O/1160/24

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3905538
IN THE NAME OF DONGGUAN TOPSON ELECTRONIC TECHNOLOGY CO.,LTD

TO REGISTER AS A TRADE MARK

IN CLASSES 30, 32 AND 33

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 442335
BY THE ABSOLUT COMPANY AKTIEBOLAG

BACKGROUND AND PLEADINGS

1. On 27 April 2023, Dongguan Topson Electronic Technology Co.,Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision in the United Kingdom. The application was accepted and published for opposition purposes on 12 May 2023, in respect of goods in classes 30, 32 and 33.

2. The application is opposed by The Absolut Company Aktiebolag ("the opponent"). The opposition was filed on 4 August 2023 and is based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all of the goods in classes 32 and 33 only, as listed under paragraph 19 of this decision. The opponent relies upon the following mark:

ELYX

UK trade mark registration number 2564081
Filing date: 12 November 2010
Registration date: 4 February 2011
Registered in Class 33
Relying on all goods, namely: *Alcoholic beverages; namely vodka and other distilled spirits*.

3. The trade mark upon which the opponent relies qualifies as an earlier trade mark under Section 6(1) of the Act. The opponent's trade mark had completed the registration process more than five years before the application date of the contested mark, and, as a result, it is, in principle, subject to the provisions on use under Section 6A of the Act. I note that on its Form TM7 Notice of opposition and statement of grounds, the opponent has made a statement of use in relation to all of the goods on which it relies, while on filing its Form TM8 Notice of defence and counterstatement, the applicant has required the opponent to provide proof of use of the mark only for "all distilled spirits apart from vodka" in class 33.

4. The opponent submits that in view of the high similarity between the respective trade marks and the identity between the respective goods in question, there exists a

likelihood of confusion arising on the part of the relevant public, including a likelihood of association. It seeks the refusal of the contested application in classes 32 and 33 in their entirety under section 5(2)(b) of the Act and requests an award of costs is made in the opponent's favour.

5. The applicant filed a counterstatement denying the claims. It submits that, in view of the differences between the trade marks, the later mark is not a similar mark within the meaning of section 5(2)(b) of the Act to the extent that a likelihood of confusion on the part of the public, including a likelihood of association, does not exist for any goods. It requests that the opposition be completely dismissed and that an award of costs be made in favour of the applicant.

6. Only the opponent filed evidence; only the opponent filed written submissions during the evidence rounds. Neither party requested a hearing; only the opponent filed written submissions in lieu of a hearing. This decision is taken following careful consideration of the papers on file.

7. In these proceedings, the opponent is represented by Marks & Clerk LLP and the applicant is represented by IPEY.

EVIDENCE AND SUBMISSIONS

8. The opponent filed evidence by way of a witness statement dated 5 December 2023 in the name of David Alexander Kemp, who is a Chartered Trade Mark Attorney and a Senior Associate of the opponent's representatives. Attached to the witness statement are six exhibits labelled **Exhibit DAK1** to **Exhibit DAK6**.

9. On the same date, the opponent filed written submissions. It later filed (final) written submissions in lieu of a hearing dated 18 March 2024.

10. Given the brevity of the evidence, I will summarise it as follows:

- Exhibits DAK1 to DAK4 relate solely to vodka and pre-mixed vodka based beverages or non-alcoholic "vodka" alternatives (including those marketed

under the earlier “ELYX” mark as well as those marketed under other brands). Mr Kemp confirms the content of these exhibits at points 2 to 5 of his witness statement.

- Exhibit DAK5 and DAK6 relate to non-alcoholic “gin” and spirit products, which is corroborated by Mr Kemp at points 6 and 7 of his witness statement. However, neither exhibit makes any mention of the earlier mark relied upon, and as such they are irrelevant to the question of genuine use of the earlier mark.

