O/0801/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003631669
BY HACIENDA DEL SACRAMENTO LTD
TO REGISTER THE TRADE MARK:

hacienda del sacramento

IN CLASS 33

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 426394
BY VIÑAS LEIZAOLA S.L.U.

BACKGROUND AND PLEADINGS

1. On 24 April 2021, Hacienda Del Sacramento Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 25 June 2021. The applicant seeks registration for the following goods:

Class 33 Wine; Wines; Mulled wines; Mulled wine; Red wine; Sparkling wines; Wine punch; Rose wines; Dessert wines; Cooking wine; Sparkling wine; Fruit wine; Sweet wines; Still wine; Fortified wines; Red wines; White wine; Sweet wine; White wines; Grape wine; Strawberry wine; Table wines; Aperitif wines; Alcoholic wines; Blackberry wine; Wine coolers [drinks]; Sparkling red wines; Naturally sparkling wines; Acanthopanax wine (Ogapiju); Sparkling white wines; Sparkling grape wine; Wine-based drinks; Low-alcoholic wine; Sparkling fruit wine; Yellow rice wine; Prepared wine cocktails; Natural sparkling wines; Wine-based aperitifs; Black raspberry wine (Bokbunjaju); Beverages containing wine [spritzers]; Korean traditional rice wine (makgeoli); Wines of protected geographical indication; Wines of protected appellation of origin; Japanese sweet grape wine containing extracts of ginseng and cinchona bark.

2. The application was opposed by Viñas Leizaola S.L.U. ("the opponent") on 24 August 2021. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opponent relies upon the following trade mark:

Comparable trade mark (IR) registration no. UK00801123537
Filing date 6 June 2012
Registration date 18 June 2013.
Priority date 11 January 2012.
Relying upon all of the goods for which the earlier mark is registered, namely:

Class 33 Wine; alcoholic beverages (except beer); sparkling wine (cava).

3. As shown above, the opposition is based upon the opponent's comparable trade mark (IR),[1] claiming that there is a likelihood of confusion because the marks are similar, and the goods are either identical or similar.

4. The applicant filed a counterstatement denying the claims made and putting the opponent to proof of use.

5. The opponent is represented by Baron Warren Redfern and the applicant is unrepresented. Neither party requested a hearing, however, the opponent filed evidence in chief and written submissions, and both parties filed submissions in lieu of a hearing. I make this decision having taken full account of all the papers, referring to them as necessary.

EVIDENCE

6. The opponent's evidence consists of the witness statement of Etienne Cordonnier dated 30 May 2022. Ms Cordonnier is the Managing Director of the opponent. Ms Cordonnier's statement is accompanied by 6 exhibits (EC1-EC6).

7. I have taken all of the evidence and submissions into account in reaching this decision.

[1] Following the end of the transition period of the UK's withdrawal from the EU, all international (EU) trade mark designations registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A 'comparable trade mark (IR)' retains the same designation date (filing date), priority date (if applicable) and registration date of the international (EU) trade mark designation.

PRELIMINARY ISSUE

8. In the official letter dated 24 January 2023, the Registry wrote to the parties confirming receipt of the applicant's email dated 13 November 2022. It was noted that this email contained both written arguments and evidential material. However, as it was sent after the evidence rounds had been concluded, as noted in the official letter dated 9 November 2022, the comments and attachments which were provided by the applicant were "unable to be admitted as evidence". That being said, where written arguments were filed, such as the applicant's comments on the visual, aural and conceptual similarity of the marks, these were to be "admitted into the proceedings as written submissions, where the Hearing Officer will determine the appropriate weight to be attached to your comments and documents as part of their final decision".

9. The official letter also noted that the previous comments of the applicant that were filed on 18 and 22 June 2022, which significantly overlaps with the same evidence filed on 13 November 2022, was not admitted into the proceedings because they were not filed in the correct evidential format, such as part of a witness statement with a signed statement of truth.

10. The evidence which is not accepted into the proceedings consists of screenshots filed to support the applicant's submissions that the opponent's evidence consists of "fake invoices". However, as noted above, this was not contained within a signed witness statement so will not be given any due consideration/will be disregarded.

11. Furthermore, the opponent's evidence is contained within a witness statement which is accompanied by a statement of truth. Therefore, if the applicant wanted to pursue their argument any further, they should have either requested cross-examination or directly challenged the evidence in the appropriate evidential format (thereby potentially prompting a response in evidence in reply). Thus, I have nothing before me to suggest that I should disbelieve the evidence of the opponent and, therefore, I am prepared to accept that the invoices provided by the opponent are legitimate.

