

O/1071/23

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NOS. UK00003732754 AND UK00003732751

BY AZHAR REHMAN

TO REGISTER THE TRADE MARKS:



AND

KING OF GOOD TIMES

IN CLASSES 29, 30, 32, 35 AND 43

AND

IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO

UNDER NOS. 433105 AND 433106 BY

UNITED BREWERIES LIMITED

BACKGROUND AND PLEADINGS

1. On 14 December 2021, Azhar Rehman (“the applicant”) applied to register the trade marks shown on the cover page of this decision, in the UK. The applications were published for opposition purposes on 28 January 2022 and registration is sought for the goods and services set out in the Annex to this decision.

2. On 28 April 2022, the applications were opposed by United Breweries Limited (“the opponent”) based upon sections 5(2)(a), 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”).¹ Under section 5(2)(a) of the Act, the opponent relies upon the following trade mark:

THE KING OF GOOD TIMES

UKTM no. 2103531

Filing date 24 June 1996; registration date 27 December 1996

Relying upon all goods, namely:

Class 32 Beer.

(“the First Earlier Mark”)

3. Under section 5(2)(b) of the Act, the opponent relies upon the First Earlier Mark, as well as the following trade marks:



UKTM no. 917027814

¹ Although the opponent originally also relied upon section 5(1) of the Act, reliance upon this ground was withdrawn in the opponent’s written submissions in lieu (paragraph 11).

Filing date 25 July 2017; registration date 26 January 2018

Relying on all goods for which the mark is registered, namely:

Class 32 Beers; Mineral and aerated waters and other non-alcoholic beverages; Fruit beverages and fruit juices; Syrups and other preparations for making beverages.

("the Second Earlier Mark")



UKTM no. 917029851

Filing date 25 July 2017; registration date 24 January 2018

Relying on all goods for which the mark is registered, namely:

Class 32 Beers; Mineral and aerated waters and other non-alcoholic beverages; Fruit beverages and fruit juices; Syrups and other preparations for making beverages.

("the Third Earlier Mark")

4. The opponent claims that the marks are identical or similar, and are registered/applied for in respect of identical or similar goods and services. The result, the opponent claims, is that there is a likelihood of confusion.

5. Under section 5(4)(a) of the Act, the opponent relies upon the sign THE KING OF GOOD TIMES which it claims to have been using throughout the UK since June 1996 in relation to "beer". The opponent claims that use of the applications would amount to passing off.

6. The applicant filed counterstatements denying the grounds of opposition and requesting that the opponent provide proof of use of the First Earlier Mark.

7. The proceedings were consolidated pursuant to rule 62 of the Trade Marks Rules 2008 on 18 August 2022.

8. The applicant is represented by Trade Mark Wizards Limited and the opponent is represented by Stevens, Hewlett & Perkins.

9. Only the opponent filed evidence. Neither party requested a hearing, and only the opponent filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

EVIDENCE AND SUBMISSIONS

10. The opponent filed evidence in the form of the witness statement of Shaun Nicholas Sherlock dated 16 March 2023, which is accompanied by 5 exhibits. Mr Sherlock is the opponent's representative in these proceedings.

11. The opponent filed written submissions in lieu dated 17 May 2023.

12. I have taken the evidence and submissions into account in reaching this decision and will refer to them, where necessary, below.

RELEVANCE OF EU LAW

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

DECISION

Sections 5(2)(a) and (b)

14. Section 5(2) of the Act reads as follows:

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

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

(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.”

15. Section 5A of the Act is as follows:

“5A 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.”

16. The trade marks upon which the opponent relies qualify as earlier trade marks pursuant to section 6 of the Act. As the First Earlier Mark had completed its registration process more than 5 years before the application date of the marks in issue, it is subject to proof of use pursuant to section 6A of the Act. The Second and Third Earlier Marks are not subject to the use provisions in section 6A of the Act and the opponent can rely upon the full breadth of their specifications.

Proof of use

17. I will begin by assessing whether there has been genuine use of the First Earlier Mark. The relevant statutory provisions are as follows:

“(1) This section applies where:

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

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

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

(3) The use conditions are met if –

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

(4) For these purposes -

a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

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

18. Section 100 of the Act states that:

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

19. Pursuant to section 6A of the Act, the relevant period for assessing whether there has been genuine use of the First Earlier Mark is the five-year period ending with the filing date of the applications in issue i.e. 15 December 2016 to 14 December 2021.

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

“114. [...] The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

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

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

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

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

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation

has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

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

21. Proven use of a mark which fails to establish that “the commercial exploitation of the mark is real” because the use would not be “viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark” is, therefore, not genuine use.

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

- a) A number of invoices have been provided which are dated within the relevant period.² They include references to products described as “Kingfisher Prem”, “Kingfisher”, “Foc Kingfisher” and “Foc Kingfisher Prem”. However, no reference is made to the words THE KING OF GOOD TIMES, nor does Mr Sherlock provide any information regarding whether these products would have displayed those words on the packaging.
- b) An image of the packaging of the opponent’s beer has been provided.³ However, this is undated.
- c) A screenshot of the Tesco website dated September 2020 has been provided which displays a “Kingfisher Lager Beer 650ml” product.⁴ However, the image is so small that, even using the Zoom feature in the electronic version of the evidence, I am unable to determine whether the product displays the words THE KING OF GOOD TIMES.

