinks; Wine-based beverages; Low alcoholic drinks; Sugarcane-based alcoholic beverages; Rum [alcoholic beverage]; Alcoholic cocktails; Wine coolers [drinks]; Coffee-based liqueurs; Chinese spirit of sorghum (gaolian-jiou); Beverages containing wine [spritzers]; Alcoholic fruit cocktail drinks; Naturally sparkling wines; Alcoholic carbonated beverages, except beer; Alcoholic beverages of fruit; Alcoholic fruit beverages; Flavored brewed alcoholic malt beverages, except beers; Whiskey [whisky]; Flavoured brewed alcoholic malt beverages, except beers; Herb liqueurs; Sparkling wines; Prepared wine cocktails; Alcoholic aperitifs; Nira [sugarcane-based alcoholic beverage]; Cachaca; Natural sparkling wines; Pre-mixed alcoholic beverages, other than beer-based; Pre-mixed alcoholic beverages; Mulled wines;

Rum-based beverages; Prepared alcoholic cocktails; Wines; Whisky; Alcoholic tea-based beverage.

24. The above terms are all types of alcoholic beverages for consumption, even “*low alcoholic drinks*”, therefore, they would all be encompassed under the Opponent’s earlier term “*Alcoholic beverages*” and are ***identical under Meric***.

Alcoholic essences; Extracts of spiritous liquors; Alcoholic bitters.

25. Whilst the above goods and the Opponent’s “*alcoholic beverages*” all contain alcohol, they differ in their specific nature, method of use and intended purpose as the Opponent’s beverages are drinks which are either consumed as they are or mixed with other beverages and consumed. By contrast, the Applicant’s goods are not beverages themselves, but concentrated alcoholic-based flavourings or extracts. Trade channels differ to the extent that alcoholic beverages are found in supermarkets, bars and liquor stores, whilst alcoholic extracts and essences are more likely to be found in speciality stores, although, I appreciate that they may be sold together in cocktail making kits or home brewing kits where alcoholic flavours may be added to vodkas or gins. Equally, bars and cocktail lounges may use both alcoholic beverages and alcoholic essence/extracts. In such circumstances users may overlap. The goods are not competitive as they cannot replace the function of the other, neither are the goods complementary as they are not essential to one another, and moreover, whilst they may be found together in cocktail making sets or home brewing sets, typically consumers are unlikely to expect the same undertaking to be responsible for providing both of the respective goods. Overall, I find that the goods are similar to ***a very low degree***.

26. For the sake of completeness, I have considered whether the above applied for goods are more similar to the Opponent’s goods in class 32, “*syrups, concentrates, [...] and preparations for making beverages*”. Whilst both terms involve concentrated liquid substances which are added to drinks, the precise nature, and purpose differ, plainly one is an alcoholic based, concentrated liquid, whilst the other is non-alcoholic. The trade channels will differ due to the different purposes. Users may overlap but this will be to a general degree. The goods are

not in competition as they have different purposes with one being alcoholic and the other not. Neither are the goods complementary as one is not needed for the use of the other, nor would consumers reasonably believe that the same undertaking is responsible for producing the competing goods. As such, I find this comparison does not take the Opponent's position any further as in my view these goods are also similar to **only a very low degree**.

27. As for the comparison between the Opponent's specification for its third earlier mark and the Applicant's specification, I make the following findings:

