

o/0022/25

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NOS. UK00003901568 AND UK00003932975
BY VALHALLA YORK LIMITED
TO REGISTER THE TRADE MARKS:

Valhalla Mead / Valhalla

IN CLASSES 32 AND 33

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NOS. 442328 AND 444065
BY ANORA GROUP PLC

AND

IN THE MATTER OF UK TRADE MARK
REGISTRATION NO. UK00911495009 AND UK00911495173
IN THE NAME OF ANORA GROUP PLC
FOR THE TRADE MARKS:

VALHALLA /



IN CLASS 33

AND

THE APPLICATION FOR REVOCATION THEREOF UNDER NOS. 506548 AND 506549
BY VALHALLA YORK LIMITED

BACKGROUND AND PLEADINGS

1. This decision involves cross-proceedings wherein Valhalla York Limited (“VYL”) and Anora Group Plc (“AGP”) brought actions against one another. I will summarise the relevant proceedings below, beginning with AGP’s oppositions on the basis that it was brought first.

AGP’s oppositions

2. On 17 April 2023, VYL applied to register the **Valhalla Mead** mark (568 Mark) shown on the cover page of this decision in the UK. The application was published for opposition purposes on 5 May 2023, and the applicant seeks registration for the following goods:

Class 33 Mead; Alcoholic drinks based on or flavoured with honey; none of the aforesaid being above 20% ABV or being distilled liqueurs.

3. On 12 July 2023, VYL also applied to register the **Valhalla** mark (975 Mark) shown on the cover page of this decision in the UK. The application was published for opposition purposes on 11 August 2023, and the applicant seeks registration for the following goods:

Class 32 Beer; Ale.

4. The applications were both fully opposed by AGP on 4 August 2023 and 10 November 2023, respectively. The oppositions are based upon section 5(2)(b) of the Trade Marks Act 1994, and AGP relies upon the following marks:

VALHALLA

Comparable UK trade mark (EU) registration no. UK00911495009

Filing date 17 January 2013.

Registration date 13 June 2013.

(“AGP’s 009 Word Mark”)



Comparable UK trade mark (EU) registration no. UK00911495173

Filing date 17 January 2013.

Registration date 13 June 2013.

(“AGP’s 127 Bottle Mark”)

5. Following the end of the transition period of the UK’s withdrawal from the EU, all EU trade marks (“EUTM”) registered before 1 January 2021 were recorded as comparable trade marks in the UK trade mark register (and as a consequence, have the same legal status as if they had been applied for and registered under UK law). A ‘comparable trade mark (EU)’ retains the same filing date, priority date (if applicable) and registration date of the EUTM from which it derives.

6. AGP relies upon some of the goods, for which both of the earlier marks are registered, namely:

Class 33 Alcoholic beverages (except beers); Alcoholic beverages, except beer; Alcoholic beverages containing fruit; Aperitifs; Liqueurs; Digesters [liqueurs and spirits]; Distilled beverages; Spirits [beverages].

7. AGP claims that there is a likelihood of confusion because of the identity of the goods and the high similarity between the marks.

8. VYL filed counterstatements denying the claims made and putting AGP to proof of use.

VYL's revocation applications

9. On 28 September 2023, VYL sought revocation of AGP's marks on the grounds of non-use under sections 46(1)(a) and 46(1)(b) of the Act. The revocation is aimed at all of the class 33 goods under AGP's 009 Word Mark, and some of the class 33 goods under AGP's 127 Bottle Mark (being those contained in Annex 1 to this decision).

10. Under section 46(1)(a) of the Act, VYL claims non-use in the five-year period following the date on which the marks were registered, i.e. 13 June 2013 to 12 June 2018. VYL requests an effective date of revocation of 14 June 2018 for both marks.

11. Under section 46(1)(b) of the Act, VYL claims non-use in respect of AGP's marks for the periods 16 April 2018 to 15 April 2023, with an effective date of revocation of 16 April 2023, and 15 July 2018 to 14 July 2023, with an effective date of revocation of 15 July 2023. It is noted that the revocation dates sought are prior to the relevant date of AGP's oppositions.

12. AGP filed counterstatements defending its registrations for all the goods subject to revocation, on the basis that they have been used throughout the relevant periods.

13. On 14 January 2024, the Tribunal wrote to the parties informing them of the consolidation of the revocation action nos. 506548 and 506549 and the opposition nos. 442328 and 444065.

14. A hearing took place before me on 9 October 2024. AGP was represented by Kendal Watkinson of Hogarth Chambers instructed by Barker Brettell LLP. VYL was represented by Ms Barbara Cookson of Filemot Technology Law Ltd. I make this decision having taken full account of all the papers, referring to them below as necessary.

RELEVANCE OF EU LAW

15. 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.

EVIDENCE

16. AGP's evidence consists of the witness statement of Aki Kaskirinne dated 14 March 2024. Ms Kaskirinne is the Senior Brand Manager of AGP, a position which she has held since September 2020. Ms Kaskirinne's statement is accompanied by 17 exhibits (AK1-AK17).

17. VYL's evidence consists of the witness statement of Matthew Bedingham dated 7 April 2024. Mr Bedingham is the director of VYL and his statement is accompanied by 1 exhibit (MB1).

18. Whilst I do not propose to summarise it here, I have taken all of the evidence into consideration in reaching my decision and will refer to it where necessary below.

MY APPROACH TO THE REVOCATIONS

19. VYL's revocation applications could have an impact on AGP's oppositions in that the level of success (if any) will determine what goods AGP can rely on in the oppositions.

20. However, if AGP's marks are fully revoked, they will not be capable of being earlier marks for the oppositions, meaning that the oppositions against VYL's marks will fall away.

DECISION

The Revocation of AGP's marks

21. Section 46 of the Act states:

“46. - (1) The registration of a trade mark may be revoked on any of the following grounds-

(a) that within the period of five years following the date of completion of the registration procedure it has not 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, and there are no proper reasons for non-use;

(b) that such use has been suspended for an uninterrupted period of five years, and there are no proper reasons for non-use;

(c) [...]

