

BL O/725/19

TRADE MARKS ACT 1994

**CONSOLIDATED PROCEEDINGS IN THE MATTER OF TRADE MARK
APPLICATIONS 3325025 & 3325036**

BY

CRYSTAL SUPPLEMENTS LIMITED

TO REGISTER THE FOLLOWING TRADE MARKS:

CRYSTAL

AND



IN CLASSES 05, 09, 29, 30, 32 & 35

AND

AND OPPOSITION NO.s 414795 & 414799 THERETO

BY

G.I.E. CRISTALINE, GROUPEMENT D'INTERET ECONOMIQUE

Background and pleadings

1. Crystal Supplements Limited, (hereafter “the applicant”) applied to register the trade marks:



(application 3325025)

And



(application 3325036)

in the UK on 17 July 2018 for a range of goods and services in classes 05, 09, 29, 30, 32 and 35. Both applications were accepted and published in the Trade Marks Journal on 28 September 2018.

2. The applications were initially filed in the name of Parhom Rahravan but were later assigned to Crystal Supplements Limited. The effective date of assignment is 22 May 2019 for both applications.
3. G.I.E. Cristaline, Groupement d'Interet Economique (“the opponent”) opposes both trade marks on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”).
4. The opposition is based on earlier UK Trade Mark No. 2110884 which was filed on 20 September 1996 and registered on 04 February 2000, for the mark:



for the following goods:

Class 32: Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.

5. Given the date of registration, the opponent's mark qualifies as an earlier mark in accordance with section 6 of the Act and is subject to proof of use.
6. Opposition has been raised solely in respect of the class 32 element of the contested applications. Classes 05, 09, 29, 30 and 35 of the contested applications are unopposed.
7. The contested goods are:

Class 32: Sports drinks; sports drinks containing electrolytes; protein-enriched sports beverages; beverages containing whey protein; protein-based beverages; protein-based fruit drinks; calorie controlled and calorie reducing beverages; protein shakes; protein-based milkshakes; protein-based smoothies; preparations containing whey protein for making beverages; nutritional beverages containing vitamins and minerals; powders for making beverages containing vitamins, minerals, whey protein and/or creatine; powders for making beverages containing vitamins, minerals, whey protein and/or creatine for use before or after sports training; all of the above goods solely in relation to beverages for sports training and improving physical performance.

8. The above is an amended list of goods from the lists published for opposition purposes. Facing the oppositions at hand, the applicant voluntarily deleted a number of terms from the original list of class 32 goods.

9. The terms deleted were: 'Mineral and aerated waters and other non-alcoholic beverages; fruit beverages and fruit juices, syrups and other preparations for making beverages' and 'Beverages, preparations for making beverages.'
10. The opponent has opposed on the ground of Section 5(2)(b) and as such, claims that the marks at issue are similar and the goods at issue are either identical or similar.
11. In its counterstatement the applicant puts the opponent to proof of use of the earlier mark relied upon.
12. The applicant claims that the marks are visually and phonetically dissimilar and that conceptually the earlier mark has no meaning so there can be no conceptual similarity. The applicant also claims the goods at issue are dissimilar and do not coincide in nature, intended purpose or methods of use; they are neither in competition nor complementary.
13. Both parties filed written submissions. I will not summarise that information here, but will refer to it later in my decision, where necessary.
14. A hearing to determine the claim was requested and took place before me on 06 November 2019.
15. Throughout the proceedings the applicant has been professionally represented by Trade Mark Wizards Limited, whilst the opponent has been professionally represented by Haseltine Lake Kempner LLP. At the hearing the applicant was represented by Mr Edward Bragiel of Hogarth Chambers, instructed by Trade mark Wizards Ltd. The opponent was not represented at the hearing.

