

O-139-17

TRADE MARKS ACT 1994

IN THE MATTER OF UK TRADE MARK APPLICATION NO. 3120031 IN THE NAME OF UNILEVER PLC

AND IN THE MATTER OF OPPOSITION NO. 405459 THERETO IN THE NAME MONSTER ENERGY COMPANY

DECISION

Introduction

1. This is an appeal against the decision of Mr. George Salthouse, acting on behalf of the Registrar, dated 3 August 2016 (O-368-16). In his decision the Hearing Officer dismissed the Opposition brought under section 5(2)(b) of the Trade Marks Act 1994.
2. On 29 July 2015, Unilever plc ("*the Applicant*") applied to register the trade mark **RELEASE THE BEAST** in respect of the following goods in Class 30: Ice cream; water ices; frozen yogurt; frozen confectionery.
3. The application was published for opposition purposes on 21 August 2015.
4. On 16 November 2015 the application was opposed by Monster Energy Company ("*the Opponent*").
5. The opposition was based on section 5(2)(b) of the Trade Marks Act 1994 ("*the 1994 Act*"). For this purpose the Opponent relied upon the following trade mark registrations:

Mark	Number	Dates of filing and registration	Class	Specification relied upon
REHAB THE BEAST!	CTM 9584244	09.12.10 20.05.11	5	Nutritional supplements in liquid form in Class 5.
			30	Ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages in Class 30.
			32	Beverages, namely, carbonated soft drinks; non-

				alcoholic carbonated and non-carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; energy or sports drinks; fruit juice drinks in Class 32.
UNLEASH THE BEAST WITHIN!	CTM 10645968	15.02.12 09.10.13	5	Nutritional supplements in liquid form.
			30	Ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages.
			32	Non-alcoholic beverages, namely energy drinks, energy drinks flavored with tea, energy drinks flavored with juice, sports drinks, and fruit juice drinks having a content of 50% or less by volume; all of the foregoing enhanced with vitamins, minerals, nutrients, amino acids and/or herbs.
PUMP UP THE BEAST!	CTM 12251898	24.10.13 11.04.14	5	Nutritional supplements in liquid form; vitamin fortified beverages.
			30	Bases for making energy shakes; prepared coffee and coffee based beverages; bases for making energy shakes with a coffee flavour; bases for making energy shakes with a chocolate flavour; prepared chocolate and chocolate-based beverages.
			32	Non-alcoholic beverages.

6. On 18 January 2016 the Applicant filed a counterstatement in which it denied the basis of the opposition.

7. Only the Opponent filed evidence. Neither side wished to be heard but both sides provided the Hearing Officer with written submissions.

The Hearing Officer's Decision

8. The Hearing Officer identified the issues that he was required to take into account in making the assessment under section 5(2)(b) by reference to the case law of the CJEU (paragraph 11 of his Decision). He went on to identify the approach that he was required to take to the comparison of goods as follows:

Comparison of goods

15) In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment 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”.

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

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

17) I also take into account Case T-736/14, *Monster Energy Company v OHIM*, where the General Court upheld the finding of the OHIM Board of appeal that there was no similarity between coffee based beverages and confectionary/sweets. The court rejected the Appellant's argument that similarity was

established by the fact the goods were sold in the same premises and share the same distribution channels.

9. Having set out the approach in law the Hearing Officer went on to apply the law to the facts that were before him as follows:

18) The goods of the two parties are:

