

O/1114/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003765477  
BY RHINOMOTIVE L.L.C. TO REGISTER THE FOLLOWING TRADE MARK:



IN CLASSES 1, 2, 3, 4, 6, 7, 8, 9, 12, 17, 21 AND 37

AND

IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 435480 BY BARZUKOV OLEG PAVLOVICH

## **Background and Pleadings**

1. On 14 March 2022, Rhinomotive L.L.C., ('the Applicant'), filed an application to register the following trade mark:

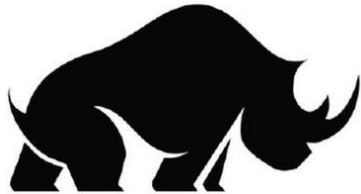


2. The application was published for opposition purposes in the Trade Marks Journal on 10 June 2022. Registration is sought in respect of a variety of goods and services in classes 1, 2, 3, 4, 6, 7, 8, 9, 12, 17, 21 and 37, the following of which have been opposed:

Class 1:	<i>Additives chemical to motor fuel; Adhesives for industrial purposes; Automobile body fillers; Extinguishing compositions (Fire-); Frosting chemicals (Glass-); Glue for industrial purposes; Industrial chemicals; Coolants for vehicle engines; Chemical additives for oils; Detergent additives to petrol [gasoline].</i>
Class 21:	<i>Aerosol dispensers, not for medical purposes; Beaters, non-electric; Bins (Dust—); Boot jacks; Bottle openers; bottles; Brooms; Brushes; Brushes (electric-), except parts of machines; Scrubbing brushes; Buckets; Buckskin for cleaning; Chamois leather for cleaning; Cleaning instruments [hand- operated]; Cleaning (Rags [cloth] for—); Cleaning tow; Closures for pot lids; Cups; Dusting cloths [rags]; Funnels; Glass flasks [containers]; Gloves (Polishing—); Glue-pots; Jugs; Mops wringers; Mops; Pads for cleaning; Spouts; Sprinkling devices.</i>

3. On 9 August 2022, the application was opposed by Barzukov Oleg Pavlovich ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). The opposition is directed against all of the Applicant's goods in classes 1 and 21 only. The Opponent relies on the following earlier registration, relying on the following goods in classes 1 and 21 only:

WO0000001508824



Date of protection of the IR in the UK: 25 March 2020

Designation date: 15 August 2019

International Registration date: 15 August 2019

Office of origin: Russian Federation

Priority date 27 March 2019

Class 1:	<i>Agar-agar; alginates for the food industry; antioxidants for use in the manufacture of food supplements; antioxidants for use in the manufacture of pharmaceuticals; albumin [animal or vegetable, raw material]; animal albumen [raw material]; iodised albumen; malt albumen; artificial sweeteners [chemical preparations]; vitamins for the food industry; vitamins for use in the manufacture of cosmetics; vitamins for use in the manufacture of food supplements; vitamins for use in the manufacture of pharmaceuticals; glycerine for industrial purposes; glucose for the food industry; gluten for the food industry; dextrin [size]; titanium dioxide for industrial purposes; casein for the food industry; tartaric acid; citric acid for industrial purposes; lactic acid; carbonic acid; spirits of vinegar [dilute acetic acid]; phosphoric acid; oxalic acid; fatty acids; mineral acids; gluten</i>
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	<p><i>[glue], other than for stationery or household purposes; beer preserving agents; preservatives for use in the pharmaceutical industry; biological tissue cultures, other than for medical or veterinary purposes; cultures of microorganisms, other than for medical and veterinary use; lactose [raw material]; lactose for the food industry; lecithin [raw material]; lecithin for the food industry; oils for the preservation of food; flour for industrial purposes; tapioca flour for industrial purposes; potato flour for industrial purposes; beer-clarifying and preserving agents; wax-bleaching chemicals; fat-bleaching chemicals; pectin for the food industry; preparations for stimulating cooking for industrial purposes; enzyme preparations for the food industry; filtering preparations for the beverages industry; chemical preparations for smoking meat; chemical substances for preserving foodstuffs; protein [raw material]; proteins for the food industry; proteins for use in the manufacture of food supplements; proteins for use in manufacture; saccharin; cream of tartar for the food industry; enzymes for the food industry; milk ferments for the food industry; tea extracts for the food industry; tea extracts for use in the manufacture of pharmaceuticals; emulsifiers.</i></p>
<p><b>Class 21:</b></p>	<p><i>Bottles; heat-insulated containers; heat-insulated containers for beverages; thermally insulated containers for food; fitted picnic baskets, including dishes; portable cool boxes, non-electric; insulating flasks; hip flasks; drinking bottles for sports; cocktail shakers; glass and plastic bottles included in this class; drinking bottles for sports; cocktail shakers for use in sports.</i></p>

4. The Opponent claims that the parties' marks are similar and for identical or similar goods.
5. The Applicant filed a defence and counterstatement in which it denies the claim against it in its entirety.

