

O/581/20

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3407449

BY BREWDOG PLC

TO REGISTER THE TRADE MARK:



IN CLASSES 40, 41 AND 43

AND

OPPOSITION THERETO UNDER NO. 418059 BY

DOGHOUSE DISTILLERY LTD

Background and pleadings

1. BrewDog plc (“the applicant”) applied to register the trade mark below in the UK on 17 June 2019.



2. It was accepted and published in the Trade Marks Journal on 12 July 2019 in respect of the following services:

Class 40 Brewing services; distilling services; brewing of beer; beverage canning services; beverage bottling services; rental of machines and apparatus for processing beverages; rental of machines and apparatus for brewing beer; leasing of machines and apparatus for processing beverages; leasing of machines and apparatus for brewing beer; information, advisory and consultancy services relating to all of the aforesaid services.

Class 41 Education and training services; entertainment services; arranging and conducting of training courses; arranging and conducting of educational courses and seminars; preparation of educational courses and examinations; development and production of educational and instructional materials; arranging and conducting competitions; arranging and conducting of demonstrations for entertainment purposes; arranging and conducting of demonstrations for instructional purposes; educational demonstrations; live demonstrations for entertainment and instructional purposes; arranging and conducting beer tasting events for educational and entertainment purposes; arranging and conducting spirits tasting events for educational and entertainment purposes; organisation

of entertainment events and activities; organisation of exhibitions; organisation of live shows; presentation of live show performances; presentation of live entertainment events; arranging and conducting live music events; information, advisory and consultancy services relating to all of the aforesaid services.

Class 43 Services for providing food and drink; bar services; restaurant services; restaurant services incorporating licensed bar facilities; serving of alcoholic beverages; snack-bar services; hotel accommodation services; temporary accommodation services; beer tasting services including the provision of beverages; providing information in the nature of recipes for beverages; information, advisory and consultancy services in connection with all of the aforesaid services.

3. Doghouse Distillery Limited (“the opponent”) opposes the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against two classes of services in the application, Class 40 and Class 43. The opponent relies upon its UK trade mark, shown below, registration number 3161406, which has a filing date of 26 April 2016 and for which the registration procedure was completed on 5 August 2016.



4. The following goods and services are relied upon in this opposition:

Class 32 Beer and non-alcoholic drinks.

Class 33 Alcoholic beverages (except beers); alcoholic wines; spirits and liqueurs; alcopops; alcoholic cocktails.

Class 43 Services for providing food and drink. Pubs and bars.

5. The opponent argues that the respective goods/services are identical or similar and that the marks are similar.
6. The applicant filed a counterstatement denying the claims made.
7. Both sides filed written submissions. These will be referred to as appropriate during the course of the decision, suffice to say that I have read and carefully considered both parties' submissions.
8. It should be noted that the opponent made reference to a prior decision involving the same parties, reference number O/249/19, in its submission. While I have read this decision and the subsequent appeal decision, and will bear them in mind, I must address the case before me on its own facts and merits.
9. Neither party filed any evidence in this case.
10. The applicant is represented by Lawrie IP Limited and the opponent is unrepresented.
11. No hearing was requested and so this decision is taken following a careful perusal of the papers.

DECISION

12. Section 5(2)(b) of the Act reads as follows:

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

(a)...

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

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

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

“(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 relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(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 relevant period 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 (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), 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 European Union 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.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(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.”

14. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provision. As this trade mark had not completed its registration process more than 5 years before the filing date of the application in issue in these proceedings, it is not subject to proof of use pursuant to

section 6A of the Act. The opponent can, therefore, rely upon all of the goods and services it has identified.

Section 5(2)(b) – case law

15. The following principles are gleaned from the decisions of the EU courts 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 greater 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 to mind the earlier mark, 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

16. The goods and services in question are as follows:

Opponent's goods and services

Class 32

Beer and non-alcoholic drinks.