Applicant's goods	Opponent's goods
<p>Class 30: Ice cream; water ices; frozen yoghurt; frozen confectionery.</p>	<p>CTM 9584244: Class 5: Nutritional supplements in liquid form. Class 30: Ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages. Class 32: Beverages, namely, carbonated soft drinks; nonalcoholic carbonated and non-carbonated drinks enhanced with vitamins, minerals, nutrients, proteins, amino acids and/or herbs; energy or sports drinks; fruit juice drinks.</p>
	<p>CTM 10645968: Class 5: Nutritional supplements in liquid form. Class 30: Ready to drink tea, iced tea and tea based beverages; ready to drink flavored tea, iced tea and tea based beverages. Class 32: Non-alcoholic beverages, namely energy drinks, energy drinks flavored with tea, energy drinks flavored with juice, sports drinks, and fruit juice drinks having a content of 50% or less by volume; all of the foregoing enhanced with vitamins, minerals, nutrients, amino acids and/or herbs.</p>
	<p>CTM 12251898: Class 5: Nutritional supplements in liquid form; vitamin fortified beverages. Class 30: Bases for making energy shakes; prepared coffee and coffee based beverages; bases for making energy shakes with a coffee flavour; bases for making energy shakes with a</p>

	chocolate flavour; prepared chocolate and chocolate-based beverages. Class 32: Non-alcoholic beverages.
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19) I note that the opponent makes no submissions as to why the goods in class 5 should be regarded as similar to the applicant's goods. To my mind, the opponent's goods in class 5 are a specialised form of nutrition which will not be sold ice cream/ frozen confectionery. The users and physical nature are different. They will not be found alongside each other in shops and, to my mind they are not in competition with each other. **In my opinion the opponent's goods in class 5 under all three earlier marks are not similar to the goods applied for by the applicant.**

20) Turning to the opponent's goods in class 30, the specifications vary somewhat between its marks. Both CTM 9584244 & CTM 10645968 have identical specifications based around tea beverages whereas CTM 12251898 is concerned with chocolate or coffee based beverages including energy shakes and unflavoured energy shakes. The opponent contends that:

“25. Furthermore, in our health-conscious society the traditional ice creams and yoghurts are being reformulated and healthier ingredients are added to make those products more nutritious for the consumer.
26. For example, non-fat pomegranate energy/vitamin boost yoghurt, and frozen Bio-Live yoghurts and ice creams are made using live bacterial cultures and probiotics are sold in the UK market.
27. Furthermore, the Opponent's goods in Classes 30 and 32 include also all kinds of iced chocolate-based beverages and energy drinks including shakes, to be served chilled. In many occasions, consumers either purchase an ice cream, a healthier shake, or a chilled energy drink to keep cool.”

21) In my opinion, the users for both parties' products would be the same i.e. the general public. The physical nature of the products differ in that the opponent's goods are liquid whereas the applicant's goods will be solid or semi-solid when purchased. I do not have any information regarding trade channels. Large retail outlets such as supermarkets have the space to display a wide range of such products. As such the ready-to-drink products will be with other such items in a chiller unit whereas the frozen items of the applicant will be kept with other frozen foods in an entirely different area. However, in small retail outlets the goods will be located closer

to each other, although probably not in the same cabinet due to the requirements for different temperatures. The applicant's goods will be kept below freezing point whereas the opponent's goods will be merely chilled. I accept that tea, coffee and chocolate based beverages can all be chilled at the point of sale and might, at a stretch, be an alternative, on a hot day, to ice cream or frozen items such as lollies or ice-cream based confectionery bars. Other than this I do not believe that the goods will be in competition with each other. **Taken overall there is no similarity between the goods of the applicant and the opponent's class 30 goods.**

21) [Sic] I next turn to consider the opponent's goods in class 32. Broadly speaking all three specifications are for non-alcoholic beverages. The same reasoning set out in paragraph 20 above applies and so I find that **there is no similarity between the goods of the applicant and the opponent's class 32 goods.**

10. Having made a finding that there was '*no similarity between the goods of the two parties*' the Hearing Officer stated that there was '*no need to go on and consider the similarity of marks*' and dismissed the Opposition in its entirety (paragraph 23 of his Decision).

