

O/083/22

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3545520
BY MURDOCH ALLAN AND SON LTD & ABERDEEN BUTTERY COMPANY LTD
TO REGISTER THE TRADE MARK:**



IN CLASSES 21, 25, 32 & 33

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 423374
BY SERIOUSLY VODKA LIMITED**

Background and pleadings

1. On 19 October 2020, Murdoch Allan and Son Ltd and Aberdeen Buttery Company Ltd

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3545520 (“the contested mark”). The contested mark was published in the Trade Marks Journal for opposition purposes on 4 December 2020. Registration is sought for the following goods:

Class 21: Brush-making materials; Articles for cleaning purposes; Steelwool; Unworked or semi-worked glass [except glass used in building]; Glassware; porcelain and earthenware; crystalware; decorative articles; utensils and other goods made from glass; crystal or porcelain; bowls; goblets; glasses, jugs; dishes; plates; figurines; drinking vessels.

Class 25: Adhesive bras; Adhesive brassieres; After ski boots; Aikido suits; Aikido uniforms; Albs; Aloha shirts; American football bibs; American football pants; American football shirts; American football shorts; American football socks; Anglers' shoes; Ankle boots; Ankle socks; Anklets [socks]; Anoraks; Anoraks [parkas]; Anti-perspirant socks; Anti-sweat underclothing; Anti-sweat underwear; Après-ski boots; Apres-ski shoes; Aprons; Aprons [clothing]; Aqua shoes; Arm warmers [clothing]; Army boots; Articles of clothing; Articles of clothing for theatrical use; Articles of clothing made of hides; Articles of clothing made of leather; Articles of outer clothing; Articles of sports clothing; Articles of underclothing; Ascots; Ascots (ties); Athletic clothing; Athletic footwear; Athletic shoes; Athletic tights; Athletic uniforms; Athletics footwear; Athletics hose; Athletics shoes; Athletics vests; Babies' clothing; Babies' outerclothing; Babies' pants [clothing]; Babies' pants [underwear]; Babies' undergarments; Babushkas; Baby bibs [not of paper]; Baby bodysuits; Baby boots; Baby bottoms; Baby clothes; Baby doll pyjamas; Baby layettes for clothing; Baby pants; Baby sandals; Baby shoes; Baby tops; Balaclavas; Ball gowns; Ballet shoes; Ballet slippers; Ballet suits; Ballroom dancing shoes; Bandanas; Bandanas [neckerchiefs]; Bandannas; Bandeaux [clothing]; Barber smocks; Baseball caps; Baseball caps and hats; Baseball hats; Baseball shoes; Baseball uniforms; Baselayer bottoms; Baselayer tops; Basic upper garment of

Korean traditional clothes [Jeogori]; Basketball shoes; Basketball sneakers; Bath robes; Bath sandals; Bath slippers; Bathing caps; Bathing costumes; Bathing costumes for women; Bathing drawers; Bathing suit cover-ups; Bathing suits; Bathing suits for men; Bathing trunks; Bathrobes; Beach clothes; Beach clothing; Beach cover-ups; Beach footwear.

Class 32: Aerated fruit juices; Aerated juices; Aerated mineral waters; Aerated water; Aerated water (Preparations for making -); Aerated water [soda water]; Aerated waters; Alcohol free aperitifs; Alcohol free beverages; Alcohol free cider; Alcohol free wine; Alcohol-free beers; Ale; Ales; Aloe juice beverages; Aloe vera drinks, non-alcoholic; Aloe vera juices; Aperitifs, non-alcoholic; Apple juice beverages; Apple juice drinks; Barley wine [Beer]; Barley wine [beer]; Beer; Beer and brewery products; Beer wort; Beer-based beverages; Beer-based cocktails; Beers; Beers enriched with minerals; Beverages consisting of a blend of fruit and vegetable juices; Beverages consisting principally of fruit juices; Beverages containing vitamins; Beverages (Non-alcoholic -); Beverages (Preparations for making -); Beverages (Whey -); Birch water; Bitter lemon; Black beer; Black beer [toasted-malt beer]; Blackcurrant cordial; Blackcurrant juice; Bock beer; Bottled drinking water; Bottled water; Brown rice beverages other than milk substitutes; Carbohydrate drinks; Carbonated mineral water; Carbonated non-alcoholic drinks; Carbonated soft drinks; Carbonated water; Carbonated waters; Cider, non-alcoholic; Cocktails, non-alcoholic; Coconut juice; Coconut water; Coconut water as a beverage; Coconut water as beverage; Coconut-based beverages; Coffee-flavored ale; Coffee-flavored beer; Coffee-flavored soft drinks; Cola; Cola drinks; Colas [soft drinks]; Concentrated fruit juice; Concentrated fruit juices; Concentrates for making fruit drinks; Concentrates for making fruit juices; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Condensed smoked plum juice; Cordials; Cordials [non-alcoholic]; Cordials (non-alcoholic beverages); Craft beer; Craft beers; Cranberry juice; Cream soda; De-alcoholised beer; De-alcoholised drinks; De-alcoholised wines; De-alcoholized beer; De-alcoholized drinks; De-alcoholized wines; Dilutable preparations for making beverages; Distilled drinking water; Douzhi (fermented bean drink); Drinking mineral water; Drinking spring water; Drinking water;

Drinking water with vitamins; Drinking waters; Dry ginger ale; Effervescing beverages (Pastilles for -); Effervescing beverages (Powders for -); Energy drinks; Energy drinks containing caffeine; Energy drinks [not for medical purposes]; Essences for making beverages; Essences for making flavoured mineral water [not in the nature of essential oils].