(d) [...]

(2) For the purpose of subsection (1) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and 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.

(3) The registration of a trade mark shall not be revoked on the ground mentioned in subsection (1)(a) or (b) if such use as is referred to in that paragraph is commenced or resumed after the expiry of the five year period and before the application for revocation is made:

Provided that, any such commencement or resumption of use after the expiry of the five year period but within the period of three months before the making of the application shall be disregarded unless preparations for the commencement or resumption began before the proprietor became aware that the application might be made.

(4) [...]

(5) Where grounds for revocation exist in respect of only some of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services only.

(6) Where the registration of a trade mark is revoked to any extent, the rights of the proprietor shall be deemed to have ceased to that extent as from-

(a) the date of the application for revocation, or

(b) if the registrar or court is satisfied that the grounds for revocation existing at an earlier date, that date”.

22. Where the mark is a comparable mark, paragraph 8 of part 1, schedule 2A is relevant. It reads:

“8.— Non-use as defence in infringement proceedings and revocation of registration of a comparable trade mark (EU)

(1) Sections 11A and 46 apply in relation to a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the period of five years referred to in sections 11A(3)(a) and 46(1)(a) or (b) (the "five-year period") has expired before [IP completion day]—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before [IP completion day]—

(a) the references in sections 11A(3) and (insofar as they relate to use of a trade mark) 46 to a trade mark, are to be treated as references to the corresponding EUTM ; and

(b) the references in sections 11A and 46 to the United Kingdom include the European Union”.

23. Section 100 is also relevant, which reads:

“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.”

24. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, 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 Bunderversvereinigung 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], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], 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], Case C-689/15 *W.F. Gözze*

Frottierweberei GmbH v Verein Bremer Baumwollbörse [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles 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]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(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]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(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]. 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].

(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]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(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]; *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].”

25. AGP’s earlier marks are comparable marks. This means that use within the EU is relevant for the part of the relevant periods which falls prior to IP Completion Day (31 December 2020). However, after that date, only use of the marks in the UK will be relevant.

26. I remind myself that there are three relevant periods for these proceedings. Those are 13 June 2013 to 12 June 2018 (“the First Relevant Period”), 16 April 2018 to 15 April 2023 (“the Second Relevant Period”), and 15 July 2018 to 14 July 2023 (“the Third Relevant Period”). While the relevant periods differ, the First and Second Relevant Periods overlap, and the Second and Third Relevant Periods overlap. Therefore, I will proceed to consider the entirety of the evidence before me rather than focusing on one relevant period.

27. I note the following from AGP’s evidence:

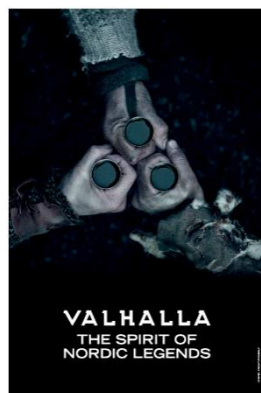
- a) AGP is a “wine and spirits brand”, which was formed in 2021 as a result of a merger between Altia and Arcus.
- b) Altia developed the Valhalla product in 2013, which is “one of the spirits” that they own, and continues to be an important brand to AGP.
- c) Valhalla is a herbal liqueur made from Nordic herbs.
- d) Ms Kaskirinne states that Valhalla is distributed and stocked across Europe. **Annex AK02** contains a list of their stockists and the European countries that they are based in. This includes Denmark, Estonia, Finland, Germany, Hungary, Iceland, Latvia, Lithuania, Norway, Poland, Slovakia, Spain, Switzerland, Belgium, Italy and the UK. AGP’s UK distributor is Amber Beverage UK.
- e) **Annex AK03** contains Amber Beverage UK’s “current product portfolio” and **Annex AK04** contains screenshots of “Valhalla” herbal liqueur being sold on House of Malt, Sale Spirits, T. Wright Wine, Master of Malt and the Whisky Exchange, dated 26 February 2024, falling after the relevant periods.
- f) Screenshots of AGP’s website are contained in **Annex AK05**, which states that they opened their web shop in 2018 “with deliveries to Germany”. The goods are also listed as “Valhalla Herb Shot”. The screenshots are dated 21 February 2024, (which falls after the relevant periods), however they show AGP’s Valhalla herb shot goods as follows:

Valhalla Herb Shot 35% 50 cl
Liquor
Herb shot from the North.
12.90€
25,80€ / l

Valhalla Herb Shot 35% 70 cl
Liquor
The popular herb shot from the North
16.90€
24,14€ / l

Valhalla Herb Shot 35% 100 cl
Liquor
Herb shot from the north, now in a big bottle.
19.90€
19,90€ / l

g) AGP also sells directly to customers in Finland. Ms Kaskirinne states that AGP’s Finnish brochures are contained within **Annex AK06** from 2018, 2019 and 2020, which show the following adverts in all three brochures for “Valhalla”:



h) Alongside the above advert, I note that “VALHALLA BY KOSKENKORVA” is priced between €19 and €35. I also note that the word “KOSKENKORVA” appears on the title page of the brochure.

i) Ms Kaskirinne states that Valhalla is also “currently available for sale on Amazon UK”, screenshots of which are exhibited in **AK07**. These screenshots are undated, however, the reviews for these goods are dated between 20 November 2020 and 11 December 2023.

- j) **Annex AK08** contains the following table of AGP's UK and EU sales numbers (in terms of units sold) for 2013 to 2023:

Year	Denmark	Estonia	Finland	Latvia	Sweden	UK
2014	Not provided	Not provided	Not provided	Not provided	Not provided	240
2015	Not provided	Not provided	Not provided	Not provided	Not provided	720
2016	Not provided	Not provided	Not provided	Not provided	Not provided	*
2017	Not provided	Not provided	Not provided	Not provided	Not provided	360
2018	6481	4411	99535	16697	5465	960
2019	4761	10420	222211	17286	2823	360
2020	80	571	9300	1022	192	1920
2021	N/A	N/A	N/A	N/A	N/A	2280
2022	N/A	N/A	N/A	N/A	N/A	600
2023	N/A	N/A	N/A	N/A	N/A	1320

*we have not been provided with the sales figures in terms of monetary value for 2016. However, the figure in terms of litres in 2016 is 198 litres.