Evidence

16. The opponent submitted evidence to prove genuine use of the earlier mark relied upon. The evidence is comprised of a Witness Statement of Mr Laurent Clair who is the proxy of Mr. Luc Baeyens who represents C.G.E.S., the French firm Administrator of the opponent company G.I.E. Cristaline, a position he has held

since 30 July 2018. Mr Clair states that he has worked at the opponent company since 09 January 2012. The witness statement of Mr Clair is dated 13 May 2019 and is accompanied by several exhibits named as: 1A–1F; CRISTALINE 2; CRISTALINE 3A–3F; CRISTALINE 4A–4D; CRISTALINE 5 and CRISTALINE 6.

17. Mr Clair states that the evidence proves that the mark relied upon has been used in the UK between July 2013 and July 2018 on Mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.

18. Mr Clair states that the exhibits provide the following information:

Exhibits 1A – 1F comprise labels bearing the CRISTALINE mark, used on the relevant goods in the UK between 2013 and 2018.

Exhibit CRISTALINE 2 comprises annual sales data in the UK during the relevant period. A summary of those sales figures is as follows:

2013:	£2,187,879
2014:	£3,621,393
2015:	£3,290,124
2016:	£3,512,662
2017:	£2,881,615
2018:	£3,042,167

Exhibits CRISTALINE 3A - 3F comprise invoices addressed to UK customers between 2013 and 2018, illustrating sales of the relevant goods.

Exhibits CRISTALINE 4A - 4D comprise extracts from Zenith reports on the UK bottled water market between the years 2015 and 2018. Zenith is a marketing intelligence agency which specialises in the food and drinks market and which produces an annual report on the UK market for plain bottled water. The extracts provided show that the CRISTALINE brand occupies a substantial part of the UK drinks market.

Exhibit CRISTALINE 5 comprises a print of a news release regarding UK Member of Parliament Michael Fabricant's visit to the opponent's water bottling facility in 2014. The article notes that the site will be the largest water bottling site in the UK, with many of the bottles labelled with the CRISTALINE brand.

Exhibit CRISTALINE 6 comprises a French media article referring to the success of the CRISTALINE brand. The article states that millions of CRISTALINE branded bottles of water are produced in the Ardennes with half being sold for export to Belgium, Netherlands and England.

The relevant statutory provisions are as follows:

"Raising of relative grounds in opposition proceedings in case of non-use

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 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 Union.

(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 states 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.”

19. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

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

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(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 to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not

genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving 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. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

20. According to section 6A(3)(a) of the Act, the relevant period in which genuine use must be established is the five-year period ending on the date of publication of the applied for mark. Consequently, the relevant period is 29 September 2013 to 28 September 2018.

21. Before assessing the opponent’s evidence of use, I remind myself of the comments of Mr Daniel Alexander, Q.C., sitting as the Appointed Person, in *Awareness Limited v Plymouth City Council*, Case BL O/236/13, where he 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.”

22. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was) as the Appointed Person summarised the test under s.46(2) of the Act, which is analogous to Section 6A(4)(a), as follows:

"33. The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter’s distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive

character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

23. Although this case was decided before the judgment of the Court of Justice of the European Union ("CJEU") in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered.

Genuine Use

24. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself¹.

25. The labels provided under Exhibits 1A–1F are labels for bottled spring water; mineral water; aerated water and waters flavoured with fruit. The earlier mark is shown prominently on all of the labels submitted, which are dated between 2013 and 2018. As is usually the case with labels to be used on food and drink packaging, the opponent's labels contain additional material such as a list of ingredients; best before dates; bar codes and size or volume of contents; however, the CRISTALINE brand can be said to be the dominant element of each label.

26. The sales figures provided in Exhibit Cristaline2 are dated between 2013 and 2018 and can be said to be substantial in each year provided. The figures appear to correspond with the figures quoted by Mr Clair in his Witness Statement and show that the opponent has sold a significant quantity of CRISTALINE branded beverages within the UK during the relevant period.

27. The invoices provided under Exhibit Cristaline3 show sales across the UK to places including Liverpool; Huddersfield and Portsmouth. This evidence points to a good geographical spread of the opponent's goods across the relevant territory. The invoices also contain the terms: 'Jus tropical'; 'Jus peche'; 'Jus fraise'; 'Fruits Rouge' and 'Citron' as part of the descriptions of the goods being purchased.