11. I note that nowhere in the exhibits or the witness statement is there any mention of the mark at issue being used in relation to distilled spirits other than vodka. The applicant has only required the opponent to provide proof of use of the mark for “all distilled spirits *apart from vodka*”. Where there is no use of the mark in respect of the goods as registered, it follows there has been no genuine use of the mark: *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd,* Case BL 0/404/13, at [22]. I further note that at point 20 of the opponent’s written submissions dated 5 December 2023, the opponent concedes that its goods at issue in these proceedings is ‘vodka’. The opponent also states at point 11b. of its (final) written submissions in lieu of a hearing that “the Opponent’s goods relied on is ‘vodka’.”

12. Consequently, given the opponent’s concession coupled with the lack of any evidence relating to genuine use of the mark for distilled spirits other than vodka, the only goods that the opponent may be rely upon under the section 5(2)(b) ground is “vodka”. As such, I will now move directly to consider the merits of the opposition under the 5(2)(b) ground.

13. I will make further reference to the relevant parts of the evidence and written submissions to the degree I consider necessary at the pertinent points within my decision.

DECISION

14. 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.

Section 5(2)(b)

15. Section 5(2)(b) is relied upon, which 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".

16. 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 Office for Harmonisation in the Internal Market (Trade Marks and Designs) ("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 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

17. Pursuant to section 60A of the Act, goods (or services) are not to be automatically regarded as being similar to each other on the ground that they appear in the same class, nor automatically regarded as dissimilar from each other on the ground that they appear in different classes.

18. As mentioned previously in paragraph's 11 and 12 of this decision, the opponent is relying only on "*Vodka*" in class 33.

19. The applicant's opposed goods are as follows:

Class 32

Non-alcoholic carbonated beverages; Non-alcoholic beverages containing fruit juices; Powders used in the preparation of coconut water drinks; Sports drinks; Sports drinks containing electrolytes; Cola; Smoothies [fruit beverages, fruit predominating]; Waters [beverages]; Fruit flavored drinks; Nonalcoholic cocktails; Fruit drinks; Fruit smoothies; Frozen fruit beverages; Beer; Vegetable drinks; Iced fruit beverages; Coffee-flavored beer; Fruit flavored soft drinks.

Class 33

Wine-based drinks; Potable spirits; Spirits; Alcoholic essences; Alcoholic beverages containing fruit; Sugarcane-based alcoholic beverages; Alcoholic extracts; Rum; Alcoholic fruit beverages; Alcoholic coffee-based beverage; Alcoholic energy drinks; Wine-based beverages; Alcoholic fruit cocktail drinks; Alcoholic carbonated beverages, except beer; Alcoholic beverages [except beers]; Alcoholic beverages (except beer); Alcopops.

20. Where the goods (or services) in the specification of one party are included in a broader term from the other party's specification, those goods (or services) are considered to be identical: See *Gérard Meric v OHIM,* Case T-133/05 at [29].

21. In *Canon*, Case C-39/97, the Court of Justice of the European Union ("CJEU") stated that:

> "23. 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".

22. Additionally, the factors for assessing similarity between goods and services identified in *British Sugar Plc v James Robertson & Sons Limited* ("*Treat* ") [1996] R.P.C. 281 include an assessment of the users and the channels of trade of the respective goods or services.

23. 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:

> "82. ...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".

24. For the purposes of considering the issue of similarity of the goods, it is permissible to consider groups of terms collectively where appropriate: *Separode Trade Mark*, BL O-399-10.[1]

[1] Paragraph 5

25. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

> "12. … Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. … Nevertheless the principle should not be taken too far. ... 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."

26. In its counterstatement, the applicant avers that the contested goods in class 32 are neither similar nor identical to the opponent's goods. It also stated that "for the time being, the applicant can only admit that …" some (but not all) of the contested goods in class 33 are "at least similar" to [the opponent's] "Alcoholic beverages; namely vodka and other distilled spirits". The counterstatement was, however, filed prior to the opponent's concession that its goods at issue in these proceedings relate only to 'vodka'. Further, as the applicant has not stated to what degree it considers the class 33 goods to be similar, I will make my own assessment on the level of similarity between the applicant's goods and the opponent's vodka.