- k) This is supported by invoices contained within **Annex AK09**. Ms Kaskirinne provides a breakdown of these as follows:


- a. an invoice dated 11 April 2014 showing sales of 240 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- b. an invoice dated 21 August 2014 showing sales of 240 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- c. an invoice dated 28 April 2015 showing sales of 720 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- d. an invoice dated 26 July 2017 showing sales of 360 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- e. an invoice dated 12 December 2018 showing sales of 360 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- f. an invoice dated 20 June 2019 showing sales of 240 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- g. an invoice dated 12 November 2019 showing sales of 120 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- h. an invoice dated 24 January 2020 showing sales of 360 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- i. an invoice dated 15 May 2020 showing sales of 300 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- j. an invoice dated 10 August 2020 showing sales of 300 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- k. an invoice dated 28 October 2020 showing sales of 360 bottles of **VALHALLA** to a UK customer, via the UK distributor;
- l. an invoice dated 2 December 2020 showing sales of 600 bottles of **VALHALLA** to a UK customer, via the UK distributor;


- m. an invoice dated 25 March 2021 showing sales of 480 bottles of **VALHALLA** to a UK customer, via the UK distributor;
 - n. an invoice dated 8 June 2021 showing sales of 600 bottles of **VALHALLA** to a UK customer, via the UK distributor;
 - o. an invoice dated 13 July 2021 showing sales of 600 bottles of **VALHALLA** to a UK customer, via the UK distributor;
 - p. an invoice dated 20 September 2021 showing sales of 600 bottles of **VALHALLA** to a UK customer, via the UK distributor;
 - q. an invoice dated 23 March 2022 showing sales of 600 bottles of **VALHALLA** to a UK customer, via the UK distributor;
 - r. an invoice dated 8 February 2023 showing sales of 240 bottles of **VALHALLA** to a UK customer, via the UK distributor; and,
 - s. an invoice dated 13 June 2023 showing sales of 600 bottles of **VALHALLA** to a UK customer, via the UK distributor.
- l) I note that the invoices dated between April 2014 and March 2021 list the goods as “VALHALLA BY KOSKENKORVA 50cl”, and the invoices dated between June 2021 and June 2023 list the goods as “VALHALLA HERB LIQUEUR SHOT 50cl”. 1 invoice is addressed to “Amathus Drinks Plc.” based in Essex, 3 invoices are addressed to “Seabrook Warehousing Ltd” based in Essex, and 15 invoices are addressed to “Amber Beverage UK” based in West Thurrock. The total price of Valhalla sold in the invoices varies between €936.00 and €2,808.00.
- m) All of the invoices are headed with the word “ANORA”. However, Ms Kaskirinne clarifies that the invoices dated before 2021 would have been sent out in different letterhead, but due to the invoices being pulled from their current system, it has resulted in them automatically being printed on the current company name letterhead.
- n) **Annex AK10** contains screenshots from the Wayback Machine showing the following goods for sale via AGP’s website:
- a. 24 June 2019 screenshot showing Valhalla Herb Shot for sale for €9.99 and €11.90.
 - b. 30 June 2019 screenshot showing Valhalla Herb Shot for sale for €7.90.
 - c. 25 September 2020 and 27 November 2002 screenshots showing Valhalla Herb Shot for sale for €11.90.

o) I also note that the goods are shown as follows:



p) **Annex AK10** also contains screenshots from the Wayback Machine showing the following goods being sold via AGP's stockists. Whilst I note that the majority of these are not in English, nor have they been translated, it is clear that the bottles above are displayed alongside the name "Valhalla by Koskenkorva"¹ in the screenshots dated between 26 November 2018 and 3 December 2020, as follows:

	LIQUIERIS	
	Valhalla by Koskenkorva	
	Tilpums: 0.5L	10.96 €
	Alk. tilpums: 35%	9.59 €
	Valsts FI Somija	Akcija spēkā līdz 31.03.2019.
		1
		Pievienot grozam

	LIQUIERIS	
	Valhalla by Koskenkorva	
	Tilpums: 0.5L	98.24 SEK
	Alk. tilpums: 35%	Price in SEK is only informative and may vary depending on exchange rate
	Valsts FI Somija	
		1
		Pievienot grozam

¹ Pages 8, 9, 10, 13 and 14 of Annex AK10.

- q) The remaining screenshots in **Annex AK10** which are in English (dated 4 December 2020, 20 April 2021, 17 May 2021, 29 July 2021, 29 November 2021 and 29 July 2022) show “Valhalla Herb Liqueur” for sale on “T. Wright Wine” for £23.99, but I note that no image of the product is shown. However, a screenshot which is dated 21 February 2024, shows the bottle above for sale under the name “Valhalla Herbal Liqueur Shot” for £24.99.
- r) **Annex AK11** contains AGP’s Instagram posts which are dated between 21 November 2018 and 20 November 2020, which shows AGP’s goods as follows:



- s) Ms Kaskirinne states that between 2018 and 2019, Valhalla was awarded a Silver Standard from the Masters of Liqueur, which is an award hosted by “The Spirits Business” which is a British magazine with a circulation reach of 50,000 spirits professionals worldwide.² I note that evidence of its awards are contained in **Annex AK12**, which refers to AGP’s goods as “Valhalla by Koskenkorva” in 2018, but refers to the goods as “Valhalla” in 2019.

Form of the mark

28. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union (“CJEU”) found that (my emphasis):

² Annex AK12

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in Nestle, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition of a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at

issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1)”.