Spirits; Spirits [beverages]; Distilled spirits; Shochu (spirits); Potable spirits; Digestifs [liqueurs and spirits]; Digesters [liqueurs and spirits]; Aguardiente [sugarcane spirits]; Korean distilled spirits (soju); Sorghum-based Chinese spirits; Distilled spirits of rice (awamori); Distilled rice spirits [awamori]; Gaolian-jiou [sorghum-based Chinese spirits]; Fermented spirit; Aperitifs with a distilled alcoholic liquor base; Grain-based distilled alcoholic beverages; Baijiu [Chinese distilled alcoholic beverage]; Distilled beverages; Beverages (Distilled -); Cordials [alcoholic beverages]; Alcoholic energy drinks; Alcoholic wines; Liqueurs; Flavored tonic liquors; Alcoholic cordials; Wine-based drinks; Wine-based beverages; Low alcoholic drinks; Sugarcane-based alcoholic beverages; Rum [alcoholic beverage]; Alcoholic cocktails; Wine coolers [drinks]; Coffee-based liqueurs; Chinese spirit of sorghum (gaolian-jiou); Beverages containing wine [spritzers]; Alcoholic fruit cocktail drinks; Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Naturally sparkling wines; Alcoholic carbonated beverages, except beer; Alcoholic beverages of fruit; Alcoholic fruit beverages; Flavored brewed alcoholic malt beverages, except beers; Whiskey [whisky]; Flavoured brewed alcoholic malt beverages, except beers; Herb liqueurs; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Beverages (Alcoholic -), except beer; Sparkling wines; Prepared wine cocktails; Alcoholic aperitifs; Nira [sugarcane-based alcoholic beverage]; Cachaca; Natural sparkling wines; Pre-mixed alcoholic beverages, other than beer-based; Pre-mixed alcoholic beverages; Mulled wines; Rum-based beverages; Prepared alcoholic cocktails; Wines; Whisky; Alcoholic tea-based beverage.

28. The above applied for goods are all various types of alcoholic beverage, whilst the Opponent's specification contains *non-alcoholic beverages*. During the hearing, Mr Milligan, pointed to the evidence provided (SM1 to SM14) to show that the landscape for non-alcoholic drinks was changing and that consumers are now demanding non-alcoholic versions of their favourite alcoholic drinks. Further he asserted that consumers are now cognisant of non-alcoholic versions of alcoholic drinks being offered by the same undertakings.
29. I keep in mind the decision of Philip Johnson in *Elux*⁸ where he reviewed a number of previous decisions that considered the similarity between various alcoholic drinks against either other alcoholic drinks or non-alcoholic drinks. In doing so, he set out a number of considerations to be taken into account when deciding future cases. These include, whether the differences between the colour, aroma and taste of two alcoholic drinks suggests to consumers that they are different, the method of production, and the alcoholic content.⁹ However, Philip Johnson highlighted that, "[...] a non-alcoholic version of an equivalent alcoholic drink is likely to be highly similar to it [...]",¹⁰ relying on a case he previously referred to: T-378/17 *La Zaragozana v EUIPO*, EU:T:2018:888 (CERVISIA) at paragraph 20.
30. As I have outlined, the Applicant's above applied for goods are all various types of alcoholic beverages whereas the Opponent's broad term "*Non-alcoholic beverages*" covers different types of non-alcoholic drinks. This can include non-alcoholic versions of alcoholic drinks, for example non-alcoholic spirits such as non-alcoholic gin or rum, or non-alcoholic wines.
31. Although non-alcoholic beverages are typically drunk for the purpose of quenching thirst, this is unlikely to be the case for non-alcoholic versions of alcoholic beverages, instead they are likely to be drunk for taste and enjoyment as would alcoholic beverages. The competing goods likely have the same method of production as alcoholic spirits and non-alcoholic spirits as both are distilled, although the alcohol will obviously be removed from the one. The colour, aroma and taste of non-alcoholic beverages are likely to mimic the alcoholic version,

⁸ BL O/0488/25

⁹ See paragraphs 12 – 17

¹⁰ Paragraph 17

notwithstanding the fact that the competing beverages clearly differ in their respective alcohol content. The competing goods overlap in so far as they are beverages consumed for taste and pleasure. However, they will likely be consumed for different reasons, for example, non-alcoholic spirits or wine may be chosen for health reasons or so that consumers can avoid intoxication because they must drive or work, in contrast, alcoholic goods are likely to be consumed for relaxation or as an intoxicant. Increasingly producers of alcoholic beverages are starting to offer non-alcoholic alternatives as supported by the evidence.¹¹ Furthermore, alcoholic beverages and non-alcoholic beverages tend to be positioned in fairly close proximity to one another in retail stores and online where they are found in similar categories. The goods are competitive with consumers choosing between alcoholic beverages or their non-alcoholic alternatives, and users may also overlap. Therefore, for all these reasons and in line with the decision of Philip Johnson acting as the Appointed Person in *Elux*, I find that the competing goods are similar to a **high degree**.

Alcoholic essences; Extracts of spiritous liquors; Alcoholic bitters.

