O/0645/24

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF APPLICATION NOS. UK00003803035 AND UK00003803044
BY ZAFER SAYGILIER
TO REGISTER THE TRADE MARKS:

FLOWER CAFE

IN CLASSES 32, 33, 35, 38, 41 AND 43

FLOWER DRINKS

IN CLASSES 32 AND 33

AND

IN THE MATTER OF THE OPPOSITIONS THERETO
UNDER NOS. 436933 AND 436931
BY FLOWERS VINEYARD AND WINERY, LLC

BACKGROUND AND PLEADINGS

1. On 24 June 2022, Zafer Saygilier ("the applicant") applied to register the FLOWER CAFE mark under no. UK00003803035 ("035 mark") shown on the cover page of this decision in the UK. The application was published for opposition purposes on 15 July 2022. The applicant seeks registration for the following goods and services:

> **Class 32:** *Beers; soft drinks, mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; syrups for making beverages; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines.*
>
> **Class 33:** *Alcoholic beverages (except beer); all the aforesaid goods excluding wine.*
>
> **Class 35:** *Advertising; marketing; sales promotions; retail services and wholesale services connected with the sale of food and drink; business information; online ordering services; consultancy, information and advisory services to all the aforesaid services.*
>
> **Class 38:** *Telecommunications; broadcasting services; electronic exchange of data, video, audio, text via computer and telecommunication networks; providing online forums; communication by online blogs; chat room services; consultancy, information and advisory services to all the aforesaid services.*
>
> **Class 41:** *Entertainment; music and night club services; discotheque services; consultancy, information and advisory services relating to all the aforesaid services.*
>
> **Class 43:** *Provision of food and drink; hotel services; restaurant, cafe and bar services; catering services; sandwich and snack bar services; preparation and serving of food and beverages; information and advisory services to all the aforesaid services.*

2. On 24 June 2022, the applicant also applied to register the FLOWER DRINKS mark under no. UK00003803044 ("044 mark") shown on the cover page of this decision in the UK. The application was also published for opposition purposes on 15 July 2022. The applicant seeks registration for the same goods in classes 32 and 33 which are applied-for under the '035 application (but not for the services).

3. The applications were both opposed by FLOWERS VINEYARD AND WINERY, LLC ("the opponent") on 17 October 2022. The oppositions are based upon Section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and the opponent relies upon the following trade mark and the goods covered by the same, as shown below:[1]

UK00801414948
FLOWERS
Filing date: 28 June 2018
Date of entry in register: 3 September 2019
Class 33: Wine.

4. The oppositions are directed towards all the goods and services applied for, with the exception of the services in class 38 as covered by the '035 mark.

5. The opponent claims that the respective goods and services are similar and that the respective marks are similar, such that there exists a likelihood of confusion.

6. The trade mark relied upon by the opponent is an earlier mark in accordance with Section 6 of the Act. As the mark had not been registered for five years or more at the application date of the contested '035 and '044 marks, it is not subject to proof of use.

[1] On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all right holders with existing EUTMs or International Registrations designating the EU ("IR (EU)"). The earlier mark was originally protected in the UK as EUTM and is now a comparable mark which is recorded on the UK trade mark register, has the same legal status as if they had been applied for and registered under UK law, and retains its original filing date.

7. The applicant filed a counterstatement in both proceedings denying the claims made.

8. The proceedings were consolidated on 8 March 2023.

9. The opponent is represented by Mewburn Ellis LLP. The applicant is represented by Trademark Eagle Limited. Only the applicant filed evidence. The opponent filed written submissions during the evidence rounds. Neither party requested a hearing, and only the opponent filed written submissions in lieu. This decision is taken following a careful consideration of the papers.

EVIDENCE

10. The applicant's evidence takes the form of a witness statement from Rosario Valdez-Knight dated 6 July 2023. Mr Valdez-Knight is a solicitor at Trademark Eagle Limited, the representatives for the applicant. Mr Valdez-Knight's evidence has been filed to show that there are other registered trade marks covering classes 32 and 33 which include the word FLOWER or FLOWERS with a view of supporting the applicant's argument that these words are not very distinctive. His evidence is accompanied by 3 exhibits (RVK1 – RVK3).

RELEVANCE OF EU LAW

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

DECISION

Section 5(2)(b)

12. Section 5(2)(b) of the Act reads as follows:

> "5(2) A trade mark shall not be registered if because –
>
> (a)…
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

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

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

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

> (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
>
> (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the

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

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

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

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

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

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

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

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

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

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

Comparison of goods and services

15. When making the comparison, all relevant factors relating to the goods and services 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."

16. Guidance on this issue has also 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.

17. In *Gérard Meric v OHIM,* Case T- 133/05, the General Court "GC") stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut for Lernsysterne v OHIM – Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

18. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM***,** Case T-325/06, the GC stated that "complementary" means:

"[…] there is a 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."

