

O/0222/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NUMBER 3777416

BY WAREN & NELSON DRINKS LTD

TO REGISTER THE FOLLOWING TRADE MARK:

Bones of Barbados

IN CLASSES 25, 33 AND 35

AND

AN OPPOSITION THERETO UNDER NUMBER 435826

BY BEAVERTOWN BREWERY LTD

BACKGROUND AND PLEADINGS

1. On 13 April 2022, Waren & Nelson Drinks 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 27 May 2022 and registration is sought for the following goods and services:

Class 25 Clothing

Class 33 Spirits; Spirits [beverages]; Distilled spirits.

Class 35 Advertising

2. On 25 August 2022, Beavertown Brewery Ltd (“the opponent”) opposed the application under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon UK trade mark number 3521940, “Bones”, which has a filing date of 12 August 2020, a registration date of 4 December 2020 and is registered for goods and services in Classes 16, 21, 25, 32, 35, 39, 40 and 43, all of which are relied upon for the purposes of this opposition.¹

3. Under section 5(2)(b), the opponent claims that there is a likelihood of confusion on the basis that the marks are similar and the goods and services are identical or similar.

4. In accordance with section 6A of the Act, the earlier mark is not subject to proof of use and so the opponent may rely upon all the goods and services for which it is registered.

5. The applicant filed a defence and counterstatement denying a likelihood of confusion on the basis of a lack of similarity between the marks and the goods and services.

¹ These are listed in the Annex to this decision.

6. The opponent is represented by Clintons; the applicant is unrepresented. Both parties filed evidence in chief and the opponent filed evidence in reply. Neither party requested a hearing nor did they file written submissions in lieu.

7. 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 AND SUBMISSIONS

8. There is a large quantity of evidence that has been of little assistance to me when writing this decision. As such, the evidence and submissions will only be referred to as and where appropriate throughout this decision. I will, however, summarise what was filed below and, under the heading 'PRELIMINARY ISSUES', address certain arguments that I consider require my acknowledgement.

9. The opponent filed evidence in chief in the form of the first witness statement of Tom Rainsford ("Rainsford (1)") dated 26 January 2023 and its corresponding eight exhibits. Mr Rainsford's position is referred to in evidence as both Brand & Communications Manager and Marketing Director of the opponent. The opponent simultaneously filed written submissions in response to the applicant's TM8.

10. The applicant filed evidence in chief in the form of the witness statement of Sherman Rajeshwaren dated (as amended) 10 May 2023 and its corresponding seventeen exhibits. The witness statement does not mention Mr Rajeshwaren's position within the applicant company.

11. The opponent filed evidence in reply in the form of the second witness statement of Tom Rainsford ("Rainsford (2)") dated 7 July 2023 and its corresponding seven exhibits.

PRELIMINARY ISSUES

12. In its written submissions, the opponent stated the following:

“2. First, the Opponent notes that the Applicant has offered to restrict UK Trade Mark Application No. 3777416 (the “**Opposed Mark**”) to “*rum*” in class 33. That is to say that the Applicant has abandoned its application for registration of the Opposed Mark in class 25 for “*clothing*”, class 33 for “*Spirits; Spirits [beverages]; Distilled spirits*” and class 35 for “*advertising*”. While that offer restricts the goods which the Tribunal needs to consider under s.5(2)(b) of the Trade Marks Act 1994 (the “**Act**”), there remains a likelihood of confusion for the reasons provided in the TM7 [...]” (Original emphasis)

13. The applicant’s submission to which the opponent refers was included in its defence and reads as follows:

“The Defendant offers to restrict the use of their product trademarked as ‘Bones of Barbados’ to just Rum, within class 33.”

14. However, at the time of issuing this decision, the applicant had not filed a Form TM21B (used to limit or remove goods or services before a trade mark is registered). Accordingly, the goods and services to be compared are those listed in paragraph 1 of this decision.

15. Throughout the evidence and submissions, the parties referred to the branding of their respective marks and included images of the packaging of some goods. I will note here that how the parties use their marks in the marketplace is not relevant to the decision I am required to make, which is a notional assessment based on the marks as they appear on the register. I will compare those marks later in this decision.

