O/0518/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003652799

BY ENERGY BRANDS SÀRL

TO REGISTER THE TRADE MARK:

IN CLASS 33

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 427971

BY FAIRLIFE, LLC

BACKGROUND AND PLEADINGS

1. On 8 June 2021, Energy Brands sàrl ("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 6 August 2021. The applicant seeks registration for the following goods:

Class 33 Alcoholic beverages (except beer and whisky); Preparations for making alcoholic beverages; pre-mixed alcoholic beverages; vodka soda; alcoholic beverages, namely, hard seltzer and hard sparkling water; none of the afore-mentioned goods being whisky and whisky-based and whisky-flavoured beverages.

2. The application was opposed by fairlife, LLC ("the opponent") on 5 November 2021, and the opposition is based upon sections 5(2)(b) and 3(6) of the Trade Marks Act 1994 ("the Act").[1]

3. Under section 5(2)(b), the opponent relies upon the following trade mark:

CORE POWER

Comparable UK trade mark (EU) registration no. UK00918261186[2]
Filing date 24 June 2020; Registration date 3 November 2020.
Relying upon all of the goods for which its mark is registered, namely:

Class 29 Dairy-based beverages; Milk; Milk beverages with high milk content; Milk products excluding ice cream, ice milk and frozen yogurt; Milk-based beverages containing chocolate; Milk-based energy drinks; Beverages

[1] I note that the section 3(6) ground was added via a Form TM7G which was filed on 24 June 2022. This was accepted into the proceedings by the Registry on 11 July 2022.
[2] 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.

consisting principally of milk; Beverages having a milk base; Milk-based beverages flavoured with chocolate; Milk shakes; Milk-based beverages flavoured with coffee; Protein milk; Flavoured milk-based beverages; Milk-based beverages flavoured with strawberry; Milk-based beverages flavoured with vanilla.

4. Under section 5(2)(b), the opponent claims there is a likelihood of confusion because the marks are highly similar and the goods are similar.

5. Under section 3(6), the opponent claims that the application has been filed in bad faith because the applicant has not made any use of its mark and the opponent has been challenging the applicant's registration before the EUIPO since 2020. Therefore the applicant was fully aware of the opponent's use, and senior rights in, its earlier mark. The applicant has also registered 2 Benelux trade marks, and an IR, (MOXIE and AHA) which are brands owned by Coca Cola, which the opponent states supports its argument that the applicant has no intention to genuinely use these marks. Moreover, the opponent states that the applicant has registered 51 well-known third party brands as domain names which shows that the applicant has no intention to use any of the marks or domain names, which have all been filed as an attempt to negotiate "payment of a licence fee or a fee for an assignment of rights". Consequently, "the application forms part of a pattern of malicious behaviour" so that the applicant can "gain commercial benefit from blocking the use of identical or similar trade marks". The opponent therefore submits that the filing of the application "clearly departs from the accepted principles of ethical behaviour or honest commercial and business practices".

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

7. The opponent is represented by Penningtons Manches Cooper LLP and the applicant is represented by Albright IP Limited. Neither party requested a hearing, however, both parties filed evidence in chief, and the opponent filed evidence in reply. The parties also filed written submissions during the evidence rounds. I make this decision having taken full account of all the papers.

RELEVANCE OF EU LAW

8. 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

9. The opponent's evidence consists of the witness statement of Andrew C Arquette dated 13 December 2022. Mr Arquette is the Chief Financial Officer of the opponent, a position that he has held since 2011. Mr Arquette's statement is accompanied by 6 exhibits (ACA1-ACA6).

10. The opponent's evidence also consists of the witness statement of Anna Catherine Frankum dated 14 December 2022. Ms Frankum is a partner at Penningtons Manches Cooper LLP, the representatives for the opponent. Ms Frankum's statement is accompanied by 6 exhibits (ACF1-ACF6).

11. The applicant's evidence consists of the witness statement of Joel Weston dated 8 February 2023. Mr Weston is a Chartered Trade Mark Attorney at Albright IP Limited, the representatives for the applicant. Mr Weston's statement is accompanied by 6 exhibits (JW1-JW6).

12. The applicant's evidence also consists of the witness statement of Carlo Cloet dated 16 February 2023. Mr Cloet is the General Manager of the applicant, and his statement is accompanied by 10 exhibits (CC1-CC10).

13. The applicant's evidence lastly consists of the witness statement of José Luis Jéldrez Aguilera dated 21 March 2023. Mr Aguilera is the manager of Singer & Jéldrez BV, and the sworn translator of the AFNIC Decision in relation to Application No. FR-2017-01487. Mr Aguilera has translated exhibit CC3.

14. The opponent's evidence in reply consists of the witness statement of Cheng Foong Tan dated 4 September 2023. Mr Tan is a senior associate at Penningtons Manches Cooper LLP, the representatives for the opponent. Mr Tan's statement is accompanied by 1 exhibit (CFT-1).

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

DECISION

Section 5(2)(b)

16. 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."

17. Due to its earlier filing date, the trade mark upon which the opponent relies qualifies as an earlier trade mark pursuant to section 6 of the Act. The earlier mark has not completed its registration process more than five years before the relevant date (the filing date of the applicant's mark). Accordingly, the use provisions at section 6A of the Act do not apply. The opponent may rely on all of the goods it has identified without demonstrating that it has used the mark.

