O/0016/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003724602
BY SIPT INTERNATIONAL LTD
TO REGISTER THE TRADE MARK:

Drink Clean.

IN CLASS 33

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 431772 BY
CLEANCO VENTURES LIMITED

BACKGROUND AND PLEADINGS

1. On 23 November 2021, Sipt International Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision, in the UK. The application was published for opposition purposes on 10 December 2021 and registration is sought for the following goods:

Class 33 Wines; Wine; Red wine; Sparkling wines; Rose wines; White wines; Grape wine; Table wines; Aperitif wines; Alcoholic wines; Sparkling wine; Fruit wine; Sweet wines; Still wine; Fortified wines; Red wines; White wine; Sweet wine; Sparkling red wines; Naturally sparkling wines; Natural sparkling wines; Sparkling white wines; Sparkling grape wine; Wine-based drinks; Low-alcoholic wine; Sparkling fruit wine; Wines of protected geographical indication; Wines of protected appellation of origin.

2. On 10 March 2022, the application was opposed by CleanCo Ventures Limited ("the opponent") based upon sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 ("the Act"). Under section 5(2)(b) of the Act, the opponent relies upon the following trade marks:

CLEANCO
UKTM no. 3504600
Filing date 25 June 2020; registration date 2 October 2020
("the First Earlier Mark")

CLEAN W
UKTM no. 3585629
Filing date 27 January 2021; registration date 28 May 2021
("the Second Earlier Mark")

CLEAN R
UKTM no. 3585633
Filing date 27 January 2021; registration date 20 August 2021

(“the Third Earlier Mark”)

CLEAN V
UKTM no. 3585638
Filing date 27 January 2021; registration date 4 June 2021
(“the Fourth Earlier Mark”)

CLEAN T
UKTM no. 3585641
Filing date 27 January 2021; registration date 4 June 2021
(“the Fifth Earlier Mark”)

CLEAN G
UKTM no. 3585623
Filing date 27 January 2021; registration date 21 May 2021
(“the Sixth Earlier Mark”)

(together “the earlier marks”)

3. The opponent relies upon all goods and services for which the earlier marks are registered, as set out in the Annex to this decision. The opponent claims that there is a likelihood of confusion because the marks are similar and the goods and services are identical or similar. The opponent also claims to have a family of “clean” marks and that the average consumer would believe that the applicant’s mark is part of that family.

4. Under section 5(3) of the Act, the opponent relies upon the First Earlier Mark only for which it claims to have a reputation in relation to the goods underlined in the Annex to this decision. The opponent claims that use of the applicant’s mark would, without due cause, take unfair advantage of, and/or be detrimental to, the distinctive character and/or reputation of the First Earlier Mark.

5. The applicant filed a counterstatement denying the claims made.

6. The applicant is unrepresented, and the opponent is represented by Wiggin LLP (although it was previously represented by Gill Jennings & Every LLP).

7. Both parties filed evidence in chief and the opponent filed evidence in reply. Neither party requested a hearing, and only the opponent filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

EVIDENCE AND SUBMISSIONS

8. The opponent filed evidence in chief in the form of the witness statement of Mark Christian Culbert dated 31 October 2022, which is accompanied by 1 exhibit. Mr Culbert was an attorney working for the opponent's previous representatives.

9. The applicant filed evidence in chief in the form of the witness statement of Nicholas Charles Harford dated 10 February 2023, which is accompanied by 4 exhibits. Mr Harford is the Director of the applicant.

10. The opponent filed evidence in reply in the form of the witness statement of Spencer George Matthews dated 26 April 2023, which is accompanied by 15 exhibits. Mr Matthews is the Director of the opponent.

11. The opponent filed written submissions in lieu dated 15 June 2023.

12. I have taken the evidence and submissions into account in reaching this decision and will refer to them below, where necessary.

RELEVANCE OF EU LAW

13. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

DECISION

Section 5(2)(b)

14. 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."

15. Section 5A of the Act is as follows:

> "5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

16. Given their earlier filing dates, the trade marks upon which the opponent relies qualify as earlier trade marks pursuant to section 6 of the Act. As the earlier marks had not completed their registration process more than 5 years before the application date of the mark in issue, they are not subject to the proof of use provisions in section 6A of the Act. The opponent can, therefore, rely upon all of the marks identified.

