O-468-14

TRADE MARKS ACT 1994

IN THE MATTER OF THE APPLICATION BY NICOLAI GLOBAL BEVERAGES LIMITED UNDER NO 3010917 FOR THE TRADE MARK

AND

IN THE MATTER OF OPPOSITION NO. 401306 THERETO BY MR JOHN CUNNINGHAM

Background and pleadings

1) Nicolai Global Beverages Limited ("the Applicant") applied to register the following trade mark ("the opposed mark") in the UK on 21 June 2013:

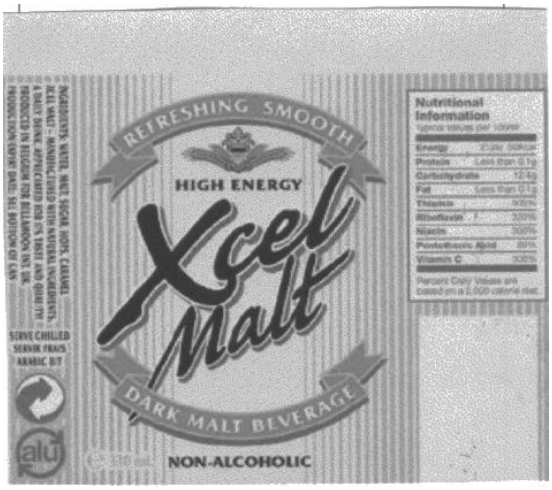
It was accepted and published in the Trade Marks Journal on 6 September 2013 in respect of the following goods:

> **Class 32:** Beers; Mineral and aerated waters and other non-alcoholic beverages; Fruit beverages and fruit juices; Syrups and other preparations for making beverages; Aerated drinks (non-alcoholic);Non-alcoholic beer;Extracts of hops for making beer;Low alcohol beer;Malt beer; Carbonated non-alcoholic drinks;De-alcoholized drinks;Non-alcoholic beverages;Concentrates for use in the preparation of soft drinks.

2) Mr John Cunningham opposes the registration of the trade mark on grounds under sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). With a letter of 27 May 2014 from his representatives in these proceedings Mr Cunningham filed amendments to the notice of opposition previously filed, relating to the ground of opposition under section 5(2)(b) in connection with UK trade mark registration no. 2277471 and under section 5(4)(a). These amendments, which represented a restriction of the goods and services relied upon by Mr Cunningham, were allowed by the Registrar.

3) For the purposes of his claims under section 5(2)(b) Mr Cunningham relies on the following marks.

UK trade mark no. 2277471 ("the earlier UK mark"), as shown below,



which was filed on 9 August 2001 and completed its registration procedure on 25 January 2002. For the purposes of this opposition Mr Cunningham relies upon the following goods for which this mark is registered:

> **Class 32:** Non-alcoholic drinks; syrups and other preparations for making beverages.

Community trade mark application no. 11790276, ("the CTM application") as shown below,

which was filed on 3 May 2013 and has not yet completed its registration procedure, being currently subject to opposition proceedings. The CTM application covers the following good and services, which Mr Cunningham relies on for the purposes of the present opposition:

> **Class 32:** Non-alcoholic cider; mineral water; still water; sparkling water; flavoured water; mineral and aerated drinks; carbonated drinks; soft drinks; non-alcoholic beverages; fruit drinks; fruit juices; fruit squashes; vegetable juices; fruit-based beverages; soda water; tonic water; lemonade; cordials; syrups and other preparations for making beverages; de-alcoholized drinks; non-alcoholic beers; alcohol free wine; non-alcoholic lager; non-alcoholic cocktails; non-alcoholic cocktail mixes; beverages enriched with added

vitamins; beverages enriched with added minerals; energy drinks; sports drinks.

Class 35: The bringing together for the benefit of others of a variety of beverages, including beers, lager, ales, ginger beer, low alcohol beer, low alcohol lager, non-alcoholic cider, mineral water, still water, sparkling water, flavoured water, mineral and aerated drinks, carbonated drinks, soft drinks, non-alcoholic beverages, fruit drinks, fruit juices, fruit squashes, vegetable juices, fruit-based beverages, soda water, tonic water, lemonade, cordials, syrups and other preparations for making beverages, shandy, de-alcoholized drinks, non-alcoholic beers, alcohol free wine, non-alcoholic lager, non-alcoholic cocktails, non-alcoholic cocktail mixes, beverages enriched with added vitamins, beverages enriched with added minerals, energy drinks and sports drinks; mail order retail services connected with a variety of beverages, including beers, lager, ales, ginger beer, low alcohol beer, low alcohol lager, non-alcoholic cider, mineral water, still water, sparkling water, flavoured water, mineral and aerated drinks, carbonated drinks, soft drinks, non-alcoholic beverages, fruit drinks, fruit juices, fruit squashes, vegetable juices, fruit-based beverages, soda water, tonic water, lemonade, cordials, syrups and other preparations for making beverages, shandy, de-alcoholized drinks, non-alcoholic beers, alcohol free wine, non-alcoholic lager, non-alcoholic cocktails, non-alcoholic cocktail mixes, beverages enriched with added vitamins, beverages enriched with added minerals, energy drinks and sports drinks; electronic shopping retail services connected with a variety of beverages, including beers, lager, ales, ginger beer, low alcohol beer, low alcohol lager, non-alcoholic cider, mineral water, still water, sparkling water, flavoured water, mineral and aerated drinks, carbonated drinks, soft drinks, non-alcoholic beverages, fruit drinks, fruit juices, fruit squashes, vegetable juices, fruit-based beverages, soda water, tonic water, lemonade, cordials, syrups and other preparations for making beverages, shandy, de-alcoholized drinks, non-alcoholic beers, alcohol free wine, non-alcoholic lager, non-alcoholic cocktails, non-alcoholic cocktail mixes, beverages enriched with added vitamins, beverages enriched with added minerals, energy drinks and sports drinks.