The Appeal

11. On 30 August 2016 Bird & Bird LLP on behalf of the Opponent, Monster Energy Company, filed an appeal against the Decision under section 76 of the 1994 Act.
12. There is no suggestion in the Grounds of Appeal or in the written or oral submissions made on behalf of the Opponent on the present appeal that the Hearing Officer did not identify the correct legal basis for the assessment that he had to make. It was also accepted that it was open to the Hearing Officer on the basis of his finding that there was no similarity between the goods in issue to adopt the course he did i.e. not to go on to consider the similarity between the marks in issue or the likelihood of confusion.
13. The Grounds of Appeal were directed at two issues: (a) the findings in relation to the average consumer; and (b) the findings in relation to the comparison of the goods in issue. However the position taken by the Opponent at the hearing of the appeal was based on what was said to be a single error of principle by the Hearing Officer which was his failure '*to take into account material evidence*' which led him to find that the goods in issue were dissimilar. In particular it was submitted that the Hearing Officer failed to take into account the evidence which was said to provide '*compelling objective support for precisely the similarity that the Hearing Officer was called on to assess*'.

14. It was further submitted that had the Hearing Officer taken into account such material evidence and on the basis of his other findings he would have found that the goods were similar. Had the Hearing Officer found that the goods were similar he would then have had to go on to consider the similarity of the marks in issue; and the likelihood of confusion. It was submitted that in such circumstances the Hearing Officer would have found that there was a likelihood of confusion such that the Opposition would have been allowed.
15. No Respondent's Notice was filed.
16. At the hearing of the appeal Hugo Cuddigan Q.C. instructed by Bird & Bird LLP appeared on behalf of the Opponent and Mark Hickey of Murgitroyd & Company appeared on behalf of the Applicant.

Standard of review

17. There was no dispute between the parties that the appeal is by way of review. Neither surprise at a Hearing Officer's conclusion, nor a belief that he has reached the wrong decision suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer was wrong. See Reef Trade Mark [2003] RPC 5; BUD Trade Mark [2003] RPC 25; and more recently the decision of Geoffrey Hobbs Q.C. in ALTI Trade Mark (O-169-16) at paragraphs [19] to [20] and the decision of Daniel Alexander Q.C. in Talk for Learning Trade Mark (O-017-17).
18. In Fine & Country Ltd v Okotoks Ltd (formerly Spicerhaart Ltd) [2013] EWCA Civ 672; [2014] FSR 11 Lewison LJ said:

50. The Court of Appeal is not here to retry the case. Our function is to review the judgment and order of the trial judge to see if it is wrong. If the judge has applied the wrong legal test, then it is our duty to say so. But in many cases the appellant's complaint is not that the judge has misdirected himself in law, but that he has incorrectly applied the right test. In the case of many of the grounds of appeal this is the position here. Many of the points which the judge was called upon to decide were essentially value judgments, or what in the current jargon are called multi-factorial assessments. An appeal court must be especially cautious about interfering with a trial judge's decisions of this kind. There are many examples of statements to this effect. I take as representative Lord Hoffmann's statement in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416 , 2423:

‘Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle.’

19. This approach was reiterated by the Court of Appeal in Fage UK Ltd v. Chobani UK Ltd [2014] EWCA Civ 5; [2014] E.T.M.R. 26 at paragraphs [114] and [115]. Moreover in paragraph [115] Lewison LJ said:

115 It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: *see Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135.

20. It is necessary to bear these principles in mind on this appeal.

Decision

21. As noted above, the issue in the appeal before me is whether the Hearing Officer failed to take into account material evidence that was before him in making the decision that the relevant goods in issue were dissimilar.
22. The only evidence that was filed in the proceedings was the witness statement of Cristina Martinez dated 4 April 2016 together with two exhibits. The witness statement was very short consisting of three paragraphs of which only two contained her substantive evidence and stated as follows:
2. On 1 April 2016 I conducted a cursory Internet search of several UK-leading ice cream and milk-based beverage brands using the google.co.uk search engine.

Attached and marked Exhibit CGM-1 are examples of the search results.