17. 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

18. I note that the applicant filed evidence to confirm that it is operating in the wine industry and that it does not intend to stray into the no/low alcohol market. However, I must consider the full breadth of its specification and terms such as “wines” could include a full range of goods, including those which are low-alcohol content. The applicant has not attempted to limit its specification to exclude low alcohol goods from its specification. Consequently, I must carry out my assessment based upon the full scope of the parties’ respective specifications on a notional basis.

19. I have included only the most relevant term from the opponent’s specification in the table below. With that in mind, the competing goods are as follows:

Opponent’s goods	**Applicant’s goods**
<u>Class 33</u> Alcoholic beverages (except beers).	<u>Class 33</u> Wines; Wine; Red wine; Sparkling wines; Rose wines; White wines; Grape wine; Table wines; Aperitif wines; Alcoholic wines; Sparkling wine; Fruit wine; Sweet

	wines; Still wine; Fortified wines; Red wines; White wine; Sweet wine; Sparkling red wines; Naturally sparkling wines; Natural sparkling wines; Sparkling white wines; Sparkling grape wine; Wine-based drinks; Low-alcoholic wine; Sparkling fruit wine; Wines of protected geographical indication; Wines of protected appellation of origin.

20. 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 for Lernsysterne 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."

21. All of the terms in the applicant's specification fall within the broader term "alcoholic beverages (except beer)" in the opponent's specification. They are, therefore, identical on the principle outlined in *Meric*.

The average consumer and the nature of the purchasing act

22. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods 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."

23. The average consumer for the goods is a member of the general public who is over the age of 18. The cost of the goods is likely to be relatively low and they are likely to be relatively frequent purchases. However, factors such as flavour, quality and alcohol content are likely to be taken into account, resulting in a medium (or average) degree of attention being paid during the purchasing process.

24. The goods are likely to be selected from the shelves of a retail outlet or following perusal of the mark on bottles behind a bar, on a drinks list or on a website. Consequently, visual considerations are likely to dominate the purchasing process. However, given that orders may be placed verbally, and advice may be sought from retail assistants, I do not discount an aural component to the purchase.

Distinctive character of the earlier trade marks

25. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the Court of Justice of the European Union ("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 1-2779, 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)."

26. 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, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctive character of a mark can be enhanced by virtue of the use that has been made of it.

27. I consider the word CLEAN in the context of these goods to be a reference to goods that are "pure" or "healthier" in some way. Consequently, I consider it to be allusive (at best) and is distinctive to only a low degree. The addition of the word CO and the letters W, R, V, T and G in the opponent's mark raises the distinctiveness of the marks overall to between a low and medium degree.

28. I note the following from the opponent's evidence:

a) The opponent was incorporated on 7 March 2019 and changed its name from The Clean Liquor Co Limited to CleanCo Ventures Limited on 5 August 2020.

b) The first product launched by the opponent was CLEANGIN in November 2019, which was followed by various other low-alcohol drinks such as CLEANRUM and CLEANTEQUILA. The launch was covered by the National press.[1]

[1] Exhibit MCC1

c) Mr Culbert states that "at a later point" the opponent began using the marks CLEAN G, CLEAN R, CLEAN T etc., but he does not state when those marks were first used in the UK.

d) I note that the CLEAN G product was available on Amazon from 13 May 2020.[2] There is also a post on social media which refers to CLEAN T.[3] The post itself is undated, although it is described as having been posted "72w" ago. The date at the bottom of the page is 11 June 2021, so I take that to date the post as having been made 72 weeks prior to 11 June 2021 i.e. in January 2020.

e) The opponent's CLEANGIN brand has been sold in the UK through national retailers such as Sainsbury's (since late 2019) and online via Amazon (since March 2019).

f) For the 52 weeks up to 28 November 2020, the CLEANGIN product held a 4.4% market share in the non-alcoholic spirits market in the UK and its turnover was over £1million in the period following its launch up to 26 November 2020.

g) The opponent's CLEANCO brand was the third bestselling brand in the UK, although it is not clear whether this relates to no- or low-alcohol gin.[4] I also note that this was correct as of 28 November 2022, which is after the relevant date.

29. Clearly, the opponent's CLEANGIN product has been successful. It has held a reasonable market share, at least in relation to low-alcohol gin. However, I have very limited evidence regarding the use that had been made of <u>the marks relied upon</u> prior to the relevant date (of which, CLEANGIN is not one). It appears that it was only in 2020 that the opponent began using the formulation CLEAN T, CLEAN G etc. to refer to its products, and it was only in 2020 that the company was re-named to include the conjoined words CLEANCO. There is no suggestion that the First Earlier Mark was used prior to that name change. The length of use prior to the relevant date is, therefore, limited. The evidence is very thin in terms of identifying sales made under

[2] Exhibit SGM13
[3] Exhibit MCC1, page 83
[4] Exhibit SGM16

the relevant marks (or what proportion of sales relates to those marks), or advertising expenditure since those marks started being used. Consequently, I do not consider that the distinctive character of the earlier marks has been enhanced through use.