4) For the purposes of his claims under section 5(4)(a) Mr Cunningham relies on signs corresponding to the two marks depicted above in respect of UK trade mark no. 2277471 and Community trade mark application no. 11790276, use being claimed in both cases for the following goods and services:

Non-alcoholic beverages, syrups and other preparations for making beverages, carbonated drinks, de-alcoholized drinks, beverages enriched with vitamins, beverages enriched with added minerals, energy drinks, sports drinks, retail services of a variety of beverages, electronic shopping retail services connected with a variety of beverages and mail order retail services connected with a variety of beverages.

5) The applicant filed a counterstatement, denying the claims made and requiring that Mr Cunningham provide proof of use of UK trade mark no. 2277471, the registration procedure for that mark having been completed more than five years before the date of publication of the opposed mark.

6) Only Mr Cunningham filed evidence in these proceedings. Only Mr Cunningham, through his representatives, filed written submissions, which I shall refer to as appropriate in this decision. No hearing was requested. I therefore give this decision after a careful review of all the papers before me.

Evidence

7) In a witness statement dated 23 May 2014 Mr Cunningham makes the following statements:

- He is the Managing Director of Malt Brew DM Limited, and has been since 2012.

- Malt Brew DM Limited uses the marks identified by the earlier UK mark and the CTM application in the course of trade in the United Kingdom under licence from Mr Cunningham.

- Malt Brew DM Limited "sells non-alcoholic beverages under the XCEL MALT device mark".

- Exhibit JC1 contains copy invoices from Malt Brew DM Limited to Tunnell Packaging Ltd dating from 2013 and showing "sales of products in the UK under the XCEL MALT device mark".

- Exhibit JC2 contains copy invoices from Brouwerij Martens of Belgium to Malt Brew DM Limited dating from 2013 and showing "purchases of products under the XCEL MALT device mark from the manufacturer, Brouwerij Martens".

- Malt Brew DM Limited is the distributor of XCEL MALT products in the United Kingdom for Brouwerij Martens.

- Malt Brew DM Limited acquired the earlier UK mark from Bellamoon International in 2012, and Mr Cunningham acquired the mark from Malt Brew DM Limited later that same year. He is therefore unable to provide evidence of use of the earlier mark prior to 2012.

Further details of the exhibits to Mr Cunningham's witness statement will be given in the course of my assessment below.

8) Having regard to the requirements for evidence of use, it will be convenient, in my assessment of Mr Cunningham's claims, to turn first to the claim made under section 5(2)(b) of the Act in reliance on the earlier UK mark, then to examine the claim under section 5(4)(a), and finally to assess the claim made under section 5(2)(b) in reliance on the CTM application.

The earlier UK mark – Proof of use

9) Since the registration procedure for the earlier UK mark was completed more than five years before publication of the opposed mark, in order to rely on this mark Mr Cunningham needs to show genuine use of the mark. The relevant provisions are as follows.

Section 6A of the Act provides:

> 6A. - (1) This section applies where -
>
> > (a) an application for registration of a trade mark has been published,
> >
> > (b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and
> >
> > (c) the registration procedure for the earlier trade mark was completed before the start of the period of five years ending with the date of publication.
>
> (2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.
>
> (3) The use conditions are met if -
>
> > (a) within the period of five years ending with the date of publication of the application 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) the earlier trade mark has not been so used, but there are proper reasons for non- use.
>
> (4) 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.
>
> (5) In relation to a Community trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(6) 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."

Section 100 of the Act provides that:

"100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

The effect of these provisions in the present case is that, in order to rely on the earlier UK mark, Mr Cunningham needs to show that there was genuine use of the mark in the period 7 September 2008 to 6 September 2013 ("the relevant period").

10) In *Stichting BDO v BDO Unibank, Inc.,* [2013] F.S.R. 35 (HC), Arnold J. stated as follows:

"51. Genuine use. In *Pasticceria e Confetteria Sant Ambreoeus Srl v G & D Restaurant Associates Ltd* (SANT AMBROEUS Trade Mark) [2010] R.P.C. 28 at [42] Anna Carboni sitting as the Appointed Person set out the following helpful summary of the jurisprudence of the CJEU in *Ansul BV v Ajax Brandbeveiliging BV* (C-40/01) [2003] E.C.R. I-2439; [2003] R.P.C. 40 ; *La Mer Technology Inc v Laboratoires Goemar SA* (C-259/02) [2004] E.C.R. I-1159; [2004] F.S.R. 38 and *Silberquelle GmbH v Maselli-Strickmode GmbH* (C-495/07) [2009] E.C.R. I-2759; [2009] E.T.M.R. 28 (to which I have added references to *Sunrider v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (OHIM) (C-416/04 P) [2006] E.C.R. I-4237):

(1) Genuine use means actual use of the mark by the proprietor or third party with authority to use the mark: *Ansul*, [35] and [37].