19. In *Sanco SA v OHIM,* Case T-249/11, the GC indicated that goods and services may be regarded as 'complementary' and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for the goods and services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander QC noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL O/255/13*:*

> "It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes."

20. Whilst on the other hand:

> "[…] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together."

21. Section 60A of the Act provides:

> "(1) For the purposes of this Act goods and services—
>
> (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification;
>
> (b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification."

22. The goods and services to be compared can be found at paragraphs 1 and 3.

Class 32

Beers

23. The only comment the applicant made with regards to the similarity of the goods and services is that the contested marks exclude wine and, therefore, none of the goods opposed are identical or similar to those covered by the opponent.

24. The opponent states that beer and wine belong to the same category of alcoholic drinks intended for the general public, who may perceive these goods as being in competition and consume them in the same way on the same occasions. It further states that these goods may coincide in distribution channels, as they can be served

in restaurants and bars, and are sold in retail environments such as supermarkets, where they will likely be found in the same aisle or in close proximity to each other.

25. The GC dealt with a comparison between beer and wine in *CocaCola v OHIM* (Case T-175/06) concluding that there was little similarity between them. It stated in its judgment:

> "Comparison between wine and beer
>
> 63. So far as concerns, first, the nature, end-users and method of use of wines and beers, ale and porter, it is correct, as argued by the applicant, that those goods constitute alcoholic beverages obtained by a fermentation process and consumed during a meal or drunk as an aperitif.
>
> 64. However, it must be stated – as did the Board of Appeal – that the basic ingredients of those beverages do not have anything in common. Alcohol is not an ingredient used in the production of those beverages, but is one of the constituents generated by that production. Moreover, although the production of each of those beverages requires a fermentation process, their respective methods of production are not limited to fermentation and are fundamentally different. Thus, crushing grapes and pouring the must into barrels cannot be assimilated to the brewing processes of beer.
>
> 65. Moreover, the fact that beer is obtained through the fermentation of malt, whereas wine is produced through the fermentation of the must of grapes, means that the end products generated differ in colour, aroma and taste. That difference in colour, aroma and taste leads the relevant consumer to perceive those two products as being different.
>
> 66. In addition, despite the fact that wine and beer may, to a certain extent, satisfy the same need – enjoyment of a drink during a meal or as an aperitif – the Court considers that the relevant consumer perceives them as two distinct products. The Board of Appeal was therefore correct to consider that wines and beers do not belong to the same family of alcoholic beverages.

67. As regards, next, the complementary nature of wine and beer as referred to in the case-law cited in paragraph 61 above, it should be borne in mind that complementary goods are goods which are closely connected in the sense that one is indispensable or important for the use of the other (see Case T-169/03 *Sergio Rossi* v *OHIM – Sissi Rossi (SISSI ROSSI)* [2005] ECR II-685, paragraph 60). In the present case, the Court considers that wine is neither indispensable nor important for the use of beer and vice versa. There is indeed nothing to support the conclusion that a purchaser of one of those products would be led to purchase the other.

68. As to whether wine and beer are in competition with each other, it has previously been held, in a different context, that there is a degree of competition between those goods. The Court of Justice thus considered that wine and beer are, to a certain extent, capable of meeting identical needs, which means that a certain measure of mutual substitutability must be acknowledged. Nevertheless, the Court of Justice pointed out that, in view of the significant differences in quality – and, accordingly, in price – between wines, the decisive competitive relationship between wine and beer, a popular and widely consumed beverage, must be established by reference to those wines which are the most accessible to the public at large, that is to say, generally speaking, the lightest and least expensive varieties (see, by analogy, Case 356/85 *Commission* v *Belgium* [1987] ECR 3299, paragraph 10; see also, Case 170/78 *Commission* v *United Kingdom* [1983] ECR 2265, paragraph 8; and Case C-166/98 *Socridis* [1999] ECR I-3791, paragraph 18). There appears to be nothing to indicate that that assessment does not also apply in the present case. Accordingly, it must be acknowledged, as the applicant indicates, that wine and beer are, to a certain extent, competing goods.

69. Finally, in accordance with the Board of Appeal's assessment, it must be accepted that the average Austrian consumer will consider it normal for wines, on the one hand, and beers, ale and porter, on the other, to come from different undertakings – and will therefore expect this – and that those beverages do not belong to the same family of alcoholic beverages. There is nothing to suggest that the Austrian public is not aware, and does not notice the characteristics

distinguishing beer and wine as regards their composition and method of production. On the contrary, the Court considers that those differences are perceived as making it unlikely that the same undertaking would produce and market the two types of beverage at the same time. For the sake of completeness, it should be noted that it is well known that, in Austria, there is a tradition of producing both beer and wine, and that this is done by different undertakings. Consequently, the average Austrian consumer expects beers, ale and porter, on the one hand, and wines on the other, to come from different undertakings.

