

O-312-10

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 2361480B
IN THE NAME OF AW HOLDINGS CORP
FOR REGISTRATION OF THE TRADE MARKS
BOOSTERJUICE/BOOSTER JUICE AS A SERIES OF SIX MARKS
IN CLASSES 32 AND 35**

AND

**AND IN THE MATTER OF OPPOSITION THERETO UNDER NUMBER 94885
IN THE NAME OF BOOST JUICE HOLDINGS PTY LIMITED**

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**IN THE MATTER OF Application No. 2361480B
in the name of AW Holdings Corp
for registration of the Trade Marks
BOOSTERJUICE/BOOSTER JUICE as a series of six marks
in Classes 32 And 35**

AND

**IN THE MATTER OF Opposition thereto
under number 94885
in the name of Boost Juice Holdings PTY Limited**

DECISION

1. On 21 April 2004, AW Holdings Corp applied to register the trade marks:

BOOSTERJUICE
BOOSTER JUICE
boosterjuice
booster juice
BoosterJuice
Booster Juice

in respect of the following goods and services:

Class 32 Non-alcoholic and low alcohol beverages; smoothies and drinks consisting of or containing fruit, vegetables and juices; juice and juice drinks.

Class 35 The bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods in a food and drink establishment or bar, from a catalogue, by mail order, telephone or other means of communication via the Internet; franchising services for a food and drink establishment or bar including administration, advertising, assistance, management, marketing, operation, planning, promotional, publicity; information, consultancy and advice relating to the aforesaid.

2. On 4 January 2007, Boost Juice Holdings PTY Limited filed notice of opposition, the grounds being in summary:

1. Under Section 5(2)(b) because the application is for marks that are similar to the opponent's earlier international for the trade mark BOOST and is in respect of goods and services that are identical or similar to those for which the opponent's

earlier marks are registered.

3. The opponents rely on one earlier mark, international registration No. 825460 for the mark BOOST which is registered in Class 43 in respect of:

“Take-away and restaurant services providing mineral and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices including fruit-based nutritional drinks and juices, vegetable drinks and vegetable juices including vegetable-based nutritional drinks and juices, fruit flavoured drinks, vegetable flavoured drinks, ades (fruit-flavoured fizzy or soft drinks) and punches, sports drinks, bottled drinking water, a blended mixture of fresh fruit, fruit juice, sorbet and ice, in a variety of flavours, a blended mixture of fresh vegetables, vegetable juice, sorbet and ice, in a variety of flavours, yoghurt-based drinks, vegetable and meat filled wraps and sandwiches, healthy snacks, muffins, muesli bars and nutritional supplements.”

4. The applicants filed a counterstatement in which they deny the grounds on which the application is based.

5. The applicants and the opponents both ask for an award of costs in their favour.

6. Both sides filed evidence in these proceedings, which, insofar as it may be relevant I have summarised below. The matter came to be heard on 16 June 2010 when the opponents were represented by Mr Ian Wilkes of Groom, Wilkes & Wright LLP, their trade mark attorneys. The applicants were represented by Ms Anne Wong of MW Trade Marks Limited, their trade mark attorneys.

Opponent's evidence

7. This consists of a Witness Statement dated 28 September 2007 from Janine Suzanne Allis, Managing Director and founder of Boost Juice Holdings PTY Limited.

8. Ms Allis refers to Exhibit JSA1 consisting of details of international registration No. 825460, the earlier mark relied upon in these proceedings. She confirms that her company has used the mark and associated marks such as a “BOOST JUICE BARS” logo in Australia since May 2000 in relation to a chain of franchised juice bars. Ms Allis says that her company currently operates approximately 180 franchises in many countries throughout the world. Exhibit JSA2 consists of a history of the company entitled “A bit about Boost” up to 2006. There is nothing in this that indicates the company has operated or made plans to extend its use of BOOST to the UK.