29. In *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22, Phillip Johnson, sitting as the Appointed Person, considered the correct approach to the test under s. 46(2). He said:

“13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*,

EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still”.

30. AGP’s earlier marks as registered are:

a) **VALHALLA**



31. I am satisfied that the “VALHALLA” word mark has been used as registered, especially in relation to the invoice evidence.

32. The invoice and brochure evidence also shows use of the sign “VALHALLA BY KOSKENKORVA”. I consider that the addition of the words “BY KOSKENKORVA” does not alter the distinctive character of the “VALHALLA” element, which is clearly visible and still continues to indicate origin.³ I therefore find that this is an acceptable variant of AGP’s 009 Word Mark.

³ *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, paras 31-35

33. As shown by paragraphs 27(f), (o), (p) and (r) above, AGP's bottles within the evidence have been shown as follows:



34. To assess whether these constitute as use of use AGP's above bottle mark (paragraph 30(b) above), I must consider where the distinctive character of AGP's mark lies. I bear in mind the comments made by Geoffrey Hobbs QC in *INVER HOUSE DISTILLERIES LTD BL O/737/22*, whereby he stated that a registration of a gin bottle identified and protected "a unitary trade mark consisting of the totality of the design (all verbal and non-verbal aspects of the appearance) of the depicted bottle".⁴ On this basis I find that the distinctive character of AGP's bottle mark lies in it as a whole (the word "VALHALLA", the circular silver device which contains linework, and the bottle itself).

35. The bottles above replicate the black bottle and the word "VALHALLA" and its capitalised stylised typeface. However, the silver device is presented slightly differently in the top right hand example, as the background to the linework is presented in black.

36. Moreover, I note that the above bottles use the wording "HERB LIQUEUR BY KOSKENKORVA" or "HERBAL LIQUEUR SHOT" underneath the word "VALHALLA". I note that the wording "herb liqueur"/"herbal liqueur" is descriptive of the goods. Regardless, I do not consider that the addition of this wording, and the presentation of the silver circular device with a black background, alters the distinctive character of

⁴ Paragraph 10

the mark, which continues to indicate origin. I therefore find that the above bottles shown within AGP's evidence are acceptable variants of AGP's 127 Bottle Mark.

Assessment of the evidence

37. As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine.

38. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as "warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark".

39. In *Awareness Limited v Plymouth City Council*, Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

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

40. I also note Mr Alexander's comments in *Guccio Gucci SpA v Gerry Weber International AG* (O/424/14). He stated:

“The Registrar says that it is important that a party puts its best case up front – with the emphasis both on “best case” (properly backed up with credible exhibits, invoices, advertisements and so on) and “up front” (that is to say in the first round of evidence). Again, he is right. If a party does not do so, it runs a serious risk of having a potentially valuable trade mark right revoked, even where that mark may well have been widely used, simply as a result of a procedural error. [...] The rule is not just “use it or lose it” but (the less catchy, if more reliable) “use it – and file the best evidence first time round- or lose it”” [original emphasis].

41. 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 itself.⁵

42. I will firstly assess whether AGP has shown genuine use of its VALHALLA word mark. In regard to AGP’s evidence, there are clearly some issues with some of the exhibits. Firstly, a proportion of them are either undated or fall after the relevant periods. I have been provided with AGP’s UK and EU sales numbers (in terms of units sold), and I note that these figures were provided under the witness statement’s sub heading “SALES UNDER THE MARK”. Whilst it is not clear what mark AGP is referring to (either its 009 Word Mark or its 127 Bottle Mark), I bear in mind the word VALHALLA also appears on the 127 Bottle Mark. Therefore I find that the table shows that from 2013 to 2023, AGP sold 8,760 bottles of its VALHALLA goods, which is supported by the invoice evidence which clearly shows that notable quantities of VAHALLA goods were distributed to Essex and West Thurrock from 2014 to 2023, which is supported by website evidence. I also note that the case law is clear that use of a mark in an area of the European Union constituting one-member state may be sufficient to demonstrate genuine use in the European Union as a whole.⁶ I consider that to be the case here. Therefore, taking all of the above into account, I am satisfied that that AGP has demonstrated genuine use of its 009 Word Mark, in the UK, during all three relevant periods.

⁵ *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

⁶ *Leno Merken BV v Hagelkruis Beheer BV*, Case C149/11, paragraphs 36, 50 and 55.

43. In regard to AGP's bottle mark, its strongest evidence is shown within the website screenshots from AGP's website and its distributors websites. AGP's bottle mark and its acceptable variants (contained in paragraphs 27(f), (o), (p) and (r) above) appear 36 times throughout the evidence, and is dated within and outside of the relevant periods. This includes the bottle shown in Amber Beverage's "current" UK product portfolio. I therefore find that the Valhalla bottle has been consistently used from November 2018 to February 2024.⁷

44. In light of the above, I consider it reasonable to proceed on the basis that these bottles were used to distribute AGP's product, and therefore the unit sales and invoice sales pertain to use of AGP's 127 Bottle Mark. I bear in mind that genuine use requires a global assessment of the evidence as a whole. I am therefore of the view that AGP has demonstrated use of its 127 Bottle Mark, in the UK, during the Second and Third Relevant Periods.⁸

AGP's word mark

45. Genuine use of the mark entails use of the mark on the market for the goods and services protected by that mark. 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."

⁷ 2 photos of a "Valhalla Herb Shot PET 50cl" bottle is shown within Annex AK10, dated 24 June 2019 and 30 November 2019. This differs from AGP's 127 Bottle Mark. However, having considered the invoice evidence, it does not make any reference to "PET"/"PET bottle". Therefore I do not consider that the invoice sales pertain to this bottle. As such, while this bottle is noted, I do not consider that its presence takes away from my finding that AGP has consistently used its 127 Bottle Mark.