² Exhibit SNS 2

³ Exhibit SNS 3

⁴ Exhibit SNS 4

- d) Mr Sherlock states that “the mark THE KING OF GOOD TIMES is also present on every bottle label” (my emphasis). He states that further details of this are provided in Exhibit SNS 5. However, I do not take that statement to confirm that those words have always been on every bottle; rather, it just indicates that they were used on every bottle at the time of Mr Sherlock’s statement. In this regard, I note that the exhibit Mr Sherlock refers to in support of his statement is a document dated 17 October 2022, which is after the relevant period, and discusses the presence of the words on the “rebranded bottle”.⁵ No information is provided as to whether those words also appeared on the bottles prior to the rebrand. In the circumstances, I do not consider it appropriate to make such an inference.
- e) Articles contained within the same document discuss the rebrand, and both are dated May 2022, which suggests that the rebrand is likely to have taken place around that time. The same exhibit includes examples of advertising, but as the document is dated after the relevant period, this does not assist the opponent.

23. I am not satisfied that the opponent’s evidence demonstrates that the opponent has sought to create or maintain a share in the market in the UK for the First Earlier Mark in relation to beer. Whilst there is evidence of sales of Kingfisher products, no information is available to me about the use of the First Earlier Mark on such products during the relevant period. In the absence of such evidence, I am not prepared to find that there has been genuine use of the First Earlier Mark.

24. Consequently, the oppositions based upon the First Earlier Mark must fail. As the First Earlier Mark is the only earlier mark relied upon under the section 5(2)(a) ground, that ground of opposition fails in its entirety. Further, I can only consider the section 5(2)(b) ground insofar as it is based upon the Second and Third Earlier Marks.

⁵ Exhibit SNS 5

Comparison of goods

25. The specifications for the Second and Third Earlier Marks are identical. Consequently, the same comparison will apply to both.

26. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

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

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

28. 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 for 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.”

Class 29

Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked [...] vegetables; eggs; dairy desserts; fruit desserts; whipped cream; jellies, jams, compotes; fruit based fillings for doughnuts, cakes, pies, pastries and biscuits; dairy desserts; dairy-based whipped toppings; nut toppings; edible nuts; fruit based snack foods; nut based snack foods.

29. These are all food products. I accept that there would be an overlap in trade channels with the opponent’s goods at a very general level, to the extent that they are all likely to be sold through supermarkets. However, the specific producers are unlikely to be the same. Further, they are likely to be sold in different parts of a supermarket. They will also, of course, overlap in user to the extent that they are all used by the general public. However, the nature of the goods clearly differs, as does the method of use (other than that they may all be consumed) and purpose. There is no competition or complementarity. I consider the goods to be dissimilar.

Preserved, frozen, dried and cooked fruits [...]

30. These goods are also food products. However, I recognise that, as they relate to fruits, there may be some overlap in nature with the opponent's "fruit juices" to the extent that they may be processed (albeit differently) versions of the same product (i.e. apples, pineapple etc.). However, the specific nature will differ as the opponent's goods will be drinkable liquids, whereas the opponent's goods are foodstuffs. The method of use will differ; the applicant's goods will be cooked or consumed as a snack or part of a meal, whereas the opponent's goods will be drunk. The purpose of the goods clearly differs. There may be some overlap in trade channels and user, for the same reasons outlined above. I have no evidence before me to suggest that the same businesses produce, for example, both processed pineapple food products and pineapple juice and I consider it unlikely that they would. There is no competition or complementarity. Taking all of this into account, I consider the goods to be dissimilar.

Milk and milk products; milk substitutes; milkshakes; milk; milk beverages; flavoured milk beverages; milkshakes; milk products; milk substitutes; dairy products and dairy substitutes.

31. These terms are all (or include) milk-based beverages such as milkshakes. These goods will overlap in purpose with the opponent's non-alcoholic beverages because they are all used to quench the thirst of the drinker. The method of use will also be the same. The nature of the goods differ to a degree as the applicant's goods are all milk-based whereas the opponent's goods are not (by virtue of them being in class 32, not 29). However, they are all liquids. The user of the goods will clearly overlap. I accept that there will be an overlap in trade channels to the extent that all of the goods may be sold through general retailers such as supermarkets. However, these goods are likely to be in different aisles, with the applicant's goods being sold in the chiller cabinets reserved for dairy-based products, and the opponent's goods being sold in soft drinks aisles. That being said, I do accept that to-go versions of these products may be sold alongside each other. There will be a degree of competition, as a consumer might choose between different categories of soft drinks. In my view, these goods are similar to a medium degree.

Class 30

Coffee, tea, cocoa and artificial coffee; frappes; hot chocolate; ice cream drinks and shakes.

32. For the same reasons set out in paragraph 31 above, I consider these goods overlap in trade channels and user with the opponent's non-alcoholic beverages. I also find there to be a competitive relationship. There will also be a degree of overlap in nature and purpose, as all are drinkable liquids. I consider the goods to be similar to a medium degree.

Rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; sandwiches; bakery goods; sweet glazes and fillings; fruit confectionary; edible ices; ice cream; ice cream mixtures; ice cream cones; ice cream powders; frozen yoghurt; puddings; sorbets; sundaes; gelato; waffles; wafers; crepes; pancakes; biscuits; cookies; brownies; cakes; muffins; tarts; pies; cookie dough; doughnuts; macaroons; ready made baking mixtures; cake mixtures; chocolate; sweets; candy; liquorice; marzipan; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); food flavourings; spices; cereal, confectionary, oat, cake, candy, chocolate and energy bars.

