

O/284/12

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO 2526366
BY SOUTH BEACH BEVERAGE COMPANY, INC
TO REGISTER THE TRADE MARK**

PURE RUSH

IN CLASS 32

AND

**THE OPPOSITION THERETO
UNDER NO 100152
BY
RSH DRINKS CO (A PARTNERSHIP)**

Background

1. South Beach Beverage Company, Inc (“the applicant”) applied to register PURE RUSH as a trade mark on 18 September 2009 for the following goods in Class 32:

Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.

2. The application was published on 13 November 2009 in the *Trade Marks Journal*, following which an opposition was filed by Rush Drinks Limited under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This section states:

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

(a)

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

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

3. The opposition relies upon two registered trade marks, 2032992 and 2266289, which, at the date on which the opposition was filed, were owned by Rush Drinks Limited. Since then, the marks have been assigned to RSH Drinks Company (a partnership) (“the opponent”). The opponent claims that the applicant’s mark is highly similar to its marks, PURE being merely a descriptor, and is for identical or highly similar goods. As a result, the opponent claims that there would be “a risk of confusion”. Details for the opponent’s two earlier marks are as follows:

(i) 2032992

RUSH

Class 32: *Non-alcoholic beverages; non-alcoholic fruit extracts; non-alcoholic fruit juice beverages; fruit juices; soda water; aerated and still mineral and table waters.*

Application date: 9 September 1995; date registration procedure completed: 26 July 1996.

(ii) 2266289

RUSH

Class 32: *Non-alcoholic beverages; non-alcoholic fruit extracts; non-alcoholic fruit juice beverages; aerated and still mineral and table waters; preparations for making non-alcoholic beverages; powders for use in making non-alcoholic beverages.*

Application date: 5 April 2001; date registration procedure completed: 7 September 2001.

4. The opponent's trade marks both completed their registration procedure more than five years before the date on which the opposed application was published. They are both therefore earlier trade marks which are subject to the proof of use provisions¹. The opponent has made a statement of use in its notice of opposition in respect of *non-alcoholic beverages*, in relation to both its earlier marks. The applicant filed a counterstatement, denying the ground of opposition and stating that it did not require the opponent to provide proof that it had used the marks on non-alcoholic beverages. Consequently, the earlier marks may be taken into account in these proceedings in respect of *non-alcoholic beverages* without the opponent being required to prove use of the marks on these goods. The effect of the statement of use, in relation to marks which are both RUSH and in relation to identical goods for both earlier registrations, is that the opponent's two earlier marks, for the purpose of these proceedings are identical. I will therefore refer to the opponent's earlier marks in the singular from now on.

5. Both sides filed evidence and written submissions, choosing to have a decision made from the papers rather than attending a hearing.

Evidence

6. The opponent's evidence in chief comes from Thomas Brand, who is a trade mark attorney at W.P. Thompson & Co, the opponent's professional representatives in these proceedings. Mr Brand has filed a witness statement dated 21 October 2011 in which he states that the previous opponent has been called Rush Drinks Limited since 2002 and that the earlier marks are therefore the opponent's house marks. In view of the fact that the marks have now been assigned to a company which does not include the word RUSH in its name, this evidence is of no assistance.

7. Mr Brand states that the mark RUSH has been used continuously in the UK since 2005 and to support his statement he files the following exhibits:

¹ See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations) 2004 (SI 2004/946) which came into force on 5th May 2004.

- (i) an article from the May 2009 edition of *bar* magazine;

Bar magazine is a trade publication for the licensed trade. The article relates to energy drink sales in bars in which “energy drink Rush” is mentioned in relation to mixing with vodka. There is a picture of a can with a stylised word „rush’ along its length.

- (ii) an advertisement from the May/June 2007 edition of *The Pulse*;

The page exhibited is very poorly reproduced and it is just possible to make out the word PULSE at the bottom of the page. The rest of the page consists of pictures of bottles with prices next to them. One of the pictures is of a bottle or can with the stylised word „rush’ along its length and pricing details of “24 x 250ml Buy 2 cases & get 3rd case free” “Sell at 2 for £1.00”. There is no information as to the nature of *The Pulse*.

