

O-192-08

TRADE MARKS ACT 1994

**IN THE MATTER OF REGISTRATION NO. 2244956
IN THE NAME OF SEA AIR & LAND FORWARDING LTD
IN RESPECT OF THE TRADE MARK:**

BULLET

IN CLASS 32

AND

**AN APPLICATION FOR A DECLARATION OF INVALIDITY THERETO
UNDER NO 82711
BY RED BULL GMBH**

TRADE MARKS ACT 1994

**IN THE MATTER OF Registration no. 2244956
in the name of Sea Air & Land Forwarding Ltd
in respect of the trade mark BULLET in Class 32**

and

**an application for a declaration of invalidity thereto
under no 82711
by Red Bull GmbH**

BACKGROUND

1. Sea Air & Land Forwarding Ltd (“SALF”) is the proprietor in the UK of a registered trade mark for the word BULLET. The trade mark was applied for on 8 September 2000 and its registration procedure was completed on 14 December 2001. The trade mark is registered in respect of:

Class 32: Health fruit drink; health fruit juice drink, still and carbonated.

2. On 10 November 2006 Red Bull GmbH (“RB”) made an application for the above registration to be declared invalid under the provisions of section 47(2)(a) of the Trade Marks Act 1994 (“the Act”) on the grounds that SALF’s trade mark was registered in breach of section 5(2)(b) of the Act. RB rely on two earlier trade marks which it say give rise to such a breach; the details of these two trade marks are:

Trade mark	Relevant dates	Specification	Proprietor
UK Registration 2101481 for the trade mark: BULLIT	Filing date: 31/5/96 Registration date: 8/8/97	Class 32: Energy drinks ¹	Red Bull GmbH
UK Registration 2122137 for the trade mark ² : SILVER BULLET THE SILVER BULLET 	Filing date: 30/1/97 Registration date: 1/10/99	Class 25: Articles of clothing. Class 32: Beer, ale and porter; non-alcoholic drinks, syrops and preparations for making beverages.	Coors Global Properties, Inc.

¹ This specification was decided (all other goods being revoked with effect from 9 August 2002) by Ms Judi Pike acting for the Registrar in a revocation decision under no 82665 (BL O-58-08); the applicant for revocation was SALF.

² The image is taken from the official file rather than the version held on the office web-site which is incorrect.

3. SALF filed a counterstatement denying the grounds on which the application is made. SALF also put forward additional reasons as to why the application for invalidity should be rejected; these are:

That RB is not the registered proprietor of registration 2122137.

That RB was not the registered proprietor of registration 2101481 as of the date of registration of SALF's trade mark.

That some of RB's claims in its application (those that relate to the similarity between the marks BULLIT and BULLET) were made in bad faith because of comments RB has made in other situations to the opposite effect; SALF adds in submission that this creates an estoppel.

4. Both sides filed evidence consisting of a mixture of submission and fact. I do not intend to summarise the evidence separately here, but will instead provide further detail about it, as and when necessary, in the body of this decision. For the record, the evidence filed is:

RB's evidence in chief

1st witness statement of Stuart Nield (RB's trade mark attorney) with exhibits SRN1-SRN7.

2nd witness statement of Stuart Nield with exhibit SRN8.

Witness statement of Jessica Enderby (in-house legal advisor for Coors Brewers Ltd) with exhibits JE1-JE4.

1st witness statement of Chantal van Eijkelenborg (Managing Director of W&S Holding B.V.) with exhibit CVE1.

SALF's evidence

Witness statement of Raminder Singh Ranger (Managing Director of SALF) with exhibits RSR1-RSR6.

RB's evidence in reply

Witness statement of Jennifer Powers (in-house Intellectual Property Counsel for RB) with exhibits JP1-JP5.

Witness statement of Sofia Arenal (RB's trade mark attorney) with exhibit SA1-SA3.

2nd witness statement of Chantal van Eijkelenborg.

5. Neither side requested a hearing, both opting instead to file written submissions via their respective trade mark attorneys. RB's submissions were made by Mewburn Ellis LLP; SALF's submissions were made by Wildbore Gibbons. All submissions will be taken into account in this decision, but I do not intend to summarise them separately.

DECISION

Relevant legislation

6. RB's application is made under the provisions of section 47(2)(a) of the Act. The relevant legislation³ reads:

“47. - (1)

(2) The registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b)

(2A) But the registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless -

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B) The use conditions are met if -

(a) within the period of five years ending with the date of the application for the declaration 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) it has not been so used, but there are proper reasons for non-use.

(2C) For these purposes -

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered, 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.

³ Sections 47(2A), (2B), (2C), (2D) & 2(E) were introduced into the Act by The Trade Marks (Proof of Use, etc) Regulations 2004 (SI 2004/946) which came into force on 5 May 2004.

(2D) In relation to a Community trade mark, any reference in subsection (2B) or (2C) to the United Kingdom shall be construed as a reference to the European Community.

(2E) 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.

(3) An application for a declaration of invalidity may be made by any person, and may be made either to the registrar or to the court, except that-

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court; and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(4) In the case of bad faith in the registration of a trade mark, the registrar himself may apply to the court for a declaration of the invalidity of the registration.

(5) Where the grounds of invalidity exists in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.”

7. Germane to one of SALF’s arguments (the argument that RB was/is not the proprietor of the earlier marks) are articles 5 to 6 of The Trade Marks (Relative Grounds) Order 2007⁴ (“the Order”) which states:

“5.—(1) Only the persons specified in paragraph (2) may make an application for a declaration of invalidity on the grounds in section 47(2) of the Trade Marks Act 1994 (relative grounds).

(2) Those persons are—

(a) in the case of an application on the ground in section 47(2)(a) of that Act, the proprietor or a licensee of the earlier trade mark or, in the case of an earlier collective mark or certification mark, the proprietor or an authorised user of such collective mark or certification mark; and

(b) in the case of an application on the ground in section 47(2)(b) of that Act, the proprietor of the earlier right.

(3) So much of section 47(3) of that Act as provides that any person may make an application for a declaration of invalidity shall have effect subject to this article.

⁴ SI 2007/1976 which came into force on 1 October 2007.

Transitional provisions

6.—(1) Articles 2 to 4 shall not apply to an application for registration of a trade mark which was published before the coming into force of this Order.

