

O/0737/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 4099194

**IN THE NAME OF ALORE HYDRATION LIMITED
TO REGISTER THE FOLLOWING TRADE MARK:**

Fuel Your Flow

IN CLASS 32

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 451666

BY

THG NUTRITION LIMITED

BACKGROUND AND PLEADINGS

1. Alore Hydration Limited (“the applicant”) applied to register the trade mark shown on the front page of this decision (UK trade mark (“UKTM”) no: UK4099194) in the UK on 12 September 2024. It was accepted and published in the Trade Marks Journal on 4 October 2024 in respect of the following goods:

Class 32 Non-alcoholic drinks; Cola drinks; Juice drinks; Carbonated non-alcoholic drinks; Non-alcoholic malt drinks; Isotonic non-alcoholic drinks; Non-alcoholic fruit drinks; Non-alcoholic vegetable juice drinks; Non-alcoholic beer flavored beverages; Sarsaparilla [non-alcoholic beverage]; Isotonic drinks; Non-alcoholic beverages flavoured with coffee; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic beverages flavored with coffee; Non-alcoholic sparkling fruit juice drinks; Guarana drinks; Non-alcoholic beer; Kvass [non-alcoholic beverage]; Non-alcoholic beverages with tea flavor; Fruit drinks; Non-alcoholic beverages flavored with tea; Non-alcoholic beverages flavoured with tea; Bottled drinking water; Drinking water; Root beers, non-alcoholic beverages; Beverages (Non-alcoholic -); Non-alcoholic beverages; Non-alcoholic carbonated beverages; Kvass [non-alcoholic beverages]; Fruit juice drinks; Carbohydrate drinks; Non-alcoholic grape juice beverages; Fruit juice beverages (Non-alcoholic -); Non-alcoholic fruit juice beverages; Drinking water with vitamins; Soft drinks flavored with tea; Apple juice drinks; Non-alcoholic wine; Fruit flavored drinks; Cocktails, non-alcoholic; Non-alcoholic cocktails; Energy drinks; Fruit flavoured carbonated drinks; Orange juice drinks; Non-alcoholic beers; Sports drinks; Non-alcoholic malt beverages; Smoothies [non-alcoholic fruit beverages]; Vegetable drinks; Cordials (non-alcoholic beverages); Non-alcoholic flavored carbonated beverages; Fruit beverages (non-alcoholic); Fruit flavoured drinks; Colas [soft drinks]; Non-carbonated soft drinks; Coconut water as a beverage; Coconut water as beverage; Fruit-based soft drinks flavored with tea; Non-alcoholic fruit cocktails; Distilled drinking water.

2. On 31 December 2024, THG Nutrition Limited (“the opponent”) opposed the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its earlier comparable trade mark, FUEL YOUR AMBITION (UKTM No:

UK909944752)¹ filed on 10 June 2011 and registered on 19 October 2011. The mark is registered for goods in classes 5, 21, 25, 29, 30 and 32. However, only the following goods are relied upon in these proceedings:

Class 5 Protein, carbohydrate, protein and carbohydrate or nutritional supplements; amino acid supplements, vitamin/mineral supplements, food supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being.

Class 29 Protein-based nutritional drink mixes for use as a meal replacement; dried milk-based products for meal replacements; milk based beverages; protein based sports nutritional powdered mix composed of grains, soya or whey; all the aforesaid for use as aids to slimming, weight gain, muscle gain and well being.

Class 30 Flavourings for food and beverages; carbohydrate-based nutritional drink mix for use as a meal replacement; food supplements (non-medicated) being glucose confectionery; protein based confectionery, chocolate coated or plain.

Class 32 Isotonic beverages; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being; beverages for meal replacement and for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being.

3. Under section 5(2)(b) of the Act, the opponent claims that there is a likelihood of confusion on the basis that the marks are similar, and the goods are either identical or highly similar leading to a likelihood of confusion, including a likelihood of association, and that the contested mark should be refused registration.

4. The applicant filed a counterstatement denying the claims made, submitting as follows:

¹ On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all right holders with an existing EU trade mark registrations. As a result of the opponent's EU trade mark being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and retains its original priority date.

“As the trademark is registered under class 32, "FUEL YOUR-" could be considered non-distinctive. Furthermore, the difference between "FLOW" and "AMBITION" are sufficient to differences that do not cause confusion for third parties and consumers. The overall usage of both trademarks are based on different agendas, as they are both being used on the [sic] a different basis. Alore hydration plans to use their trademark on their products, however THG essentially have limited use of theirs across their social media accounts.

Following from the above, "Fuel your Ambition" is no longer used or printed on products, nor has it been used in the same way as "Fuel your Flow" under class 32. Alore Hydration has this trademark printed across their products, however THG do not have this physically printed across their stock within class 32 which we can see.

Furthermore, trade mark no. 909944752 is older than five years old which is subject to non-use cancelation action if no evidence of active use within class 32 is given. Having pursued searches, it appears to be limited use of the trade mark "FUEL YOUR AMBITION" by THG.

In conclusion to the above, we strongly believe there are no similarities or confusion between the two trademarks that should cause any harm to both brands.”

5. The mark relied upon by the opponent qualifies as an ‘earlier mark’ in accordance with section 6 of the Act. It had been registered for more than five years at the filing date of the applicant’s mark and is, therefore, subject to the proof of use requirements in section 6A of the Act. The applicant has requested that the opponent provide proof of use.

REPRESENTATION

6. The opponent is represented by HGF Limited, and the applicant is self-represented. Only the opponent filed evidence in these proceedings. Neither party requested a hearing, however, the opponent did file written submissions in lieu. This decision is taken following careful consideration of the papers filed.

RELEVANCE OF EU LAW

7. 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

8. The opponent filed the witness statement of Mr James Pochin, dated 8 July 2025, which is accompanied by twenty-four exhibits (exhibit 1 - 24). Mr Pochin is a General Counsel of THG Nutrition ("THG") and he has provided evidence to show use of the opponent's mark.

9. The opponent filed written submissions in lieu, dated 14 October 2025.

10. I have given due consideration to all of the documents filed but will only refer to the evidence/submissions as appropriate to the extent that is necessary in my decision.

PROOF OF USE

11. The relevant statutory provisions are as follows:

"6A(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a),
(aa) or (ba) in relation to which the conditions set out in section 5(1),
(2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if – (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes – (a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and (b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

12. As the opponent’s mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

“7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union”.