Class 33: Alcoholic beverages [except beers and wines], cider; perry; mead; spirits and liqueurs; whisky and whisky based liqueurs; gin; vodka; rum; alcopops; alcoholic cocktails.

2. On 1 March 2021, Seriously Vodka Limited (“the opponent”) filed a notice of opposition. The opposition was originally brought under sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). However, as the opponent elected not to file any evidence (of which the Registry was informed by correspondence dated 6 August 2021), its claim under section 5(3) was withdrawn and the opposition now continues under section 5(2)(b) only. The opposition is directed against all the goods of the application. The opponent relies on its UK trade mark number 3248581, **SERIOUSLY** (“the earlier mark”). The earlier mark was filed on 7 August 2017 and became registered on 3 November 2017 in respect of the following goods, all of which are relied upon for the purposes of the opposition:

Class 32: Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages; non-alcoholic drinks.

Class 33: Alcoholic beverages (except beers); vodka.

3. Given the respective filing dates, the opponent’s mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods for which the earlier mark is registered without having to establish genuine use.

4. The opponent also originally intended to rely upon its EU trade mark number 6461255 for its claim under section 5(2)(b). However, as it was subject to proof of use

and no evidence of use was filed by the opponent, reliance upon this particular mark was withdrawn.

5. In its notice of opposition, the opponent essentially argues that the respective goods are identical or similar and that the marks are similar, giving rise to a likelihood of confusion, including a likelihood of association.

6. The applicants filed a counterstatement denying the ground of opposition. In their counterstatement, the applicants admit that some of their goods in classes 32 and 33 are identical to those of the earlier mark, whilst others are similar. However, the applicants deny that their goods in classes 21 and 25 are similar to the goods of the earlier mark. The applicants deny that there is a likelihood of confusion.

7. The opponent is professionally represented by Stobbs, whereas the applicants are professionally represented by Lawrie IP Limited. Both parties were given the option of an oral hearing, though neither asked to be heard on this matter. Only the opponent filed written submissions in lieu of an oral hearing. Whilst I do not intend to summarise these, I have taken them into consideration and will refer to them as and where appropriate during this decision. This decision is taken following a careful perusal of the papers.

8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark case law.

Preliminary issue

9. It is worth mentioning at this point that the opponent's written submissions filed on 8 December 2021 also included evidence. I note that the opponent's deadline for providing its evidence expired on 11 August 2021. As outlined above, by correspondence dated 6 August 2021 the opponent confirmed that it did not wish to file any evidence in support of its case. Moreover, I note that no formal request to file evidence after the deadline has been made by the opponent. Accordingly, I cannot take the evidence produced alongside the written submissions into account. However,

even if I were to place any weight on the evidence provided, it is my view that this does not further the opponent's claim.

Decision

Section 5(2)(b)

10. Sections 5(2)(b) and 5A of the Act read as follows:

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

[...]

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

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

Case law

11. I am guided by the following principles which 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 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

12. Section 60A of the Act provides:

“(1) For the purpose 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.

(2) In subsection (1), the "Nice Classification" means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

13. Put simply, this means that whether the goods are in the same or different classes is not decisive in determining whether they are similar or dissimilar. Therefore, what matters is the actual goods at issue and whether they are similar or not having regard to the case law that follows.

14. In *Canon*, Case C-39/97, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment that:

“In assessing the similarity of the goods or services concerned, [...] 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”.

15. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(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.

16. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless, the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question”.

17. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Merici')*,¹ the General Court (“the GC”) stated that:

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

18. For the purposes of considering the issue of similarity of goods or services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

¹ Case T-133/05

19. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (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”.

20. 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, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C., sitting as the Appointed Person, noted 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”,

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. In their counterstatement,² the applicants conceded that the following goods in the application are identical to those covered under the earlier mark:

Class 32: Aerated mineral waters; Aerated water; Beers; Beverages consisting of a blend of fruit and vegetable juices; Beverages consisting principally of fruit juices; Beverages (Non-alcoholic -); Concentrated fruit juice.

Class 33: Alcoholic beverages [except beers].

Class 33

Vodka

22. The term “vodka” is explicitly named in both the applicants’ and the opponent’s specification and is therefore identical.

Alcoholic beverages [except beers and wines]

23. The applicants’ term includes all alcoholic beverages other than beers and wines. The opponent’s “alcoholic beverages (except beers)” provides protection for all alcoholic beverages, except beers. It is considered that the applicants’ term is encompassed by the opponent’s broader term and, as such, I find that the respective goods are *Merici* identical.

