**O/235/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003514297**

**BY GULIN COUNTY JIUSHENG INVESTMENT CO., LTD TO REGISTER**

**THE FOLLOWING TRADE MARK:**


**IN CLASS 33**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. 600001534 BY ROK STARS LIMITED**

## Background and Pleadings

1. On 21 July 2020, Gulin County Jiusheng Investment Co., Ltd. ('the Applicant') filed an application to register the trade mark shown on the cover page of this Decision, number 3514297. The application was published for opposition purposes in the *Trade Marks Journal* on 23 October 2020. Registration is sought in respect of the following goods:

| | |
|---|---|
| **Class 33** | Liqueurs; alcoholic beverages containing fruit; whisky; aperitifs; brandy; Baijiu [Chinese distilled alcoholic beverage]; Wine; fruit extracts, alcoholic; Alcoholic beverages, except beer; cocktails; Arrack; Distilled rice spirits [awamori]; Gaolian jiou [sorghum-based Chinese spirits]; Rice alcohol. |

2. On 30 November 2020, the application was opposed by ROK Stars Limited ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed against all of the Applicant's goods. The Opponent relies on the following earlier trade mark registration for its section 5(2)(b) ground:

UK00003231992


Filing date: 18 May 2017; Date registration completed: 11 August 2017.

Relying on its registered goods in **class 32**:

*Beers; Mineral and aerated waters and other non-alcoholic beverages; Fruit*

*beverages and fruit juices; Syrups and other preparations for making beverages.*

3. The Opponent claims that there is a likelihood of confusion under section 5(2)(b) and its opposition is directed against all of the goods within the Applicant's mark's specification.

4. The Applicant filed a defence and counterstatement, denying the grounds.

5. Neither party has filed written submissions.

6. The Opponent represents itself; the Applicant is represented by Potter Clarkson LLP.

7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Marks Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that:

> "(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit."

8. The net effect of these changes is to require parties to seek leave in order to file evidence in fast track oppositions. No leave was sought in respect of these proceedings.

9. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary.

10. The only material from the parties available to me is that contained within the Opponent's Notice of Opposition and Grounds and the Applicant's Defence and Counterstatement.

11. The following decision has been made after careful consideration of the papers before me.

## Decision

### Section 5(2)(b) of the Act and related case law

12. Section 5(2)(b) of the Act states:

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

13. The following principles are derived from the decisions of the CJEU[1] 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

[1] Although the UK has left the EU, section 6(3)(a) of the European (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 Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

C120/04; *Shake di L. Laudato & C. Sas v OHIM,* Case C-334/05P; and *Bimbo SA v OHIM,* Case C-591/12P

The principles:

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

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

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

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

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

**Comparison of goods**

14. Similarity of goods and services – Nice Classification

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."

15. I must therefore be mindful of the fact that the appearance of the respective goods or services in different classes is not a sufficient condition for dissimilarity between those goods or services.

16. The Tribunal may group goods (or services) together for the purposes of assessment:

*Separode Trade Mark* BL O-399-10 (AP):

"The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision."

17. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties' goods and services must be taken into account:

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

18. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281[2], identified the following factors for assessing similarity of the respective goods and services:

    (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.

19. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.[3]

20. 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 [or services]. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)***,** Case T-325/06, the General Court stated that "complementary" means:

[2] *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.
[3] *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

> "...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".

21. In *Sanco SA v OHIM, Case* T-249/11, the General Court 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. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

> "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."

22. The goods to be compared are as follows:

| Opponent's mark: | Applied-for mark: |
|---|---|
| **Class 32**<br>Beers; Mineral and aerated waters and other non-alcoholic beverages; | **Class 33**<br>Liqueurs; alcoholic beverages containing fruit; whisky; aperitifs; |

| | |
|---|---|
| Fruit beverages and fruit juices; Syrups and other preparations for making beverages. | brandy; Baijiu [Chinese distilled alcoholic beverage]; Wine; fruit extracts, alcoholic; Alcoholic beverages, except beer; cocktails; Arrack; Distilled rice spirits [awamori]; Gaolian jiou [sorghum-based Chinese spirits]; Rice alcohol. |

23. I will make my comparison with reference to the Applicant's goods and services, all of which have been opposed.

24. I will compare *Alcoholic beverages, except beer* against the Opponent's class 32 term *beer*; *beer* being the only alcoholic beverage within the Opponent's specification (indeed, *beer* is the only alcoholic beverage within class 32 of the Nice classification system).