⁸ I bear in mind section 46(3) of the Act above, and whilst use has not been shown in the First Relevant Period, it has been shown to have been resumed in the Second and Third Relevant Periods, and therefore the mark shall not be revoked on the grounds mentioned in section 46(1)(a) of the Act.

46. 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.

47. It is clear that the only goods sold under AGP's 009 Word Mark and 127 Bottle Mark is a herbal shot liqueur.

48. I bear in mind that at the hearing, Ms Watkinson stated that AGP's goods are a type of alcoholic beverage and therefore should be protected as such in class 33. However, this is a broad category, one which encompasses for example, whiskey, rum, vodka, brandy, white wine, prosecco and cocktails. This term would therefore give AGP a broad protection when the use of its mark has only been in relation to herbal liqueur.

49. I note that AGP has the term "liqueurs" in both specifications. I note that this would encompass fruit liqueurs, cream liqueurs and herbal liqueurs. On this basis, I consider that this is also a broader category in AGP's specification which needs to be narrowed down to reflect AGP's herbal liqueur only.

50. I therefore consider a fair specification of AGP's 009 Word Mark and 127 Bottle Mark to be:

Class 33 Herbal liqueur.

51. For AGP's remaining goods (in both marks), being: alcoholic beverages (except beers), alcoholic essences, alcoholic beverages, except beer, alcoholic beverages containing fruit, alcoholic extracts, aperitifs, arak [arrack], cocktails, curacao, gin, fruit extracts, alcoholic, bitters, kirsch, brandy, anisette [liqueur], nira [sugarcane-based alcoholic beverage], perry, peppermint liqueurs, piquette, rice alcohol, rum, digesters [liqueurs and spirits], sake, cider, hydromel [mead], distilled beverages, spirits [beverages], pre-mixed alcoholic beverages, other than beer-based, wine, whisky and vodka; there has been no evidence filed for these, and as a result I find there is no genuine use of these goods in all three relevant periods.

Conclusion of the Revocation of AGP's marks

52. Subject to any successful appeal against my decision, AGP's 009 Word Mark (UK00911495009) may remain registered only for the following goods, being those for which AGP has genuinely proven use:

Class 33 Herbal liqueur.

53. As for the remaining goods contained in paragraph 51 above, (being those for which no genuine use has been found), AGP's mark is, revoked in respect of the same. Given I have found no genuine use in respect of these goods during any of the relevant periods, it follows that the effective date of revocation for those goods is the earliest date claimed, being 14 June 2018.

54. Subject to any successful appeal against my decision, AGP's 127 Bottle Mark (UK00911495173) may remain registered only for the following goods, being those for which AGP has genuinely proven use, and for those which the revocation was not directed against:

Class 33 Herbal liqueur; Anise [liqueur].

55. As for the remaining goods contained in paragraph 51 above, being those for which no genuine use has been found, AGP's mark is, revoked in respect of the same. The effective date of revocation is 14 June 2018, the earliest date claimed.

MY APPROACH TO THE OPPOSITIONS

56. AGP's 009 Word Mark appears to me to represent AGP's best case in respect of the opposition against VYL's marks, under section 5(2)(b). This is on the basis that it is a word mark, and VYL's marks are also both word marks.

57. Consequently, I will assess the oppositions under section 5(2)(b) based upon AGP's 009 Word Mark, returning to AGP's 127 Bottle Mark only if it becomes necessary to do so.

The Opposition of VYL's marks

Section 5(2)(b)

58. Section 5(2)(b) 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.”

Proof of use

59. AGP's earlier 009 Word Mark qualifies as an earlier mark in accordance with section 6(1)(a) of the Act as its filing date is earlier than the filing dates of the VYL's marks. As AGP's mark had completed its registration process more than five years before the filing date of the marks in issue, it is subject to proof of use pursuant to section 6A of the Act.

60. The relevant period for assessing whether there has been genuine use of the earlier mark is the five years ending on the filing dates of VYL's marks, i.e. 17 April 2023 and 12 July 2023.

61. I note that for the revocation under section 46(1)(b), the Second and Third Relevant Periods (16 April 2018 to 15 April 2023 and 15 July 2018 to 14 July 2023) were assessed. As this completely overlaps with the relevant periods of proof of use under the oppositions, the same considerations and conclusions apply.

62. Proof of use is shown for AGP's class 33 herbal liqueur's. These are, therefore, the only goods which AGP can rely upon.

Section 5(2)(b) - case law

63. In making this decision, I bear in mind the following principles 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 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

64. The competing goods are as follows:

AGP's goods	VYL's goods
<u>Class 33</u> Herbal liqueur.	<u>Valhalla Mead Mark</u> <u>Class 33</u>

	<p>Mead; Alcoholic drinks based on or flavoured with honey; none of the aforesaid being above 20% ABV or being distilled liqueurs.</p> <p><u>Valhalla Mark</u></p> <p><u>Class 32</u></p> <p>Beer; Ale.</p>
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65. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 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.”

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;

- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut 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.”

68. At the hearing, during their submissions in reply, Ms Watkinson brought my attention to the Romanov decision, BL O/0943/24, stating that paragraphs 13, 15 and 14 are “particularly helpful” when considering the degree of overlap between different types of alcoholic beverages.

69. I gave Ms Cookson the opportunity to reply to the newly relied upon case after the hearing, to which she stated it is not “materially helpful” as the comparison was made “based on a concession” contained in paragraph 12 of the decision.

70. I agree with Ms Cookson that the concession made in paragraph 12 meant that the Hearing Officer was bound to find the goods to be similar to at least a “low to moderate” degree. However, I do not consider that the *Treat* factors identified by the Hearing Officer were impacted by this admission. Regardless, I bear in mind that I am not bound by the previous decisions of this Tribunal.