32. The above goods are extracts and essences made from alcohol, which may be for the purpose of adding to alcoholic beverages or other consumable goods, or for mixing to create alcoholic drinks, whereas the Opponent's goods are "*non-alcoholic beverages*" that are ready for human consumption. The applied for goods may be purchased either by the general public in supermarkets (for mixing into cocktails at home, for example) or by those in the industry for making drinks or food items. The respective goods will likely be sold in different types of receptacles and, without evidence to the contrary, I find it unlikely these goods will be located next to each other in retail shops nor are they likely to be typically offered by the same undertakings. I do not find the goods to be complementary as they are not important or essential for the use of the other, nor are consumers likely to believe the goods are provided by the same undertakings. Neither will

¹¹ See reference to Tanqueray 0.0 and Gordon's Pink 0.0 at Exhibit SM1, page 1, reference to Captain Morgans release of alcohol-free versions at Exhibit SM5, page 2, reference to Beefeater 0.0 and non-alcoholic versions of Gordon's, Gordon's Pink and Tanqueray gin, as well as Captain Morgan's rum at Exhibit SM22, page 1.

the goods be in competition as the applied for goods are not ready to drink beverages and cannot be used as a direct replacement for such. Consequently, I find the goods to be **dissimilar**.

33. At the hearing, in relation to the Opponent's third earlier mark's specification, Mr Milligan argued in the alternative that if the applied for goods were not similar to the Opponent's goods, i.e. its *non-alcoholic beverages*, then the Opponent's retail services in class 35 would be similar to the applied for beverages. I note that the Opponent's terms in class 35 are as follows: *Retail store services in relation to beverages; online retail store services in relation to beverages*. However, the above applied for goods are not beverages as they are not for the purpose of drinking in their concentrated form. Instead, they are extracts and essences for the purpose of diluting in other food or drinks.

34. In this regard, I remind myself of the relevant case law concerning the similarity of retail services and goods, focusing in particular on case law concerning similarity between goods that are not identical to goods subject to the competing retail services.

35. In *Oakley, Inc v OHIM*,¹² the GC held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

36. In *Tony Van Gulck v Wasabi Frog Ltd*,¹³ Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. However, on the basis of the European courts' judgments in *Sanco SA v OHIM*,¹⁴ and *Assembled Investments (Proprietary) Ltd v. OHIM*,¹⁵ upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd*,¹⁶ Mr Hobbs concluded that:

¹² Case T-116/06, at paragraphs 46-57

¹³ Case BL O/391/14 see paragraph 9

¹⁴ Case C-411/13P

¹⁵ Case T-105/05 at paragraphs [30] to [35]

¹⁶ Case C-398/07P

i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;

ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

37. In *Praktiker Bau*¹⁷ the Court of Justice of the European Union ("CJEU") rejected the premise that it was necessary to specify the retail services in detail. Rather, the CJEU favoured an approach through which the services are characterised by reference to the goods to which they relate. Thus, it is not necessary to specify exactly which services are provided or how they are provided, e.g. through a bricks and mortar store or online. By contrast, it is necessary to provide a list of all the goods to which the retail services relate. The approach adopted by the court was intended, in part, to deal with the potential number of conflicts that would arise if traders were permitted to register trade marks for retail services *per se*.

38. The CJEU thus made it clear that in examining the scope of protection of a retail services-type trade mark registration, the court or tribunal should (a) pay particular attention to the specified goods in relation to which the retail services

¹⁷ Case C-418/02 see paras 34 and 40 – 51.

are registered, and (b) have regard to the legitimate interests of the proprietor, and of third parties using, or wishing to use, similar marks to attract consumers to their goods.

39. Accordingly, it is necessary to construe the meanings of the descriptions of goods forming part of the Opponent's retail services specification by reference to their ordinary natural meaning. However, in doing so it is again necessary to keep in mind the guidance from *Sky v Skykick* that specifications of goods and services should be interpreted as covering the core of the possible meanings of the words used.
40. On that basis, I do not consider it appropriate to interpret *Retail store services in relation to beverages; online retail store services in relation to beverages* as similar to goods containing alcohol that are not beverages, such as the Applicant's *Alcoholic essences; Extracts of spiritous liquors; Alcoholic bitters*. Furthermore, whilst some goods that are not identical to the goods subject to the retail services can be similar to certain retail services this is dependent on there being an overlap in trade channels and complementarity. I do not find this to be the case here. Indeed, the Applicant's goods are not important or essential to the use of retail services for beverages, neither are consumers likely to believe that the same undertakings are responsible for producing them as the Applicant's goods are not beverages and are more likely to be found in specialist stores. Therefore, I consider these goods to be **dissimilar** to the Opponent's class 35 services. However, if I am wrong, they are similar to only a **very low degree**.