Cider; perry; mead; spirits and liqueurs; whisky and whisky based liqueurs; gin; rum; alcopops; alcoholic cocktails.

24. The term “alcoholic beverages, (except beers)” in the opponent’s specification is broad enough to encompass all the above goods, being particular examples of alcoholic beverages. As such, I find the respective goods identical under the principle outlined in *Merici*.

² Counterstatement, paragraph 7

Class 32

Ale; Ales; Barley wine [beer]; Beer; Beer and brewery products; Beer-based beverages; Beer-based cocktails; Beers enriched with minerals; Black beer; Black beer [toasted-malt beer]; Bock beer; Coffee-flavored ale; Coffee-flavored beer; Craft beer; Craft beers

25. The term “Beers” in class 32 of the opponent’s specification is also broad enough to cover the above goods in the applicants’ specification. I find that these goods are identical under *Meric*.

Aerated fruit juices; Aerated juices; Aerated water [soda water]; Aerated waters; Alcohol free aperitifs; Alcohol-free beers; Alcohol free beverages; Alcohol free cider; Alcohol free wine; Aloe juice beverages; Aloe vera drinks, non-alcoholic; Aloe vera juices; Aperitifs, non-alcoholic; Apple juice beverages; Apple juice drinks; Beverages containing vitamins; Beverages (Whey -); Birch water; Bitter lemon; Blackcurrant cordial; Blackcurrant juice; Bottled drinking water; Bottled water; Brown rice beverages other than milk substitutes; Carbohydrate drinks; Carbonated mineral water; Carbonated non-alcoholic drinks; Carbonated soft drinks; Carbonated water; Carbonated waters; Cider, non-alcoholic; Cocktails, non-alcoholic; Coconut juice; Coconut water; Coconut water as a beverage; Coconut water as beverage; Coconut-based beverages; Coffee-flavored soft drinks; Cola; Cola drinks; Colas [soft drinks]; Concentrated fruit juices; Condensed smoked plum juice; Cordials; Cordials [non-alcoholic]; Cordials (non-alcoholic beverages); Cranberry juice; Cream soda; De-alcoholised beer; De-alcoholised drinks; De-alcoholised wines; De-alcoholized drinks; De-alcoholized wines; Distilled drinking water; Douzhi (fermented bean drink); Drinking mineral water; Drinking spring water; Drinking water; Drinking water with vitamins; Drinking waters; Dry ginger ale; Energy drinks; Energy drinks containing caffeine; Energy drinks [not for medical purposes]

26. The term “Non-alcoholic drinks” found within class 32 of the opponent’s specification would cover all the above non-alcoholic beverages. As such I find that the goods are identical following the principle identified in *Meric*.

Aerated water (Preparations for making -); Beer wort; Beverages (Preparations for making -); Concentrates for making fruit drinks; Concentrates for making fruit juices; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Dilutable preparations for making beverages; Effervescing beverages (Pastilles for -); Effervescing beverages (Powders for -); Essences for making beverages; Essences for making flavoured mineral water [not in the nature of essential oils]

27. Finally, in relation to the above goods, in my opinion these would be covered under the opponent's term "Syrups and other preparations for making beverages". Equally, I find these goods identical under the principle of *Meric*.

Class 25

28. When considering the relevant factors outlined in the case law above, I find the goods listed in class 25 of the application and the opponent's goods to be dissimilar. The terms set out within the applicants' specification under class 25 can broadly be described as clothing, footwear and headgear, whereas the opponent's goods encompass beverages (both alcoholic and non-alcoholic) as well as components for making beverages. Clearly, the physical nature of these goods is completely different. The opponent's goods are consumed for thirst, enjoyment or taste; in contrast, the applicants' goods in class 25 are to be worn for fashion or for practicality. Therefore, the method of use and intended purpose of the respective goods are entirely different.

29. The opponent claims in its submissions that "alcoholic beverage brands regularly produce merchandise such as [...] items of clothing and these are sold alongside their 'core' goods in the likes of bars and pubs and as giftsets in online and offline retail establishments".³ I do not discount that particular items of clothing such as T-shirts and baseball caps may, in very limited circumstances, be sold by the producers of certain alcoholic drinks, such as breweries, as promotional merchandise. In that regard, there may be some limited overlap in trade channels.

³ Written Statement, (unnumbered, not paragraphed)

However, I do not find that this is typical of the trade; the vast majority of pubs, bars or drinks manufacturers would not sell clothing, footwear or headgear, and the vast majority of clothing outlets would not sell alcohol products. This is especially the case when you consider items in the applicants' specification such as "ball gowns; ballet shoes; ballet slippers; ballet suits; ballroom dancing shoes; babies' clothing; basic upper garment of Korean traditional clothes [Jeogori]". These items in particular are highly unlikely to originate from the same source as alcoholic beverages. I find that the limited overlap in trade channels is not sufficient enough to engage any overall similarity between the respective goods.

