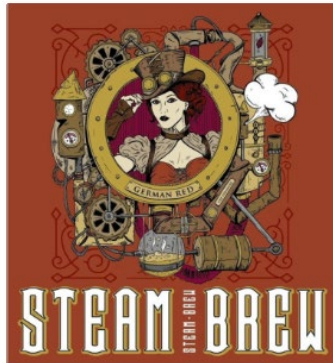


**O/0779/23**

**CONSOLIDATED PROCEEDINGS**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF TRADE MARK APPLICATIONS NO. 3671185 & 3671186  
IN THE NAME OF PRIVATBRAUEREI EICHBAUM GMBH & CO. KG  
TO REGISTER AS TRADE MARKS**



**AND**



**IN CLASS 32**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NUMBERS 430639 & 430641  
BY ANCHOR BREWING COMPANY LLC**

## BACKGROUND AND PLEADINGS

1. On 20 July 2021, Privatbrauerei Eichbaum GmbH & Co. KG (“the applicant”) applied to register trade mark numbers UK3671185 (the ‘185 mark) and UK3671186 (the ‘186 mark) for the marks shown on the cover page of this decision, in the United Kingdom. Each trade mark application was filed pursuant to Article 59 of the Withdrawal Agreement between the United Kingdom and the European Union, based on its European Union Trade Mark (“EUTM”) No 1475699 and No.1387709, respectively. Consequently, the applicant can rely upon the earlier EU filing dates, being the 29 April 2019 for the ‘185 mark with a claimed priority date of 31 October 2018, and 11 December 2017 for the ‘186 mark with a claimed priority date of 30 October 2017.

2. Both applications were accepted and both were published for opposition purposes on 29 October 2021. Each application was in respect of the following (identical) goods:

Class 32: *Beers; non-alcoholic beers; beer-based mixed drinks; non-alcoholic drinks.*

3. The applications are opposed by Anchor Brewing Company LLC (“the opponent”). The opposition against the ‘185 mark was filed on 28 January 2022 (OP430639); and the opposition against the ‘186 mark was filed on 31 January 2022 (OP430641).

4. Both oppositions are based upon Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The oppositions are directed against all of the goods in the applications. These oppositions have been consolidated.<sup>1</sup> In each of the cases, the opponent relies upon the following four UK marks:

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<sup>1</sup> A letter was sent by the Tribunal to the parties, dated 14 July 2022, which confirms the same, pursuant to Rule 62(1)(g) of the Trade Mark Rules 2008.



2

UK trade mark registration number 1305077

Filing date: 25 March 1987

Registration date: 28 November 1997

Registered in Class 32

Relying on all goods, namely:

Class 32: *Alcoholic beverages included in Class 32*

("Mark 1"); and

### **ANCHOR STEAM**

UK trade mark registration number 900404459

Filing date: 8 November 1996

Registration date: 19 November 2003

Registered in Class 32

Relying on all goods, namely:

Class 32: *Beer; ale; porter; malt beverages.*

("Mark 2"); and

### **ANCHOR STEAM BEER**

UK trade mark registration number 900405936

Filing date: 8 November 1996

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<sup>2</sup> I note the Mark Description/Limitation is recorded as "In use in relation to goods covered by the specification other than beer, the mark will be varied by the substitution of the description of such goods for the word "beer". "

Registration date: 3 May 2002

Registered in Class 32

Relying on all goods, namely:

Class 32: *Beer; ale; porter; malt beverages.*

("Mark 3"); and



UK trade mark registration number 900404418

Filing date: 8 November 1996

Registration date: 18 May 1999

Registered in Class 32

Relying on all goods, namely:

Class 32: *Beer; ale; porter; malt beverages.*

("Mark 4").

5. Marks 2, 3 and 4 are comparable marks. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UK IPO created comparable UK trade marks for all right holders with an existing registered EUTM or International Trade Mark designating the EU. As a result, the opponent's marks were converted into comparable UK trade marks. Comparable UK marks are now recorded in the UK trade mark register, have the same legal status as if they had been applied for and registered under UK law, and the original filing dates remain the same.<sup>3</sup>

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<sup>3</sup> See Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.

6. Under each of the oppositions, the opponent submits that the opposed goods are identical to those of the earlier marks. It further submits that due to the highly similar nature of the competing marks, taking into account the distinctive and dominant components of each, and the identical goods, there exists a likelihood of confusion.

7. The applicant filed a counterstatement for each of the oppositions, denying the claims. It submits that the sole shared element between both of the applied-for marks and each of the earlier marks is the word "STEAM", which it submits refers to a type of beer and which it submits is offered by the opponent under its marks. It denies that there is a likelihood of confusion between any of the earlier rights and either of the contested marks, and it submits that each of the oppositions should be rejected in its entirety.

8. Both parties filed written submissions which will be referred to as and where appropriate during this decision, and both parties elected to file evidence. Neither party requested a hearing, therefore this decision is taken following careful consideration of the papers.

9. In these proceedings, the opponent is represented by Hoffmann Eitle PartmbB and the applicant is represented by Mishcon de Reya LLP.

### **Preliminary Issues**

10. On 7 June 2023, the applicant filed a copy of an EUIPO decision issued on 31 May 2023 of an invalidity action concerning both parties involved in the proceedings before me. The applicant requested that the EUIPO decision be brought to the attention of the Hearing Officer prior to the substantive decision being issued in these current opposition proceedings.

11. In its response dated 7 July 2023, the Tribunal confirmed that the deadline to file submissions had passed, and further, the Registry is not bound by decisions given in other jurisdictions. Consequently, the requested EUIPO decision was not admitted into these proceedings.