25. The uses of the respective goods are the same; both *beers* and *alcoholic beverages, except beer* are consumed for relaxation, intoxication, celebration and/or to 'break the ice' during social occasions. The users will also be the same; members of both the general public, and the professional public e.g. in the pub/bar trade.

26. The physical nature of the respective goods will be very similar. Both *beers* and *alcoholic beverages, except beer* are liquids with varying degrees of alcohol content. *Alcoholic beverages, except beer* will include ciders, perries and wines; both these beverages and *beers* are most often consumed as 'complete' drinks, i.e. without other ingredients added, in pint or half-pint measures (I appreciate that, in some instances, cordial or lemonade may be added).

27. The respective goods will often share trade channels. Both *beers* and *alcoholic beverages, except beer* will be sold in supermarkets and other physical shops; in public houses and restaurants; as well as online. I consider that, in physical

shops, ciders and perries, falling within the Applicant's *alcoholic beverages, except beer,* will be sold alongside *beers*, usually in the same aisles and often on the same shelves. In public houses and bars, the pumps and taps for *beers* will appear alongside the taps for ciders; bottled beers and ciders will also be found next to each other in the refrigerated units displayed behind the bar.

28. I consider that ciders and perries, goods included within *alcoholic beverages, except beer* will be in a competitive relationship with *beers*. Both ciders/perries and *beers* are 'long' drinks, drunk in pint or half-pint measures and, aside from their relaxing and intoxicating effects, can also be consumed for refreshment or to quench a thirst. Both *beers* and ciders/perries can be purchased in single servings, by way of cans or bottles. The alcoholic content of these respective goods is also within the same range. To my mind, the goods are substitutable; one might deliberate over whether to choose a can of cider or lager (which falls under the term *beer*) on a picnic, or a glass of cider or beer in a public house or restaurant.

29. I do not find any complementarity between *alcoholic beverages, except beer* and *beers*.

30. Consequently, I find that the level of similarity between *alcoholic beverages, except beer* and *beers* is at least medium.

31. This represents the strongest comparison between the Applicant's terms enumerated above at [22], and the Opponent's goods. It is therefore unnecessary for me to compare the above-mentioned term with any other of the Opponent's goods.

*32.* The term *alcoholic beverages containing fruit* will also include ciders and perries. Given my findings above, at paragraphs [25] – [30], I find that the level of similarity between *alcoholic beverages, except beer* and *beers* is at least medium.

33. I now compare *wine* to *beers*. In the case of *The Coca-Cola Company v OHIM*[4] the General Court ('GC') held that, although *wines* and *beers* are both produced by fermentation, the different respective methods of fermentation (i.e. fermentation of malt for beer; fermentation of grape must for wine) give rise to end products differing in colour, aroma and taste. These differences, it held, lead the relevant consumer to perceive wine and beer as distinct products. Although there is a degree of competition to the extent that beers and wines alike might be consumed with a meal, the GC held that it must be accepted that the average consumer would expect the respective goods to originate from different undertakings.[5]

34. Consequently, I find that the level of similarity between *wine* and *beers* is no more than low.

35. I group the following of the Applicant's goods together:

*Arrack; Distilled rice spirits [awamori]; Gaolian jiou [sorghum-based Chinese spirits]; Rice alcohol; brandy; Baijiu [Chinese distilled alcoholic beverage]; whisky; liqueurs; cocktails.*

All of these products are spirits or spirit-based (*liqueurs* are drinks comprised of spirits to which flavourings such as sugar, fruits, herbs or spices are added; cocktails are mixtures of spirits and other mixers/flavourings).

36. These alcoholic drinks are typically consumed in small amounts, owing to their potency. They are usually, although not always, mixed with other ingredients such as fruit juice or tonic water/soda water (I acknowledge that whisky, for example, is often drunk neat or with still water). These alcoholic drinks are, owing to their potency, not typically consumed in order to quench a thirst, but for pure relaxation and/or intoxication.

[4] Case T-175/06, at [64]-[65].
[5] Above, at [68]-[69].

37. In comparing these goods with *beers*, I bear in mind the decision of the GC in *Bodegas Montebello*[6] in which it was held that there was no similarity between wine and rum. The factors that led the Court to this conclusion were: the different ingredients from which wine and rum are composed; the different methods of production; the fact that the end products differed in their taste, colour and smell. The Court held that even though wine and rum might share distribution channels, wine and rum are not generally found on the same shelves; neither are they complementary or in a competitive relationship.