30. Similarly, I also accept that the respective goods are likely to share users, i.e. the general public. However, that is also far too broad an overlap to engage any similarity between the goods overall.

31. Additionally, the goods are not competitive in nature or complimentary.

Class 21

Unworked or semi worked glass [except glass used in building]; Glassware; crystalware; utensils and other goods made from glass; crystal or porcelain; goblets; glasses, jugs; drinking vessels"

32. The above goods in class 21 are particular examples of, or could include, drinkware products. They are linked to the opponent's goods insofar as they can hold the beverages. However, this is not enough by itself to engage any similarity between the respective goods. The goods completely differ in uses and physical nature. The intended purpose of a beverage is to quench thirst or for enjoyment or taste, whereas the intended purpose of drinkware is to act as a receptacle to hold drinks. Similarly, the goods also differ with regards to trade channels and distributors; although they may both be found in large retailers such as supermarkets, they are not found in the same sections of those outlets and are commonly located within different aisles. The respective goods are also not competitive in nature.

In relation to complementarity between drinkware and beverages, I adopt the same approach as was taken in the *Sandra Amelia Mary Elliot* case, outlined above. The use of drinkware for beverages, by itself, is not sufficient for a finding of complementarity, it does not mean that they are important or indispensable to one another in such a way that consumers will assume they are produced by the same undertaking. Although matching glasses for certain drinks is becoming more popular, i.e. beer brands having matching beer glasses, it is certainly not commonplace and, overall, it is not typical of trade to have the same undertaking producing and selling both products; it would be quite customary for your drink to be poured into a glass not associated with the drink that you have ordered. For these reasons, I find that drinkware and beverages are dissimilar.

Porcelain and earthenware; utensils and other goods made from glass; crystal or porcelain; bowls; dishes; plates

33. The above goods are all connected to serving food rather than containing drinks and, as such, I find that these items are dissimilar to the goods within the opponent's specification; the respective goods differ in use, method of use, intended purpose, physical nature, trade channels and distribution. These goods would be found in different shops or on different aisle within a supermarket. Furthermore, the goods are neither competitive nor complimentary.

Decorative articles; figurines

34. These terms again differ in nature, use, intended purpose, method of use and trade channels to the goods found in the opponent's specification. These goods are not important or essential to the consumption of drinks, or vice versa, and, as such, are not complementary. Neither is there any competition between them. Overall, I find that the respective goods are dissimilar.

Brush-making materials; Articles for cleaning purposes; Steelwool

35. The above terms all describe products related to cleaning. When compared with the opponent's goods, there is no overlap in nature, method of use, intended purpose or trade channels. The respective goods are neither complementary nor in competition. In light of this, I find the respective goods dissimilar.

The average consumer and the nature of the purchasing act

36. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

37. 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.”

38. I find that relevant consumers of the goods at issue for which I have found similarity, i.e. those specified within classes 32 and 33, will include members of the general public as well as members of the business community. In respect of the alcoholic goods found in these classes, consumers will consist solely of those aged 18 and over.

39. On average, the general public are likely to purchase the goods rather frequently for the purposes of quenching thirst, enjoyment or socialising. The price of the goods is likely to vary, though, overall, they are relatively inexpensive purchases.

As such, I find that the purchasing process is likely to be more casual than careful and will not require an overly considered thought process. The general public will, however, consider factors such as quality, price, origin of the goods, taste or flavour when selecting the products. In addition, the general public will consider the alcoholic content of the product when selecting alcoholic beverages. Taking the above factors into account, I find that the general public will demonstrate an average level of attention in respect of these goods. The goods are typically sold through a range of retail outlets, such as supermarkets, and their online equivalents. In such outlets, the goods will be displayed on shelves or in chilled cabinets, from which they will be self-selected by consumers. A similar process will apply to websites, where consumers will select the goods after viewing images and information displayed on a webpage. In the foregoing circumstances, visual considerations would dominate. Goods such as these are also sold in hospitality settings such as in cafés, drinks kiosks, restaurants, bars, nightclubs and public houses. In these environments, there may be an aural component to the selection process, such as requests to serving staff. However, even where the goods are ordered in this way, the selection process would still be in the context of a visual inspection of the goods or a drinks list, for example, prior to the order being placed. As such, overall, it is my view that the purchasing process would be primarily visual in nature, though I do not discount that aural considerations will play their part.⁴

40. As indicated above, the goods may also be purchased by the owners of businesses such as, for example, shops, kiosks, cafés, bars, public houses, restaurants and nightclubs. For these consumers, the goods are likely to be frequent purchases for the ongoing operation of the business. In addition to the factors considered by the general public during the selection process, these consumers will be acutely aware that the goods they are selecting will be consumed by their customers, as well as the negative impact of choosing the wrong goods for their business. Due to this increased responsibility and liability, it is my view that consumers from the business community will demonstrate an above average level of attention when purchasing these goods. Businesses are likely to purchase the goods from distributors and wholesalers, as well as through

⁴ *Simonds Farsons Cisk plc v OHIM*, Case T-3/04

online channels. In these circumstances, the goods are likely to be purchased after a visual inspection of the product, or after viewing information in brochures or on the internet. As such, the purchasing process will be largely visual in nature. However, businesses may also engage in discussions with salespersons about the products. Therefore, I do not discount aural considerations entirely.

