

O/0821/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004276471

BY DANIEL JOHNSON

TO REGISTER:

FUEL YOUR EDGE

IN CLASSES 5 & 35

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP600003932 BY

NETWORK MOBILE LIMITED

Background and pleadings

1. On 11 October 2025, Daniel Johnson (“the applicant”) applied to register in the UK the trade mark shown on the cover page of this decision (“the applicant’s mark”). The application was accepted and published for opposition purposes on 24 October 2025 and registration is sought for the following goods and services:

Class 5: Nutritional supplements; dietary supplements; food supplements; powdered nutritional supplement drink mixes; amino acid supplements; pre-workout and intra-workout nutritional supplements; creatine preparations; BCAA (branched chain amino acid) supplements; caffeine-based preparations; electrolyte supplements; vitamin and mineral preparations; sports nutrition supplements for performance, endurance, and recovery. Excluding: any goods containing nicotine or for use in connection with nicotine replacement therapy, smoking cessation, or vaping products.

Class 35: Retail, wholesale and online retail services connected with the sale of nutritional supplements, dietary supplements, sports nutrition products, food and drink supplements, protein powders, energy drinks, minerals, shaker bottles, water bottles, towels, gym bags and branded sports apparel; promotional and marketing services relating to sports nutrition and fitness products. Excluding: retail or marketing services relating to nicotine, e-liquids, or smoking cessation products.

2. On 19 January 2026, Network Mobile Limited (“the opponent”) filed a fast track opposition opposing the application in full under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following mark:

YOUR EDGE

UK Registration no. UK00004170978 (“opponent’s mark”)

Filing date 09 March 2025; Registration date 06 June 2025

Relying on all goods, being:

Class 5: Dietary supplement drinks; Vitamin supplement patches; Dietary supplements; Vitamin supplements; Nutritional supplements; Probiotic supplements; Prebiotic supplements; Herbal supplements; Anti-oxidant supplements; Dietary supplements in powder form; Protein supplement shakes; Protein supplements; Food supplements; Liquid vitamin supplements; Dietary supplements for pets; Vitamin supplements for animals.

3. By virtue of relying on section 5(2)(b) of the Act, the opponent's position is that the marks are highly similar visually, aurally and conceptually with the shared wording "your edge" being identical and dominant and the applicant's goods and/or services are identical and/or highly similar to those of the opponent.
4. The applicant filed a counterstatement submitting that he denies use or registration of the applicant's mark would give rise to a likelihood of confusion within the meaning of section 5(2)(b) of the Act, whether directly or indirectly, and he denies each and every allegation set out in the notice of opposition unless expressly admitted in the counterstatement. The applicant only admits that the opponent relies upon UK Trade Mark NO. UK00004170978 for the mark YOUR EDGE and save for this all remaining allegations are denied.
5. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008 but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”
6. Neither party is represented. Neither party filed evidence. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. No hearing was requested or considered necessary. Both the opponent and the applicant filed

written submissions in lieu of a hearing. This decision is taken following a careful perusal of the papers.

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

PRELIMINARY ISSUES

8. In its notice of fast track opposition and statement of grounds, the opponent submits that it operates the domains www.fuelyouredge.co.uk and www.fuelyouredge.com and [fuel_youredge](#) on Instagram and TikTok. The opponent submits that they have historically used "Fuel Your Edge" as a marketing slogan, traded under "Your Edge" and has registered "Your Edge Supplements" at Companies House. The opponent submits that consumers are therefore already accustomed to associating the wording "fuel your edge" with the opponent.
9. In its counterstatement, the applicant submits that it operates within a broader EDGE brand architecture (including marks such as EDGE FUEL, EDGE SUPPLEMENTS and EDGE CUSTOM) reinforcing that FUEL YOUR EDGE will be perceived as part of the applicant's distinct branding rather than the opponent's mark.
10. Whilst the above submissions are noted together with the parties' written submissions in lieu, these have no bearing on the assessment I am required to make. While evidence of other marks in the marketplace may assist in demonstrating that a mark has a weakened distinctive character due to its commonplace use, no evidence has been filed to that effect in these proceedings. As a result, the position in respect of this point is entirely unsupported. When considering the likelihood of confusion under section 5(2)(b) the assessment must

be based, in fact, on the concept of 'notional and fair use' which involves carrying out the comparison of the goods and services based on the specifications before me, not the goods and services effectively provided by the parties or the way in which they reach the market.¹

DECISION

Section 5(2)(b): legislation and case law

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

“5(2) A trade mark shall not be registered if because-

(a) ...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

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

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

13. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

¹ *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06 at [66] and *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at [22]

“(6)(1) In this Act an “earlier trade mark” means –

- (a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.”