70. In the light of all of the preceding factors, the Court considers that, for average Austrian consumers, there is little similarity between wines and beers."

26. I find that the above reasoning is equally applicable in the instant case, in respect of the average UK consumer and the UK market at the relevant date. Further, as regards the channels of trade, although the goods share distribution channels, including off-licences, supermarkets, restaurants and bars, they will not generally be sold on the same shelves as there is normally a clear demarcation between the wine area and the beer area. Overall, I conclude that the goods are similar to a **low degree.**

Soft drinks, non-alcoholic drinks; fruit drinks and fruit juices; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines.

27. The opponent states that in the beverage industry, consumers are typically offered a choice between various alcoholic and non-alcoholic beverages and that the products at issue often share the same relevant public, are produced and distributed by the same entities and are in competition or substitutable.

28. Although both parties' goods are drinks, the very nature of those goods is different in light of the presence, or absence, of alcohol in their composition. The applicant's *soft drinks, non-alcoholic drinks, fruit drinks and fruit juices* will be consumed primarily to quench thirst, for health reasons or to give energy, for instance when practicing sports, whereas the opponent's *wines* are not designed to quench thirst and are likely to be consumed to enjoy the effects of alcohol. The purpose of the goods may,

therefore, be somewhat similar, but is different in a key respect. Even though the applied-for goods cover grape juices which are made from grapes like the opponent's wine, I do not consider there to be any meaningful competition because grape juice is not generally considered on a par with non-alcoholic wines and de-alcoholised wines. Furthermore, commercial choices are likely to be made between different types of alcoholic drinks, or between an alcoholic drink and its non-alcoholic equivalent, rather than between wine and a soft drink or fruit drink. Whilst there may be an overlap in trade channels to the extent that all of the goods may be sold through supermarkets and other retail outlets, they are unlikely to be sold in the same aisles. There is no complementary relationship in play, in the sense described in the case law. Further, I have no evidence before me to suggest that it is common for producers of wine to also produce non-alcoholic goods, nor do I consider it likely that producers of wine would produce other soft drinks other than non-alcoholic wines. Overall, I consider that the goods are similar to a **low degree.**

Mineral and aerated waters; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines.

29. It seems to me that the differences between *wine* and *mineral and aerated waters* are even more pronounced than those between *wine and soft drinks, non-alcoholic drinks, fruit drinks and fruit juices; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines*. Hence, I find that due to the overlapping purpose, but taking into account the differences I have outlined in relation to wine and soft drinks, these goods are similar to a **low degree.**

Syrups for making beverages; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines.

30. Syrups for making beverages are concentrated thick liquids which are mixed with water or other liquids in order to prepare non-alcoholic drinks. The main purpose of the goods is to add flavour to beverages, rather than to quench one's thirst. Further, I consider that there is even less overlap between the opponent's *wine* and these goods in method of use, nature and purpose than there is for the *mineral and aerated waters;*

soft drinks, non-alcoholic drinks; fruit drinks and fruit juices. Consequently, I find these goods to be **dissimilar.**

Class 33

Alcoholic beverages (except beer); all the aforesaid goods excluding wine.

31. The applied-for *alcoholic beverages (except beer); all the aforesaid goods excluding wine* include, *inter alia*, spirits as a broader category that includes various types of beverages, including wine-based spirits, such as brandy. This is the closest clash that I can see with the opponent's *wine*. Although brandy and wine also have a different alcohol content, their nature is similar to a general level insofar as brandy is a wine based alcoholic beverage. The goods can be bought in the same specialised wine shops, and they target the same public. However, the goods differ in their production methods (distillation as opposed to fermentation) and, as a result, in their taste, colour and smell. In *Vanhove v EUIPO - Aldi Einkauf (bistro Régent)* Case T-437/22, the GC upheld the decision of the Board of Appeal that wine and brandy were similar to a low degree on account of the difference in the degree of alcohol in those beverages, but also on account of their different production methods. I agree with that conclusion and therefore I consider these goods to be similar to a **low degree**.

Class 35

Retail services and wholesale services connected with the sale of drink.

32. The opponent states that the case law has established that retail services concerning the sale of specific goods are similar to an average degree to the specific goods, and that the contested *retail services and wholesale service connected with the sale of food and drink* are similar to the opponent's *wine* because they coincide in end users, distribution channels and complementarity.

33. In *Oakley, Inc v OHIM*, Case T-116/06, at paragraphs 46-57, the GC held that although retail services are different in nature, purpose and method of use to goods,

retail services for particular goods may be complementary to those goods, and distributed through the same trade channels, and therefore similar to a degree.