(2) The use must be more than merely token, which means in this context that it must not serve solely to preserve the rights conferred by the registration: *Ansul*, [36].

(3)The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end-user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin: *Ansul*, [36]; *Sunrider* [70]; *Silberquelle*, [17].

(4) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, i.e. exploitation that is aimed at maintaining or creating an outlet for the goods or services or a share in that market: *Ansul*, [37]-[38]; *Silberquelle*, [18].

(a) Example that meets this criterion: preparations to put goods or services on the market, such as advertising campaigns: *Ansul*, [37].

(b) Examples that do not meet this criterion: (i) internal use by the proprietor: *Ansul*, [37]; (ii) the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle*, [20]-[21].

(5) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including in particular, the nature of the goods or services at issue, the characteristics of the market concerned, the scale and frequency of use of the mark, whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them, and the evidence that the proprietor is able to provide: *Ansul*, [38] and [39]; *La Mer*, [22] -[23]; *Sunrider*, [70]–[71].

(6) Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no de minimis rule. Even minimal use may qualify as genuine use if it is the sort of use that is appropriate in the economic sector concerned for preserving or creating market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor: *Ansul*, [39]; *La Mer*, [21], [24] and [25]; *Sunrider*, [72]".

Although minimal use may qualify as genuine use, the CJEU stated in Case C-141/13 P, *Reber Holding GmbH & Co. KG v OHIM* (in paragraph 32 of its judgment), that "*not every proven commercial use may automatically be deemed to constitute genuine use of the trade mark in question".* The factors identified in point (5) above must therefore be applied in order to assess whether minimal use of the mark qualifies as genuine use.

A fair specification

11) In deciding upon a fair specification of the services for which genuine use is found, the description must not be over pernickety[1]. It is necessary to consider how the relevant public would likely describe the services[2]. The General Court ("GC") in *Reckitt Benckiser (España), SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-126/03 ("*Aladdin*") held:

> "43 Therefore, the objective pursued by the requirement is not so much to determine precisely the extent of the protection afforded to the earlier trade mark by reference to the actual goods or services using the mark at a given time as to ensure more generally that the earlier mark was actually used for the goods or services in respect of which it was registered.

[1] See *Animal Trade Mark* [2004] FSR 19
[2] See *Thomson Holidays Ltd v Norwegian Cruise Lines Ltd* [2003] RPC 32

44 With that in mind, it is necessary to interpret the last sentence of Article 43(2) of Regulation No 40/94 and Article 43(3), which applies Article 43(2) to earlier national marks, as seeking to prevent a trade mark which has been used in relation to part of the goods or services for which it is registered being afforded extensive protection merely because it has been registered for a wide range of goods or services. Thus, when those provisions are applied, it is necessary to take account of the breadth of the categories of goods or services for which the earlier mark was registered, in particular the extent to which the categories concerned are described in general terms for registration purposes, and to do this in the light of the goods or services in respect of which genuine use has, of necessity, actually been established.

45 It follows from the provisions cited above that, if a trade mark has been registered for a category of goods or services which is sufficiently broad for it to be possible to identify within it a number of sub-categories capable of being viewed independently, proof that the mark has been put to genuine use in relation to a part of those goods or services affords protection, in opposition proceedings, only for the sub-category or subcategories relating to which the goods or services for which the trade mark has actually been used actually belong. However, if a trade mark has been registered for goods or services defined so precisely and narrowly that it is not possible to make any significant sub-divisions within the category concerned, then the proof of genuine use of the mark for the goods or services necessarily covers the entire category for the purposes of the opposition.

46 Although the principle of partial use operates to ensure that trade marks which have not been used for a given category of goods are not rendered unavailable, it must not, however, result in the proprietor of the earlier trade mark being stripped of all protection for goods which, although not strictly identical to those in respect of which he has succeeded in proving genuine use, are not in essence different from them and belong to a single group which cannot be divided other than in an arbitrary manner. The Court observes in that regard that in practice it is impossible for the proprietor of a trade mark to prove that the mark has been used for all conceivable variations of the goods concerned by the registration. Consequently, the concept of 'part of the goods or services' cannot be taken to mean all the commercial variations of similar goods or services but merely goods or services which are sufficiently distinct to constitute coherent categories or sub-categories.

53 First, although the last sentence of Article 43(2) of Regulation No 40/94 is indeed intended to prevent artificial conflicts between an earlier trade mark and a mark for which registration is sought, it must also be observed that the pursuit of that legitimate objective must not result in an unjustified limitation on the scope of the protection conferred by the earlier trade mark where the goods or services to which the registration relates represent, as in this instance, a sufficiently restricted category."

12) I also note the comments of Mr Geoffrey Hobbs QC, sitting as the appointed person, in *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited* BL O/345/10, where he stated:

"In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned".