¹ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

28. The Zenith reports provided under Exhibit Cristaline 4A – 4D are dated between 2015 and 2018. These reports show that the opponent company became the UK's third biggest imported brand of plain bottled water in 2012, only Evian and Volvic being bigger. In 2013 the opponent sold 18 million litres of bottled water in the UK. In 2014 it sold 44 million litres of sparkling water and had 7.6% of the UK market for imported waters including 5.2% of the UK plain spring water market. In 2015 the opponent sold 22 million litres of bottled water under the CRISTALINE brand. In 2016 the volume of sales was 26 million litres of bottled water, in 2017 it was 22.2 million litres and in 2018 it was 24 million litres of spring water. The information in these reports establishes clearly that the opponent has a firm foothold in the relevant market in the UK and enjoys a reasonable market share. It also supports the evidence in Mr Clair's Witness Statement and in Exhibit CRISTALINE 2, regarding the volume of sales of goods by the opponent in the UK during the relevant period.
29. The information in Exhibit CRISTALINE 5 shows a page from the Member of Parliament Michael Fabricant's website. Mr Fabricant visited the opponent's bottling plant in Lichfield in 2014. It was claimed that in 2015 the opponent would bottle 350 million bottles of water under the CRISTALINE brand. This information supports the opponent's claim to a place in the UK market for the relevant goods and use of the CRISTALINE brand during the relevant period.
30. The final Exhibit, CRISTALINE 6, comprises a press article from a French magazine. The article is in French and does not appear to be of any particular value in terms of my assessment of genuine use of the earlier mark in the UK. The CRISTALINE mark can be seen within the article however, which is dated 2014.
31. I refer back to paragraph 19 above, and the findings in *Walton* in respect of genuine and actual use of a trade mark. In particular that 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 to distinguish the goods or services from others which have another origin. The use must be more than merely token. All of the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark,

including the nature of the goods or services and the characteristics of the market concerned. Use of the mark need not always be quantitatively significant for it to be deemed genuine. There is no *de minimis* rule.

32. Whilst the opponent has not provided any evidence relating to marketing or promotional activities, this does not necessarily detract from the evidence that has been provided, which shows substantial levels of sales of at least a part of the goods at issue, during the relevant period, with the mark clearly displayed on labels that will be affixed to the products on offer.
33. Taking into account the evidence provided by Mr Clair as a whole, I am satisfied that use of the CRISTALINE mark has been more than merely token use and is sufficient to show that the proprietor has been commercially exploiting the mark for the purposes of creating a market share. The use of the mark as shown in evidence is to all intents and purposes, the mark as it is registered. This being the case, I am content that no consideration or assessment of variant use is necessary.
34. Accordingly, I conclude that the evidence before me establishes that there has been genuine use of the mark at issue during the relevant period, for a part of the goods at issue.

Fair Specification

35. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“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.”

36. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows.

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) ("Thomas Pink") at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is, how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand,

protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them;
Mundipharma AG v OHIM (Case T-256/04) ECR II-449; EU:T:2007:46.”

37. Mr Bragiel accepted at the hearing, that the opponent had shown genuine use of the earlier mark on a limited range of goods. Mr Bragiel suggested that the opponent had shown use of the earlier mark on mineral and aerated waters only. He accepted that the evidence also showed that the opponent had sold a range of fruit flavoured or aromatized water beverages, however he told me that the evidence showed that the sale of those products was both minimal in terms of value and directed at the Belgian market rather than the UK.

38. The specification of goods that the opponent relies upon is:

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

39. In its submissions, the opponent has made no reference to 'beers' and I see no evidence at all that the opponent is engaged in commercial activity which encompasses such goods. As I have concluded previously, the evidence is sufficient to show genuine use of the earlier mark, during the relevant period and across the UK. However, I agree with the Mr Bragiel that the opponent has not shown use of its mark on all of the goods protected. The evidence does not show use of the earlier mark on 'beers'; 'fruit drinks and fruit juices'; 'syrups and other preparations for making beverages' or the broad term '...and other non-alcoholic drinks'.