9. Ms Allis says that her company first began to look at entering the UK in 2006 receiving significant media attention, in particular referring to an article that appeared in the 11 June 2006 edition of Financial Mail, a supplement to The Mail on Sunday. She says the first BOOST juice bars opened in the Trafford Centre, Manchester and the Clarendon Centre, Oxford in April 2007. A further bar opened in Nottingham in September 2007 with plans to open more including one at Piccadilly Station, Manchester which will open “very soon.” Exhibit JSA3 consists of articles that accompanied the openings, the first being from the 16 April 2007 edition of Guardian Unlimited, the online version of the Guardian. This reports Boost Juice's plans to expand into the UK and confirming the opening of the bars in

Manchester and Oxford. Articles from publications entitled “Shopping-centre” and “Didsbury Magazine” are written in similar terms. The Exhibit also includes the UK version of the Boost Juice Holdings PTY Ltd company newsletter entitled “Juicy Bits” dated June/July 07 and stated to be “Issue #2 (UK)”. This refers to the Trafford Centre bar as being the “highest turnover BOOST from the 200 stores...” with the Oxford bar being in the top 40. It also mentions that local and national media interest, including a copy of the article that appeared in the Financial Mail.

11. Ms Allis mentions her company’s trade-marking activities, details of applications and registrations being shown as Exhibit JSA4. Exhibit JSA5 consists of the BOOST/BOOST JUICE BAR website with extracts from the applicant’s website being shown as Exhibit JSA6

Applicant’s evidence

12. This consists of a Witness Statement dated 16 January 2008 from Alice Margaret Mastrovito.

13. Ms Mastravito recounts the development of BOOSTER JUICE from its foundation in 1999 becoming one of the fastest growing food service chains. A photograph of “a typical BOOSTER JUICE outlet” is shown as Exhibit AMM1. She goes on to refer to Exhibit AMM2 which consists of an extract from the BOOSTERJUICE website listing the awards received by the company. Ms Mastrovito mentions that in 2008 the company was ranked 2nd in the juice bar category by Entrepreneur.com in their Franchise 500 listing of the top franchises. One of the founders of the business was interviewed as a finalist in the Ernst & Young 2005 Entrepreneur of the Year award, a copy of the interview being shown as Exhibit AMM3. Ms Mastrovito concludes saying that a master franchise agreement for the UK has been finalised.

14. That concludes my review of the evidence insofar as it is relevant to these proceedings.

Decision

15. The ground of objection is made under Section 5(2)(b) which reads as follows:

“5. - (1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected

(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.”

16. An earlier trade mark is defined in Section 6 of the Act as follows:

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

(a) a registered trade mark, international trade mark (UK), 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,”

17. The opponents rely on one prior designation under the Madrid Protocol for the trade mark BOOST (registration number 825460) in plain block capitals. This earlier mark has a date of protection less than five years prior to the date of publication of the mark in suit so the provisions of The Trade Marks (Proof of Use, etc.) Regulations 2004 do not apply.

18. I intend to proceed on the basis of the guidance provided by the ECJ in *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] FSR. 77, *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] ETMR 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) from which it is clear 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 of 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*,

(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*,

(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*,

(g) 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*,

(h) 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*,

(i) 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*,

(j) 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*.

(k) 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*, Case C-3/03P *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market* [2004] ECR I-3657 at 32, That is the case where the component in the complex is likely to dominate, by itself, the image of that mark which the relevant public keeps in mind, with the result that all the other components of the mark are negligible within the overall impression created by it (Case T-6/01 *Matratzen Concord v OHIM – Hukla Germany (MATRATZEN)* [2002] ECR II-4335, paragraph 33, and Case T-28/05 *Ekabe International v OHIM – Ebro Puleva (OMEGA3)* [2007] ECR II-4307, paragraph 43, *Shaker di L. Laudato & C. Sas v OHIM (LIMONCELLO)*

19. So, where marks have a number of component features it is the contribution of the individual elements to the mark as a whole and in the impression conveyed to the “average consumer” of the goods in question that are important factors when considering whether two marks are similar and the potential for confusion as part of the “global appreciation”. Therefore, before looking at the question of whether the respective marks are similar it seems appropriate to look first at the distinctiveness and dominance of the component parts.