13) In assessing the evidence provided by Mr Cunningham I bear in mind the guidance provided in a number of decided cases. In *MOO JUICE* [2005] EWCH 2584 (Ch), [2006] RPC 18. Kitchen J stated:

> "To my mind the requirement laid down by r. 31(3) is not therefore satisfied by a proprietor who simply asserts, through a relevant witness, that the trade mark has been used. Such a bare assertion would provide no evidence as to the actual use made by the proprietor."

MOO JUICE was a case dealing with an issue relating to the viability of the registered proprietor's defence under the Trade Mark Rules 2000, but the principle is also applicable in deciding whether the proprietor has made genuine use of his trade mark. In *Extreme* O-161-07 Mr Richard Arnold QC commented:

> "Kitchen J's statement that "bare assertion" would not suffice must be read in its context, which was that it had been submitted to him that it was sufficient for a proprietor to give evidence stating "I have made genuine use of the trade mark". A statement by a witness with knowledge of the facts setting out in narrative form when, where, in what manner and in relation to what goods or services the trade mark has been used would not in my view constitute bare assertion."

14) In *Awareness Limited v Plymouth City Council,* Case BL O/230/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

> "22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."
>
> and further at paragraph 28:

> "28. ..... I can understand the rationale for the evidence being as it was but suggest that, for the future, if a broad class, such as "tuition services", is sought to be defended on the basis of narrow use within the category (such as for classes of a particular kind) the evidence should not state that the mark has been used in relation to "tuition services" even by compendious reference to the trade mark specification. The evidence should make it clear, with precision, what specific use there has been and explain why, if the use has only been narrow, why a broader category is nonetheless appropriate for the specification. Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered in any draft evidence proposed to be submitted."

15) In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd,* Case BL 0/404/13*,* Mr Geoffrey Hobbs Q.C. as the Appointed Person stated that:

> 22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not *'show'* (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use."

Evaluation of the evidence

16) In order to find genuine use I must find that the mark actually used in relation to the goods did not alter the distinctive character of the mark as registered. Mr Cunningham states that Malt Brew DM Ltd "uses the marks identified by the [earlier UK mark] and the [CTM application] in the course of trade in the United Kingdom". The invoices in JC1 indicate that products have been supplied under the name XCEL MALT, but Mr Cunningham does not specify which, if either, of the two marks relied on in these proceedings was used. Apart from items such as ingredients and nutritional information, which the consumer will not perceive as a distinctive part of the mark, the earlier UK mark appears against a darker background than the CTM application, and the descriptive reference "high energy" appears in the earlier UK mark in the place of "extra energy" in the CTM application. I do not consider that these differences alter the distinctive character of the marks; use of either mark could therefore be regarded as use of the other. I conclude that "the XCEL MALT device mark" referred to by Mr Cunningham as being "identified" by the marks relied on consists of a mark which does not alter the distinctive character of either of the marks, and constitutes use of both.

17) Nothing in the evidence indicates that there has been use in relation to "syrups and other preparations for making beverages". Mr Cunningham states that Malt Brew DM Limited uses the marks identified by the earlier UK mark and the CTM application in the course of trade in the United Kingdom, and sells "non-alcoholic beverages under the XCEL MALT device mark", but provides no explicit statement

as to the specific type or types of beverage sold, beyond describing them by the all-encompassing term “non-alcoholic”. The specifications of the opposed mark and the marks relied on by Mr Cunningham together illustrate that the comprehensive term “non-alcoholic drinks” can embrace a variety of sub-categories aimed at various markets with varying degrees of generality and speciality. To justify such a broad specification as “non-alcoholic drinks” Mr Cunningham would need to show use over more than a narrow category of drinks. He has not done so. Nor has he provided specific information indicating that there has been use in connection with a narrower particular category of goods. The evidence is insufficient to show use of the broad category “non-alcoholic drinks”. Nor has genuine use been shown in respect of any specific category that would admit of a narrower fair specification. That would in itself be sufficient ground to dismiss the claim made in reliance on the earlier UK mark. However, I think it is appropriate to record that there are further shortcomings in the evidence.

18) Mr Cunningham states that the mark was acquired by Malt Brew DM Limited in 2012, and that he is therefore unable to provide evidence of use of the earlier mark prior to 2012. I can see that this might well make it difficult to furnish direct evidence such as invoices, etc. issued in the pre-acquisition period, since these would be in the possession of a third party; but one would assume that the purchaser of a trade mark would normally wish to satisfy himself as to whether the trade mark to be acquired by him has been used and, if so, how, when, where and to what extent. Mr Cunningham gives no further explanation in this connection.

19) Exhibit JC2 contains 6 invoices made out by Brouwerij Martens of B 3950 Bocholt to Malt Brew DM Limited in Dublin. Invoice no. 300014 is dated 31/01/2013 and contains no shipping address, transport or packaging costs. The items column is headed “Development costs Xcel Malt”. The first item reads “VSTO375 Xcel Malt 24 x 50cl can Invoice S+T 254251”. Five other items consist of similar abbreviated descriptions, the quantity in each case being given as 1, the amounts giving a total invoice amount of EUR 7.882,25. Mr Cunningham gives no further explanation of the goods or services involved here. The 5 other invoices are all made out to Malt Brew DM Limited in Dublin but specify they are to be shipped to the address “Malt Brew DM Limited, E14 0JP London”. One invoice is dated 23-01-2013. The remaining four invoices are all dated 04-02-2013. All appear to relate to shipping of quantities of packs of “Xcel Malt” items in various sizes. The net amounts given for “Xcel Malt” items amount to a total net value of € 59,503.40.