34. In *Tony Van Gulck v Wasabi Frog Ltd,* Case BL O/391/14, Mr Geoffrey Hobbs Q.C. as the Appointed Person reviewed the law concerning retail services v goods. He said (at paragraph 9 of his judgment) that:

> "9. The position with regard to the question of conflict between use of **BOO!** for handbags in Class 18 and shoes for women in Class 25 and use of **MissBoo** for the Listed Services is considerably more complex. There are four main reasons for that: (i) selling and offering to sell goods does not, in itself, amount to providing retail services in Class 35; (ii) an application for registration of a trade mark for retail services in Class 35 can validly describe the retail services for which protection is requested in general terms; (iii) for the purpose of determining whether such an application is objectionable under Section 5(2)(b), it is necessary to ascertain whether there is a likelihood of confusion with the opponent's earlier trade mark in all the circumstances in which the trade mark applied for might be used if it were to be registered; (iv) the criteria for determining whether, when and to what degree services are *'similar'* to goods are not clear cut."

35. However, on the basis of the European courts' judgments in *Sanco SA v OHIM*, Case C-411/13P and *Assembled Investments (Proprietary) Ltd v. OHIM,* Case T-105/05*,* at paragraphs [30] to [35] of the judgment, upheld on appeal in *Waterford Wedgewood Plc v. Assembled Investments (Proprietary) Ltd* Case C-398/07P, Mr Hobbs concluded that:

> i) Goods and services are not similar on the basis that they are complementary if the complementarity between them is insufficiently pronounced that, from the consumer's point of view, they are unlikely to be offered by one and the same undertaking;
>
> ii) In making a comparison involving a mark registered for goods and a mark proposed to be registered for retail services (or vice versa), it is necessary to

envisage the retail services normally associated with the opponent's goods and then to compare the opponent's goods with the retail services covered by the applicant's trade mark;

iii) It is not permissible to treat a mark registered for 'retail services for goods X' as though the mark was registered for goods X;

iv) The General Court's findings in *Oakley* did not mean that goods could only be regarded as similar to retail services where the retail services related to exactly the same goods as those for which the other party's trade mark was registered (or proposed to be registered).

36. The contested *retail services and wholesale service connected with the sale of drink* include retail services and wholesale services connected with the sale of the opponent's wine. Whilst the above case-law establishes that there is a degree of similarity between goods and retail services associated with the same goods, it did not state to what degree the goods and services are similar. Accordingly, I consider that based on their complementarity, but taking into account their different nature, purpose and method of use, these goods and services are similar to a **low to medium degree.**

Retail services and wholesale services connected with the sale of food.

37. Contrary to what I found in relation to *retail services and wholesale services connected with the sale of drink,* I find that *retail services and wholesale services connected with the sale of food* are one step removed from the opponent's wine and are **dissimilar.**

Advertising; marketing; sales promotions; business information; online ordering services; consultancy, information and advisory services to all the aforesaid services.

38. The opponent states that these services are similar and complementary to the opponent's *wine* as they would include business services in relation to the wine industry and may be provided by the same entities to the same consumers alongside the provision of goods such as wine. The opponent indicates as an example *online*

ordering services and *advisory services* in relation to wine which, it states, would typically be provided alongside the goods themselves.

39. I am not persuaded by the opponent's argument. Online ordering is the process of ordering goods and services from a website or other application. The contested *online ordering services* and related *advisory services* are business to business services whereby the provider of the ordering services takes orders on behalf (and from the customers) of a third-party business. Conversely the opponent's submissions seem to refer to a scenario whereby a company selling wine would also offer *online ordering services* and related *advisory services* to its customers. I do not understand whether the opponent means that suppliers of wines might take orders online from their own customers, or whether it is alleged that producers and distributors of wine might offer a service whereby they take orders from the customers of the business to which they sell their own wines. In the former scenario, it cannot be said that a wine business selling its own goods online provides *online ordering services* to its customers; as regard the latter scenario, there is no evidence that suppliers of wines (or any other goods) in the UK render online ordering services to the business to which they sell their wines or that the services and goods are sold through the same distribution channels. The opponent failed to submit any concrete and objective evidence justifying such finding. The goods and services have a different, nature, purpose and method of use, they do not share trade channels and are neither complementary nor in competition. The same goes for the contested *advertising; marketing; sales promotions; business information*. These services are **dissimilar.**

Class 41

Entertainment; music and night club services; discotheque services.

40. Insofar as the term entertainment in the application is sufficiently broad to include disco and nightclub services, I will deal with these services together. The opponent states that the contested services in class 41 are similar to its wine goods in class 33 on account of the complementarity between the goods and services, the end users and overlapping points of sale.