RELEVANCE OF EU LAW

12. Although the UK has left the EU, 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. This is why this decision continues to make reference to the trade mark case-law of EU courts.

DECISION

Section 5(2)(b)

13. Section 5(2)(b) 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."

14. The opponent's mark qualifies as an earlier mark in accordance with section 6(1)(a) and 6(1)(ab) as its priority date is an earlier date than the filing date of the applicant's mark. As the opponent's mark had completed its registration process more than five years before the filing date of the mark in issue, it is subject to proof of use pursuant to section 6A of the Act.

Proof of use

15. I will begin by assessing whether there has been genuine use of the earlier marks. The relevant statutory provisions are as follows:

16. Section 6A of the Act states:

"(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."

17. As the opponent's earlier 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".

18. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier mark is the five years ending on the filing date of the applicant's mark, i.e. 25 April 2016 to 24 April 2021.

19. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

"114……The CJEU has considered what amounts to "genuine use" of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), 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 Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, 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] and Case C-689/15 W.F. *Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles establihed by these cases 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]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(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]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(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] and [22]. 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]; *Reber* at [29].

(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]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(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] and [76]-[77]; *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].”

Evidence of use

20. I note the following from the opponent’s evidence:

a) The opponent provides the following production and sales figures for 75cl bottles of wine for the years 2016 to 2021:

	Production	Sales
Year 2016	17,979	1,620
Year 2017	7,456	3,210
Year 2018	10,592	7,070
Year 2019	20,538	4,299
Year 2020	26,000	3,149
Year 2021	27,300	6,650

b) Ms Cordonnier notes that the production of wine is “a long way ahead of sales because wine is sold several years after it is produced”.

c) The opponent also provides the following total revenue of its wine “worldwide and in the UK” for 2016 to 2021:

	Total	E.U.
Year 2016	€76.503	76.503
Year 2017	€171.271.	116.540
Year 2018	€232.423	€204.407
Year 2019	€315.639	€211.791
Year 2020	€280.650	€229.650
Year 2021	€269.250	€224.364

d) **Exhibit EC2** contains sample invoices showing the sale of the opponent’s goods in the EU. The invoices are dated between 2016 to 2021. Ms Cordonnier confirms that the invoices relate to sales in Belgium, Denmark, France, Germany, Latvia, Luxembourg, Spain, Switzerland and the UK. I note that the majority of the sales are in relation the following goods:

a. El Sacramento 2011
b. El Sacramento 2012
c. El Sacramento 2012 Magnum
d. El Sacramento DOC Rioja 2012
e. El Sacramento DOC Rioja 2013
f. El Sacramento DOCG Rioja 2014
g. El Sacramento 2014
h. El Sacramento 2015
i. El Sacramento 2016
j. El Sacramento 2017

e) Within the invoices, some of the goods are listed as “12 x 75cl”, or “4 x 1,5L” which I consider pertains to the size of the bottles which are ordered, being

either 75cl or 1,5L. I also note that the following marks are used in the top left hand corner of the invoices:

f) **Exhibit EC3** contains screenshots of the opponent's website from 18 June 2016, 1 September 2017, 12 June 2018, 10 August 2019, 1 October 2020 and 14 April 2021. The above marks are clearly displayed on the page. The website drop downs include history, terroir, method, wine, gallery and contact.

g) **Exhibit EC4** contains the opponent's brochure which Ms Cordonnier states has been distributed in the UK during the relevant period. I note that this contains the following picture of the opponent's wine:

h) **Exhibit EC5** contains examples of press coverage and awards. From the evidence that I can read, I note that The Wine Advocate rated the El Sacramento wines positively in 2018, with most of the release prices at $49. The Wine Enthusiast Buying Guide in February/March 2020 rated the 2015 El

Sacramento Rioja 93 points, which is priced at $74. The opponent also won Gold and Silver awards in 2019 from The Grand International Wine Award for its 2014 and 2015 El Sacramento's riojas.

Form of the mark

21. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union ("CJEU") found that (my emphasis):

> "31. It is true that the 'use' through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas 'genuine use', within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.
>
> 32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in Nestle, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.
>
> 33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition of a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

22. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

"13. […] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative

elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still”.