16. In Mr Rajeshwaren’s witness statement, he refers to the opponent’s evidence and states the following:

“2. According to the opponents (sic) filings, most of their registrations have come under BEAVERTOWN followed by the sub brand as seen in Exhibit 2, except the BONES. Yet continue to trade under Beavertown Bones, BONES Lager Beavertown and BONES LAGER 4.4% according to the images included in Exhibit 3 (a, b, c & d). This makes it incredibly confusing under what name they are trading under (sic).”

17. It is not relevant to these proceedings under what name the opponent is trading, nor is it relevant how the opponent’s earlier mark BONES is used in conjunction with other brands. As per paragraph 4 of this decision, the opponent’s earlier mark is not subject to proof of use. I will say no more about this line of argument.

18. In Mr Rajeshwaren’s witness statement, he refers to other brands using the word ‘BONES’ and attaches images of the same at exhibit 7. In accordance with the comments of the General Court (“GC”) in *Zero Industry Srl v OHIM*,² the presence on the register of similar marks or marks containing shared elements is not evidence of how many of such trade marks are in fact used in the market, nor does it clarify whether consumers have or have not been confused by the presence of such marks.

19. I note the opponent’s evidence going to the similarity between the parties’ goods, in particular, between beers and spirits. I will return to this evidence during the goods and services comparison later in this decision.

DECISION

Section 5(2)(b)

20. Sections 5(2)(b) and 5A of the Act state:

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

[...]

² Case T-400/06

(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.

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.”

Relevant law

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

The principles

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the

imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

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

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

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

Comparison of goods and services

22. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

23. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited* (“*Treat*”) [1996] RPC 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services and, in the case of self-serve consumer items, where in practice they are respectively found.

24. Further, in *Kurt Hesse v OHIM*,³ the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods/services. In *Boston Scientific Ltd v OHIM*,⁴ the GC stated that “complementary” means:

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

³ Case C-50/15 P

⁴ Case T-325/06

Class 25

25. It is self-evident that the applicant's 'clothing' is identical to the same term in the opponent's specification. These goods are identical.

Class 35

26. Whilst the opponent has opposed the registration of the applicant's 'advertising' services, it has made no submissions regarding any similarity between these and its own goods and services: I find no similarity.

Class 33

27. The applicant has applied for 'spirits; spirits [beverages]; distilled spirits'. I will compare these to the opponent's 'beers' in Class 32 as I consider it to be its best case; it is also where the opponent has focused its submissions and associated evidence. To clarify, despite the applicant's numerous references to 'rum', it has applied for 'spirits' at large and so it is this term that will be assessed.

28. The opponent's related evidence, mentioned at paragraph 19 of this decision, includes, *inter alia*: (i) images to show beer in close proximity to spirits in bars/pubs⁵ and in supermarkets⁶ and (ii) the "growing trend" of bars offering spirits on tap (or on draught).⁷ With or without this evidence, I accept that beers and spirits are displayed in close proximity behind bars and may be sold in the same aisle in supermarkets, though not usually on the same shelf. Whilst I accept that the evidence shows that it is possible for spirits to be sold on tap, the evidence does not establish that this is common. In any case, the proximity of the goods is only one factor to consider.

29. The nature, purpose and method of use of the goods are similar to the extent that they are both alcoholic drinks consumed for social purposes and/or the intoxicating

⁵ Rainsford (1) at [22] and [23].

⁶ Rainsford (2), Exhibits 1-7.

⁷ Rainsford (1) at [24] and Exhibit 8.

effects of alcohol. However, other than them both containing alcohol, the core ingredient in beer is different to those in spirits and the alcohol content of beer and spirits differ greatly. There is no complementary relationship. Whilst there is some competition between the goods where consumers select either beer or spirits, I do not consider this to be a common choice. There is no evidence showing that the production methods are similar. Nor is there evidence that producers of beer commonly diversify into the production of spirits or vice versa. Overall, I conclude that the goods are similar, but to only a low degree.

