O/0903/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003727520

BY PENG AS

TO REGISTER THE FOLLOWING TRADE MARK:

ANCIENT NUTRITION

IN CLASSES 3, 5, 30, 32 AND 35

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 433361 BY MADE BY BRAVE LIMITED

Background and Pleadings

1. On 30 November 2021, Peng AS, ('the Applicant'), filed an application to register the following trade mark:

ANCIENT NUTRITION

2. The application was published for opposition purposes in the Trade Marks Journal on 18 March 2022. Registration is sought in respect of the following goods and services, all of which have been opposed:

Class 3:	*Skincare preparations; Cosmetic creams and lotions; Beauty lotions; Body cleaning and beauty care preparations; Soaps and gels; Essential oils.*
Class 5:	*Dietary supplements and dietetic preparations; Food supplements; Pharmaceuticals and natural remedies; Pharmaceuticals; Medicinal herbs; Mineral dietary supplements; Vitamin preparations; Vitamin supplements; Vitamin drinks; Mineral nutritional supplements; Dietary supplements for human beings and animals; Protein powder dietary supplements; Dietary supplements in powder form; Protein capsules dietary supplements; Nutritional supplement meal replacement bars for boosting energy; Pharmaceutical and veterinary preparations; Pharmaceuticals; Pharmaceutical preparations for skincare; Pharmaceutical preparations and substances; food supplement capsules; Cannabis for medical purposes; Extracts of medicinal plants; Extracts of medicinal herbs; Collagen for medical purposes.*
Class 30:	*High-protein cereal bars; Snack bars containing a mixture of grains, nuts, and dried fruit [confectionery]; Dried herbs; Protein bars; Edible energy bars based on grains, nuts, oats, dried fruit and/or cereals containing the protein collagen.*

Class 32:	*Flavoured carbonated beverages; Waters; Mineral and aerated waters and other non-alcoholic beverages; Non-alcoholic beverages; Isotonic beverages; Energy drinks; Non-alcoholic drinks enriched with vitamins and mineral salts.*
Class 35:	*Providing online consumer product advice, Providing online consumer product information; Online retail services relating to skincare preparations, cosmetic creams and lotions, beauty lotions, body cleaning and beauty care preparations, soaps and gels, essential oils; Online retail services relating to dietary supplements and dietetic preparations, food supplements, pharmaceuticals and natural remedies, medicinal herbs, mineral dietary supplements, vitamin preparations, vitamin supplements, vitamin drinks, mineral nutritional supplements, dietary supplements for human beings and animals, protein powder dietary supplements, dietary supplements in powder form, protein capsules dietary supplements, nutritional supplement meal replacement bars for boosting energy, food supplement capsules; Online retail services relating to collagen for medical purposes; Online retail services relating to Pharmaceuticals, pharmaceutical and veterinary preparations, pharmaceutical preparations for skincare, pharmaceutical preparations and substances, cannabis for medical purposes, extracts of medicinal plants, extracts of medicinal herbs; Online retail services relating to high-protein cereal bars, snack bars containing a mixture of grains, nuts and dried fruit [confectionery], dried herbs, protein bars; Online retail services relating to edible energy bars based on grains, nuts, oats, dried fruit and/or cereals containing the protein collagen; Online retail services relating to flavored carbonated beverages, waters, mineral, and aerated waters and other non-alcoholic beverages, non-alcoholic beverages, isotonic*

	beverages, energy drinks, non-alcoholic drinks enriched with vitamins and mineral salts.

3. On 29 June 2022, the application was opposed by Made By Brave Limited ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ('the Act').[1] The Opponent relies on the following earlier registration, relying upon all of the goods in respect of which it is registered:

UK00003407542

Filing date: 18 June 2019

Date of entry in register: 27 September 2019

Registered in respect of the following:

Class 5:	*Acne medication; Activated charcoal for medical use; Aloe vera gel for therapeutic purposes; Amino acid preparations for pharmaceutical use; Anti-oxidant food supplements; Bath (Therapeutic preparations for the -); Baths (Salts for mineral water -); Bee pollen for nutraceutical use; Bee pollen for use as a dietary food supplement; Capsules for medicines; Coconut oil for medical purposes; Collagen for medical purposes; Confectionery for medicinal purposes; Dietary and nutritional preparations; Dietary and nutritional supplements; Dietary food supplements; Dietary food supplements used for modified fasting; Dietary supplement drink mixes; Dietary supplement drinks; Dietary supplemental drinks; Dietary supplements; Dietary supplements and dietetic preparations containing CBD oil; Dietary supplements*