23. Where the opponent’s mark has been used as registered this will, clearly, be use upon which the opponent can rely. However, and as highlighted above, I note that the mark has been used in the following variants:

24. The crest, composed of the knight, castle and dragon, presented above the words "EL SACRAMENTO" are replicated in the above variants, however, I notice that they are presented in darker purple tones, whereas the mark is presented fully in gold. The burgundy background from the mark is not replicated. Instead, the variants use a white background. I also note that the additional words "VIÑAS LEIZSOLA" are present in the above variants. I do not consider that the stylistic differences alters the distinctive character of the mark. I also consider that the addition of the words "VIÑAS LEIZSOLA" do not prevent the opponent's mark from continuing to indicate origin within the composite mark. The above variants are, therefore, acceptable use of the opponent's mark.

Assessment of genuine use

25. As I have found the mark used in the evidence to be accepted, I will now consider 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.[2]

26. As indicated in the case law cited above, use does not need to be quantitively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as "warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark".

27. As the opponent's First Earlier Mark is a comparable mark, the relevant territory for the period before IP Completion Day (31 December 2020) is the EU, and for the remainder of the period is the UK.

28. Clearly, there are some issues with the opponent's evidence. For example, I have not been provided with any advertising figures, but I have been provided with evidence of marketing activity in the form of third party publications. I also have only been

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

provided with “worldwide and in the UK” sales figures, which would inevitably cover the EU also, but this has not been broken down specifically into territories. However, the invoice evidence demonstrates that sales have been made to Belgium, Denmark, France, Germany, Latvia, Luxembourg, Spain, Switzerland and the UK, and therefore is not geographically limited. Furthermore, while the turnover represents a very low market share when compared to what is an enormous market, I remind myself that use does not always need to be quantitively significant for it to be deemed genuine, and that even minimal use may qualify as genuine if it is deemed to be justified in the economic sector. I have also given consideration to the fact that the production and sale of wine is reliant upon the productivity of the vineyard each year. Smaller vineyards would naturally produce a smaller and more limited collection of wine every year, or in the case of larger vineyards, they may have issues with the certain harvests, which thus this would affect the amount of wine that is produced that year. Therefore, taking all of the evidence as a whole, I am satisfied that the earlier mark has been put to genuine use in relation to wine during the relevant period in the EU and UK.

Fair specification

29. I must now consider whether, or the extent to which, the evidence shows use of the goods and services relied upon. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. 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.”

30. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows:

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria’s Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46.”

31. The goods for which the earlier mark is registered and upon which the opponent relies is class 33 “wine”, “sparkling wine (cava)” and “alcoholic beverages (except beer)”.

32. Clearly, the opponent will be able to rely upon the term “wine”, for which it is shown use. However, for the remainder of its goods, I note that there is no evidence that the opponent provides these goods under its mark. I have no evidence in relation to the sale of sparkling wine, and I also have no evidence in relation to the sale of any other alcoholic beverages which are not wine.

33. Consequently, I consider a fair specification of the earlier mark to be:

Class 33 Wine.

Section 5(2)(b) - case law

34. In making this decision, I bear in mind the following principles 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 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 great degree of similarity between the marks, and vice versa;

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

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

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

(k) if the association between the marks 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

35. The competing goods are as follows:

Opponent's goods	Holder's goods
Class 33 Wine.	Class 33 Wine; Wines; Mulled wines; Mulled wine; Red wine; Sparkling wines; Wine punch; Rose wines; Dessert wines; Cooking wine; Sparkling wine; Fruit wine; Sweet wines; Still wine; Fortified wines; Red wines; White wine; Sweet wine; White wines; Grape wine; Strawberry wine; Table wines; Aperitif wines; Alcoholic wines; Blackberry wine; Wine coolers [drinks]; Sparkling red wines; Naturally sparkling wines; Acanthopanax wine (Ogapiju); Sparkling white wines; Sparkling grape wine; Wine-based drinks; Low-alcoholic wine; Sparkling fruit wine; Yellow rice wine; Prepared wine cocktails; Natural sparkling wines; Wine-based aperitifs; Black raspberry wine (Bokbunjaju); Beverages containing wine [spritzers]; Korean traditional rice wine (makgeoli); Wines of protected geographical indication; Wines of protected appellation of origin; Japanese sweet grape wine containing extracts of ginseng and cinchona bark.

36. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "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."

37. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(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

38. In *Gérard Meric v Office for Harmonisation in the Internal Market (OHIM),* Case T-133/05, the General Court ("GC") stated that:

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 Institut für Lernsysterne 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."

39. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

> "… Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. 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."

Wine.

40. "Wine" appears identically in both specifications.

Wines.

41. The applicant's above goods are self-evidently identical to "wine" in the opponent's specification.

Mulled wines; Mulled wine; Red wine; Sparkling wines; Rose wines; Dessert wines; Cooking wine; Sparkling wine; Fruit wine; Sweet wines; Still wine; Fortified wines; Red

wines; White wine; Sweet wine; White wines; Grape wine; Strawberry wine; Table wines; Aperitif wines; Alcoholic wines; Blackberry wine; Sparkling red wines; Naturally sparkling wines; Acanthopanax wine (Ogapiju); Sparkling white wines; Sparkling grape wine; Low-alcoholic wine; Sparkling fruit wine; Yellow rice wine; Natural sparkling wines; Black raspberry wine (Bokbunjaju); Korean traditional rice wine (makgeoli); Wines of protected geographical indication; Wines of protected appellation of origin; Japanese sweet grape wine containing extracts of ginseng and cinchona bark.

42. The applicant's above goods falls within the broader category of "wine" in the opponent's specification. They are identical on the principle outlined in *Meric.*

Wine punch; Wine coolers [drinks]; Wine-based drinks; Prepared wine cocktails; Beverages containing wine [spritzers].

43. I consider that the applicant's above goods are similar to the opponent's "wine". The applicant's goods are drinks that contain wine combined with soft drinks (such as soda, lemonade, tonic and fruit juices). They are all alcoholic drinks, which are commonly consumed for pleasure whilst socialising, or with the intention of becoming intoxicated. As a result, the goods overlap in nature, method of use and purpose. The goods also overlap in user, being consumed by adults over the age of 18. Taking the above into account, I also consider that the goods are likely to be in competition and they will also overlap in distribution channels as they are likely to be sold by the same retailers, being displayed in the same aisle/on the same shelves in close proximity. Furthermore, the goods are likely to be displayed near each other behind a bar. Taking all of the above into account, I consider that the goods are similar to a high degree.

Wine-based aperitifs.

44. The applicant's above goods are fortified wines, which are wines which contain distilled spirits, such as port, sherry and vermouth. I note that these goods are alcoholic drinks which are generally consumed in smaller amounts than the typical glass of wine, for example. I consider that these goods therefore overlap in nature and method of use with the opponent's "wine". They will also overlap in user, and distribution

channels, being sold in the same aisle in supermarkets and off-licences. The goods are also likely to be displayed near each other behind a bar. The goods are not complementary, but they may be in competition. I therefore consider that the goods are similar to a high degree.

The average consumer and the nature of the purchasing act

45. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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 then was) described the average consumer in these terms:

> "60. 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."

46. I am of the view that the majority of average consumers for the goods will be adult members of the general public over the age of 18 that do not have any expert knowledge in relation to wine. In addition, I also consider that the presence of a smaller, but still significant, proportion of members of the general public will be wine enthusiasts, or experts, who have a greater knowledge of wine. The cost of the goods in question is likely to vary, however, on balance it is likely to be relatively low. The majority of the goods will be purchased relatively frequently. The average consumer will take various factors into consideration such as the origin and age of the goods, the cost, flavour, ingredients and alcohol percentage. Taking all of this into consideration, I consider it likely that a medium degree of attention will be paid during the purchasing process. However, for those average consumers who are wine enthusiasts/experts,

they will also consider additional factors such as the vintage, classification as to the type of wine and its origin. This will, in my view, result in above a medium (but not high) degree of attention being paid during the purchasing process.

47. All of the goods are likely to be purchased by self-selection from the shelves of a range of retail outlets such as supermarkets and off-licences, and their online equivalents. Such goods are also sold in public houses, bars, and restaurants where they will be publicly displayed behind the counter or on a drinks menu. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a webpage. Visual considerations are, therefore, likely to dominate the selection process. However, I do not discount that there will also be an aural component to the purchase given that the goods could be verbally ordered at a bar, or if stocked behind a counter, the average consumer may have to ask the sales assistant for them.

Comparison of the trade marks

48. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU 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."

49. 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.

50. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
	**hacienda del sacramento**

51. The opponent's mark consists of a golden crest composed of a knight on top of a shield which has depictions of a castle and dragon on it. Below the crest is the words "EL SACRAMENTO" in gold. This is all presented on a burgundy background. As I will come to discuss in the conceptual comparison, I consider that the word "SACRAMENTO" is the dominant and distinctive element of the mark. The eye is also naturally drawn to the element of the mark that can be read, and therefore, the device and background will play a lesser role in the overall impression of the mark.