## EVIDENCE

### Opponent's evidence

12. For both oppositions, the opponent filed evidence by way of three witness statements.

13. The first witness statement, (dated 21 June 2022 for the '185 mark, and dated 24 June 2022 for the '186 mark), is in the name of Debra Louise Lewis, who is a UK Registered Trade Mark Attorney, attached to which are three exhibits, labelled **Exhibit DLL1** to **Exhibit DLL3** accordingly. I note that apart from the date, identical witness statements and exhibits were filed under each of the oppositions, prior to consolidation.

14. The second witness statement, dated 6/20/2022, was also filed prior to the two oppositions being consolidated, and is in the name of Masashi Minami, who is the CEO and president of the opposition company, a position which he states he has held since March 30, 2022. Mr Minami adduces eight exhibits, labelled **Exhibit MM1** to **Exhibit MM8**. I note that the witness statements filed under the separate opposition proceedings each bear the same date, however, the respective statements are worded slightly differently at paragraphs 6, 7 and 10, although they are essentially the same. Further, the accompanying exhibits filed under each of the oppositions are identical aside from the respective exhibits MM2 and MM6. Both these exhibits comprise a selection of invoices, which contain minimal differences between each set filed under the separate oppositions.

15. The third witness statement was filed following consolidation of the two sets of opposition proceedings, alongside a further nine exhibits, labelled **Exhibit DLL4** to **Exhibit DLL112**. It is also in the name of Debra Louise Lewis and is marked as her Second Witness Statement, which is dated 21 October 2022. Ms Lewis states that the evidence contained within is in reply to the evidence filed by the other party.

16. I consider the main purpose of the evidence is to support the opponent's submissions that the earlier marks have been put to genuine use in the EU during the relevant period.

### **Applicant's evidence**

17. The applicant filed evidence following the consolidation of the two oppositions by way of a witness statement dated 16 December 2022 in the name of Dominic Peter Francis Walsh, being an associate of the law firm Mischon de Reya LLP, acting as representatives of the applicant. Mr Walsh adduces nine exhibits, marked as **Exhibit DPFW1** to **DPFW9** in support of the application, and has provided an Index of Exhibits.

18. There is also a second witness statement, dated 20 January 2023, in the name of Clay Suddath, being a professional translator at HL TRAD, accompanied by exhibits **CS1** and **CS2**, being translations from German into English of exhibits DPFW4 and DPFW5.

19. I have read and considered all of the evidence and I will refer to the relevant parts at the appropriate points in the decision.

### **DECISION**

20. Although the UK has left the European Union, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. Therefore, this decision contains references to the trade mark case-law of the European courts.

21. By virtue of their earlier filing dates, each of the four trade marks upon which the opponent relies qualifies as an earlier trade mark pursuant to section 6 of the Act.

### **Proof of Use**

22. Proceedings were started on 28 January 2022 for the '185 mark, and on 31 January 2022 for the '186 mark, being after IP Completion Day. As the contested applications may rely on the earlier EU filing dates, both being prior to 11pm on 31 December 2020, the law at that time applies, and as such, the following statutory provisions under Section 6A of the Act are relevant:<sup>4</sup>

(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), (b) 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 period of five years ending with the date of publication.

(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 period of five years ending with the date of publication of the application 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 -

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<sup>4</sup> Ibid.

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, 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) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Union.

(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.”

23. Section 100 of the Act states that:

“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”.

24. The opponent’s trade marks each completed the registration process more than five years before the priority claimed for the application of the contested marks, and, as a result, are subject to the provisions on use under Section 6A of the Act. The applicant has required the opponent to provide proof of use of the marks for all the goods on which it relies, as listed under paragraph 4 of this decision.

### **My approach**

25. I note that while Mark 1 (being UK1305077) for the composite word and device mark “REAL STEAM BEER” is relied upon by the opponent, as cited on Form TM7, use of the mark has not been shown within the evidence, and no mention of this mark has been made in the opponent’s written submissions, dated 22 June 2022 for

OP430639 and 24 June 2022 for OP430641. Further, in these submissions, the opponent states that only the following marks are relied upon in each of these oppositions:

**Proof of use**

The Applicant has asked for proof of use of the marks relied on. The following marks are relied on in this opposition:

UK00900404459 ANCHOR STEAM

UK00900405936 ANCHOR STEAM BEER

UK00900404418 (ANCHOR STEAM BEER LOGO)



26. Given that no evidence of use has been provided in relation to Mark 1, it cannot be relied upon in these proceedings.

27. Having reviewed the evidence in relation to the opponent's Marks 2, 3 and 4, I note that the evidence does not give any specific examples of use of the words "ANCHOR STEAM" on their own, although the words are encompassed in their entirety within the earlier Mark 3, being "ANCHOR STEAM BEER", with both marks being "word only" marks.<sup>5</sup> As the specifications for Marks 2, 3 and 4 are identical, I do not consider that assessing the opponent's Mark 2 would improve the opponent's position. I will therefore proceed by making my comparisons in relation to the earlier Mark 3 and Mark 4 only, however, I will return to consider the position in respect of the earlier Mark 2 should I consider it necessary to do so.

28. For reasons that will become apparent throughout the course of my decision, I propose to proceed on the basis that the opponent has put the marks to genuine use during the relevant period for all the goods upon which it relies. I will now move to consider the 5(2)(b) ground of the oppositions.

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<sup>5</sup> I note the opponent's submissions that the words "ANCHOR STEAM" are shown on the label underneath the cap of the bottles in the photographs contained in Exhibit MM3, however, I consider the evidence does not show the full picture of the bottle label and I therefore find it to be inclusive.