(2) Article 5 shall not apply to an application for a declaration of invalidity which relates to a trade mark the application for the registration of which was published before the coming into force of this Order.”

8. RB’s application is made on the basis that SALF’s trade mark was registered in breach of section 5(2)(b). Section 5(2)(b) states:

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

(a)

(b) it is similar to an earlier trade mark and it 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.”

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

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

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

The case on the basis of trade mark 2101481 - BULLIT

Ownership and assignment of the earlier mark

10. SALF highlights in its counterstatement that the earlier mark was not in RB's ownership when SALF's mark was placed on the register. To demonstrate this, Mr Ranger (for SALF) exhibits at RSR1 of his evidence a copy of a document assigning the mark from W & S Holding BV ("WS") to RB; the document is dated 4 July 2005.

11. RB does not deny the above facts. However, in the evidence of both Mr Nield & Ms Arenal it is stated that SALF's claim is irrelevant because WS assigned all rights in the mark to RB and therefore RB is fully entitled to rely on the earlier mark in these proceedings. RB add in submission (in relation to 2122137 as well as 2101481) that at the time of filing the application for invalidity RB was not, in any event, required to be the proprietor of the marks upon which it relies.

12. I am in full agreement with RB's position for the two reasons that it has given. RB is now the proprietor of the mark in question and I can see no reason why they should not be entitled to apply for (and succeed if the case warrants it) a declaration of invalidity irrespective of whether it was the proprietor of the mark at the point in time when the mark the subject of the application was placed on the register. SALF has not put forward any legal reason for coming to an alternative view.

13. Prior to the coming into force of the Order anyone could apply for a declaration of invalidity on the basis of a breach of section 5 of the Act. There was no requirement for the applicant for invalidity to be the proprietor of (or to otherwise have an interest in) the mark upon which it relied. Although the Order has now changed this⁵, the transitional provisions of the Order state that this does not apply to a declaration of invalidity relating to a trade mark, the application for the registration of which was published before the coming into force of the Order. The Order came into force on 1 October 2007. The trade mark to which this application for a declaration of invalidity relates (SALF's trade mark) was published well before the Order came into force, namely, on 29 August 2001. This, therefore, means that the Order and its limit on who can apply for a declaration of invalidity has no bearing on these proceedings. Given that there is no requirement for any form of interest, the issue of assignment has even less significance. **The issue of ownership and assignment is not relevant.**

Estoppel and claims made in bad faith

14. RB claims in these proceedings that BULLET and BULLIT are similar trade marks likely to confuse the relevant public (paragraphs 7-11 of their statement of grounds). SALF argues that this claim is made in bad faith because of RB's previous conduct where it has argued to the opposite effect. Mr Ranger's evidence for SALF provides two pieces of evidence on this (both are contained in his Exhibit RSR2), these are:

⁵ Article 5(1)(2) of the Order limits an application for invalidation on section 5 grounds to being made by the proprietor or licensee of the mark relied on

i) A copy of a letter dated 8 December 2004 from RB (via a firm of solicitors called *Laytons*) to SALF. In this letter RB seeks consent from SALF in order to allow a later application for a BULLIT trade mark to be registered. RB states in this letter:

“In view of our client’s interest being primarily in the energy drinks field and in view of the large number of “BULL” marks currently coexisting on the UK Register, we do not consider that our client’s registration of the mark “BULLIT” in the UK will conflict with your business interests. In any event there are obvious visual and conceptual differences between the marks “BULLET” and “BULLIT”. Accordingly, we should be grateful if you would grant our client consent to their registration of “BULLIT” in the UK in classes 32, 33 and 43. We enclose a draft letter of consent for your use”.

ii) A copy of a letter in relation to the same later BULLIT trade mark but this letter is written by Mr Nield of Mewburn Ellis on behalf of RB to the UK Trade Marks Registry. The purpose of this letter is to persuade the examiner of the application not to refuse registration on the basis of an unrelated (to these proceedings) earlier mark in Class 43 (2335168). RB makes representations in this letter that BULLET and BULLIT bring very different allusions or connotations.

15. Mr Ranger also states in evidence that the reversal of RB’s position was simply to meet its own needs. He states that negotiations were taking place between SALF and RB and that when these broke down RB undertook the assignment of WS’s earlier BULLIT mark in order to undermine his business.

16. RB denies that an estoppel arises or that it has acted in bad faith. As part of Mr Nield’s second witness statement he exhibits at SRN8 a reply to RB’s request for consent. The reply is in the form of a letter from Mr Ranger on behalf of SALF which states:

“We are in receipt of your letter asking us to give your client consent to register the Trademark Bullit. In our opinion, bearing in mind the same word spelt with an “I” instead of an “e” but with the same pronunciation and in the same classes, there is definitely a conflict of interest.”

17. A copy of Mr Ranger’s letter is also included in the evidence of Ms Powers on behalf of RB (Exhibit JP1). She states that RB’s previous conduct must be taken in context, namely, that it was trying to seek protection for its later filed BULLIT mark and at that time it understood SALF’s product to be in a very narrow and specific sector of the fruit juice and fruit juice drinks market. She also states that the purchase of the earlier BULLIT mark from WS was unrelated to its dealings with SALF and that the purchase resulted from long standing negotiations which were commenced before it was aware of any conflict with SALF; to corroborate this, she states that RB’s interest in BULLIT

marks predates SALF's mark. At Exhibit JP2 of her witness statement there is a copy of International Registration 715928 (BULLIT). The date of the international registration (although not the date of UK designation) is earlier than the date on which SALF applied for its mark. Ms Powers also highlights that Mr Ranger's letter demonstrates a reversal of SALF's own position given that it is now arguing in these proceedings that the marks are not similar (contrary to what Mr Ranger previously said in his letter to RB). Ms Arenal also gives evidence on all these points, however, she adds no more than what has already been stated by Mr Nield and/or Ms Powers.

18. I do not find SALF's claim to be particularly clear. Its counterstatement refers to RB's claims as having been made in bad faith, this is further particularised in Mr Ranger's evidence as RB's conduct falling below the standards of acceptable behaviour. This is then rounded off in submission to say that this created an estoppel on the basis that RB's words and conduct caused SALF to maintain their registration and to continue developing business plans. Irrespective of this, the fact that SALF saw RB's reversal of position as a relevant factor was signalled at the outset and RB dealt with this issue in its evidence. I, therefore, intend to consider whether any form of estoppel arises.