33. These are food products. For the same reasons set out above in paragraph 29, I consider the goods to be dissimilar.

Fruit coulis; fruit sauces

34. I recognise that there might be an overlap in nature with the opponent's "syrups [...] for making beverages" because both are liquids that may be made of fruit. However, the purpose and method of use of the goods will differ, as the applicant's goods are typically used as an accompaniment to a dessert or meal, whereas the opponent's goods are used for making beverages. The user of the goods will overlap. I have no evidence before me to suggest an overlap in trade channels, other than that both may be sold in supermarkets (although they would be in different aisles). There

is no competition or complementarity. I consider the goods to be dissimilar. If I am wrong in this finding, then they will be similar to only a very low degree.

Class 32

Non-alcoholic beverages; non-alcoholic cocktails; mineral and aerated waters; non-alcoholic cocktail mixes; fruit beverages, fruit juices and fruit smoothies; vegetable juices and smoothies; cold pressed juices and smoothies; cold pressed shots; cold pressed juice shots; soft drinks; carbonated soft drinks; cola drinks; flavoured carbonated beverages; isotonic non-alcoholic drinks; beverages containing vitamins; protein drinks; energy drinks; sports drinks containing electrolytes; lemonades; aloe vera drinks; sherbet drinks; slush drinks.

35. These goods are all self-evidently identical or identical on the principle outlined in *Merix* to “mineral and aerated waters and other non-alcoholic beverages” in the opponent’s specification.

Syrups and other non-alcoholic preparations for making beverages; flavoured edible bubbles and jellies for preparation of bubble slush and bubble tea beverages; syrups and other non-alcoholic preparations for making beverages.

36. These goods are either self-evidently identical or identical on the principle outlined in *Merix* to “syrups and other preparations for making beverages” in the opponent’s specification.

Class 35

Advertising, marketing and promotional services; business management; business administration; business advisory and consultancy services; office functions; loyalty, incentive and bonus program services; publicity services.

37. These services clearly differ in nature, purpose and method of use to the opponent’s goods. I can see no basis for there to be an overlap in trade channels, and I have no evidence before me to support such a finding. The users may overlap, but

there is no competition or complementarity. I consider the goods and services to be dissimilar.

Online and offline retail and wholesale services in relation to the sale of meat, fish, poultry and game, meat extracts, preserved, frozen, dried and cooked fruits and vegetables, eggs, dairy desserts, fruit desserts, whipped cream, jellies, jams, compotes, fruit based fillings for doughnuts, cakes, pies, pastries and biscuits, dairy desserts, dairy-based whipped toppings, nut toppings, edible nuts, fruit based snack foods, nut based snack foods, rice, tapioca and sago, flour and preparations made from cereals, bread, pastry and confectionery, sandwiches, bakery goods, sweet glazes and fillings, fruit confectionary, edible ices, ice cream, ice cream mixtures, ice cream cones, ice cream powders, frozen yoghurt, puddings, sorbets, sundaes, gelato, waffles, wafers, crepes, pancakes, biscuits, cookies, brownies, cakes, muffins, tarts, pies, cookie dough, doughnuts, macaroons, ready made baking mixtures, cake mixtures, chocolate, sweets, candy, liquorice, marzipan, sugar, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (condiments), fruit coulis, fruit sauces, food flavourings, spices, cereal, confectionary, oat, cake, candy, chocolate and energy bars.

38. These are retail services relating to various food products. Clearly, there may be an overlap in trade channels to the extent that these retail services may be offered by supermarkets, and the opponent's goods may also be sold through supermarkets. For the same reason, users may overlap. However, the purpose, method of use and nature of the goods and services clearly differ. There is no competition or complementarity. In my view, the goods and services are dissimilar.

Online and offline retail and wholesale services in relation to the sale of milk and milk products, milk substitutes, milkshakes, milk, milk beverages, flavoured milk beverages, milkshakes, milk products, milk substitutes, dairy products and dairy substitutes, coffee, tea, cocoa and artificial coffee, frappes, hot chocolate, ice cream drinks and shakes.

39. I acknowledge that there is more likely to be an overlap in trade channels between these services and the opponent's goods because the applicant's services relate to drinks products and the opponent's goods are drinks products. However, the only other point of overlap is the user. The nature, method of use and purposes differ and there is no competition or complementarity. At best, I consider these goods and services to be similar to a low degree.

Online and offline retail and wholesale services in relation to the sale of non-alcoholic beverages, non-alcoholic cocktails, mineral and aerated waters, non-alcoholic cocktail mixes, fruit beverages, fruit juices and fruit smoothies, vegetable juices and smoothies, cold pressed juices and smoothies, cold pressed shots, cold pressed juice shots, soft drinks, carbonated soft drinks, cola drinks, flavoured carbonated beverages, isotonic non-alcoholic drinks, beverages containing vitamins, protein drinks, energy drinks, sports drinks containing electrolytes, syrups and other non-alcoholic preparations for making beverages, lemonades, aloe vera drinks, sherbet drinks, slush drinks, flavoured edible bubbles and jellies for preparation of bubble slush and bubble tea beverages, syrups and other non-alcoholic preparations for making beverages.

40. These retail services relate to the opponent's goods. There is clear overlap in user and trade channels. I also consider the goods and services to be important or indispensable for each other and the average consumer would conclude that they originate from the same undertaking. Consequently, they are complementary. I consider them to be similar to a medium degree.

Class 43

Provision of food and drink; preparation of food and drink for consumption on or off the premises; services for providing food and drink; restaurant services; mobile restaurant services; dessert bar services; milkshake bar services; ice cream parlour services; café and tea room services; cafeteria services; provision of food and drink from market stalls; juice bar services; kiosk services (provision of food and drink); pop-up restaurant services; food and drink catering; buffet services; canteen services; snack bar services; bar services; catering services; takeaway services; hospitality services

in relation to food and drink; corporate hospitality in relation to food and drink; private members dining club services; arranging of wedding receptions food and drink.