The average consumer and the purchasing act

41. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer.
42. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great*

Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1) [2024] EWCA Civ 262, where he pointed out that:

- (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
- (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
- (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
- (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling courts and tribunals to determine such issues so far as possible without the need for evidence;
- (e) The average consumer's level of attention varies according to the category of goods or services in question; and
- (f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

43. In his Skeleton argument, Mr Milligan contended that the average consumer would pay a low level of attention when purchasing the goods at issue. To support this assertion, during the hearing Mr Milligan presented the scenario where someone is in a rush or in a busy or noisy environment, in particular when ordering at a bar.¹⁸ For the reasons I will provide below I do not agree with Mr Milligan that the

¹⁸ See transcript, page 10

average consumer is likely to pay a low level of attention when purchasing the goods. The assessment is supposed to be of the average consumer, not a careless one that is in a rush. Further, even where an environment is noisy or busy it does not preclude consumers from first inspecting marks on bottles behind the bar or from considering drinks lists prior to ordering.

44. The goods at issue are alcoholic and non-alcoholic beverages and preparations used in their production such as alcoholic essences, extracts and bitters. The average consumer of the goods will be either the general public, (although insofar as alcoholic drinks and preparations are concerned, they will be adults over the age of 18) or businesses such as public bars and restaurants. The goods will be purchased fairly frequently, and will vary in cost, however, overall, they are relatively inexpensive purchases. Consumers will consider factors such as the type, taste, quality, cost and alcohol content. Overall, I consider the **general public will pay a medium level of attention**, whilst **business users may pay an above medium level of attention** due to the increased liability that comes with serving and selling these goods to the public.

45. The general public will purchase the goods either in supermarkets or off licences for drinking at home, or in a hospitality setting, such as, bars or restaurants. As for business users, they will purchase the goods from wholesalers, specialist suppliers or distilleries. The goods will be sold on shelves where they will be viewed and self-selected by consumers. A similar process will apply to websites, where consumers will select the goods having viewed an image displayed on a webpage. For goods sold in restaurants, bars and public houses, they are likely to be displayed behind the counter or listed on a drinks menu where consumers can visually inspect them before any oral purchase is made.¹⁹ Overall, the selection process is predominantly visual, although I do not discount aural considerations.

Distinctive character of the earlier marks

46. In *Lloyd Schuhfabrik Meyer* the CJEU stated that:

¹⁹ *Simonds Farsons Cisk plc v OHIM*, Case T-3/04, paragraph 58

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

47. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

48. No evidence of use has been provided by the Opponent for me to determine whether the first and third earlier marks’ distinctiveness has been enhanced by use, as such, I have only the inherent position to consider.

49. Mr Milligan stated at the hearing that in both the earlier marks the dominant and distinctive element of these marks is the word “UNLEASHED”. In relation to the distinctiveness of “FLAVOR UNLEASHED” Mr Milligan for the Opponent stressed that by virtue of the fact that the mark is a registered trade mark it

carries a certain level of distinctiveness. Within his submissions he suggested that the earlier marks possess an average level of distinctiveness.

50. In relation to the first earlier mark, the words “THE BEAST UNLEASHED” will be understood as referring to the release of something strong and powerful, typically an animal, however, in the context of the goods, it could be perceived as the release of a strong and powerful product that is superior, or alternatively the product itself gives you the ability to achieve a peak or high performance. Overall, I consider the first earlier mark to possess **a low to medium level** of inherent distinctiveness.

51. As for the third earlier mark, this encompasses the words “FLAVOR UNLEASHED”. The word FLAVOR will be immediately understood by UK consumers as an American spelling of the UK word flavour. Therefore, consumers are likely to perceive the words together as having a unitary meaning, understanding the mark in relation to the goods to refer to an intense taste experience or a taste explosion when the goods are consumed. In view of this unitary meaning, I reject Mr Milligan’s position that the word “FLAVOR” within the Opponent’s third earlier mark will be seen as less distinctive with the word “UNLEASHED” being the distinctive element. Overall, given the unitary meaning of the third earlier mark, I consider it to have only a **low level** of inherent distinctiveness. This is taking into consideration *Formula One Licensing BV v OHIM*,²⁰ where it was held that registered marks must be assumed to have at least some level of distinctiveness.