Section 5(2)(b) case law

18. 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

19. The competing goods are as follows:

Opponent's goods	**Applicant's goods**
Class 29 Dairy-based beverages; Milk; Milk beverages with high milk content; Milk products excluding ice cream, ice milk and frozen yogurt; Milk-based beverages containing chocolate; Milk-based energy	Class 33 Alcoholic beverages (except beer and whisky); Preparations for making alcoholic beverages; pre-mixed alcoholic beverages; vodka soda; alcoholic beverages, namely, hard seltzer and

drinks; Beverages consisting principally of milk; Beverages having a milk base; Milk-based beverages flavoured with chocolate; Milk shakes; Milk-based beverages flavoured with coffee; Protein milk; Flavoured milk-based beverages; Milk-based beverages flavoured with strawberry; Milk-based beverages flavoured with vanilla.	hard sparkling water; none of the afore-mentioned goods being whisky and whisky-based and whisky-flavoured beverages.

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

21. 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

22. I note that **exhibit JW6** contains an EUIPO decision which compares beer against milk-based beverages. Whilst the applicant may seek to rely upon the conclusions made in this decision, this Tribunal is not bound by decisions of the EUIPO. I will, therefore, carry out a full comparison of the goods.

23. I consider that all of the applicant's goods are to some extent similar to the opponent's "dairy-based beverages" on the basis that they overlap in method of use, purpose and user, being drunk by the general public, to quench their thirst and provide them with refreshment. However, I also recognise that the applicant's goods are often consumed for the effects of alcohol, and therefore can only be bought by users over the age of 18.[3] I also recognise that the goods do not overlap in nature, because the opponent's goods are dairy-based, whereas the applicant's goods are alcoholic.

24. Whilst the goods would not be produced by the same undertaking, there would be an overlap in distribution channels, with the goods being sold in the same restaurants and retail outlets such as supermarkets. I note that Mr Weston has provided undated photos from supermarkets such as Waitrose and Sainsbury's in **exhibit JW4**, to show that the parties' goods are not sold within the same aisle. I agree that the goods would not be located in close proximity, with the opponent's goods most likely being sold in the refrigerated dairy aisle, and the applicant's goods being sold in the alcoholic beverage aisle. Whilst the goods are not complementary, nor in direct competition, the user can make a choice between them, wishing to have either an alcoholic or non-

[3] I note that the applicant's exhibited evidence at **JW1** and **JW2** supports this.

alcoholic (dairy-based) drink to quench their thirst. Therefore, taking all of the above into account, I consider that the goods are similar, but only to a low degree.

25. For the sake of completeness I note that **exhibit CFT1** shows 5 images of wine being sold in 75cl cartons. I have not been provided with any explanation as to why these images were filed as evidence. However, I consider that it is most likely to show that alcoholic goods can be sold in a similar way/packaging to milk-based beverages. I note that these photos are undated, and without any explanation, I do not know geographically where these goods are sold. This evidence, therefore, does not assist the opponent.

The average consumer and the nature of the purchasing act

26. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

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

27. The average consumer for the goods will be members of the general public, and more specifically for the applicant's goods, adults over the age of 18. The cost of the goods, on balance, is likely to be relatively low, and the goods will be purchased relatively frequently, most likely as part of a weekly shop. However, I note that the average consumer will take various factors into consideration such as the cost, taste and ingredients, especially to reflect their dietary requirements, or any allergens to

avoid. For the applicant's goods, the consumer will also consider the alcohol percentage. Taking all of the above into account, I consider that a medium degree of attention will be paid during the purchasing process for all of the goods.

28. 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 drinks 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.

Comparison of the trade marks

29. 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."

30. 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.

31. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
CORE POWER	

32. The opponent's mark consists of the words "CORE POWER". I consider that the overall impression lies in the combination of these elements.

33. The applicant's mark consists of the word "CORE" presented on top of the word "POWER", in a slightly stylised and capitalised red typeface. I note that these words are presented within a thick broken circle outline, in the colour red, against a grey rectangular background. Given the size and positioning of the words, and bearing in mind that the eye is naturally drawn to the element of the mark can be read, I consider that "CORE POWER" plays a greater role in the overall impression of the mark, with the stylisation, broken circle outline and background playing a lesser role.

34. Visually, both marks consist of, or include the words "CORE POWER". I also note that these words play a greater role in the overall impression of the applicant's mark. Furthermore, the opponent's mark is a word mark, which covers use in any standard typeface or colour. These, therefore, act as a visual points of similarity. However, I note that the words in the applicant's mark are surrounded by a broken red circle outline, presented on a grey rectangular background. These act as visual points of difference. However, taking the marks as a whole into account, I consider that they are visually similar to a high degree.

35. Aurally, the stylisation and background in the applicant's mark will not be articulated. As these words are given their ordinary English pronunciation in both marks, I consider them to be aurally identical.

36. Both of the parties' marks consist of two ordinary dictionary words; "CORE" and "POWER". Together, I consider that the marks convey the meaning of the strength of the centre of an object. The stylisation of the applicant's mark does not evoke any meaning to the consumer. At best, I consider that the broken circle device may reinforce the meaning of "CORE" whereby the words "CORE POWER" are in the centre of the circle. Consequently, I consider that the marks are conceptually identical.

Distinctive character of the earlier trade mark

37. 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 1-2779, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in 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)."

38. 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.