Class 33

Alcoholic beverages (except beers); alcoholic wines; spirits and liqueurs; alcopops; alcoholic cocktails.

Class 43

Services for providing food and drink. Pubs and bars.

Applicant's services

Class 40

Brewing services; distilling services; brewing of beer; beverage canning services; beverage bottling services; rental of machines and apparatus for processing beverages; rental of machines and apparatus for brewing beer; leasing of machines and apparatus for processing beverages; leasing of machines and apparatus for brewing beer; information, advisory and consultancy services relating to all of the aforesaid services.

Class 43

Services for providing food and drink; bar services; restaurant services; restaurant services incorporating licensed bar facilities; serving of alcoholic beverages; snack-bar services; hotel accommodation services; temporary accommodation services; beer tasting services including the provision of beverages; providing information in the nature of recipes for beverages; information, advisory and consultancy services in connection with all of the aforesaid services.

17. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia,

their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

18. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (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.

19. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... 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) (IP TRANSLATOR)* [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."

20. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term 'computer software'. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

"...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded."

21. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

22. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

“In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase.”

23. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut for Lernsysteme v OHIM – Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

24. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market* (Trade Marks and Designs) (OHIM), Case T-325/06, the GC stated that “complementary” means:

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

25. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amelia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.”

While on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

26. Both parties have made submissions regarding the similarity of the goods and services. However, it should be stressed that I must make my decision based upon the goods and services for which the marks are registered/applied for. This is a notional assessment and differences or similarities arising from the actual goods and services that the parties provide, or intend to provide, are not relevant, unless they are apparent from the specifications of the marks in question. Consequently, the opponent’s statement in its submission that it is involved in manufacturing identical/similar goods to that of the applicant does not have a bearing on my decision.

27. I will make my comparison with reference to the applicant's services which have been opposed:

Class 40

28. "Brewing services; distilling services; brewing of beer" in the applicant's specification apply to the process of making beer and spirits. They are essential for making the products specified in the opponent's Class 32 and Class 33 entries – "Beer ..." and "spirits and liqueurs". Businesses will often both make and sell alcoholic beverages and consequently there will be an overlap in the trade channels and in the users in these instances. While the relevant goods and services in Class 40 and Classes 32 and 33 respectively are different, I consider them to be complementary, one being indispensable for the other. I therefore see these goods and services as highly similar.

29. There is also an overlap between the applicant's "brewing services" and "brewing of beer" and the opponent's "pubs ..." services. There is complementarity in respect of the not uncommon practice of pubs being "tied" i.e. they can only sell beer from the brewery that owns the pub. In this case, the trade channels and users overlap, and the services are highly similar.

30. "Beverage canning services" and "beverage bottling services" in the applicant's specification will be services offered to other businesses involved in the drinks production process and can therefore be seen as separable from the end products and services aimed at end consumers in the opponent's specification. The trade channels and users of the goods and services will, therefore, differ. I consider the goods and services in question to be neither complementary nor competitive. Overall, I regard the applicant's services in these instances as dissimilar to all of the opponent's goods and services. If I am wrong, they are only likely to be similar to a low degree.

31. Again, “rental of machines and apparatus for processing beverages”, “rental of machines and apparatus for brewing beer”, “leasing of machines and apparatus for processing beverages” and “leasing of machines and apparatus for brewing beer” in the applicant’s specification will be services offered to other businesses involved in the drinks production process and can therefore be seen as separable from the end products and services aimed at end consumers in the opponent’s specification. The trade channels and users of the goods and services will, therefore, differ. I consider the goods and services in question to be neither complementary nor competitive. Overall, I regard the applicant’s services in these instances as dissimilar to all of the opponent’s goods and services. If I am wrong, they are only likely to be similar to a low degree.