19. SALF has not indicated the precise form of estoppel on which they rely. Estoppel by record and estoppel by deed can be quickly ruled out. The former relates, essentially, to the principle that matters already adjudicated upon should not be litigated and adjudicated upon again. This is clearly not the case here. Estoppel by deed relates to facts that have been stated in a deed, again, this is not the case here.

20. Estoppel by conduct is closer to SALF's position. However, this form of estoppel has a number of sub-sets. I do not intend to summarise them all, this is because the majority of these forms of estoppel have a common feature, namely, that the conduct complained of (in this case RB's conduct) must have been acted upon by the complainer (SALF) to its detriment; for example, in relation to promissory estoppel, *Halsbury's Laws of England* states:

“Promissory estoppel is an extension by equity of common law estoppel by representation. The principle of promissory estoppel is that, when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced. This principle was developed in a line of authority from 1877 onwards but first clearly enunciated in 1944. The term ‘promissory estoppel’ was not, however, used in the 1944 judgment generally taken as the basis of the doctrine.”

21. I do not see how SALF can suggest that it has acted upon RB's conduct to its detriment. One of the examples of reverse positioning stems from a letter from RB to the

UK Trade Marks Registry. I do not see how SALF's could have acted upon this as it was not even directed at them. In relation to the letter sent by RB to SALF seeking consent, it is clear from Mr Ranger's letter in response that SALF had its own (and different) view. Therefore, I do not see that it has acted on anything resulting from RB's conduct let alone acted upon it to its detriment. SALF says in submission that RB's conduct caused it to maintain its registration and to continue developing business plans; Mr Ranger's letter in response contradicts this claim.

22. I should also deal with what is known as estoppel by election. This is often explained as the principle that a person cannot approbate and reprobate on the same point. On this, *Halsbury's Laws of England* states:

“On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that a person may not approbate and reprobate expresses two propositions, (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent. Thus a plaintiff, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general, afterwards choose to return to the former claims and sue on it; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them. The common law principle which puts a man to his election between alternative inconsistent courses of conduct has no connection with the equitable doctrine of election and relates mainly, though not exclusively, to alternative remedies in a court of justice.”

23. Whilst I can see the argument that RB has both approbated and reprobated in relation to the same proposition, it is clear from the above that the estoppel does not operate unless RB has taken a benefit under or arising out of its first course of conduct. RB asked for consent, SALF declined. On the basis of the above, I cannot see that estoppel by election is relevant.

24. Taking all of the above into account, I cannot identify any form of estoppel that arises. SALF has failed to highlight any relevant case-law to suggest otherwise. The claim to bad faith in the making of RB's claims seems nothing more than an allegation that RB should be estopped from making its new claim and therefore this does not take the matter any further forward. I am also conscious that SALF itself has acted in a similar way by now reversing its own position from its initial point of view. **In all the circumstances, RB is not estopped from relying on 2101481.**

Proof of use

25. The registration procedure with regard to earlier mark 2101481 was completed on 8 August 1997. This is more than five years before the date on which the application for invalidation was made, and, therefore, according to the provisions of section 47(2A) of the Act, the use conditions must be met if this mark is to be relied on. In relation to the use conditions, no reasons for non use have been put forward, therefore, RB must show that within the period of five years ending with the date of the application for invalidity, the trade mark has been put to genuine use. **Genuine use must therefore be shown in the period 11 November 2001 – 10 November 2006.**

26. The primary evidence to demonstrate genuine use is included in the first witness statement of Mr Nield. Exhibit SRN7 of his evidence consists of a copy of the evidence that he gave in relation to revocation proceedings initiated by SALF in respect of 2101481. The revocation itself was determined⁶ by Ms Judi Pike (for the Registrar) and she found that genuine use had been shown in relation to “energy drinks”; Ms Pike’s decision was not the subject of an appeal. Ms Eijkelenborg’s witness statement in the present proceedings corroborates some of the information in SRN7 but does not, from what I can see, add anything of substance to the totality of the evidence that Ms Pike was able to take into account.

27. Mr Ranger (for SALF) has made some criticisms of Ms Eijkelenborg’s evidence on the basis that it is not clear what role she played in WS at the relevant time. This is strongly disputed in Ms Eijkelenborg’s second witness statement and also in Ms Powers’ witness statement; from this reply evidence it is clear that Ms Eijkelenborg played an important role in the business of WS and in the management team that negotiated with RB in relation to the assignment of 2101481. In any event, Ms Eijkelenborg clearly stated that she had full access to company records etc; therefore, RB’s concern is ill founded. Mr Ranger is also surprised that the assignment from WS to RB was for a nominal sum. RB’s witnesses say that the assignment formed part of large scale international negotiations and that the true sums involved are confidential, they also say that this is irrelevant to the question of use; I agree, I shall say no more about it.

28. SALF’s evidence on this point is from Mr Ranger. His exhibit RSR5 introduces the evidence he filed in the earlier revocation proceedings, which was, of course, considered by Ms Pike. Mr Ranger makes further comments in his witness statement in the present proceedings in a similar manner to those made in RSR5, he particularly questions whether the evidence shows genuine use as he does not regard the use as having any real market significance.

29. One of the periods of alleged non-use in the revocation proceedings (the period pleaded under section 46(1)(b) of the Act) was 18 October 2001 to 17 October 2006. This is a very similar period to the period in which proof of use is required in these proceedings. Having compared the respective periods against the evidence in exhibit SRN7, there is only one invoice that Ms Pike was able to take into account that I cannot,

⁶ Revocation no. 82665 (BL O-58-08).

namely, an invoice dated 31 October 2001 to Meridian House. Ms Pike was able to take four Meridian House invoices into account (under the section 46(1)(b) period) whereas I can only take into account three. The other pieces of evidence that Ms Pike was able to consider under section 46(1)(b) are all relevant here, namely, invoices to Kubizz, invoices to World Wines and Spirits and also Farmfoods' till receipts; there is also attendance and promotion at an exhibition in 2005 which, although not constituting sales, does show a degree of brand presence.