20) Mr Cunningham provides no further explanation of the significance and background of the invoices in Exhibit JC2 beyond his statement that they show “purchases of products under the Xcel Malt device mark from the manufacturer, Brouwerij Martens”. Supplies to Malt Brew DM Limited by a third party, even if made “under the Xcel Malt device mark”, clearly cannot demonstrate use of the mark in the UK by Mr Cunningham or his licensee. It is perhaps intended that I should infer that the “Xcel Malt” items in these invoices were sold on by Malt Brew DM Limited to UK customers under the marks covered by the earlier UK mark or CTM application, but there is no explicit statement that this was the case; Mr Cunningham gives no explanation of why no further invoices directly evidencing any such sales to UK customers within the relevant period have been provided beyond the invoice of 06.01.13 to Tunnell Packaging mentioned below.

21) Exhibit JC1 contains very simple and basic copy invoices typed on plain paper from Malt Brew DM Limited to Tunnell Packaging Ltd. There are only three in total, since the invoice shown on page five is a duplicate of that on page 3. Only invoice no. 15, which is dated 06.01.13, falls within the relevant period before publication of the opposed mark on 6 September 2013. It is made out to Tunnell Packaging at Blackwall Trading Estate, E14 0JP, and includes the item "2756 cases Xcel Malt @ 7.40: 20394.40". The currency is not specified, but subsequent invoices are made out in euros. The remaining two invoices, dated 19.10.2013 and 02.12.2013, are also made out to Tunnell Packaging Ltd, and contain invoice items bearing the description "Xcel Malt". In respect of these items the first gives a total net price (i.e. net of packaging and transport costs) of €22,269 and the second a total price of €71,730 (with no mention of packing or transport costs). Both fall outside the relevant period. No further background information is given.

22) bearing the mark are sold to consumers and end users, but that a market also exists where those goods are sold to distributors in the UK; and, further, that even sales to a single distributor may constitute genuine use (see *Laboratoires Goemar SA v La Mer Technology Inc.* 2006 FSR 5). However, the primary evidence of use in this case consists of a single invoice (probably intended to be denominated in euros) for 20,394.40, representing one sale to a distributor in the final year of the relevant period, with no evidence of any other use in the period. There is no indication as to what the distributor did with the goods, no further information on the scale and frequency of use of the mark, and no sales figures for products supplied in the UK during the relevant period. Nor is it explained whether the mark was used to market the whole range of goods covered by the earlier UK mark, or just some, or one category of them. I appreciate that evidence from outside the relevant period may sometimes assist the tribunal in making inferences about the genuine nature of use during the relevant period. However, in the light of the shortcomings discussed above, evidence of later sales to Tunnel Packaging is not of material assistance in this case.

23) Viewed as a whole, the evidence is insufficient to enable me to conclude that there has been real commercial exploitation of the mark on the market for *non-alcoholic drinks* or any narrower specification, or for *syrups and other preparations for making beverages*. **Accordingly, the earlier UK mark may not be relied upon to support a claim under section 5(2)(b) of the Act.**

Section 5(4)(a)

24) Section 5(4)(a) of the Act reads:

> "(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented –
>
> (a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, …"

In the present proceedings there is no evidence that the Applicant was using the opposed mark prior to the application for its registration. The date by which Mr Cunningham must show that he had acquired a right under the law of passing-off to oppose registration of the mark will therefore be the date of application for its registration (*Last Minute Network Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM),* Joined Cases T-114/07 and T-115). In this case the relevant date is 21 June 2013.

25) The requirements for this ground of opposition can be found in the decision of Mr Geoffrey Hobbs QC, sitting as the Appointed Person, in *WILD CHILD Trade Mark* [1998] R.P.C. 455. Adapted to opposition proceedings, the three elements that must be present can be summarised as follows:

> (1) that the opponent's goods or services have acquired a goodwill or reputation in the market and are known by some distinguishing feature;
>
> (2) that there is a misrepresentation by the applicant (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by the applicant are goods or services of the opponent; and
>
> (3) that the opponent has suffered or is likely to suffer damage as a result of the erroneous belief engendered by the applicant's misrepresentation.

This ground is completely separate from that under section 5(2)(b) and requires separate analysis in the light of the different tests applicable. Nevertheless, some of my observations above regarding insufficiencies in the evidence may have some relevance here too.

26) For his claim to succeed under section 5(4)(a) Mr Cunningham must establish, amongst other things, that, by the relevant date, sufficient goodwill existed in connection with the sign relied on by him. In his notice of opposition Mr Cunningham identified, by graphical representations, signs corresponding to the earlier UK mark and the CTM application as those relied upon under section 5(4)(a). Although Mr Cunningham does not specify exactly which mark was used where and when, I have already found in paragraph 16 that the marks do not differ in their distinctive elements. Mr Cunningham has therefore identified with sufficient precision the sign relied upon by him for the purposes of section 5(4)(a).