20. The earlier mark cited by the opponents is for the word BOOST in plain block script. This is an ordinary English word that I consider likely to be sufficiently well known to the “notional average consumer” of the respective goods and services so as to be able to understand its meaning without need for recourse to a reference work. Boost has a number of meanings essentially relating to increasing, raising or lifting. The applicants argue that when used in connection with beverages BOOST will be seen as suggestive of health-giving or energy drinks, and as such is a mark of low distinctiveness. If BOOST is descriptive it is of an effect that may be gained from the consumption of such goods rather than the product itself, and any descriptiveness is indirect and somewhat allusory. Whilst it may not be a mark of the highest distinctive character for beverages it is nonetheless distinctive and being the only element there can be no argument that it dominates the mark.

21. The first part of the mark applied for is the word BOOSTER which has the meaning of someone (or more usually something) that boosts. Whereas a drink might be said to give a “boost” it would not, in usual parlance, be referred to as a “booster”, but in my view the word will still be regarded in this semi-descriptive way. There is another textual element to this mark; the word “JUICE” which is clearly no more than a description of some of the goods mentioned in the specifications, explicitly in Class 32, and implicitly in the term “beverages” in the Class 35. In the conjoined versions the eye naturally separates these words so whilst it may not be as obvious as when the words are separated it is still evident. BOOSTER on its own would be regarded as the distinctive and dominant component of the mark for which registration is sought.

22. The goods and the services that provide them are available at locations where there is concentration of consumers and I would say form a regular feature on high streets throughout the country. I consider the “notional consumer” to be the public at large.

23. Insofar as BOOSTER contains the entirety of the opponent's mark BOOST there must be a degree of visual similarity. The opponents argue that this being in the first part of the applicant's mark makes the BOOST prefix noticeable, which is the thrust of the *London Lubricants* case [1925] 42 R.P.C. 264 referred to by the opponents. Although an old case this principle is still considered to be a relevant factor in determining visual similarity. However, there is also the word JUICE in the applicant's mark, which although negligible in terms of its contribution to the distinctive whole, does have an effect on how the mark looks, and particularly so when presented as a single word. This addition elongates the mark and counters the effect of the common use of BOOST such that I consider the respective marks not to be visually similar.

24. Likewise, that BOOST is the first element of the respective marks must mean that to this extent there will be similarity in their sound when spoken, but the additional element JUICE will add a difference and makes it likely that the “ER” suffix to BOOSTER will be enunciated. The consequence is that the marks move apart in their sound to the extent that they can be regarded to have some similarity but not enough to be similar.

25. Earlier I said that the use of BOOST in relation to beverages will give consumers the idea of a drink with health or energy giving properties. I then stated that BOOSTER will convey a meaning of someone (or more usually something) that boosts, but that whilst a drink might be said to give a “boost” it would not usually be referred to as a “booster”. So the opponent's BOOST mark and the BOOSTER element of the applicant's mark both give an idea centred on the same theme. However, the mark applied for has the added word “JUICE” which even though it is no more than a description, in the totality of the mark has the effect of limiting the idea to these goods whereas in respect of the opponent's mark the consumer has simply the BOOST. So whilst there are conceptual similarities I do not consider that the marks are conceptually similar.

26. Balancing of these assessments I consider that whilst there is some similarity the respective marks cannot be considered similar.

27. When comparing the respective goods, the established tests in assessing the similarity or otherwise is set out in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996]

R.P.C. 281, *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer*. I also have regard to the decision of the General Court in *Saint-Gobain SA v OHIM* Case T-364/05 and the decisions in *Claudia Oberhauser v OHIM (Fifties)* [2003] E.T.M.R. 58 and *Criminal Clothing Ltd v Aytan's Manufacturing (UK) Ltd*, [2005] EWHC 1303. I must consider the uses and users of the respective goods or services, the physical nature of the relevant goods, the trade and distribution channels through which they reach the market and how the goods and trade marks are encountered by the consumer, particularly at the point at which the purchase is made. In the case of self-serve consumer items this will also include consideration of where the respective goods are likely to be found, particularly in multi product outlets such as supermarkets. The extent to which the respective goods or services are competitive or complementary is also a relevant consideration guided by how they are classified in trade, and known by the relevant consumer.