32. “Information, advisory and consultancy services relating to all of the aforesaid services” in the applicant’s specification will cover a broad spectrum of activity. However, I consider that the “information ... services” part of the term to have a degree of overlap where it relates to the “brewing services; distilling services” and “brewing of beer” in the applicant’s specification and the “pubs and bars” services in the opponent’s specification. Information services in this context will be provided to customers in breweries and distilleries, but also to members of the public in pubs and bars. For example, this could be in the form of events held in pubs and bars where people are given information about particular alcoholic beverages or brands. I therefore see an overlap in users and trade channels. While the nature and uses of such services differ and they are neither complementary nor competitive, I consider there to be a medium degree of similarity between the “information services relating to all of the aforesaid services” in the applicant’s specification and “pubs and bars” in the opponent’s specification.

33. By way of contrast, I do not consider there to be any degree of similarity between “advisory and consultancy services relating to all of the aforesaid services” in the applicant’s specification and “pubs and bars” in the opponent’s specification. This is because I see such services as targeted at professional

users in the brewing and distilling sectors and therefore the primary user community is distinct from the primary user community in pubs and bars and the trade channels do not overlap. If I am wrong in this finding, then there will only be a low degree of similarity.

Class 43

34. In its submission, the applicant accepts that the following specified services: “services for providing food and drink”, “bar services”, “restaurant services”, “restaurant services incorporating licensed bar facilities”, “serving of alcoholic beverages” and “snack-bar services” are identical to the opponent’s goods and services. I concur with that view in that there is a direct read across to “services for providing food and drink” and “pubs and bars” in the opponent’s specification. The services are identical.
35. “Hotel accommodation services” and “temporary accommodation services” in the applicant’s specification will have users in common with “services for providing food and drink” and “pubs and bars” in the opponent’s specification. While the respective services have different core aims, the trade channels will frequently overlap in that hotels will provide food and drink, and will normally have a bar, while pubs often offer rooms. While they are not competitive, there is a degree of complementarity in the services given the increasing blurring of the distinction between hotels and pubs in what facilities they offer. They are important for the use of the other in such a way that customers may think the responsibility for those services lies with the same undertaking. I therefore consider these services to be similar to a medium degree.
36. “Beer tasting services including the provision of beverages” in the applicant’s specification falls within the opponent’s “services for providing food and drink” and “pubs and bars” in which case the logic of the *Meric* case applies and the services can be construed as identical. At the very least, the categories overlap to a high degree when considering the criteria relating to use, users and trade channels and can be regarded as similar to a high degree, if I am wrong that the services are identical.

37. “Providing information in the nature of recipes for beverages” in the applicant’s specification is a service which may be delivered in pubs or bars. This could be in the form of tasting events. There will therefore be a considerable overlap in trade channels and users in the case of “pubs and bars” in the opponent’s specification. Strictly, the nature of the services differs, one involving the provision of information and the other involving the provision of drinks and, by the same token, the uses of the services will be different. I do not consider them to be either competitive or complimentary. Overall, I find these services to be similar to a medium degree.

38. In respect of “information, advisory and consultancy services in connection with all of the aforesaid services” in the applicant’s specification, I again consider that advisory and consultancy services are more likely to be provided to businesses than to members of the general public, whereas the goods and services in the opponent’s specification are more likely to be provided to members of the general public. The goods and services will, therefore, differ in terms of user. They will also differ in respect of trade channels and the nature and uses of the services. These services are therefore sufficiently removed from the relevant services themselves to be dissimilar or, if I am wrong, they are similar to a low degree. However, when it comes to information services, there is a greater overlap of users and trade channels, even though the nature and uses of the services differ. For example, members of the public will avail themselves of guides to food and drink, restaurants and bars, and could seek such information from the same outlets as trade professionals. I consequently regard information services in this context to be of medium similarity.