Comparison of trade marks

52. It is clear from *Sabel* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU states at paragraph 34 of its judgment in *Bimbo*, that:

²⁰ Case C-196/11P

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

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

54. Whilst I will not repeat them here, I have taken the parties’ submissions in relation to the competing marks into account.

55. The marks to be compared are as follows:

The Opponent’s first earlier mark	The Applicant’s contested mark
THE BEAST UNLEASHED	UNLESHED
The Opponent’s third earlier mark	
FLAVOR UNLEASHED	

Overall Impression

56. The Applicant's mark is a word only mark containing the word, UNLESHED.

This is an invented word, and as such, the overall impression lies in the word itself.

57. As for the Opponent's earlier marks these are also both word-only marks. In relation to those earlier marks, Mr Milligan claimed that the dominant element of each of the marks was the word UNLEASHED. He stated that the UNLEASHED element of the earlier marks is the most structurally complex and visually striking element of the marks, and that despite it being positioned at the end of the mark, he asserted that the Opponent considered it to have the most complexity, and therefore to be the most distinctive and dominant element within the earlier marks. In relation to the third earlier mark, Mr Milligan submitted that the word FLAVOR within the context of the goods is likely to be of limited distinctiveness and that consumers would pay much less attention to that element of the mark than to the second element, UNLEASHED.²¹

58. Taking the first earlier mark, consisting of the words THE BEAST UNLEASHED, I acknowledge Mr Milligan's submissions however, I disagree. I find that Mr Milligan's position looks to dissect the first earlier mark in precisely the artificial way that caselaw warns against. Instead, in my view, the first earlier mark conveys a unitary meaning and therefore, I find that the overall impression of the mark lies in the mark as a whole.

59. As for the third earlier mark, although initially here Mr Milligan's submissions have somewhat more weight with FLAVOR being recognised by UK consumers as the American spelling of flavour which could be seen as describing the flavour of a drink particularly if accompanied by flavours such as orange or another flavour. However, in this case the word FLAVOR is followed by the word UNLEASHED which is likely to be seen as having a unitary meaning referring to the release of a forceful or intense flavour, as such the words are

²¹ See transcript, pages 2 and 3

unlikely to be seen as sitting independently of one another. Therefore, in my view, the overall impression of the third earlier mark rests in the words in equal measure.

Visual similarity

60. In relation to the visual similarity between the marks, Mr Milligan submitted that from a visual comparison, the difference between the opposed mark and the earlier trademarks is in the letter A, which is the only difference with the 'Unleashed' element of the earlier marks. He stressed that consumers would be focusing on the 'Unleashed' element of the earlier trade marks and then when they consider the opposed mark, they will not necessarily notice the difference of the letter A. He continued to conclude that visually the contested mark would be either near identical or certainly highly similar to the Opponent's third earlier mark and similar to the Opponent's first earlier mark.²²

The contested mark and the Opponent's first earlier mark

61. The marks coincide in the highly similar elements UNLESHED/UNLEASHED, which is the entirety of the contested mark and falls at the end of the first earlier mark. However, the Opponent's first earlier mark also comprises of the words THE BEAST at the beginning of the mark where consumers tend to focus their attention.²³ As such, I consider the marks visually similar to **a low degree**.

The contested mark and the Opponent's third earlier mark

62. As for the Opponent's third earlier mark again even though there is an overlap in the highly similar elements UNLESHED/UNLEASHED, the third earlier mark also contains the word FLAVOR at the beginning of its mark where consumer's attention is usually drawn, and which is not replicated in the opposed mark. Overall, I find that the competing marks are similar to **a medium degree at best**.