39. Although the opponent has not specifically pleaded that the distinctiveness of its mark has been enhanced, Mr Arquette has filed evidence of use of the opponent's mark. However, the relevant market for assessing enhanced distinctiveness is the UK market, and the evidence provided by the opponent relates only to the US and Canada. Consequently, I have only the inherent position to consider.

40. As noted above, the opponent's word mark consists of the ordinary dictionary words "CORE POWER", which together evoke the meaning of the strength of the centre of an object. However, I note that the opponent's dairy-based beverages could include protein shakes, and therefore the mark could be allusive in terms of these goods providing the user with "CORE POWER" (powering the core of their body). Consequently, I consider that the mark is inherently distinctive to between a low and medium degree.

Likelihood of confusion

41. 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.

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

- The marks are visually similar to a high degree.
- The marks are aurally identical
- The marks are conceptually identical.
- I have found the opponent's mark to be inherently distinctive to between a low and medium degree.
- I have identified the average consumer for the goods to be members of the general public, including adults 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 to a low degree.

43. I bear in mind the decision of the CJEU in *L'Oréal SA v OHIM*, Case C-235/05 P, in which the court confirmed that weak distinctive character of the earlier trade mark does not preclude a likelihood of confusion.

44. Therefore, taking all of the above factors into account, considering the principle of imperfect recollection, and bearing in mind that both marks consist of or have the words "CORE POWER" as the element playing a greater role in the overall impression, I consider that the marks are likely to be mistakenly recalled or misremembered as each other. This is particularly the case given the conceptual and aural identity and the high degree of visual similarity between the marks.

45. The only differing elements between the opponent's and applicant's marks are all stylistic, including the broken red circle outline and grey rectangular background in the applicant's mark. I therefore consider that all of these elements would be easily overlooked by the average consumer, especially as they play a lesser role in the overall impression. Consequently, this results in a likelihood of direct confusion on all of the parties' goods, which are similar to a low degree, due to the effect of the interdependency principle.

46. For the sake of completeness, 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."

47. 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.

48. I consider that the shared common use of the words "CORE POWER" will lead the average consumer to conclude that the marks originate from the same or economically linked undertakings. The average consumer will see the addition of the stylistic elements in the applicant's mark (including the broken circle outline and grey rectangular background) and perceive it as an alternative mark being used by the same or economically linked undertakings. I find a likelihood of indirect confusion.

49. The opposition under section 5(2)(b) succeeds in its entirety.

Section 3(6)

50. Section 3(6) of the Act states:

> "(6) A trade mark shall not be registered if or to the extent that the application is made in bad faith."

51. In *Sky Limited & Ors v Skykick, UK Ltd & Ors*, [2021] EWCA Civ 1121 the Court of Appeal considered the case law from *Chocoladefabriken Lindt & Sprüngli AG v Franz Hauswirth GmbH*, Case C-529/07 EU:C:2009:361, *Malaysia Dairy Industries Pte. Ltd v Ankenævnetfor Patenter Varemærker* Case C-320/12, EU:C:2013:435, *Koton Mağazacilik Tekstil Sanayi ve Ticaret AŞ*, Case C-104/18 P, EU:C:2019:724, *Hasbro, Inc. v EUIPO, Kreativni Dogaaji d.o.o. intervening*, Case T-663/19, EU:2021:211, *pelicantravel.com s.r.o. v OHIM, Pelikan Vertriebsgesellschaft mbH & Co KG (intervening)*, Case T-136/11, EU:T:2012:689, and *Psytech International Ltd v OHIM, Institute for Personality & Ability Testing, Inc (intervening)*, Case T-507/08, EU:T:2011:46. It summarised the law as follows:

> "68. The following points of relevance to this case can be gleaned from these CJEU authorities:
>
> 1. The allegation that a trade mark has been applied for in bad faith is one of the absolute grounds for invalidity of an EU trade mark which can be relied on before the EUIPO or by means of a counterclaim in infringement proceedings: *Lindt* at [34].
>
> 2. Bad faith is an autonomous concept of EU trade mark law which must be given a uniform interpretation in the EU: *Malaysia Dairy Industries* at [29].
>
> 3. The concept of bad faith presupposes the existence of a dishonest state of mind or intention, but dishonesty is to be understood in the context of trade mark law, i.e. the course of trade and having regard to the objectives of the law namely the establishment and functioning of the internal market, contributing to the system of undistorted competition in the Union, in which each undertaking must,

in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin: *Lindt* at [45]; *Koton Mağazacilik* at [45].

4. The concept of bad faith, so understood, relates to a subjective motivation on the part of the trade mark applicant, namely a dishonest intention or other sinister motive. It involves conduct which departs from accepted standards of ethical behaviour or honest commercial and business practices: *Hasbro* at [41].

5. The date for assessment of bad faith is the time of filing the application: *Lindt* at [35].

6. It is for the party alleging bad faith to prove it: good faith is presumed until the contrary is proved: *Pelikan* at [21] and [40].

7. Where the court or tribunal finds that the objective circumstances of a particular case raise a rebuttable presumption of lack of good faith, it is for the applicant to provide a plausible explanation of the objectives and commercial logic pursued by the application: *Hasbro* at [42].

8. Whether the applicant was acting in bad faith must be the subject of an overall assessment, taking into account all the factors relevant to the particular case: *Lindt* at [37].

9. For that purpose it is necessary to examine the applicant's intention at the time the mark was filed, which is a subjective factor which must be determined by reference to the objective circumstances of the particular case: *Lindt* at [41] – [42].