52. The applicant's mark consists of the words "hacienda del sacramento". I consider that, for reasons I will come to discuss in the conceptual comparison, the word "sacramento" is the dominant and distinctive element of the mark, and therefore plays a greater role in the overall impression, with the words "hacienda" and "del" playing lesser roles.

53. Visually, the marks coincide in the letters E and L, followed by the word "SACRAMENTO". This acts as a visual point of similarity. However, the applicant's mark begins with the word "hacienda" followed by the letter D at the front of the letters E and L. The opponent's mark also consists of the golden crest at the top of the mark, and the burgandy background. These all act as points of visual difference. I also bear in mind that the average consumer tends to pay more attention to the beginning of the

marks.[3] Consequently, I consider that the marks are visually similar to between a low and medium degree.

54. Aurally, the crest in the opponent's mark will not be articulated, and therefore it will be pronounced as EL-SACK-RA-MEN-TOE. The applicant's mark will be pronounced as HA-SEA-EN-DAH DEL SACK-RA-MEN-TOE. Consequently, the beginning of the marks differ aurally. However, as the marks overlap in the pronunciation of "EL" element, and the word "SACRAMENTO", they are aurally similar to a medium degree.

55. Conceptually, the opponent submits that the words "EL SACRAMENTO" in its mark is Spanish for "the sacrament", and that as Spanish is widely spoken and understood in the UK, this concept would be conveyed to the average consumer. However, the opponent has not provided any evidence that a significant proportion of average consumers in the UK speak or understand Spanish. I therefore do not consider that the meaning of "the sacrament" would be conveyed by its mark to UK consumers.

56. I consider that a proportion of average consumers would recognise the word "SACRAMENTO" as denoting the geographical location in the US. I also consider that a proportion would recognise the word "SACRAMENTO" as a geographical location, but not necessarily know where it is. A proportion may also recognise it as a foreign word, but will not know the meaning, and a proportion may recognise it as a foreign name/surname. Regardless, the same concept will be conveyed to the average consumer in both marks.

57. The opponent's mark also includes the crest device, which will convey some conceptual meaning, as it is composed of the knight, castle and dragon.

58. The applicant's mark also begins with the word "hacienda". I consider that a significant proportion of the wine buying UK consumers, not just wine experts, and even those who speak Spanish (which I acknowledge would be a small proportion of the UK), would recognise the word "hacienda" as meaning "the house of". For these

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

consumers, taking the mark as a whole, I consider that they would understand the applicant's mark as meaning "the house of Sacramento", and therefore Sacramento would most likely be understood as denoting a place or name. I consider that these consumers, as a collective, would also amount to a significant proportion.

59. However, I also appreciate that there will be a proportion of consumers who would recognise the word "hacienda" as a Spanish word, but it would not convey any particular meaning.

60. Furthermore, both marks consists of the words "EL" and "del" which would be recognised as foreign words which act as a preposition within the marks.

61. Regardless, as both marks share the concept of "SACRAMENTO", I consider that the marks are conceptually similar to between a low and medium degree.

Distinctive character of the earlier trade mark

62. 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 C108/97 and C-109/97 Windsurfing Chiemsee v Huber and Attenberger [1999] ECR 1-2779, 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 promotion of 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)."

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

64. I will begin by assessing the inherent distinctive character of the opponent's mark. As highlighted above, the average consumer would recognise the word "SACRAMENTO" as either a geographical location in the US, an unknown geographical location, a foreign language word, or a foreign name/surname. In all circumstances, save for the recognition as a location or foreign name/surname, none of these meanings are descriptive of the goods. However, for those who consider that Sacramento is a geographical location, or a foreign name/surname, they may assume that the word "SACRAMENTO" is alluding to where the goods are from or who produces them.

65. The opponent's mark also includes the crest device composed of a depiction of a knight, castle and dragon. I note that crests are very commonly used on wine bottles, and therefore minimally contributes to the distinctiveness of the mark.

66. I therefore consider that, taking the mark as a whole into account, for those who consider that the "SACRAMENTO" is foreign language word, which therefore has no distinct meaning, that the opponent's mark is inherently distinctive to a high degree. However, for those who consider that "SACRAMENTO" is a geographical location or foreign name/surname, which as highlighted above, is allusive of the goods, I consider that the opponent's mark is inherently distinctive to between a low and medium degree.