<u>The contested goods in class 32</u>

Non-alcoholic carbonated beverages; Non-alcoholic beverages containing fruit juices; Nonalcoholic cocktails.

27. The applicant directs me to, inter alia, the judgement of the GC in *Wesergold Getrankeindustrie GmbH & bCo KG v EUIPO*, case T-278/10, where the GC held that 'spirits, particularly whisky' was not similar to non-alcoholic beverages.[2] I agree that the same reasoning could be applied to the opponent's "*vodka"* against the applicant's "*Non-alcoholic carbonated beverages; Non-alcoholic beverages containing fruit juices;*

[2] I note that at paragraph 41 of the judgement, it was found that the Board of Appeal did not make an error of judgement in finding a low level of similarity between spirits at issue in class 33 and the non-alcoholic beverages at issue in class 32.

Nonalcoholic cocktails". However, whilst I have considered the impact of this decision, I am not bound by its findings, and I draw my own conclusions as follows. Firstly I note that the *Wesergold* judgement referenced by the applicant was issued in 2010, and since that time, in my view, there has been a marked increase in the availability of non-alcoholic spirits, as well as beers, wines and pre-mixed "mocktails". I am aware of several producers who now offer 0% alcohol alternatives to spirits, particularly in the field of gin and vodka, and this is supported by the opponent's evidence by way of exhibits DAK4 – DAK6. I consider the same to be true for pre-mixed drinks which contain non-alcoholic 'spirits' mixed with carbonated beverages or juice to form an alternative 'cocktail' to the traditional alcoholic offerings. As such, the applicant's goods could feasibly include non-alcoholic 'vodka' based beverages and I consider that these would be situated in relatively close proximity to spirits at large, including vodka, in retail outlets. Secondly, there will be an element of competition between such goods, and it would not be unreasonable for the average consumer to expect undertakings to offer vodka at large and both vodka-based and non-alcoholic 'vodka' based mixed beverages. In view of the overlap in trade channels, as well as the shared purpose i.e. as a liquid refreshment, and method of use i.e. oral consumption, given the broad nature of the terms "*Non-alcoholic carbonated beverages; Non-alcoholic beverages containing fruit juices; Nonalcoholic cocktails"* all of which could include alcohol-free vodka, I consider them to be similar to the opponent's "*vodka"* in class 32 to a low to medium degree.

Beer; Coffee-flavored beer.

28. There is an overlap in users of the applicant's beers and the opponent's vodka inasmuch they are all intended for consumption by adults (i.e. over 18 years of age) and are consumed for pleasure, with a shared method of use being oral consumption. They are likely to be positioned in relatively close proximity in physical retail outlets such as supermarkets and off-licences, although not necessarily in the same aisle, as well as being found close together in restaurants and bars. There is an element of competition between the goods, with the consumer making an informed choice between the different alcoholic beverages at issue, although as the taste and content (including the level of alcoholic content) of the goods is quite distinct, in my view, the element of competition is low. I do not consider the goods to be complementary and

I do not consider that the average consumer would expect the likes of beers and spirits to originate from the same undertaking, particularly given their different methods of production (i.e. fermentation v distillation). Considered overall, if there is any similarity between the applicant's "*Beer; Coffee-flavored beer"* and the opponent's "*vodka*", then I find it to be to only a very low degree.

Powders used in the preparation of coconut water drinks; Sports drinks; Sports drinks containing electrolytes; Cola; Smoothies [fruit beverages, fruit predominating]; Waters [beverages]; Fruit flavored drinks; Fruit drinks; Fruit smoothies; Frozen fruit beverages; Vegetable drinks; Iced fruit beverages; Fruit flavored soft drinks.