Comparison of trade marks

30. It is clear from *Sabel* that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade 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."

31. 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.

32. The respective trade marks are shown below:

Opponent's trade marks	Applicant's trade mark
CLEANCO (the First Earlier Mark) CLEAN W	Drink Clean.

(the Second Earlier Mark) CLEAN R (the Third Earlier Mark) CLEAN V (the Fourth Earlier Mark) CLEAN T (the Fifth Earlier Mark) CLEAN G (the Sixth Earlier Mark)	

33. I note that the applicant has filed evidence to show that it intends to use the applied-for mark as part of a composite mark, being “Drink Clean. Get Sipt.”. Whilst that might be the case, I must consider the marks as filed/registered. As the applicant has applied for the mark “Drink Clean.”, it is that mark that I must consider for the purposes of my comparison.

Overall Impression

34. The applicant’s mark consists of the words DRINK CLEAN, presented in title case, followed by a full stop. The words DRINK CLEAN form a unit, referring to the act of drinking something that is “clean” (which I understand in this context to be synonymous with healthier or purer). It is the combination of these words that play the greater role in the overall impression, with the full stop playing a lesser role. The First Earlier Mark consists of the conjoined words CLEANCO. The overall impression lies in the combination of these words, which is likely to be understood as referring to a “clean” company. The Second, Third, Fourth, Fifth and Sixth Earlier Marks all consist of the word CLEAN followed by a single letter (W, R, V, T and G respectively). The overall impression lies in the combination of these elements, with neither dominating. For the

reasons explained above, I consider the word CLEAN to be low in distinctiveness for the relevant goods.

Visual Comparison

35. Visually, the marks all overlap in the presence of the word CLEAN. They differ in the position of that word (being at the beginning of the opponent's marks and at the end of the applicant's mark). They also differ in the additional words/letters added to the marks (CO, W, R, V, T and G in the opponent's marks and DRINK in the applicant's mark). The full stop in the applicant's mark is also a point of difference, although not a very striking one. In my view, they are visually similar to a low degree.

Aural Comparison

36. Aurally, the marks will overlap in the pronunciation of the word CLEAN which will be the same for all of the marks. However, as above, the articulation of the additional elements (CO, W, R, V, T and G in the opponent's marks and DRINK in the applicant's mark) will act as points of aural difference. In my view, the marks are aurally similar to a low degree.

Conceptual Comparison

37. As discussed above, the First Earlier Mark is likely to be seen as referring to a company that is "clean" in some way. The applicant's mark will be seen as referring to the act of drinking something that is "clean" in some way. In my view, this results in only a low degree of conceptual similarity between the marks.

38. The Second, Third, Fourth, Fifth and Sixth Earlier Marks consist of the word CLEAN followed by a letter. I do not consider that the single letter will convey any conceptual message to the average consumer. However, whilst there is plainly some conceptual overlap, there is a difference in the meaning conveyed by the word CLEAN solus and the unit DRINK CLEAN. In my view, there is only a medium degree of conceptual similarity.

Likelihood of confusion

39. 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 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 and vice versa. As I mentioned above, it is necessary to keep in mind the distinctive character of the earlier marks, the average consumer for the goods and the nature of the purchasing act. 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 he has retained in his mind.

40. I have found as follows:

a) The goods are identical.

b) The average consumer for the goods is a member of the general public who is over the age of 18 and who will pay a medium (or average) degree of attention during the purchasing act.

c) The purchasing act will be predominantly visual, although I do not discount an aural component.

d) The marks are visually and aurally similar to a low degree. The First Earlier Mark and the applicant's mark are conceptually similar to a low degree and the Second, Third, Fourth, Fifth and Sixth Earlier Marks and the applicant's mark are conceptually similar to a medium degree.

e) The earlier marks are inherently distinctive to between a low and medium degree. However, the common element (being the word CLEAN) is inherently distinctive to only a low degree.

41. Bearing in mind the differences between the marks, I can see no reason why the average consumer would mistakenly recall one for the other. I do not consider that the presence of the additional elements DRINK, CO, W, R, V, T and G would be forgotten or overlooked. Consequently, I do not consider there to be a likelihood of direct confusion, even when the marks are used on identical goods.