The average consumer and the nature of the purchasing act

39. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods and services. I must then determine the manner in which the goods and services are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios*

Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

40. I have received no submissions from either party about the average consumer or the level of attention that they would pay given the goods and services in question. Where the goods of the opponent overlap, they are in the field of alcoholic beverages and therefore the average consumers will be adult members of the public. Because distilled products are referred to, there will be some instances where the goods are expensive but, overall, the average transaction will not be one where high cost is a dominant factor during the purchasing process. Conversely, there will be circumstances in which alcoholic beverages are purchased at speed. However, overall, I consider that an average degree of attention will be paid when the goods are being purchased.

41. The goods may be obtained as a self-serve consumer item on the shelves of a supermarket or off licence, or their online equivalent, or they may be acquired in pubs, bars or restaurants. In a primarily self-service retail environment, although there may be the occasional verbal enquiry regarding the goods, visual considerations will be overwhelmingly to the fore. Even where the customer is served their beverages, visual considerations will predominate in the form of use of a drinks menu, looking at a beer pump, or directly scrutinising the goods on shelves or in glass-fronted refrigerators. Consequently, while an aural component in the purchasing process is not ruled out, on average, visual factors will be decisive.

42. The average consumer of the comparable services in question will be either members of the public or business users. There will be variation across this range of services in terms of frequency of purchase, cost and quality. However, taking these variations into account, I consider that the level of attention paid by the average consumer during the purchasing process will be average.
43. The comparable services in question are primarily purchased from premises that serve food and drink to the public – restaurants, snack bars, pubs and bars, and so on – or, in the case of brewing and distilling, will mainly be purchased by business users from commercial premises set up for those purposes. Whether purchasing directly from the physical premises in question, or via their websites, the purchasing process will be dominated by visual considerations. In the case of physical premises, inspection of the frontage will play a part or, if online, perusal of the front page of a website. In either case, advertising material could be reviewed. Only in a minority of cases will an aural component - word-of-mouth - be a factor, although I will not rule out completely the significance of the aural aspects of the marks.

Comparison of the trade marks

44. 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 CJEU 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.”

45. It would be wrong, therefore, to artificially dissect the trade marks, 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.

46. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
	

47. In its submission, the opponent stated that it considers its mark to be highly similar to that of the applicant with a consequent likelihood of confusion between the two. It states that the same word, DOGHOUSE, appears in both marks. It further states that the word DOGHOUSE is the dominant element in both marks.

48. In its submission, the applicant argued that the two marks in question are sufficiently different so as not to give rise to confusion. It contended that the figurative elements predominate in the two marks and therefore outweigh the presence of the same word in the two marks. It also argued that its drawing could be viewed as any four-legged animal, not necessarily a dog, to further differentiate it from the drawing of a dog's head in the opponent's mark.

49. Having summarised the two parties' submissions, I set out my analysis in full below.
50. The opponent's mark consists of the word DOGHOUSE presented on a curve, and as if stencilled, in block capitals beneath a relatively detailed picture of a bulldog-type dog's head. While the word is smaller than the picture, one's eye is drawn to the word element given that it can be read. It is not as though the word is tiny in comparison to the picture. Consequently, I consider the two elements to play an equal role in the overall impression of the mark.
51. The applicant's mark consists of the word DOGHOUSE presented in a straight line and in the form of bold block letters below a picture of a four-legged animal as a solid white shape on a black shield, the picture as a whole giving the impression of having been spray painted. While it is not self-evident that the four-legged animal is a dog, when presented above the word DOGHOUSE it is probable that the average consumer would regard the otherwise imprecise picture to be a stylised representation of a dog. Again, the word is smaller than the picture, but one's eye is drawn to the word element given that it can be read. I consider the two elements to play an equal role in the overall impression of the mark.
52. Visually, the marks have the word DOGHOUSE in both. The lettering is in the form of a curve in the opponent's trade mark and on a straight line in the applicant's trade mark and the typefaces are different, but these differences are of minor significance. Both feature pictures of animals, but, in the opponent's trade mark, the picture is of a dog's head and is relatively detailed, and, in the applicant's trade mark, the picture is of a four-legged animal as a whole as a solid white shape with relatively little detail. When viewed in conjunction with the word DOGHOUSE, it is probable that the average consumer would regard the otherwise imprecise picture in the applicant's mark to be a stylised representation of a dog. The applicant's trade mark features a shield which has no corresponding element in the opponent's trade mark. While the words are the same, the figurative

elements are very different and, overall, I consider the marks to be visually similar to a medium degree.