30. I am not bound by the findings of Ms Pike, particularly so, given that the dates at issue are not identical. Nevertheless, having considered the evidence filed together with the various submissions made, I also find that genuine use has been shown. The use, although not particularly voluminous, is more than token use and is sufficient to have created and maintained a share in the market concerned. I also adopt Ms Pike's specification (it is in any event the specification of the mark as registered now) of energy drinks. Although Ms Pike concluded that her decision was a close call, I doubt whether her decision would have been any different in the absence of the one invoice to which I have referred above. **The use conditions have therefore been met in relation to energy drinks in class 32.**

31. I move on to consider whether any similarity between the respective marks and their respective goods would lead to a likelihood of confusion. In reaching my decision on this, I take into account the guidance provided by the European Court of Justice ("ECJ") in a number of judgments relating to Article 7(2) of the Directive (Section 5(2) as incorporated into the Act), notably in: *Sabel BV v. Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* [1999] R.P.C. 117, *Lloyd Schuhfabrik Mayer & Co. GmbH v. Klijsen Handel B.V* [2000] F.S.R. 77 and *Marca Mode CV v. Adidas AG + Adidas Benelux BV* [2000] E.T.M.R. 723. It is clear from these cases that:

(a) the likelihood of confusion must be appreciated globally, taking account of all the relevant factors: *Sabel BV v. Puma AG*, paragraph 22;

(b) the matter must be judged through the eyes of the average consumer of the good/services in question; *Sabel BV v. Puma AG*, paragraph 23, who is deemed to be reasonably well informed and 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; *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details; *Sabel BV v. Puma AG*, paragraph 23;

(d) the visual, aural and conceptual similarities of the marks must therefore be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components; *Sabel BV v. Puma AG*, paragraph 23;

(e) a lesser degree of similarity between the marks may be offset by a greater degree of similarity between the goods, and vice versa; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17;

(f) there is a greater likelihood of confusion where the earlier trade mark has a highly distinctive character, either per se or because of the use that has been made of it; *Sabel BV v. Puma AG*, paragraph 24;

(g) mere association, in the sense that the later mark brings the earlier mark to mind, is not sufficient for the purposes of Section 5(2); *Sabel BV v. Puma AG*, paragraph 26;

(h) further, 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; *Marca Mode CV v. Adidas AG + Adidas Benelux BV*, paragraph 41;

(i) but if the association between the marks causes the public to wrongly believe that the respective goods come from the same or economically linked undertakings, there is a likelihood of confusion within the meaning of the section; *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 29

Relevant public and the purchasing act

32. As matters must be judged through the eyes of the average, relevant consumer (*Sabel BV v. Puma AG*, paragraph 23) it is important that I assess who this is. The goods are energy drinks on the one hand (RB's goods) and health fruit drinks and health fruit juice drinks (still and carbonated) on the other (SALF's goods). Although one focuses on energy gain and the other on health aspects, neither of these aspects results in them being regarded as specialist items consumed by a narrow group of consumer. Both sets of goods are beverages that are likely to be purchased by the general public at large.

33. SALF submit that the relevant consumer (particularly for health drinks) is discerning. Mr Nield (for RB) states in his evidence that on a recent trip to the supermarket *Sainsburys* (whilst taking photographs as evidence for another sets of proceedings) no shopper remained in the drinks aisle in the period of around two minutes that he was there; I infer from this that Mr Nield is suggesting that the average consumer is far from discerning. Mr Ranger states that this merely indicates that consumers know what they wish to purchase.

34. I take little from what Mr Nield says. The circumstances (such as time of day) surrounding his two minute visit to the drinks aisle of *Sainsbury* is not given. Neither is this one observation a particularly scientific analysis of shopper habits. I agree with Mr Ranger to the extent that little can be inferred from Mr Nield's evidence. However, I fall short of saying that the relevant consumer is discerning. The goods are beverages which are generally low cost items. They are general consumer items purchased by the general public at large. In my view, they are unlikely to be purchased with the highest degree of

consideration compared, for example, to a piece of electrical equipment or a new car. There will, of course, be some consideration given that the product may be inspected for its flavour, ingredients, whether it is still or carbonated etc; I also bear in mind that the case-law informs me that the relevant consumer is deemed to be reasonably well informed and circumspect and observant (see *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*). Nevertheless, the fact that the degree of consideration and attention applied during the purchasing process is not high, means that the propensity to imperfectly recall the marks may be higher.

Similarity of trade marks

35. When assessing this factor I must do so with reference to the visual, aural and conceptual similarities between the respective trade marks bearing in mind their distinctive and dominant components (*Sabel BV v. Puma AG*, para 23). For ease of reference, the respective marks are:

SALF's mark

RB's mark

BULLET

BULLIT

36. RB considers there to be a high degree of similarity between the marks on a visual and phonetic basis, indeed, it says in its statement of grounds that the marks are phonetically identical which leads, it says, to conceptual similarity. It also adds in submission that the BULLIT mark may, alternatively, be seen on a conceptual level as a reference to a bull (the animal) which is fast moving and, as such, there is conceptual similarity with a bullet given that both are fast moving and therefore a similar message is created of a product that delivers results quickly. For its part, SALF says that the marks are not similar and that BULLIT will be seen as an invented word, hence, there is no conceptual similarity with a bullet.

37. In terms of visual similarity, both marks are the same length, with five of their six letters being in common. These five letters are also in the same order. There is a point of difference (the “e” for the “i”) but this is towards the end of the mark and although this prevents the marks from being identical, it does not create a significant or marked visual difference. In terms of aural similarity, there is a slight aural difference; BULLET is likely to be pronounced as BUL-LUT whereas BULLIT is likely to be pronounced as BUL-LIT. This equates to the marks being very close from an aural point of view as the point of difference is very slight indeed.

38. In relation to conceptual similarity, the word “bullet” has an obvious meaning which will be known by the relevant consumer. It is a small usually metallic missile used as the projectile of a gun⁷. I accept that the word BULLIT has no dictionary meaning, however, similarity and subsequent confusion must be judged through the eyes of the relevant average consumer rather than on the basis of dictionary meanings (or in this case the lack

⁷ See Collins English Dictionary 5th Edition

of one). It is therefore important to consider whether the relevant consumer will nevertheless attribute a meaning to the word BULLIT.