14. Given its earlier filing date, the opponent’s mark qualifies as an earlier trade mark under the above provisions. As the opponent’s mark had not completed its registration process more than five years before the filing date of the applicant’s mark, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent may rely on the goods highlighted in its notice of opposition without having to demonstrate genuine use.

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

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks

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

- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a 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; and
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

16. The parties' goods and services are outlined below:

The opponent's goods	The applicant's goods and services
Class 5: Dietary supplement drinks; Vitamin supplement patches; Dietary supplements; Vitamin supplements; Nutritional supplements; Probiotic supplements; Prebiotic supplements; Herbal supplements; Anti-oxidant supplements; Dietary supplements in powder form; Protein supplement shakes; Protein supplements; Food supplements; Liquid vitamin supplements; Dietary supplements for pets; Vitamin supplements for animals.	Class 5: Nutritional supplements; dietary supplements; food supplements; powdered nutritional supplement drink mixes; amino acid supplements; pre-workout and intra-workout nutritional supplements; creatine preparations; BCAA (branched chain amino acid) supplements; caffeine-based preparations; electrolyte supplements; vitamin and mineral preparations; sports nutrition supplements for performance, endurance, and recovery. Excluding: any goods containing nicotine or for use in connection with nicotine replacement therapy, smoking cessation, or vaping products.
	Class 35: Retail, wholesale and online retail services connected with the sale of nutritional supplements, dietary supplements, sports nutrition products, food and drink supplements, protein powders, energy drinks, minerals, shaker bottles, water bottles, towels, gym bags and branded sports apparel; promotional and marketing

	services relating to sports nutrition and fitness products. Excluding: retail or marketing services relating to nicotine, e-liquids, or smoking cessation products.
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17. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.*² where the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgement:

“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.”

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;

² Case C-39/97

- (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.

19. In *Gérard Meric v Office for Harmonisation in the Internal Market*, 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 fur 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.”

20. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), paragraph 12, Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

“[...] 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.”

21. In *Kurt v Hesse v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC stated that “complementary” means:

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

22. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken against transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public is liable to believe that the responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

23. Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

24. I bear in mind that it is permissible to group goods and services together for the purposes of assessment: *Separode Trade Mark*.³
25. In its notice of fast track opposition and statement of grounds, the opponent's position is that the applicant's goods and/or services are identical and/or highly similar to those of the opponent. The opponent submits in its written submissions in lieu that the parties operate in the same class 5 and that the goods and services are identical or highly similar in nature, purpose and target market with both parties operating in the same supplements and fitness sector and targeting the same consumers resulting in a high likelihood of confusion between the marks.
26. In its counterstatement, the applicant submits that while certain goods in class 5 may overlap, similarity of goods alone is insufficient to establish a likelihood of confusion where the marks differ. The applicant also submits that the applicant's mark covers services in class 35 which are not covered by the opponent's earlier mark, providing additional commercial context and reducing any likelihood of confusion.
27. In making the following comparison, I remind myself of Section 60A(1)(b) of the Act which sets out that goods or services are not to be regarded as dissimilar from each other solely on the ground that they appear in different classes under the Nice Classification. I also note that in *Unicorn Studio Inc v Veronese* [2024] EWHC 1098 (Ch), Iain Purvis KC, sitting as deputy High Court judge, stated that any finding of similarity (between goods and services) requires the exercise of common sense.⁴
28. In respect of the applicant's specification in class 5, I note that it includes the limitation "Excluding: any goods containing nicotine or for use in connection with nicotine replacement therapy, smoking cessation, or vaping products". Additionally, I note that the applicant's specification in class 35 includes the limitation "Excluding: retail or marketing services relating to nicotine, e-liquids, or smoking cessation products". I must consider the parties terms using the core of their possible meanings. I consider that the applicant's terms are wide-ranging and the majority of the terms have a level of similarity with the opponent's terms,

³ BL O-399-10 (AP)

⁴ At [24].

regardless of the applicant's limitations. Whilst I bear the applicant's limitations in mind, I will consider the ordinary meaning of each term, unless stated otherwise.