41. In relation to these services, the opponent directs me to the decision of this Tribunal in *Gaicho v Casa Gaicho*, BL O/441/18, in which the Hearing Officer considered the similarity of a number of non-alcoholic beverages with services for the provision of food and drink. She stated:

“37. Notwithstanding that the opponent’s services provide convenient facilities for consuming food and drinks, and the goods and services differ in nature, purpose and method of use, the services focus on the consumption of the above goods. There is, to a degree, competition between them for the same reasons given [...] above, i.e. that a consumer may purchase a beverage as goods as an alternative to visiting premises where the beverage may be purchased and consumed. There may be an overlap in channels of trade and there is complementarity. These goods are similar to the opponent’s services to a medium degree.”

42. The terms considered by the Hearing Officer in that case were, of course, not entirely the same as the goods and services before me. However, I do agree that there will be an overlap in trade channels, as the opponent’s goods could be sold as part of the applicant’s services. They will also either be complementarity (because the goods are important or indispensable to each other, such that the average consumer would conclude that they originate from the same or economically linked undertakings) or there will be competition (as the average consumer could choose to either purchase the opponent’s drinks as goods or may visit the applicant’s offerings from which beverages can be purchased). The users will plainly overlap. The method of use, nature and purpose of the goods and services differ. I consider there to be a medium degree of similarity.

Provision of food-ordering services through an on-line computer network; ordering and booking services for restaurants and takeaway restaurants; temporary accommodation.

43. These are all ancillary services that may be provided by a restaurant business. The highest point of the opponent's case is that in some circumstances there may be an overlap in trade channels and user. At best, these services are similar to a low degree.

Consultancy services relating to food preparation; rental of food service equipment; provision of information relating to the preparation of food and drink; provision of information relating to restaurants and takeaways.

44. These appear to me to be services that would all be provided to a restaurant business. Consequently, I can see no overlap in user, nature, method of use, trade channels of purpose with the opponent's specification. There is no competition or complementarity. I consider the goods and services to be dissimilar.

The average consumer and the nature of the purchasing act

45. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

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

46. The average consumer for the goods and services is likely to be a member of the general public. The cost of the purchase is likely to vary, but they are unlikely to be particularly expensive. In the case of some goods, such as mineral water, they will be a low cost, frequent purchase, which would attract a relatively low degree of attention. However, in respect of some of the other goods and services, various factors will be taken into consideration (such as ingredients for the goods and customer service standards and selection of products for the services). Consequently, I consider that a medium degree of attention will be paid during the purchasing act.

47. The goods and services are likely to be selected following perusal of signage on physical premises, product packaging and/or advertisements. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount an aural component to the goods and services given that advice may be sought from a retail assistant and word-of-mouth recommendations may be made.

Comparison of trade marks

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

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

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

50. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade marks
 <p>The logo features a kingfisher bird in flight above a red banner with the word 'KINGFISHER' in white. Below the banner, it says 'STRONG PREMIUM BEER'. The circular border contains the text 'THE KING OF GOOD TIMES' at the top and 'THE FINEST MALTED BARLEY & HOPS' at the bottom. A small crest with 'SERVE COOL' is at the bottom center.</p>	 <p>The logo consists of a white crown above the word 'KING' in large, pink, dotted letters. Below 'KING' is the phrase 'OF Good Times' in a white, cursive script. A pink underline is beneath 'Good Times'.</p>
<p>(the Second Earlier Mark)</p>	<p>(the First Application)</p>
 <p>The logo features a kingfisher bird in flight above a red banner with the word 'KINGFISHER' in white. Below the banner, it says 'PREMIUM LAGER BEER'. The circular border contains the text 'THE KING OF GOOD TIMES' at the top and 'THE FINEST MALTED BARLEY & HOPS' at the bottom. A small crest with 'SERVE COOL' is at the bottom center.</p>	<p>KING OF GOOD TIMES (the Second Application)</p>
<p>(the Third Earlier Mark)</p>	

Overall Impression

51. The First Application consists of the word KING presented in large pink and white lettering, with the K appearing larger than the remaining letters. Underneath that word, in smaller, white font are the words "OF Good Times". Above the K appears a white crown outline device. All of these elements are presented on a black square background. The overall impression of the mark lies in the combination of these elements, with the words KING OF GOOD TIMES forming a unit. The stylisation/presentation used in the mark is quite striking and so makes an important contribution to the overall impression of the mark, although the wording itself does play the greater role. The Second Application consists of the words KING OF GOOD TIMES. There are no other elements to contribute to the overall impression, which lies in the combination of these words.

52. The Second Earlier Mark consists of the word KINGFISHER presented in upper case font on a red and gold label background. Above the word is a kingfisher device. Beneath the word, in much smaller font, are the words STRONG and (smaller again) PREMIUM BEER and SINCE 1857. The words SERVE COOL and a device appear in the inner ring of the label, and the words THE KING OF GOOD TIMES and THE FINEST MALTED BARLEY & HOPS appear at the top and bottom of the outer ring. The overall impression lies in the combination of these elements, with the word KINGFISHER and the kingfisher device playing the greater role due to their size and the fact that they are distinctive for these goods. The words THE KING OF GOOD TIMES play a less dominant role in the overall impression, although they are the third most distinctive element (after the word KINGFISHER and the kingfisher device). The same is true of the Third Earlier Mark, although the colour combinations used differ and the words STRONG and PREMIUM BEER are replaced by the words PREMIUM and LAGER BEER. However, the differing words do not affect my assessment of the relative roles of the various elements in the overall impression of the mark.