13. Section 100 of the Act states that:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

14. I note that in his witness statement, Mr Pochin states that the relevant period in respect of these proceedings is 12 September 2020 – 11 September 2025. I do not consider these dates to be correct and find that the relevant period for assessing genuine use is the five-year period ending with the filing date of the application in issue, i.e. 13 September 2019 – 12 September 2024. As the earlier mark is a comparable mark, in accordance with schedule 2A of the Act previously set out, EU use up until the end of the transition period on 31 December 2020 will be relevant.

15. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 *P Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a subcategory of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others

which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns:

Ansul at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no de minimis rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

16. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, Case BL O/404/13, Mr Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person stated that:

“22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

17. What I take from this case law is that there is no requirement to produce any specific form of evidence. I must consider what the evidence as a whole shows me, and whether on this basis I can reasonably be satisfied on the balance of probabilities that there has been genuine use of the contested mark.

18. As outlined previously, the opponent is only relying upon some of its registered goods in classes 5, 29, 30 and 32, within these proceedings, as set out within its TM7 and paragraph 2 of this decision. As the opponent has been put to proof of use by the

applicant, I will only consider this more restricted list of goods when considering the use made of the opponent's mark.

The Opponent's Evidence

19. In his witness statement, Mr Pochin states that he has been acting as General Counsel for the opponent for nearly 15 years. THG established Myprotein.com in 2004 and began using the earlier mark in 2016. Mr Pochin states that the company is now considered one of the UK and Europe's leading online sports nutrition brands and were the first UK sports nutrition brand to secure British Retail Consortium (BRC) Global Food Safety Standard for their premium sports supplements.² Mr Pochin has provided an article in support of this, however, this is dated 4 September 2015 and therefore falls outside the relevant period.

20. The brand has won a number of awards including the following:³

- a. Most Exciting Partnership Award for partnership with Hotel Chocolat in 2022;
- b. Brand & Lifestyle Licensing Awards - Inspired Innovation Brand Licensing Product or Range Award in 2023 for its collaboration with Jelly Belly;
- c. Nominated for International Best Licensed Product Award for its Jelly Belly collaboration.

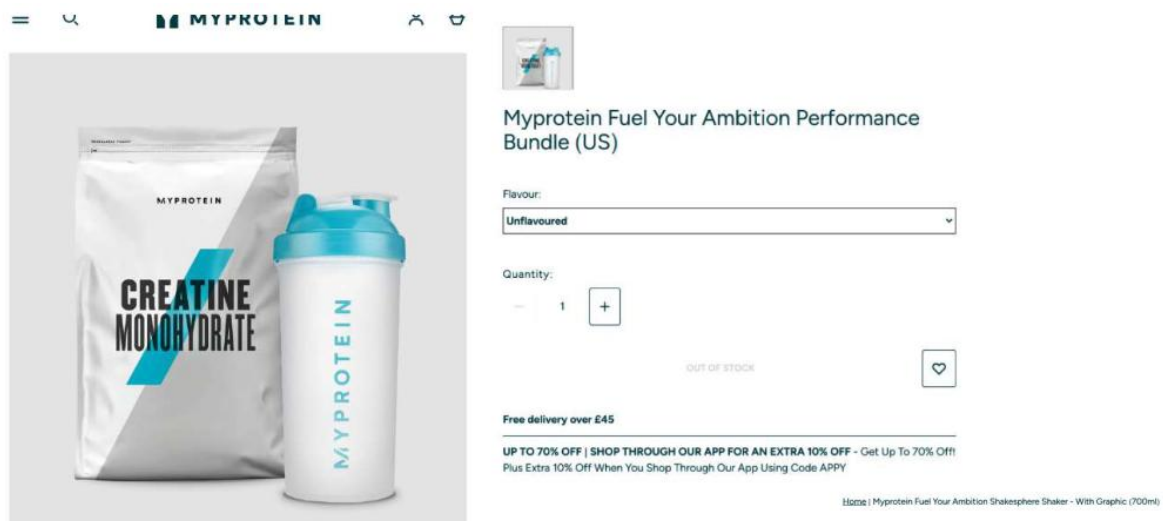
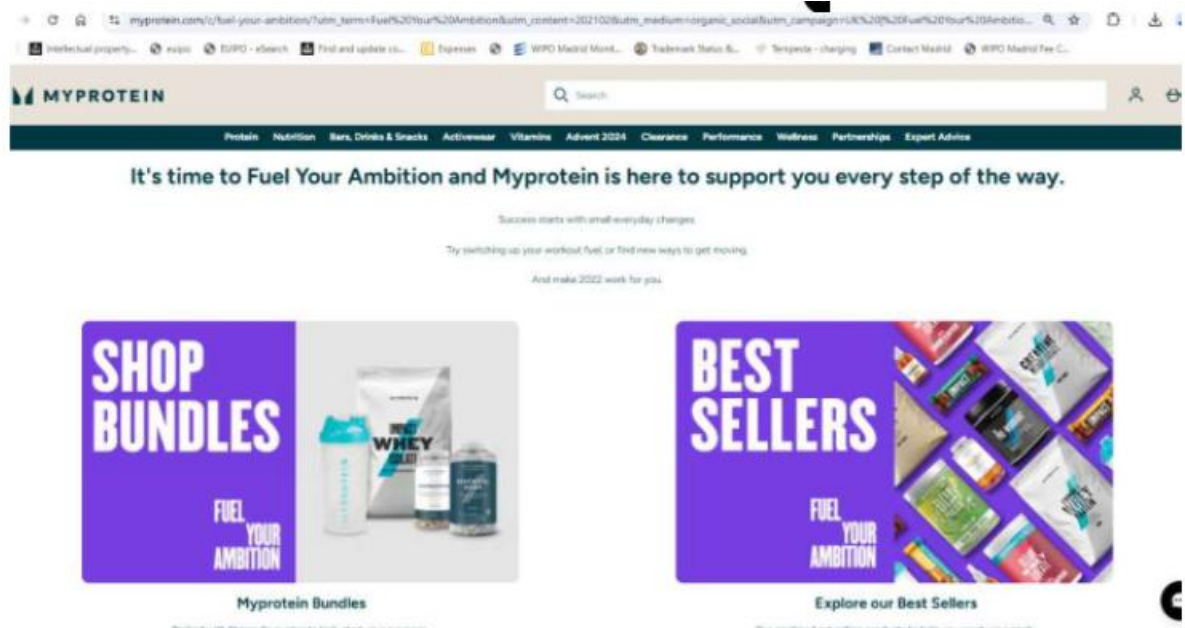
All of the evidence in respect of the above, either refers to The Hut Group or MyProtein. There is no reference to the mark within the exhibit. I also note that a number of other awards have been evidenced, however, all of these fall outside the relevant period.