Comparison of the marks


41. It is clear from *Sabel BV v. Puma AG*⁵ 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 them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, Case C-591/12P, that:

“34. [...] 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.”

42. It would therefore be wrong to artificially dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create.

43. The respective trade marks are shown below:

⁵ Case C-251/95, paragraph 23

Earlier mark	Contested mark
SERIOUSLY	

Overall impressions

44. The earlier mark is in word-only format and consists of the word “SERIOUSLY”. Given that it is the only element of the mark, the overall impression lies in the word itself.

45. The contested mark consists of the words “SERIOUSLY SPIRITED” presented on a black curved background device. Presented at either side of this central curved device are two droplets which appear to be falling in opposite directions. The particular arrangement of the figurative elements means that the background device may or may not be seen as the letter “S”. The words “SERIOUSLY SPIRITED” combine to form a singular phrase. As the eye is naturally drawn to elements that can be read, the phrase is slightly more dominant than the figurative element.⁶ However, it should be acknowledged that the figurative elements still contribute to the overall impression, although they will play a lesser role.

Visual comparison

46. The competing marks are visually similar, insofar that they share the same word “SERIOUSLY”. I note that this similarity appears at the beginning of the competing marks, being where consumers tend to focus.⁷ However, the competing marks are visually different in that the contested mark contains an added word “SPIRITED” and the figurative elements, neither of which are replicated in the earlier mark.

⁶ *Wassen International Ltd v OHIM*, Case T-312/03, paragraph 37

⁷ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

These additional elements contribute to the overall impression of the contested mark. Overall, I find that the competing marks are visually similar to a medium degree at best.

Aural comparison

47. The earlier mark comprises of four syllables, i.e. “SEE/REE/US/LEE”, whereas the contested mark consists of seven syllables, i.e. “SEE/REE/US/LEE – SPIR/I/TID”. The competing marks aurally coincide in the first four common syllables, i.e. “SEE/REE/US/LEE”. Although these syllables are the first four of the contested mark and form the entirety of the earlier mark, the contested mark bears three additional syllables which are absent from the earlier mark. In my view, this produces an obvious difference between the two marks. I consider it highly unlikely that the figurative elements of the contested mark would be articulated, despite these elements combining to form the shape of a letter ‘S’. Overall, I find that the competing marks are aurally similar to a medium degree.

Conceptual comparison

48. In my view, the word “SERIOUSLY”, which is the common element within both marks, is a common word used in everyday language with several dictionary definitions. Its meanings include ‘with earnest intent’,⁸ ‘in a serious manner or to a serious degree’,⁹ ‘extremely or remarkably’,¹⁰ or the word can be used as an ‘exclamation or expression of disbelief or surprise’.¹¹ The word may be understood as having any of these meanings. However, I find that the meanings more readily identified in the mind of consumers would either be in a serious manner or to a serious degree, or extremely or remarkably.

49. The word “SPIRITED” found only in the contested mark will be identified by consumers under its ordinary dictionary definition, meaning ‘full of energy,

⁸ <https://www.lexico.com/definition/seriously>

⁹ Ibid

¹⁰ <https://www.thefreedictionary.com/seriously>

¹¹ Ibid

enthusiasm and determination'.¹² When the words are combined, as they are in the contested mark, the word "SERIOUSLY" qualifies the word "SPIRITED". The resultant phrase is likely to be perceived by consumers as meaning extremely or remarkably spirited, i.e. full of energy, enthusiasm and determination to a serious degree. In respect of the applied-for goods which are, or contain sprits, as well as their non-alcoholic counterparts, at least a significant proportion of consumers would perceive the word "SPIRITED" as an allusive reference to the goods, a play on words concerning the kind of beverages offered under the mark. The droplet devices will also be seen as alluding to liquid-based products. Irrespective of whether the letter "S" is identified in the contested mark, it has no semantic content.

50. The two marks overlap insofar as they both convey the meaning associated with the word "SERIOUSLY". However, the competing marks are conceptually different insofar as the contested mark also conveys the meaning associated with the word "SPIRITED" which is absent in the earlier mark. Bearing in mind my assessment of the overall impressions, I find that the competing marks are conceptually similar to a medium degree.

Distinctive character of the earlier trade mark

51. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. 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-

¹² <https://www.lexico.com/definition/spirited>

108/97 and C-109/97 *Windsurfing Chiemsee 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).”

52. 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 or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

53. In *Kurt Geiger v A-List Corporate Limited*, BL O/075/13, Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of ‘distinctive character’ is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

54. In other words, simply considering the level of distinctive character possessed by the earlier mark is not enough. It is important to ask ‘in what does the distinctive character of the earlier mark lie?’ Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

55. Further, although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use. Consequently, I have only the inherent position to consider.