10. Even where there exist objective indicia pointing towards bad faith, however, it cannot be excluded that the applicant's objective was in pursuit of a legitimate objective, such as excluding copyists: *Lindt* at [49].

11. Bad faith can be established even in cases where no third party is specifically targeted, if the applicant's intention was to obtain the mark for purposes other than those falling within the functions of a trade mark: *Koton Mağazacilik* at [46].

12. It is relevant to consider the extent of the reputation enjoyed by the sign at the time when the application was filed: the extent of that reputation may justify the applicant's interest in seeking wider legal protection for its sign: *Lindt* at [51] to [52].

13. Bad faith cannot be established solely on the basis of the size of the list of goods and services in the application for registration: *Psytech* at [88], *Pelikan* at [54]".

52. According to *Alexander Trade Mark*, BL O/036/18, the key questions for determination in a claim of bad faith are:

(a) What, in concrete terms, was the objective that the applicant has been accused of pursuing?

(b) Was that an objective for the purposes of which the contested application could not be properly filed? And

(c) Was it established that the contested application was filed in pursuit of that objective?

53. It is necessary to ascertain what the applicant knew at the relevant date: *Red Bull GmbH v Sun Mark Limited and Sea Air & Land Forwarding Limited* [2012] EWHC 1929 (Ch). Evidence about subsequent events may be relevant, if it casts light backwards on the position at the relevant date: *Hotel Cipriani SRL and others v Cipriani (Grosvenor Street) Limited and others*, [2009] RPC 9 (approved by the Court of Appeal in England and Wales: [2010] RPC 16).

54. The relevant date in this decision is 8 June 2021.

55. The opponent states that the application has been filed in bad faith because the applicant has not made any use of its mark, and has been fully aware of the opponent's use of it, as the opponent has been challenging registrations by the applicant for CORE POWER before the EUIPO since 2020.

56. In its Form TM7G, the opponent also states the following:

- "In addition to the Application, the Applicant has also applied to register/registered the MOXIE brand (which belongs to The Coca Cola Company) as a Benelux and International trade mark designating the UK, India and China. […]

- The Applicant has also registered the AHA brand (which also belongs to The Coca Cola Company) as a Benelux trade mark. […]

- Both MOXIE and AHA are carbonated beverage brands owned by The Coca Cola Company and are well known in many countries including in the United States. […]

- In addition, the Applicant has registered the following well-known third party brands as domain names:

    - [the opponent lists 51 domain names, including carambra.in, carambrausa.com, chocovit.fr, cocacolapower.com, cold-press.net, coldpressonline.com, fusetea.fr, fuzeteafrance.com, fuzeteapower.com, kindersnack.fr, kingfisher-beer.fr, monsterbeer.co.uk, monster-cola.fr, redbullpower.com, romanov-vodka.fr, vitawater.fr, moxiedrink.com, just to name a few].

- The above brand names are owned by the following parties:

    - The 'Fuze Tea', 'Monster Energy', 'Coca-Cola' and 'Moxie' brands are all owned by The Coco-Cola Company;
    - The 'Kingfisher' beer brand is owned by the United Breweries Group which is partially owned by The Heineken Group;

- The ‘Romanov’ vodka brand is owned by United Spirits which is part of the United Breweries Group;
- The ‘Kinder happy hippo snack’ brand is owned by Ferrer SpA;
- The ‘Red Bull’ brand is owned by Red Bull GmbH;
- The ‘Carambar’ brand is owned by CARAMBAR AND CO. of 9 rue Maurice Mallet F-92130 ISSY-LES-MOULINEAUX, France;
- The ‘Chocovit’ brand is owned by AFM International Sàrl of Z.A. Vers la Pièce, Route de l’Etraz, Rolle, 1180, Switzerland;
- The ‘Cold Press’ brand is owned by Coldpress Foods Ltd, a UK juice and smoothie brand; and
- The ‘Vitawater’ brand is owned by INTERSALES COMPANY of De Leiteweg 8 B-8020 Oostkamp, Belgium.”

57. The opponent states that the above “forms part of a pattern of malicious behaviour whereby applications were made by the Applicant to register third parties’ marks as trade marks and/or domain names in order to gain commercial benefit from blocking the use of identical or similar trade marks/domain names by the rightful prior owners. As a result, the Application is part of a blocking strategy”, and the mark and registrations have been made “in an attempt to negotiate payment of a licence fee or a fee for an assignment of rights from the brand owners”.

58. In Ms Frankum’s witness statement she confirms that the owner of Monster Energy above is inaccurately recorded and that the owner of the Romanov brand has changed since the date of the bad faith grounds. I therefore note that the owner of Monster Energy is “Monster Energy Company”, as confirmed by **exhibit ACF-3** and **exhibit ACF-5**, and the owner of the Romanov brand is Inbrew Beverages Private limited as confirmed by **exhibit ACF-6**.

59. In summary, the opponent claims that the applicant has been pursuing the objective of 1) filing its mark with the knowledge that the opponent owns it, 2) filing a mark with no intention to use it, 3) that it has been filed alongside other marks and domain names that do not belong to the applicant 4) that this is part of a pattern of

malicious behaviour and 5) it has been done to gain a commercial benefit to negotiate payment of a licence fee or a fee for an assignment of rights from the brand owners.