## Section 5(2)(b)

29. Section 5(2)(b) is relied upon, which reads 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”.

30. I am guided by the following principles which are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (“OHIM”)*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(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 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 to mind the earlier mark, 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

## Comparison of goods

31. The goods to be compared are:

Opponent's goods	Applicant's goods
The goods are identical for both earlier marks:	The goods are identical for both contested marks:
<u>Class 32</u> <i>Beer; ale; porter; malt beverages.</i>	<u>Class 32</u> <i>Beers; non-alcoholic beers; beer-based mixed drinks; non-alcoholic drinks.</i>

32. In *Gérard Meric v OHIM*, Case T-133/05, the General Court ("GC") stated that:

"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".<sup>6</sup>

33. In *Canon*, Case C-39/97, the Court of Justice of the European Union ("CJEU") stated that:

"In assessing the similarity of the goods or services concerned, ... 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".<sup>7</sup>

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<sup>6</sup> Paragraph 29

<sup>7</sup> Paragraph 23

34. Additionally, the factors for assessing similarity between goods and services identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] R.P.C. 281 include an assessment of the users and the channels of trade of the respective goods or services.

35. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

“... 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. ... Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods 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 in question.”<sup>8</sup>

36. In its written submissions, the opponent submits that the term ‘beer’ encompasses all types of beer, including ‘beer-based mixed drinks’ and that ‘non-alcoholic drinks’ include non-alcoholic beers, and therefore all the contested goods are identical to the goods of the earlier marks.

37. In its written submissions, the applicant admits that the contested term “Beers” is obviously identical to the earlier goods, but it denies that the remaining contested goods are identical, although it admits to some similarity for certain of the goods.

38. Given that the contested “*Beers*” are self-evidently identical to the opponent’s “*Beer*”, as admitted by the applicant, I will proceed to assess the degree of similarity between the earlier goods and the remaining goods of the applications.

#### *Non-alcoholic beers*

39. In *Tiny Rebel Brewing Company Limited V Tropicana Products Inc.*, Case BL O/482/19, Professor Ruth Annand, sitting as Appointed Person observed that:

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<sup>8</sup> Paragraph 12

“25 (1) the term “beers” in the Applicant’s specification would include non-alcoholic beers, which meant that on the comparison case being put forward by the Applicant, identical goods were involved (Case T-133/05, *Gérard Meric v. EUIPO* [2006] ECR II-2737, para. 29);”.

Taking account of the above, I consider that the opponent’s broad term “*beer*” would encompass the contested “*non-alcoholic beers*”, rendering the goods identical as per the principle outlined in *Meric*.

#### *Non-alcoholic drinks*

40. The applicant submits that “*non-alcoholic drinks*” are “not similar in any material respect to beer, ale or porter when giving these words their natural and ordinary meaning”. I do not consider it uncommon for beer manufacturers to also make a non-alcoholic version to cater for those consumers who choose not to partake of alcoholic beverages. As such, the applicant’s broad term “*non-alcoholic drinks*” may reasonably include the opponent’s “*Beer*”, albeit that it could only be non-alcoholic beer, and therefore the goods are *Meric* identical. However, I am mindful of the guidance in *YouView* not to apply a too liberal interpretation. If I have given too much weight to what the average consumer would assume to be encompassed within the term “*non-alcoholic drinks*”, then I consider there to be an overlap in users with the earlier “*Beer*”, as well as in purpose and nature (both are forms of beverages intended to quench thirst or may be consumed for pleasure), method of use and channels of trade. The goods may also be in direct competition. I again defer to the guidance given in *Tiny Rebel* in this regard.<sup>9</sup> Depending on the exact nature of the “*non-alcoholic drinks*”, I find that if the competing good are not identical, then they are similar to between a medium to high degree.

#### *Beer-based mixed drinks*

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<sup>9</sup> At [25-28].

41. I construe “*beer-based mixed drinks*” to include the likes of shandy, being bitter/lager mixed with lemonade, which is often available in pre-mixed cans or bottles. While I do not consider the goods to be identical, there will be an overlap in the nature and intended purpose of the applicant’s “*beer-based mixed drinks*” with the opponents “*beer*” inasmuch that the purpose of each is as a liquid refreshment, both of which contain beer. The goods share the same method of use, i.e. oral consumption, and they share the same channels of trade, and are likely to be positioned in close proximity on supermarket shelves. Although I do not consider them to be complementary, the respective goods may be in competition with each other, with the consumer making an informed choice between beer or an alternative beer-based mixed drink. I do not consider it unreasonable that the average consumer would expect the same or economically linked undertakings to produce both sets of goods. Taking all of the above into account, I consider the competing goods to be similar to a high degree.

#### **The average consumer and the nature of the purchasing act**

42. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. (as he was then) described the average consumer in these terms:

“The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median”.<sup>10</sup>

43. 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.

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<sup>10</sup> Paragraph 60

44. Both parties submit that the average consumer is an adult consumer of beers who will pay an average degree of attention to their purchases.

45. The overlapping goods at issue are both alcoholic and non-alcoholic beer. Insofar as the alcoholic drinks are concerned, the average consumer will be an adult (over 18) member of the general public, and will include “pleasure drinkers” alongside enthusiasts (such as “real ale” aficionados or “beer buffs”) whose knowledge of the goods will be heightened, both of whom may purchase the goods for consumption at home or in a social setting such as a bar or restaurant. The goods will also be purchased by buyers for venues such as public bars and restaurants.

46. The goods are sold through a range of channels including wholesale outlets and retail outlets such as supermarkets and off-licences, as well as through specialist suppliers and online. In bricks and mortar stores, the goods will be sold on shelves (usually in bottles or cans) where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a webpage. The goods will also be sold in restaurants, bars and public houses, where they are likely to be displayed behind the counter, (where beer is usually available “on draught” or in bottles) or listed on a drinks menu. Considered overall, the selection process is predominantly visual, although I do not discount aural considerations, particularly in bars and restaurants, where the goods may also be selected and requested verbally.