56. Within its written submissions, the opponent argues that the earlier mark is distinctive in relation to the goods for which it is registered as the mark is not in any way descriptive of these goods. At the very least, it contends, the earlier mark possesses an average level of inherent distinctiveness.

57. The earlier mark comprises the plain word “SERIOUSLY”. As outlined above, the word “SERIOUSLY” is an ordinary dictionary word with a number of meanings. I appreciate that none of its meanings have allusive or descriptive qualities in relation to the goods for which it is registered. Overall, I consider that the earlier mark possesses a medium degree of inherent distinctive character.

Likelihood of confusion

58. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor 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 also necessary for me to keep in mind the distinctive character of the opponent’s

trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be aware of 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 they have retained in their mind.

59. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

60. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume

that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.)

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

61. These examples are not exhaustive but provide helpful focus.

62. I have found that the goods in classes 32 and 33 of the application are identical to those of the earlier mark. I have found that the goods in classes 21 and 25 of the application are dissimilar to the goods of the earlier mark. I have found that the relevant consumers of the goods would include members of the general public (both over and under the age of 18 depending on alcoholic content) and members of the business community. I have found that the general public would pay an average degree of attention when selecting the goods, while businesses would pay an above average degree of attention. I have found that the purchasing process will be largely visual, however, I have not discounted aural considerations. The overall impression of the earlier mark is dominated by the word “SERIOUSLY”. I have found that the phrase “SERIOUSLY SPIRITED” is dominant in the contested mark, though the figurative elements still contribute to its overall impression. I have found that the earlier mark and the contested mark are visually, aurally, and conceptually similar to a medium degree. I have also found that the earlier mark has a medium level of inherent distinctive character.

63. 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.”

64. As I have found some of the opposed goods to be dissimilar to the goods of the earlier mark as such the opposition under section 5(2)(b) of the Act must necessarily fail in relation to those goods, namely:

Class 21: Brush-making materials; Articles for cleaning purposes; Steelwool; Unworked or semi-worked glass [except glass used in building]; Glassware; porcelain and earthenware; crystalware; decorative articles; utensils and other goods made from glass; crystal or porcelain; bowls; goblets; glasses, jugs; dishes; plates; figurines; drinking vessels.

Class 25: Adhesive bras; Adhesive brassieres; After ski boots; Aikido suits; Aikido uniforms; Albs; Aloha shirts; American football bibs; American football pants; American football shirts; American football shorts; American football socks; Anglers' shoes; Ankle boots; Ankle socks; Anklets [socks]; Anoraks; Anoraks [parkas]; Anti-perspirant socks; Anti-sweat underclothing; Anti-sweat underwear; Après-ski boots; Apres-ski shoes; Aprons; Aprons [clothing]; Aqua shoes; Arm warmers [clothing]; Army boots; Articles of clothing; Articles of clothing for theatrical use; Articles of clothing made of hides; Articles of clothing made of leather; Articles of outer clothing; Articles of sports clothing; Articles of underclothing; Ascots; Ascots (ties); Athletic clothing; Athletic footwear; Athletic shoes; Athletic tights; Athletic uniforms; Athletics footwear; Athletics hose; Athletics shoes; Athletics vests; Babies' clothing; Babies' outerclothing; Babies' pants [clothing]; Babies' pants [underwear]; Babies' undergarments;

Babushkas; Baby bibs [not of paper]; Baby bodysuits; Baby boots; Baby bottoms; Baby clothes; Baby doll pyjamas; Baby layettes for clothing; Baby pants; Baby sandals; Baby shoes; Baby tops; Balaclavas; Ball gowns; Ballet shoes; Ballet slippers; Ballet suits; Ballroom dancing shoes; Bandanas; Bandanas [neckerchiefs]; Bandannas; Bandeaux [clothing]; Barber smocks; Baseball caps; Baseball caps and hats; Baseball hats; Baseball shoes; Baseball uniforms; Baselayer bottoms; Baselayer tops; Basic upper garment of Korean traditional clothes [Jeogori]; Basketball shoes; Basketball sneakers; Bath robes; Bath sandals; Bath slippers; Bathing caps; Bathing costumes; Bathing costumes for women; Bathing drawers; Bathing suit cover-ups; Bathing suits; Bathing suits for men; Bathing trunks; Bathrobes; Beach clothes; Beach clothing; Beach cover-ups; Beach footwear.