[1] The Opposition, as initially pleaded, also included a section 5(3) claim, which was subsequently deemed withdrawn in the absence of supporting evidence. The Opposition therefore proceeds on the basis of s(5)(2)(b) only.

	consisting of vitamins; Dietary supplements for human beings; Dietary supplements for humans not for medical purposes; Dietary supplements for infants; Dietary supplements promoting fitness and endurance; Dietetic and nutritional preparations; Dietetic beverages adapted for medical purposes; Dietetic food adapted for medical use; Dietetic food preparations adapted for medical purposes; Dietetic foods adapted for infants; Dietetic foods adapted for invalids; Dietetic foods adapted for medical use; Dietetic foods for use in clinical nutrition; Dietetic infusions for medical use; Dietetic preparations for children; Dietetic products for invalids; Extracts of medicinal herbs; Food supplements consisting of amino acids; Ginseng for medicinal use; Gummy vitamins; Herbal medicine; Herbal supplements; Herbal tea for medicinal use; Herbs (Smoking -) for medical purposes; Medicated balms; Medicated bath preparations; Medicated candy; Nutritional supplement energy bars; Nutritional supplements; Oils (Medicinal -); Pharmaceutical preparations for the treatment of diseases of the metabolic system; Plant and herb extracts for medicinal use; Prebiotic supplements; Therapeutic preparations for the bath; Vitamin tablets; Vitamins and vitamin preparations.
Class 29:	*Almond milk for culinary purposes; Beverages having a milk base; Broth; Cocoa butter; Cocoa butter for food; Cocoa flavored milk beverages; Coconut fat; Coconut milk [beverage]; Coconut milk for cooking; Coconut milk for culinary purposes; Coconut milk powder; Coconut milk used as beverage; Coconut milk-based beverages; Coconut oil; Coconut oil and fat [for food]; Coconut oil for food; Coffee creamers; Coffee whiteners consisting principally of dairy products; Cooking fats; Cooking oil; Edible oil; Fat (Coconut -); Flavoured milk beverages; Meat extract; Milk based beverages [milk predominating]; Milk beverages; Milk beverages with cocoa; Milk-based beverages containing coffee; Milk-based beverages*

	flavored with chocolate; Milkshakes; Oat milk; Oat-based beverages [milk substitute]; Oils and fats for food; Organic coconut oil for culinary purposes.
Class 30:	*Beverages based on chocolate; Beverages based on coffee; Beverages based on tea; Beverages consisting principally of coffee; Beverages made from cocoa; Beverages made from coffee; Cacao powder; Chicory based coffee substitute; Chicory for use as substitutes for coffee; Chicory mixtures for use as substitutes for coffee; Chocolate; Chocolate drink preparations; Chocolate flavoured beverage making preparations; Chocolate-based beverages; Cocoa beverages; Cocoa preparations; Cocoa preparations for use in making beverages; Cocoa-based beverages; Coffee; Coffee based beverages; Coffee based drinks; Coffee pods; Coffee substitutes; Coffee, teas and cocoa and substitutes therefor; Fruit tea [other than for medical purposes]; Ginseng tea; Green tea; Gummy candies; Herbal tea; High-protein cereal bars; Low-carbohydrate confectionery; Mate [tea]; Tea beverages; Tea mix powders; Tea pods; Teas; Turmeric; Japanese green tea; Edible spices; Edible turmeric.*
Class 32:	*Aloe vera juices; Bottled water; Coconut water as beverage; Coffee-flavored soft drinks; Energy drinks; Energy drinks containing caffeine; Fruit-based beverages; Mineral water; Nutritionally fortified beverages; Nutritionally fortified water; Powders for the preparation of beverages; Preparations for making beverages; Protein drinks; Protein-enriched sports beverages; Smoothies; Soft drinks for energy supply; Sports drinks containing electrolytes; Vegetable-based beverages; Vitamin enriched sparkling water [beverages]; Water-based beverages containing tea extracts.*

4. The Opponent claims that:[2]
   - the parties' goods and services are the 'same';
   - the parties' marks contain the same element 'Ancient';
     and
   - that there is therefore a likelihood of confusion between the parties' marks.

5. The Applicant filed a Defence and Counterstatement in which it denies the claim against it in its entirety.

6. The Opponent represents itself. The Applicant is represented by Daniel Dimov. Neither party filed evidence or written submissions. A hearing was neither requested nor thought necessary. The following decision has been made after careful consideration of the papers before me.