41. I agree with the opponent that notwithstanding the different nature, purpose and method of use of the goods and services, there is a certain degree of similarity between them. Even though wine is, by its nature, different from *entertainment; music and night club services; discotheque services* and does not, in general, have the same business origin, the said goods and services have some points in common. In particular, the opponent's *wine* is normally consumed to accompany a meal or for fun, while the contested *entertainment; music and night club services; discotheque services* involve the activity of preparing and serving alcoholic beverages in a place where people go to have fun.[2] Therefore, taking into account that (a) it is not common (although not implausible) in the market for a producer of wine to provide the discos and nightclubs services (b) the complementarity between the goods and services, which entails a partial coincidence in the points of sale to the same public, I consider these services to be similar to a **low degree.**

Consultancy, information and advisory services relating to all the aforesaid services.

42. These services are consultancy services relating to entertainment; music and night club services; discotheque services. In my view these services are one step removed from the opponent's *wine* and are **dissimilar.**

Class 43

Provision of food and drink; hotel services; restaurant and bar services; catering services; preparation and serving of food and beverages.

43. The opponent states that *restaurant, cafe and bar services* are similar to *wine* because they are complementary, as it is common to find house-branded wines in such venues. It also states that according to case-law established in a variety of cases over time (none of which is mentioned), there is complementarity between different foodstuffs and drinks and services for providing food and drink because those foodstuffs and drinks are necessary for the provision of the respective services. Finally, the opponent refers to market practices concerning different foodstuffs and

[2] T-161/07, Coyote ugly, paragraph 35

drinks being available in the same establishments where the services of providing food and drink are offered, or vice versa, and alleges that foodstuffs and drinks may be produced by the same or economically linked entities that also offer services for providing food and drink, or vice versa.

44. The goods and services have a different nature, purpose and method of use and are not in competition. Although I recognise that the opponent's submission about the goods being complementary is not supported by references to specific cases or evidence, it is common knowledge that wines are necessarily used in the serving of food and drinks at any restaurant, bar, hotels and similar facilities with the result that those goods and those services are complementary.[3] Moreover, it is not uncommon for wine producers to run food and drinks establishments, in which they also provide their own wines as part of wine tourism marketing activities which include the tasting, consumption or purchase of wine, often at or near the source. Further, it is not unusual to find restaurants and bars which also sell their own goods, including wine; this may be a commercial technique used to promote goods which may then also be purchased in the same place.[4] I consider these services to be similar to a **low degree.**

Information and advisory services to all the aforesaid services.

45. These services are information and advisory services relating to provision of food and drink; hotel services; restaurant, cafe and bar services; catering services; sandwich and snack bar services; preparation and serving of food and beverages. In my view these services are one step removed from the opponent's wine and are **dissimilar.**

Sandwich and snack bar services; café services; Information and advisory services to all the aforesaid services.

46. *Sandwich and snack bar services* are places where sandwiches and snacks are sold. Café is defined as "*a place where you can buy drinks, simple meals, and snacks,*

[3] T-345/09, *Puerta De Labastida / Castillo Labastida,* paragraphs 51-53; T-84/14 & T-97/14, *Harry's New York Bar / Pub Café Harrys Restaurant* paragraph 68.
[4] T-467/20, Zara paragraph 131.

but, in Britain, not usually alcoholic drinks" (Collins online dictionary). Whilst those places sell soft drinks, they do not normally sell wine or other alcoholic drinks and in the absence of any evidence to the contrary, I do not consider it typical of trade for cafés and snack bars to offer wine. Hence, I cannot see any meaningful similarity between these services and the opponent's wine. These services are **dissimilar.**

47. In *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, Lady Justice Arden stated that:

> "49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity.

48. As I found some of the goods and services to be dissimilar, the opponent's claim under Section 5(2)(b) fails in relation to these goods and services, namely:

> **Class 32:** *Syrups for making beverages; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines.*
>
> **Class 35:** *Advertising; marketing; sales promotions; retail services and wholesale services connected with the sale of food; business information; online ordering services; consultancy, information and advisory services to all the aforesaid services.*
>
> **Class 41:** *Consultancy, information and advisory services relating to entertainment, music and night club services, discotheque services.*
>
> **Class 43:** *Sandwich and snack bar services; café services; information and advisory services to the following services: provision of food and drink, hotel*

services, restaurant, cafe and bar services, catering services, sandwich and snack bar services, preparation and serving of food and beverages.

Average consumer

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

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

50. The average consumer for the goods and services will typically be a member of the general public (who is over the age of 18, in the case of alcoholic drinks).