3. From this search, I located the Applicant's own Magnum brand showing cross-over of this brand from ice-cream to novelty, confectionery, chocolates. Attached and marked Exhibit CGM-2 is a print out of these results.
23. Exhibit CGM-1 contained a number of images of products but there was no indication in the exhibit as to where such images or had been obtained from and/or on what basis the selection of such examples had been made. Save as could be seen from the images there was no explanation in the evidence as to what the products shown in the images were.
24. Exhibit CGM-2 appeared to be an article published by The Food and Drink Innovation Network dated 3 August 2015 entitled '*Magnum launches new "Premium Chocolate" collection*' relating to the introduction of a new range of '*Magnum Chocolate*' together with screen grabs from www.mymagnum.co.uk/product showing a variety of Magnum products including ice-creams and chocolate confectionery. In this connection it is to be noted that chocolate confectionery is not one of the goods that are in issue in the present case.
25. The Hearing Officer expressly referred to the evidence of Ms Martinez in paragraph 6 of his Decision. In that paragraph he summarised the evidence as far as he considered necessary as follows:
 - 6) The opponent filed a witness statement, dated 4 April 2016 by Cristina Garrigues Martinez, the opponent's Trade Mark Attorney. She states that she carried out a "cursory Internet search on 1 April 2016" in respect of several UK -leading ice cream and milk based beverage brands and also the applicant's own MAGNUM brand showing cross-over of this mark from ice cream to novelty confectionery and chocolates. She provides the following exhibits:
 - CGM1: The various pages show images of brand such as Galaxy, Mars, Snickers, Nesquik and Bounty used on milk shakes, ice cream and lollies / choc ices / cornets.
 - CGM2: This shows the Unilever brand of MAGNUM, previously used on ice cream lollies now launching a range of chocolate confectionery under the same brand.
26. There was no suggestion that this was an inaccurate summary of the evidence.

27. With regards to the goods that were to be compared for the purposes of assessing conflict the Opponent highlighted those goods upon which it sought to rely on this appeal as opposed to those relied upon before the Hearing Officer as follows (the relevant goods are identified in bold underlined text):

Applicant's goods	Opponent's goods
<p>Class 30: <u>Ice cream; water ices; frozen yoghurt; frozen confectionery.</u></p>	<p>CTM 9584244: Class 5: Nutritional supplements in liquid form. Class 30: Ready to drink tea, <u>iced tea</u> and tea based beverages; <u>ready to drink</u> flavored tea, <u>iced tea</u> and tea based beverages. Class 32: Beverages, namely, carbonated soft drinks; nonalcoholic carbonated and <u>non-carbonated drinks enhanced with vitamins</u>, minerals, nutrients, <u>proteins</u>, amino acids and/or herbs; energy or sports drinks; fruit juice drinks.</p>
	<p>CTM 10645968: Class 5: Nutritional supplements in liquid form. Class 30: Ready to drink tea, <u>iced tea</u> and tea based beverages; <u>ready to drink</u> flavored tea, <u>iced tea</u> and tea based beverages. Class 32: Non-alcoholic beverages, namely energy drinks, energy drinks flavored with tea, energy drinks flavored with juice, sports drinks, and <u>fruit juice drinks having a content of 50% or less by volume</u>; all of the foregoing <u>enhanced with</u> vitamins, minerals, nutrients, <u>amino acids</u> and/or herbs.</p>
	<p>CTM 12251898: Class 5: Nutritional supplements in liquid form; vitamin fortified beverages. Class 30: Bases for making energy shakes; prepared coffee and coffee based beverages; bases for making energy shakes with a coffee flavour; bases for making energy shakes with a chocolate flavour; <u>prepared chocolate and chocolate-based beverages.</u> Class 32: <u>Non-alcoholic beverages.</u></p>