Decision

Section 5(2)(b) of the Act and related case law

7. Section 5(2)(b) of the Act states:

> "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."

[2] At Q5 of the Statement of Grounds

8. In accordance with section 6 of the Act, the Opponent's mark is an earlier mark by virtue of its filing date (18 June 2019) which fell before the filing date of the Applicant's mark (30 November 2021).

9. Section 6A of the Act provides that where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the application date (or priority date) of the applied-for mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged because the Opponent's mark had been registered for less than 5 years on the date on which the Applicant filed its application for registration. The Opponent is therefore entitled to rely upon all of the goods that it seeks to rely upon.

10. The following principles are derived from the decisions of the Court of Justice of the European Union[3] ("CJEU") 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 C120/04; *Shake 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;

[3] 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 Trade Marks 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.

(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 and services

11. Section 60A of the Act provides:

> (1) For the purpose of this Act goods and services-
>
> (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.
>
> (b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.
>
> (2) In subsection (1), the 'Nice Classification' means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.

12. The Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties' goods and services must be taken into account:

> "[23] 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".

13. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281[4], identified the following factors for assessing similarity of the respective goods and services:

[4] *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

(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.

14. Goods (or services) may be grouped together for the purposes of assessment, as Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, said in *Separode Trade Mark* BL O-399-10:

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

15. In making an assessment between the competing goods and services, I bear in mind the decision of the GC in *Gérard Meric v Office for Harmonisation in the Internal Market.*[5] The GC held to the effect that goods and services can be considered as identical when the goods and services designated by the earlier

[5] Case T-133/05

mark are included in a more general category, designated by the trade mark application and vice versa.

16. Case law establishes that "… Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise" but "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."[6]

17. The goods and services to be compared are set out above at [2] and [3].

Class 3

Applicant's goods: *Skincare preparations*

18. 'Skincare preparations' are intended to improve the condition and/or appearance of the skin. I compare the Applicant's goods to the Opponent's class 5 term *Medicated balms* which is sufficiently broad to include medicated skin balms. I note that the Nice classification system groups non-medicated skincare in class 3 and medicated skin preparations in class 5. I am of the view that a 'medicated' skincare product will be understood by the average consumer as a product which contains some sort of ingredient that has a therapeutic effect on a certain skin condition; e.g. a cream containing an ingredient especially for eczema. I find that both 'skincare preparations' and 'medicated balms' will be used on the skin to improve its condition/appearance. Users will also overlap; both goods will be purchased by members of the general public seeking to address a skin concern/aspect. Trade channels will likely coincide; both parties' goods will often be sold in the same retail outlets and their online equivalents and will likely often be located in the same section of the shop e.g. the 'skincare' section. I recognise that 'medicated' skincare goods might be located on a separate shelf from 'non-medicated' versions. The parties' goods are similar in nature; both terms will encompass substances in the form of creams or liquids typically packaged in tubs/pots or bottles. Methods of use

[6] *YouView TV Ltd v Total Ltd,* [2012] EWHC 3158 (Ch).

will also coincide; both parties' goods will be applied topically to the skin. I consider the respective goods to be competitive; one might deliberate over whether to purchase a non-medicated moisturiser (encompassed by the Applicant's term *Skincare preparations*) over the Opponent's *medicated balm.* I do not, however, find complementarity; neither party's goods are necessary or important for each other, although both parties' goods might be presumed to originate from the same undertaking. I find the parties' goods to be highly similar.

Applicant's goods: *Cosmetic creams and lotions; Beauty lotions; beauty care preparations*

19. The Applicant's goods are intended to beautify; i.e. to enhance the appearance of the person in some way, an example being the skin. I compare these goods to the Opponent's class 5 term *Aloe vera gel for therapeutic purposes.* The goods will, in my view, overlap in purpose in that both parties' goods could be used to improve the appearance of the skin. Users will also likely overlap; both goods might be purchased by consumers hoping to improve their skin. The goods might diverge in terms of their specific purposes where, for example, aloe vera gel is used to treat a graze or burn. Although such therapeutic uses typically improve the appearance of the skin (because an improvement in condition often entails an aesthetic improvement) their purpose is not always primarily cosmetic. The parties' goods will be similar in terms of their physical natures where both parties' products are in the form of gels. Methods of use will also overlap; both parties' terms will encompass skincare products applied topically. I consider the respective goods to be competitive; one might deliberate over whether to purchase a moisturiser (encompassed by each of the Applicant's terms) over an aloe vera gel to address dry skin. I do not find complementarity, neither party's goods being necessary or important for each other. I find the parties' goods to be highly similar.