27) In describing the goods covered by the invoices in Exhibit JC1 simply as "non-alcoholic drinks" I do not consider that Mr Cunningham has identified the goods supplied under this sign with sufficient precision to enable an accurate and solid assessment to be made of whether use of the opposed mark would give rise to a likelihood of deception when applied to all the various types of goods covered by the application. However, there is also a further problem, and it concerns the extent of the goodwill.

Goodwill

28) The nature of goodwill was explained in *Muller & Co's Margarine Ltd* [1901] AC 217 at 223 as follows:

> "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first."

29) In order to establish that goodwill existed in connection with "the XCEL MALT device mark" by the relevant date Mr Cunningham needs to show that Malt Brew DM Ltd had customers, or at least prospective customers, in the UK before the 21 June 2013. As Arnold J pointed out in *Starbucks v British Sky Broadcasting* [2012 EWHC 3074*,* this does not necessarily mean that there needs to have been actual sales before the relevant date. However, to qualify for protection under the law of passing-off, any goodwill must be of more than a trivial nature (*Hart v Relentless Records* [2002] E.W.H.C. 1984) – although being a small player does not prevent the law of passing-off from being relied upon, as it can be used to protect a more limited goodwill (see *Stannard v Reay* [1967] F.S.R. 140, *Teleworks v Telework Group* [2002] R.P.C. and *Stacey v 2020 Communications* [1991] F.S.R. 49). In *Sutherland v V2 Music Ltd* [2002] EWHC 14 ("*LIBERTY"*) Laddie J said:

> "22. There is one other general matter to deal with before turning to the facts, namely the size of the claimant's reputation. At some point a reputation may be respected by such a small group of people that it will not support a passing-off action. Neither Mr Purle nor Mr Speck were able to formulate a test for this bottom level. Mr Purle said it was a matter of fact and degree. I agree with that. The law of passing-off protects the goodwill of a small business as much as the large, but it will not intervene to protect the goodwill which any reasonable person would consider trivial".

The case law includes a number of cases in which the issue of triviality of goodwill has been addressed. However, one must be wary of inappropriately reasoning by analogy to cases which really concern very different facts in a number of subtle ways; the question is one of fact and degree.

29) Mr Cunningham has provided no details of any customers other than Tunnel Packaging. However, the goodwill enjoyed in connection with branded goods ultimately reflects the goodwill enjoyed by the brand with the goods' end consumers. Branded goods distributed through one UK distributor might generate very substantial goodwill. How much goodwill exists in connection with the brand at the relevant date will depend on a number of factors. However, Mr Cunningham provides no further background information on what happened to the goods in the hands of Tunnel Packaging. The category of non-alcoholic goods supplied is not specified, and no further information is provided on total sales figures in the UK or on the length of time over which goods were supplied under the sign. I recognise that goodwill can exist with the trade. However, in the absence of further background information, what the evidence really amounts to is a single sale in the amount of

€20,394.20 made to Tunnel Packaging eight months before the relevant date. This is insufficient to establish that protectable goodwill existed in connection with the relevant sign at the relevant date. **Accordingly, the claim under section 5(4)(a) fails.**

Section 5(2)(b) – the CTM application

30) Sections 5(2)(b) of the Act is as follows:

> "5(2) A trade mark shall not be registered if because-
>
> (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".

31) I have taken into account the guidance provided by the Court of Justice of the European Union ("CJEU") in a number of judgments. The following principles are gleaned from the decisions in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

32) When comparing the respective goods and services, if a term clearly falls within the ambit of a term in the competing specification then identical goods/services must be considered to be in play (see *Gérard Meric v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-133/05 – "*Meric*") even if there are other goods/services within the broader term that are not identical. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer* 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."

33) Guidance on this issue has also come from Jacob J In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 where the following factors were highlighted as being relevant when making the comparison:

> "(a) The respective uses of the respective goods or services;
>
> (b) The respective users of the respective goods or services;
>
> (c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors."

34) In relation to understanding what terms used in specifications mean and cover, the guidance in the case-law is to the effect that "in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade"[3] and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning[4]. I also note the judgment of Mr Justice Floyd in *YouView TV Limited v Total Limited* where he stated:

> "..... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IPTRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of "dessert sauce" did not include jam, or because the ordinary and natural description of jam was not "a dessert sauce". Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

35) The following goods appear in the respective specifications of both the opposed mark and the CTM application, and are therefore identical: *non-alcoholic beverages; de-alcoholized drinks; syrups and other preparations for making beverages*. Moreover, the following goods of the Applicant all fall within the ambit of the *non-alcoholic beverages* of the CTM application, and are therefore identical under the guidance in *Meric*: *mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices; aerated drinks (non-alcoholic); non-alcoholic beer; carbonated non-alcoholic drinks*. *Concentrates for use in the preparation of soft drinks* and *extracts of hops for making beer* are covered by *preparations for making beverages* in the CTM application; they are therefore identical. *De-alcoholized drinks* in the CTM application includes drinks with reduced alcohol content, and thus covers the opposed mark's *low alcohol beer*; they are therefore identical.