28. The mark in suit is sought to be registered in respect of:

- Class 32** Non-alcoholic and low alcohol beverages; smoothies and drinks consisting of or containing fruit, vegetables and juices; juice and juice drinks.
- Class 35** The bringing together, for the benefit of others, of a variety of goods, enabling customers to conveniently view and purchase those goods in a food and drink establishment or bar, from a catalogue, by mail order, telephone or other means of communication via the Internet; franchising services for a food and drink establishment or bar including administration, advertising, assistance, management, marketing, operation, planning, promotional, publicity; information, consultancy and advice relating to the aforesaid.

whereas the opponent's earlier mark is protected in respect of:

- Class 43** Take-away and restaurant services providing mineral and aerated waters and other non-alcoholic drinks, fruit drinks and fruit juices including fruit-based nutritional drinks and juices, vegetable drinks and vegetable juices including vegetable-based nutritional drinks and juices, fruit flavoured drinks, vegetable flavoured drinks, ades (fruit-flavoured fizzy or soft drinks) and punches, sports drinks, bottled drinking water, a blended mixture of fresh fruit, fruit juice, sorbet and ice, in a variety of flavours, a blended mixture of fresh vegetables, vegetable juice, sorbet and ice, in a variety of flavours, yoghurt-based drinks, vegetable and meat filled wraps and sandwiches, healthy snacks, muffins, muesli bars and nutritional supplements.

29. These are goods and services that are seen and available on high streets throughout the country. In the case of beverages these will be familiar goods and regular purchases by the public at large, part of which will be the retail service aspect. The take-away and restaurant services will be less frequently used but nonetheless will be utilized by all sectors of society. Foodstuffs and beverages of the type specified tend not to be high value items such that where a purchase is made it will be done with a reasonable rather than a high degree of care and attention. The same may be the case with take-aways but not so with restaurants where a

service element to the cost makes the purchase more expensive and probably more considered.

30. Useful guidance when considering the question of the similarity in nature, purpose, use and complementarity of services and goods can be found in the decision of the General Court in Case T-116/06 *Oakley, Inc. v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* an appeal from the decision of the Board of Appeal. This involved a comparison of a “retail service” and the same goods as sold through that service. In their decision the General Court did not agree with the Board of Appeal’s finding that the nature, purpose and method of use, etc, of the service and the products in question were similar:

“47 Indeed – as also pointed out by the Cancellation Division in paragraphs 21 and 22 of the decision of 18 June 2004 – the nature of the goods and services in question is different, because the former are fungible and the latter are not. Their purpose is also different, since the retail service precedes the purpose served by the product and concerns the activity carried out by the trader for the purpose of encouraging the conclusion of the sales transaction for the product in question. So, for example, an item of clothing is intended in particular to clothe the person who purchases it, whereas a service linked to the sale of clothes is intended, inter alia, to offer assistance to the person interested in the purchase of that clothing. The same applies to their method of use, which for clothes means the fact of wearing them, whereas the use of a service linked to the sale of the clothes consists, inter alia, in obtaining information about the clothes before proceeding to buy them.

48 With regard, second, to the distribution channels of the services and the goods in question, it is correct, as rightly pointed out by the Board of Appeal in paragraph 22 of the contested decision, that retail services can be offered in the same places as those in which the goods in question are sold, as the applicant has also recognised. The Board of Appeal’s finding that retail services are rarely offered in places other than those where the goods are retailed and that consumers need not go to different places to obtain the retail service and the product they buy, must therefore be upheld.”