47. I bear in mind the comments of the GC in *Simonds Farsons Cisk plc v OHIM*, Case T-3/04, who said:

"58. In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having

examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.”

48. The goods, which while not an everyday purchase are likely to be purchased on a semi-regular basis by the general public, are inexpensive, and, in my view, neither alcoholic nor non-alcoholic drinks are highly considered purchases. Overall, I consider that the average consumer will pay a medium level of attention during the selection process, basing their selection on the type of beverage and personal taste, although I acknowledge that the enthusiast may pay a higher degree of attention to their selection.

### **Comparison of marks**

49. 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 in *Bimbo SA v OHIM* Case C-591/12P, 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.”<sup>11</sup>

50. It would be wrong, therefore, to artificially dissect the trade marks, 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.

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<sup>11</sup> Paragraph 34

51. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade marks
<p data-bbox="204 365 308 398"><u>Mark 3</u></p> <p data-bbox="308 472 671 506" style="text-align: center;"><b>ANCHOR STEAM BEER</b></p> <p data-bbox="204 692 308 725"><u>Mark 4</u></p> 	<p data-bbox="805 365 1018 398"><u>The '185 Mark</u></p>  <p data-bbox="805 947 1018 981"><u>The '186 Mark</u></p> 

### Overall impression

52. In *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, the GC noted that the beginning of words tend to have more visual and aural impact than the ends, although I acknowledge that this is not always the case.

53. The opponent's Mark 3 consists of the words "ANCHOR STEAM BEER", presented in capital letters in a standard typeface, without any other elements to contribute to the overall impression. To my mind, the average consumer will view the words "STEAM BEER" in combination as non-distinctive, being allusive of the type of goods to which it relates i.e. beer produced by a steam method of manufacture. I therefore consider that it is the word "ANCHOR" which will make the greatest contribution to the overall impression, although the words "STEAM BEER" will not go unnoticed.

54. The opponent's Mark 4 comprises the stylised words "ANCHOR STEAM BEER" which are positioned within a ribbon device above a depiction of an anchor flanked by two different types of leaves which I assume to be barley or another grain used in beer making. The whole of the above is encased within an oval shape which gives the impression of a badge, having an irregular thin black border. Within the border are the non-distinctive words, "Made in San Francisco since 1896" which are presented in a smaller typeface and which follow the interior curve at the bottom of the border, while the words "BREWED AND BOTTLED BY ANCHOR BREWING CO., SAN FRANCISCO.CA FROM ALL BARLEY MALT CONTENTS 12 FLUID OZ." are presented in a much smaller typeface, and are positioned around the interior curve of the upper border. In my view, it is likely that it is the combination of the anchor and leaves device elements, as described, combined with the words "ANCHOR STEAM BEER" to which the average consumer will pay the most attention, the remaining words being presented in a smaller typeface as well as being non-distinctive, and as such are likely to have little impact.

55. The applicant's '185 mark is a composite mark comprising the stylised words "STEAM BREW" presented in a white typeface which are positioned horizontally below a complex device element. The device consists of an illustration of the head and shoulders of a female character dressed in period clothing who is positioned within a thin double bordered circle resembling a porthole, with what appears to be an old-fashioned brewing mechanism in the background. The words "GERMAN RED" are situated on a plaque on the bottom of the 'porthole' element. Meanwhile, the words "STEAM BREW", are repeated in a much smaller typeface and intersect the horizontally presented words "STEAM BREW", but this time run vertically from bottom to top. The whole of the mark sits on a rust-coloured square background, which I consider to be purely decorative feature which does not add to the trade mark message conveyed by the rest of the mark. To my mind, it is the aforementioned device in its totality and the larger words "STEAM BREW" which contribute equally to the overall impression. Given the size of the lettering and their position within the device, I find that the words "GERMAN RED" will have little impact on the overall impression of the mark.

56. The applicant's '186 mark comprises the words "STEAM BREW" presented in a white double bordered typeface positioned in the centre of a black rectangular background, with the rectangular shape running horizontally. I consider the background to be a purely decorative element which serves to frame the words within and which does not add to the trade mark message conveyed by the words. In my view, it is the combined words "STEAM BREW" which are the dominant and distinctive element and which plays the greatest role in the overall impression of the mark.

### **The '185 mark**

#### **Visual comparison**

57. The only element in common between the applicant's mark and the earlier marks, each as described previously, is the word "STEAM". The word "STEAM" is positioned as the second of three words in Mark 3, while the same word is positioned at the start of the applicant's mark, which results in a visual difference between the word elements. Given the complexity of the device element in the contested mark against the earlier word only Mark 3, which creates further visual disparity, I consider there to be only a low degree of visual similarity between the competing signs.

58. While the earlier Mark 4 is also a complex composite mark, the word "STEAM" is positioned in the middle of the two other words "ANCHOR" and "BEER", (being "ANCHOR STEAM BEER"), while in the contested mark, the same word is positioned at the beginning of the two word combination "STEAM BREW". The device elements pertinent to each of these marks share no visual similarity. In spite of the occurrence of the word "STEAM" being present in both marks, I consider the degree of visual similarity between these composite marks to be very low.

#### **Aural comparison**

59. I consider that the only element to be voiced in the contested mark would be the words "STEAM BREW", which would be articulated as two syllables "STEEM-BROO". For the earlier Mark 3, to those consumers who do not voice the final, descriptive word "BEER", it would be voiced as three syllables. "AN-KER-STEEM", which I consider to

be aurally similar to the contested mark to no more than a medium degree. For those consumers who voice Mark 3 in its entirety, it will be pronounced as five syllables, “ANKER-STEEM-BEE-UH”. In these circumstances, I consider the competing marks to be aurally similar to a low degree.