Class 5

Nutritional supplements.

29. The above term of the applicant is self-evidently identical to "nutritional supplements" in the opponent's specification.

Food supplements.

30. The above term of the applicant is self-evidently identical to "food supplements" in the opponent's specification.

Dietary supplements.

31. The above term of the applicant is self-evidently identical to "dietary supplements" in the opponent's specification.

Powdered nutritional supplement drink mixes; pre-workout and intra-workout nutritional supplements; sports nutrition supplements for performance, endurance, and recovery.

32. The above terms fall within the opponent's broader term of "nutritional supplements". As a result, I find that these goods are identical under the principle outlined in *Meric*.

Amino acid supplements; BCAA (branched chain amino acid) supplements.

33. The opponent's specification includes the broad term "dietary supplements" which is not limited in any way. The above applied for goods are commonly dietary in nature and used to supplement and improve a person's diet. Consequently, the

above applied for goods are all encompassed within the opponent's term "dietary supplements" and are thus identical in accordance with the principle in *Meric*.

Creatine preparations.

34. It is my understanding that *creatine preparations* are a type of dietary supplement used to supply energy to the user and their muscles. As the opponent's term "dietary supplements" is broad enough that the applicant's *creatine preparations* falls within this broader term, I find the goods to be identical under the principle outlined in *Meric*.

Vitamin and mineral preparations.

35. The above goods are preparations taken, for example, to address nutrient gaps in diets, to improve or maintain overall health and potentially reduce the risk of certain health conditions. Whilst such vitamins and minerals are normally digested naturally through foodstuffs, they can also be ingested via various preparations. The above terms are dietary supplements as they help fill dietary gaps and support health without replacing food. The opponent's term "dietary supplements" is sufficiently broad so as to cover the above applicant's terms. As a result, I find that these goods are identical under the principle outlined in *Meric*.

Electrolyte supplements.

36. Electrolyte supplements provide essential minerals to help maintain or improve hydration and muscle activity. Dietary supplements provide minerals and nutrients. As the opponent's term "dietary supplements" is broad enough that the applicant's *electrolyte supplements* fall within this broader term, I find the goods to be identical under the principle outlined in *Meric*.

Caffeine-based preparations.

37. Without any submissions from the parties, it is my understanding that *caffeine-based preparations* are a type of "dietary supplement" by virtue of these goods being in class 5, the class 5 heading specifically including "dietary supplements for

human beings and animals” and the Court of Appeal deciding that “the registrar is entitled to treat the class number in the application as relevant to the interpretation of the scope of the application, for example, in the case of an ambiguity in the list of the specification of goods”.⁵ Given this, it is my understanding that the above applicant’s goods fall within the opponent’s broader term of “dietary supplements”. As a result, I find that these goods are identical under the principle outlined in *Meric*.

Class 35

Retail, wholesale and online retail services connected with the sale of nutritional supplements, dietary supplements, sports nutrition products, food and drink supplements, protein powders, energy drinks, minerals, [...].

38. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the GC held that although retail services are different in nature, purpose and method of use to goods, retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

39. In *Tony Van Gulck v Wasabi Frog Ltd*, Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said that:

“9. The position with regard to the question of conflict between use of BOO! for handbags in Class 18 and shoes for women in Class 25 and use of MissBoo for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent’s earlier trade mark in all the circumstances in which the trade mark

⁵ *Altecnic Ltd’s Trade Mark Application* [2002] RPC 34.

applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are 'similar' to goods are not clear cut."