Applicant's goods: *Body cleaning preparations; Soaps and gels*

20. The Applicant's goods are intended to clean the body. I compare these goods to the Opponent's class 5 term *Therapeutic preparations for the bath.* The Opponent's term will, to my mind, cover bath gels and other preparations used while taking a

bath. I consider the parties' respective goods to overlap in purpose to the extent that both will cover preparations for the bath intended to clean the body. However, I acknowledge that the Opponent's therapeutic bath preparations will likely cover goods sought for their therapeutic effects e.g. bath gels, scrubs or soaps containing essential oils for relaxation, for example. There is user overlap in the trite sense that both parties' goods will be purchased by the general public for the same purpose, i.e. cleaning the person. However, the Opponent's goods will more likely be purchased by members of the general public seeking to address an aspect of the health beyond mere cleanliness. Trade channels will likely be shared; both parties' goods will likely be sold through the same retail outlets and their online equivalents. The parties' goods will, in many cases, be similar in terms of physical nature; both parties' terms will, to my mind, cover goods in the form of soaps, gels and scrubs. Methods of use will be the same; both parties' goods will typically be either added to a bath or used to clean oneself while taking a bath. I consider the parties' goods to be competitive in some instances; for example, some average consumers might deliberate over whether to purchase a fragranced bodywash (under the Applicant's terms) over another fragranced bodywash that contains ingredients, e.g. a herbal extract, which place it in the 'therapeutic' category. I do not find complementarity between the parties' goods; neither party's goods are necessary or important for each other. I find the parties' goods to have a high level of similarity.

Applicant's goods: *Essential oils*

21. I understand that the Applicant's goods are natural oils derived from plants which are typically used in a number of ways, including, *inter alia*: for relaxation, stress relief, during massage. I note that the Opponent's class 5 specification contains the term *Oils (Medicinal -).* However, I am of the view that this term covers oils which are ingested rather than applied to the body topically, e.g. cod liver oil. I therefore do not consider a comparison of the Applicant's goods to 'oils (medicinal) to represent the Opponent's best case. I will compare the Applicant's 'essential oils' to the Opponent's class 5 term *Therapeutic preparations for the bath.* I consider the parties' goods to overlap somewhat; I consider that one of the uses of the Applicant's essential oils is to add a few drops to a bath for relaxation. Users

of the respective goods will overlap to the extent that both may be purchased by members of the general public to address an aspect of health or wellbeing. Trade channels may also overlap; both parties' goods might be sold via the same retail outlets and their online equivalents. The parties' goods are somewhat similar in physical nature to the extent that the Opponent's term covers bath oils. Overlap will not be total, however, because the Opponent's term will cover many goods that are not in the form of oils. Methods of use will be similar in so far as one of several uses of essential oils is to add drops to a bath. Again, this overlap will not be total, because the Applicant's term will also cover goods that are not used in this way. Although I have found some overlap between the respective goods in terms of how they are used, owing to the fact that essential oils have several uses, I do not consider the goods to be realistic substitutes for one another. I do not find them to be in a significant competitive relationship. I do not find complementarity, either. I find the respective goods to be similar to a low degree.

Class 5

22. I set out in the following table which goods I find to be identical, either by virtue of identically or synonymously-worded terms, or according to the principle in 'Meric':

Opponent's mark:	Applicant's mark:
Dietary supplements and dietetic preparations containing CBD oil; *Dietary supplements*	*Dietary supplements and dietetic preparations*
Food supplements consisting of amino acids	*Food supplements*
Pharmaceutical preparations for the treatment of diseases of the metabolic system	*Pharmaceuticals;*[7] *Pharmaceutical preparations;* *Pharmaceutical preparations and substances;* *Pharmaceutical preparations for skincare;*

[7] This term appears twice in the Applicant's specification.