71. I also note that at the hearing, whilst making their submissions on the similarity of the goods, Ms Cookson stated that “Anora’s product now seems to be sold over the internet [and] it is certainly not sold in our client’s bar any more”. However, these submissions regarding how the parties goods are used and sold in practice are not relevant to my assessment. I have to carry out a notional assessment based upon the specifications before me (how the goods within the parties’ specifications could be used and sold), and all the circumstances in which the mark applied for might be used if it were registered.⁹

Valhalla Mead 568 Mark

Class 33

Mead; Alcoholic drinks based on or flavoured with honey; none of the aforesaid being above 20% ABV or being distilled liqueurs.

72. Whilst VYL’s above limitation would prevent a finding of identity, it does not prevent a finding of similarity.

73. I consider that VYL’s above goods are similar to AGP’s “herbal liqueur”. I consider that the goods are all alcoholic drinks, which are commonly consumed for pleasure whilst socialising, or with the intention of becoming intoxicated. As a result, the goods overlap in method of use and purpose. I also bear in mind that the goods overlap in user, being consumed by adults over the age of 18. Thus, taking the above into account, I consider that the goods would be sold in close proximity within the same retailers, being sold in alcohol aisles in supermarkets and off licences, and displayed near each other behind a bar. Therefore, to the extent that they are all alcoholic beverages that will be sold near each other, I consider that, to some extent, the goods may be in competition with each other.

74. However, I appreciate that the respective goods are produced in different ways, and made from different ingredients meaning that they taste very different. Both goods

⁹ *O2 Holdings Limited & Anor v Hutchison 3G UK Limited*, Case C-533/06, paragraph 66.

could be combined with mixers or other ingredients to create a cocktail, however, I also appreciate that mead can be consumed by itself (in a similar manner to beer) and that AGP's goods could be consumed as a shot. As such, they do not overlap in nature and there is unlikely to be any significant degree of competition between the goods. I also note that the goods are clearly not complementary. Therefore, taking all of the above into account, I find that the goods are similar to between a low and medium degree.

Valhalla 975 Mark

Class 32

Beer; Ale.

75. VYL's above goods are similar to AGP's "herbal liqueur" as they are all alcoholic drinks, which are commonly consumed for pleasure whilst socialising, or with the intention of becoming intoxicated. As a result, the goods overlap in method of use and purpose. The goods also overlap in user (being consumed by adults over the age of 18) and would be sold in close proximity within the same retailers and displayed near each other behind a bar. However, the respective goods are produced in different ways, and made from different ingredients meaning that they taste very different, and they are most likely to be consumed in different ways (with AGP's goods either consumed as a shot, or combined within a mixer, whereas beer is usually consumed solus in a pint or half pint). As such, they do not overlap in nature, and there is unlikely to be any significant degree of competition between them, and they are not complementary. On this basis, I find that the goods are similar to no more than between a low and medium degree.

The average consumer and the nature of the purchasing act

76. 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 (as he then was) 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.”

77. Before I conduct my assessment, I note that the witness statement of Mr Bedingham was filed in relation to the purchasing process and average consumer of the parties’ alcoholic beverages. I note that he states the following:

- Beer has the lowest level of purchasing attention and 75% of his bar customers who order beer are male. Beer is drunk over a “long period in a social setting” and is sold from the bar in pumps, or in bottles and cans.
- Mead is a combination of honey, yeast and water, and is served in a 125ml measure, and “in contrast to beer drinkers, the mead drinkers are both male and female”. It is also a “slow drink”, which is higher in alcoholic strength than beer, but less than spirits.
- Liqueurs are distilled alcohol, and the “average consumer will pay a high attention” when purchasing them because they “are usually highly distinctive in colour and flavour”, and are sold in volumes of 25ml or 35ml.

78. I consider that the above takes a very narrow approach when assessing the average consumer and their level of attention. All of the goods are clearly alcoholic drinks, which will be brought and consumed by adult members of the general public over the age of 18. The cost of the goods in question is likely to vary, however, on balance it is likely to be relatively low. The majority of the goods will be purchased relatively frequently. The average consumer, for beer, mead and liqueurs, will take

various factors into consideration such as the origin of the goods, the cost, flavour, ingredients and alcohol percentage. I therefore consider that a medium degree of attention will be paid during the purchasing process for all of the goods.

79. All of the goods are likely to be purchased by self-selection from the shelves of retail outlets such as supermarkets and off-licences, and their online equivalents. Such goods are also sold in bars and restaurants, being displayed behind the counter or on a drink's menu. Visual considerations are, therefore, likely to dominate the selection process. However, I do not discount that there will also be an aural component to the purchase given that the goods could be verbally ordered at a table or bar, or if stocked behind a counter, the average consumer may have to ask the sales assistant for them. However, in those circumstances, the average consumer is still likely to encounter the marks visually before placing their order due to exposure of the marks on beer taps at a bar and/or spirit bottles visible behind the bar, for instance.¹⁰

Comparison of the trade marks

80. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) 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.”

¹⁰ *Rani Refreshments FZCO v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-523/12 and *Simonds Farsons Cisk plc v OHIM*, Case T-3/04.

81. 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.

82. The respective trade marks are shown below:

AGP's 009 Word Mark	VYL's trade marks
<p>VALHALLA</p>	<p>VALHALLA MEAD</p> <p>(“568 Mark”)</p> <p>VALHALLA</p> <p>(“975 Mark”)</p>

Overall Impression

83. AGP's mark consists of the word "VALHALLA". There are no other elements to contribute to the overall impression which lies in the word itself.

84. VYL's 568 mark consists of the words "VALHALLA MEAD". I note that the word "MEAD" is descriptive of VYL's goods and therefore plays a lesser role in the overall impression, with the word "VALHALLA" at the beginning of the mark playing a greater role.

85. VYL's 975 mark consists of the word "VALHALLA". There are no other elements to contribute to the overall impression which lies in the word itself.

Visual Comparison

AGP's Mark and 568 Mark

86. Visually, both marks consist of the word "VALHALLA". I note that this word plays a greater role in the overall impression in VYL's 568 Mark, and is presented at the beginning of the mark, a position to which the average consumer tends to pay more attention.¹¹ This acts as a visual point of similarity.