65. In respect of the remaining goods, I acknowledge that the dominant element of the competing marks, i.e. the word “SERIOUSLY”, is identical and that this overlapping element is found at the beginning of the marks, a position to which the attention of the consumer is usually directed. However, I do not consider that the differences between the marks will be overlooked by consumers, especially given the device element on which the words are set and the additional word “SPIRITED”. As a result, it is unlikely that the marks will be misremembered upon a visual inspection of the mark, which is of heightened importance given that I have found the purchasing process to be predominantly visual in nature.¹³ Aurally, the number of syllables differ in the earlier mark compared to the opposed mark and although the first four syllables are identical the following three syllables create enough variance for the consumer to aurally distinguish between the marks, even in, for example, a crowded bar or restaurant. I have also found that the marks are conceptually similar to a medium degree. However, although the marks both convey the meaning associated with the word “SERIOUSLY”, the words in the contested mark will combine to form a unitary meaning, which will also help consumers to distinguish between the marks in their minds. In my judgement, taking all the above factors into account, the differences between the marks are likely to be sufficient for consumers paying at least an average degree

¹³ *Quelle AG v OHIM*, Case T-88/05

of attention to differentiate between the marks, even in relation to identical goods. Consumers are unlikely to mistake the contested mark for the earlier mark (or vice versa). Therefore, even when factoring in the principles of imperfect recollection and interdependency, I consider there is no likelihood of direct confusion.

66. That leaves indirect confusion to be considered. I bear in mind that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion.¹⁴

67. As explained above, consumers will recognise that there is a difference between the competing marks in the word “SPIRITED” and in the figurative elements. However, they will also recognise the common element “SERIOUSLY”, which is a dominant and distinctive element of both trade marks. Whether consciously or unconsciously, this will lead consumers through the mental process described above, namely, that there is a difference between the marks, but there is also something in common.

68. For goods relating to spirits, the word “SPIRITED” would be seen by at least a significant proportion of consumers as a play on words and an allusive reference to those goods. In combination with the common element “SERIOUSLY”, especially when used in connection with identical goods, the contested mark is likely to be perceived as a brand extension, sub brand or variant mark of the earlier mark that alludes to goods that are, or contain, spirits, even where consumers pay an above average degree of attention during the purchasing process. Furthermore, it is my view that the presentational differences in the figurative device elements will be perceived simply as decorative; these would be seen as additional decoration in an alternative mark used by the same or an economically linked undertaking.

69. In my opinion, the same rationale applies to the non-alcoholic counterparts of these goods. Even though these goods do not technically contain spirits, they include

¹⁴ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

their non-alcoholic equivalents. As such, the message is likely to be the same; although consumers would appreciate that these goods do not literally contain alcoholic spirits, they will still see the play on words and the word “SPIRITED” is likely to convey the same allusive message.

70. Consequently, taking all of the above factors into account, I consider there to be a likelihood of indirect confusion for some of the goods, namely:

Class 33: “alcoholic beverages [except beers and wines], spirits and liqueurs; whisky and whisky based liqueurs; gin; vodka; rum; alcopops; alcoholic cocktails”.

Class 32: “alcohol free beverages; Aperitifs, non-alcoholic; Beverages (Non-alcoholic -); Cocktails, non-alcoholic; De-alcoholised drinks; De-alcoholized drinks”.

71. Turning to the remaining goods within the application, I note that none can be considered spirits or their non-alcoholic equivalents. In respect of these goods, I do not believe that the consumers will assume that the opponent and the applicants are economically linked undertakings on the basis of the competing trade marks; I am unconvinced that consumers would assume a commercial association or licensing arrangement between the parties, or sponsorship on the part of the opponent, merely because of the shared word “SERIOUSLY”. It is my view that consumers are unlikely to identify the same message from the word “SPIRITED” in connection to these goods; it would not be regarded as a play on words or an allusive reference to the goods. Where consumers do not perceive the word “SPIRITED” as an allusive reference to the goods, the differences between the competing marks are not conducive to any logical brand extensions. Neither is the contested mark likely to be perceived as a sub-brand of the earlier mark, or vice versa. Rather, the contested mark is more likely to be seen as a solitary unit meaning extremely or remarkably spirited, i.e. full of energy, enthusiasm and determination to a serious degree, and the commonality of the word “SERIOUSLY” is more likely to be seen as a coincidence, even on goods that are identical. Therefore, I find that there is no likelihood of indirect confusion in relation to the remaining goods.

Conclusion

72. The opposition brought under section 5(2)(b) of the Act has succeeded against the following goods:

Class 33: “alcoholic beverages [except beers and wines], spirits and liqueurs; whisky and whisky based liqueurs; gin; vodka; rum; alcopops; alcoholic cocktails.”

Class 32: “alcohol free beverages; Aperitifs, non-alcoholic; Beverages (Non-alcoholic -); Cocktails, non-alcoholic; De-alcoholised drinks; De-alcoholized drinks”.

73. However, the opposition has failed under the Act in respect of the following goods, which will proceed to registration, subject to any appeal against my decision:

Class 21: Brush-making materials; Articles for cleaning purposes; Steelwool; Unworked or semi-worked glass [except glass used in building]; Glassware; porcelain and earthenware; crystalware; decorative articles; utensils and other goods made from glass; crystal or porcelain; bowls; goblets; glasses, jugs; dishes; plates; figurines; drinking vessels.