31. From this it seems that goods and services should generally be considered different in nature even if the service involves the provision or sale of the goods. In their respective uses retail services have been distinguished from the goods in that the service precedes the purpose of the products and has “...the purpose of encouraging the conclusion of the sales transaction...” by offering “...assistance to the person interested in the purchase of that clothing” whereas the purpose of clothing is to clothe; the use is the act of wearing them. To me this indicates that it is necessary to determine the extent to which the service is connected with the provision of the goods, or peripheral in the sense that it aids the transaction.

32. The General Court went on to say that it considers it to be relevant that retail services are provided at the sales points at which the goods are obtained, and that a retail service will be provided in the same sales outlets as the goods connected with the service. The Court went on to say that complementary goods and services are those which are closely connected in the sense that one is indispensable or important for the use of the other in that the services involve the retailing of identical goods. As such, a retail service should be regarded as complementary to the type of goods that it sells and not merely auxiliary or ancillary.

33. Applying this to a comparison of the beverages specified in Class 32 of the application, and the opponent's restaurant and take-away services (insofar as they involve beverages) it is clear that the applicant's goods are "fungible" and the opponent's take-away and restaurant services are not, and accordingly they are different in nature. Whilst a restaurant service provides the goods involved in the service at the point of sale, namely through its waiting staff and the end product may include a drink, the primary purpose of such a service is to provide an environment conducive to the consumption of food with beverages as an accompaniment, offering a menu of options from which the consumer makes their selection which the restaurant prepares and serves. If a consumer simply wished to purchase food and drink they would go to a shop, supermarket or even a take-away. As with retailing, a restaurant service precedes the purpose served by the products that it eventually delivers which in the case of food and beverages are for the purpose of eating and drinking.

34. The position in respect of a take-away is somewhat different in that here the business may also bring together a selection of foodstuffs and beverages but offers little in assisting or facilitating the sale. The service element is a vehicle to prepare the goods ready for consumption off the premises and in this the purpose or uses of the service and the goods it provides are close.

35. In determining the relationship between the goods provided as part of a service and the act of service the General Court agreed that the goods should be regarded as complementary if there is a close connection between them in the sense that one is indispensable or important for the use of the other, but with the proviso "...in such a way that customers may think that the responsibility for those goods lies with the same undertaking." Food, and to a lesser extent drink is important to a restaurant; consumers would not use the service otherwise; but I repeat that the service is more the preparation and delivery and the environment in which this takes place than the food and drink itself. Whilst the consumer may consider a restaurant to have responsibility for the food, which in reality is only to the extent that it has been prepared and served by that business, I see no reason why such an assumption would be made in respect of beverages which usually and visibly bear the brands of other traders. The connection of a take-away is much more with the food/drink products with less emphasis on the service. In neither case is the food and drink merely auxiliary or ancillary to the service. On balance I would say that in a restaurant service the food and drink may be somewhat complementary but more definitely so in the case of take-aways.

36. Returning to the criteria laid down in *British Sugar et seq*, it seems logical to assume that foodstuffs and beverages are capable of reaching the market and consumer from the same outlets including restaurants and take-aways. I see no reason why the same supplier-wholesaler chain could not be used, although the provider of restaurant and take-away services will be the consumer interface. They may nonetheless sell the goods of other manufacturers and this is a certainty in the case of beverages. Where beverages are available in shops and take-aways they could be open for self-selection, and also sold from dispensing apparatus behind a counter. Where sold in a restaurant they will certainly be obtained on request. Whilst I have no evidence of how the respective goods are classified in trade it seems likely to me that a service even for the provision of foodstuffs and beverages would be classified in a different trade sector to the goods provided as part of that service. I consider that this would also be the consumer's understanding.