Plant and herb extracts for medicinal use	*natural remedies*
Herbal medicine	*Medicinal herbs*
Nutritional supplements	*Mineral dietary supplements;* *food supplement capsules;*
vitamin preparations.	*Vitamin preparations;* *Vitamin supplements;* *Vitamin drinks*
Nutritional supplements	*Mineral nutritional supplements;* *Nutritional supplement meal replacement bars for boosting energy;*
Dietary supplements promoting fitness and endurance	*Dietary supplements for human beings;* *Protein powder dietary supplements;* *Dietary supplements in powder form;* *Protein capsules dietary supplements*
Herbs (Smoking -) for medical purposes; *Herbal medicine*	*Cannabis for medical purposes*
Plant and herb extracts for medicinal use	*Extracts of medicinal plants;* *Extracts of medicinal herbs*
Collagen for medical purposes	*Collagen for medical purposes*
Dietary food supplements	*Dietary supplements for animals*

Applicant's goods: *Dietary supplements for animals*

Applicant's goods: *veterinary preparations*

23. It is my understanding that 'veterinary preparations' encompass preparations used in the treatment and prevention of disease and treatment of injury in animals. Bearing in mind the purposes, users, trade channels, physical natures and methods of use of the parties' goods and services, and considering the matters of competition and complementarity, I do not find the Applicant's goods to bear any level of similarity to any of the Opponent's goods and services. I find the parties' goods and services to be dissimilar.

Class 30

Applicant's goods:

24. I find the following goods to be identical, either by virtue of identically or synonymously-worded terms, or according to the principle in 'Meric':

Opponent's mark:	Applicant's mark:
High-protein cereal bars	*High-protein cereal bars;* *Protein bars;* *Edible energy bars based on grains, nuts, oats, dried fruit and/or cereals containing the protein collagen.*

Applicant's goods: *Snack bars containing a mixture of grains, nuts, and dried fruit [confectionery]*

25. I compare the Applicant's goods to the Opponent's *High-protein cereal bars.* It is my understanding that grains and nuts are ingredients that are typically considered by the average consumer as sources of protein. It is my view that the Applicant's term will likely encompass bars that contain a notable amount of protein. However, I consider that, even if a bar made from grains, nuts and fruits is, in fact, high in protein, it will not necessarily be labelled as, or considered by the average as, a

'high protein cereal bar'. I also acknowledge that not all bars containing grains, nuts and dried fruit will necessarily be particularly high in protein (perhaps owing to their small size or only containing small amounts of cereals/grains and nuts). The parties' goods will overlap in purpose to the extent that the Applicant's goods could cover bars which are high in protein. Both goods will be purchased by the general public. I consider that trade channels will be shared; both goods will often be sold via the same retail outlets and their online equivalents. The goods will overlap in terms of physical nature and methods of use. I consider the goods to be competitive; a consumer seeking a high energy snack might deliberate over whether to purchase one of the Opponent's 'high-protein cereal bars' or a bar within the Applicant's term which is made from grains, nuts and seeds that happens to be, in fact, high protein, although might not be explicitly labelled as such. I do not find the parties' goods to be complementary; neither is necessary or important for each other, although the average consumer might presume both to originate from the same undertaking. I find the parties' goods to be highly similar.

Applicant's goods: *Dried herbs*

26. The Applicant's goods comprise herbs in dried form. I compare these goods against the Opponent's *Herbal tea.* The parties' goods may overlap in purpose somewhat; some mixtures of dried herbs can be used to make a tea. However, the overlap will not be total because not all dried herbs will be used in this way. Both parties' goods will be purchased by the general public, with a smaller number of goods being purchased by professionals, e.g. in the food and drink business. Trade channels will be shared. The goods will be similar in terms of their physical nature; both being in the form of herbs that have been dried. Although some mixes of herbs encompassed by the Applicant's term could be used to make a tea, my view is that they are not commercially realistic substitutes for one another. The average consumer would, to my mind, not deliberate over whether to purchase a pack of herbal tea bags/loose tea over some dried herbs. I do not find complementarity, either; although dried herbs are necessary in order to make herbal tea, an average consumer would unlikely consider both jars/packets of dried herbs and boxes of herbal teas to originate from the same undertaking. I find the parties' goods to have a medium level of similarity.

Class 32

27. I set out in the following table which goods I find to be identical, either by virtue of identically or synonymously-worded terms, or according to the principle in 'Meric':

Opponent's mark:	Applicant's mark:
Fruit-based beverages	*Flavoured carbonated beverages;* *Non-alcoholic beverages* [8]
Bottled water	*Waters;* *Mineral and aerated waters*
Energy drinks containing caffeine	*Energy drinks;*
Nutritionally fortified beverages	*Non-alcoholic drinks enriched with vitamins and mineral salts.*
Sports drinks containing electrolytes[9]	*Isotonic beverages*[10]

Class 35

Applicant's services: *Providing online consumer product advice, Providing online consumer product information*

28. The Opponent's goods comprise items which will typically be sold via retailers, many of which will sell their goods online. Product listings online typically include descriptions and information about the products concerned. I therefore recognise that purchasers of the Opponent's online goods will necessarily also be users of the Applicant's services. Trade channels will also necessarily overlap. However, these factors alone are insufficient to support a finding of similarity. The parties'

[8] This item appears twice in the Applicant's specification.
[9] I understand that 'electrolytes' are substances needed by the body in order for cells to function.
[10] I understand that 'isotonic' drinks are intended to replace electrolytes lost during physical exertion.

goods and services will be very different in terms of their purposes, physical natures and methods of use. They are neither competitive nor complementary. I find the Applicant's services to be dissimilar to the Opponent's goods. If I am wrong about that, then there will be a very low level of similarity between the parties' offerings.