60. For the earlier Mark 4, in my view, the only element to be vocalised are the words “ANCHOR STEAM BEER”, and as such, the mark will be voiced as five syllables, “ANKER-STEEM-BEE-UH”, rendering it aurally similar to a low degree to the contested mark, which as outlined above, would be articulated as two syllables “STEEM-BROO”.

### **The ‘186 mark**

#### **Visual comparison**

61. The earlier Mark 3 consists of three words “ANCHOR STEAM BEER”, while the contested mark consists of two words “STEAM BREW”, with the element in common between the competing marks, being the word “STEAM”, being positioned as the second word in the earlier mark and as the first word in the applicant’s two-word combination. Given the purely decorative background of the application mark, overall, I consider the marks to be visually similar to a low to medium degree.

62. The earlier Mark 4 is a complex composite mark, while the stylisation of the contested mark is very simple in comparison. Again, the only visual similarity resides in the word in common “STEAM”. Overall, I consider that if any similarity between the marks exists, it is to only a very low degree.

#### **Aural comparison**

63. I consider that the aural considerations for this mark to be identical to those outlined above in relation to the contested ‘185 mark. Therefore, my findings are the same as those given under paragraphs 59 and 60.

#### **Conceptual comparison**

64. With regard to conceptual comparison, in *Luciano Sandrone v European Union Intellectual Property Office (EUIPO)*, Case T-268/18, the GC held:

“... In that regard, it must be borne in mind that the purpose of the conceptual comparison is to compare the ‘concepts’ that the signs at issue convey. The term ‘concept’ means, according to the definition given, for example, by the Larousse dictionary, a ‘general and abstract idea used to denote a specific or abstract thought which enables a person to associate with that thought the various perceptions which that person has of it and to organise knowledge about it.’<sup>12</sup>”

65. The opponent submits that both of the contested marks and the earlier marks are conceptually identical, and evoke the notion of “steam” and “beer”, with the word “brew” in the contested mark referring to brewing beer and being a synonym for beer. The opponent has provided evidence to support this by way of Exhibit DLL3, which comprises definitions of the word “brew”, which have been sourced from the Cambridge Dictionary (online) and Merriam-Webster online dictionary. This is denied by the applicant.<sup>13</sup> In the counterstatement, the applicant submits that the ‘185 mark refers to the “Steampunk” genre, which it further describes as “*a subgenre of science fiction that incorporates retrofuturistic technology and aesthetics inspired by 19<sup>th</sup>-century industrial steam-powered machinery*” as referenced in Wikipedia. In its written submissions, the applicant submits that this is the concept evoked by the mark, while the earlier mark only evokes the concept of an anchor and steam, with the latter being descriptive of steam beer. It also submits that the contested ‘186 mark is conceptually “strikingly different” to the earlier marks.

66. To my mind, the words “STEAM BREW” in both the contested marks and the words “STEAM BEER” in the earlier Mark 3 and Mark 4, each form a unit, with the word “STEAM” qualifying the subsequent words “BREW” and “BEER”, with both alluding to the manufacturing process of the goods, that is to say, beverages/beers which have been produced through a process which involves steam. I find this to be the message

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<sup>12</sup> Paragraph 8.

<sup>13</sup> See paragraph 16 of the counterstatement.

conveyed by the marks even where the consumer might not have been previously aware of such a process. To those consumers who recognise the concept of “Steampunk” in the ‘185 mark, it merely serves to reinforce the type of technology behind the brewing process of the goods, although I would not expect a significant proportion of consumers of beer to appreciate this. Given that the concept conveyed by the everyday word “ANCHOR” in both the earlier marks is absent from the applied-for marks, I consider that due to the shared concept of the “STEAM” element as the process used in the production the goods at hand, the marks are conceptually similar to a medium degree.

### **Distinctive character of the earlier marks**

67. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

68. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 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).

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).”

69. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up 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 made of it. The opponent has claimed that due to the long standing use of the marks made by the proprietor in the UK and EU, the distinctive character of the three marks has been enhanced and it has provided evidence of use in relation to the earlier marks.

70. I will begin by considering the inherent characteristics of the earlier marks. It is the distinctiveness of the common element that is important here. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C., sitting as the Appointed Person, said:

“It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”<sup>14</sup>

71. In its written submissions, the opponent submits that “STEAM” and “STEAM BEER” do not refer to a type of beer and only refers to the product from the Anchor Brewing Company, which obtained a US trade mark for the term “STEAM BEER” in the US in 1981, and as such is clearly distinctive in its own right.<sup>15</sup> Regardless of the opponent’s submissions, I can only consider the evidence before me in relation to the

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<sup>14</sup> Paragraph 39.

<sup>15</sup> See paragraph 80 of this decision regarding evidence provided by the opponent.

UK consumer's perceptions in relation to the (UK) Trade Marks Act 1994. None of the marks being relied upon in these proceedings are for the mark "STEAM" or "STEAM BEER" alone, with each of the earlier marks containing what the opponent has described as the house mark "ANCHOR".

72. The evidence provided by the applicant includes a variety of printouts showing definitions for the term "steam beer" as a type of beer, and various articles relating to the same. I note, however, that these definitions are shown as being in American English or they explicitly state that steam beer is a type of beer brewed in the US (DPFW1), while the article on the list of beer styles provided under DPFW2 states that "there is no universally agreed list of beer styles, as different countries and organisations have different sets of criteria". Although the same article states that beers that originated in a particular country or region may now be produced in other countries, I see nothing within the applicant's evidence to show that the UK public would be familiar with the term "steam beer" as a beer type. That being said, as mentioned in paragraph 66 of this decision, I consider that a significant proportion of the average UK consumer, being reasonably well informed and reasonably circumspect and observant, would, when viewed on the goods at issue, interpret the words in this way without the need for any mental effort, even if the consumer had previously been unaware of such a manufacturing process.