30. In accordance with *eSure Insurance v Direct Line Insurance* [2008] ETMR 77 CA, if there is no similarity between goods or services, there is no likelihood of confusion to be considered. Consequently, the opposition has failed in relation to the following services, which may proceed to registration:

Class 35 Advertising

The average consumer and the purchasing act

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

32. The relevant goods are those for which I have found identity or similarity. The average consumer of the parties' alcoholic drinks is the adult general public. The goods may be purchased in supermarkets, off-licences etc as well as their online equivalents. This all suggests a more visual selection process. Whilst the goods may also be purchased in bars, pubs and similar establishments, where they may be requested orally, the goods will still, ordinarily be on display so that they can be seen. Therefore, overall I consider the purchase to be a primarily visual one, but there will be an aural impact. The level of attention paid during the purchase will generally be average (or medium).

33. The average consumer of the parties' clothing goods is the general public, who will purchase the goods reasonably frequently by self-selecting them from the shelves of a retail outlet or via the pages of their online or catalogue equivalents. Consumers will consider factors such as aesthetics, durability and material. I consider it likely that an average (or medium) degree of attention will be paid during the purchase which will be predominantly visual. However, given that advice may be sought from retail assistants, I do not discount an aural component to the purchase.

Comparison of the marks

34. 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 *Bimbo*, 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 relevant 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.”

35. It would be wrong, therefore, to dissect the trade marks artificially, although it is necessary to take into account the distinctive and dominant components of the trade 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.

36. The trade marks to be compared are as follows:

The opponent's earlier mark	The applicant's contested mark
BONES	Bones of Barbados

37. Both parties have made submissions relating to the comparison of their respective marks, some of which relate to marks other than those shown above, such as stylised versions claimed to be used in the market. I have already explained that it is the registered word mark relied upon by the opponent and the applicant's applied-for word mark that are relevant in this decision. I have, however, considered all submissions made by the parties and will only refer to them where necessary during my assessment.

38. The earlier mark comprises the word 'BONES' in word-only format, with no other elements; the overall impression lies in that one word.

39. The contested mark consists of the three words 'Bones of Barbados' in word-only format, with no other elements. I do not agree with the opponent that 'Bones' is "clearly the dominant and distinctive element [with neither 'of' nor 'Barbados' being] distinctive."⁸ Whilst the word 'of' is indistinctive by itself, combined with the word 'Barbados' it suggests the preceding word ('Bones') originates from that country. Bones originating from Barbados has no obvious meaning and so in the context of the contested mark, I do not consider the word 'Barbados' to be descriptive as suggested by the opponent. There is nothing in the applicant's specification to suggest that the

⁸ See the opponent's statement of grounds.

goods and services originate from Barbados, though I accept (as does the applicant)⁹ that the word will be seen as a reference to the Caribbean island. ‘Bones’ is not descriptive of the goods and services either. The three words ‘Bones of Barbados’ hang together as an unusual unit, the overall impression lying in those three words.

40. Visually, the marks coincide in the word ‘Bones’ and differ in the additional words in the contested mark – ‘of Barbados’. Neither mark contains any stylisation or additional elements. I consider them to be visually similar to a medium degree.

41. The earlier mark will be pronounced as the ordinary dictionary word it comprises, consisting of one syllable. The contested mark will be pronounced, in five syllables, as the three words it comprises. The marks overlap in the first syllable – BONES – and differ in the remaining syllables of the contested mark. I consider there to be a medium degree of aural similarity between the marks.

42. The earlier mark will immediately conjure, in the mind of consumers, the ordinary meaning of the word ‘BONES’, i.e. the pieces of hard tissue making up the skeleton in humans and other vertebrates.¹⁰ The same word in the contested mark will conjure the same meaning, however, the addition of the words ‘of Barbados’ renders the concept of that mark slightly unusual. As mentioned at paragraph 39, above, Bones originating from Barbados does not have a clear meaning for consumers. Taking all of this into account, I find there to be conceptual similarity, albeit to only a low degree.

Distinctive character of the earlier mark

43. In *Lloyd Schuhfabrik Meyer* 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

⁹ See the applicant’s defence and counterstatement.

¹⁰ Oxford English Dictionary

undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-000, 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).”

44. 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/services, 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.