- (iii) an advertisement from the April/May 2010 edition of *LWC*

Similarly, I do not know what *LWC* is. The page exhibited is of poor quality. There is a picture of drink from a can, which appears to be the same as the „rush’ drink in the other exhibits, being poured into someone’s mouth. The page makes a reference to “Rush Energy Drink”. This exhibit is after the relevant date, which is the application date (18 September 2009).

- (iv) four invoices from 2008 and 2009 raised against various companies in the UK².

The invoices are to customers in Whitstable (1 April 2008 for £1013.51), Barking (30 July 2008 for £1013.51), Leominster (4 August 2009 for £991.94) and Stockton-on-Tees (22 July 2008 for £3040.52). The invoices are all in respect of RUSH (energy drink) for trays consisting of 24 x 250ml cans, at £5.99 per tray. The wholesale price per can in these invoices is therefore about 25p.

8. The applicant’s trade mark attorney filed submissions about Mr Brand’s evidence. Part of its submissions deal with the issue of genuine use, which is not relevant to these proceedings because the applicant specifically stated in its counterstatement that it did not require proof of use³. I will therefore disregard this part of the applicant’s submissions and will bear in mind the remainder when making my assessment as to whether there is a likelihood of confusion. The

² More invoices were supplied with the opponent’s reply evidence, but it is unnecessary to document them for reasons that will become clear.

³ In box 5 of Form TM8 the applicant has answered „No’ to the question „Do you want the opponent to provide proof of use?’

applicant has also filed evidence from its Vice President, Elizabeth N. Bilus. Ms Bilus states that the mark has been used in the UK since February 2011.

9. In order to preserve its position with regard to the applicant's genuine use challenge, the opponent, in reply, filed evidence of its use⁴ although it did not have to meet the challenge for the reasons already explained. I will deal with it briefly, not in the context of genuine use, but in relation to the applicant's point about lack of marketplace confusion. The applicant has stated that it sold 3.2 million units of beverages in 2011, but it does not say in which country (the applicant is American). The opponent states that its turnover figures for the last five years (on energy drinks) range from £756,208 in 2007 to £728,851 in 2011, with unit sales figures of 3,024,831 in 2007 falling to 2,915,403 in 2011. However, whilst the applicant refers to its drinks being sold in BP, Total, WHS Travel, Boots, Shell, Tesco, Sainsbury's, Asda, Spar and Compass Group, the opponent says that it does not sell its goods through these outlets and that "consequently, any absence of confusion to date is more likely to be a result of differing distribution channels than any inherent lack of confusing similarity between the marks." The applicant submits that its evidence shows that "the relevant public have not and would not be confused". However, for concurrent trading to be relevant there must be evidence that enough members of the relevant public had been exposed to both marks, been able to differentiate between them and ultimately conclude that the undertakings were unconnected. Absence of confusion has been the subject of judicial comment: it seldom has an effect on the outcome of a case brought under section 5(2)(b) of the Act⁵. In this

⁴ From Lee Routledge, a partner in the opponent company.

⁵ In *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 Laddie J held:
"22. It is frequently said by trade mark lawyers that when the proprietor's mark and the defendant's sign have been used in the market place but no confusion has been caused, then there cannot exist a likelihood of confusion under Article 9.1(b) or the equivalent provision in the Trade Marks Act 1994 ("the 1994 Act"), that is to say s. 10(2). So, no confusion in the market place means no infringement of the registered trade mark. This is, however, no more than a rule of thumb. It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place."

In *Rousselon Freres et Cie v Horwood Homewares Limited* [2008] EWHC 881 (Ch) Warren J commented:

"99. There is a dispute between Mr Arnold and Mr Vanhegan whether the question of a likelihood of confusion is an abstract question rather than whether anyone has been confused in practice. Mr Vanhegan relies on what was said by Laddie J in *Compass Publishing BV v Compass*

case, there is no evidence that the goods have been sold in the same outlets, or that the public differentiates between the two undertakings. It is necessary for the possibility of confusion to have been properly tested. Use between February 2011 and 31 January 2012, the latter being the date on which Ms Bilus signed her witness statement, is too short a period of time in which to draw the conclusions which are postulated by the applicant. The applicant's evidence does not assist me in deciding whether there is a likelihood of confusion.