21. Mr Pochin states that the opponent sells over 2000 products via www.myprotein.com and other UK websites, and "the Mark is used on a variety of products, such as, but not limited to clothing, protein bars, snacks and drinks, protein

² Exhibit 2

³ Exhibit 5

supplements, such as protein powder, accessories such as shakers and clothing”.⁴
Examples have been provided, a sample of which are as follows:⁵



I note that much of the evidence is undated, although the first screenshot, above, does state “and make 2022 work for you”. I note that in all of the evidence in this exhibit, the

⁴ Witness statement of Mr Pochin, para 9

⁵ Exhibit 6

mark appears to be used in conjunction with 'MyProtein'. For example, 'MyProtein Fuel Your Ambition'. There are several issues with the latter screenshot. The title of the product seems to indicate that the product is for sale within the USA, however, I note that it also states, "free delivery over £45". This renders it unclear as to which territory this is aimed at. I also note that the product is out of stock.

22. Further images are also provided in this exhibit. These show a number of products, including protein powders, bars, shakes and syrup are provided, but the images are undated. One of the undated pages shows what is referred to as a "Fuel Your Ambition Box" and shows protein powder, a protein shaker, protein maple syrup, a protein bar, a protein cookie and supplements. I note that whilst this page is undated, there is reference on the page to Advent 2024. There is a screenshot of a product entitled 'My Amino Energy' in which the mark is just about visible, however, this pre-dates the relevant period. I note that the following is also provided:



23. I have screenshots before me from the Wayback Machine which are dated between 18 January 2021 and 4 May 2022.⁶ The screenshots show the mark in use on various products including protein powder, protein bars, bundles of supplements, electrolytes, workout gummies, a 50% off offer and another payday sale. All of these

⁶ Exhibit 7

screenshots appear to be aimed at the UK consumer. Other screenshots have been provided; however, these fall outside of the relevant period.

24. Mr Pochin has provided examples of products being sold in other countries, such as Europe, Australia, the US and Singapore and extracts have been taken from the websites in these countries.⁷ Some of the products are available in Euros, however, the majority of the screenshots are undated.

25. Mr Pochin provides the gross revenue figures under the MYPROTEIN trade mark worldwide. There is no breakdown to attribute the turnover to the category of goods. As these figures are for MYPROTEIN as a whole, they do not assist me for the purposes of this assessment. The annual turnover under the FUEL YOUR AMBITION mark has been provided between 2017 and 2021 within the UK, as follows:⁸

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

I also have before me the information regarding sales of products that contain the mark within its category code, between 1 January 2019 and 2024:

⁷ Exhibit 8

⁸ Witness statement of Mr Pochin, para 14

MasterID	Master Title	Units Sold	Gross Revenue
12605174	MP Men's Fuel Your Ambition Print Joggers - Black	9,566	£138,317
12758618	Myprotein Fuel Your Ambition Energy Bundle	9,629	£119,590
12758709	Myprotein Fuel Your Ambition Recovery Bundle	14,185	£118,710
12605548	MP Women's Fuel Your Ambition Print Leggings - Black	8,794	£104,904
12605165	MP Men's Fuel Your Ambition Print Hoodie - Black	4,817	£77,194
12605192	MP Men's Fuel Your Ambition Print T-Shirt - Black	7,482	£64,464
12766478	Myprotein Fuel Your Ambition Bundle (Asia)	3,098	£52,386
12605540	MP Women's Fuel Your Ambition Print Bra - Black	5,523	£44,140
12605564	MP Women's Fuel Your Ambition Print Hoodie - Black	3,201	£43,301
12758698	Myprotein Fuel Your Ambition Performance Bundle	5,742	£39,825
12605183	MP Men's Fuel Your Ambition Print Shorts - Black	2,250	£24,586
12605201	MP Men's Fuel Your Ambition Print Tank - Black	3,109	£23,045
12605556	MP Women's Fuel Your Ambition Print T-Shirt - Black	3,127	£21,789
12778553	Myprotein Fuel Your Ambition Energy Bundle (US)	125	£2,315
12778603	Myprotein Fuel Your Ambition Performance Bundle (US)	191	£1,832
13598918	Myprotein Fuel Your Ambition Gift Box (IND)	72	£1,077
12778558	Myprotein Fuel Your Ambition Recovery Bundle (US)	14	£288
Grand Total		80,925	£877,762

There appears to be some significant disparity between the figures provided in the first table and the figures provided with the category codes above. Mr Pochin has not provided any explanation for this. I note that a significant number of these items relate to clothing, which the opponent is not relying upon.

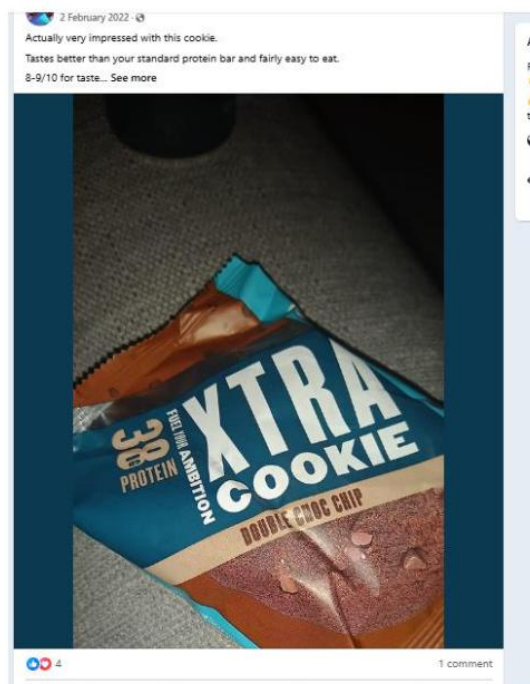
26. Mr Pochin states that the opponent has invested heavily in its online and offline marketing in order to promote its products, and that a large proportion of this advertising occurs online, particularly via social media. Mr Pochin states that the table below contains the annual advertising and promotion expenditure in pounds in the UK since 2017:⁹