39. RB claims in submission that the word BULLIT could be seen as a reference to a bull and therefore similar in concept to a bullet (because they are both fast moving). I consider this argument to be far fetched. However, as RB states in its statement of grounds, the marks are phonetically very close and there is the potential that the relevant consumer may approximate the word BULLIT to the word BULLET. In *Usinor SA v OHIM* (Case T-189/05), the CFI⁸ stated:

“In the third place, as regards the conceptual comparison, it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him.”

40. Taking the above into account, I consider that the relevant consumer is likely to notice the strong resemblance between the two words and will therefore approximate the meaning of BULLIT to that of a bullet and therefore the conceptual hook that he or she will take away is the same. Indeed, I would go so far as to say that some consumers may not even notice that the spelling is different. **All things considered, I consider there to be a high degree of similarity between the respective trade marks.**

Similarity of goods/services

41. All relevant factors relating to the goods and services in the respective specifications should be taken into account in determining this issue. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* the ECJ stated at paragraph 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.’

42. Other factors may also be taken into account such as, for example, the distribution channels of the goods concerned (see, for example, paragraph 53 of the judgment of the Court of First Instance (CFI) in Case T-164/03 *Ampafrance SA v OHIM – Johnson & Johnson (monBeBé)*).

⁸ The Court of First Instance of the European Communities.

43. The goods to consider are:

SALF's goods

Health fruit drink;
health fruit juice drink,
still and carbonated.

RB's goods

Energy drinks

44. The original claims by both parties focus on RB's specification as at the date of making the application for invalidity. At that point it included non-alcoholic beverages at large. To this extent, there was no dispute between the parties that SALF's goods fell within the ambit of RB's goods and were thus identical. However, RB's specification has been limited to "energy drinks" in view of the revocation action against its trade mark. Even if it had been argued that the revocation decision has no bearing on these proceedings given the effective date of revocation, I have, in any event, limited the goods to "energy drinks" for the purpose of these proceedings due to the proof of use provisions. SALF has made no specific comment on the degree of similarity between the respective goods that remain. RB says in submission that even though the goods constitute different categories of beverage, they are still similar given that they are non-alcoholic beverages generally available through the same outlets and that they are consumed by the same or similar type of customer. It also refers to a decision⁹ of the Board of Appeal ("BOA") where it was held that the same goods being compared here are similar to each other.

45. Both sets of goods are in the nature of a non-alcoholic soft drink, they are likely to be sold in close proximity to each other (in the soft drinks area) and both are general consumer items. There is no reason why an energy drink cannot be fruit flavoured, thus making the goods even closer. The distinction that one focuses on health aspects and the other on boosting energy is a relevant factor to consider, but, I consider this to be a relatively subtle distinction. **I find that the goods are similar to a high degree.**

Distinctiveness of the earlier trade mark

46. I have already found that the earlier trade mark will, on a conceptual level, be approximated to the word bullet. The misspelling may or may not be noticed by the relevant consumer. In relation to the goods (energy drinks) it could be argued that the mark has as suggestive quality, for example, that the drink will give a fast boost of energy. Irrespective of this, the suggestive quality is not an overwhelming aspect so that the mark would be regarded as being low in distinctiveness. I consider that the mark has at least a reasonable degree of distinctive character. Distinctive character can be enhanced through use. Although I have found that the mark has been used in order to meet the proof of use provisions, the use is not, as I have commented, overwhelming. Therefore, the mark is not likely to be known by a significant proportion of the relevant public and therefore its distinctiveness is not enhanced by its use. **Nevertheless, the mark remains as one possessing a reasonable degree of distinctive character.**

⁹ Case R1251/2005-2 of the Second Board of Appeal

Likelihood of confusion

47. Before reaching my conclusion, I should say that SALF (in Mr Ranger's evidence) say that RB cannot claim to have a monopoly in marks based on the word BULL. He refers to the existence of marks on the register such as BULL BRAND to demonstrate this. RB (in the evidence of Ms Arenal & Ms Powers) say that this is irrelevant as they are not claiming any form of monopoly. I will deal with this point briefly. The registrar does not know what is happening in the marketplace, state of the register evidence is not relevant. It is also not relevant to my deliberations if one party can or cannot appropriate the word BULL to itself (see the CFI's judgment in *Koipe Corporación SL v OHIM* T-363/04).

48. I have found the respective marks and their respective goods to be very similar. I have also found the earlier mark to be a reasonably distinctive one. In my view, these factors combine to create a likelihood of confusion on the part of the relevant consumer. I consider that a relevant consumer encountering the respective marks in relation to their respective goods will be directly confused, i.e., they are likely to mistake one for the other. It could be argued that if the respective goods (together with their trade marks) were compared side by side then the consumer would notice the difference. However, this is not the test (see Lloyd *Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). **Applying the correct test (taking into account that the consumer rarely has the chance to make direct comparisons etc) there is, in my view, a likelihood of confusion on the part of the relevant consumer. The application for invalidity succeeds on the basis of earlier mark 2101481.**

The case on the basis of trade mark 2122137 - THE SILVER BULLET

Previous hearing

49. Both parties have highlighted in evidence and in submission that during the examination of SALF's mark, earlier mark 2122137 was raised by the registrar as an objection but that this objection was subsequently waived at a hearing. RB says that the Hearing Officer's decision was flawed, whereas SALF says that all matters were duly considered by the Hearing Officer and that it would be wrong to re-visit his decision.