40. However, on the basis of the European courts' judgments in *Sanco SA v OHIM*, Case C-411/13P and *Assembled Investments (Proprietary) Ltd v. OHIM*, Case Page 14 of 27 T105/05, at paragraphs [30] to [35] of the judgment, upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd* Case C-398/07P, Mr Hobbs concluded that:

- i. Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;
- ii. In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;
- iii. It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;
- iv. The GC's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

41. In this case, I compare the applicant's services above with the opponent's goods. These goods and services are complementary as the opponent's goods are important/indispensable to the provision of the above applicant's class 35 services in that they are all types of supplements which can be consumed for sports nutrition and fitness and the average consumer is likely to believe that the undertaking responsible for the opponent's goods is also responsible for the applicant's

services. I also consider that all of the opponent's goods will be sold through the same trade channels as the applicant's services, and to the same users. Consequently, I consider these goods and services to be similar to a medium degree.

Promotional and marketing services relating to sports nutrition and fitness products.

42. The above applicant's services are different in nature, purpose and user to the opponent's goods. Whilst the above applicant's services may promote and market the opponent's goods, the fact that the promotional and marketing services relate to sports nutrition and fitness products does not automatically make them similar to the opponent's goods themselves. The consumers of the above applicant's services are likely to be businesses and not the end consumers being the general public. The goods and services are not in competition and are not complementary. The trade channels differ. Taking all of these factors into consideration, I find the goods and services to be dissimilar.

Retail, wholesale and online retail services connected with the sale of [...] shaker bottles, water bottles [...].

43. I accept that there may be an overlap in trade channels for the above applicant's services with the opponent's goods such as for the likes of large departmental stores or supermarkets which offer an extensive range of goods in many different departments. However, I consider that this does not necessarily mean it is at a sufficient level to establish similarity as, if so, any goods sold at large department stores or supermarkets would have a sufficient level of overlap. While the opponent's goods may be used by the same user, this is at a very general level given the broad nature of the user base being members of the general public. Such an overlap in both user and trade channel is at best fleeting and is not at a sufficient level to establish similarity. I acknowledge that shaker bottles are sometimes used for the consumption of dietary supplements. However, that is too tenuous a link to warrant a finding of similarity. The retail of bottles is not important/indispensable to supplements generally and the users are unlikely to perceive the goods and services as emanating from the same undertaking. Consequently, I do not consider

these goods and services to be complementary and I find the goods and services to be dissimilar.

Retail, wholesale and online retail services connected with the sale of [...] towels, gym bags and branded sports apparel.

44. In this case, I accept that there may be an overlap in trade channels for the above applicant's services with the opponent's goods such as for the likes of large departmental stores or supermarkets which offer an extensive range of goods in many different departments. However, I consider that this does not necessarily mean it is at a sufficient level to establish similarity as, if so, any goods sold at large department stores or supermarkets would have a sufficient level of overlap. While the opponent's goods may be used by the same user, this is at a very general level given the broad nature of the user base being members of the general public. Such an overlap in both user and trade channel is at best fleeting and is not at a sufficient level to establish similarity. Despite this, the users are unlikely to perceive the goods and services as emanating from the same undertaking. The opponent's goods are not important/indispensable to the provision of the above applicant's class 35 services. Consequently, I do not consider these goods and services to be complementary and I find the goods and services to be dissimilar.

Conclusion of goods and services comparison

45. Where there is no similarity of goods or services, there can be no likelihood of confusion in respect of oppositions brought under s5(2)(b) grounds.⁶ As a result, my findings above mean that the opposition fails in respect of the following services, being those that I have found dissimilar:

Class 35: Retail, wholesale and online retail services connected with the sale of [...] towels, gym bags and branded sports apparel; Retail, wholesale and online retail services connected with the sale of [...] shaker bottles, water bottles [...];

⁶ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

Promotional and marketing services relating to sports nutrition and fitness products.

The average consumer and the nature of the purchasing act

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

47. In *Iconix* (cited above), the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

- (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
- (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
- (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
- (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by enabling

courts and tribunals to determine such issues so far as possible without the need for evidence;

- (e) The average consumer's level of attention varies according to the category of goods or services in question; and
- (f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

48. I have no submissions from the opponent as to who the average consumer for the goods at issue will be. The applicant submits that the relevant consumer is reasonably well-informed and accustomed to motivational branding.