6. The Opponent is represented by Haseltine Lake Kempner LLP. The Applicant is represented by AA Thornton IP LLP. Neither party filed evidence or written submissions. A hearing was neither requested nor thought necessary, and neither party filed written submissions in lieu thereof. 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.”

8. In accordance with section 6 of the Act, the Opponent’s mark is an earlier mark by virtue of its priority date (27 March 2019) which fell before the filing date of the applied-for mark (14 March 2022).
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 enjoyed protection in the UK for less than 5 years on the filing date of the applied-for mark.

10. The following principles are derived from the decisions of the Court of Justice of the European Union<sup>1</sup> (“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;

(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;

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<sup>1</sup> 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.

(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**

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 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<sup>2</sup>, identified the following factors for assessing similarity of the respective goods and services:

- (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;

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<sup>2</sup> *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

(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 General Court in *Gérard Meric v Office for Harmonisation in the Internal Market*.<sup>3</sup> The General Court held to the effect that goods and services can be considered as identical when the goods and services designated by the earlier 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.”<sup>4</sup>

17. The goods to be compared are as follows:

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<sup>3</sup> Case T-133/05

<sup>4</sup> *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch).

Earlier mark:	Contested mark:
<p>Class 1:</p> <p><i>Agar-agar; alginates for the food industry; antioxidants for use in the manufacture of food supplements; antioxidants for use in the manufacture of pharmaceuticals; albumin [animal or vegetable, raw material]; animal albumen [raw material]; iodised albumen; malt albumen; artificial sweeteners [chemical preparations]; vitamins for the food industry; vitamins for use in the manufacture of cosmetics; vitamins for use in the manufacture of food supplements; vitamins for use in the manufacture of pharmaceuticals; glycerine for industrial purposes; glucose for the food industry; gluten for the food industry; dextrin [size]; titanium dioxide for industrial purposes; casein for the food industry; tartaric acid; citric acid for industrial purposes; lactic acid; carbonic acid; spirits of vinegar [dilute acetic acid]; phosphoric acid; oxalic acid; fatty acids; mineral acids; gluten [glue], other than for stationery or household purposes; beer preserving agents; preservatives for use in the pharmaceutical industry; biological tissue cultures, other than for medical or veterinary purposes; cultures of microorganisms, other than for medical</i></p>	<p>Class 1:</p> <p><i>Additives chemical to motor fuel; Adhesives for industrial purposes; Automobile body fillers; Extinguishing compositions (Fire-); Frosting chemicals (Glass-); Glue for industrial purposes; Industrial chemicals; Coolants for vehicle engines; Chemical additives for oils; Detergent additives to petrol [gasoline].</i></p> <p>Class 21:</p> <p><i>Aerosol dispensers, not for medical purposes; Beaters, non-electric; Bins (Dust—); Boot jacks; Bottle openers; bottles; Brooms; Brushes; Brushes (electric-), except parts of machines; Scrubbing brushes; Buckets; Buckskin for cleaning; Chamois leather for cleaning; Cleaning instruments [hand-operated]; Cleaning (Rags [cloth] for—); Cleaning tow; Closures for pot lids; Cups; Dusting cloths [rags]; Funnels; Glass flasks [containers]; Gloves (Polishing—); Glue-pots; Jugs; Mops wringers; Mops; Pads for cleaning; Spouts; Sprinkling devices.</i></p>