50. The previous hearing was undertaken during the examination phase of SALF's mark and was, therefore, without notice to any other party. The previous hearing was undertaken as part of the registrar's administrative role and not as part of the tribunal process to which these proceedings relate. I must therefore determine the merits of RB's claim myself and, therefore, **the previous hearing will have no bearing, either way, on my decision.**

Ownership

51. The earlier mark is owner by Coors Global Properties, Inc ("CGP") and not by RB. SALF say that RB should not be able to rely on CGP's mark in view of the recent changes embodied in the Order which limits the opportunity to file declarations of invalidity to the proprietor or licensees of the trade marks upon which they rely. RB says that the Order is not retroactive and the changes are, therefore, not relevant. As already highlighted in paragraph 13 of this decision, the Order does not apply to these proceedings. **The issue of ownership, therefore, has no bearing.**

Proof of use

52. Mr Nield for RB states in evidence that proof of use is not required. He appears to be aware of the relevant parts of section 47 of the Act that deal with the use conditions, but, he feels that the Act (the amended part of section 47) is wrong. I do not intend to debate the rights and wrongs of his argument. Whatever Mr Nield's opinion, the fact remains that the Act is in force and I have no option other than to enforce it. In the circumstances, and as with registration 2101481, **genuine use must be shown in the period 11 November 2001 – 10 November 2006.**

53. As to whether there has been genuine use, Mr Nield's evidence (his first witness statement) exhibits some packaging used for the THE SILVER BULLET mark (exhibits SRN2 & SRN3) and a receipt showing the purchase of the goods (exhibit SRN4). However, the receipt is dated 11 May 2007 which is after the relevant period and, therefore, cannot help to establish genuine use. Mr Nield's Exhibit SRN6 shows some examples of the use of the name THE SILVER BULLET appearing on the Internet (including goods for sale in on-line shops), however, I have been unable, with the exception of one (an extract from a web-site called "Wheat Free"), to place them within the relevant period.

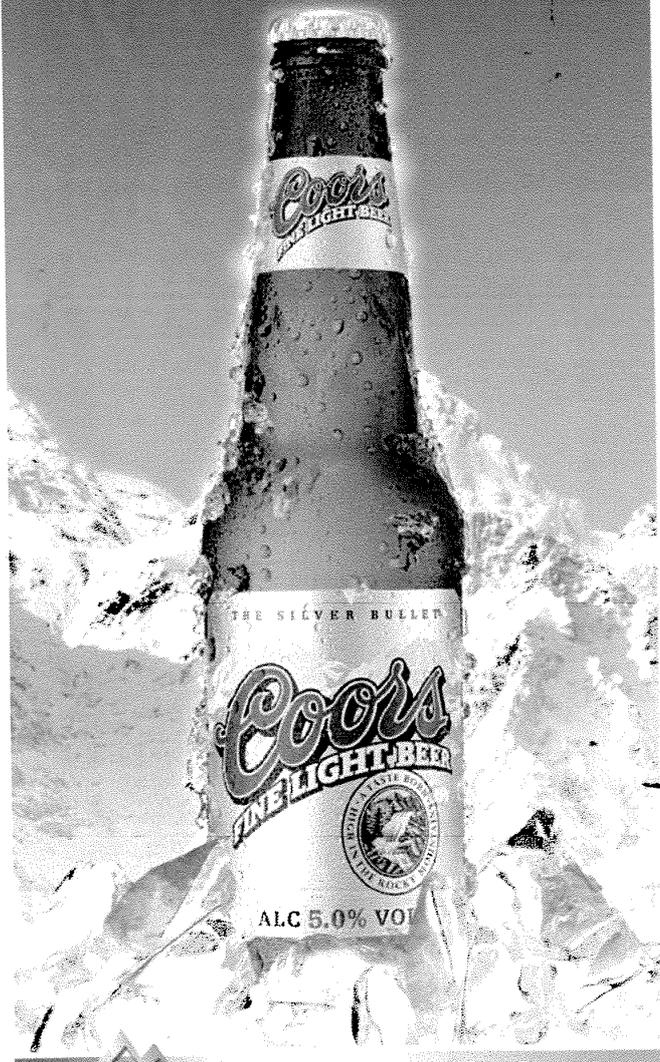
54. Further evidence demonstrating use of the mark comes from Ms Jessica Enderby who is a legal advisor working for Coors Brewers Limited (“Coors”). Coors is a related company to CGP and is the licensed user of the mark in the UK. The evidence can be summarised thus:

- a) Ms Enderby believes the relevant period to be 9 November 2001–9 November 2006. Although this is different to the period I have highlighted, the difference is so small that nothing will turn on this.
- b) That THE SILVER BULLET mark is used in relation to Coors Fine light beers and other Coors light products. She states that THE SILVER BULLET mark has been used in relation to these beers throughout the relevant period. Examples of product labels and packaging used between September 2003 and November 2006 are provided in Exhibit JE3. Although they all include the words THE SILVER BULLET, it is fair to say that this is in much smaller font and has less impact than the primary Coors trade mark.
- c) It is stated that approximately 50 million bottles of these beers (which carry the mark) are sold each year and that significant sums of money are invested in promotion. Some examples of promotional material are provided at Exhibit JE4. The goods are promoted in this material, but, THE SILVER BULLET mark is not specifically highlighted or promoted. Two examples of the promotional material include a picture of a beer bottle with the words THE SILVER BULLET appearing on its label, however, in the context of the promotional material as a whole, I doubt whether the consumer would even notice this.
- d) Wholesale turnover figures are provided for goods that bear THE SILVER BULLET mark. These are: 2003 (£4 million), 2004 (£6.5 million), 2005 (£13 million) and 2006 (£14 million).
- e) Ms Enderby states that £19 million was expended on promotion between 2003 to November 2006 and that the goods bearing the mark have been widely available throughout the UK via a number of retailers, including large national supermarkets.
- f) A typical example of the nature of the use of the mark is shown below:

Coors
FINE LIGHT BEER

A REFRESHING, LIGHTER
TASTING LAGER BORN HIGH IN
THE ROCKY MOUNTAINS

5% ABV
PREMIUM LAGER



55. For SALF, Mr Ranger questions in evidence whether the nature of this use will result in it being seen as a badge of trade origin. He also notes that the six marks in the series that are shown on the UK-IPO website were reduced to three (as shown in the table on page 2 of this decision) but that it is THE SILVER BULLET version that has been used. He also states that even if this constitutes genuine use, then such use would only be in relation to beers. Mr Ranger adds that it would be inappropriate for him to have to part cancel CGP's mark if it has only been used in relation to beer.

56. For RB, Ms Arenal states that the mark is used in a trade mark sense and cross refers to the evidence of Mr Nield and Ms Enderby. She also refers to her Exhibit SA1 which consists of other SILVER BULLET registrations which she considers demonstrate that Coors/CGP regard the sign as a trade mark.