42. I will now consider whether there is a likelihood of indirect confusion. 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'.
>
> 17. 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)”.

43. These examples are, clearly, not intended to be an exhaustive list but illustrate some of the circumstances in which indirect confusion may arise. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor KC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

44. Having recognised the differences between the marks, I can see no reason why the average consumer would conclude that they originate from the same or economically linked undertakings. The common element, being the word CLEAN, is low in distinctiveness for the relevant goods. It cannot be said to be so strikingly distinctive that the average consumer would expect only one undertaking to be using it. I do not consider that the addition of the word DRINK, as well as the removal of the word/letters CO, W, R, V, T and G, is consistent with a sub-brand or brand extension in either of the ways envisaged by paragraphs b) and c) of *LA Sugar*. I can see no other reason for indirect confusion to arise. Indeed, it seems to me that the average consumer is more likely to put the common use of the word CLEAN down to coincidence, given its low level of distinctive character, rather than indicating a

connection in responsible undertakings. In my view, there is no likelihood of indirect confusion.

45. I will now consider the opponent's family of marks argument. In *Il Ponte Finanziaria SpA v OHIM*, Case C-234/06, the CJEU stated that:

> "62. While it is true that, in the case of opposition to an application for registration of a Community trade mark based on the existence of only one earlier trade mark that is not yet subject to an obligation of use, the assessment of the likelihood of confusion is to be carried by comparing the two marks as they were registered, the same does not apply where the opposition is based on the existence of several trade marks possessing common characteristics which make it possible for them to be regarded as part of a 'family' or 'series' of marks.
>
> 63 The risk that the public might believe that the goods or services in question come from the same undertaking or, as the case may be, from economically-linked undertakings, constitutes a likelihood of confusion within the meaning of Article 8(1)(b) of Regulation No 40/94 (see *Alcon* v *OHIM*, paragraph 55, and, to that effect, *Canon*, paragraph 29). Where there is a 'family' or 'series' of trade marks, the likelihood of confusion results more specifically from the possibility that the consumer may be mistaken as to the provenance or origin of goods or services covered by the trade mark applied for or considers erroneously that that trade mark is part of that family or series of marks.
>
> 64 As the Advocate General stated at paragraph 101 of her Opinion, no consumer can be expected, in the absence of use of a sufficient number of trade marks capable of constituting a family or a series, to detect a common element in such a family or series and/or to associate with that family or series another trade mark containing the same common element. Accordingly, in order for there to be a likelihood that the public may be mistaken as to whether the trade mark applied for belongs to a 'family' or 'series', the earlier trade marks which are part of that 'family' or 'series' must be present on the market.

> 65 Thus, contrary to what the appellant maintains, the Court of First Instance did not require proof of use as such of the earlier trade marks but only of use of a sufficient number of them as to be capable of constituting a family or series of trade marks and therefore of demonstrating that such a family or series exists for the purposes of the assessment of the likelihood of confusion.
>
> 66 It follows that, having found that there was no such use, the Court of First Instance was properly able to conclude that the Board of Appeal was entitled to disregard the arguments by which the appellant claimed the protection that could be due to 'marks in a series'."

46. I accept that the opponent has demonstrated that the First, Fifth and Sixth Earlier Marks were on the market prior to the relevant date. However, I do not consider that the opponent's family of marks argument can succeed. This is because the opponent's marks consist of the dictionary word CLEAN followed by another letter/word. I do not consider that the opponent has established that the average consumer would expect <u>any</u> mark which consisted of the word CLEAN followed by a letter/ word to originate from the opponent. Even if it had, the applicant's mark does not follow that pattern; it consists of the word DRINK <u>followed</u> by the word CLEAN. Certainly, I do not consider that the evidence demonstrates that any mark which uses the word CLEAN (in any position) would be perceived as originating from the opponent. Consequently, the family of marks argument does not assist the opponent.

Final remarks

47. For the avoidance of doubt, even if I had found that the evidence was sufficient to establish enhanced distinctive character for the earlier marks, it would not assist the opponent. This is because they are starting from a relatively low position in terms of inherent distinctive character and so any enhancement would only take them to a medium (or slightly higher than medium) degree of distinctiveness overall. Any enhancement would lie in the combination of the word CLEAN with the word CO or the letters listed above. It would not relate to the word CLEAN solus. Consequently, the differences between the marks would still be sufficient to overcome the moderate

degree of enhanced distinctiveness and I would still have found no likelihood of direct or indirect confusion.