87. However, VYL's mark ends in the word "MEAD" which, regardless of its role in VYL's mark, acts as a visual point of difference. Therefore, I find that the marks are visually similar to between a medium and high degree.

AGP's Mark and 975 Mark

88. Both AGP's and VYL's marks consist of the word "VALHALLA", and are therefore visually identical.

Aural Comparison

AGP's Mark and 568 Mark

89. AGP's Mark is likely to be pronounced as VAL-HAL-AH and VYL's 568 Mark is likely to be pronounced as VAL-HAL-AH MEED. Therefore the beginning 3 syllables are aurally identical, resulting in the marks, as a whole, being aurally similar to between a medium and high degree.

AGP's Mark and 975 Mark

90. Both marks consist of the word "VALHALLA" (being pronounced as VAL-HAL-AH) making them aurally identical.

¹¹ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

Conceptual Comparison

AGP's Mark and 568 Mark

91. At the hearing, Ms Cookson states that “VALHALLA” is “one of the halls of Asgard where warriors go after their life on this earth”. I consider that a significant proportion of average consumers would assign this meaning to both marks. Whilst at the hearing, Ms Cookson states that “VALHALLA” is not an invented word, I consider that there will also be a significant proportion of average consumers who will not recognise and assign the above meaning to the word “VALHALLA” in both marks, and will instead, see it as an invented word with no conceptual meaning.¹²

92. I note that the ordinary dictionary word “MEAD” at the end of VYL’s 568 Mark will be recognised as a type of honey-based alcoholic drink. Whilst this is descriptive of VYL’s goods, I note that when assessing the conceptual similarity of two marks, this is usually done without reference to the goods in question.¹³ Therefore, if the word “VALHALLA” in both marks is recognised as one of the halls of Asgard by the consumer, they are conceptually identical, with the word “MEAD” acting as a conceptual difference, resulting in the marks being conceptually similar to between a medium and high degree. If the word “VALHALLA” is seen as an invented word, it will be conceptually neutral in both marks, with the word “MEAD” making the marks, as a whole, conceptually dissimilar.

AGP's Mark and 975 Mark

93. As noted above, both marks consist of the word “VALHALLA” which will either be assigned the conceptual meaning of the “hall of Asgard”, making them conceptually identical, or they will be both seen as invented words with no conceptual meaning, making them conceptually neutral.

¹² *Interflora Inc v Marks and Spencer plc* [2013] EWHC 1291 (Ch) . Arnold J considered at some length whether there was a "single meaning rule" in trade mark law under which the court had to identify one, and one only, perception amongst the relevant class of average consumer, and judge confusion accordingly. At paragraph 213 he found there is no such rule.

¹³ Mr Philip Johnson, sitting as the AP in *Viñedos Emiliana SA v Consorzio Tutela Vini Emilia, (2) Chiarli 1860 – Pr.I.V.I Srl And (3) Medici Ermete E Figli Srl O/054/22*.

Distinctive character of the earlier trade mark

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-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 promotion of 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).”

95. 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 distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

96. I bear in mind that, in his witness statement, Mr Bedingham states that “there are numerous other UK businesses containing the term VALHALLA” and that “a search on the Companies House website shows 287 matches found at present time”. In *Zero*

Industry Srl v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-400/06 the GC stated that:

“73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word ‘zero’, it should be pointed out that the Opposition Division found, in that regard, that ‘... there are no indications as to how many of such trade marks are effectively used in the market’. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word ‘zero’ is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 GfK v OHIM – BUS(Online Bus) [2005] ECR II-4865, paragraph 68, and Case T-29/04 Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH) [2005] ECR II-5309, paragraph 71).”

97. The mere fact that there might be multiple companies using the word “VALHALLA” (as a company name or in a trade mark sense) is not relevant to my assessment. I have no evidence of how these companies have used the word “VALHALLA” in practice, including whether this mark is frequently used on class 32 and 33 goods. Consequently, I do have any evidence to show the distinctive character of the word “VALHALLA” has been weakened because of its frequent use in the fields concerned. This submission, therefore, does not assist VYL.

98. I will firstly begin by assessing the inherent distinctive character of AGP’s “VALHALLA” mark.

99. As noted above, I consider that a portion of average consumers will recognise and assign the meaning of the “hall of Asgard” to it. I do not consider that this is descriptive or allusive of AGP’s goods, and therefore, for those consumers, the mark is inherently distinctive to a medium degree. However, for those consumers who recognise AGP’s mark as an invented word with no conceptual meaning, the mark will be inherently distinctive to a high degree.

100. Although the AGP has not specifically pleaded enhanced distinctiveness, for the sake of completeness, I will make a finding as to whether I consider the evidence sufficient to demonstrate enhanced distinctiveness. The relevant market for assessing this is the UK market.

101. I have been provided with UK invoice evidence which shows that sale of “VALHALLA” goods between €936.00 and €2,808.00. However, I note that the invoice evidence is not geographically spread, as it only shows sales made to Essex and West Thurrock. Whilst UK sales numbers (in terms of units sold) contained in the table in paragraph 27 (j), shows that from 2014 to 2022 7,440 bottles of its VALHALLA goods were sold, I consider that over a period of 8 years, the amount is not particular high in relation to the goods. I have also not been provided with any evidence of AGP’s market share, but based on the unit sales above, I consider that it would only amount to a small proportion of the market.

102. I note that I have not been provided with any advertising figures. Albeit I have been provided with some brochure evidence, Ms Kaskirinne states that they are “Finnish brochures”, I have not been provided with any figures as to how many brochures were printed and distributed, and how many UK consumers would have been exposed to this advertising. Moreover, whilst I have been provided with website screenshots, a portion of these are dated after the relevant dates (being the filing dates of VYL’s marks), and I have not been provided with any evidence as to what sales were made from the website evidence that falls within the relevant dates. Therefore, I do not consider the evidence sufficient to establish enhanced distinctiveness.