29. I note that in *Wesergold*, the GC found that the Board of Appeal was correct to find that the average consumer makes a distinction when comparing spirits with non-alcoholic beverages, even when they choose a beverage on impulse.[3] While the likes of cola and sports drinks may, of course, be mixed with spirits such as the opponent's vodka, I do not consider them to be complementary in a trade mark sense and, as outlined in *Boston Scientific*, I see no reason why the consumer would expect the distinct goods to come from the same undertaking. I bear in mind the guidance given in *YouView* not to apply too wide an interpretation to the goods at issue, and I consider that the applicant's above listed goods are not so broad that they suggest to me that they are likely to contain other ingredients such as non-alcoholic spirits which make up a pre-mixed 'mocktail' in the way that the goods considered under paragraph 27 of this decision do. I do not consider that they would be found in particularly close proximity in retail premises such as supermarkets (and certainly not in the same aisles), and although there is an overlap in nature and method of use, with all of the goods being drinks or for use in the preparation of drinks which are consumed orally, pragmatically, this is insufficient for a finding of similarity. In *Unicorn Studio Inc v Veronese* Case CH-2023-000214, Iain Purvis, KC, sitting as deputy High Court judge, stated that any finding of similarity requires the exercise of common sense.[4] Taking a realistic approach to the comparison of these particular goods, I find them to be

[3] At [31].
[4] At [24].

dissimilar. If I am wrong in this, then I find them to be, at best, similar to only a very low degree.

The contested goods in class 33

Potable spirits; Spirits; Alcoholic beverages [except beers]; Alcoholic beverages (except beer).

30. The applicant's above terms are all broad and could each encompass the opponent's "*Vodka".* Applying the principle set out in *Meric*, I therefore find the competing goods to be identical.

Alcoholic essences; Alcoholic extracts.

31. I consider that alcoholic essences and extracts could encompass those which are derived from vodka, and as such there is an overlap in nature between the goods and a degree of complementarity, as without the base spirit there would be no essence or extract. It would therefore be reasonable for the average consumer to assume that the goods all originate from the same undertaking. I consider the applicant's "*Alcoholic essences; Alcoholic extracts"* and the opponent's *"vodka"* to be similar to a high degree.

Alcoholic beverages containing fruit; Alcoholic fruit beverages; Alcoholic coffee-based beverage; Alcoholic energy drinks; Alcoholic fruit cocktail drinks; Alcoholic carbonated beverages, except beer; Alcopops.

32. Given the broad nature of the terms, the "*alcoholic*" content of each of the applicant's above listed goods could easily include the opponent's vodka, although the applicant's goods also contain other ingredients, such as fruit, coffee and carbonated and energy drinks. I note that the opponent has provided evidence by way of exhibits DAK2 – DAK3 to support the inclusion of vodka as an ingredient in the likes of alcopops and alcoholic energy drinks. There is an overlap in users and nature of the goods, all being for consumption by adults over 18 years of age and all are consumed for pleasure, with a shared method of use being oral consumption. The goods at hand

are likely to be positioned in relatively close proximity in physical retail outlets and in restaurants and bars, and there is an element of competition between the goods, with the consumer choosing either a pre-mixed alcoholic beverage or selecting the alcoholic base and a mixer separately. It would not be unreasonable for the average consumer to expect the applicant's above listed alcoholic drinks and the opponent's "*vodka*" to originate from the same undertaking. Overall, I consider the respective goods to be similar to a medium to high degree.

Sugarcane-based alcoholic beverages; Rum.

33. To the best of my knowledge, rum is a sugarcane-based alcoholic beverage while vodka is usually produced from the likes of cereal grains or potatoes. While the competing goods can all be classed under the broad term 'spirits' and share the same method of production i.e. a distillation process, the distinct base ingredients will produce very different taste profiles. As before, there will be an overlap in users, nature (alcoholic content) and method of use, and the goods at hand will share the same channels of trade. Although the goods are not complementary, they may be in competition. Overall, I consider the applicant's *"Sugarcane-based alcoholic beverages; Rum"* and the opponent's "*vodka*" to be similar to a medium degree.