Section 5(3)

48. Section 5(3) of the Act states:

> "5(3) A trade mark which -
>
> > (a) is identical with or similar to an earlier trade mark, […] shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark."

49. Section 5(3A) of the Act states:

> "Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected."

50. I can deal with this ground relatively swiftly. My primary finding is that the evidence filed is not sufficient to establish the that the First Earlier Mark had the requisite reputation at the relevant date. I have no breakdown to show what proportion of the opponent's turnover figures relates to goods sold under that mark prior to the relevant date, or what proportion of any advertising/marketing spend can be attributed to the promotion of that mark. Whilst I note that market share figures have been provided, these relate to the opponent's CLEANGIN product, and I have insufficient evidence to establish to what extent the First Earlier Mark was applied to that product prior to the relevant date. However, even if I am wrong in that finding, given the differences between the marks, I am not convinced that a link would be made in the mind of the relevant public, even when used on identical goods. This is because the word "CLEAN" is low in distinctiveness for the relevant goods and the average consumer would not bring the opponent's marks to mind simply by virtue of that word being

included in another mark (particularly bearing in mind the differences between those marks as outlined above). If a link was made, it would be too fleeting to give rise to damage.

51. The opposition based upon section 5(3) of the Act is dismissed.

FINAL COMMENT

52. In reaching these decisions, I have borne in mind the opponent's evidence that it has previously used the hashtag #DrinkClean on social media.[5] The opponent also runs a website (directed at the US market) at www.drinkclean.com. Whilst that may be the case, the opponent has not sought to rely upon that mark (either as a registered mark under sections 5(2)(b) and 5(3) or as an unregistered sign under section 5(4)(a) of the Act). The evidence does not establish, in my view, that the opponent's use of that hashtag or the words DRINK CLEAN was trade mark use; rather, it appears to me to be a laudatory and non-distinctive slogan referring to the opponent seeking to encourage customers to adopt a healthy lifestyle and move away from traditional alcoholic goods to its own low or no alcohol products. I do not consider that this evidence assists the opponent's case under either of the pleaded grounds.

CONCLUSION

53. The opposition is unsuccessful, and the application may proceed to registration.

COSTS

54. The applicant has been successful and would ordinarily be entitled to a contribution towards its costs. However, as the applicant is unrepresented, the Tribunal wrote to the applicant on 18 May 2023, inviting it to file a costs proforma recording the amount of time and costs incurred in the course of these proceedings. That letter stated:

[5] See, for example, exhibit MCC1, page 30.

> "If the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time), may not be awarded."

55. As no costs proforma was filed by the applicant, and it did not incur any official fees in the course of these proceedings, I decline to award any costs in the applicant's favour. Consequently, I direct that each party bear their own costs.

Dated this 10th day of January 2024

S WILSON
For the Registrar

ANNEX

Class 32

Beers; lagers; ale; porter; stout; shandy; mineral water; aerated water; low alcohol beer; non-alcoholic drinks; non-alcoholic beer; de alcoholized drinks; fruit beer; fruit flavoured drinks; fruit juices; apple stout; vegetable flavoured drinks; vegetable juices; cordials; mixtures containing any of the aforesaid; preparations for making any of the aforesaid.

Class 33

Alcoholic beverages (except beers), cider; perry; wines; spirits; liqueurs; cocktails; alcopops; alcoholic essences; alcoholic carbonated drinks or beverages; alcoholic beverages containing fruit, fruit juice or fruit essence; alcoholic beverages containing vegetables, vegetable juice or vegetable essence; low alcohol drinks; mixtures containing any of the aforesaid; preparations for making any of the aforesaid.

Class 35

Retail services, shop retail services, mail order retail services and electronic shopping retail services connected with the sale of beers, lagers, ale, porter, stout, shandy, mineral water, aerated water, low alcohol drinks, low alcohol beer, non-alcoholic drinks, non-alcoholic beer, de-alcoholized drinks, fruit beer, fruit flavoured drinks, fruit juices, apple stout, vegetable flavoured drinks, vegetable juices, cordials, alcoholic beverages (except beers), cider, perry, wines, spirits, liqueurs, cocktails, alcopops, alcoholic essences, alcoholic carbonated drinks or beverages, alcoholic beverages containing fruit, fruit juice or fruit essence, alcoholic beverages containing vegetables, vegetable juice or vegetable essence, mixtures containing any of the aforesaid, preparations for making any of the aforesaid; on-line ordering services; advisory, consultancy and information services relating to all the aforesaid.