YEAR	EXPENDITURE
2021	54,602,341
2020	42,602,770
2019	31,239,015
2018	27,222,798
2017	22,129,961

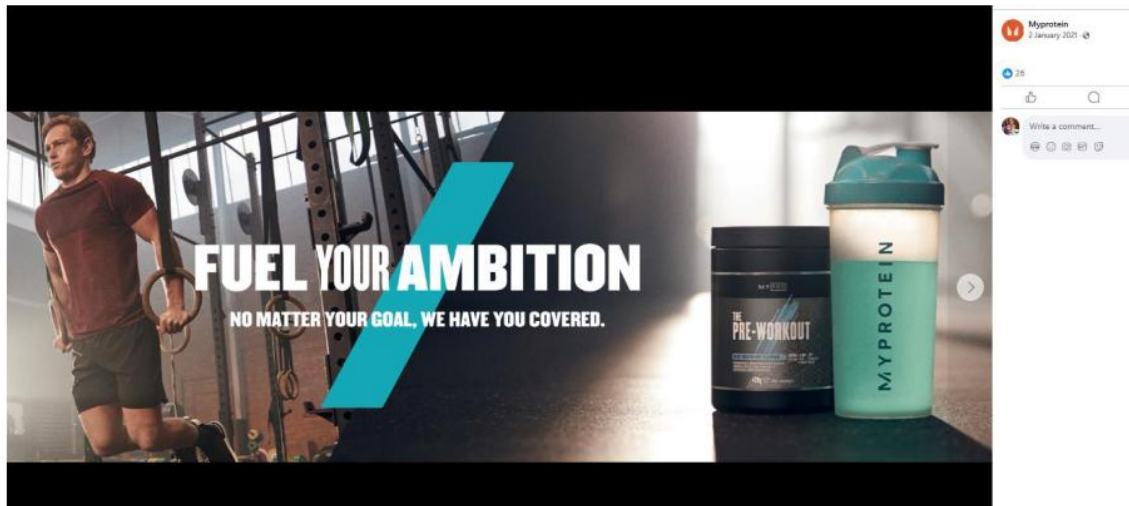
⁹ Witness statement of Mr Pochin, para 18

Mr Pochin does not confirm how much of this advertising can be attributed to the goods at issue. Neither does he specify whether this relates to the goods under the FUEL YOUR AMBITION mark, rather than MYPROTEIN.

27. Exhibit 9 includes screenshots from the opponent's Facebook community group, which has 7,500 members. Whilst the cover of the page does not include the mark, and instead refers to 'Myprotein', in the 'about' section of the page I note reference to "Fuel Your Ambition Community group rules and regulations", although this does not tell me anything in respect of the goods on offer under the mark. Mr Pochin states that this community group ran until 2022. A post containing a protein cookie is also included which is dated 2 February 2022. I note that this post contains the mark and has 4 'likes':



Various posts have been provided from 2021 and 2022, which show the mark in use. Further Facebook pages are also provided at this exhibit. The printout of the pages itself is undated. These show the Facebook page has 2.3 million likes and 2.3 million followers, and there is a reference Myprotein UK. Again, the posts include an advert referencing the earlier mark placed next to pre-workout powders and a protein shaker are dated January 2021:



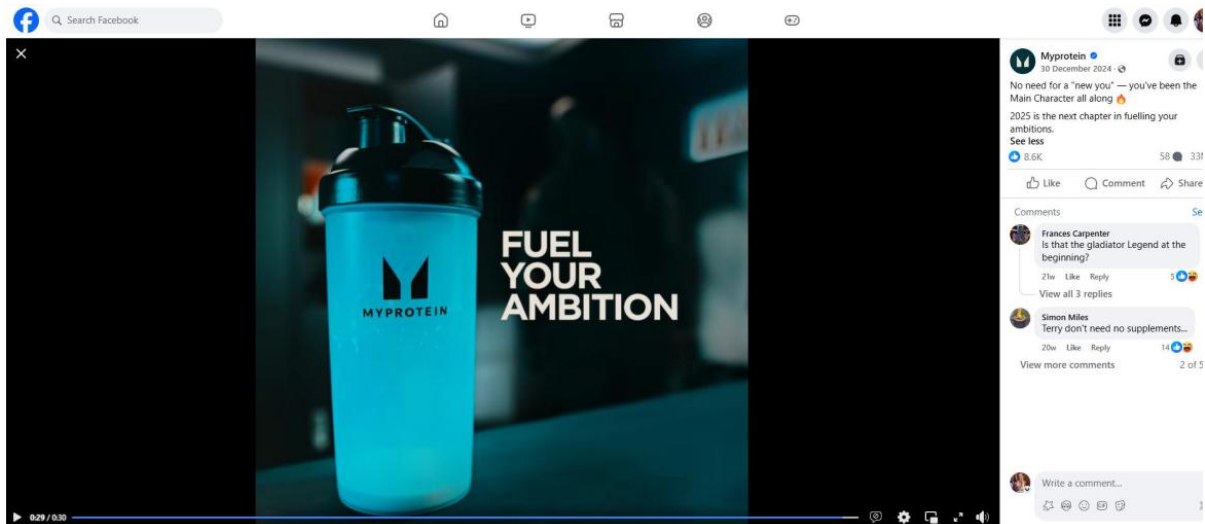
28. Mr Pochin also states that:

“The Opponent has posted many videos that make use of the Mark. The content of these videos shows customers the range of products that they sell, as well as providing meal ideas. For example, in 2021 the Opponent created a video showing what consumers can eat for breakfast in order to fuel them for the day. Now produced and shown to me at Exhibit 10 are screenshots of this video. The Mark appears in the title of the video and in the video itself at the end showing the product range”.¹⁰

Additional screenshots from videos are provided, which I understand to be taken from posts on Facebook, TikTok and YouTube.¹¹ The majority of these posts have likes or views which run into the thousands. Some of the posts are dated outside of the relevant period, however, the majority of the posts do feature the mark in use, such as the following:

¹⁰ Witness statement of Mr Pochin, para 22

¹¹ Exhibit 11



29. The opponent has used the hashtag, FUEL YOUR AMBITION on their X (formerly Twitter) page. The posts include links to the website where the products can be purchased. Various screenshots of these posts have been provided.¹² I note that some of the posts are dated outside the relevant period, and some are taken from My Protein’s US page. Mr Pochin also provides images of social media posts from of British gymnast Matt Whitlock OBE.¹³ In one post, dated January 2021, he holds a protein shaker showing the mark. In another, he holds a bag of protein powder, however, the earlier mark is not clearly visible on the same. The opponent has also provided information of its partnership with Terry Crews, former NFL player and Hollywood Actor. The campaign was advertised across the opponent’s various social media platforms. Mr Pochin states that the videos received over 5.3 million views on YouTube. An article about the campaign has been provided.¹⁴ The article is dated ‘5 months ago’ and was printed on 6 March 2025. The article does not feature the mark; however, the mark does feature in one of the YouTube videos for this campaign.