Wine-based drinks; Wine-based beverages.

34. The opponent's "*vodka"* and the applicant's "*Wine-based drinks; Wine-based beverages"* are similar in nature in as much that they are all alcoholic beverages consumed orally for pleasure. However, the base ingredients are different and the alcoholic strength of vodka is much higher compared to wine/wine-based beverages. There is an overlap in trade channels, although the goods are unlikely to be found in the same aisle in physical retail outlets. I consider the element of competition between wine-based beverages and spirits to be low, and there is no complementarity: given their different production methods, I do not consider that the average consumer would expect wine-based drinks/beverages to originate from the same undertaking as vodka. Consequently, I find the opposing goods similar to only a very low degree.

The average consumer and the nature of the purchasing act

35. The average consumer is a legal construct, who is deemed to be reasonably well informed and reasonably circumspect: see *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), paragraph 60. 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, at [26].

36. The overlapping goods at issue are predominantly alcoholic beverages and those combined with their non-alcoholic equivalents. The average consumer of the goods will be the general public, although insofar as alcoholic drinks are concerned, they will be adults over the age of 18. They will include connoisseurs alongside 'pleasure drinkers' whose knowledge will be more rudimentary, both of whom may purchase the goods for consumption at home or in a social setting such as a bar or restaurant. The goods will also be purchased by buyers for venues such as public bars and restaurants.

37. The goods are sold through a range of channels including wholesale outlets and retail outlets such as supermarkets and off-licences, as well as through specialist suppliers and online. In bricks and mortar stores, the goods will be sold on shelves 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 having viewed an image displayed on a webpage. The goods will also be sold in restaurants, bars and public houses, where they are likely to be displayed behind the counter or listed on a drinks menu. Considered overall, the selection process is predominantly visual, although I do not discount aural considerations, particularly in bars and restaurants, where the goods may also be selected and requested verbally. I bear in mind the comments of the GC in *Simonds Farsons Cisk plc v OHIM*, Case T-3/04, who said:

> "58. In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why,

> even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them."

38. The value of the goods, which are likely to be purchased on a semi-regular basis by the general public, will vary in price but are generally considered to be relatively inexpensive. I accept that high-end spirits will be more expensive than the likes of alcopops, which may give rise to an elevated degree of attention being paid to such goods. In my view, neither alcoholic nor non-alcoholic drinks are commonly highly considered purchases. I consider that the average consumer will base their selection on personal taste and whim at the time of purchase, as well as the particular occasion for which it is being purchased, and that overall they will pay a medium level of attention during the selection process.

Comparison of marks

39. 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 in *Bimbo SA v OHIM* Case C-591/12P, 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."[5]

[5] Paragraph 34

40. 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.

41. The opponent submits that the relevant public will consider the marks to be highly visually and phonetically similar, while the applicant submits that the marks are conceptually, visually and aurally different.

42. The applicant's mark comprises the single word "**ELUX**", presented in a stylised black typeface in capital letters thus:  . There are no other elements to contribute to the overall impression which therefore rests in the word as presented. The opponent's mark consists of a single word, "**ELYX**" presented in a standard black typeface in capital letters, with no other elements to contribute to the overall impression. The overall impression of the mark therefore rests in the word itself.

43. As referred to by the applicant, I note that in *dm-drogerie markt GmbH & Co. KG v OHIM,* Case T-304/10, the GC noted that in the case of word signs which are relatively short, the differences between marks of different lengths will be more easily grasped by the average consumer.[6] In this case, both words are the same length, consisting of only four letters, with three out of four of those letters being identical, as well being placed in the same position within each word. Therefore, the stylisation notwithstanding, the marks differ only in respect of the third letter in each word. The variance between the letters which make up each word is subsumed in the body of the marks and accounts for only 25% of the marks as a whole. Further, I do not consider the stylisation of the applicant's mark to be particularly striking or to deviate greatly from a standard font. I note the applicant's reference to the findings of the court in *Inter-Ikea Systems BV v OHIM*, Case T-112/06, however the circumstances in the case before me are somewhat different. Overall, I find there to be a medium to high degree of visual similarity between the marks.