²² See transcript, pages 2 and 3

²³ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

Aural similarity

63. Aurally, Mr Milligan suggested that consumers would pronounce the contested mark the same as the word UNLEASHED in the earlier marks, and that as such the highly similar elements UNLESHED/UNLEASHED would be aurally identical. He asserted that overall, the marks would be aurally highly similar given that the FLAVOR and BEAST elements of the earlier marks would be less dominant and less distinctive.²⁴

64. I disagree with Mr Milligan's approach. I fail to see why consumers would pronounce the contested mark in the same way as they would pronounce the word UNLEASHED in the earlier marks. If the contested mark contained another vowel next to the E such as the letter E or I, then I could see the argument for that, however this is not the case. Rather, it is more likely in my view that the Applicant's mark would be pronounced as UN/LESHED rather than UN/LEESHED.

The contested mark and the Opponent's first earlier mark

65. Taking into account what I have said above, the contested mark contains just two syllables. In contrast, the first earlier mark possesses four syllables, two in the word UNLEASHED with one each in the words THE and BEAST, all of which will be pronounced in the usual way. Whilst the marks coincide in similar sounds produced by the last two syllables in the first earlier mark, they differ in the additional syllables found at the beginning of that mark. As such, I consider the competing marks to be aurally similar to somewhere ***between a low to medium degree***.

The contested mark and the Opponent's third earlier mark

66. As for the third earlier mark, this also contains four syllables, two deriving from the first word FLAVOR, which will be verbalised as the UK word flavour and two

²⁴ See transcript, page 3

from the word UNLEASHED which as discussed above will be pronounced in the usual way. The respective marks overlap due to the similar sounds found in the contested mark as it will be pronounced as discussed above, however, the marks differ due to the additional syllables as a result of the presence of FLAVOR found at the beginning of the third earlier mark. Consequently, I consider the marks to be aurally similar to ***a medium degree at best***.

Conceptual similarity

67. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29.

68. The Applicant's mark is a word only mark containing the word, "UNLESHED".

69. During the hearing Mr Milligan submitted that the Applicant's mark carries the same meaning as unleashed, as he considered the opposed mark to have the same meaning as unleashed, and so, therefore the meaning of the opposed mark would be mapped onto the earlier trade marks.²⁵

70. However, the contested mark is not unleashed, it is the made-up word UNLESHED, therefore, I do not accept Mr Milligan's submissions on this matter and find that the contested mark will instead be perceived as an invented word without any meaning. I will keep this in mind when assessing the conceptual similarity of the respective marks.

The contested mark and the Opponent's first earlier mark

71. In the first earlier mark the words will be understood as referring to the release of something strong and powerful, typically an animal, however, in the context of the goods it could be perceived as the release of a strong and powerful product that is superior, or alternatively the product itself gives you the ability to achieve a peak or high performance. Regardless of the meaning attributed to

²⁵ See transcript, page 4 (towards the bottom)

the first earlier mark as the contested mark is an invented word without any meaning the marks will be **conceptually dissimilar**.

The contested mark and the Opponent's third earlier mark

72. Taking the third earlier mark, FLAVOR UNLEASHED, in my opinion this will be recognised as referring to the release or explosion of flavour as FLAVOR will merely be understood by UK consumers as an American spelling of the English word flavour as I have referred to above. In the context of the goods, it will be perceived as referring to an intense flavour experienced through the consumption of the goods. Keeping in mind that I have found the contested mark to have no meaning, I find that the respective marks are **conceptually dissimilar**.

Likelihood of confusion

73. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the Opponent's trade mark, the average consumer for the goods and services, and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

74. In relation to indirect confusion this was best described in the following terms by Iain Purvis QC (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc.*²⁶

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI”, etc.).

²⁶ BL O/375/10

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

75. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal. I recognise that a finding of indirect confusion should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.²⁷

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

The contested mark and the Opponent’s first earlier mark

77. I have found the marks to be visually similar to a low degree and aurally similar to somewhere between a low and medium degree and conceptually dissimilar. Furthermore, I have found the earlier mark to possess a low to medium level of inherent distinctiveness. I have identified the average consumer to be either the general public who will pay a medium level of attention, or business users who will pay an above medium level of attention during the purchasing process. Finally, I have found the goods to be either identical or similar to a very low degree.

78. Although the respective marks both contain the highly similar words UNLESHED/UNLEASHED, the presence of the additional words used in the

²⁷ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

first earlier mark provide enough visual differences that they will not be directly confused for one another, notwithstanding the principle of imperfect recollection. As a result, I find there to be no direct likelihood of confusion between the contested mark and the first earlier mark.