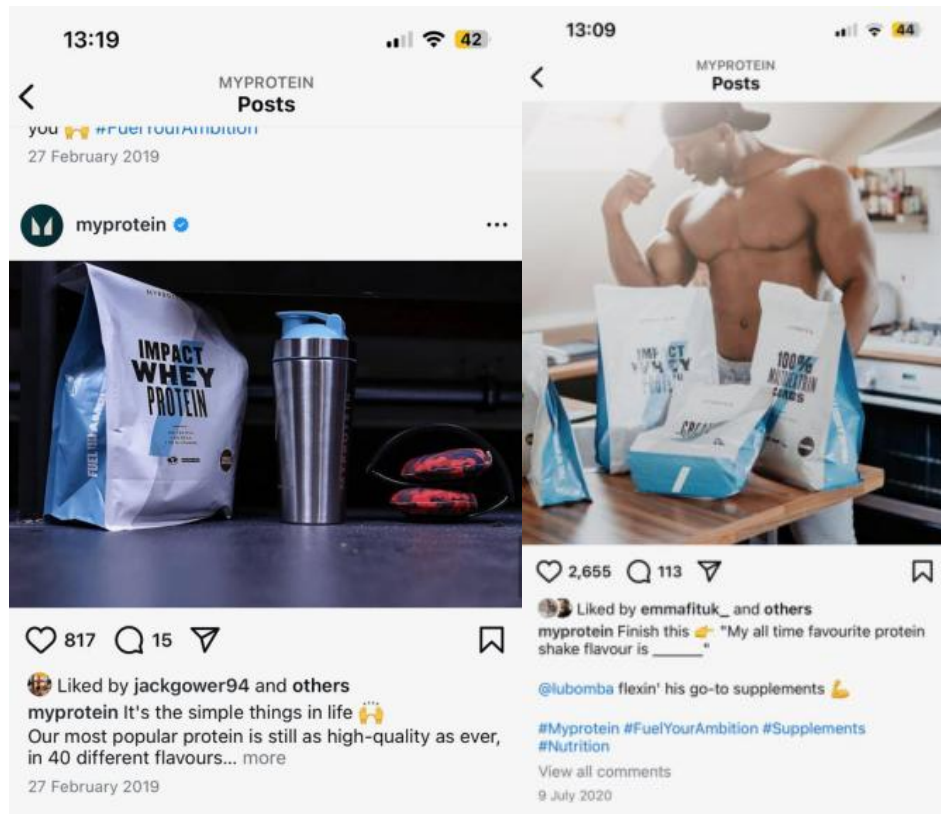
30. In his witness statement, Mr Pochin explains that the opponent uses a variety of different Instagram accounts. He provides details of these including follower numbers and posts. There are no details as to the date when the follower numbers were taken and whether that fell within the relevant period. There are 14 accounts listed, all beginning with Myprotein or myprotein. 13 of these are then followed by what appears to be a two-letter country code, such as fr, es, it, de etc. Many appear to be EU

¹² Exhibit 12

¹³ Exhibit 13

¹⁴ Exhibit 15

accounts. I have also been provided with examples of posts from these accounts using the hashtag #FuelYourAmbition.¹⁵ Some of these posts are undated, and some are dated but fall outside of the relevant period. For those that are dated and fall within the relevant period, only some of the posts show the mark in use, as follows:



31. Mr Pochin states that in 2018, the opponent partnered with a premiership rugby team. An article has been provided regarding this partnership; however, this makes no reference to the earlier mark. I also note that the partnership began prior to the relevant period. Mr Pochin also provides an image promoting the Myprotein “FUEL YOUR AMBITION RACE”. I note that this took place between 24 May and 13 June 2021. The document references 4260 participants.¹⁶

32. In his witness statement, Mr Pochin confirms that newsletters sent out to customers in 2021 are provided at Exhibit 18. Dates that emails were sent out are provided in the exhibit, and they run throughout January and February 2021. The earlier mark is displayed on a number of these newsletters, alongside goods such as

¹⁵ Exhibit 16

¹⁶ Exhibit 17

protein powder and protein snacks, vitamin and mineral supplements and flavour drops. I do not have details of the number of consumers these were sent to and the territory of the same is not outlined.

33. Details of a “Refuel your ambition” challenge run in 2021 are provided at Exhibit 19, however, I do not consider this use of the earlier mark. Similarly, details are provided of a partnership with Mastercard and the World Food Programme to provide school meals to developing countries. I note that this took place in late 2018, which falls outside of the relevant period. This project was named ‘Fuel Their Ambition’. Again, I do not consider this use of the earlier mark.

34. Mr Pochin has provided evidence of attendance at trade shows in 2017 and has provided YouTube content from July 2010 to evidence the exhibit. This evidence falls outside of the relevant period.

35. Third-party articles have been provided¹⁷ which highlight the launch of the ‘Fuel Your Ambition’ campaign. A number of these fall within the relevant period, however, I note reference to American spellings within some of the articles, and the price per tub of protein is featured in dollars. There is nothing indicating that either of these are targeted at the UK (or EU) consumer. There is an article from Woman’s Health that appears directed at the UK consumer, however, this is dated 18 July 2018 and therefore falls outside of the relevant period. There is also an article from the Independent which appears to be aimed at the UK consumer, and I note the price of the product is featured in pounds. This article is dated 18 June 2024.