40. Whilst I take note of the applicant's comments regarding the sales of fruit flavoured waters, I find that the opponent clearly has a business interest in these products and has shown evidence that they sell such goods in the UK.

41. Exhibit CRISTALINE 2 of the opponent's evidence comprises six pages listing sales of goods. Pages 4 and 6 of that exhibit show sales of various fruit flavoured waters, with prices displayed in pounds sterling. Page 13 of Exhibit 3D shows sales of 'Fruits Rouges' and 'Citron' waters from Roxane UK Ltd to a company in East Sussex, amounting to £523.80. Page 6 of exhibit 3F shows sales of 'Jus Peche'; 'Jus Fraise' and 'Jus Tropical', to the value of £11,513.15, from Roxane UK Ltd to a company in Luton, England. The volume of sales of those products in the UK may be considered to be relatively small scale, however, there is no *de minimis* rule, as I have previously set out.

42. Consequently, I believe a fair specification in this matter to be the following:

Mineral and aerated waters; fruit flavoured mineral and aerated waters.

Decision

Section 5(2)(b) of the Act

43. Section 5(2)(b) of the Act is as follows:

“(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.”

44. The following principles are gleaned from the decisions of the CJEU 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.

The principles

(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 might 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

45. In the judgment of the 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”.

46. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (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.

47. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court 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 für 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”.

48. Having considered the evidence of the opponent and come to a conclusion in respect of a fair specification (see paragraph 42 above), the goods to be compared are:

Opponent's goods	Contested goods
<p>Class 32: Mineral and aerated waters; fruit flavoured mineral and aerated waters.</p>	<p>Class 32: Sports drinks; sports drinks containing electrolytes; protein-enriched sports beverages; beverages containing whey protein; protein-based beverages; protein-based fruit drinks; calorie controlled and calorie reducing beverages; protein shakes; protein-based milkshakes; protein-based smoothies; preparations containing whey protein for making beverages; nutritional beverages containing vitamins and minerals; powders for making beverages containing vitamins, minerals, whey protein and/or creatine; powders for making beverages containing vitamins, minerals, whey protein and/or creatine for use before or after sports training; all of the above goods solely in relation to beverages for sports training and improving physical performance.</p>

49. The opponent's earlier goods are waters and fruit flavoured waters which will be purchased and consumed as a beverage intended to quench the thirst, or as a refreshment. The contested goods are beverages or preparations for making beverages. The applicant has limited the nature of its contested goods to 'goods solely in relation to beverages for sports training and improving physical performance'.

50. The contested 'Sports drinks; sports drinks containing electrolytes; protein-enriched sports beverages; beverages containing whey protein; protein-based beverages; protein-based fruit drinks; calorie controlled and calorie reducing beverages; protein

shakes; protein-based milkshakes; protein-based smoothies; nutritional beverages containing vitamins and minerals; all of the above goods solely in relation to beverages for sports training and improving physical performance' are beverages including such goods to which additives such as protein; vitamins; minerals and electrolytes have been added. Whilst such products are designed to assist the consumer in performance or recovery from exercise and to improve physical activity, that does not necessarily make them substantially different from water. Water and sports drinks are both consumed for refreshment purposes and both have a re-energising effect.

51. These goods are distributed through the same channels, such as traditional retail outlets or supermarkets, and from vending machines at sports centres and gyms or specialist health food or supplement shops. They are usually displayed either side by side or in close proximity to one another, and target the same consumers, for whom the goods are interchangeable. The goods coincide in their natures, namely as non-alcoholic drinks for human consumption and can therefore be said to be in competition. These goods are similar to a medium degree.

52. The contested 'preparations containing whey protein for making beverages; powders for making beverages containing vitamins, minerals, whey protein and/or creatine; powders for making beverages containing vitamins, minerals, whey protein and/or creatine for use before or after sports training; all of the above goods solely in relation to beverages for sports training and improving physical performance' are goods which will be turned into beverages by the addition of water or alternative liquid such as milk or non-dairy alternatives to milk. These goods share purpose, channels of trade and end-user with the opponent's earlier goods. They may also be said to be in competition. These goods are similar to a low degree.