Visual Comparison

The First Application

53. The First Application and the Second and Third Earlier Marks overlap to the extent that they all contain the words KING OF GOOD TIMES. However, they differ in that the word KINGFISHER and the kingfisher device, which play the greater role in the Second and Third Earlier Marks, are absent from the First Application. I note that the word THE precedes the words KING OF GOOD TIMES in the Second and Third Earlier Marks, but, in my view, nothing turns on this. There is also a significant difference in the presentational/colour arrangement used in the Second and Third Earlier Marks compared to the First Application. In my view, they are visually similar to a very low degree.

The Second Application

54. The Second Application is incorporated entirely into the Second and Third Earlier Marks. However, there are a number of visual elements to the Second and Third Earlier Marks which are absent from the Second Application, including the dominant elements KINGFISHER and the kingfisher device. In my view, there is only between a low and medium degree of visual similarity between the marks.

Aural comparison

55. As the device/presentational elements of the First Application will not be articulated, the same comparison will apply to both applications.

56. In my view, the only part of the Second and Third Earlier Marks that will be articulated is the word KINGFISHER. The first syllable of that word will be pronounced identically to the first syllable of the First and Second Applications. However, the latter syllables, FISH-ERR in the Second and Third Earlier Marks and OF-GOOD-TIMES in the First and Second Applications, will be pronounced differently. Consequently, I consider there to be only a low degree of similarity between the marks.

Conceptual comparison

57. The Second and Third Earlier Marks will convey the message of a type of bird. However, the words THE KING OF GOOD TIMES will also convey a secondary laudatory message about someone (or something) who is the life and soul of the party. The identical message is conveyed by the applications. However, I bear in mind that the main conceptual message conveyed by the earlier marks (being a type of bird) is absent from the applications. I do not consider that the device/presentational aspects of the First Application will contribute to the message conveyed. Consequently, the marks are all conceptually similar to a low degree.

Distinctive character of the earlier trade marks

58. 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-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in 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).”

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

60. The Second and Third Earlier Marks are, in my view, distinctive to between a medium and high degree; they are both composite marks made up of multiple elements. However, it is the distinctiveness of the common element that is key. The applicant has not argued that the words THE KING OF GOOD TIMES are non-distinctive; indeed, that is not a position that is realistically open to the applicant to take given the mark that is the subject of the Second Application. Nonetheless, I consider the words THE KING OF GOOD TIMES to be of below average distinctiveness due to their laudatory nature.

61. The opponent has filed evidence of use. For the same reasons set out above, I am not satisfied that it has demonstrated use of the words THE KING OF GOOD TIMES, let alone use on a scale sufficient to demonstrate enhanced distinctiveness. Even if the evidence were sufficient to demonstrate enhanced distinctiveness for KINGFISHER (which I do not consider that it is), as it is the distinctiveness of the common element that is key to my assessment, this would not assist the opponent in any event.

Likelihood of confusion

62. 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 them 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 goods and services may be offset by a greater degree of similarity between the respective marks and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the goods and services, and the nature of the purchasing act. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

63. I have found as follows:

- a) The First Application and the earlier marks are visually similar to a very low degree.
- b) The Second Application and the earlier marks are visually similar to between a low and medium degree.
- c) The First and Second Application and the earlier marks are aurally similar to a low degree.
- d) The First and Second Applications and the earlier marks are conceptually similar to a low degree.
- e) The earlier marks are inherently distinctive to between a medium and high degree. However, the common element i.e. the words KING OF GOOD TIMES is inherently distinctive to a below average degree.
- f) The goods and services vary from being identical to similar to only a very low degree (except where I have found them to be dissimilar).
- g) The average consumer is a member of the general public or a business user who will pay either a low or medium degree of attention.

- h) The purchasing process will be predominantly visual, although I do not discount an aural component.

64. Taking all of the above into account, given the differences between the marks, I am satisfied that they are not likely to be mistakenly recalled or misremembered as each other, even where they are used on identical goods. Consequently, I do not consider there to be a likelihood of direct confusion.

65. In deciding whether or not there is indirect confusion, I bear in mind that in *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), Arnold J. (as he then was) considered the impact of the CJEU's judgment in *Bimbo*, Case C-591/12P, on the court's earlier judgment in *Medion v Thomson*. The judge said:

“18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It

does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors.”

66. However, I bear in mind that the fact that the marks include the same words, even if those words play an independent distinctive role in both marks, does not automatically result in a likelihood of confusion. In *AnncO, Inc. V OHIM*, Case T-385/09, the General Court considered an appeal against OHIM’s decision that there was no likelihood of confusion between ANN TAYLOR LOFT and LOFT (both for clothing and leather goods) and found that:

“48. In the present case, in the light of the global impression created by the signs at issue, their similarity was considered to be weak. Notwithstanding the identity of the goods at issue, the Court finds that, having regard to the existence of a weak similarity between the signs at issue, the target public, accustomed to the same clothing company using sub-brands that derive from the principal mark, will not be able to establish a connection between the signs ANN TAYLOR LOFT and LOFT, since the earlier mark does not include the ‘ann taylor’ element, which is, as noted in paragraph 37 above (see also paragraph 43 above), the most distinctive element in the mark applied for.

49 Moreover, even if it were accepted that the ‘loft’ element retained an independent, distinctive role in the mark applied for, the existence of a likelihood of confusion between the signs at issue could not for that reason be automatically deduced from that independent, distinctive role in that mark.