60. I bear in mind that the first objective, in isolation, may not be compelling because mere knowledge of another party's use of a mark (either in the UK or elsewhere) does not establish bad faith.[4] However, prior knowledge of a trade mark may amount to bad faith in some circumstances, for example, if the application is made with the intent of blocking another business' legitimate activities and/or to gain a commercial benefit, which is argued by the opponent in this case (objective 5).

61. I consider that all 5 objectives are interlinked and could be the basis of a bad faith objection, if proven. Therefore, the key question is whether the opponent has satisfied the burden of proving the applicant's intention in filing the application. In this regard, I note the following points from the opponent's evidence:

a) **Exhibit ACF-1** contains the details of international registration no. 1449620, MOXIE, which was registered by the applicant on 7 January 2019.

b) **Exhibit ACF-2** contains a screenshot from the US Patent and Trade Mark office which confirms that the owner of the MOXIE registration no. 5718670 is Coca-Cola. I note that it was registered on 9 April 2019, however, the FORTUNE magazine screenshot details that "yesterday the Coca-Cola Company announced it will buy the brand" Moxie, and this article is dated 29 August 2018.

c) **Exhibit ACF-2** also contains a screenshot of the UK00003614219 AHA mark which is owned by Coca-Cola. I note that the mark relies on 2 priority dates from US and EUIPO marks, being 25 June 2019 and 20 December 2019.

d) **Exhibit ACF-3** contains multiple screenshots, including:

    a. The UK00003337370 MONSTER ENERGY mark, registered on 1 February 2019, which claims a priority date from US mark of 14 March

[4] *Malaysia Dairy Industries Pte Ltd v Ankenævnet for Patenter og Varemærker* Case C-320/12 and *Lindt, Koton* (paragraph 55).

2018. This mark is owned by Monster Energy Company, but a screenshot of an article dated 15 August 2014 confirms that Coca-Cola brought a 16.7% stake in Monster.

b. The UK00001068679 COCA-COLA mark which was registered on 24 September 1976 and is owned by Coca-Cola.

c. The US mark 78729820 FUZE, which is owned by Coca-Cola. This is supported by a screenshot dated 31 October 2022 showing “Fuze Tea” is a brand listed on Coca-Cola’s website.

d. The UK00911705175 Kingfisher mark, which was registered on 13 August 2013, and is owned by United Breweries Ltd.

e. The UK00002012126 RED BULL mark, which was registered on 27 February 1998 and is owned by Red Bull.

f. The UK00901407956 CARAMBAR mark which was registered on 22 February 2001 and is owned by CARAMBAR AND CO.

g. The UK00900925271 CHOCOVIT mark, which was registered on 26 October 1999, which claims seniority from 31 May 1977. The mark is owned by ADM International Sàrl.

h. The UK0003448722 Cold Press mark which was registered on 8 August 2020 and is owned by Coldpress Foods Ltd.

i. The WO0000001107937 VITAWATER mark, which was registered on 28 December 2011, with a priority date of 30 June 2011. The mark is owned by INTERSALES COMPANY.

e) **Exhibit ACF-4** (and **exhibit ACA6**) contains a Reverse Whois search result, dated 17 May 2022, for domains owned by the applicant. 229 domains are listed, including the 51 provided by the opponent in its Form TM7G. I note that the following domains use the marks listed above (Red Bull, Chocovit, Cold

Press, Coca-Cola, Kingfisher, Carambar, Cold Press, Fuze Tea, Moxie) as well as the Core Power and Kinder names:

16	carambar.in	2013-03-30	OVH (R130-AFIN)
17	carambar.tv	2013-03-30	OVH
18	carambarusa.biz	2016-06-24	OVH SAS
19	carambarusa.com	2016-06-24	OVH
20	carambarusa.fr		OVH
21	carambarusa.info	2016-06-24	OVH SAS
24	chocovit.fr	2013-09-09	OVH
25	cocacolapower.com	2017-10-18	OVH
26	cola-distribution.fr		OVH
27	cola-drink.fr		OVH
28	cold-press.biz	2015-05-13	OVH SAS
29	cold-press.fr		OVH
30	cold-press.info	2015-05-13	OVH SAS
31	cold-press.net	2017-09-15	OVH
32	coldpressonline.biz	2017-02-18	OVH SAS
33	coldpressonline.com	2017-02-18	OVH
34	coldpressonline.info	2017-02-18	OVH SAS
35	coldpressonline.net	2017-02-18	OVH
36	coldpressonline.org	2017-02-18	OVH
38	corepower.cz	2012-12-20	REG-OVH
39	core-power.fr	2012-07-12	OVH
58	fuse-energy.fr		OVH
59	fuse-tea.fr		OVH
60	fusetea.fr		OVH
61	fuzeteafrance.biz	2017-10-20	OVH SAS

63	fuzeteafrance.info	2017-10-20	OVH SAS
64	fuzeteafrance.net	2017-10-20	OVH
62	fuzeteafrance.com	2017-10-20	OVH
79	kindersnack.fr	2011-09-06	OVH
80	kindersnak.fr		OVH
81	kingfisher-beer.fr	2011-09-05	OVH
82	kingfisher-europe.fr	2011-09-05	OVH
98	monster-cola.fr	2011-04-03	OVH
99	monster-cola.tv	2011-03-04	OVH
100	perfumeline.fr	2011-08-06	OVH
173	vitawater.fr		OVH
174	vitawater.tv	2011-03-19	OVH
216	moxiedrink.info	2018-08-30	OVH SAS
217	moxiedrink.org	2018-08-30	OVH
218	moxiedrink.com	2018-08-30	OVH
219	moxiedrink.biz	2018-08-30	OVH SAS
216	moxiedrink.info	2018-08-30	OVH SAS
217	moxiedrink.org	2018-08-30	OVH
218	moxiedrink.com	2018-08-30	OVH
219	moxiedrink.biz	2018-08-30	OVH SAS
224	corepowerenergy.com	2020-08-16	OVH SAS
225	corepowerprotein.com	2020-09-16	OVH SAS
226	corepowerproteindrink.com	2020-09-16	OVH SAS
227	corepowerproteinwater.com	2020-09-16	OVH SAS