29. The remainder of the Applicant's services are retail services, the majority of which relate to goods within, or encompassing goods within, the Opponent's specification, or goods that have some similarity to the Opponent's goods.

30. When comparing goods against the retailing of goods, I bear in mind *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, in which 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.

31. I also note that on the basis of the European courts' judgments in *Sanco SA v OHIM*,[11] and *Assembled Investments (Proprietary) Ltd v. OHIM*,[12] upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd*,[13] Geoffrey Hobbs QC (as he then was) sitting as the Appointed Person in the MissBoo case,[14] 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 <u>normally</u> associated with the opponent's goods

[11] Case C-411/13P
[12] Case T-105/05, at paragraphs [30] to [35] of the judgment
[13] Case C-398/07P
[14] *Tony Van Gulck v Wasabi Frog Ltd,* Case BL O/391/14; see paragraph 9 of that ruling.

and then to compare the opponent's goods with the retail services covered by the Applicants' trade mark;

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

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

Applicant's services: *Online retail services relating to skincare preparations, cosmetic creams and lotions, beauty lotions, body cleaning and beauty care preparations, soaps and gels*

32. The Applicant's services entail the bringing together, and making available for purchase, goods which I have found to be highly similar to goods within the Opponent's specification. The party's offerings, one being a service and the other being goods, will have very different purposes, natures and methods of use. Users and trade channels may overlap. There will be no competition between the parties' offerings. The goods to which the Applicant's services relate are not identical to the Opponent's goods, but highly similar. Strictly speaking, there is therefore no complementarity between the parties' goods and services. I find the parties' offerings to be dissimilar. If I am wrong about that, then the level of similarity will be very low.

Applicant's services: *Online retail services relating to dietary supplements and dietetic preparations, food supplements, pharmaceuticals and natural remedies, medicinal herbs, mineral dietary supplements, vitamin preparations, vitamin supplements, vitamin drinks, mineral nutritional supplements, dietary supplements for human beings, protein powder dietary supplements, dietary supplements in powder form, protein capsules dietary supplements, nutritional supplement meal replacement bars for boosting energy, food supplement capsules; Online retail services relating to collagen for medical purposes; Online retail services relating*

to Pharmaceuticals, pharmaceutical preparations, pharmaceutical preparations and substances, cannabis for medical purposes, extracts of medicinal plants, extracts of medicinal herbs; Online retail services relating to high-protein cereal bars, snack bars containing a mixture of grains, nuts and dried fruit [confectionery], protein bars; Online retail services relating to edible energy bars based on grains, nuts, oats, dried fruit; Online retail services relating to flavored carbonated beverages, waters, mineral, and aerated waters and other non-alcoholic beverages, non-alcoholic beverages, isotonic beverages, energy drinks, non-alcoholic drinks enriched with vitamins and mineral salts.

33. The retail services enumerated above relate to goods that are identical to goods in the Opponent's specification. The parties' offerings, one being a service and the other being goods, have distinct purposes, natures and methods of use. There will be user overlap; purchasers of the Applicants' goods will, in many cases, necessarily also be consumers of the Opponent's retail services. Trade channels will be shared; both the Opponent's retail services and the goods to which they relate will be accessed/purchased from the same stores/websites. In my view, although the Applicants' goods are necessary in order to deliver the retail services in respect of those goods, I consider it unlikely that the average consumer would presume that the provider of the retail services in respect of those goods also produces those goods. I find the parties' goods and services to have a low level of similarity.

Applicant's services: *Online retail services relating to essential oils; Online retail services relating to dietary supplements for animals; Online services relating to veterinary preparations, pharmaceutical preparations for skincare; Online retail services relating to dried herbs.*

34. The Applicant's services do not encompass any of the Opponent's goods. Bearing in mind the purposes, users, trade channels, physical natures and methods of use of the parties' goods and services, and considering the matters of competition and complementarity, I do not find the Applicant's goods to bear any level of similarity to any of the Opponent's goods and services. I find the parties' goods and services

to be dissimilar. If I am wrong about that, then the level of similarity between the parties' offerings will be very low.