53. In conclusion, I find all of the contested goods to be similar, either to a medium degree or to a low degree, to the earlier goods of the opponent.

Average consumer and the purchasing act

54. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

55. 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 word “average” denotes that the person is typical. The term “average” does not denote some form of numerical mean, mode or median.”

56. The goods at issue are a variety of waters and beverages, including beverages intended for use by people engaging in sports; and powders for making beverages. The average consumer of these goods is likely to be a member of the general public. It is possible that a professional consumer may also be involved in the purchase process, however more often it will be the general public consumer who will be selecting the goods at issue.

57. The goods concerned are largely day to day items which are relatively inexpensive, although there may be some products that are perhaps slightly more expensive than others and which are also purchased or consumed less frequently, for example protein shakes. As such, I consider that generally the average consumer will pay no more than a medium degree of attention during the selection process. The consumer of sports beverages and protein enriched drinks may pay a slightly higher level of

attention during the purchase process, to ensure that the product contains the nutritional additives and ingredients that they require. However, these kinds of goods are also relatively common place and can be purchased in supermarkets and vending machines and are unlikely to be significantly more expensive than e.g. bottled mineral or spring water.

58. The average consumer will purchase the goods from traditional retail outlets and specialist suppliers either in a retail setting or from a website. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount that there may be an oral element to the purchase of these goods, given that advice may be sought from sales assistants in a store environment or over the telephone.

Comparison of marks

59. 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.”

60. 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.

61. The marks to be compared are:

Earlier mark	Contested marks
	<p data-bbox="842 383 970 416"><u>3325025</u></p>  <p data-bbox="842 674 970 707"><u>3325036</u></p> 

62. The earlier mark is a complex figurative mark comprised of several elements. The word CRISTALINE is presented in a fairly standard typeface in black capital lettering. That word is placed within a white rectangular border at the centre of the mark. Behind the rectangular border there is a geometric oval device element, which the applicant has suggested may be perceived as an eye. At the base of this device, directly below the word CRISTALINE, is a figurative element that the applicant has suggested may be perceived as a spring or fountain of water. All of these elements are placed on a black background. Whilst there are a number of elements contained within the earlier mark, the word CRISTALINE, due to its size and prominent placement at the centre of the mark can be said to be the dominant element in the mark and will therefore play a greater role in the earlier mark than the other elements.

63. Contested application 3325025 is comprised of the single word CRYSTAL, presented in a stylised font reminiscent of characters displayed on a digital display, e.g. a digital watch or radio alarm clock. The overall impression of that mark lies in the totality of the word CRYSTAL.

64. Contested application 3325036 is a series of two marks as presented above. The marks in the series differ only in the use of colour. These marks contain the same CRYSTAL mark that makes up application 3325025, however both marks also incorporate a large figurative element which may be perceived to be a letter 'C'. In one of the marks this element is presented in the colour blue and in the other it is grey. The letter 'C' element in these marks, sits directly above the word CRYSTAL and it can be said that both elements take up a roughly equal proportion of the marks. As neither element plays a greater role than the other, the overall impression in the marks of 3325036 can be said to lie in the totality of each mark.
65. In written submissions the opponent stated that the word element CRISTALINE in the earlier mark is dominant and that the stylisation and additional matter in that mark is minimal and secondary. The applicant disagrees with this and has stated that the mark must be considered as a whole. Whilst I have found the verbal element of the earlier mark to be dominant within that mark, it is of course the case that the mark must be assessed as a whole. The earlier mark contains a number of figurative and stylised elements, all of which play a role in that mark, to one degree or another. The large geometric design at the centre of the mark and the smaller geometric device directly below the verbal element cannot be described as negligible and cannot therefore be dismissed as minimal. Whilst the non-verbal elements of the earlier mark may be said to be secondary to the word CRISTALINE, they are clear and immediately obvious within the mark and must be given due weight in an assessment of the mark in the round.