*and veterinary use; lactose [raw material]; lactose for the food industry; lecithin [raw material]; lecithin for the food industry; oils for the preservation of food; flour for industrial purposes; tapioca flour for industrial purposes; potato flour for industrial purposes; beer-clarifying and preserving agents; wax-bleaching chemicals; fat-bleaching chemicals; pectin for the food industry; preparations for stimulating cooking for industrial purposes; enzyme preparations for the food industry; filtering preparations for the beverages industry; chemical preparations for smoking meat; chemical substances for preserving foodstuffs; protein [raw material]; proteins for the food industry; proteins for use in the manufacture of food supplements; proteins for use in manufacture; saccharin; cream of tartar for the food industry; enzymes for the food industry; milk ferments for the food industry; tea extracts for the food industry; tea extracts for use in the manufacture of pharmaceuticals; emulsifiers.*

Class 21:

*Bottles; heat-insulated containers; heat-insulated containers for beverages; thermally insulated containers for food;*

<p><i>fitted picnic baskets, including dishes; portable cool boxes, non-electric; insulating flasks; hip flasks; drinking bottles for sports; cocktail shakers; glass and plastic bottles included in this class; drinking bottles for sports; cocktail shakers for use in sports.</i></p>	
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**Class 1**

Contested goods: *Additives chemical to motor fuel; Automobile body fillers; Extinguishing compositions (Fire-); Frosting chemicals (Glass-); Coolants for vehicle engines; Detergent additives to petrol [gasoline].*

18. The contested goods are chemical-based substances relating to non-food items, namely vehicles, fuel, fire extinguishers and glass. The Opponent's class 1 goods (with the exceptions of *glycerine for industrial purposes, titanium dioxide for industrial purposes and wax-bleaching chemicals*) broadly speaking, relate to the manufacture of foodstuffs and pharmaceuticals. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar. I do not consider any of the Opponent's remaining terms to be closer comparators.

Contested goods: *Industrial chemicals*

19. I find that the broad term 'Industrial chemicals' will encompass several of the Opponent's class 1 terms, e.g. *carbonic acid* and *titanium dioxide for industrial purposes*, to name just two. The parties' goods are therefore identical according to the principle in 'Meric'.

Contested goods: *Adhesives for industrial purposes; Glue for industrial purposes*

20. It is well known that 'adhesives' and 'glues' are synonymous. I find that each of these broad terms will encompass the Opponent's class 1 term *gluten [glue], other than for stationery or household purposes*. The parties' goods are therefore identical according to the principle in 'Meric'.

Contested goods: *Chemical additives for oils*

21. The above term encompasses substances that are added to oils. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar. I find this to be the case even though the Opponent's specification contains the term *oils for the preservation of food*.

## **Class 21**

Contested goods: *Bottles*

22. The term *bottles* appears in both parties' specifications. These goods are therefore self-evidently identical.

Contested goods: *Brooms; Brushes; Brushes (electric-), except parts of machines; Scrubbing brushes; Buckskin for cleaning; Chamois leather for cleaning; Cleaning instruments [hand- operated]; Cleaning (Rags [cloth] for—); Cleaning tow; Dusting cloths [rags]; Mops wringers; Mops; Pads for cleaning*

23. The above goods are tools or accessories used during cleaning. The Opponent's class 21 goods are all, broadly speaking, receptacles of one sort of another, none of which are used during cleaning. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the

above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Cups; Glass flasks [containers]; Jugs*

24. I compare these goods to the Opponent's class 21 term *heat-insulated containers for beverages*. My view is that the Applicant's cups, glass flasks and jugs will include heat-insulated versions. I therefore find the contested goods to be identical to the Opponent's *heat-insulated containers for beverages* according to the principle in 'Meric'.<sup>5</sup>

Contested goods: *Gloves (Polishing—)*

25. It is my understanding that polishing gloves are worn when buffing small items against a polishing wheel. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Boot jacks*

26. It is my understanding that a 'boot jack' is a tool, usually made of wood or iron, used to remove one's boots by way of pushing the heel against the U-shaped cut-out in the boot jack. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Beaters, non-electric*

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<sup>5</sup> I also consider the Applicant's term *glass flasks [containers]* to be identical to certain bottles encompassed by the Opponent's broad term *bottles*. I understand that there are drinking vessels on the UK market which are described as 'bottles' but which are, essentially, flasks (e.g. bottles sold under the brand 'Chilly's').