57. Assessing the evidence, it is clear that sales of goods bearing the mark are very high, as are the sums of money spent on promotion. It is also clear from Ms Enderby's evidence that the mark THE SILVER BULLET appears on the goods themselves, as per the example given above. The promotional material promotes the goods being sold, but, it does not specifically refer to THE SILVER BULLET. Whilst I understand the concern raised by Mr Ranger regarding the impact that the mark will have on the relevant consumer, I am prepared to accept that regular and consistent sales of the volume demonstrated in evidence will result in the mark being seen as a badge of trade origin. The use conditions are, therefore, met. However, as Mr Ranger states, use has only been shown in relation to beer. Section 47(2)(E) requires that if use is shown for only some of the goods then the earlier mark can only be relied on to this extent. **Therefore, for the purposes of these proceedings, earlier mark 2122137 shall only be considered to the extent that it covers beer in Class 32.**

Relevant public and the purchasing act

58. In relation to health fruit drinks, I have already commented that they are items purchased by the general public at large and although the purchasing act will not be an ill considered process, the goods, nevertheless, are unlikely to be purchased with the highest degree of attention. In relation to beer (covered by CGP's trade mark) the average consumer will be the general public, albeit those of drinking age. Teetotallers will form a small part of the relevant consumer group as they may buy beer from time to time (for example, as gifts for others), but, in the main, the typical relevant consumer will be those who drink alcohol. Although beer is not the most expensive item in the world, it is still purchased with at least a reasonable degree of attention given that taste, and to some extent brand loyalty, play a part in the selection process, but, again, this does not equate to the purchasing act being undertaken with the highest degree of attention or consideration which means that the propensity to imperfectly recall the marks is higher.

Similarity of trade marks

59. CGP's registration is for a series of three trade marks. For the purposes of comparison, I will use the plain word mark as depicted below; the other marks in the series are no better or no worse for RB's case.

SALF's mark

CGP's mark

BULLET

THE SILVER BULLET

60. RB says in submission that the word "bullet" will dominate CGP's mark given that SILVER is a qualifying term and that the goods have silver packaging. They add that the dominant part of CGP's mark is identical to SALF's mark. On this point, SALF says that there is no reason to suppose that the word bullet will dominate the mark and that the consumer will recognise it as a whole phrase. Of relevance here is the judgment of the ECJ where it is stated at paragraph 42 of their judgment in *Shaker di L. Laudato & Co. Sas* (C-334/05):

"As the Advocate General pointed out in point 21 of her Opinion, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element."

61. The words THE SILVER cannot be said to be negligible in the context of the overall impression of the mark. I must therefore compare the marks as a whole. I should add that the fact that the CGP mark may currently be used in relation to goods with silver coloured packaging is of no significance. The packaging of goods is merely part of the marketing strategy utilised by a proprietor and can therefore be temporary. A proprietor who adopts a particular strategy at one point in time has the freedom to choose another strategy at a different point. In the CFI's judgment in *Devinlec Développement Innovation Leclerc SA v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM) Case T- 147/03 it was stated:

"104 Consideration of the objective circumstances in which the goods covered by the marks are marketed is fully justified. The examination of the likelihood of confusion which the OHIM authorities are called on to carry out is a prospective examination. Since the particular circumstances in which the goods covered by the marks are marketed may vary in time and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between two marks, which pursues an aim in the general interest, that is, the aim that the relevant public may not be exposed to the risk of being misled as to the commercial origin of the goods in question, cannot be dependent on the commercial intentions, whether carried out or not, and naturally subjective, of the trade mark proprietors.

.....

107 It follows that by taking into consideration in the assessment of the likelihood of confusion between the marks the particular circumstances in which the goods covered by the earlier mark are marketed, the temporal effect of which is bound to be limited and necessarily dependent solely on the business strategy of the proprietor of the mark, the Board of Appeal erred in law.”

62. The above case (see paragraphs 66-67 of the CFI’s judgment) also highlights that the comparison of the marks should not be undertaken on the basis of the actual nature of the use that may be demonstrated in evidence. It is the notional use of the mark as registered that must be considered.

63. In relation to any visual similarity between the marks, both share a common element that is likely to be noticed by the eye, namely, the word “bullet”. However in CGP’s mark this is preceded by the words “The Silver”. This, therefore, adds a point of visual difference between the two and also creates a different visual structure. Nevertheless, the common element creates some similarity. Similar considerations apply in relation to the aural assessment.

64. In relation to conceptual similarity, SALF state that “the silver bullet” has a recognisable conceptual meaning relating to a straightforward solution of extreme effectiveness. This meaning is itself a metaphor based on the fact that, according to folklore, a silver bullet was the only means of killing a werewolf. RB questions whether the conceptual meaning put forward will be grasped by the relevant consumer - Mr Nield states in evidence that this is down to the fact that the phrase has two possible meanings and therefore creates ambiguity, and, furthermore it may simply be seen as a descriptive term followed by a noun. Exhibit SRN6 of Mr Nield’s evidence also has an extract from Coors’ website which refers to the mark THE SILVER BULLET and its origins; the name is based on colour, no mention of the mythological or subsequent metaphorical meaning is given.

65. I am aware that visual and aural similarity can, in certain circumstances, be counteracted by a conceptual difference. In *Devinlec Développement Innovation Leclerc SA v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* (Case T-147/03) the CFI stated:

“It is true that, according to case-law, a conceptual difference between the marks at issue may be such as to counteract to a large extent the visual and aural similarities between those signs (*BASS*, cited in paragraph 60 above, paragraph 54). However, for there to be such a counteraction, at least one of the marks at issue must have, from the point of view of the relevant public, a clear and specific meaning so that the public is capable of grasping it immediately.”

66. I am also conscious of the decision of Ms Anna Carboni (sitting as the Appointed Person¹⁰) in *Chorkee Trade Mark* (BL 0/048/08) where she stated:

¹⁰ A person appointed by the Lord Chancellor to hear appeals under the Act.

“37. I have no problem with the idea that judicial notice should be taken of the fact that the Cherokee Nation is a native American tribe. This is a matter that can easily be established from an encyclopaedia or internet reference sites to which it is proper to refer. But I do not think that it is right to take judicial notice of the fact that the average consumer of clothing in the United Kingdom would be aware of this. I am far from satisfied that this is the case. No doubt, some people are aware that CHEROKEE is the name of a native American tribe (the Hearing Officer and myself included), but that is not sufficient to impute such knowledge to the average consumer of clothing (or casual clothing in the case of UK TM no. 1270418). The Cherokee Nation is not a common subject of news items; it is not, as far as I am aware, a common topic of study in schools in the United Kingdom; and I would need evidence to convince me, contrary to my own experience, that films and television shows about native Americans (which would have to mention the Cherokee by name to be relevant) have been the staple diet of either children or adults during the last couple of decades.”