62. Taking all of the above into account, I am satisfied that the opponent has demonstrated a pattern of behaviour on the part of the applicant of applying for IP rights that belong to successful businesses such as Monster, Red Bull, Kingfisher and Coca-Cola.

63. The opponent also provides evidence of its own use of its mark. I note the following from Mr Arquette's witness statement:

a) The opponent's business started in 2012, and is wholly owned by The Coca-Cola Company.

b) The opponent has used its CORE POWER mark since March 2012 in the US and since 2017 in Canada.

c) The opponent has a collection of CORE POWER marks which it owns worldwide and has been registered as early as 19 June 2012.

d) In 2021, the opponent achieved double digit sales growth week on week, which culminated in a new annual record of over US$1 billion in retail sales. Mr Arquette provides the following turnover figures table:

	USA	Canada
2019	$120.5 million	[no data]
2020	$147.9 million	$7.2 million
2021	$226.3 million	$10.4 million
2022 (estimate)	$279.3 million	$15.2 million

e) Mr Arquette also provides the following advertising figures:

	USA	Canada
2019	$8.6 million	$9,000
2020	$10.5 million	$3,300
2021	$14.9 million	$74,700
2022 (estimate)	$21.9 million	$866,000

f) **Exhibit ACA-3** contains the following screenshot of the opponent's CORE POWER twitter which shows that it joined in February 2012:

g) Mr Arquette also provides the following press-coverage examples of its CORE POWER brand:

i. An article from the opponent's website (fairlife.com) dated 21 December 2015 titled "Core Power High Protein Drink Announces Signing of 'Everyday Awesome' Gymnastics Superstar Simone Biles".

ii. An article from navigator-usa.com dated 11 September 2017 which notes that Core Power has continued growth and is a part of the fairlife "family".

iii. A wholefoods magazine article dated 5 March 2018 titled "Fairlife adds a coffee flavour to its Core Power protein drink line". In this article it confirms that the price of this drink is $2.99.

iv. An article from businessinsider.com dated 31 May 2019, which lists 6 products that keep the writer motivated when they want to work out. The article shows a picture of a woman drinking a CORE POWER protein drink, and specifically makes reference to the Core Power protein shakes, which have 5 different flavours, including coffee.

64. It is clear that Coca-Cola owns the opponent's brand CORE POWER, which has been in use since 2012. I note that both the turnover and advertising figures provided by the opponent are significant, and that in the opponent's most successful year of trading, in 2021, the applicant applied for the contested mark. Consequently, the application for the contested mark is consistent with the pattern of behaviour shown in the evidence, and on this basis, it is my view that a *prima facie* case of bad faith has been made out.

65. The burden of proof is, therefore, reversed, and requires the applicant to provide a plausible explanation for the objectives and the commercial logic pursued by the application. The applicant's evidence is as follows:

a) Mr Cloet was not aware of the MOXIE or AHA marks in the US and EU, and is not aware of them ever having been used.

b) The applicant's reasoning for registering the MOXIE trade mark was from a brainstorm of a children's beverage, to which they designed a parrot called MOXIE "as it's funny and cuddly".

c) The applicant was also unaware of the opponent's US, CORE POWER mark.

d) In 2012 the applicant "looked at Intel's "CORE" trademark for their computer chips as inspiration for a new name" for their food and beverage product concepts, and added "POWER" to it to result in the "CORE POWER" mark.

e) The applicant owns the CORE POWER international registration no. 1162853, which is registered for class 5, 29, 30 and 32 goods. The specification does not include protein based drinks, however, for reasons I will come to discuss below, I note that Mr Cloet submits that "if the specification contained the word "protein", then this was a pure coincidence, although, in the initial application period (2012 -2013) one of our concepts was to add a protein drink".

f) Mr Cloet states that their mark, in the UK, will be used on drinks and beverages such as low alcohol premixed cocktails, commonly known as "breezers".