27. I understand that 'beaters' are a tool used to mix substances. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Bins (Dust—)*

28. Dust bins are intended to store waste before it is disposed of. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Aerosol dispensers, not for medical purposes*

29. I understand that 'aerosol dispensers' are items which convert liquids into vapour droplets. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Bottle openers*

30. I compare the contested goods to the Opponent's class 21 term *bottles*. The purpose of 'bottle openers' is, self-evidently, the removal of tops from bottles. This purpose differs from that of *bottles*, which function as receptacles for liquids. Users will overlap; both parties' goods will be purchased by both the general and professional public. Trade channels may overlap; both goods might be sold via the same outlets. The respective goods will differ in terms of their physical natures and methods of use. There is no competition between the goods; neither good being substitutable for the other. I do not find complementarity between the goods, either; I consider it unlikely that an average consumer would presume both goods to originate from the same undertaking. I find the parties' goods to be dissimilar.

Contested goods: *buckets*

31. 'Buckets' are intended as receptacles for, or a means of carrying, substances or materials held in them. I compare these goods to the Opponent's class 21 term *bottles*, which are also receptacles. 'Bottles' is a broad term which will encompass several types of bottles in a variety of sizes. The parties' goods will overlap in purpose to the extent that both can be used for holding/carrying substances. Users will overlap; both will be purchased by both the general and professional public. Trade channels will likely overlap somewhat; both parties' goods may be sold via the same outlets and their online equivalents. The goods will be similar in physical nature to the extent that both may be composed of plastic, for example. On the other hand, their physical natures will differ in terms of their shape; bottles typically have a 'neck' which tapers out to the main body of the vessel, and almost always have a lid or cap, whereas buckets are typically tapered 'cylinders', *usually* without lids. Although both parties' goods are used as receptacles, I do not consider them to be in a competitive relationship; in my view, the goods are not realistic substitutes for one another. I do not find complementarity, either; neither party's goods are necessary or important for each other. In the light of the foregoing, I find the marks to have a low level of similarity.

Contested goods: *Closures for pot lids*

32. In my view, it is not clear whether 'closures for pot lids' refers to 'closures' as items to be affixed to pot lids which enable those lids to fit snugly onto jars, or closures 'as' pot lids. Whichever interpretation is correct, bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Funnels*

33. *Funnels* are intended to channel substances into receptacles. I compare these goods to the Opponent's class 21 *bottles*. The specific purposes of the respective goods will differ; bottles being receptacles for substances, usually liquids, as opposed to funnels for channeling substances into receptacles. Methods of use will also diverge. Users and trade channels will likely overlap. Where the respective goods are sold in the same physical shops, funnels might be found in fairly close proximity to bottles (e.g. 'snap-top' glass bottles for home-made beverages might be found in the same section as funnels, which are often used when making home-made beverages). The goods will differ in terms of their physical natures due their differences in appearance ('bottle-shaped' versus 'funnel-shaped'). The goods may sometimes coincide in terms of the material from which they are composed; funnels can be made of plastic, as can bottles. I do not consider the goods to be competitive, neither good being substitutable for the other. I do not find complementarity, either. Although funnels are frequently used with bottles, it cannot be said that funnels are necessary or particularly important for bottles. All things considered, I find the parties' goods to have a low level of similarity.

Contested goods: *Spouts; Sprinkling devices*.

34. The above goods are items used to direct where liquids are poured or sprinkled. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

Contested goods: *Glue-pots*

35. The above goods are intended as receptacles for glue. The Opponent's class 21 goods are, broadly speaking, intended as receptacles for food and drink. Bearing in mind the purposes, users, trade channels, physical natures, methods of use of the parties' respective goods, and considering the matters of competition and complementarity, I do not find the above-named goods to have any level of similarity to any of the Opponent's goods – they are dissimilar.

36. 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**

37. 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*.

#### Class 1 goods

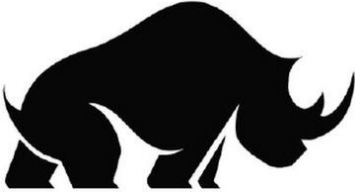

38. The average consumer of the class 1 goods at issue in this opposition will be the professional public, i.e. manufacturers. The purchasing act will likely be primarily visual in nature; the goods, being industrial chemicals and the like, will, in my view, be selected from catalogues or online listings. I consider that there will be an aural aspect to the purchasing process in many cases; for, example, the purchaser may discuss its business needs with the seller before committing to a transaction. I consider that many purchases will likely involve large consignments of chemicals and will, therefore, have a fairly high price-point. I find that the average consumer of the class 1 goods will likely pay a high level of attention during the purchasing act. Factors considered will likely include, *inter alia*, manufacturing outputs.