[6] At [42].

44. Both marks will be articulated in their entirety as two syllables, with the opponent's mark pronounced as either EE-LICKS or EL-ICKS, and the applicant's mark will be pronounced as either EE-LUCKS or EL-UCKS. In either case, I would expect the first syllable to be voiced identically in each of the marks as either EE or EL, with the second syllable differing only by the soft vowel sound but having the same hard sound resonating from the consonants. Consequently, I consider there to be a medium to high degree of aural similarity between the marks.

45. For a conceptual message to be relevant, it must be capable of immediate grasp by the average consumer - Case C-361/04 P *Ruiz-Picasso and others v OHIM* [2006][7].

46. To the best of my knowledge, neither mark is defined in a standard dictionary relating to the English language as spoken in the United Kingdom. I note the applicant's submissions that the opponent's mark "is clearly coined from the English noun elixir" while it submits that its own mark "contains the common abbreviation of the English word luxury, namely lux".[8] In *Usinor SA v OHIM*, Case T-189/05, the GC found that:

> "62. … it must be noted that while the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details (Lloyd Schuhfabrik Meyer, paragraph 25), he will nevertheless, perceiving a verbal sign, break it down into verbal elements which, for him, suggest a concrete meaning or which resemble words known to him (Case T-356/02 Vitakraft-Werke Wührmann v OHIM – Krafft (VITAKRAFT) [2004] ECR II-3445, paragraph 51, and Case T-256/04 Mundipharma v OHIM – Altana Pharma (RESPICUR) [2007] ECR II-0000, paragraph 57)."

47. The applicant has provided no evidence to support its submissions on how either of the marks would be perceived. Bearing in mind the findings of *Usinor,* I accept that there may be some consumers who consider that the opponent's mark is evocative of the word "elixir" and some who will attribute the concept of luxury to the applicant's

[7] Paragraph 56.
[8] See points1.2.5.1 and 1.2.5.2 of the applicant's counterstatement.

mark. However, I consider that both marks will most likely be seen by a significant proportion of the average consumer as a wholly invented word with no such recognisable conceptual content, and, in these circumstances, the marks are conceptually neutral.

Distinctive character of the earlier mark

48. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91.

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

> " 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)."

50. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are allusive or suggestive of a characteristic of the goods and services, ranging up 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. The opponent has not claimed that its mark

has enhanced distinctiveness and no evidence of use, per se, has been filed.[9] Therefore, I only have the inherent characteristics of the mark to consider.

51. As mentioned previously, I note the applicant's comments that the earlier mark "is clearly coined from the English noun elixir", which it goes on to describe as "a sweetened liquid usually containing alcohol that is used in medication either for its medicinal ingredients or as a flavouring".[10] I have been provided with no evidence of this, however, even if this was the perception of some consumers, given the goods to which the mark is applied i.e. vodka, I cannot see how the mark can be said to be allusive of such goods which are consumed for pleasure rather than as a medication. To my mind, the mark ELYX is most likely to be perceived as an invented word with no allusive qualities and as such it possesses a high degree of inherent distinctive character.

Likelihood of confusion

52. There is no simple formula for determining whether there is a likelihood of confusion. It is clear that I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them 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 (*Canon* at [17]). I must consider the various factors from the perspective of the average consumer, bearing in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

53. There are two types of possible confusion: direct, where the average consumer mistakes one mark for the other, or indirect, where the average consumer recognises that the marks are different but assumes that the goods and/or services are the responsibility of the same or connected undertakings. The distinction between these

[9] Although the opponent's exhibit DAK1 shows three screenshots of the mark being used on a bottle of vodka, and the goods are being offered for sale, the pages are all undated and there is no evidence of actual sales/turnover or advertising spend in the UK, I therefore consider the evidence insufficient to support a finding of enhanced distinctiveness through use.
[10] See 1.2.5.1 of the applicant's counterstatement.

was explained by Mr Iain Purvis Q.C. (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v Back Beat Inc*, Case BL-O/375/10. He said:

> "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)."