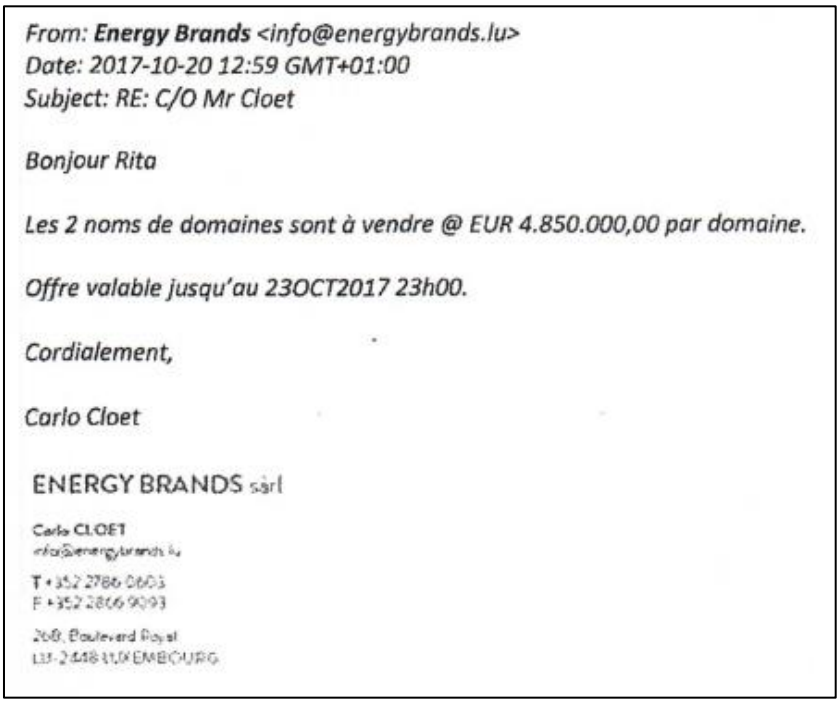
g) In Mr Cloet's witness statement, he states that he was approached by a company called "Novel Brands" who were trying to purchase the applicant's CORE POWER domains. However, Mr Cloet believes that the instructors behind Novel Brands was The Coca-Cola Company, which wholly owns the opponent.

h) In paragraph 9, Mr Cloet states that after being approached by "Novel Brands" asking to purchase their CORE POWER domains, that "we did some company research and it resulted in a very poor, not to say, inexistant financial background. I refer to Exhibit CC1".

i) **Exhibit CC1** contains emails from 2018 between "Novel Brands" and the applicant. "Novel Brands" asked to purchase 2 of the applicants CORE POWER marks (0931297 and 11662853). In the email dated June 2018, Mr Cloet says, "thank you for your repeated interested" and that they "might consider licencing our brand". The email dated 18 July 2018 from "Novel Brands" mentions a discussion on the phone, and that they had previously tried to buy 2 fuze tea domains from the applicant (to which I note is also a brand owned by Coca-

Cola). The email also says that "we would like to **continue** negotiating with you ourselves as our interest in buying the Core Power trade marks is genuine". **(my emphasis)**

j) Mr Cloet stated that "since [Novel Brands] kept pushing us, we offered them a ridiculously high amount to get rid of their repeated and pushy emails and phone calls", the following of which is exhibited in **CC2**:



From: ***Energy Brands*** *<info@energybrands.lu>*
Date: 2017-10-20 12:59 GMT+01:00
Subject: RE: C/O Mr Cloet

Bonjour Rita

Les 2 noms de domaines sont à vendre @ EUR 4.850.000,00 par domaine.

Offre valable jusqu'au 23OCT2017 23h00.

Cordialement,

Carlo Cloet

ENERGY BRANDS sàrl

Carlo CLOET
info@energybrands.lu
T +352 2786 0603
F +352 2866 9093
26B, Boulevard Royal
L-2449 LUXEMBOURG

k) **Exhibit CC4** contains emails whereby Mr Silverman (representing the opponent) asks if the applicant would be willing to sell their CORE POWER marks. Mr Cloet states that they "might consider licencing" their brand and invites Mr Silverman to an in person meeting, to which he responds that if they are interested in assigning the mark then they want to agree a price. The last email contained within this exhibit is dated 28 February 2020, is from Mr Siliverman, and simply says "are you interesting in providing us a number to consider?".

l) **Exhibit CC5** contains an email dated 24 June 2020, from Mr Silverman notifying Mr Cloet that they have filed non-use petitions in the EU, China and

Japan against the applicant's CORE POWER marks. He also says that the opponent is willing to pay the applicant $10,000 to assign its right, title and interest in the CORE POWER mark, including its 0931297 and 11662853 registrations.

m) In Mr Cloet's witness statement, in paragraph 15, he states that "nonetheless, compared to the mentioned turnover [the opponent's US$1 billion US sales from 2021] **one could say that the offered US$10,000 by Mr Silverman is at the very least ridiculous, and I was left thinking that this offer could not actually be serious at all**". **(my emphasis)**

n) The applicant's CORE POWER domains were based on their international registration no. 1162853.

o) With regard to the remaining domains, Mr Cloet states that Coca-Cola and the opponent own thousands of domain names "many of which do not even correspond to any of their products or brands". **Exhibit CC8** contains a reverse whois search showing that "coca cola" own 4,621 domains, and **CC9** contains a reverse whois search showing that "coca cola company" owns 2,781 domains.

    a. I note that in **exhibit CC9**, domain numbers 259 to 261, 283 to 288, 300 to 895 and 900 to 902 all use the words "coca cola", showing that at least a notable proportion do relate to the signs that they have an obvious interest in.

p) Mr Cloet states that one of the applicant's "activities is investing in domain names". He also states that "with regards to the Kingfisher domain names, we have been in contact with UG Group years ago and were about to start import of their beers into Europe when shortly later, the entire group went bankrupt. […] We registered a kingfisher domain name to promote their products".

q) Mr Cloet states he has "assisted Red Bull with their launch in France in 2008 and became their 2nd largest customer in 2013. We developed a unique

distribution product, which included the registration of specific Red Bull derived domain names".

r) Lastly, the applicant has referred me to a decision from the French special Court Syreli whereby The Coca-Cola Company issued a claim for illegal and abusive registration of the applicant's "fuzetea.fr" domain. However, I am not bound by this decision and I must make my own conclusions from the evidence before me in relation to this decision.