79. Consumers recognising the differences between the marks, are unlikely to believe that the marks derive from the same or economically linked undertakings as it is illogical that the only point of overlap between the competing marks, i.e. the highly similar element, has been changed to an invented word without any meaning, therefore the overlapping elements are conceptually different. Further the additional words are not merely non-distinct words that are bolted on at the beginning of the mark to create a rational sub-brand or brand extension. Instead, the additional words in the first earlier mark create a specific overall meaning in the first earlier mark that is not present in the contested mark.

80. Turning to those that overlook the difference between the highly similar words UNLESHED/UNLESHED and misremember the invented word in the contested mark for the dictionary defined word UNLEASHED in the first earlier mark. Although I accept that where a composite mark is made up of the entirety of the competing mark, (or in this case a sign that would be misremembered as the competing mark) plus another component, it may lead to a likelihood of confusion, this is only if the earlier sign retains a distinctive significance that is independent of the mark as a whole. In contrast, it is clear from *Whyte and McKay*,²⁸ (which considered the impact of *Bimbo*²⁹ and *Medion*³⁰) that this does not apply where the average consumer would perceive the composite mark as forming a unit and having a different meaning to the separate components. Therefore, even where consumers misremember the word UNLESHED for UNLEASHED, the additional words found within the first earlier mark will result in the first earlier mark being perceived as having a unitary meaning that when combined differs to the meaning of the word UNLEASHED solus.

²⁸ *Whyte and McKay Limited v Origin Wine UK Limited* [2015] EWCH 1271 (Ch) paras 19 -21

²⁹ *Bimbo SA v OHIM*, Case C-591/12P

³⁰ *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04

Consequently, the conceptual differences will counteract any overlap in visual or aural similarity caused by the highly similar words used in the respective marks.³¹ As such, I do not find that there is an indirect likelihood of confusion between the contested mark and the first earlier mark.

The contested mark and the Opponent's third earlier mark

81. I have found the marks to be visually and aurally similar to a medium degree at best and conceptually dissimilar. Furthermore, I have found the earlier mark to possess a low level of inherent distinctiveness. I have identified the average consumer to be either the general public who will pay a medium level of attention, or business users who will pay an above medium level of attention during the purchasing process. Finally, for the goods that I have found to be similar, these are similar to a high degree.

82. Whilst the respective marks both contain the highly similar words UNLESHED/UNLEASHED, the presence of the additional word FLAVOR in the third earlier mark provides not only a visual difference but changes the conceptual meaning of the earlier mark resulting in the marks being unlikely to be directly confused for one another, notwithstanding the principle of imperfect recollection. Furthermore, in my view, the third earlier mark has a low level of inherent distinctiveness in relation to goods for consumption that would not benefit from a broad scope of protection. As a result, I find there to be no direct likelihood of confusion.

83. Moving on to indirect confusion. Where the contested mark may be misremembered for UNLEASHED in the third earlier mark, the presence of the word FLAVOR found at the beginning of the third earlier mark joins with the word UNLEASHED to create a different overall meaning to the word UNLEASHED on its own. This is in line with Whyte and McKay referenced above. As such I do not consider consumers will believe that responsibility for the competing mark rests with the same or an economically linked undertaking. Further, the third earlier mark has a low level of inherent distinctiveness, and

³¹ *The Picasso Estate v OHIM*, Case C-361/04 P

when taking into account the goods to which they relate, I consider the scope of protection to be fairly limited. Taking all of this into account, I find there is no likelihood of indirect confusion between the competing marks, even for goods that are highly similar.

Conclusion

84. The opposition under section 5(2)(b) of the Act has failed. Therefore, subject to any successful appeal against my decision, the application will proceed to registration.

Costs

85. The Applicant has been successful and is therefore entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice (“TPN”) 1/2023. In accordance with that TPN, I award the Applicant costs as follows:

Considering the Notice of Opposition and preparing a counterstatement:	£250
Considering the other side’s evidence	£350 ³²
Total:	£600

86. I hereby order Monster Energy Company to pay JL Drinks Ltd the sum of £600. The above 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 27th day of June 2026

Sarah Wallace
For the Registrar

³² I have taken into account that whilst the Applicant did not provide any evidence themselves, nor did they comment on the other side’s evidence they would have had to consider the Opponent’s evidence which was not light.