50 Indeed, the likelihood of confusion cannot be determined in the abstract, but must be assessed in the context of an overall analysis that takes into consideration, in particular, all of the relevant factors of the particular case (*SABEL*, paragraph 18 above, paragraph 22; see, also, Case C-120/04 *Medion* [2005] ECR I-8551, paragraph 37), such as the nature of the goods and services at issue, marketing methods, whether the public's level of attention is higher or lower and the habits of that public in the sector concerned. The examination of the factors relevant to this case, set out in paragraphs 45 to 48 above, do not reveal, *prima facie*, the existence of a likelihood of confusion between the signs at issue.”

67. It is convenient to deal with the Second Application first. I bear in mind that the common element is of below average distinctiveness. Whilst the word KINGFISHER and the device are undoubtedly the most distinctive and dominant elements in the Second and Third Earlier Marks, the words THE KING OF GOOD TIMES still carries some distinctiveness in the marks and retains an independent role. Indeed, as noted above, the applicant is hardly in a position to suggest that it would be of no distinctiveness given the subject of the Second Application. In my view, bearing in mind the above case law, whilst the average consumer would undoubtedly notice the differences between the marks, they are likely to view the use of the Second Application as indicating that the opponent is simply using part of its composite mark (forgetting the absence/presence of the word THE) independently, and that they will believe the marks (and the goods and services sold under them) originate from the same or economically linked undertakings. In my view, this will apply where the marks are used on goods and services that are similar to a medium degree or higher. For those goods and services, there is a likelihood of indirect confusion. Where there is only a low (or very low) degree of similarity between the goods and services, I consider that this is sufficient to offset the similarity of the marks and avoid a likelihood of confusion.

68. In respect of the First Application, I do not consider that the same is true. In my view, even when used on identical goods, the strikingly different presentational/device elements of the marks will be sufficient to avoid a likelihood of confusion. I can see no reason why the average consumer would conclude that the opponent would decide to

use part of its composite marks in a way that is so strikingly different from the way it appears in the composite mark, nor has the opponent set out any convincing arguments in that regard. In respect of the First Application, I consider there to be no likelihood of confusion.

69. The opposition directed against the First Application based upon section 5(2)(b) is dismissed.

70. The opposition directed against the Second Application based upon section 5(2)(b) succeeds in respect of the following goods and services only:

Class 29 Milk and milk products; milk substitutes; milkshakes; milk; milk beverages; flavoured milk beverages; milkshakes; milk products; milk substitutes; dairy products and dairy substitutes.

Class 30 Coffee, tea, cocoa and artificial coffee; frappes; hot chocolate; ice cream drinks and shakes.

Class 32 Non-alcoholic beverages; non-alcoholic cocktails; mineral and aerated waters; non-alcoholic cocktail mixes; fruit beverages, fruit juices and fruit smoothies; vegetable juices and smoothies; cold pressed juices and smoothies; cold pressed shots; cold pressed juice shots; soft drinks; carbonated soft drinks; cola drinks; flavoured carbonated beverages; isotonic non-alcoholic drinks; beverages containing vitamins; protein drinks; energy drinks; sports drinks containing electrolytes; syrups and other non-alcoholic preparations for making beverages; lemonades; aloe vera drinks; sherbet drinks; slush drinks; flavoured edible bubbles and jellies for preparation of bubble slush and bubble tea beverages; syrups and other non-alcoholic preparations for making beverages.

Class 35 Online and offline retail and wholesale services in relation to the sale of non-alcoholic beverages, non-alcoholic cocktails, mineral and aerated waters, non-alcoholic cocktail mixes, fruit beverages, fruit juices and fruit smoothies, vegetable juices and smoothies, cold pressed juices and

smoothies, cold pressed shots, cold pressed juice shots, soft drinks, carbonated soft drinks, cola drinks, flavoured carbonated beverages, isotonic non-alcoholic drinks, beverages containing vitamins, protein drinks, energy drinks, sports drinks containing electrolytes, syrups and other non-alcoholic preparations for making beverages, lemonades, aloe vera drinks, sherbet drinks, slush drinks, flavoured edible bubbles and jellies for preparation of bubble slush and bubble tea beverages, syrups and other non-alcoholic preparations for making beverages.

Class 43 Provision of food and drink; preparation of food and drink for consumption on or off the premises; services for providing food and drink; restaurant services; mobile restaurant services; dessert bar services; milkshake bar services; ice cream parlour services; café and tea room services; cafeteria services; provision of food and drink from market stalls; juice bar services; kiosk services (provision of food and drink); pop-up restaurant services; food and drink catering; buffet services; canteen services; snack bar services; bar services; catering services; takeaway services; hospitality services in relation to food and drink; corporate hospitality in relation to food and drink; private members dining club services; arranging of wedding receptions food and drink.

Section 5(4)(a)

71. Section 5(4)(a) of the Act states as follows:

“5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -

a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

aa)...

b) ...

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of “an earlier right” in relation to the trade mark”.

72. Subsection (4A) of section 5 of the Act states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

73. I can deal with this ground relatively swiftly. For the same reasons set out above, I am not satisfied that the opponent’s evidence is sufficient to demonstrate goodwill under the sign relied upon in the UK. In any event, given that the opponent relies only upon “beer” under this ground, which is narrower than its specifications under section 5(2)(b) of the Act, I do not consider that this ground would have put the opponent in a stronger position in any event.

74. The oppositions based upon section 5(4)(a) are dismissed in their entirety.

CONCLUSION

75. The opposition against the First Application is dismissed and the application may proceed to registration.

76. The opposition against the Second Application is successful in relation to the following goods and services, for which the application is refused:

Class 29 Milk and milk products; milk substitutes; milkshakes; milk; milk beverages; flavoured milk beverages; milkshakes; milk products; milk substitutes; dairy products and dairy substitutes.