66. In my view, the applicant's explanation and evidence does not rebut the *prima facie* case of bad faith established by the opponent.

67. Firstly, the applicant's argument at paragraph 65(o) that Coca-Cola and the opponent also own thousands of domains themselves, is completely irrelevant. The legitimacy of their business strategies (which may include registering domains for legitimate goods which are in development) is not relevant to my assessment. I have to look at the actions of the applicant only, and whether I consider that it falls short of the standards of acceptable commercial behaviour.

68. Secondly, the applicant has provided an explanation for why Kingfisher and Red Bull domains were registered at paragraphs 52(p) and (q). However, I find this reasoning unconvincing. There is nothing in the evidence to show that any agreement was in place with Kingfisher or Red Bull to this effect. The registration of these domains is consistent with the pattern of behaviour on the part of the applicant of registering various IP rights owned by other businesses. In this regard, I note that no explanation has been provided as to why the applicant has registered domains using the intellectual property of Coca-Cola, Monster, Fuze Tea, Carambar, Chocovit, Cold Press or Vitawater. Against this backdrop, the explanation provided as to how the applicant came up with the marks MOXIE and CORE POWER appears far less convincing.

69. Thirdly, the applicant has registered the domains corepowerprotein.com, corepowerproteindrink.com and corepowerproteinwater.com on 16 August 2020 and 16 September 2020, which are highlighted by the red box in paragraph 61(e) above.

In his witness statement, Mr Cloet states that the applicant's CORE POWER mark, in the UK, will be used on drinks and beverages such as low alcohol premixed cocktails, commonly known as "breezers", as reflected by the applicant's class 33 specification. The applicant's international registration no. 11662853, which has a filing date of 31 December 2012 is also not registered for any protein drinks. Therefore, it is entirely unclear as to why the applicant's domains which pre and post-date the registered marks, would include the word "protein" when it is clear that their goods are not protein based, unlike the opponent's.

70. Moreover, I note that Mr Cloet states that "if the specification contained the word "protein", then this was a pure coincidence, although, in the initial application period (2012-2013) one of our concepts was to add a protein drink". However, it is entirely unclear as to why the applicant has registered core power protein domains in 2020, when this concept was only supposedly considered in 2012 to 2013, which clearly did not come to fruition as their international mark which was filed on 31 December 2012 does not contain protein drinks in its specification.

71. Fourthly, whilst no evidence has been provided that the applicant has sold any of its marks, and whilst Mr Cloet states "several reminder emails followed to which [they] replied [they] were not interested to sell"/they "replied that [they] would not sell to Novel Brands"[5], none of the email evidence contained in **CC1** and **CC4** shows that Mr Cloet explicitly stated this. The emails simply thank the sender for their interest, and states that the applicant might consider licencing their brand. Consequently, there is no denial from the applicant that they were prepared to enter into financially beneficial agreements with regard to their IP rights. The issue seems to have been that the opponent did not offer enough money for the sale to go ahead, which is supported by the applicant carrying out financial backgrounds on prospective buyers or licensees, the offer of €4,850,000.00 for the purchase of a CORE POWER mark to "Novel Brands" (who Mr Cloet believed was instructed by Coca-Cola which wholly owns the opponent), and the fact Mr Cloet states that the opponent's offer of $10,000 to assign its right, title and interest in the CORE POWER mark was "at the very least ridiculous" due to the fact that the opponent has made $1 billion US sales from 2021, leaving Mr

[5] Paragraphs 9 and 10 of Mr Cloet's witness statement.

Cloet to think “that this offer could not actually be serious at all”. For the sake of completeness, as noted above, **exhibits CC1** and **CC4** shows Mr Cloet saying to both Novel Brands (who the applicant believes was instructed by the opponent) and the opponent that they “might consider licencing” their brand, which of course would also benefit them commercially and financially. This was followed by an email to Novel Brands which mentioned that they would “like to continue negotiating” with the applicant in buying the CORE POWER marks. Mr Cloet did not provide any evidence or detail as to his phone call with Novel Brands, but the wording of the email suggests that there was a negotiation that must have occurred which they wanted to continue. Again, this is consistent with the alleged motive of attempting to gain financial benefit from registering intellectual property rights owned by pre-existing brands.

72. Therefore, bearing in mind the inconsistencies of the applicant’s defence, combined with the admission from Mr Cloet that their CORE POWER mark has not in fact been used commercially, shows that the intention of the applicant falls below the accepted standards of ethical behaviour and honest commercial practices. It also establishes a clear pattern of behaviour by the applicant. This amounts to bad faith.

73. For all of these reasons, the opposition based upon section 3(6) succeeds in its entirety.

CONCLUSION

74. The opposition is successful in its entirety and the application is refused.

COSTS

75. The opponent has been successful 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 the opponent the sum of **£2,250** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Filing a Notice of opposition and considering the applicant’s counterstatement	£400

Preparing and filing evidence,[6] and considering the applicant's evidence	£1,200
Filing written submissions	£450
Official Fee	£200[7]
Total	**£2,250**

76. I therefore order Energy Brands sàrl to pay fairlife, LLC the sum of £2,250. 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 05th day of June 2024

L FAYTER

For the Registrar

[6] This includes Mr Arquette's, Ms Frankum's and Mr Tan's witness statement evidence.
[7] This includes the TM7 and TM7G official fees which are £100 each.