67. I am prepared to accept that the average consumer will know the meaning of the word BULLET. However, I am less certain that this is so with regard to the phrase “the silver bullet”. I have heard of the term, and whilst I accept that some members of the relevant public would also be aware of its meaning, I do not know how common this knowledge will be. In the absence of any evidence to support the proposition that the phrase is widely known, I find that the meaning that will generally be attributed to it is a literal one, namely, a bullet that is made of silver. On this basis, my assessment of conceptual similarity means that the concepts are not dissonant in nature, far from it, they are actually similar, i.e. both relating to bullets, albeit one of them being made from silver.

68. Overall, I consider the marks to be similar to at least a reasonable degree.

Similarity of goods/services

69. The goods to consider are:

SALF’s specification

Health fruit drink; health fruit
juice drink, still and carbonated

CGP’s specification

Beer

70. SALF (Mr Ranger) says that the goods are not similar. RB takes an opposite point of view, Ms Powers states that the goods are sold in the same retail outlets, to the same consumer (the general public) and are consumed at social events often as substitutes for each other. She also refers to the practice of mixing non-alcoholic drinks with beer. Mr Arenal (for RB) makes similar statements to Ms Powers but she also refers to a decision of the opposition division of OHIM¹¹ in *Red Bull GmbH v The Sao Cola Company Inc* where the goods of the type being compared here were found to be similar because: they

¹¹ The Office for Harmonization in the Internal Mark (Trade Marks & Designs).

were both drinks; that a soft drink may be substituted for beer thus creating an element of competition; that the goods are aimed at the same consumer (the general public); that they are both served in similar establishments and sold in specialised shops close to each other on the same shelves.

71. The decision of OHIM's opposition division is neither binding nor persuasive. I am also conscious that the CFI has recently issued a judgment in *The Coca-Cola Company v OHIM* (Case T-175/06) where wine and non-alcoholic beverages were found not to be similar. The goods under comparison here are slightly different to those considered by the CFI, however, my view (and a view supported by the CFI) is that whilst both goods are indeed drinks, any similarity is quite superficial due to the fundamental difference between their nature and end purpose, namely, that one is alcoholic whereas the other is a soft drink and one is consumed, in the main, because of its alcoholic content (and distinctive taste) whereas the other does not have this feature. Furthermore, in terms of distribution channels, whilst the same undertaking (for example a supermarket) may sell both, they are not normally sold alongside each other; in fact, they are normally sold in different areas of the supermarket. **Overall, I equate this to mean that there is no similarity or, at the very most, any similarity is of a very minimal nature indeed.**

Distinctiveness of the earlier trade mark

72. The earlier mark has, at the very least, a reasonable degree of distinctive character; it has no descriptive quality and gives no real allusion to the goods. The mark also has the benefit of the use to which it has been put with the result that it is likely to be known by a significant proportion of the relevant public for beer. On this basis, the distinctiveness of the mark is enhanced by its use. **Accordingly, I consider the mark to be a highly distinctive one.**

Likelihood of confusion

73. On confusion, Mr Ranger for SALF notes in his evidence that CGP's goods are sold in bottles whereas his goods are sold in cans. He adds that even if CGP's goods were sold in cans then the consumer will still take a moment to consider what they are purchasing. He also highlights that no instances of confusion are known to him or have been put forward by RB. In relation to the point regarding use on bottles, Ms Arenal states that notional use must be considered and the assessment should not be limited to that proposed by Mr Ranger. All things considered, RB believes that confusion will arise.

74. I should firstly say that the point regarding use on bottles against use on cans is not relevant. As Ms Arenal states, notional use must be considered, not simply the current forms of use by either party. In my assessments, I have found the respective trade marks to be reasonably similar and for the earlier mark to be highly distinctive. However, I have found any degree of similarity between the goods to be minimal. The likelihood of confusion must be appreciated globally, taking account of all the relevant factors (*Sabel BV v. Puma AG*). I also bear in mind that there is an interdependency between the similarity between the goods and the marks, in that a lesser degree of similarity between

the goods may be off-set by a greater degree of similarity between the marks and vice versa (see *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17). It is therefore a question of balancing these respective factors and concluding whether or not the average consumer is likely to be confused about the economic origin of the goods. In my view, the average consumer will not be so confused. I take the view that the degree of similarity between the goods is so minimal that the average consumer, at most, will bring the THE SILVER BULLET mark to mind but that they will not necessarily believe that the goods sold under the BULLET mark are in any way linked to it. In reality, I doubt whether, taking into account the respective goods, THE SILVER BULLET mark will even be brought to mind with the result that the trade marks will simply be viewed as different and separate trade marks from different and separate undertakings. **There is no likelihood of confusion with 2122137.**

CONCLUSION

75. The application for invalidation is successful in view of my findings in relation to earlier mark 2101481. In accordance with section 47(6) of the Act, SALF's registration shall be deemed never to have been made.

COSTS

76. Submissions have been made regarding the conduct of the respective parties. For example, SALF says that continued negotiations may have resolved the dispute and that RB should not have acted in the way that it did. RB says that it attempted to settle by negotiation but that the requests made by SALF were disproportionate. RB adds that SALF's conduct has sailed close to the wind because SALF has registered marks such as BULL-NRD, BULL DOG; I infer from this that RB feels that SALF are purposefully getting close to RB's well known RED BULL trade marks.

77. None of this persuades me that I should award anything other than costs from the registrar's published scale. In the circumstances, RB has been successful and is entitled to a contribution towards costs. I hereby order SALF to pay RB the sum of £1500 made up as follows:

Filing application of invalidation	£300
Official fee	£200
Considering counter-statement	£200
Preparing and filing evidence	£400
Considering SALF's evidence	£200
Preparing written submissions	£200
Total	£1500

78. The above sum should be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 4th day of July 2008

**Oliver Morris
For the Registrar
The Comptroller-General**