Visual similarity

66. The marks at issue are visually similar inasmuch as they both share the letter strings 'CR' and 'STAL'. They differ in the letter 'Y' of the contested marks and in the letter 'I' and the letters 'INE' of the earlier mark. The marks also differ visually in the figurative elements of the earlier mark, which have no counterpart in the contested marks, and in the stylised typeface of the contested marks which is not shared by the earlier mark. In respect of contested application 3325036, the marks also differ in the figurative letter 'C' of the later marks. As the earlier mark and the contested mark

CRYSTAL (3325025) are dominated by the verbal element in each mark, they can be said to be visually similar to a medium degree.

67. The contested marks containing a stylised letter 'C' and the word CRYSTAL (3325036) have been found to have no dominant element which might overwhelm the other elements in the marks. Those contested marks share some of the same letters as the earlier mark, however as the overall impression of the contested marks rests in their totality, they are found to be visually similar to the earlier mark, but only to a low degree.

Aural similarity

68. The opponent's earlier mark is likely to be articulated as either *KRYS/TAAL/EIN* or *KRYS/TAAL/EEN*. The applicant's contested marks are likely to be articulated as *KRYS/TAAL*. I find it likely that the stylised letter 'C' contained in the contested marks under 3325036 (assuming that this element is perceived as a letter C) will generally not be articulated by the average consumer, which would, I believe, refer to those marks simply as 'CRYSTAL' marks. The marks share the same beginnings in *KRYS/TAAL*. The marks differ phonetically in the final syllable of the earlier mark, whichever way that might be articulated. As the initial parts of the marks will be articulated identically, the marks at issue are considered to be aurally similar to at least a medium degree.

Conceptual similarity

69. The word CRISTALINE in the earlier mark does not appear in any English dictionaries, however it may be perceived as alluding to the English word 'Crystalline', as it is phonetically very similar if not identical to that word and looks somewhat similar. The word Crystalline is defined as *a substance in the form of crystals or containing crystals; something clear or bright.*²

70. In *Usinor SA v OHIM*, Case T-189/05, the General Court found that:

² Collinsdictionary.com

“62. In the third place, as regards the conceptual comparison, it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (*Lloyd Schuhfabrik Meyer*, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him (Case T-356/02 *Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT)* [2004] ECR II-3445, paragraph 51, and Case T-256/04 *Mundipharma v OHIM – Altana Pharma (RESPICUR)* [2007] ECR II-0000, paragraph 57).

63. In the present case, the Board of Appeal correctly found that the signs at issue have a common prefix, ‘galva’, which evokes the technique of galvanisation, that is, the act of fixing an electrolytic layer to a metal to protect it

64. By contrast, the Board of Appeal incorrectly took the view that a conceptual comparison of the second part of the signs was not possible, because the suffixes ‘llia’ and ‘lloy’ were meaningless.

65. That conclusion is based on an artificial division of the signs at issue, which fails to have regard to the overall perception of those signs. As stated in paragraph 59 above, the relevant public, which is French-speaking but has knowledge of the English language, will recognise in the mark applied for the presence of the English word ‘alloy’, corresponding to ‘alliage’ in French, even if the first letter of that word (‘a’) has merged with the last letter of the prefix ‘galva’, according to the usual process of haplology. That mark will therefore be perceived as referring to the concepts of galvanisation and alloy.

66. As far as the earlier mark is concerned, the suffix ‘allia’ is combined with the prefix ‘galva’ in the same way. The evocative force of the suffix ‘allia’ will enable the relevant public – on account of its knowledge and experience – to understand that that is a reference to the word ‘alliage’. That process of identification is facilitated still further by the association of the idea of ‘alliage’ (alloy) with that of galvanisation, the suffix ‘allia’ being attached to the prefix ‘galva’.

67. By breaking down the signs at issue, the relevant public will therefore interpret both signs as referring to the concepts of galvanisation and alloy.