38. In *Tiger Gin*[7] the Tribunal found that the element of competition between beer and gin is less than that between beer and wine; an average consumer is more likely to deliberate over whether to drink wine or beer than over whether to drink beer or gin. The Tribunal was persuaded by the following factors[8] that the level of similarity between beer and gin was very low:

    - The different processing/manufacture of beer and gin;
    - The different taste, colour and smell;
    - The very different alcoholic content. Beer is a long drink and gin is a spirit, drunk in short measures;
    - They are not in the same 'family' of alcoholic beverages;
    - They are not complementary;
    - There is less competition between beer and gin than between beer and wine;
    - But it is common to find the sale of various alcoholic drinks in the same outlet.

39. Applying the same logic, I find that the level of similarity between the Applicant's goods, enumerated above at [35], is very low.

[6] ECLI: EU: T: 2009: 127.
[7] O-286-15 Tiger Gin, at [15].
[8] Above, at [18].

40. I now compare *aperitifs* with *beers*. *Aperitifs* are alcoholic drinks consumed before a meal in order to whet the appetite. Typical *aperitifs* include, to name but a few, vermouth, champagne or dry wines.

41. Applying the reasoning set out above at [33] in my comparison between *wine* and *beers,* I find that the level of similarity between *aperitifs* and *beers* is no more than low.

42. I now consider the level of similarity between the Applicant's *fruit extracts, alcoholic* and the Opponent's goods. *Fruit extracts, alcoholic* are, by virtue of being very strong, ingredients added to beverages in very small amounts i.e. a few drops are sufficient to flavour a drink.

43. I compare *fruit extracts, alcoholic* against the Opponent's *Syrups and other preparations for making beverages*. Both sets of goods are ingredients added in small amounts to flavour beverages. The class 32 term *Syrups and other preparations for making beverages*, however, comprises non-alcoholic goods. The physical nature of the goods is similar to the extent that both are 'pourable' substances, being liquids or syrups, and small amounts of each are used to flavour drinks or foods.

44. I find that there will be overlap in user; the respective goods will be used by both members of the general and professional public when making drinks, at home or in the course of their work in a pub/bar or food business.

45. The respective goods will be purchased from physical shops and supermarkets, as well as online. To my mind, the Applicant's *fruit extracts, alcoholic* may well be found on the same shelves as *Syrups and other preparations for making beverages*.

46. In my view, the goods are substitutable to the extent that either a 'fruit extract (alcoholic)' or a 'fruit syrup' could be used in a particular cocktail. The goods are therefore in a competitive relationship. I do not consider the goods to be complementary; neither *fruit extracts, alcoholic* nor *Syrups and other preparations for making beverages* are important or useful for each other.

47. Consequently, I find that *fruit extracts, alcoholic* and *Syrups and other preparations for making beverages* are similar to at least a medium degree.

48. This represents the strongest comparison between the Applicant's *fruit extracts, alcoholic* and the Opponent's goods. It is therefore unnecessary for me to compare *fruit extracts, alcoholic* with any other of the Opponent's goods.

**Average consumer and the purchasing act**

49. 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.

50. In *Hearst Holdings Inc*[9] Birss J. described the average consumer thus:

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

51. I consider that the average consumer of the respective goods will be predominantly the general public. I appreciate that a smaller number of purchases will be made by professional consumers in the course of their business e.g. pubs/bars and restaurants.

[9] *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).

52. The respective goods will be purchased either as sealed goods, for consumption at a time of the purchaser's choosing, from physical shops/supermarkets or online stores; or (with the exception of *fruit extracts, alcoholic* and *Syrups and other preparations for making beverages* and *fruit extracts, alcoholic*) as 'ready-to-drink' beverages from a public house/bar or restaurant. Purchases made from physical shops will, in most cases, be visual in nature; the purchaser self-selecting the goods from shelves. Some purchases will be made aurally by way of requests to retail staff. In a pub or bar setting, the average consumer will order from the bar by way of aural request. There will, in many instances, nevertheless be a visual aspect to the purchasing act to the extent that the beer pumps/taps, spirit optics and bottles containing other beverages on display along or near the bar will be viewed before the purchaser makes their choice.[10] The average consumer may consider factors such as alcohol content and, in the case of wines, vintage and compatibility with certain foods. Some alcoholic goods, for example, champagnes and spirits, are expensive. Consequently, in my view, the level of attention displayed when purchasing the respective goods will be at least medium.