Decision

10. The leading authorities which guide me in this Section 5(2)(b) ground are from the Court of Justice of the European Union ("CJEU"): *Sabel BV v Puma AG* [1998] RPC 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P (LIMONCELLO). It is clear from these cases that:

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

(b) the matter must be judged through the eyes of the average consumer for the goods/services in question; *Sabel BV v Puma AG*, who is deemed to be reasonably well informed and reasonably circumspect and observant - but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind; *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel B.V.*,

(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*,

(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*,

Logistics Ltd [2004] RPC 41 at paragraphs 22 to 26, especially paragraph 23. Mr Arnold says that that cannot any longer be regarded as a correct statement of the law in the light of *O2 Holdings Ltd v Hutchison 3G Ltd* [2007] RPC 16. For my part, I do not see any reason to doubt what Laddie J says..."

In *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283 Millett LJ stated: "Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

e) assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark; the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*

f) it is only when all other components of a complex mark are negligible that it is permissible to make the comparison on the basis of the dominant element; *Shaker di L. Laudato & C. Sas v OHIM*.

(g) 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*,

(h) 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*,

(i) in determining whether similarity between the goods or services covered by two trade marks is sufficient to give rise to the likelihood of confusion, the distinctive character and reputation of the earlier mark must be taken into account; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*,

(j) 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*,

(k) 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 and Adidas Benelux BV*,

(l) 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*.

Comparison of goods and services

11. It is necessary for me to determine the level of similarity between the parties' services on account of the interdependency principle, whereby a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the trade marks, and vice versa, as a factor in the global appreciation of the likelihood of confusion⁶.

⁶ As per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*.

12. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

“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.”

„Complementary’ was defined by the General Court (“GC”) in *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-325/06:

“82 It is true that goods are complementary if there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking...”

13. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] R.P.C. 281 for assessing similarity between goods and services included an assessment of the channels of trade of the respective goods or services. Specifications should not be given an unnaturally narrow meaning, as per *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267. Finally, if goods or services fall within the ambit of terms within the competing specification, they are considered to be identical, as stated by the GC in *Gérard Meric v OHIM*, case T-133/05⁷.

14. The comparison is between the opponent’s goods, *non-alcoholic beverages* and the applicant’s goods, *beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.* The terms which I have underlined in the applicant’s specification are clearly identical to, or are encompassed by, the opponent’s goods.

⁷ 29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark (Case T-104/01 *Oberhauser v OHIM – Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM – Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42).”

15. Beers

Beers can be alcoholic and non-alcoholic and the applicant's term encompasses both types. Goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application. The opponent's term *non-alcoholic beverages* encompasses non-alcoholic beers and so the goods must be considered to be identical.

16. Syrups and other preparations for making beverages

These are ingredients for making beverages (whether ingredients are similar to the finished item depends on the goods being considered⁸). Such preparations include concentrated cordials and fruit syrups which, when diluted, create still or carbonated drinks. The nature of the parties' goods differs because the applicant's goods are not drinks. There is not identity of purpose because there is the step of preparation to make a drink in the first place, although the ultimate purpose of both the opponent's and the applicant's goods is convergent (i.e. drinks to quench thirst or enjoy socially). There is also competition between the parties' goods because the choice is whether to buy a drink which is ready to drink (e.g. in a can) or whether to make a drink oneself with a concentrate and, e.g. water. For those who sell drinks, such as pubs, there is a complementary relationship between the concentrate (syrups and other preparations for making beverages) and the finished form of the drink (such as Coca Cola on tap at the bar). Furthermore, in a supermarket, squashes and cordials are found nearby to read-to-drink beverages. There is a good level of similarity between the parties' goods⁹.

⁸ The GC considered the relationship between finished article and component parts in *Les Editions Albert René v OHIM Case T-336/03*:

"The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular their nature, intended purpose and the customers for those goods may be completely different."

⁹ In *VITASOY International Holdings Ltd v The Sunrider Corp (VITALITE Trade Mark)* [2007] R.P.C. 29, Warren J said, at paragraph 6:

"...I consider that it would be a justifiable inference (rebuttable by evidence) to conclude that a syrup or other preparation to make a beverage similar to another beverage would entail that the syrup was similar to the latter beverage. Putting that in terms of the present case: drink X could be both a nutritional supplement and, at the same time, a drink falling within the VITA class 32 specification. A syrup to make drink X (or drink Y where drink Y is similar to drink X) would fall within the VITALITE class 32 specification. The syrup would itself be similar to drink X."