68. Consequently, the conclusion to be drawn is, as the applicant correctly maintains, that the signs at issue are conceptually very similar, inasmuch as they both evoke the idea of galvanisation and of an alloy of metals, although that idea is conveyed more directly by the mark applied for than by the earlier mark”.

71. In the matter to hand, I find that the verbal element CRISTALINE in the earlier mark evokes the concept of something crystalline or crystal in nature. This finding is supported by comments made by the opponent (see paragraph 76 below).

72. The contested marks all contain the word CRYSTAL, which has an obvious meaning in English and will be understood as *a transparent rock used to make jewellery and ornaments; a high-quality glass, or a small piece or substance that has formed naturally into a regular symmetrical shape, e.g. a salt crystal.*³ The figurative element that may be perceived as a letter ‘C’ in contested application 3325036 conveys no clear conceptual message and is likely therefore, to be taken as either a decorative element in those marks, or simply intended to highlight the first letter of the word CRYSTAL. As the earlier mark evokes the word Crystalline, there can be said to be some conceptual association between that word and the word CRYSTAL of the contested marks, and the marks can be said to be conceptually similar to a medium degree.

73. In conclusion, the marks have been found to be visually similar to a medium degree in respect of contested mark 3325025 and to a low degree in respect of contested marks 3325036; aurally similar to at least a medium degree and conceptually similar to a medium degree.

Distinctive character of the earlier trade mark

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

³ Collinsdictionary.com

“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).”

75. Whilst the opponent has not claimed that its earlier mark has an enhanced level of distinctive character, it has filed evidence of use. The assessment of distinctiveness can come from either the inherent nature of the mark, its use, or a combination of both. Therefore, it is incumbent upon me to factor the evidence submitted into an assessment when deciding upon the overall distinctiveness of the earlier mark.

76. The word CRISTALINE in the mark has been found to evoke something which is crystalline or crystal in nature, and as such the earlier mark will be perceived to have a link to something clear or bright, or something which is formed of crystals. That connection is likely to suggest a certain quality in respect of the goods at issue, for example, very clear mineral waters. In written submissions the opponent stated that the word CRISTALINE would be perceived by the average consumer as the English word Crystalline, which is defined as something that is clear or bright. In the same

submissions the opponent also states that water is sometimes described as being 'crystal clear'.⁴

77. The use of this term would, I feel, be used only in a laudatory manner, to suggest that water which is crystal clear is of a very high quality.

78. I accept the comments made by the opponent in this respect and conclude that the word crystal can be said to be fairly low in distinctive character when applied to goods such as mineral and spring waters. It follows on that, as the verbal element CRISTALINE evokes the concept of something of a crystal nature or something crystalline, it can also be said to be fairly low in distinctive character. I must however consider the mark in the round and take into account all of the additional figurative elements that make up the mark. Considering the mark as a whole, it cannot be said that it lacks distinctive character.

79. Whilst it is the case that the dominant element of the earlier mark has been found to be fairly low in distinctive character, when factoring in the figurative elements in the mark, and taking due note of the evidence of use that the opponent has provided to show genuine use of the mark, I conclude that overall the earlier mark is distinctive to a medium degree.

Likelihood of Confusion

80. I now draw together my earlier findings into a global assessment of the likelihood of confusion, keeping in mind the legal principles established previously (see paragraph 44 above).

81. In determining whether there is a likelihood of confusion, 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 marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing

⁴ Written submissions dated 31 October 2019, filed in lieu of attending the Hearing.

process and the fact that the average consumer rarely has the opportunity to make direct comparisons between marks side by side but must instead rely upon the imperfect picture of them he has retained in his mind.

82. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, whilst indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and goods/services down to the responsible undertakings being the same or related.