#### Class 21 goods

39. The average consumer of the class 21 goods at issue in this opposition will be the general public. The purchasing act will be primarily visual. 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 be an aural aspect to the purchasing process where requests are made to retail staff, for example. The goods will be fairly 'every day' purchases with a low price-point. I

find that the average consumer would likely pay a medium level of attention during the purchasing act. Factors considered will likely include, *inter alia*, the size and materials of the goods.

### Comparison of the marks

Opponent's mark:	Applicants' mark:
	

40. 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.”

41. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account their distinctive and dominant components, 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

42. The earlier mark consists of a figurative representation of a rhinoceros device rendered in solid black. The stylisation of the rhinoceros might be described as simple and streamlined. The overall impression of the mark will derive from the sole figurative element of which the mark is composed.

43. The applied-for mark comprises a word element and a device. The device is a solid black rhinoceros in a simple and streamlined style. The word element 'RHINOMOTIVE' is presented beneath the device in a plain font, with the 'RHINO' portion emboldened. I recognise that, where a mark comprises figurative and verbal elements, the verbal element tends to be registered first because it is articulable. However, in this instance, I find that the rhinoceros device and the word element play a roughly equal visual role, with neither element dominating the other, owing to both elements being comparably large.

#### Visual comparison

44. Both parties' marks include a rhinoceros device rendered in a closely similar simple and streamlined style. I note that the rhinoceros in the earlier mark has all four feet on the ground, whereas the rhinoceros in the applied-for mark appears to have its front legs off the ground in a leaping stance. However, my view is that the difference in stance will likely be overlooked by the vast majority of average consumers who would simply recall a general 'rhinoceros' shape from either mark. The marks differ in the presence of the word element 'RHINOMOTIVE' in the applied-for mark, which is absent from the earlier mark. All things considered, I find the marks to have a level of visual similarity above medium.

#### Aural comparison

45. The earlier mark is purely figurative. Purely figurative marks are, generally speaking, incapable of articulation. However, it is my view that, if the figurative element is unambiguously and undoubtedly seen as a rhinoceros, it *could* nevertheless have an aural identity and it is, therefore, possible that some average

consumers might refer to the brand as 'rhinoceros'. For average consumers will accord an aural identity to the Opponent's mark, it will likely be articulated as 'RY-NOSS-ERUS'. The Applicant's mark will likely be articulated as 'RYE-NOE MOE-TIV'. In such an instance, I find the marks to be aurally similar to a low degree. For those average consumers who will not accord an aural identity to the earlier mark, the marks will be aurally dissimilar.

#### Conceptual comparison

46. The earlier mark will, in my view, be readily recognised by the average consumer as the animal by the name of 'rhinoceros'. It is well known that the rhinoceros is known for its strength and tough exterior. I find that the mark, in the context of the goods in respect of which the mark is registered, will likely conjure the idea of robust and hard-wearing goods. I consider that the 'rhinoceros' device in the applied-for mark will be recognised in the same way. The word element 'rhinomotive' will, to my mind, likely be perceived by the average consumer as an invented word, albeit a word created by combining 'rhino' as a colloquial reference to a 'rhinoceros' with the word element 'motive'. I find that the 'motive' element will likely be seen as an allusion to 'automotive' or vehicle-related goods. I consider that the inclusion of the 'rhino' element in the context of the goods in respect of which registration is sought, will be seen by many average consumers as an allusion to strength and robustness. I find that the applied-for mark as a whole will convey the idea of robust and durable goods related to vehicles. All things considered, I find the parties' marks to be highly conceptually similar.

#### **Distinctive character of the earlier mark**

47. *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular

undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

48. 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.

49. The Opponent’s mark is purely figurative, and will be perceived as a rhinoceros. The mark is not descriptive of those goods in respect of which it is registered which are at issue in these proceedings. However, I consider that a rhinoceros might, for the average consumer, be considered to be mildly allusive of the properties of strength and toughness which are associated with glue. For the Opponent’s term *gluten [glue], other than for stationery or household purposes*, I find the mark to have a level of inherent distinctive character in the medium to high range. For the remaining goods that are at issue, I find the mark to have a fairly high level of inherent distinctive character.