[3] See *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281
[4] See *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

36) In relation to beer there is no direct counterpart in the earlier mark. However, nowadays it is not uncommon for beer manufacturers to produce alcohol-free and low alcohol beers and market them under the same mark as their alcoholic beer. They are in direct competition with alcoholic beer, being aimed at the same consumers and targeted in particular at drinkers who wish to drive a vehicle without running the risk of having levels of alcohol above the legal limit; they are also sold through the same channels of trade. There is a fairly high degree of similarity between the Applicant's *beers; low alcohol beer; malt beer* and the CTM application's *non-alcoholic beers*; *non alcoholic lager.*

37) The General Court in *Oakley Inc v OHIM*, Case T-116/06 decided that the retail of specific goods can, potentially, create a close link with the goods themselves by virtue of the complementary relationship between them. In *Tony Van Gulck v Wasabi Frog Ltd,* Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 4):

> "4 The factors conventionally taken to have a particular bearing on the question of 'similarity' between goods and services are: uses, users and the nature of the relevant goods or services; channels of distribution, position in retail outlets, competitive leanings and market segmentation: see *Canon KK v. Metro Goldwyn Mayer Inc* C-39/97, EU : C : 1998 : 442 at paragraph [23] together with paragraphs [44] to [47] of the Opinion of Advocate General Jacobs in that case (EU:C:1998:159). More than just the physical attributes of the goods and services in issue must be taken into account when forming a view on whether there is a degree of relatedness between the consumer needs and requirements fulfilled by the goods or services on one side of the issue and those fulfilled by the goods or services on the other. The relatedness or otherwise of the trading activities involved in the comparison is ultimately a matter of consumer perception".

38) Class 35 of the CTM includes *the bringing together for the benefit of others of a variety of beverages, including ...* and *mail order retail services connected with a variety of beverages, including ...* and *electronic shopping retail services connected with a variety of beverages ...* in respect, in each case, of the following list of goods (amongst others):

> *Beers, low alcohol beer, mineral water, still water, sparkling water, mineral and aerated drinks, carbonated drinks, non-alcoholic beverages, fruit drinks, fruit juices, syrups and other preparations for making beverages, de-alcoholized drinks, non-alcoholic beers*.

The goods in this list are either identical with, or include, all the goods of the opposed mark's goods in class 32. I consider that the relationship between the goods and the retailer of these goods is such as to produce a reasonable degree of similarity.

The average consumer and the purchasing act

39) According to the case-law, the average consumer is reasonably observant and circumspect (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27). The degree of care and attention the average consumer uses when selecting goods/services can, however, vary depending on what is involved. Consumers of *extracts of hops for making beer* might perhaps include those brewing beer commercially, and consumers of *preparations for making beverages* might include, for example, bars and restaurants. However, the average consumer of all the goods and services in the specifications of both the opposed mark and the CTM application will consist of, or include, a member of the general public purchasing beer or non-alcoholic drinks, or preparations for making such drinks (such as squash concentrates and cordials, ingredients for home brewing, etc). These goods are not particularly costly, nor are they infrequent purchases. No more than an average level of care and consideration will be deployed in their selection. The purchasing process will normally involve self-selection in retail outlets or their online equivalents; even where orders are placed orally in a bar or restaurant, the product may be on display or on a drinks menu (see *Simonds Farsons Cisk plc v OHIM* Case T-3/04 at paragraph 58). In view of all this the visual aspects of the marks take on more importance, but the aural impact of the marks will not be ignored completely in my assessment.

Distinctive character of the earlier trade mark

40) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark (on the basis either of inherent qualities or because of use made), the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). The distinctive character of a trade mark must be assessed by reference to the goods or services in respect of which registration is sought and by reference to the way it is perceived by the relevant public (see *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91).

41) It will be obvious from my earlier comments on the evidence in the case that there is no evidence of enhanced distinctiveness, so I have only the inherent distinctiveness of the earlier mark to consider. The words appearing in relatively small standard font in the mark are descriptive. The words XCEL MALT are the prominent focal point of the mark. MALT is in itself descriptive of certain drinks, but hangs together with XCEL in the name XCEL MALT. XCEL echoes the word “excel”, with its laudatory allusion, but the X at the beginning of the word is unusual, and its eye-catching quality is emphasized by the visual prominence it is given in the flamboyant stylisation of the words XCEL MALT. The small device at the top of the mark and banner strips above and below are fairly commonplace, but do add something to the total appearance and balance of the mark. The mark is of at least average distinctiveness.

Comparison of the marks

42) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, Bimbo SA v OHIM, that:

> ".....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

43) The marks to be compared are shown below:

The opposed mark	The CTM application
	

The CTM application consists of the words EXCEL MALT written in a highly stylized script with an upward slant from left to right, the initial X being greatly enlarged in an eye-catching way. These words are framed above and below by curved, narrow banner strips bearing, in much smaller standard font capitals, the words "refreshing smooth" and "dark malt beverage" respectively. Immediately below the upper banner is a small device, which appears, on close examination, to be a symbolic representation of a flower and leaves – but the average consumer will not notice its nature in this detail, registering it, at most, simply as a small, decorative device. Below this the words "extra energy" appear in still smaller standard font capitals, the word "non-alcoholic" appearing in the same size capital font beneath the lower banner strip. The stylized words XCEL MALT form the most distinctive feature of the mark, but the small device and banners also contribute appreciably to the overall

visual impression. All these central elements are superimposed on a background consisting of bands of narrow stripes to the left and right of a central blank band. This background contributes to a lesser degree to the overall impression.