35. Some similarity between the parties' goods and services is necessary in order for an opposition under section 5(2)(b) of the Act to succeed. I will therefore give no further consideration to the goods and services that I have found to be dissimilar, since the opposition must necessarily fail to that extent.

Average consumer and the purchasing act

36. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. The word "average" denotes that the person is typical. 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.

37. The average consumer of the goods and services at issue in this opposition will be the general public. The services will be accessed by entering the physical retail premises or visiting a retailer's website. Typically, the goods will be picked up or examined in physical shops, or, in the case of online purchases, product information will be read, before making a purchase. There may also be an aural aspect to the purchasing process, for instance, as I do not discount, for example 'word of mouth' recommendations or advice sought from sale assistants. In my view, the average consumer would pay no more than a medium level of attention when accessing the services or selecting the goods, taking into account factors such as, *inter alia*: the range of goods available for sale.

Comparison of the marks

Opponent's mark:	Applicants' mark:
	ANCIENT NUTRITION

	

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

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

39. 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.

Overall impression of the marks

40. The Opponent's mark comprises the word elements 'ANCIENT' and 'BRAVE' in a minimally stylised typeface, in large white font, set against a solid black background. A '+' symbol is positioned to the left of the word 'Brave', in a small font size relative to the other elements, in the manner of a superscript. The overall impression resides in the mark in its entirety, with the words 'ANCIENT' and 'BRAVE' having greater visual prominence owing to their positioning and relative size to the much smaller '+' element, which will play a lesser role.

41. The Applicant's mark is a 'word' mark.[15] It comprises the word elements 'ANCIENT NUTRITION'. The overall impression resides in the mark as a whole. The two elements will play a roughly equal role owing to their similar length, with neither element dominating the other.

Visual comparison

42. Both marks include the text element 'Ancient'. Although the characters in the Opponent's mark have some slight stylisation, notional use of the applicant's mark (which is a word-only mark) covers the applicant's mark being presented in a similar font and typeface. The points of visual difference are:
    - the presence of the word 'Nutrition' in the Applicant's mark, which is absent from the Opponent's mark;
    - the presence of the word 'Brave' in the Opponent's mark, which is absent from the Applicant's mark;
    - the presence of the '+' symbol in the Opponent's mark, which his absent from the Applicant's mark;
    - the presence of the solid black background in the Opponent's mark, which is absent from the Applicant's mark.

    I find the parties' marks to have a medium level of visual similarity.

Aural comparison

43. The Opponent's mark is likely to be articulated as 'AYN-SHUNT AND BRAVE'. Although the '+' symbol is small in size relative to the other elements of the mark, I consider that it will be articulated by a significant proportion of average consumers because 'Ancient and Brave' is more intelligible than merely 'Ancient Brave'. The

[15] In *LA Superquimica v EUIPO*, Case T-24/17, at paragraph [39] it was held that:

> ' […] it should be noted that a word mark is a mark consisting entirely of letters, words or groups of words, without any specific figurative element. The protection which results from registration of a word mark thus relates to the word mentioned in the application for registration and not the specific figurative or stylistic aspects which that mark might have. As a result, the font in which the word sign might be presented must not be taken into account. It follows that a word mark may be used in any form, in any colour or font type (see judgment of 28 June 2017, *Josel* v *EUIPO — Nationale-Nederlanden Nederland (NN)*, T-333/15, not published, EU:T:2017:444, paragraphs 37 and 38 and the case-law cited).'

Applicant's mark will likely be articulated by the average consumer as 'AYN-SHUNT NYOO-TRISH-UN'. The first two syllables of the parties' marks are aurally identical. The points of aural difference are:

- the presence of the 'NYOO-TRISH-UN' element in the Applicant's mark, which is absent from the Opponent's mark;
- the presence of the 'AND BRAVE' elements in the Opponent's mark, which are absent from the Applicant's mark.

I find the marks to be aurally similar to no more than a medium degree.

Conceptual comparison

44. In my view, the average consumer will likely understand the word 'ancient' as meaning 'very old' or 'from the distant past'. The word 'and' will be understood as as a 'connector' between other words. The word 'brave' will likely be understood as a synonym for the words 'unafraid' or 'bold/daring'. In my view, the Opponent's mark will conjure the notions of being distant from the past and being unafraid or daring. In the Applicant's mark, the word 'ancient' will likely be understood in the same way. 'Nutrition' will be, in my view, be understood as a nourishment to maintain health. The Applicant's mark will likely conjure the idea of sources or ideas of nutrition that are traditional or that derive from 'ancient' ways of living. I find the parties' marks to have a level of conceptual similarity that is above low but below medium.