- Class 30 Coffee, tea, cocoa and artificial coffee; frappes; hot chocolate; ice cream drinks and shakes.
- Class 32 Non-alcoholic beverages; non-alcoholic cocktails; mineral and aerated waters; non-alcoholic cocktail mixes; fruit beverages, fruit juices and fruit smoothies; vegetable juices and smoothies; cold pressed juices and smoothies; cold pressed shots; cold pressed juice shots; soft drinks; carbonated soft drinks; cola drinks; flavoured carbonated beverages; isotonic non-alcoholic drinks; beverages containing vitamins; protein drinks; energy drinks; sports drinks containing electrolytes; syrups and other non-alcoholic preparations for making beverages; lemonades; aloe vera drinks; sherbet drinks; slush drinks; flavoured edible bubbles and jellies for preparation of bubble slush and bubble tea beverages; syrups and other non-alcoholic preparations for making beverages.
- Class 35 Online and offline retail and wholesale services in relation to the sale of non-alcoholic beverages, non-alcoholic cocktails, mineral and aerated waters, non-alcoholic cocktail mixes, fruit beverages, fruit juices and fruit smoothies, vegetable juices and smoothies, cold pressed juices and smoothies, cold pressed shots, cold pressed juice shots, soft drinks, carbonated soft drinks, cola drinks, flavoured carbonated beverages, isotonic non-alcoholic drinks, beverages containing vitamins, protein drinks, energy drinks, sports drinks containing electrolytes, syrups and other non-alcoholic preparations for making beverages, lemonades, aloe vera drinks, sherbet drinks, slush drinks, flavoured edible bubbles and jellies for preparation of bubble slush and bubble tea beverages, syrups and other non-alcoholic preparations for making beverages.
- Class 43 Provision of food and drink; preparation of food and drink for consumption on or off the premises; services for providing food and drink; restaurant services; mobile restaurant services; dessert bar services; milkshake bar services; ice cream parlour services; café and tea room services; cafeteria services; provision of food and drink from

market stalls; juice bar services; kiosk services (provision of food and drink); pop-up restaurant services; food and drink catering; buffet services; canteen services; snack bar services; bar services; catering services; takeaway services; hospitality services in relation to food and drink; corporate hospitality in relation to food and drink; private members dining club services; arranging of wedding receptions food and drink.

77. The opposition against the Second Application is unsuccessful in relation to the following goods and services, for which the application may proceed to registration:

Class 29 Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; eggs; dairy desserts; fruit desserts; whipped cream; jellies, jams, compotes; fruit based fillings for doughnuts, cakes, pies, pastries and biscuits; dairy desserts; dairy-based whipped toppings; nut toppings; edible nuts; fruit based snack foods; nut based snack foods.

Class 30 Rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; sandwiches; bakery goods; sweet glazes and fillings; fruit confectionary; edible ices; ice cream; ice cream mixtures; ice cream cones; ice cream powders; frozen yoghurt; puddings; sorbets; sundaes; gelato; waffles; wafers; crepes; pancakes; biscuits; cookies; brownies; cakes; muffins; tarts; pies; cookie dough; doughnuts; macaroons; ready made baking mixtures; cake mixtures; chocolate; sweets; candy; liquorice; marzipan; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); fruit coulis; fruit sauces; food flavourings; spices; cereal, confectionary, oat, cake, candy, chocolate and energy bars.

Class 35 Advertising, marketing and promotional services; business management; business administration; business advisory and consultancy services; office functions; loyalty, incentive and bonus program services; publicity services; online and offline retail and wholesale services in relation to the sale of meat, fish, poultry and game,

meat extracts, preserved, frozen, dried and cooked fruits and vegetables, eggs, milk and milk products, milk substitutes, milkshakes, milk, milk beverages, flavoured milk beverages, milkshakes, milk products, milk substitutes, dairy products and dairy substitutes, dairy desserts, fruit desserts, whipped cream, jellies, jams, compotes, fruit based fillings for doughnuts, cakes, pies, pastries and biscuits, dairy desserts, dairy-based whipped toppings, nut toppings, edible nuts, fruit based snack foods, nut based snack foods, coffee, tea, cocoa and artificial coffee, frappes, hot chocolate, rice, tapioca and sago, flour and preparations made from cereals, bread, pastry and confectionery, sandwiches, bakery goods, sweet glazes and fillings, fruit confectionary, edible ices, ice cream, ice cream mixtures, ice cream drinks and shakes, ice cream cones, ice cream powders, frozen yoghurt, puddings, sorbets, sundaes, gelato, waffles, wafers, crepes, pancakes, biscuits, cookies, brownies, cakes, muffins, tarts, pies, cookie dough, doughnuts, macaroons, ready made baking mixtures, cake mixtures, chocolate, sweets, candy, liquorice, marzipan, sugar, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (condiments), fruit coulis, fruit sauces, food flavourings, spices, cereal, confectionary, oat, cake, candy, chocolate and energy bars.

Class 43 Provision of food-ordering services through an on-line computer network; ordering and booking services for restaurants and takeaway restaurants; consultancy services relating to food preparation; rental of food service equipment; provision of information relating to the preparation of food and drink; provision of information relating to restaurants and takeaways; temporary accommodation.