53. *Fruit extracts, alcoholic* and *Syrups and other preparations for making beverages* and *fruit extracts, alcoholic* will be self-selected from the shelves of physical shops or ordered online after viewing a product listing. Factors considered will include: alcoholic content, as well as the ingredients in general. These goods are fairly expensive. I consider that the average purchaser would display a medium level of attention when purchasing these goods also.

[10] *Rani Refreshments FZCOv Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM),* Case T-523/12 and *Simonds Farsons Cisk plc v OHIM*, Case T-3/04, both General Court.

**Comparison of the marks**

| | |
|---|---|
|  |  |
| Opponent's (earlier) mark | Applicant's (contested) mark |

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

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

55. 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.

56. The Opponent's mark comprises three elements: a number, a word and a shape. At the centre of the mark, the number '700' is arranged vertically such that each successive digit appears underneath the previous digit. This element is rendered in a plain white font and is emboldened relative to the word element 'YEARS', whose letters are arranged conventionally i.e. from left to right. The word 'YEARS' is coloured red and rendered in a much smaller plain font, all letters being in upper case. These two elements are set against a solid black four-sided shape: the two horizontal sides of the shape are in parallel and concave or 'dipped' relative to the horizon; whereas the two vertical sides gradually taper inwards towards the top of the shape. The overall impression resides in the mark in its entirety; albeit the '700' element will be read first owing to its visual dominance.

57. The Applicant's mark comprises an array of Chinese characters arranged from left to right; underneath which appear three characters which might be seen by some consumers as the number '700'. In my view, some consumers would not see '700' but would perceive these characters simply as more *Chinese* characters. All elements are black and rendered in a uniform font which might be described as 'angular'. The overall impression resides in the mark in its entirety; albeit the eye will be drawn to the '700' element first because that is the part of the mark that can be read by the average non-Chinese speaking UK consumer.

58. Visual comparison

Both marks include the element '700'. In the Opponent's mark, '700' is arranged vertically in a plain font; whereas in the Applicant's mark, the '700' is arranged horizontally and the digits have an angular stylisation to the extent that the two strokes of the '7' are at right angles, and each '0' is almost square in shape. In the Opponent's mark, the word element 'YEARS', in plain red font, positioned centrally at the bottom of the mark, will be noticed despite being much smaller that the '700' element. Other points of difference are: the Chinese characters in the Applicant's mark; and the solid black shape against which the '700' and 'YEARS' elements are set in the Opponent's mark. Consequently, I find that the level of visual similarity between the respective marks is low.

59. Aural comparison

I consider that the Opponent's mark will be articulated as either 'se-ven-hun-dred' or 'se-ven-hun-dred-years'. In my view, some average consumers will omit to pronounce the 'YEARS' element owing to its being dwarfed by the large and emboldened '700' element above it.

60. I now turn to the Applicant's mark. In my view, the vast majority of UK average consumers will not articulate the three Chinese characters. Whilst I acknowledge that a small number of average consumers will be Chinese speakers, I do not consider that number to be sufficiently significant for their perception of the mark to have a bearing on my assessment of likelihood of confusion.[11] The mark will therefore be articulated as 'se-ven-hun-dred'. Consequently, I find that, if the 'YEARS' element of the Opponent's mark is not articulated, the marks will be aurally identical; if it *is* articulated, then the marks will be aurally similar to a medium degree.

61. Conceptual comparison

The '700' element of the Opponent's mark will be understood by the average consumer as referring to the number 700. 'YEARS' will be understood as a common word in the English language denoting a time period of 365 days (or 366 days in a leap year). '700 years' would be understood as what it says.

62. The '700' element in the Applicant's mark would be understood as noted above. The vast majority of average UK consumers would not ascribe any meaning to the three Chinese characters; at best, they would recognise them as Chinese characters, but without knowing their meaning.

[11] See decision O/144/17 DOUBLE HAPPINESS at para [13] …'Where the vast majority of relevant UK consumers would not understand the meaning of the word/sign in question, the perception of those in the group that would understand the meaning of the foreign word/sign is unlikely to be a decisive factor in the assessment of the likelihood of confusion'.

63. Consequently, I find that the respective marks are conceptually similar to a medium degree if the element in the applied-for mark is seen as the number 700. If it is not, the marks are conceptually neutral because none of the elements in the later mark will be seen as having a meaning, to the average UK consumer.

**Distinctive character of the earlier mark**

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

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *WindsurfingChiemsee* v *Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

65. The Opponent's mark is neither descriptive of, nor allusive to, the goods in respect of which is registered. I find that the mark has an average level of distinctiveness.