67. Although the opponent has not specifically pleaded enhanced distinctiveness, for the sake of completeness, I will make a finding as to whether I consider the evidence sufficient to demonstrate enhanced distinctiveness. The relevant market for assessing this is the UK market.

68. The turnover figures provided by the opponent are noted as being "worldwide" figures which would include the UK. However, it has not been specifically broken down into territories and therefore I am unable to determine the sales for the UK only. I also have not been provided with UK advertising figures and UK market share figures. I consider that the wine market is saturated, and therefore would be significant in size. Therefore based on the sales alone made by the opponent referred to in paragraph 20(c), I consider that even if these were only sales for the UK, that this would amount to an extremely small proportion of the market. Therefore, taking all of the above into account, I do not consider the evidence sufficient to establish enhanced distinctiveness.

Likelihood of confusion

69. 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 vice versa. It is necessary for me to keep in mind the distinctive character of the earlier 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.

70. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually and conceptually similar to between a low and medium degree.
- I have found the marks to be aurally similar to a medium degree.
- I have found the opponent's mark to vary from being inherently distinctive to between a low and medium degree, or to a high degree, depending on how it is interpreted.
- I have identified the average consumer for the goods to be members of general public, including wine enthusiasts/experts, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process for the wine goods by the general public, and above a medium (but not high) degree of attention will be paid during the purchasing process by wine enthusiasts/experts.
- I have found the parties' goods to be identical or similar to a high degree.

71. Therefore, taking all of the factors listed in paragraph 70 into account, and even bearing in mind the principle of imperfect recollection, I am satisfied that the marks are unlikely to be mistakenly recalled or misremembered as each other. This is on the basis that I do not consider that the average consumer would overlook the word "hacienda" at the beginning the applicant's mark. Consequently, I do not consider there to be a likelihood of direct confusion.

72. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C. sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

> "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."

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

74. As highlighted above, the beginning of the marks tend to make more of an impact than the ends. However, I bear in mind that in *Bristol Global Co Ltd v EUIPO,* T-194/14, the GC held that there was a likelihood of confusion between AEROSTONE (slightly stylised) and STONE if both marks were used by different undertakings in relation to identical goods (land vehicles and automobile tyres). This was despite the fact that the beginnings of the marks were different. The common element – STONE – was sufficient to create the necessary degree of similarity between the marks as wholes for the opposition before the EUIPO to succeed.

75. Furthermore, In *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ 41, Kitchin LJ stated that:

"if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then it may properly find infringement."

76. This was, of course, in the context of infringement. However, the same approach is appropriate under section 5(2).[4] It is not, therefore, necessary for me to find that the majority of consumers will be confused. The question is whether there is a likelihood of confusion amongst a significant proportion of the public displaying the characteristics attributed to an average consumer.

77. I consider that the shared common use of the dominant and distinctive element, SACRAMENTO, in both marks will lead the average consumer to conclude that the marks originate from the same or economically linked undertakings. For the significant proportion of consumers that recognise the applicant's mark as a whole to mean "the house of Sacramento", the consumer would perceive it as either an updated version of the same (opponent's) mark, and therefore indicative of re-branding, or a sub-brand mark (with the crest EL SACRAMENTO mark being the house brand, and hacienda del sacramento mark being the sub-brand). Furthermore, and as noted above, crest devices are commonly used on wine, and therefore are not particularly distinctive when used on these goods. Thus, I do not consider the absence of such a device on either an updated mark, or sub-brand mark, would be noted or given significant weight by the average consumer. Therefore, taking all of the above into account, I consider there to be a likelihood of indirect confusion.

CONCLUSION

78. The opposition is successful in its entirety and the application is refused.

COSTS

79. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award the opponent the sum of **£1,150** as a contribution towards the costs of the proceedings.

80. The sum is calculated as follows:

[4] *Soulcycle Inc v Matalan Ltd* [2017] EWHC 496 (Ch), Mann J.

Filing a Notice of opposition and considering the applicant's counterstatement	£200
Preparing and filing evidence	£500
Filing written submissions	£350
Official Fee	£100
Total	**£1,150**

81. I therefore order Hacienda Del Sacramento Ltd to pay Viñas Leizaola S.L.U. the sum of £1,150. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 21st day of August 2023

L FAYTER

For the Registrar