49. I am of the view that the average consumer will be both members of the general public and professional consumers such as medical professionals or dieticians, with the purchase of the goods / use of the retail services most likely to be used by the individual consumer, whereas professionals are most likely to use the wholesale services. When selected by members of the general public, the goods will, for the most part, be subject to self-selection from the shelves of retail establishments such as supermarkets or specialist health stores and their online or catalogue equivalents (where available). This means that the mark will be seen and so the visual element of the marks will be the most significant,⁷ though I do not discount the aural component entirely as suggestions may come from word-of-mouth recommendations or advice from sales assistants. The price of the goods will vary, but none of the goods will be prohibitively expensive. The goods will be purchased fairly frequently, and consumers will be alive to factors such as ingredients, suitability, nutritional value and quality. For these goods, I consider that a medium degree of attention will be paid.

50. Turning to the goods selected by professional consumers, the goods are likely to be purchased from suppliers and manufacturers, whereby the selection process

⁷ *New Look Limited v OHIM*, Joined cases T-117/03 to T-119/03 and T-171/03, paragraph 50

will be a combination of visual and aural. Information about the products is likely to be sought primarily from brochures and websites, though professional consumers may also engage in verbal discussions with sales representatives. The professional consumer is likely to select the goods relatively frequently. I do not consider the purchasing act for any of the goods to be merely casual. The level of attention for nutritional supplements / dietary supplements will be medium to high as selecting the correct goods will be important due to the increased liability that will come with their professional role.

51. Consumers will choose a provider of services after having seen promotional material, such as advertisements, browsing websites or seeing signage on physical premises. Visual considerations are, therefore, likely to dominate the selection process. However, given that word of mouth recommendations may be made, or requests made to staff, I do not completely discount an aural component to the purchase. The price of the services will vary depending on the type of service, but none will be prohibitively expensive. For these services, I consider that a medium degree of attention will be paid.

Comparison of marks

52. 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.

53. 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.”

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

55. The respective trade marks are shown below:

The opponent’s mark	The applicant’s mark
YOUR EDGE	FUEL YOUR EDGE

56. In its notice of fast track opposition, the opponent argues that the applicant’s mark wholly incorporates the opponent’s mark which remains the distinctive element. The opponent submits that the addition of the word “FUEL” does not distinguish the marks and instead reinforces the same concept of performance and enhancement. The opponent submits that the marks are highly similar visually, aurally and conceptually, with the shared wording “your edge” being identical and dominant.

57. In its counterstatement, the applicant denies that its mark is similar to the opponent’s mark to the degree alleged, whether visually, aurally or conceptually. The applicant submits that whilst the marks share the words “YOUR EDGE”, those words do not dominate the overall impression of the contested mark, which is perceived as a single, unified expression. The applicant submits that the addition of the word “FUEL” materially alters the structure, syntax, rhythm, and overall commercial impression of the mark and the marks differ in length, grammatical construction, cadence and overall commercial impression.

58. I do not intend to repeat all submissions from both parties in full here. Instead, I will, where necessary, discuss them further below. For the avoidance of doubt,

however, I can confirm that I have taken these submissions into account in making the following comparison.

Overall impression

59. The applicant's mark is a word only mark consisting of the words "FUEL YOUR EDGE". These words hang together to form a message. The overall impression of the mark lies in the combination of the three words, though they do not create a unitary meaning that is separate from the three words individually.

60. The opponent's mark is a word only mark consisting of the words "YOUR EDGE". There are no other elements that contribute to the overall impression of the mark which lies equally across the mark.

Visual comparison

61. At the outset of this comparison, I consider it necessary to set out that as both marks are word only marks, they are protected for use in any standard case. Visually, the marks overlap through the use of the two words "YOUR EDGE" being the entirety of the opponent's mark and the second and third words of the applicant's mark. The marks differ in the presence of the first word of the applicant's mark being "FUEL". Regardless of its role within the mark, this point of difference will have an impact on the visual comparison of the marks. Overall, I am of the view that the shared use of the words "YOUR EDGE" and bearing in mind that consumers tend to focus on the beginning of marks,⁸ which is where the marks differ, is sufficient to result in a finding that the marks at issue are visually similar to a medium degree.