28. As accepted by the Opponent the Hearing Officer correctly identified the legal approach to the assessment of similarity in paragraphs 15 and 16 of his Decision.
29. However, what is said on behalf of the Opponent on this appeal is that the evidence of Ms Martinez was not taken into account in the assessment of similarity by the Hearing Officer. In particular it is said that the evidence provides ‘*compelling objective support for precisely the similarity that the Hearing Officer was called on to assess*’. The basis upon which this evidence was said to provide objective support was that the it demonstrated that well-known brand owners have expanded into from one area into another (one example relied upon was the expansion by the owner of the Mars trade mark into ice cream and then into protein drinks); and that consumers of such products would be aware of this.
30. The comparison i.e. assessment of similarity of goods and services is the subject of guidance in Chapter 2 of the Guidelines for the Examination of European Trade Marks published by the EUIPO Part C dated 1 February 2017¹. At paragraph 3.2.8 of those Guidelines guidance is given as the ‘*Usual origin (producer/provider)*’ factor. Those guidelines state as follows (emphasis added):

3.2.8 Usual origin (producer/provider)

Although the Court of Justice did not explicitly mention this factor in its *Canon* judgment, it follows from the general concept of likelihood of confusion that the usual origin of the goods and services is of particular importance for the analysis of similarity. As the Court has stated, it is ‘the risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically linked undertakings, [that] constitutes a likelihood of confusion’ (29/09/1998, C 39/97, *Canon*, EU:C:1998:442, § 29). Hence, there is a strong indication of similarity when, in the mind of the relevant public, the goods/services have the same usual origin.

However, this should not be misinterpreted as turning the examination of likelihood of confusion and similarity of goods/services upside down: the finding of a likelihood of confusion depends on many other factors (such as the similarity of signs, the distinctiveness of the earlier mark) and is not exclusively determined by the usual origin, which

¹ https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/law_and_practice/trade_marks_practice_manual/WP_1_2017/Part-C/02-part_c_opposition_section_2/part_c_opposition_section_2_chapter_2_comparison_of_g_and_s/part_c_opposition_section_2_chapter_2_comparison_of_g_and_s_en.pdf

as such is only one factor in the analysis of the similarity of goods/services.

A finding that consumers will not be confused about the origin of the goods/services is not an argument appropriate to the comparison of goods/services. This finding should be mentioned in the overall assessment of likelihood of confusion. **Origin, in this context, relates mainly to the manufacturing sector (industry) or kind of undertaking producing the goods or offering the services in question rather than to the identity of the producer.**

The 'origin' is not merely defined by the actual place of production/provision (e.g. factory, workshop, institute or laboratory) but primarily by taking into consideration who manages and/or controls the production/provision of the goods/services. In other words, the question to be asked is: who is responsible for manufacturing the product or providing the service?

The geographical origin (e.g. China) is not relevant for the finding of similarity of goods/services.

In the *ELS* judgment, the Court held that even goods and services can have the same origin if it is common for the same type of company to produce/provide both. Educational textbooks (Class 16) were considered to have the same origin as provision of correspondence courses (Class 41) since 'undertakings offering any kind of course often hand out those products to pupils as support learning materials' (judgment of 23/10/2002, T-388/00, *ELS*, EU:T:2002:260, § 55).

The criterion 'usual origin' has to be applied in a restrictive way in order not to dilute it. If all kinds of goods/services deriving from one large (multinational) company or holding were found to have the same origin, this factor would lose its significance.

31. The guidelines go on to identify a number of features that may be relevant to defining a common origin namely manufacturing sites, methods of manufacture, technical know-how, and established trade custom known the public. It is this last feature that is relied upon by the Opponent. In relation to that feature the guidelines state as follows:

An established trade custom, such as when manufacturers expand their businesses to adjacent markets, is of particular importance in concluding that goods/services of different nature have the same origin. In such situations, it is necessary to determine whether such expansion is common in the industry or, conversely, whether it may occur in exceptional cases only.

Example where extension has become customary

- Shoes (Class 25) and handbags (Class 18): It is customary in the market for the producers of shoes also to be involved in the manufacture of handbags.

Example where extension is not (yet) common

- Clothing (Class 25) and perfumes (Class 3): Even though some designers that make fashion clothes nowadays also sell perfumes under their marks, this is not the rule in the clothing industry, and rather applies to (economically) successful designers.