50. 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

51. 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*<sup>6</sup>. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*<sup>7</sup>, 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.

52. 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.

53. I have found the following of the applied-for goods to be identical to the Opponent’s goods:

*Class 1: Industrial chemicals; Adhesives for industrial purposes; Glue for industrial purposes*

Class 21:

*Bottles; Cups; Glass flasks [containers]; Jugs*

I have found the following goods to have a low level of similarity to the Opponent’s goods:

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<sup>6</sup> Case BL O/375/10 at [16].

<sup>7</sup> *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

Class 21:

*Buckets; Funnels*

54. I have found a number of the opposed goods to be identical or to have some level of similarity to those of the Opponent. In my view, the levels of visual and conceptual similarity ('above medium' and 'high', respectively) that I have identified between the parties' marks, together with the fairly high level of inherent distinctive character of the figurative element common to the parties' marks, are factors pointing towards a likelihood of direct confusion. The 'rhinoceros' devices are very closely similar in size and style. My view is that a significant proportion of average consumers may encounter either one of the parties' marks and, upon seeing the fairly highly distinctive 'rhinoceros' device, presume that the mark seen is the same as the previously-encountered other party's mark. I find that there is a likelihood of direct confusion. I find this to be the case even where the average consumer pays only a medium level of attention during the purchasing act.

55. 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 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.

56. In *L.A. Sugar Limited v Back Beat Inc*<sup>8</sup> Mr Iain Purvis Q. C. (as he then was), as the Appointed Person, explained that [my words in parentheses]:

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<sup>8</sup> Case BL O/375/10

'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)".

57. It is my view that the instant case falls within the first category identified by Mr Purvis. I have found the earlier mark, a purely figurative mark, to have a level of inherent distinctive character in the medium to high range for *glue* and, for the remaining goods in respect of which it is registered, a high level of inherent distinctive character. I consider that a significant proportion of average consumers would overlook the slight differences in the stance of the 'rhinoceros' devices, but notice the 'Rhinomotive' element of the applied-for mark and conclude that the marks are economically-related brands or variant marks relating to the same brand. An average consumer upon encountering the Opponent's purely figurative mark might presume that it was simply a version of the Applicant's mark where the word element 'Rhinomotive' had been omitted. In my view, it is not uncommon for a brand to use versions of its marks with and without word elements (e.g. the Nike 'tick'). I therefore find that there is a likelihood of indirect confusion.

## Outcome

58. The Opposition has been partially successful. Subject to a successful appeal, the Application:

- is refused in respect of the following goods only:

*Class 1: Industrial chemicals; Adhesives for industrial purposes; Glue for industrial purposes*

*Class 21:*

*Bottles; Cups; Glass flasks [containers]; Jugs; funnels; buckets*

- may proceed in respect of the following goods and services only:

*Class 1: Additives chemical to motor fuel; Automobile body fillers; Extinguishing compositions (Fire-); Frosting chemicals (Glass-); Coolants for vehicle engines; Detergent additives to petrol [gasoline].*

*Class 21: Brooms; Brushes; Brushes (electric-), except parts of machines; Scrubbing brushes; Buckskin for cleaning; Chamois leather for cleaning; Cleaning instruments [hand- operated]; Cleaning (Rags [cloth] for—); Cleaning tow; Dusting cloths [rags]; Mops wringers; Mops; Pads for cleaning; Gloves (Polishing—); Boot jacks; Beaters, non-electric; Bins (Dust—); Aerosol dispensers, not for medical purposes; Bottle openers; Closures for pot lids; Funnels; Spouts; Sprinkling devices; Glue-pots*

## COSTS

59. The Applicant has enjoyed the greater level of success and is therefore entitled to a contribution to its costs based upon the scale published in Tribunal Practice Notice 2/2016, calculated as follows:

Consideration of the Opposition and preparation of Defence and Counterstatement	£200
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Less approximately 33% to account for the fact that the Opposition has failed in respect of roughly two-thirds of the opposed terms	-£66
<b>Total:</b>	<b>£134</b>

60. I therefore order Barzukov Oleg Pavlovich to pay to Rhinomotive L.L.C the sum of £134. 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 24<sup>th</sup> day of February 2023**

**N. R. Morris**

**For the Registrar,**

**the Comptroller-General**