73. In *Whyte and Mackay Ltd v Origin Wine UK Ltd*<sup>16</sup> Arnold J. (as he was then) considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. In my view, the average consumer will identify the meaning of the word "ANCHOR" within the composite mark, which as per *Medion*, plays an independent, distinctive role. Meanwhile, as outlined previously in this decision, I consider the combined words "STEAM BEER" to be non-distinctive, referring to the manufacturing process of the goods at issue, being beer which has been made through a steam process.

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<sup>16</sup> *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch).

74. Therefore, to my mind, the distinctive character of Mark 3 lies in the ordinary, dictionary defined word “ANCHOR”, being neither descriptive nor allusive of the goods at issue, which I consider to be distinctive to a medium degree when considered *solus*.

75. Given that the word “BEER” is clearly descriptive of the goods at issue, I must also consider the opponent’s submissions that the word “STEAM” is distinctive in its own right and plays an independent role within the composite signs “ANCHOR STEAM BEER”. In my view, the average consumer will identify the word “STEAM” as a non-distinctive element within the composite mark, or at best it is low in distinctive character, which by reference to the goods being provided under the mark, alludes to the method of manufacture of those goods.

76. Given the allusive qualities of the words “STEAM”/“STEAM BEER” within the composite marks, when considered as a whole, I find Mark 3 to be inherently distinctive to a medium degree, while the additional device element elevates Mark 4 to what I consider to be an above medium degree of distinctiveness, although not to the highest degree.

77. The territory relevant to the assessment of enhanced distinctiveness is the United Kingdom. I must now assess if the evidence demonstrates whether, at the time of the claimed priority dates of the contested marks, being 31 October 2018 and 30 October 2017 respectively, the earlier marks enjoyed an enhanced degree of distinctive character by virtue of the use made of them in relation to the UK market.

78. The opponent submits that the following examples show the marks being used on the goods:



While the first two images demonstrate use of the earlier composite Mark 4, the word “ANCHOR” is absent from the third image, Mark 3 being the word only mark “ANCHOR STEAM BEER”. I note that the words “ANCHOR STEAM BEER” are also used in the text on the invoices provided, as shown under paragraph 80.

79. The evidence of use provided by way of the witness statements and accompanying exhibits is predominantly targeted at a European audience. Exhibit MM2 comprises invoices which relate solely to sales to the Netherlands. In his witness statement, Mr Minami states that Exhibit MM1 demonstrate quantities of products bearing the trade

marks which were shipped to Europe from 2011 to 2018, although I note that there is no breakdown to show how these figures relate directly to the UK market:

Europe Steam Shipments (Units) YoY

		2011	2012	2013	2014	2015	2016	2017	2018 (Aug)
Bier & Co	12oz	20.189	18.446	11.973	6.830	6.929	7.840	6.020	3.010
Bier & Co	20liter	1.957	2.892	2.200	780	1.180	1.040	1.400	382
<b>Bier &amp; Co Total</b>		<b>22.146</b>	<b>21.338</b>	<b>14.173</b>	<b>7.610</b>	<b>8.109</b>	<b>8.880</b>	<b>7.420</b>	<b>3.392</b>
James Clay & Sons	12oz	8.290	12.270	20.860	31.220	40.066	26.528	19.950	10.414
James Clay & Sons	20liter				120	1.450	790	40	
James Clay & Sons	5.16gal	1.230	1.460	2.120	2.650	340		890	350
<b>James Clay &amp; Sons Total</b>		<b>9.520</b>	<b>13.730</b>	<b>22.980</b>	<b>33.990</b>	<b>41.856</b>	<b>27.318</b>	<b>20.880</b>	<b>10.764</b>
Cask Sweden	12oz			8.960	15.270	10.320	4.760	3.780	1.400
Cask Sweden	20liter			1.200	1.280	1.180	440	280	
<b>Cask Sweden Total</b>		<b>-</b>	<b>-</b>	<b>10.160</b>	<b>16.550</b>	<b>11.500</b>	<b>5.200</b>	<b>4.060</b>	<b>1.400</b>
Cask Finland	12oz								1.050
<b>Cask Finland Total</b>		<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>1.050</b>
<b>Grand Total</b>		<b>-</b>	<b>31.666</b>	<b>35.068</b>	<b>47.313</b>	<b>58.150</b>	<b>61.465</b>	<b>41.398</b>	<b>16.606</b>

Source: Anchor Internal File (ABC COMPLETE SHIPMENT FILE 2011 JAN - 2015 DEC) & (ABC COMPLETE SHIPMENT FILE 2016 JAN - 2018 AUG)

80. However, Exhibit MM6 includes over 150 invoices dated from 1/11/2013 – 10/05/2017, with the goods listed as “ANCHOR STEAM BEER” (Mark 3), which all relate to one particular distributor in Yorkshire, being James Clay & Sons. I therefore infer that the above figures relating to James Clay & Sons are in relation to UK use. Mark 4 is also included at the head of the invoices:



**ANCHOR BREWING CO.**  
 1705 Mariposa Street  
 San Francisco, CA 94107  
 Phone: 415 863-8350  
 Fax: 415 552-7049

Invoice	INV44886
Date	1/11/2013
Page	1

**Exhibit MM6, page 1 of 155**  
 24 June 2022  
 HE-Ref.: E1011496

**Invoice**

Bill To:

JAMES CLAY & SONS  
 UNIT 1 GROVE MILLS  
 ELLAND WEST YORKSHIRE HX59DZ

Ship To:

JAMES CLAY & SONS  
 UNIT 25 GROVE MILLS  
 ELLAND WEST YORKSHIRE HX59DZ

Purchase Order No.	Customer ID	Salesperson ID	Shipping Method	Payment Terms	Req Ship Date	Site ID
1812B	JACL01		BAY AREA	Cash	1/9/2013	MARB
Ordered	Shipped	UOM	Item Number	Description	Unit Price	Ext. Price
700.00	700.00	CASE	501-0104	ANCHOR STEAM BEER 24-12OZ 1.00 - CASE	\$17.9500	\$12,565.00
140.00	140.00	CASE	501-0304	LIBERTY ALE 24-12 OZ CASE 1.00 - CASE	\$17.9500	\$2,513.00
140.00	140.00	CASE	501-0204	ANCHOR PORTER 24-12 OZ CASE 1.00 - CASE	\$17.9500	\$2,513.00
140.00	140.00	KEG	501-0102	ANCHOR STEAM BEER 5.16 GAL KEG 1.00 - KEG	\$43.2600	\$6,056.40
40.00	40.00	KEG	501-0302	LIBERTY ALE 5.16 GAL KEG	\$43.2600	\$1,730.40

81. Mr Minami explains that exhibit MM7 contains a selection of photographs which were taken in November 2018 at the facilities of this UK distributor and relate to the sales and shipments identified on the invoices of exhibit MM6, while exhibit MM8 contains a letter dated 1 November 2018 from the UK distributor James Clay to confirm that it has imported and sold 'Steam Beer' in the UK from the opponent in the USA for the previous 5 years. However these are both dated after the later priority date of 31 October 2018.

82. With regard to the evidence submitted by Ms Lewis, in her first witness statement she confirms that each of the printouts in the exhibits were taken on 16 June 2022, being subsequent to the relevant dates, while the attached exhibits to her second witness statement are largely irrelevant, referring to non-UK use, or are again dated outside the relevant timeframe. I further note that exhibit DLL2, being a printout from Wikipedia, uses the term 'steam beer' descriptively:

The screenshot shows the Wikipedia article for 'Steam beer'. On the right side, there is an orange box with the text: 'Exhibit DLL2, page 1 of 1', '24 June 2022', and 'HE-Ref.: E1011496'. The article title is 'Steam beer' and it is noted as being from Wikipedia, the free encyclopedia. A warning box states: 'This article needs additional citations for verification. Please help improve this article by adding citations to reliable sources. Unsourced material may be challenged and removed. Find sources: "Steam beer" - news - newspapers - books - scholar - JSTOR (June 2007)'. The main text defines 'Steam beer' as a highly effervescent beer made by fermenting lager yeasts at warmer ale yeast fermentation temperatures. It lists two meanings: 'Historic steam beer' produced in California and in the East at the James River Steam Brewery in Richmond, Virginia from the mid-19th century to the mid-20th century; and 'Modern California common beer', a competition category name for the beer family, which includes steam beers such as Anchor Steam beer. It further explains that historic steam beer was brewed with lager yeast without the use of true refrigeration (by ice or mechanical means) and was an improvised process originating out of necessity, perhaps as early as the Gold Rush and at least 1860 in Nevada. Modern steam beer, also known as California common beer, was originated by Anchor Brewing Company, which trademarked the term Steam Beer in 1981. Although the modern company has corporate continuity with a small brewery which has made beer since the 1890s, Anchor Steam is a modern craft-brewed lager. The company does not claim any close similarity between its present-day product and turn-of-the-20th-century steam beer.

83. I accept that the evidence shows use of Marks 3 and 4 as trade marks on the goods at issue<sup>17</sup> and that the invoices provided under exhibit MM6 and the letter contained in exhibit MM8 show supply to a UK distributor. However, most of the remaining evidence relates to use in the EU. While the sales figures contained within the UK invoices are considerable, I have no evidence to show the size of the UK beer market, but I would expect it to be substantial. Further, there is nothing to show how or where potential customers were able to access the goods under the marks in the

<sup>17</sup> I acknowledge that the evidence of the marks as shown on the goods does not differentiate between the applied for "Beer; ale; porter; malt beverages", however, I consider that these would all be covered by the wider term "beer".

UK. As such, in the absence of any relevant turnover, advertising or market share figures in relation to the marks being used on the pertinent goods within the UK market, I do not consider the evidence sufficient to establish that the distinctive character of Mark 3 and Mark 4 has been enhanced through use in the UK for the goods being relied upon.

### **Likelihood of confusion**

84. There is no simple formula for determining whether there is a likelihood of confusion. It is clear that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them 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 vice versa (*Canon* at [17]). I must consider the various factors from the perspective of the average consumer, bearing in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

85. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different, but assumes that the goods and/or services are the responsibility of the same or connected undertakings. The distinction between these was explained by Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

“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 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).”

86. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

87. Earlier in this decision, I found all the contested goods to be if not identical, then similar to between a medium to high to the opponent’s goods.

88. I considered that the level of attention of the general public as the average consumer will be medium when selecting the goods, although I acknowledged that the enthusiast may pay a higher degree of attention, both groups selecting the goods at issue by predominantly visual means.

89. Given the descriptive/allusive qualities of the words “STEAM BEER” on the goods at issue, due to the ordinary, dictionary defined word “ANCHOR” being neither

descriptive nor allusive, I found Mark 3 to be inherently distinctive to a medium degree when considered as a whole, while I considered that the additional device element elevated Mark 4 to an above medium degree of distinctiveness, although not to the highest degree. On consideration of the evidence of use of the marks within the UK market, I found it insufficient to find that the distinctive character of the marks had been enhanced through use.