Aural comparison

62. The opponent's mark consists of two syllables and the applicant's mark consists of three syllables. Both will be pronounced in the ordinary way. The second and third syllables of the applicant's mark are identical to the two syllables of the opponent's

⁸ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

mark. Regardless of its role in the applicant's mark, "FUEL" being the first syllable of the applicant's mark, acts as a point of aural difference. I remind myself that consumers tend to focus on the beginnings of marks. Taking all factors into consideration, I find that the marks are aurally similar to a medium degree.

Conceptual comparison

63. Conceptually, the applicant submits that their mark conveys a call to action, whereas the opponent's mark conveys a possessive concept. The applicant states that these meanings are distinct. The applicant further submits that the conceptual difference between the marks is decisive and the meanings of the marks are not equivalent. The applicant submits that "YOUR EDGE" conveys possession and "FUEL YOUR EDGE" conveys action and enhancement.

64. The opponent submits that the marks are conceptually highly similar and the applicant's mark wholly incorporates the opponent's mark. The opponent further submits that the addition of the word "FUEL" does not materially distinguish the marks and instead reinforces the same concept of improving oneself through performance, enhancement and competitive advantage conveyed by the opponent's mark.

65. The opponent's mark consists of two words "YOUR EDGE". I consider that consumers will associate this mark with something that makes you stand out from others or makes you different from others. The applicant's mark consists of three words "FUEL YOUR EDGE". As a whole this mark conveys a message instructing consumers to provide themselves with "FUEL" or sustenance for them to grow or maintain their different qualities that make them stand out. I find that consumers will understand "FUEL" to be qualifying the words "YOUR EDGE". As such, it introduces an additional meaning to the concept of "YOUR EDGE", though the concept of the shared element remains the same: "YOUR EDGE" in both marks refers to what makes a person unique/stand out; the addition of "FUEL" simply means to sustain or give energy to a person's 'edge'. Overall, I consider the marks to be conceptually similar to a medium degree.

Distinctive character of the opponent's mark

66. 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).”

67. 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 or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has not filed evidence of use of its mark. Therefore, I have only the inherent position to consider.

68. As set out above, the opponent's mark is a word only mark that consists of two words “YOUR EDGE”. Both words are ordinary dictionary words that consumers

will understand the meaning of. Placing the words together, I consider that the majority of consumers will understand them or associate them with something that differentiates someone from others or makes them stand out. The opponent's mark has a promotional meaning in the context of the goods, suggesting an advantage or quality which helps the consumer stand out, but it does not describe or allude to what the goods are. Taking all of this into consideration, I am of the view that the inherent distinctiveness of the opponent's mark is no more than medium.

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 and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

70. Whilst conducting a global assessment of the likelihood of confusion I must be aware of the fact that not all aspects of the respective marks will necessarily have the same impact. For example, the importance of the respective visual, aural and conceptual aspects will be dependent on factors such as the way the goods and services at issue are marketed, and in which type of store/platform they are made available.

71. Throughout the course of this decision, I have found that the respective goods and services range from being identical to similar to a medium degree. The average consumers are members of the general public and professional consumers such as medical professionals or dieticians who will select the goods via primarily visual means (though I do not discount an aural component) after having paid either a medium or medium to high degree during the purchasing process depending on the type of goods and services at issue. I have found the marks to be similar to a medium degree from a visual, aural and conceptual perspective. I have found the opponent's mark to possess no more than a medium degree of inherent distinctive character.

72. Taking all of the above into account and even bearing in mind the principle of imperfect recollection, I do not consider that consumers would inaccurately recall or misremember the marks for one another. In my view, the shared use of "YOUR EDGE" is not sufficient to result in consumers overlooking the first word in the applicant's mark, "FUEL", which is where consumers tend to focus. It is my view that when looking to recall the marks, the consumer will pin their recollection of the applicant's mark on the mark as a whole, being "FUEL YOUR EDGE". Taking the above into account, it is my view that the differences between the competing marks are likely to be sufficient for the consumer, paying a medium or medium to high degree of attention, to distinguish between them and avoid mistaking one for the other. As such, notwithstanding the principles of imperfect recollection and interdependency, I find that there is no likelihood of direct confusion, even when considered on identical goods.

73. That leaves indirect confusion to be considered. In respect of such, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the

later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the earlier mark, but also has something in common with it. Taking account of the 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)".