51. The relevant goods and services are sold through a range of channels including bars, restaurants, nightclubs, hotels and supermarkets, as well as online. In retail stores, the goods will be on open display, where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods or book the services having viewed an image displayed on a web page. Consumers might also select the services from signage outside outlets, bars, restaurants, nightclubs and hotels. In these circumstances, visual considerations will dominate the process. The goods may also be purchased following perusal of the goods at food and drink venues (either on taps, on shelves or in fridges behind the bar or, alternatively, on a drinks list). Consequently, visual considerations are likely to

dominate the purchasing process. However, I do not discount an aural component to the purchase given that advice may be sought from retail assistants and orders may be placed verbally in a bar or restaurant.

52. Although the price of the goods and services can vary considerably, on balance it seems to me that the cost of the purchase is not so high as to attract a higher-than-normal degree of attention. Whilst factors such as flavour and alcohol content are also likely to be considered when purchasing the goods, and factors such as location, facilities and type of food and drinks on offer are likely to be considered when selecting the services, the degree of attention paid by the average consumer of these goods and services is likely to be medium.

Comparison of marks

53. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

> ".....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

54. 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.

55. The respective marks are shown below:

The applicant's marks	The opponent's mark
FLOWER CAFE FLOWER DRINKS	FLOWERS

Overall Impression

The earlier mark

56. The opponent's mark consists of the word FLOWERS presented in a standard upper-case font. Therefore, the overall impression of the mark lies in the word itself.

The contested mark FLOWER CAFE

57. The applicant's '035 mark, i.e. FLOWER CAFE, consists of two words FLOWER and CAFE presented in capital letters in a standard font without any other elements to contribute to the overall impression. The word FLOWER is neither descriptive nor allusive of the goods and services applied-for. Collins online dictionary gives different spelling of the word CAFE, namely with an accent on the final E and without it, as shown below:

"**Café**

1. *A café is a place where you can buy drinks, simple meals, and snacks, but, in Britain, not usually alcoholic drinks*.
2. *A street café or a pavement café is a café which has tables and chairs on the pavement outside it where people can eat and drink."*

"**Cafe**

in British English

small or inexpensive restaurant serving light refreshments".

"**Café**

in British English

a small or inexpensive restaurant or coffee bar, serving light meals and refreshments".

58. These dictionary definitions suggest that there is no difference between the words café and cafe, insofar as they both denote a place where the public can buy drinks and simple meals or snacks (but typically not alcoholic drinks).

59. Although the applicant's services in class 43 belong to the same category as those of cafés/cafes, i.e. hospitality and the provision of food and drinks, the word CAFE is not descriptive of the services that I found to be similar because (a) hotels, restaurants, bars and catering companies offer different types of services compared to those offered by cafés/cafes, and (b) whilst *provision of food and drink; and preparation and serving of food and beverages* are broad terms that cover café services, since I found that café services are dissimilar to the opponent's wine (because cafés do not sell wine), it follows that *provision of food and drink; and preparation and serving of food and beverages* are still in play but only insofar as they do not cover café services. In any event, even if I am wrong, and the word CAFE has a strong conceptual hint or allusion to the contested services in class 43, the phrase FLOWER CAFE has a unitary character that extends beyond the individual elements; it follows that the word CAFE will not be perceived as used descriptively but will be seen as part of a distinctive trade mark, with both elements FLOWER and CAFE contributing equally to the overall impression.

The contested mark FLOWER DRINKS

60. The applicant's '044 mark, i.e. FLOWER DRINKS, consists of two words FLOWER and DRINKS presented in capital letters in a standard font without any other elements to contribute to the overall impression. As the applicant's goods in classes 32 and 33, are various types of drinks, I note that the word DRINKS is descriptive and will have no or little impact on the consumers. The word FLOWER is neither descriptive nor allusive of the goods applied-for, and is the dominant and distinctive element of the mark.

Visual and aural similarity

61. Visually and aurally, the earlier mark consists of the seven-letter word FLOWERS. The singular version of the same word, i.e. FLOWER, is found identically at the beginning of the contested marks. The ‘035 mark ends in the four-letter word CAFE and the ‘044 mark ends in the six-letter word DRINKS, neither of which are replicated in the earlier mark.

62. I find that the marks FLOWER CAFE and FLOWERS are visually and aurally similar to a medium degree.

63. However, as the word DRINK in the ‘044 mark is wholly descriptive, I consider that this mark and the earlier mark are visually and aurally similar to a high degree.