90. In respect of the earlier Mark 2, I considered the word “ANCHOR” to be the distinctive component, making the greatest contribution to the overall impression, although the words “STEAM BEER” would not go unnoticed, while it was the combination of the anchor and leaves device elements, combined with the words “ANCHOR STEAM BEER” in the composite Mark 4 to which the average consumer would pay the most attention.

91. With regard to the contested ‘185 mark, in relation to the opponent’s Mark 3, I found it to be visually similar to a low degree and aurally similar to the contested mark to no more than a medium degree when only the first two words “ANCHOR STEAM” are articulated, reducing to a low degree when Mark 3 is pronounced in its entirety as “ANCHOR STEAM BEER”. In relation to the earlier Mark 4, I found the degree of visual similarity between the marks to be very low, with the marks being aurally similar to a low degree.

92. In respect of the contested ‘186 mark, in relation to the opponent’s Mark 3, I found it to be visually similar to a low to medium degree, while in relation to the earlier Mark 4, I considered that if any similarity between the marks existed, it was to only a very low degree. My finding on the aural similarities between the marks was the same as for the ‘185 mark.

93. Conceptually, I found that as the idea conveyed by the everyday word “ANCHOR” present in each of the earlier marks was absent from both the applied-for marks, due to the shared concept of the “STEAM BEER” element, the marks were conceptually similar to a medium degree.

94. I note the submissions of both parties seem to focus on whether the term “STEAM BEER” is descriptive (the position of the applicant), or, as submitted by the opponent, distinctive in its own right. However, as mentioned previously, it is my view that the common element between the competing marks, being the word “STEAM”, is allusive of a characteristic of the goods, and as such is considered to be low in distinctive character.

95. In making my decision, I acknowledge the guidance of Emma Himsworth K.C., sitting as Appointed Person in *Face2FaceHR Partners Limited v Peninsula Business Services Limited*, Case O/0368/23, on the correct approach to assessing the likelihood of confusion where the common element is not considered to be high in distinctive character. She provided the following summary:

44. (1) The distinctiveness of the mark as a whole must be assessed, taking into account that a minimum degree of distinctiveness must be acknowledged.

(2) The distinctiveness of each of the components of both marks must be assessed with priority being given to the coinciding elements.

(3) The focus of the assessment of the likelihood of confusion should be on the impact of the non-coinciding components on the overall impression of the mark.

(4) Account must be taken of the similarities/differences in the non-coinciding elements of the marks.

(5) A coincidence of an element with a low level of distinctiveness will not usually lead to a likelihood of confusion.

(6) There may be a finding of a likelihood of confusion if (a) the non-coinciding elements of the mark are of lower (or equally low) degree of distinctiveness or are of insignificant visual impact and the overall impression is similar; or (b) the overall impression of the marks is highly similar or identical.”

96. For both the contested marks, while allowing that the average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind, I consider it unlikely that they would mistake one mark for the other. In my view, the average consumer will notice and recall the visual and aural differences between the marks. I consider that the impact of the earlier marks is in the distinctive “ANCHOR” element, with the coinciding element between the competing marks being non-distinctive or, at best, low in distinctive character. I do not consider there is any likelihood of direct confusion as the differences between the marks are too great for confusion to arise. I find this even where the respective goods are held to be identical, which offsets a lesser degree of similarity between the marks.

97. Taking into account the previously outlined guidance of Mr Iain Purvis Q.C. (as he then was), in *L.A. Sugar*, I will now consider whether there might be a likelihood of indirect confusion.

98. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

99. In *Liverpool Gin Distillery Ltd and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, Lord Justice Arnold 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”. Lord Justice Arnold added that there must be “a proper basis” for concluding that there is a likelihood of indirect confusion when there is no likelihood of direct confusion.

100. I acknowledge that the categories listed by Mr Iain Purvis Q.C. (as he then was) are not exhaustive, however, having made a multi-factorial assessment of the various considerations in play, and in particular the low degree of distinctive character (at best)

of the common element “STEAM”, I do not see anything which would lead the average consumer into believing that one mark is a variant brand of the other, or assume that there is an economic connection between the undertakings. I therefore find no likelihood of indirect confusion.

101. The opposition under Section 5(2)(b) fails in respect of both the ‘185 mark and the ‘186 mark.

102. Earlier in my decision under paragraph 27, I explained that I would return to consider the position in respect of the earlier Mark 2, should I consider it necessary to do so. In view of the above findings, even had I found that genuine use of Mark 2 had been proven for the goods relied upon, given my assessment of the distinctive character of the “STEAM” element within the earlier marks, I consider that the outcome in relation to likelihood of confusion against the mark “ANCHOR STEAM” would be the same as for its other marks on which this decision is based.

## **CONCLUSION**

103. In relation to both OP430639 and OP430641, the opposition has failed in its entirety. Subject to any successful appeal, applications UK3671185 & UK3671186 filed by Privatbrauerei Eichbaum GmbH & Co. KG may proceed to registration.

## **COSTS**

104. In these consolidated proceedings, with regard to both oppositions, the applicant has been successful, and is therefore entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice (“TPN”) 2/2016. The costs award will reflect that there were two separate oppositions at issue, albeit that the issues were broadly similar, resulting in the proceedings being consolidated early on. Applying the guidance in that TPN, I award the applicant the sum of £1,400, which is calculated as follows:

Considering two notices of opposition and preparing counterstatements: £400

Preparing evidence and commenting on the other party's evidence:	£600
Preparing written submissions:	£400
<b>Total:</b>	<b>£1,400</b>

105. I therefore order Anchor Brewing Company LLC to pay Privatbrauerei Eichbaum GmbH & Co. KG the sum of £1,400. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 15th day of August 2023**

**Suzanne Hitchings**  
**For the Registrar,**  
**the Comptroller-General**