Average consumer and the purchasing process

17. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect, but his/her level of attention is likely to vary according to the category of goods. The average consumer for the parties' goods is the general public plus, in the case of syrups and preparations for making into beverages, those who make drinks such as in pubs and cafés. Taking into account that the applicant's mark covers beer, in relation to which taste preference and alcoholic content may play a part in selection, the average consumer will pay a reasonable amount but not the highest amount of attention. The purchasing process for drink is largely a visual process, but I do not ignore the potential for oral use of the mark¹⁰.

Comparison of trade marks

18. The above authorities direct that, in making a comparison between the marks, I must have regard to each mark's visual, aural and conceptual characteristics. I have to decide which, if any, of their components I consider to be distinctive and dominant, without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details. The opponent's mark consists of the single word RUSH, and the applicant's mark contains two words: PURE RUSH. Clearly the dominant distinctive element of the opponent's mark is RUSH as that is its single component. In the applicant's mark, PURE is an adjective and, generally, adjectives are subordinate to nouns so that PURE is less dominant than RUSH. The phrase conforms to this common grammatical pattern. It is a rough rule of thumb that the beginnings of marks are important in the perception of marks by the average consumer because this is the part that first strikes the consciousness, but the extent to which the element affects similarity must be put into perspective according to the nature of the initial element. If the beginning of the mark consists of an element which is a descriptive or common combining form, the importance may be reduced¹¹. In the circumstances of this case, the rule of thumb has little application because PURE is less distinctive than RUSH in relation to drinks where purity may be a quality of the drink.

19. Both words are equal in length. The first element of the applicant's mark is not present in the opponent's mark, which makes for a degree of difference visually and aurally. There is an average degree of visual and aural similarity between the marks.

¹⁰ General Court ("GC") in *Simonds Farsons Cisk plc v Office for Harmonization in the Internal Market* (OHIM) Case T-3/04

¹¹ *Castellani SpA v OHIM*, T-149/06 and *Spa Monopole, compagnie fermière de Spa SA/NV v OHIM*, Case T-438/07.

20. This brings me to consider the conceptual significance of the marks. As a verb, „rush’ means to hurry (or to make something or someone hurry). Collins English Dictionary¹² also gives, as a noun:

“a sudden surge of sensation, especially produced by a drug.”

21. „Pure’ is an adjective which Collins defines as meaning “not mixed with any extraneous or dissimilar materials, elements, etc.: *pure nitrogen*” and “free from tainting or polluting matter; clean; wholesome: *pure water*.” Collins also refers to the word as a prenominal intensifier, as in “*pure stupidity*; *a pure coincidence*.”

22. Rush is not an invented word or a word rarely met. It will be recognised without any other elements to give it context as the verb to rush. However, there is the possibility that it will evoke connotations of “a sudden surge of sensation”, in relation to flavour or drinks which contain certain properties, such as energy drinks: an energy rush. Although a possibility, without other words or devices which tie the single word more obviously to this meaning, the reference is oblique.

23. Pure is not a word which would commonly be used as an intensifier in relation to „rush’ in the sense of hurry; one would not describe oneself as being in a pure rush. Rather than making sense of the mark in this way, the average consumer is more likely to consider that „pure’ in „pure rush’ describes the unadulterated, „pure’ form of something called rush. When considered in relation to drinks, „pure’ gives „rush’ some context: a sudden surge (rush) of pure flavour or energy (or some other property), or an intense rush of e.g. a flavour or energy.

24. Rush is a well understood word which is featured in both marks but the addition of Pure, which is an unnatural intensifier in relation to being in a rush, tilts the meaning of the applicant’s mark away from the more easily understood meaning of haste. In relation to drinks, the opponent’s mark evokes the meaning of a rush/sudden surge of sensation, whilst the applicant’s mark is an intense (pure) rush or sensation. In this sense, the marks are conceptually highly similar.

Distinctiveness of the earlier mark

25. I must consider the distinctive character of the earlier mark because the more distinctive it is, either by inherent nature or by use (nurture), the greater the likelihood of confusion¹³. The distinctive character of the earlier trade mark must be assessed by reference to the goods for which it is registered and by reference to the way it is perceived by the relevant public¹⁴. Although the opponent has

¹² 2000 Edition

¹³ *Sabel BV v Puma AG* [1998] RPC 199.