Conceptual similarity

64. As regards the conceptual similarity, the opponent states as follows:

> “Conceptually, the marks are also highly similar. The dominant and distinctive element of all marks is the English noun FLOWER, which refers to the seed-bearing part of a plant. This element is shown in the plural form in the Opponent's mark and the singular form in the Applicant's marks, which is a minor and insignificant difference unlikely to be noticed by consumers.
>
> The additional words CAFE and DRINKS in the Applicant's marks are descriptive and/or non-distinctive in relation to the goods applied for, such as alcoholic beverages. Due to this and their placement at the end of the Applicant's marks, the elements CAFE and DRINKS would not be afforded trade mark significance by the consumer, who would focus on the shared element FLOWER-. As a general rule, the public will not consider a descriptive element forming part of a complex mark to be the distinctive and dominant element in the overall impression conveyed by that mark.”

65. The applicant states that the marks are conceptually different:

> "The mark FLOWERS means several blooms or plants that possess petals. This word is commonly understood as just a plant and in the case of the Opponent's wine goods, suggests that their products may have some Flowers scent or ingredient that makes them aromatic".
>
> "The Applicant's mark on the other hand, FLOWER CAFE, would be perceived as a place where consumers will go to have coffee or tea rather than a plant or a blossom. The relevant public would therefore perceive the Applicant's mark as being a made-up combination of words and fanciful combination for a location or at least a combination of words that have a totally different meaning to that of the word FLOWERS. Therefore, the two marks in issue are conceptually different."
>
> "The Applicant's mark on the other hand, FLOWER DRINKS, would be perceived as a place where consumers will go to have any sort of refreshments, coffee or tea, rather than a plant or a blossom. The relevant public would therefore perceive the Applicant's mark as being a made-up combination of words and fanciful combination for a location or at least a combination of words that have a total different meaning to that of the word FLOWERS. Therefore, the two marks in issue are conceptually different."

66. The words FLOWERS, FLOWER, CAFE and DRINKS and their meanings will be very well-known to the average consumer.

67. The word FLOWER is defined as *"the part of a plant which is often brightly coloured, grows at the end of a stem, and only survives for a short time"* (Collins online dictionary). Since the word FLOWERS of the earlier mark is presented in the plural form, it will convey the concept of a multitude of flowers.

68. In its submissions, the applicant states that the word FLOWERS in the earlier mark suggests that the products may have some flowers scent or ingredient that makes them aromatic. I reject the submission. In my view, the average consumer seeing the earlier mark FLOWERS on a bottle of wine is unlikely to associate it with a characteristic of the goods because wines are typically aromatised with fruits and

spices but not with flowers; rather, he/she will see it as the name of the vineyard from which the wine originates.

69. Turning to applicant's FLOWER DRINKS mark, I agree with the opponent that when considered in relation to the beverage goods for which the mark seeks registration, the word DRINKS is likely to be regarded as being used in a descriptive way (indeed it actually appears in the applied-for specification in classes 32 and 33). Further, I reject the applicant's argument that the mark FLOWER DRINKS is unitary and would be perceived as a place where consumers will go to have a drink, coffee or tea as neither the word FLOWER nor the word DRINK (alone or in combination) convey the concept of a place. Finally, I do not think that consumers will see FLOWER DRINKS as a sign describing drinks that may have some flowers scent or ingredient that makes them aromatic, as the specification is not limited to aromatic drinks. Consequently, when the mark FLOWER DRINKS is applied to drinks that have nothing to do with flowers (that being the best-case scenario for the opponent which is covered by the notional use of the contested mark), the word FLOWER will be perceived as having independent trade mark significance whereas the word DRINKS will be perceived as descriptive. Overall, I consider that the marks FLOWER DRINKS and FLOWERS are conceptually similar to a high degree.

70. Turning to the applicant's FLOWER CAFE mark, as it will be recalled, I found that the average consumer is likely to perceive the word CAFE as a distinctive element within the unit FLOWER CAFÉ. The mark has a whole will, in my view, convey the concept of a themed café or a floral café whereas the earlier mark FLOWERS will convey the concept of a multitude of flowers. The marks are conceptually different; if I am wrong, they are conceptually similar to a low degree.

Distinctive character of earlier mark

71. 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 C-108/97 and C-109/97 *WindsurfingChiemsee* v *Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

72. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or 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 made of it.

73. The word FLOWERS is a dictionary word that is neither descriptive nor allusive in relation to wine. Whilst the applicant has provided a few examples of use of the word FLOWER in trade, they are all undated and it is not clear to what extent those marks have been used. In its counterstatement, the applicant states as follows:

"By Opposing the Applicant's mark based on the fact that both marks at issue incorporate the word FLOWER, the Opponent is trying to monopolize a descriptive word which is commonly used in relation to most of the goods or services in the Nice classification and in particular wine, drinks in general, restaurants, coffee places, entertainment amongst others. The Applicant's

contention that the common element the word FLOWER, is not the most distinctive component of the conflicting marks is further supported by the fact that there are several national registrations for or including this word, in fact a simple search of marks for or incorporating the word FLOWER returned around 700 entries. Further, when searching only in relation to the goods and services in question the search returned approximately 80 marks all peacefully co-existing."