74. 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*,⁹ 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

⁹ BL O/219/16

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.

75. It is not sufficient that a mark merely calls to mind another mark: *Duebros Limited v Heirler Cenovis GmbH*.¹⁰ This is mere association not indirect confusion.

76. The types of examples of indirect confusion as set out in *L.A. Sugar* (cited above) are not exhaustive. However, they are the most usual circumstances where indirect confusion may arise. In the present circumstances, I consider it likely that consumers would, when confronted by the parties’ marks, believe them to originate from the same or economically connected undertakings. In my view the addition of the word “FUEL” to the words “YOUR EDGE” will be seen as a logical addition that consumers would consider to be consistent with a brand extension. For example, the applicant’s mark will be seen as a sub-brand of “YOUR EDGE” that offers goods and services that fuel you such as various supplements, even if said goods and services are not obviously for fuel purposes. Taking all of this into consideration, I consider there to be a likelihood of indirect confusion, even in circumstances where the consumer pays a medium to high degree of attention and where the goods and services are only similar to a medium degree.

CONCLUSION

77. The opposition succeeds in respect of all the goods and services that I have found to be identical or similar. Therefore, the applicant’s mark will, subject to any successful appeal of my decision, be refused registration for the following:

Class 5: Nutritional supplements; dietary supplements; food supplements; powdered nutritional supplement drink mixes; amino acid supplements; pre-workout and intra-workout nutritional supplements; creatine preparations; BCAA (branched chain amino acid) supplements; caffeine-based preparations; electrolyte supplements; vitamin and mineral preparations; sports nutrition supplements for performance, endurance, and recovery. Excluding: any goods

¹⁰ BL O/547/17

containing nicotine or for use in connection with nicotine replacement therapy, smoking cessation, or vaping products.

Class 35: Retail, wholesale and online retail services connected with the sale of nutritional supplements, dietary supplements, sports nutrition products, food and drink supplements, protein powders, energy drinks, minerals. Excluding: retail or marketing services relating to nicotine, e-liquids, or smoking cessation products.

78. I note that there is a separate ongoing opposition against this application that is aimed at all of the applied for goods and services (opposition no. OP000459622). Pending the outcome of that opposition, the applicant's mark may proceed (again, subject to any successful appeal of my decision) for the following services, which I have found to be dissimilar:

Class 35: Retail, wholesale and online retail services connected with the sale of shaker bottles, water bottles, towels, gym bags and branded sports apparel; promotional and marketing services relating to sports nutrition and fitness products. Excluding: retail or marketing services relating to nicotine, e-liquids, or smoking cessation products.

COSTS

79. On balance, I consider that the opponent has enjoyed the greater degree of success in these proceedings. Therefore, I consider that the opponent is entitled to a contribution towards its costs. Given that the applicant has succeeded in registering some of its services, I consider it appropriate to reduce the costs award to a degree in order to reflect the applicant's partial success. As the opponent is considered to be an unrepresented party, the scale published in Tribunal Practice Notice 1/2023 is not applied to them. The sum to be awarded is analogous to that set out in Part 46 of the Civil Procedure Rules. Such costs would be based on £19

per hour.¹¹ At the conclusion of the evidence rounds, the Tribunal wrote to the opponent and invited them to indicate whether they intended to make a request for an award of costs. The opponent completed the proforma with the following hours:

Notice of opposition:	0.5 hours
Drafting submissions:	5 hours
Time spent on communication with IPO:	1 hour
Total:	7 hours
Official fees:	£100

80. I note the opponent has submitted that they spent 7 hours in total on these proceedings. However, the time allocated for the individual categories totals 6.5 hours. I consider this to be reasonable.

81. In the circumstances, I award the opponent the sum of £198.80 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

6.5 hours at £19 per hour:	£123.50
Reduction for applicant's partial success	-£24.70
	= £98.80
Official fee:	£100
Total:	£198.80

82. I therefore order Daniel Johnson to pay Network Mobile Limited the sum of £198.80. The above sum should be paid within 21 days of the expiry of the appeal

¹¹ As was pertinent at the time these proceedings were launched and as set out in The Litigants in Person (Costs and Expenses) Act 1975 (as amended).

period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 10th day of September 2026

N Barratt

For the Registrar