¹⁴ *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

filed use of its mark, it has not given any information about the proportion of the market which it occupied at the relevant date. An annual turnover of £700,000 to £800,000 in the UK energy drinks market strikes me as being a small fraction of a huge market. This means that the opponent is not entitled to claim the benefit of an enhanced level of distinctive character through its use of the mark. RUSH does not describe or obviously allude to the characteristics of non-alcoholic beverages. The most that can be said is that one may experience a rush of flavour or energy after consumption (the applicant submits that the opponent's mark is allusive in relation to energy drinks containing caffeine). RUSH has a good level of inherent distinctive character as a trade mark for non-alcoholic beverages.

Likelihood of confusion

26. In deciding whether there is a likelihood of confusion between the marks, I must weigh the various factors I have identified and also bear in mind the principle of interdependency, whereby a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the trade marks, and vice versa (*Canon*). I have found that the applicant's goods range from identical to a good level of similarity to the opponent's goods.

27. I bear in mind the whole mark comparison and the dominant and distinctive elements within the marks. I should guard against dissecting the marks so as to distort the average consumer's perception of them; the average consumer perceives trade marks as wholes and rarely has the opportunity to compare marks side by side, relying instead upon the imperfect picture he has of them in his mind.

28. I have considered the applicant's submissions in relation to third party marks in class 32 on the register; it cites PURE BLUE, PURE & SIMPLE, VIRGIN PURE, V PURE, PURE LIFE and PURE SURPRISE. The applicant submits that if PURE was to be considered completely descriptive, these marks would not have achieved registration. This line of argument does not assist the applicant because its own mark has been accepted for registration; it is facing a relative grounds objection, not an absolute grounds objection. That there are previous acceptances of marks incorporating PURE and various other elements (particularly irrelevant are V PURE and VIRGIN PURE) tells me nothing in relation to the likelihood of confusion with RUSH¹⁵.

¹⁵ Ms Anna Carboni, sitting as the appointed person, in *Feedback Matters* BL O/185/12, referred to the "sense that there is in the general rule that each mark has to be assessed independently against the relevant legal criteria and to stand or fall on its own merits. While it is possible to reach a broad view that two marks are of a similar type and therefore should be treated similarly, that can only be so if the relevant goods and services and their respective average consumers are identical. And, of course, the marks themselves all mean different things and may or may not be the same or similar to phrases in regular use, or have particular connotations."

29. In relation to *beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices;*, there is a likelihood of confusion because the average consumer will assume that the applicant's goods are part of a 'rush' range of drinks and are in some way 'pure' or of premium quality, imparting a more intense flavour, for example. If used on energy drinks, where there are connotations of a rush of energy, imperfect recollection will cause the average consumer to mistake RUSH for PURE RUSH and vice versa. The concept is so similar and the additional PURE will not offset it because it describes the concept of a 'rush' (an intense sudden surge of sensation). These are not goods to which a high level of attention will be paid and so the potential for imperfect recollection is greater than for goods which are subject to a more considered purchasing decision.

30. I consider that there is also a likelihood of confusion in relation to *syrups and other preparations for making beverages*. This is because the word PURE is apt to describe something which does not contain any additions. In relation to concentrates or fruit syrups, the applicant's PURE RUSH syrups and preparations for making beverages may be confused for the concentrated, or pure, form of a drink to which other ingredients are added.

Outcome

31. There is a likelihood of confusion in relation to the whole application. The application is to be refused.

Costs

32. The opponent has been successful and is entitled to an award of costs¹⁶. Although the opponent's evidence was not compelling and did little to assist the outcome, I have taken into account that the opponent's evidence in reply was filed in response to the applicant's erroneous submissions regarding proof of use.

Filing a statement of opposition (including statutory fee):	£400
Preparing evidence and considering and commenting on the other side's submissions and evidence:	£750
Total:	£1150

¹⁶ As per the scale in Tribunal Practice Notice 4/2007.

33. I order South Beach Beverage Company, Inc to pay to RSH Drinks Company (a partnership) the sum of £1150. This sum is to 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 25th day of July 2012

**Judi Pike
For the Registrar,
the Comptroller-General**