36. Mr Pochin states that the opponent’s products are available to purchase in supermarkets across the UK, including Asda and Sainsbury’s. He also states that they are available on Amazon. Mr Pochin goes on to confirm:

“Three years ago, the Opponent also launched their very own on the go MyProtein area within Asda. The first store was in Wigan and included a variety of products such as bars, cookies and drinks. Now produced and shown to me at Exhibit 23 are examples taken from various supermarkets across the UK and the promotion campaign in Asda. In the “features” and “description” sections of

¹⁷ Exhibit 22

the products, the words “FUEL YOUR AMBITION” are displayed proving that consumers will attribute the trade mark to the Opponent.”¹⁸

I note that the mark does not feature on the products themselves, or in the product name. Whilst I accept that the words ‘fuel your ambition’ appear within the product description, I do not consider this to constitute use as a trade mark. I do not consider that the consumer would see the wording FUEL YOUR AMBITION as being indicative of the economic origin of the goods:¹⁹

Taste the Difference

Description

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

20g Protein

1.5g Sugar

Fuel Your Ambition

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

Not suitable for vegetarians.

FORM OF THE MARK

37. There are some instances where the mark is used by itself which clearly constitutes use of the mark as registered. There are also instances where the mark is used in conjunction with additional matter, namely the MyProtein mark.²⁰ In these variations, the mark remains as registered and therefore I consider that this is use upon which the opponent can rely.

¹⁸ Witness statement of Mr Pochin, para 40

¹⁹ Exhibit 23 – highlighting added by Mr Pochin

²⁰ *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12

SUFFICIENT EVIDENCE

38. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.²¹

39. The evidence before me is lengthy, however, I consider that there are a number of issues with the same. Much of the evidence is undated or dated outside of the relevant period. There are also some vague time references such as “three years ago” which are unhelpful. When weighing the evidence as a whole, the revenue figures are substantial and whilst a number of the social media posts and advertising information is either undated, or filed outside of the relevant period, the opponent has clearly taken steps to promote the products sold under its mark and to maintain a share in the market, including spending a significant amount on advertising and promotional expenditure. It is my view, therefore, that the opponent has proved genuine use of the mark within the relevant period.

FAIR SPECIFICATION

40. Having reached the above conclusion, I must now consider whether, or the extent to which, the evidence shows use of the earlier mark in relation to the goods relied upon. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

²¹ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

41. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834 the Court of Appeal set out the proper approach to partial revocation, as follows:

“245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. [...] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range

of goods or services within the scope of the terms describing the goods or services for which its mark is registered.”

42. The goods for which proof of use has been sought are set out above. Some of the terms relied upon by the opponent are broad and would cover a wide range of goods. Whilst I am satisfied that the trade mark has been used as registered, I consider that the opponent has shown enough evidence for some of their terms, such as protein powders, supplements and confectionary, but not enough for some of the specific goods that they have within their specification. For example, I have no evidence of Isotonic beverages or food flavourings. Consequently, I consider a fair specification for the earlier mark to be:

Class 5 Protein supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being.

Class 29 Protein powders; all the aforesaid for use as aids to slimming, weight gain, muscle gain and well being.

DECISION

Section 5(2)(b)

43. Section 5(2)(b) of the Act is as follows:

“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”.

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

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the

trade mark is applied for, the application is to be refused in relation to those goods and services only.”

RELEVANT LAW

45. 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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may

retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

(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.

COMPARISON OF GOODS

46. The competing goods are as follows:

The opponent's goods	The applicant's goods
Class 5 - Protein supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being. Class 29 - Protein powders; all the aforesaid for use as aids to slimming, weight gain, muscle gain and well being.	Class 32 - Non-alcoholic drinks; Cola drinks; Juice drinks; Carbonated non-alcoholic drinks; Non-alcoholic malt drinks; Isotonic non-alcoholic drinks; Non-alcoholic fruit drinks; Non-alcoholic vegetable juice drinks; Non-alcoholic beer flavored beverages; Sarsaparilla [non-alcoholic beverage]; Isotonic drinks; Non-alcoholic beverages flavoured with coffee; Non-alcoholic soda beverages flavoured with tea; Non-

	alcoholic beverages flavored with coffee; Non-alcoholic sparkling fruit juice drinks; Guarana drinks; Non-alcoholic beer; Kvass [non-alcoholic beverage]; Non-alcoholic beverages with tea flavor; Fruit drinks; Non-alcoholic beverages flavored with tea; Non-alcoholic beverages flavoured with tea; Bottled drinking water; Drinking water; Root beers, non-alcoholic beverages; Beverages (Non-alcoholic -); Non-alcoholic beverages; Non-alcoholic carbonated beverages; Kvass [non-alcoholic beverages]; Fruit juice drinks; Carbohydrate drinks; Non-alcoholic grape juice beverages; Fruit juice beverages (Non-alcoholic -); Non-alcoholic fruit juice beverages; Drinking water with vitamins; Soft drinks flavored with tea; Apple juice drinks; Non-alcoholic wine; Fruit flavored drinks; Cocktails, non-alcoholic; Non-alcoholic cocktails; Energy drinks; Fruit flavoured carbonated drinks; Orange juice drinks; Non-alcoholic beers; Sports drinks; Non-alcoholic malt beverages; Smoothies [non-alcoholic fruit beverages]; Vegetable drinks; Cordials (non-alcoholic beverages); Non-alcoholic flavored carbonated beverages; Fruit beverages (non-alcoholic); Fruit flavoured drinks; Colas [soft drinks]; Non-carbonated soft drinks; Coconut water as a beverage; Coconut water as
--	---

	beverage; Fruit-based soft drinks flavored with tea; Non-alcoholic fruit cocktails; Distilled drinking water.
--	---

47. The opponent makes the following submissions:

“37. The above goods are identical and highly similar to the Class 32 goods registered under the Earlier Registration. In particular, the Contested Application broadly cover goods such as “nonalcoholic drinks” “Beverages (Non-alcoholic -)” and “juice drinks”, “fruit flavoured drinks”, “carbonated non-alcoholic drinks” which would encompass the Earlier Goods “Isotonic beverages; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being; beverages for meal replacement and for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being.”

38. ...

39. The remainder of the Contested Goods are similar to a high degree to the Earlier Registration’s class 32 goods as these goods will be provided by the same entities, have similar distribution channels, are complementary to one another and have the same end user. They are also in competition.

40. The Contested Goods in Class 32 are also identical and highly similar to the class 29 goods covered under the Earlier Registration. The Earlier Registration covers goods such as “protein based nutritional drink mixes for use as a meal replacement” and “milk-based beverages...”

The Contested Application includes broad terms such as ““Beverages (Non-alcoholic-)” and “non-alcoholic drinks” which would encompass the Earlier Goods.

41. Further, these goods are highly similar as they have the same nature, purpose, target the same end user, have the same distribution channels, and are in competition.