Distinctive character of the earlier mark

45. *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 *WindsurfingChiemsee* 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)."

46. Registered trade marks possess varying degrees of inherent distinctive character: perhaps lower where a mark may be suggestive or allusive of a characteristic of the goods, ranging up to those with high inherent distinctive character, such as invented words which have no allusive qualities.

47. The words 'ancient' and 'brave' are ordinary dictionary words with which the average consumer will be familiar. The Opponent's mark, in my view, neither describes nor alludes to the goods in respect of which the mark is registered. I find that the mark has a medium level of inherent distinctive character.

48. The Opponent has not adduced any evidence in these proceedings. I am therefore unable to make an assessment as to whether the earlier mark enjoys an enhanced level of distinctive character.

Likelihood of confusion

49. Confusion can be direct or indirect. Mr Iain Purvis QC, (as he then was) as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v Back Beat Inc*[16]. Direct confusion occurs when one mark is mistaken for another.

[16] Case BL O/375/10 at [16].

In *Lloyd Schuhfabrik*[17], the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly matches it to the imperfect image of the earlier mark in their 'mind's eye'. Indirect confusion occurs when the average consumer recognises that the competing marks are not the same in some respect, but the similarities between them, combined with the goods at issue, leads them to conclude that the goods are the responsibility of the same or an economically linked undertaking.

50. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [10]. When considering all relevant factors 'in the round', I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

51. Despite the identity and similarity that I have identified between the parties' goods and services, my view is that the net effect of the visual, aural and conceptual differences between the parties' marks is sufficient to prevent the average consumer from mistaking one party's mark for the other. I have found the marks to be visually similar to a medium degree and aurally similar to no more than a medium degree. I have found the marks to have a level of conceptual similarity that is more than low but less than medium. Despite both parties' marks containing the word 'ancient', I am of the view that the visual and aural differences that I have identified will be noticed by the average consumer. I find that there is no likelihood of direct confusion. I find this to be the case even though no more than a medium level of attention will likely be paid during the purchasing act.

52. I now consider whether there is a likelihood of indirect confusion. I note that in the recent case of *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*

[17] *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

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.

53. In *L.A. Sugar Limited v Back Beat Inc*[18] Mr Iain Purvis Q. C. (as he then was), as the Appointed Person, explained that [my words in parentheses]:

> 17. Instances where one may expect the average consumer to reach such a conclusion [i.e. to conclude that marks relate to the same or economically linked undertakings] 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)".

54. My view is that the instant case does not fall within any of the categories identified above. It is acknowledged that these categories are not intended to be exhaustive. Although the marks share the element 'ancient', the way in which the word functions within each mark is different. In the Applicant's mark, the words 'ancient'

[18] Case BL O/375/10

and ‘nutrition’ form a unit because ‘ancient’ is an adjective for ‘nutrition’; whereas, in the Opponent’s mark, ‘ancient’ and ‘brave’ stand as unitary concepts linked with a ’+’. Although the Opponent’s mark has a medium level of inherent distinctive character, and the ‘nutrition’ element of the Applicant’s mark is descriptive, it is, in my view, difficult to conceive of the marks being seen as sub-brands or brand variations. To my mind, the construction of the Opponent’s mark is such that it is difficult to see the Applicant’s ‘Ancient Nutrition’ as a commercially effective related brand because it is not a logical extension of the earlier mark. I do not consider there to be any other mental process, outside of the three categories identified by Mr Purvis, according to which the average consumer would presume the marks to derive from the same or economically-related undertakings. I can find no proper basis for a finding of a likelihood of indirect confusion between the parties’ marks.

55. The Opposition has failed in its entirety. Subject to a successful appeal, the application may proceed to registration.

COSTS

56. The Applicant is the successful party and is entitled to a contribution to its costs. The Applicant has filed a Cost Pro Forma in which it claims for 4 hours’ work. I therefore award the Applicant the sum of £76 calculated as follows:[19]

    4 x hours at £19 per hour = £76.

57. I therefore order Made By Brave Limited to pay to Peng AS the sum of £76. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of September 2023

N. R. Morris
For the Registrar,
the Comptroller-General

[19] Litigants in Person (Costs and Expenses) Act 1975, the Civil Procedure Rules Part 46