45. I will begin by assessing the inherent distinctive character of the earlier mark, which consists of the one ordinary dictionary word ‘BONES’. The applicant has suggested that because ‘BONES’ is a common word, it should not be registered. This is not a relevant issue in this decision. The earlier mark was accepted and is a registered trade mark. As such, it is deemed to have at least some distinctive character.¹¹

46. BONES is an ordinary dictionary word with an obvious meaning, as opposed to an invented word, so I do not consider it to have a high degree of inherent distinctive character. However, BONES has no meaning in relation to the goods/services for which the earlier mark is registered: it is neither allusive nor descriptive so it has more

¹¹ *Formula One Licensing BV v OHIM*, Case C-196/11P.

than a low degree of distinctiveness. I consider BONES to be an unusual word in relation to the goods and services and so I afford it a medium degree of inherent distinctive character.

47. Turning now to consider whether the distinctiveness of the earlier mark has been enhanced through use, I refer to the evidence filed by the opponent. The narrative evidence explains that the earlier mark has been used on lager since August 2021. From that date to the date of Mr Rainsford's first witness statement (being January 2023), sales of BONES lager totalled £2.3m and the amount spent on marketing BONES lager totalled £275,000. Mr Rainsford states that over 300 venues across the UK serve BONES lager. The narrative evidence is supported by: (i) articles published in relation to the launch of BONES lager;¹² pages from the opponent's website showing the venues in the UK serving BONES lager;¹³ examples of marketing material;¹⁴ and reviews of BONES lager.¹⁵ Despite there being no reference to the market share of BONES lager, £2.3m in sales in the first 17 months following its launch is not an insignificant sum, neither is £275,000 spent on marketing the goods. The evidence is sufficient for me to find that the distinctiveness of the earlier mark has been enhanced to a medium to high degree in relation to 'beers' in Class 32 only. The evidence is insufficient for the same finding to apply to the remainder of the opponent's specification.

Likelihood of confusion

48. In determining whether there is a likelihood of confusion, all of the above factors need to be borne in mind. They must be considered globally (*Sabel*) from the perspective of the average consumer. In making my assessment, I must keep in mind 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 he has retained in his mind (*Lloyd Schuhfabrik*). The factors considered above have a degree of interdependency (*Canon*): for example, a lesser degree of similarity between the

¹² Rainsford (1), Exhibit 2.

¹³ Rainsford (1), Exhibits 4 and 5.

¹⁴ Rainsford (1), Exhibit 6.

¹⁵ Rainsford (1), Exhibit 7.

respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa.

49. I have found the marks to be visually and aurally similar to a medium degree and conceptually similar to a low degree. I have found the earlier mark to have a medium degree of inherent distinctive character, enhanced to a medium to high degree in relation to 'beers' in Class 32. I have identified the average consumer of the parties' clothing goods to be a member of the general public and the parties' alcohol drinks to be an adult member of the general public, both of whom would pay a medium degree of attention to the respective purchases. I found the purchasing process to be predominantly visual for all goods, though I have not discounted an aural consideration.

50. Confusion can be direct or indirect. The difference between these two types of confusion was explained in *L.A. Sugar Limited v By Back Beat Inc.*, BL O/375/10, where Iain Purvis QC (as he then was), sitting 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 recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

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).”

51. I bear in mind that the contested mark contains the entirety of the earlier mark and that this shared element has a medium degree of distinctive character (enhanced to a medium to high degree for beers). I also remind myself that the marks begin with the same word and that the beginning of marks tend to have more visual and aural impact than the ends.¹⁶ However, the contested mark has an additional two words (‘of Barbados’), rendering the marks very different in length. Further, those additional words are not so indistinctive that they will be overlooked. Given that direct confusion involves no process of reasoning, I find it unlikely that the average consumer would mistake one mark for the other. Even for identical goods, I do not consider there to be a likelihood of direct confusion.

52. I turn now to indirect confusion. 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

¹⁶ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02.

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.

53. During the comparison of the marks, I explained that whilst the individual elements of the contested mark, ‘Bones of Barbados’, will be given their ordinary dictionary meanings and understood by the average consumer, they create an unusual combination given that ‘bones originating from Barbados’ has no clear meaning.