32. Whilst these guidelines are not binding upon me it seems to me that, for the purposes of the present appeal, they encapsulate the approach to the relevance of the ‘usual origin’ by reason of ‘the established trade custom known to the public’ factor for the purposes of determining whether or not goods or services are similar.
33. It seems to me that it is clear that the Hearing Officer was fully aware of the evidence of Ms Martinez when reaching his Decision as he expressly and correctly summarised her evidence in paragraph 6 of that Decision. However it is also correct to state that it is not referred to later on in his Decision and in particular in the paragraphs in which the Hearing Officer set out his reasoning as to why the goods were dissimilar.
34. In my view on the facts of the present case, whilst the Hearing Officer did not make an express reference to the Ms Martinez’s evidence in the paragraphs in which his findings of dissimilarity were made, this is not a material error and the Decision that he reached does not seem to me to be wrong. I have come to that view for a number of reasons.
35. Firstly, it was undisputed that the Hearing Officer correctly identified the legal approach that he was required to apply to the question of similarity. Whilst the Hearing Officer did not expressly refer to the evidence of Ms Martinez in his reasoning, it is clear that he was aware of it as he correctly summarised the evidence in paragraph 6 of his Decision. As noted in the judgment of the Court of Appeal in Fage UK Ltd v. Chobani UK Ltd (above) it is not necessary for a tribunal to deal with every argument that was before it as long as the basis for the decision are given. The Hearing Officer did set out his reasoning for his findings of dissimilarity in paragraphs 20 and following of his Decision.
36. Secondly, it seems to me that the submissions on behalf of the Opponent are such as to: (a) put the examination of the existence of the likelihood of confusion before the examination of the similarity of the goods; (b) elevate the ‘usual origin’ factor to such

a degree that the other factors that were expressly dealt with by the Hearing Officer in his Decision (in my view correctly on the basis of the materials that were before him) are effectively reduced to nothing in circumstances where a multi-factorial assessment of a number of factors is required; and (c) illegitimately broaden the 'usual origin' criteria beyond any recognisable limits.

37. Thirdly, in my view the evidence contained in the witness statement of Ms Martinez is in no way sufficient to demonstrate that the goods in issue in the present appeal are of the type where it can be said that such goods are of a class or category where expansion from one to the other is (a) common in the industry and (b) known to the consumers of such products as being common in the industry. In this connection I note that Ms Martinez's evidence does not address at all many of the goods in issue and/or addressed irrelevant goods (see paragraph 24 above); and to the very limited extent that it does deal with relevant goods the evidence is vague and un-particularised (see paragraph 23 above). In the circumstances it seems to me that the evidence simply does not establish that the expansion relied upon is common in the industry and is something of which the average consumer would have been aware.

Conclusion

38. In the circumstances, it does not seem to me that the Opponent has identified any material error of principle in the Hearing Officer's analysis or that the Hearing Officer was wrong. In the result I have decided that the Hearing Officer was entitled to make the findings that he did for the purposes of his assessment under section 5(2)(b) of the 1994 Act.
39. In the result the appeal fails.
40. Neither side has asked for any special order as to costs. Since the appeal has been dismissed, the Applicant is entitled to its costs of the Appeal. I will therefore make an order that the Opponent pay to the Applicant a contribution of £1,200 towards its costs of the appeal. This sum should be paid in addition to the costs of £1,100 ordered by the Hearing Officer below. I therefore order Monster Energy Company to pay Unilever plc £2,300 within 14 days of the date of this decision.

Emma Himsworth Q.C.
Appointed Person
22 March 2017

Hugo Cuddigan Q.C. instructed by Bird & Bird LLP appeared on behalf of the Opponent/Appellant

Mark Hickey of Murgitroyd & Company appeared on behalf of the Applicant/Respondent

The Registrar was not represented at the hearing and took no part in the Appeal.