COSTS

78. As the applicant has been entirely successful in relation to the opposition against the First Application and has enjoyed a roughly equal degree of success in relation to the opposition against the Second Application, it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. I have

applied an appropriate reduction for the only partial success in relation to the Second Application. In the circumstances, I award the applicant the sum of **£750**, calculated as follows:

Preparing counterstatements and considering the Notices of opposition	£450
Considering the opponent's evidence	£300
Total	£750

79. I therefore order United Breweries Limited to pay Azhar Rehman the sum of £750. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 10th day of November 2023

S WILSON
For the Registrar

ANNEX

Class 29

Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; eggs; milk and milk products; milk substitutes; milkshakes; milk; milk beverages; flavoured milk beverages; milkshakes; milk products; milk substitutes; dairy products and dairy substitutes; dairy desserts; fruit desserts; whipped cream; jellies, jams, compotes; fruit based fillings for doughnuts, cakes, pies, pastries and biscuits; dairy desserts; dairy-based whipped toppings; nut toppings; edible nuts; fruit based snack foods; nut based snack foods.

Class 30

Coffee, tea, cocoa and artificial coffee; frappes; hot chocolate; rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; sandwiches; bakery goods; sweet glazes and fillings; fruit confectionary; edible ices; ice cream; ice cream mixtures; ice cream drinks and shakes; ice cream cones; ice cream powders; frozen yoghurt; puddings; sorbets; sundaes; gelato; waffles; wafers; crepes; pancakes; biscuits; cookies; brownies; cakes; muffins; tarts; pies; cookie dough; doughnuts; macaroons; ready made baking mixtures; cake mixtures; chocolate; sweets; candy; liquorice; marzipan; sugar, honey, treacle; yeast, baking-powder; salt; mustard; vinegar, sauces (condiments); fruit coulis; fruit sauces; food flavourings; spices; cereal, confectionary, oat, cake, candy, chocolate and energy bars.

Class 32

Non-alcoholic beverages; non-alcoholic cocktails; mineral and aerated waters; non-alcoholic cocktail mixes; fruit beverages, fruit juices and fruit smoothies; vegetable juices and smoothies; cold pressed juices and smoothies; cold pressed shots; cold pressed juice shots; soft drinks; carbonated soft drinks; cola drinks; flavoured carbonated beverages; isotonic non-alcoholic drinks; beverages containing vitamins; protein drinks; energy drinks; sports drinks containing electrolytes; syrups and other non-alcoholic preparations for making beverages; lemonades; aloe vera drinks; sherbet drinks; slush drinks; flavoured edible bubbles and jellies for preparation of

bubble slush and bubble tea beverages; syrups and other non-alcoholic preparations for making beverages.

Class 35

Advertising, marketing and promotional services; business management; business administration; business advisory and consultancy services; office functions; loyalty, incentive and bonus program services; publicity services; online and offline retail and wholesale services in relation to the sale of meat, fish, poultry and game, meat extracts, preserved, frozen, dried and cooked fruits and vegetables, eggs, milk and milk products, milk substitutes, milkshakes, milk, milk beverages, flavoured milk beverages, milkshakes, milk products, milk substitutes, dairy products and dairy substitutes, dairy desserts, fruit desserts, whipped cream, jellies, jams, compotes, fruit based fillings for doughnuts, cakes, pies, pastries and biscuits, dairy desserts, dairy-based whipped toppings, nut toppings, edible nuts, fruit based snack foods, nut based snack foods, coffee, tea, cocoa and artificial coffee, frappes, hot chocolate, rice, tapioca and sago, flour and preparations made from cereals, bread, pastry and confectionery, sandwiches, bakery goods, sweet glazes and fillings, fruit confectionary, edible ices, ice cream, ice cream mixtures, ice cream drinks and shakes, ice cream cones, ice cream powders, frozen yoghurt, puddings, sorbets, sundaes, gelato, waffles, wafers, crepes, pancakes, biscuits, cookies, brownies, cakes, muffins, tarts, pies, cookie dough, doughnuts, macarons, ready made baking mixtures, cake mixtures, chocolate, sweets, candy, liquorice, marzipan, sugar, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, sauces (condiments), fruit coulis, fruit sauces, food flavourings, spices, cereal, confectionary, oat, cake, candy, chocolate and energy bars, non-alcoholic beverages, non-alcoholic cocktails, mineral and aerated waters, non-alcoholic cocktail mixes, fruit beverages, fruit juices and fruit smoothies, vegetable juices and smoothies, cold pressed juices and smoothies, cold pressed shots, cold pressed juice shots, soft drinks, carbonated soft drinks, cola drinks, flavoured carbonated beverages, isotonic non-alcoholic drinks, beverages containing vitamins, protein drinks, energy drinks, sports drinks containing electrolytes, syrups and other non-alcoholic preparations for making beverages, lemonades, aloe vera drinks, sherbet drinks, slush drinks, flavoured edible bubbles and jellies for preparation of bubble slush and bubble tea beverages, syrups and other non-alcoholic preparations for making beverages.

Class 43

Provision of food and drink; preparation of food and drink for consumption on or off the premises; services for providing food and drink; restaurant services; mobile restaurant services; dessert bar services; milkshake bar services; ice cream parlour services; café and tea room services; cafeteria services; provision of food and drink from market stalls; juice bar services; kiosk services (provision of food and drink); pop-up restaurant services; food and drink catering; buffet services; canteen services; snack bar services; bar services; catering services; takeaway services; hospitality services in relation to food and drink; corporate hospitality in relation to food and drink; private members dining club services; arranging of wedding receptions food and drink; provision of food-ordering services through an on-line computer network; ordering and booking services for restaurants and takeaway restaurants; consultancy services relating to food preparation; rental of food service equipment; provision of information relating to the preparation of food and drink; provision of information relating to restaurants and takeaways; temporary accommodation.