42. The Earlier Registration also covers goods such as “carbohydrate-based nutritional drink mix for use as a meal replacement” in class 30 which are identical and highly similar to the Contested Goods. The Contested Application broadly covers beverages, non-carbonated soft drinks and non-alcoholic drinks which would encompass the Earlier Goods.

43. In addition, or in the alternative, the goods are highly similar as they have the same nature, purpose, target the same end user and are in competition.

44. Finally, the Contested Application covers goods such as “Drinking water with vitamins”, “energy drinks”, “fruit juice drinks” and “smoothies”. The Opponent’s class 5 goods consist of a range of dietary, nutritional and vitamin supplements. These goods are similar to a high degree to the Contested Goods as they can all include vitamins, carbohydrates, minerals and/or protein. These goods are of the same nature, purpose, target the same end user, and are in competition.”

48. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

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

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

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

50. Further, in *Kurt Hesse v OHIM*,²² the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*,²³ the General Court (“GC”) stated that “complementary” means:

“...there is close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking.”

²² Case C-50/15 P

²³ Case T-325/06

Class 32

Isotonic non-alcoholic drinks; Isotonic drinks; Carbohydrate drinks; Drinking water with vitamins; Energy drinks; Sports drinks.

51. The above products are drinks which have a nutritional value, such as to enhance a person's vitamin or carbohydrate intake over and above that which they derive from food. The opponent's class 5 specification includes the term *protein supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being*. The nature of the products differs, as one is sold as supplements, whereas the other is sold as a ready-to-drink beverage. However, there may be an overlap in purpose as both can be taken for nutritional purposes / to enhance the user's diet, and the method of use will be the same, in that both products will be consumed orally. Users will overlap. i.e. those who take part in sports and fitness. Trade channels may overlap as the goods may both be sold in specialist nutrition stores or may be found in the same areas of supermarkets. I do not find competition or complementarity. I find the goods to be similar to a medium degree.

Non-alcoholic drinks; Non-alcoholic beverages; Fruit flavored drinks; Fruit flavoured drinks;

52. I consider that the goods I have dealt with in paragraph 50 will also fall within the broad categories as set out above. The goods set out in paragraph 50 are all types of non-alcoholic drinks and it is common for goods such as energy drinks and isotonic beverages to be fruit flavoured (although I do not consider the same are likely to be carbonated or made with fruit juice). As such, I also consider these to be similar to the earlier goods to a medium degree, for the reasons already set out above.

Cola drinks; Juice drinks; Carbonated non-alcoholic drinks; Non-alcoholic malt drinks; Non-alcoholic fruit drinks; Non-alcoholic vegetable juice drinks; Non-alcoholic beer flavored beverages; Sarsaparilla [non-alcoholic beverage]; Non-alcoholic beverages flavoured with coffee; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic beverages flavored with coffee; Non-alcoholic sparkling fruit juice drinks; Guarana drinks; Non-alcoholic beer; Kvass [non-alcoholic beverage]; Non-alcoholic beverages with tea flavor; Fruit drinks; Non-alcoholic beverages flavored with tea; Non-alcoholic

beverages flavoured with tea; Bottled drinking water; Drinking water; Root beers, non-alcoholic beverages; Beverages (Non-alcoholic -); Non-alcoholic carbonated beverages; Kvass [non-alcoholic beverages]; Fruit juice drinks; Non-alcoholic grape juice beverages; Fruit juice beverages (Non-alcoholic -); Non-alcoholic fruit juice beverages; Soft drinks flavored with tea; Apple juice drinks; Non-alcoholic wine; Cocktails, non-alcoholic; Non-alcoholic cocktails; Fruit flavoured carbonated drinks; Orange juice drinks; Non-alcoholic beers; Non-alcoholic malt beverages; Smoothies [non-alcoholic fruit beverages]; Vegetable drinks; Cordials (non-alcoholic beverages); Non-alcoholic flavored carbonated beverages; Fruit beverages (non-alcoholic); Colas [soft drinks]; Non-carbonated soft drinks; Coconut water as a beverage; Coconut water as beverage; Fruit-based soft drinks flavored with tea; Non-alcoholic fruit cocktails; Distilled drinking water.

53. It is my view the ordinary and natural meaning of the terms above does not extend to protein drinks. I do not consider that the nature or purpose of the above goods will be shared with the opponent's goods, and I do not consider them complementary or to be in competition. The trade channels will not be shared to any meaningful extent. Whilst they will all be consumed, and whilst the consumers of both sets of goods will include members of the general public, this is not sufficient to find similarity between the same. I find the above goods dissimilar to those relied upon.

54. As some degree of similarity between the goods is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition aimed against those goods that I have found to be dissimilar will fail.²⁴

AVERAGE CONSUMER AND THE PURCHASING ACT

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

²⁴ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

56. 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.

57. The average consumer of the overlapping goods is a member of the general public, who is likely to have an interest in health and fitness. The purchasing process is likely to be predominantly visual, with the goods predominantly being purchased

through websites, or in-store. However, as word of-mouth recommendations may also play a part, I do not discount that there will also be an aural component to the purchase. Although consumers who purchase the goods might be particularly attentive to their protein content, dietary needs and the product flavour, the goods are relatively low in price and frequently purchased, and the degree of attention is likely to be medium.

COMPARISON OF MARKS

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

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

59. 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 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.

60. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
FUEL YOUR AMBITION	Fuel Your Flow

Overall Impression

61. The contested mark is a three-word mark, consisting of 'Fuel Your Flow'. There are no additional elements to the contested mark and therefore the overall impression lies in the combination of the words themselves.

62. The earlier mark is a three-word mark, consisting of 'FUEL YOUR AMBITION'. There are no additional elements to the contested mark and therefore the overall impression lies in the combination of the words themselves.

Visual Comparison

63. Visually, the competing marks are similar to the extent that they share the words 'Fuel Your'. The third word in each of the marks differs, being 'Flow' in the contested mark and 'AMBITION' in the earlier mark. Given that the overall impression lies in the combination of the words themselves, these words act as point of difference. Although the words in the contested mark start with a capital letter, whilst the second and third word in the earlier mark do not, I am mindful that a word trade mark protects the notional use of the word itself irrespective of font capitalisation or otherwise and therefore the difference in casing will have little impact on the assessment. I also note the beginnings of marks tend to have more impact both visually and aurally,²⁵ and therefore, I am of the view that the marks are visually similar to between a medium and high degree.