74. In *THE NEWS HUB* (figurative), BL O/0432/24, Professor Phillip Johnson, sitting as the Appointed Person, confirmed the correctness of the Hearing Officer's approach that considered the state of the register evidence but did not give it any weight. He stated:

> "While "state of the register" evidence is admissible it is also the case that it is usually both "irrelevant" to what is being considered by the tribunal (BREXIT (O/262/18 at [10]; *British Sugar plc v James Robertson & Sons Ltd* [1996] RPC 281 at 305) and "worthless" in terms of evidential weight: *Lifestyle Equities CV v Royal County of Berkshire Polo Club Ltd* [2022] EWHC 1244 (Ch)".[5]

75. Accordingly, the presence of other trade marks incorporating the word FLOWER/FLOWERS on the trade mark register cannot assist the opponent in establishing that the distinctiveness of the earlier mark FLOWERS has been weakened. Overall, I consider the earlier mark to be distinctive to a medium degree.

Likelihood of confusion

76. 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 marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the

[5] Paragraph 18

average consumer for the goods and services 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 marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

77. Confusion can be direct or indirect. The difference between these two types of confusion was explained in *L.A. Sugar Trade Mark,* BL O/375/10, where Iain Purvis Q.C. (as he then was) as the Appointed Person explained that:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ("26 RED TESCO" would no doubt be such a case).
>
> (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand

extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

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

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

79. Earlier in this decision I found that:

- some of the parties’ goods are similar to a low degree, or a medium to low degree;

- The earlier mark and the FLOWER DRINKS mark are visually, aurally and conceptually similar to high degree;

- The earlier mark and the FLOWER CAFÉ mark are visually and aurally similar to a medium degree, and conceptually different or, alternatively, similar to a low degree;

- The earlier mark is distinctive to a medium degree.

80. Taking into account the above factors, I am persuaded that there is no likelihood of direct confusion. Direct confusion is unlikely to arise where the goods are not identical or close to being so.[6] In this case, the low, at best low-to-medium, degree of similarity between the goods, and the goods and services, means that the average

[6] CALEDONIAN, BL-O/382/16

consumer would not accidently buy the applicant's goods and services in the belief that they are the opponent's wine.

81. In terms of indirect confusion, I will deal with the '044 mark first.

82. In my view, there is a likelihood of indirect confusion with the mark FLOWER DRINKS. This is because given the descriptive nature of the word DRINKS in relation to the goods for which the mark is applied-for (all of which are drinks) it is likely that the average consumer will not attribute any trade mark significance to that element of the mark and will overlook the differences created by the final S in the earlier mark FLOWERS. Although the goods are similar only to a low degree, the earlier mark is distinctive to a medium degree and the only element of the applied-for mark which the average consumer is likely to perceive as denoting origin is nearly identical to the earlier mark, making the average consumer likely to (a) confuse the element FLOWER and FLOWERS in the respective marks, and (b) overlook the descriptive element DRINKS in the contested mark and (c) think that the opponent's wine business has expanded into other categories of drinks and beverages.

83. The opposition against the '044 mark FLOWER DRINKS is successful in relation to the following goods:

> **Class 32:** *Beers; soft drinks, mineral and aerated waters; non-alcoholic drinks; fruit drinks and fruit juices; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines.*
>
> **Class 33:** *Alcoholic beverages (except beer); all the aforesaid goods excluding wine.*

84. The opposition against the '044 mark FLOWER DRINKS fails in relation to the following goods:

> **Class 32:** *syrups for making beverages; all the aforesaid goods excluding non-alcoholic wines and de-alcoholised wines.*

85. I now turn to the ‘035 mark.

86. In my view, the low or low to medium degree of similarity between the goods and services, the conceptual dissimilarity (or low degree of similarity) between the marks and the unitary character of the mark FLOWER CAFE are sufficient to prevent the average consumer from extrapolating the word FLOWER in the application and attributing it independent trade mark significance. This is all of the more so since the word FLOWER is a common dictionary word, and it is not so distinctive that the average consumer will think that no one else aside from the opponent uses it in trade. There is no likelihood of indirect confusion.

87. The opposition against the ‘035 FLOWER CAFE mark fails in its entirety.

OUTCOME

88. The opposition against the mark UK00003803044 FLOWER DRINKS is successful in relation to the goods listed at paragraph 83 which will be refused registration, and fails in relation to the goods listed at paragraph 84 which can proceed to registration.

89. The opposition against the mark UK00003803035 FLOWER CAFE fails in its entirety and the mark can proceed to registration.

COSTS

90. As each party have achieved a measure of success, I order that each party bear their own costs.

Dated this 8th day of July 2024

TERESA PERKS
For the Registrar