54. In my view, there is no clear basis for a finding of indirect confusion. As explained earlier in my decision, ‘Bones of Barbados’ hangs together and, as such, the consumer is unlikely to attribute any significance to the ‘Bones’ element solus within the contested mark. On this basis, it does not seem likely to me that the contested mark would be shortened to ‘Bones’. Contrary to the opponent’s submissions, I am not of the view that “of Barbados” is of a type commonly used to denote a sub-brand. This applies to all the parties goods. Further, I bear in mind the possibility of the parties’ alcohol drinks being ordered orally at a bar, for example, but given my assessment of the comparison between the goods, I do not envisage a scenario whereby a consumer would be confused between ordering a beer and ordering a spirit. For the alcohol goods, any similarity between the marks is outweighed by only a low degree of similarity between the goods. Even for identical goods, I do not consider there to be a likelihood of confusion.

CONCLUSION

55. The opposition has failed and the application may proceed to registration in full.

COSTS

56. The applicant has been successful and is entitled to a contribution towards their costs, in line with the scale published in Tribunal Practice Notice (“TPN”) 2/2016. As the applicant is unrepresented, it filed a costs pro-forma, claiming it has spent the following amount of time on these proceedings:

Considering forms filed by the other side	504 minutes
Preparing evidence/submissions and considering and commenting on the other side's evidence/submissions	1080 minutes
Travelling to pubs, gathering evidence, transport fees	230 minutes
Total	1814 minutes

57. In addition to the above activities, there is a claimed total of 180 minutes on the pro-forma that is not attributed to any particular activity and so I dismiss this amount from the total claimed. I also consider the reference to “travelling to pubs, gathering evidence, transport fees” to be encompassed within research for preparing/considering evidence and so these fall within the same category.

58. Costs to unrepresented parties are governed – in conjunction with the TPN – by The Litigants in Person (Costs and Expenses) Act 1975, the Civil Procedure Rules Part 46 and the associated Practice Direction. Collectively, they set the amount payable to litigants in person at £19 per hour. Accordingly, I will convert the applicant's claim in minutes to hours: approximately 8 hours for the considering of forms and 22 hours for research, and preparation and consideration of evidence/submissions, totalling 30 hours for the entire proceedings. At £19 per hour, this equates to £570. However, I have explained at paragraphs 12-19 that the majority of the applicant's evidence was not relevant to the decision I was required to make. As such, I deduct 50% of the award in this regard. I therefore award costs to the applicant at the sum of £361, calculated as follows:

Considering forms filed by the other side	8 hours at £19/hour	£152
Research and the consideration of evidence	11 hours at £19/hour	£209
Total	19 hours at £19/hour	£361

59. I order Beavertown Brewery Ltd to pay Waren & Nelson Drinks Ltd the sum of £361. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the final determination of the appeal proceedings.

Dated this 14th day of March 2024

MRS E FISHER

For the Registrar

Annex

Opponent's goods and services

- Class 16 Beer mats; Mats for beer glasses; Mats of paper for beer glasses.
- Class 21 Beer glasses; Beer jugs; Beer mugs; Beverage glassware; Beverage ware; Portable beverage container holders; Containers for beverages; Drinks containers.
- Class 25 Clothing, footwear and headgear.
- Class 32 Non-alcoholic beers; beers.
- Class 35 Retail services in connection with beer, ales, stout, brewery products, beer mats, mats for beer glasses, mats of paper for beer glasses, beer glasses, beer jugs, beer mugs, beverage glassware, beverage ware, portable beverage container holders, containers for beverages, drinks containers, clothing, footwear and headgear, beer and brewery products, ale, beers, beers enriched with minerals, beverages (preparations for making -), pilsner, stout, lager, black beer [toasted-malt beer], beers enriched with minerals, beer-based cocktails, extracts of hops for making beer, low alcohol beer, alcoholic beverages (except beers), alcoholic beverages containing fruit, alcoholic bitters, bitters, ciders.
- Class 39 Brewery tours.
- Class 40 Brewing of beer; Brewing services.
- Class 43 Provision of food and drink; Pubs; Restaurants services; Bars; Cafes services; Drink dispensing machines (rental of); Public house services.