²⁵ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

Aural Comparison

64. The point of aural overlap lies with the words ‘Fuel Your’, as this is the same in both marks, and will be pronounced identically. The third word in the earlier mark has one syllable, making the whole mark three syllables long, whereas the third word in the contested mark has three syllables, making the whole mark five syllables long. There is no overlap in the words ‘Flow’ and ‘AMBITION’, which are aurally different. Overall, I find the marks to be aurally similar to a medium degree.

Conceptual Comparison

65. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer, as highlighted in numerous judgments of the GC and the CJEU²⁶.

66. The earlier mark as a unit will be understood as meaning to “fuel” or increase your ambition and desire to achieve your goals. The contested mark as a unit will be understood as meaning to “fuel” or increase your productivity and focus, which is how I consider a significant proportion of average consumers would interpret “flow” in this context. Conceptually, I consider that the ‘Fuel Your’ element of both marks will overlap. Overall, I find the marks to be conceptually similar to a medium degree.

DISTINCTIVE CHARACTER OF THE EARLIER TRADE MARK

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

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

²⁶ *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29

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)."

68. 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 services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. It is neither descriptive nor allusive of the opponent's goods. I find that the earlier mark has a low degree of inherent distinctive character.

69. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, and such enhanced distinctiveness may affect the likelihood of confusion between that mark and a later mark including the same, or a similar, element.

70. As discussed in detail above, the opponent filed a witness statement by Mr Pochin to evidence its use of the earlier mark in the UK during the relevant period. Whilst I have determined that the opponent has provided sufficient evidence to illustrate use of the mark, I note that there are limitations to the evidence, much of which is either undated or falls outside of the relevant period. Mr Pochin has provided turnover figures for MYPROTEIN as a whole, and whilst I note that the brand itself is clearly successful, these figures do not assist me for the purposes of this assessment. I have set out the turnover figures in paragraph 25 which Mr Pochin states relate to the earlier mark. In considering this, I remind myself that I have found use for protein supplements and protein powder. There is a significant disparity between the two tables of figures that Mr Pochin has provided, and I have no explanation as to why this is the case. Whilst the latter does break down the goods on offer to some degree, I am unable to take the

vast majority of those goods into account as they relate to items for which I have not found use or are not relied upon. Taking the above into account, whilst I have found this evidence to be sufficient in respect of genuine use, I do not consider that it goes far enough to establish enhanced distinctiveness.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

71. 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 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 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.

72. I have found as follows:

- The goods at issue are similar to a medium degree (except those which I have found to be dissimilar which will not form part of this assessment);
- The average consumer will be members of the general public. They will select the contested goods by primarily visual means, although I do not discount an aural component;
- A medium degree of attention will be paid;
- The marks are visually similar to between a medium and high degree;
- The marks are aurally similar to a medium degree;

- The marks are conceptually similar to a medium degree;
- I have found the earlier mark to be inherently distinctive to a low degree, but that the evidence did not sufficiently show that it had enhanced its distinctive character through use.

73. I begin by considering a likelihood of direct confusion. It is worth stating at this point, that a low level of distinctive character does not preclude a likelihood of confusion.²⁷ The competing marks are both three-word marks, which share the words FUEL YOUR at the beginning of each mark, however the third word in the marks is different, being FLOW as opposed to AMBITION. I consider that the differences created by the different word of each mark are highly unlikely to be overlooked. Taking all of the above into account, it is my view that the differences between the competing marks are likely to be sufficient for consumers – paying a medium level of attention – to distinguish between them and avoid mistaking them for one another. Accordingly, notwithstanding the principles of imperfect recollection and interdependency, it follows that there will be no direct confusion, even on goods that are similar to a medium degree.

74. This leads me to consider indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

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

²⁷ *L’Oréal SA v OHIM*, Case C-235/05 P

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.).
- (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 Appeal²⁸. 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 confusion²⁹. The Court of Appeal has also emphasised that, where there is no direct confusion, there must be a “proper basis” for finding indirect confusion³⁰.

76. For indirect confusion to arise the average consumer must consider that as a result of the common element, there is an economic connection between the respective marks, such that the services provided under one is regarded as a brand extension or sub brand of the other, for example.

²⁸ *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207

²⁹ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

³⁰ *Liverpool Gin Distillery*

77. In my view, I believe that the average consumer is more likely to consider that both marks form a unit. Therefore, I do not consider that the “FUEL YOUR” element of either mark is the distinctive element independent of the whole, and therefore the average consumer is unlikely to rely on ‘FUEL YOUR’ more than ‘AMBITION’ or ‘FLOW’ when considering whether the same economic entity is responsible for both marks. Further, I do not consider that consumers would view the differences between the two marks as alternations or additions that constitute a logical brand extension or sub-brand. Whilst both marks share the use of ‘FUEL YOUR’, I have found the opponent’s mark to be low in distinctive character, and both marks are likely to be interpreted as a slogan or strapline, and as a result, indirect confusion would not arise. In short, based upon each mark incorporating the words ‘FUEL YOUR’, I can see no basis on which the average consumer would conclude that the marks must originate from the same, or a related, undertaking. Consequently, I consider that there exists no likelihood of indirect confusion.

FINAL REMARKS

78. The opposition has failed in its entirety. Subject to any successful appeal, the application will therefore proceed to registration in respect of all of the relevant goods.

COSTS

79. The applicant has been successful and is entitled to a contribution towards its costs. However, as the applicant is not legally represented, in its letter to the applicant of 16 September 2025, the Tribunal said:

“If you intend to make a request for an award of costs you must complete and return the attached pro-forma and send a copy to the other party. Please send these by e-mail to tribunalhearings@ipo.gov.uk.

If there is to be a “decision from the papers” this should be provided **on or before 14 October 2025**.

If a hearing is taking place you will be advised of the deadline to do so when the Hearing is appointed.

If the proforma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded. You must include a breakdown of the actual costs, including accurate estimates of the number of hours spent on each of the activities listed and any travel costs. Please note that The Litigants in Person (Costs and Expenses) Act 1975 (as amended) sets the minimum level of compensation for litigants in person in Court proceedings at £19.00 an hour.”

80. No cost pro forma has been received to date. Since the applicant did not file a cost pro forma by the deadline given in the Tribunal’s letter of 14 October 2025, and has paid no statutory fees in these proceedings, I will make no costs order against the opponent in this matter.

Dated this 14th day of August 2026

LA Bailey

For the Registrar