**Likelihood of confusion**

66. Confusion can be direct or indirect. Mr Ian Purvis Q. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*[12]*.* Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*[13], the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that he has in his mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark before him but mistakenly matches it to the imperfect image of the earlier mark in his 'mind's eye'. Indirect confusion occurs when the average consumer recognises that the later mark is indeed different from the earlier mark, but, concludes that the later mark is economically linked to the earlier mark by way of being a 'sub brand', for instance.

67. Before arriving at my decision, I must make a global assessment taking into account all of the relevant factors, including the principles a) – k) set out above at [13].

68. When considering all relevant factors 'in the round', I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

69. The purchasing act will, in most cases, as noted above at [52], be visual in nature; though there will in some cases be an aural aspect. The visual aspect of the marks will play a more prominent role because the selection of, or decision to purchase, the goods will usually be made after visual exposure to the mark. In a

[12] Case BL O/375/10 at [16].
[13] *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

bar/public house, purchases will usually be made after exposure to the brands on the taps/optics/bottles on display; online purchases will be made after viewing an image of the product on the website. Consequently, I consider that the weight to be accorded to the aural similarity of the marks is somewhat diminished[14].

70. I have determined that:

- The Applicant's *alcoholic beverages, except beer* are similar to the Opponent's *beers* to at least a medium degree.

- The level of similarity between the Applicant's *wine* and the Opponent's *beers* is no more than low.

- The following of the Applicant's goods are similar to *beers* to a very low degree:

  *Arrack; Distilled rice spirits [awamori]; Gaolian jiou [sorghum-based Chinese spirits]; Rice alcohol; brandy; Baijiu [Chinese distilled alcoholic beverage]; whisky; liqueurs; cocktails.*

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[14] In *New Look Limited v OHIM* the General Court stated that:

"49. …it should be noted that in the global assessment of the likelihood of confusion, the visual, aural or conceptual aspects of the opposing signs do not always have the same weight. It is appropriate to examine the objective conditions under which the marks may be present on the market…";

And

In *Quelle AG v OHIM*[14], the General Court held that:

"68..... If the goods covered by the marks in question are usually sold in self-service stores where consumers choose the product themselves and must therefore rely primarily on the image of the trade mark applied to the product, the visual similarity between the signs will as a general rule be more important. If on the other hand the product covered is primarily sold orally, greater weight will usually be attributed to any phonetic similarity between the signs."

- The Applicant's *aperitifs* are similar to the Opponent's *beers* to no more than a low degree.

- The Applicant's *fruit extracts, alcoholic* are similar to the Opponent's *Syrups and other preparations for making beverages* to at least a medium degree.

- There is a low level of visual similarity between the marks.

- If the 'YEARS' element of the Opponent's mark is not articulated, the marks will be aurally identical; if it *is* articulated, then the marks will be aurally similar to a medium degree.

- The level of conceptual similarity depends on how the bottom row of characters in the Applicant's mark is perceived by the average consumer. The angular stylisation of the characters, in particular the right-angled configuration of the first character, is such that some consumers might perceive those characters simply as Chinese characters rather than '700'. Therefore, for the average consumers who *do* see '700', the marks will have a medium level of conceptual similarity; for those who do not see '700', the marks will be conceptually neutral.

71. In my view, the visual differences between the marks, together with my finding, at [60], that the visual aspect of the marks carries more weight than the aural impact of the marks, are sufficient to rule out the likelihood of both direct *and* indirect confusion.

72. I find this to be the case even though, for some average consumers, the marks will share a common element '700'. I bear in mind the decision of Mr James Mellor Q. C., as the Appointed Person in *Duebros Limited v Heirler Cenovis GmbH*[15] in which he cautioned that a finding of direct confusion should not be made merely because

[15] BL O/547/17, at [81.4].

the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

**Final Remarks**

73. The Opposition has failed. The Application may proceed to registration.

**COSTS**

74. I award the Applicant the sum of **£200** as contribution towards its costs, calculated as follows[16].

| | | |
|---|---|---|
| Consideration of the Opposition and preparation of Defence and Counterstatement | £200 | |
| **Total:** | | **£200** |

75. I therefore order ROK Stars Limited to pay to Gulin County Jiusheng Investment Co., Ltd. **the sum of £200**. 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 April 2021**

**Mx N. R. Morris**
**For the Registrar,**
**the Comptroller-General**

[16] Based upon the scale published in Tribunal Practice Notice 2/2016.