44) The Applicant's mark consists of two main elements: the depiction of a pyramid display of drinks cans, and the text above it. The text consists of the words XCEL MALT in standard font capitals, followed, on the same line, by a small device, unobtrusively squeezed into a marginal position at the end of the first line of text (the contribution of this small, marginal device to the overall impression is very slight). Beneath the first line the text continues with the words IS THE KING OF ALL MALT in somewhat smaller standard capital font, except for the word KING, which appears in larger font above the apex of the pyramid display figure. The picture of a pyramid of drinks cans is the most prominent visual feature of the opposed mark, but the text, though visually slightly less prominent than the pictorial figure, is nevertheless balanced prominently above it, and makes a significant contribution to the overall impression of the mark.

45) Visually, the words EXCEL MALT play a prominent role in both marks, forming visually prominent focal point of the device in the CTM application and the first line of the first element of the opposed mark, and they contribute an element of similarity. The stylisation of the words EXCEL MALT into a central device in the CTM application, and the depiction of the drinks can pyramid in the opposed mark, provide dissimilarities. The text elements of the marks are largely different, and the layout of text and figurative elements in the marks is very different. It should be mentioned that, so far as can be discerned, the label on the cans depicted in the opposed mark appears to correspond essentially to the central elements of the CTM application mark. In the kind of size in which the opposed mark would be reproduced on, for example, a drinks can, this feature would not be readily readable, though the striking pattern of the stylized central words and framing banner elements of the CTM application can be made out. However, I must bear in mind that the average consumer 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. Overall, there is a low degree of visual similarity between the marks.

46) Despite the lack of an initial E in XCEL, XCEL MALT will inevitably be pronounced in both marks as "Excel Malt". Obviously laudatory or descriptive phrases like "refreshing smooth" or "dark malt beverage" will be ignored in oral use of the mark, and the CTM application will be referred to simply as "Excel Malt". Despite its promotional aspect, some consumers may pronounce the whole of the text element of the opposed mark, which involves some aural dissimilarity; but many will refer simply to "Excel Malt", in which case the marks will be aurally identical. Even where the whole text element of the opposed mark is pronounced, there will still be at least a reasonable degree of aural similarity overall.

47) There are both conceptual similarities and dissimilarities between the marks. Although XCEL has no meaning as such, its laudatory allusion contributes some conceptual similarity to the marks, as does MALT – both marks therefore suggesting a reference, at least in part, to malt, or a malt product, that excels in some way. The words IS THE KING OF ALL MALT and the laudatory or descriptive phrases in the CTM application provide some dissimilarities.

Likelihood of confusion under 5(2)(b)

48) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG,* paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

49) I have found the CTM application to have at least an average degree of distinctiveness. I have found the Applicant's goods in class 32 to be identical, or to have a fairly high degree of similarity respectively, with goods of the CTM application; I have also found them to have a reasonable degree of similarity with services of the CTM in class 35. I have found a low degree of visual similarity, at least a reasonable degree of aural identity, and some conceptual similarities and dissimilarities between the marks. The picture of a pyramid of drinks cans is the most prominent visual feature of the opposed mark but, consisting of a visual reference to the product itself, it is hardly a very distinctive one for drinks. Notwithstanding the obvious differences in the marks, the most distinctive element in both marks, despite its laudatory allusion, consists of the words XCEL MALT, with its unusual spelling. In the CTM application XCEL MALT is prominent as the central focal element. In the opposed mark the distinctive character of XCEL MALT is highlighted by its positioning as the first line of the text balanced at the top of the pictorial figure. The overall similarity between the marks is too low for them to be confused directly with one another. However, bearing in mind my findings on the average consumer and the purchasing process, and taking into account the principle of imperfect recollection, I nevertheless consider that, having found at least reasonable similarity between the goods of the opposed mark and goods or services of the CTM application, the average consumer is likely to believe that those goods and services marketed under the marks come from the same undertaking, or from economically linked undertakings. **Accordingly, there is a likelihood of confusion under section 5(2)(b) in respect of all the goods of the Applicant's specification.**

Conclusion

50) Mr Cunningham has succeeded, but only insofar as its opposition is based on its earlier CTM application. Accordingly, I cannot refuse the subject trade mark until such time as the CTM application is registered. This decision is, therefore, provisional, being dependant on registration of the CTM application. Mr Cunningham is directed to inform the Tribunal as and when the CTM application is registered, or, alternatively, as and when it is refused (if the opposition against it is successful). I will then issue a supplementary decision confirming the outcome of the subject proceedings and I will issue my decision on costs at that point too.

Dated this 31st day of October 2014

Martin Boyle
For the Registrar,
The Comptroller General