Class 25: Adhesive bras; Adhesive brassieres; After ski boots; Aikido suits; Aikido uniforms; Albs; Aloha shirts; American football bibs; American football pants; American football shirts; American football shorts; American football socks; Anglers' shoes; Ankle boots; Ankle socks; Anklets [socks]; Anoraks; Anoraks [parkas]; Anti-perspirant socks; Anti-sweat underclothing; Anti-sweat underwear; Après-ski boots; Apres-ski shoes; Aprons; Aprons [clothing]; Aqua shoes; Arm warmers [clothing]; Army boots; Articles of clothing; Articles of clothing for theatrical use; Articles of clothing made of hides; Articles of clothing made of leather; Articles of outer clothing; Articles of sports clothing; Articles of underclothing; Ascots; Ascots (ties); Athletic clothing; Athletic footwear; Athletic shoes; Athletic tights; Athletic uniforms; Athletics footwear; Athletics hose;

Athletics shoes; Athletics vests; Babies' clothing; Babies' outerclothing; Babies' pants [clothing]; Babies' pants [underwear]; Babies' undergarments; Babushkas; Baby bibs [not of paper]; Baby bodysuits; Baby boots; Baby bottoms; Baby clothes; Baby doll pyjamas; Baby layettes for clothing; Baby pants; Baby sandals; Baby shoes; Baby tops; Balaclavas; Ball gowns; Ballet shoes; Ballet slippers; Ballet suits; Ballroom dancing shoes; Bandanas; Bandanas [neckerchiefs]; Bandannas; Bandeaux [clothing]; Barber smocks; Baseball caps; Baseball caps and hats; Baseball hats; Baseball shoes; Baseball uniforms; Baselayer bottoms; Baselayer tops; Basic upper garment of Korean traditional clothes [Jeogori]; Basketball shoes; Basketball sneakers; Bath robes; Bath sandals; Bath slippers; Bathing caps; Bathing costumes; Bathing costumes for women; Bathing drawers; Bathing suit cover-ups; Bathing suits; Bathing suits for men; Bathing trunks; Bathrobes; Beach clothes; Beach clothing; Beach cover-ups; Beach footwear.

Class 32: Aerated fruit juices; Aerated juices; Aerated mineral waters; Aerated water; Aerated water (Preparations for making -); Aerated water [soda water]; Aerated waters; Alcohol free cider; Alcohol free wine; Alcohol-free beers; Ale; Ales; Aloe juice beverages; Aloe vera drinks, non-alcoholic; Aloe vera juices; Apple juice beverages; Apple juice drinks; Barley wine [Beer]; Barley wine [beer]; Beer; Beer and brewery products; Beer wort; Beer-based beverages; Beer-based cocktails; Beers; Beers enriched with minerals; Beverages consisting of a blend of fruit and vegetable juices; Beverages consisting principally of fruit juices; Beverages containing vitamins; Beverages (Preparations for making -); Beverages (Whey -); Birch water; Bitter lemon; Black beer; Black beer [toasted-malt beer]; Blackcurrant cordial; Blackcurrant juice; Bock beer; Bottled drinking water; Bottled water; Brown rice beverages other than milk substitutes; Carbohydrate drinks; Carbonated mineral water; Carbonated non-alcoholic drinks; Carbonated soft drinks; Carbonated water; Carbonated waters; Cider, non-alcoholic; Coconut juice; Coconut water; Coconut water as a beverage; Coconut water as beverage; Coconut-based beverages; Coffee-flavored ale; Coffee-flavored beer; Coffee-flavored soft drinks; Cola; Cola drinks; Colas [soft drinks]; Concentrated fruit juice; Concentrated fruit juices; Concentrates for making fruit drinks; Concentrates for

making fruit juices; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Condensed smoked plum juice; Cordials; Cordials [non-alcoholic]; Cordials (non-alcoholic beverages); Craft beer; Craft beers; Cranberry juice; Cream soda; De-alcoholised beer; De-alcoholised wines; De-alcoholized beer; De-alcoholized wines; Dilutable preparations for making beverages; Distilled drinking water; Douzhi (fermented bean drink); Drinking mineral water; Drinking spring water; Drinking water; Drinking water with vitamins; Drinking waters; Dry ginger ale; Effervescing beverages (Pastilles for -); Effervescing beverages (Powders for -); Energy drinks; Energy drinks containing caffeine; Energy drinks [not for medical purposes]; Essences for making beverages; Essences for making flavoured mineral water [not in the nature of essential oils].

Class 33: Cider; perry; mead.

Costs

74. Both parties have been successful in part, however the applicants have enjoyed a greater measure of success. Therefore, the applicants are entitled to a contribution towards their costs based upon the scale published in Annex A of Tribunal Practice Notice 2 of 2016, with an appropriate reduction to reflect the opponent's degree of success. Applying this guidance, in the circumstances I jointly award the applicants the sum of **£250** as a contribution toward the costs of reviewing the opponent's notice of opposition and preparing a counterstatement.

75. Accordingly, I hereby order Seriously Vodka Limited to pay Murdoch Allan and Son Ltd and Aberdeen Buttery Company Ltd the sum of **£250**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 1st day of February 2022

**Sarah Wallace
For the Registrar**