37. Taking all of the above into account I reach the conclusion that restaurant services are not similar services to the goods listed in Class 32 of the application, but that take-away services should be considered similar services to these goods with the caveat that I do not consider them to be highly so. Insofar as franchising services for a food and drink establishment includes restaurants, take-aways and bars the same position exists in relation to this part of the applicant's specification. However, this similarity does not extend to the other listed services that involve the administration, advertising, assistance, management, marketing, operation, planning, promotional, publicity; information, consultancy and advice relating to the operation of such franchises. For the reasons as stated in the *Café Mambo* decision (BL-O/397/00) to which the applicants referred me, these services are plainly dissimilar to the opponent's restaurant and take-away services.

38. This leaves the question of the similarity of the opponent's restaurant and take-away services with the applicant's services in Class 35. Insofar as both are in the service sector involved in the provision of food and drink they could be considered to be similar in nature.

39. Retail services are for the purpose "...of encouraging the conclusion of the sales transaction..." by offering "...assistance to the person interested in the purchase of that clothing". This bears some relationship to the provision of a restaurant service which as I have said is more to do with the surrounding service preceding the delivery of the goods, and as such I would say that such services are similar in their purpose. In the provision of take-away services the "assistance" provided is far less in evidence and accordingly I consider the purpose to be different to that of a retail service. Retail, restaurant and take-away services are all provided at the sales points at which the goods are obtained, although will be provided in different sales outlets.

40. Restaurant and retail services are not connected in the sense that one is indispensable or important for the use of the other. There is a retail element in respect of take-away services although that does not make retailing of food and drink and the provision of take-away services complementary. I am aware that certain retail establishments provide a restaurant service within their retail environment which to some extent is part of, and complementary to the process of "...encouraging the conclusion of the sales transaction." In such a situation the consumer may consider the retail service provider to have responsibility for the restaurant but this does not reflect the general situation of retailers and restaurants/take-aways. These will be seen and regarded as separate businesses and classified in different service sectors, which is how I consider the consumer will regard them. There is sufficient separation in retailing and restaurant/take-away services for me to conclude that these are different services.

41. Ms Allis confirms that her company has used BOOST and associated marks such as a "BOOST JUICE BARS" logo in Australia since May 2000 in relation to a chain of franchised juice bars. The business is stated to currently operate approximately 180 franchises in many countries throughout the world although Ms Allis confirms that it did not turn its attention to entering the UK market until 2006. This is said to have attracted significant media attention as in the example from the 11 June 2006 edition of Financial Mail. The first BOOST juice bars opened in the Trafford Centre, Manchester and the Clarendon Centre, Oxford in April 2007 with one further in Nottingham in September 2007. Ms Allis confirms there are plans to open more including one at Piccadilly Station, Manchester which will open "very soon." An article from the 16 April 2007 edition of Guardian Unlimited, the online version of the Guardian reports Boost Juice's plans to expand into the UK and the opening of the bars in

Manchester and Oxford. The in-house publication Juicy Bits newsletter dated June/July 07 and stated to be “Issue #2 (UK)” refers to the Trafford Centre bar as being the “highest turnover BOOST from the 200 stores...” with the Oxford bar being in the top 40. It also mentions that local and national media interest, including a copy of the article that appeared in the Financial Mail.

42. To my mind the evidence attests to the current success and likely reputation of the BOOST juice bar business in many locations throughout the world, but not clearly at the relevant date of 21 April 2004, and not within the UK. As such I cannot see how I can infer that the earlier mark enjoys a reputation that warrants an enhanced penumbra of protection, or that the mark BOOST should be regarded as having acquired a higher distinctive character.

43. Taking all of the above into account and adopting the global approach advocated, I reach the conclusion that whilst there may be some similarities, the differences are such that use of BOOSTER JUICE/BOOSTERJUICE by the applicants (in any of the forms for which it is sought to be registered) in connection with the stated goods and services will not lead to confusion. Even allowing for the possibility imperfect recollection does not create the required potential for confusion. The opposition under Section 5(2)(b) therefore fails.

44. The opposition having failed on all grounds the applicants are entitled to a contribution towards their costs. I order the opponent to pay the applicants the sum of £2,150. 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 7th day of September 2010

**Mike Foley
for the Registrar
the Comptroller-General**