83. I have already found that:

- All of the contested goods are similar, either to a medium or a low degree, to the earlier goods;
- the marks are visually similar to a medium degree (contested application 3325025) and a low degree (contested application 3325036); aurally similar to at least a medium degree; and conceptually similar to a medium degree;
- the average consumer will more likely be a member of the general public;
- the consumer can be expected to be paying an average level of attention when selecting a part of the goods at issue, however for some of the goods there will likely be a higher than average level of attention paid;
- during the selection process, the visual and aural considerations both carry weight; but the visual assessment will likely be more important;
- the earlier mark is distinctive to a medium degree;

84. Having weighed up all of the factors, I conclude that there is no likelihood of direct confusion between the marks. The differences between the marks will not go unnoticed and the average consumer will not mistake one mark for the other.

85. I must therefore go on to consider the potential for indirect confusion between the marks.

86. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“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 recognized 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.

Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

87. These examples are not exhaustive but provide helpful focus.

88. It is my opinion that whilst there are similarities between the marks at issue, there are also clear differences. I have concluded previously that the marks at issue will not be mistaken for one another and direct confusion will not occur. In considering the possibility of indirect confusion, I must again assess those differences that I have concluded will not go unnoticed by the average consumer and decide whether they will be perceived by the average consumer as e.g. an evolution or extension of the opponent's earlier brand. Where this is the case, the average consumer will conclude that, whilst appreciating that the marks are different, the goods on offer are however linked to the same undertaking and are being controlled and provided by the same entity, or by an economically linked undertaking.

89. In this regard, I find that indirect confusion will not occur. The word CRISTALINE is a longer word than the word CRYSTAL present in the contested marks, and this difference is obvious. The misspellings between the words CRISTALINE and CRYSTALLINE are also obvious. The additional figurative and stylised elements in the earlier mark cannot be said to be negligible and do play a part in the mark that cannot be dismissed readily. Whilst the verbal element in the earlier mark may play a more dominant role in that mark, it has also been found to be fairly low in distinctive character as it is deemed to evoke the words crystalline or crystal. I find the word crystal to be a fairly obvious choice to use when describing the quality or purity of water and that may also be true of the word crystalline.

90. As the shared evocation in something crystalline or crystal clear will likely be perceived in a laudatory sense, implying a quality in the products at issue, the differences between the marks subsequently take on more significance and mitigate the issue of imperfect recollection. They also provide little basis for consumers to think that they are from the same stable. As the areas of similarity between the marks lie in an element which has been found to be low in distinctive character and likely to be perceived as descriptive or laudatory in nature, the average consumer will likely focus more on the differences between the marks.

91. I find that the differences between the marks at issue outweigh their similarities and, with the differences being so obvious, the average consumer will not, when faced with the earlier mark, having been previously exposed to the later marks, or vice-

versa, conclude that they are so similar that the goods on which the marks appear must come from the same or an economically linked undertaking. There cannot be said to be a common element which is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one other than the brand owner would be using it in a trade mark at all. Neither is it the case that the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension, or that a change of one element of the earlier mark appears entirely logical and consistent with a brand extension.

92. Although these are not exhaustive categories, the similarities between the marks will, I conclude, be put down to separate undertakings wishing to evoke a commonplace word for clear, or pure, for beverages.

93. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., sitting as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

94. Whilst I am not entirely convinced that exposure to the earlier mark would bring to mind either of the contested marks, or vice-versa, it is possible a connection may be made due to the concept of a crystal and something which has a crystalline quality. However, where this might occur, it would, I believe, be construed merely as association and indirect confusion would not occur.

95. In this respect I conclude that there is no likelihood of confusion, directly or indirectly.

Conclusion

96. The opposition has failed. Both applications may proceed to registration.

Costs

97. The applicant has been successful and is entitled to a contribution towards its costs, which are sought on the usual scale (contained in Tribunal Practice Notice 2/2016). I award the applicant the sum of £1500 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Considering the statement of case and preparing the counterstatement	£200
Considering the evidence of the opponent and preparing written submissions	£500
Preparing for and attending a hearing	£800
Total	£1500

98. I therefore order G.I.E. Cristaline, Groupement d'Interet Economique to pay Crystal Supplements Limited the sum of £1500. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 28th day of November 2019

**Andrew Feldon
For the Registrar
The Comptroller-General**