Likelihood of confusion

103. 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. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

Valhalla Mead 568 Mark

104. The following factors must be considered to determine if a likelihood of confusion can be established:

- I have found the marks to be visually similar to between a medium and high degree.
- I have found the marks to be aurally similar to between a medium and high degree.
- I have found the marks to be conceptually similar to between a medium and high degree, or conceptually dissimilar, depending on the concept assigned to the word “VALHALLA” in the parties marks.
- I have found the earlier mark to be inherently distinctive to a medium degree or to a high degree, depending on how the average consumer perceived the mark.
- I have identified the average consumer for the goods to be adult members of the general public over the age of 18, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process.
- I have found the parties’ goods to be similar between a low and medium degree, and to no more than between a low and medium degree.

105. Taking all of the above into account, considering the principle of imperfect recollection, and bearing in mind that the AGP’s word mark is wholly contained at the beginning of VYL’s 586 Mark, a position to which the consumer pays more attention, I

consider that there is a likelihood of direct confusion. The only difference between the marks is the word “MEAD” at the end of VYL’s 586 Mark, which would be easily overlooked or misremembered by the average consumer, especially as it is descriptive of VYL’s mead goods. I therefore find that there is a likelihood of direct confusion, even on the goods that are similar to no more than between a low and medium degree, due to the effect of the interdependency principle.

106. I will also assess if there is a likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C. sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually 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.”

107. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (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.

108. I consider that the shared common use of the word “VALHALLA” in the parties’ marks, on alcoholic drinks which are similar between a low and medium degree, and

to no more than between a low and medium degree, will lead the average consumer to conclude that they originate from the same or economically linked undertakings. Whilst VYL's 586 Mark ends in the word "MEAD", this is descriptive of VLY's mead goods, and therefore, it is my view that the addition of the word "MEAD" VYL's 586 Mark would be indicative of a sub-brand mark (VALHALLA being the house brand and VALHALLA MEAD being the sub brand focused on mead alcoholic goods). Taking the above into account, I find there to be a likelihood of indirect confusion.

Valhalla 975 Mark

- I have found the marks to be visually and aurally identical.
- I have found the marks to be conceptually neutral.
- I have found the earlier mark to be inherently distinctive to a medium degree or to a high degree, depending on how the average consumer perceived the mark.
- I have identified the average consumer for the goods to be adult members of the general public over the age of 18, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that a medium degree of attention will be paid during the purchasing process.
- I have found the parties' goods to be similar between a low and medium degree, and to no more than between a low and medium degree.

109. The parties marks are both the word "VALHALLA", and are therefore identical. The identity of the marks offsets the differences between the goods that I have found to be similar to a between a low and medium degree, and to no more than between a low and medium degree. Consequently a likelihood of direct confusion will arise.

Final Remarks

110. AGP's 127 Bottle Mark has additional elements (mainly the depiction of the bottle and silver circle device) which means that there is a greater distance between the marks visually. I therefore do not consider that the opposition based upon AGP's 127 Bottle Mark would have put them in any stronger position.

Conclusion of the Opposition of VYL's marks

111. Subject to any successful appeal against my decision, the opposition under section 5(2)(b) is successful in its entirety and VYL's applications UK00003901568 and UK00003932975 are refused.

Conclusion of the Revocation of AGP's marks

112. As noted in paragraphs 52 and 53 above, AGP's 009 Word Mark (UK00911495009) may remain registered only for its class 33 "herbal liqueur" and its remaining goods will be revoked for the earliest date claims, being 14 June 2018.

113. As noted in paragraphs 54 and 55 above, AGP's 127 Bottle Mark (UK00911495173) may remain registered only for its class 33 "herbal liqueur" and "anise [liqueur]". Its remaining goods will be revoked for the earliest date claims, being 14 June 2018.

COSTS

114. In these consolidated proceedings, AGP has enjoyed a greater degree of success and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. In the circumstances, I award AGP the sum of £1,750 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Filing both Notice of Oppositions and considering VYL's counterstatements	£200
Considering VYL's applications for revocation and preparing counterstatements	£150
Preparing and filing evidence, and considering the other sides evidence	£500

Preparation for and attendance at hearing £700

Official fee for filing the Oppositions £200

115. I therefore order Valhalla York Limited to pay Anora Group Plc the sum of £1,750. This sum is to 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 13th day of January 2025

L FAYTER

For the Registrar

Annex 1

AGP's 009 Word Mark

Class 33

Alcoholic beverages (except beers); Alcoholic essences; Alcoholic beverages, except beer; Alcoholic beverages containing fruit; Alcoholic extracts; Anise [liqueur]; Aperitifs; Arak [arrack]; Cocktails; Curacao; Gin; Fruit extracts, alcoholic; Bitters; Kirsch; Brandy; Anisette [liqueur]; Liqueurs; Nira [sugarcane-based alcoholic beverage]; Perry; Peppermint liqueurs; Piquette; Rice alcohol; Rum; Digesters [liqueurs and spirits]; Sake; Cider; Hydromel [mead]; Distilled beverages; Spirits [beverages]; Pre-mixed alcoholic beverages, other than beer-based; Wine; Whisky; Vodka.

AGP's 127 Bottle Mark

Class 33

Alcoholic beverages (except beers); Alcoholic essences; Alcoholic beverages, except beer; Alcoholic beverages containing fruit; Alcoholic extracts; Aperitifs; Arak [arrack]; Cocktails; Curacao; Gin; Fruit extracts, alcoholic; Bitters; Kirsch; Brandy; Anisette [liqueur]; Liqueurs; Nira [sugarcane-based alcoholic beverage]; Perry; Peppermint liqueurs; Piquette; Rice alcohol; Rum; Digesters [liqueurs and spirits]; Sake; Cider; Hydromel [mead]; Distilled beverages; Spirits [beverages]; Pre-mixed alcoholic beverages, other than beer-based; Wine; Whisky; Vodka.