53. Aurally, the word DOGHOUSE in each of the marks will be pronounced identically in the same way as the two ordinary English words DOG and HOUSE. The dog's head picture in the opponent's mark will not be pronounced by the consumer, nor will the picture of a four-legged animal on a shield in the applicant's mark. I consider the marks to be aurally identical.
54. Conceptually, the word DOGHOUSE will have the same meaning in both marks and may be seen as a reference to a kennel for a dog. The different pictures in each case support the same concept to the extent that they will be perceived as dogs. I consider the marks to be conceptually identical, or if not, they are highly similar.

Distinctive character of the earlier mark

55. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested

by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

56. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities.
57. The opponent has not pleaded that its mark has acquired enhanced distinctive character through use. It does, however, argue that the word DOGHOUSE in its mark is highly distinctive for the goods and services it relates to.
58. I must make an assessment of the inherent distinctive character of the earlier mark. As noted above, the word DOGHOUSE will be seen as a reference to a kennel for a dog. This is neither allusive nor descriptive of the goods and services for which the mark is registered. The picture of the dog’s head in the opponent’s mark reinforces the word’s distinctive character in that it acts as a further conceptual hook in the mind of the consumer, but again with no allusive or suggestive characteristics. At the same time, the word and associated picture are not highly distinctive in the way that they might be if one was dealing with an invented word. Consequently, I consider the mark to be inherently distinctive to at least a medium degree. I bear in mind that the degree of distinctiveness of the earlier mark is only likely to be significant to the extent that it relates to the point of commonality between the marks¹, the word DOGHOUSE. To that extent, I confirm that my view is that that the word is inherently distinctive alone to at least a medium degree.

¹ See, *Kurt Geiger v A-List Corporate Limited*, BL O-075- 13,

Likelihood of confusion

59. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

60. The applicant commented on the distinctiveness of its mark (notably the brand recognition of the drawing of the white dog) as something which helps avoid confusion. However, no evidence has been filed to demonstrate this and, in any event, I struggle to see how the distinctiveness of the later mark will help to avoid confusion.

61. I have found the parties' marks to be visually similar to a medium degree, aurally identical and conceptually identical, or at least conceptually highly similar. I have identified the average consumer to be a member of the general public or a business user who will select the goods and services primarily by visual means (although I do not discount an aural component). I have concluded that the average consumer will pay at least an average degree of attention when selecting the goods and services. I have found the parties' goods and services to range from similar to a low degree to identical

(except for those in respect of which I have found no similarity). I have found the opponent's mark to have at least a medium degree of inherent distinctive character, including the common element DOGHOUSE.

62. Notwithstanding the principle of imperfect recollection and recognising that the word DOGHOUSE is also present in the applicant's mark, together with the conceptually reinforcing picture of a dog (when perceived by the average consumer), I consider that there are sufficient visual differences between the marks to avoid them being mistakenly recalled as each other. Notably, both feature pictures of dogs (when perceived by the average consumer), but, in the opponent's trade mark, the picture is of a dog's head and is relatively detailed, and, in the applicant's trade mark, the picture is of a dog as a whole, as a solid shape, and with relatively little detail. Such stark differences between the types of representation are likely to be recalled by the average consumer. I am therefore satisfied that there is no likelihood of direct confusion, even in relation to identical services.

63. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

64. The single word DOGHOUSE is present in both marks and each mark has a conceptually reinforcing picture of a dog (when viewed by the average consumer), even if those pictures are quite different. Looking at the identical goods and services and those which are similar to at least a medium degree, I consider that the various factors will lead the average consumer to conclude that the parties' marks indicate goods and services sold by the same or economically linked undertakings. The differences that exist between the marks will be seen as symptomatic of a brand variation. I therefore consider that there is a likelihood of indirect confusion in respect of goods and services which I have found to be identical or similar to at least a medium degree to the opponent's goods and services, but not those goods and services which are similar to only a low degree; it is in my view a step too far to extend the finding to the goods and services with only a low degree of similarity when the various factors are considered, even bearing in mind the interdependency principle.

CONCLUSION

65. The opposition has succeeded in relation to the following services, for which the application is refused:

Class 40 Brewing services; distilling services; brewing of beer; information services relating to all of the aforesaid services.

Class 43 Services for providing food and drink; bar services; restaurant services; restaurant services incorporating licensed bar facilities; serving of alcoholic beverages; snack-bar services; hotel accommodation services; temporary accommodation services; beer tasting services including the provision of beverages; providing information in the nature of recipes for beverages; information services relating to all of the aforesaid services.

66. The application will proceed to registration in respect of the following services only (and includes those services not subject to this opposition i.e. the Class 41 services specified by the applicant):

Class 40 Beverage canning services; beverage bottling services; rental of machines and apparatus for processing beverages; rental of machines and apparatus for brewing beer; leasing of machines and apparatus for processing beverages; leasing of machines and apparatus for brewing beer; advisory and consultancy services relating to all of the aforesaid services.

Class 41 Education and training services; entertainment services; arranging and conducting of training courses; arranging and conducting of educational courses and seminars; preparation of educational courses and examinations; development and production of educational and instructional materials; arranging and conducting competitions; arranging and conducting of demonstrations for entertainment purposes; arranging and conducting of demonstrations for instructional purposes; educational demonstrations; live demonstrations for entertainment and instructional purposes; arranging and conducting beer tasting events for educational and entertainment purposes; arranging and conducting spirits tasting events for educational and entertainment purposes; organisation of entertainment events and activities; organisation of exhibitions; organisation of live shows; presentation of live show performances; presentation of live entertainment events; arranging and conducting live music events; information, advisory and consultancy services relating to all of the aforesaid services.

Class 43 Advisory and consultancy services in connection with services for providing food and drink, bar services, restaurant services, restaurant services incorporating licensed bar facilities,

serving of alcoholic beverages, snack-bar services, hotel accommodation services, temporary accommodation services, beer tasting services including the provision of beverages, providing information in the nature of recipes for beverages.

COSTS

67. The opposition has succeeded in relation to roughly two thirds of the class 40 and class 43 terms in the applicant's specification. As the opponent has achieved the greater degree of success it is entitled to a contribution towards its costs. However, I have taken the fact that the opponent has only succeeded in part into account when deciding the amount to be awarded. The opponent is unrepresented and has submitted a costs proforma outlining the number of hours spent on these proceedings.

68. The opponent submitted a claim for a total of 13 hours spent on compiling, reviewing and deciding upon the relevant forms and submissions, together with researching the trade mark process itself. I proportionately reduce this to what I consider to be a reasonable cost award of 9 hours.

69. The opponent is also entitled to the official fee for filing the Notice of Opposition in the sum of £100.

70. In relation to the hours expended, I note that The Litigants in Person (Costs and Expenses) Act 1975 (as amended) sets the minimum level of compensation for litigants in person in Court proceedings at £19 per hour. I see no reason to award anything other than this. I award the opponent the sum of £171 (9 hours at £19 per hour) plus the official fee of £100, totalling £271.

71. I therefore order BrewDog plc to pay Doghouse Distillery Ltd the sum of £271. This sum should be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

Dated this 19th Day of November 2020

JOHN WILLIAMS
For the Registrar