54. The above are examples only which are intended to be illustrative of the general approach. These examples are not exhaustive but provide helpful focus.

55. Earlier in this decision, I found that the contested goods ranged between identical as per the principle set out in *Meric* to dissimilar[11] (or as an alternative, at best similar to only a very low degree) to the opponent's goods. I considered that the selection process would be made by predominantly visual means, although I did not discount oral considerations, and that overall, the general public would pay a medium level of attention during the selection process. I considered the competing trade marks to be visually and aurally similar to a medium to high degree. Although I noted the applicant's submissions relating to the concept of each of the marks, it has not provided any supporting evidence in this regard, and therefore, to my mind, the marks would be seen as conceptually neutral to a significant proportion of the average consumer, who I considered would see both marks as invented words with no immediately recognisable conceptual content. I found the earlier mark to be inherently distinctive to a high degree.

56. I have weighed up each of the competing factors in my decision, including the differences as well as the similarities between the competing marks. The average consumer is unlikely to see the marks side-by-side and will therefore be reliant on the imperfect picture of them they have kept in their mind. Given the high degree of inherent distinctive character of the earlier mark, as well as the degree of visual and aural similarity between the marks, in my view, the similarities between the marks are such that they are likely to be mistakenly recalled as each other. Consequently, I consider there to be a likelihood of direct confusion in relation to all the goods which in my view ranged between a low to medium degree of similarity, or higher. Realistically, I do not consider there to be any likelihood of confusion for those goods for which only a very low degree of similarity, at best, was found.

57. The opposition under section 5(2)(b) succeeds in respect of the following goods only:

[11] Under section 5(2)(b), a degree of similarity between the goods is essential for there to be a finding of likelihood of confusion: at [49] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA.

Class 32

Non-alcoholic carbonated beverages; Non-alcoholic beverages containing fruit juices; Nonalcoholic cocktails.

Class 33

Potable spirits; Spirits; Alcoholic essences; Alcoholic beverages containing fruit; Sugarcane-based alcoholic beverages; Alcoholic extracts; Rum; Alcoholic fruit beverages; Alcoholic coffee-based beverage; Alcoholic energy drinks; Alcoholic fruit cocktail drinks; Alcoholic carbonated beverages, except beer; Alcoholic beverages [except beers]; Alcoholic beverages (except beer); Alcopops.

CONCLUSION

58. The opponent has been partially successful under Section 5(2)(b) of the Act in relation to the class 32 and class 33 goods listed above under paragraph 57 of this decision. I note that the goods in class 30 of the application were unopposed. Subject to any successful appeal, the application by Dongguan Topson Electronic Technology Co.,Ltd may proceed to registration in respect of the following goods only:

Class 30 in its entirety - (unopposed)

Class 32

Powders used in the preparation of coconut water drinks; Sports drinks; Sports drinks containing electrolytes; Cola; Smoothies [fruit beverages, fruit predominating]; Waters [beverages]; Fruit flavored drinks; Fruit drinks; Fruit smoothies; Frozen fruit beverages; Beer; Vegetable drinks; Iced fruit beverages; Coffee-flavored beer; Fruit flavored soft drinks.

Class 33

Wine-based drinks; Wine-based beverages.

COSTS

59. Both parties have enjoyed a share of success. Considering the balance of success is roughly equal, adopting a “rough and ready” approach to the matter, I have concluded that both parties should bear their own costs.

Dated this 5th day of December 2024

Suzanne Hitchings
For the Registrar,
the Comptroller-General