

O-327-19

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3281046 BY
EVANS GROUP HOLDING COMPANY LIMITED**

TO REGISTER THE TRADE MARK:

Lord Nelson

**FOR GOODS AND SERVICES
IN CLASSES 32 and 33**

AND

**IN THE MATTER OF OPPOSITION TO ITS REGISTRATION
UNDER NO. 412571
BY HEAVEN HILL DISTILLERIES, INC.**

Background and pleadings

1) On 8 January 2018 Clare Joanne Evans applied to register the following trade mark for goods and services in Classes 32 and 33:

Lord Nelson

The application was published for opposition purposes on 2 February 2018. During the course of these proceedings an amendment to the specification in Class 32 was accepted, so that the specification of the opposed mark in Classes 32 and 33 now stands as shown in the Annex to this decision.

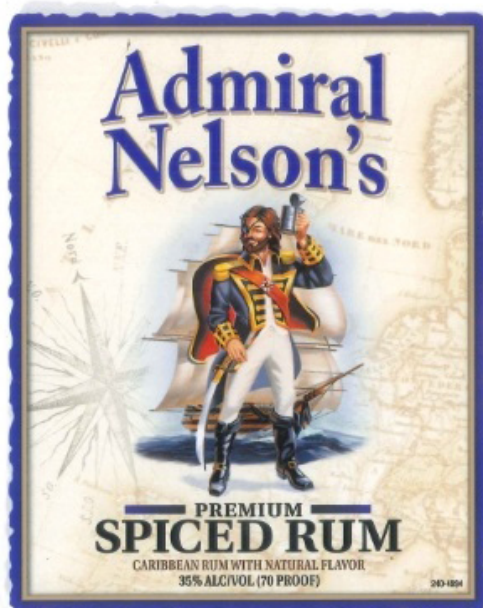
2) The application is opposed by Heaven Hill Distilleries, Inc. (“the Opponent”). The opposition, which is directed against all the goods applied for, is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), for the purposes of which the Opponent relies upon the following EU trade mark registrations for the following respective marks and goods:

EU 16756652

ADMIRAL NELSON’S

Class 33: *Spirits; rum.*

EU 14329254



Class 33: *Spirits; rum.*

3) EU 16756652 was filed on 22 May 2017 and registered on 5 September 2017. EU 14329254 was filed on 02 July 2015 and registered on 15 October 2015. The significance of these respective dates is that (1) both the Opponent's marks constitute earlier marks in accordance with section 6 of the Act, and (2) they are not subject to the proof of use conditions contained in section 6A of the Act, their respective registration procedures having been completed less than five years before the publication of the Applicant's mark.

4) During the course of these proceedings the application was transferred to Evans Group Holding Company Limited ("the Applicant"), which confirmed that it had had sight of the relevant documents filed, that it stood by the statements made in the counterstatement, and that where the name of the original applicant appeared this should be read as though made in its name. The Opponent is represented by HGF Limited. The Applicant is represented by ip21 Limited. The Opponent claims that the mark applied for is similar to the earlier marks, that it is registered for identical or similar goods and services, and that there consequently exists a likelihood of confusion, including a likelihood of association between them. The Applicant filed a notice of defence and counterstatement, denying the grounds of opposition.

5) Both parties filed evidence during the evidence rounds, the Applicant's evidence being accompanied by written submissions. Both parties filed written submissions in lieu of attendance at a hearing. I therefore give this decision after a careful review of all the papers before me.

The evidence

6) I consider it unnecessary to give an evidence summary here, since I shall refer to the parties' evidence, as appropriate, when considering their submissions in the course of my assessment below.

Section 5(2)(b)

7) Section 5(2)(b) of the Act reads 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”.

8) The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

The Opponent's best case

9) In addition to the word element "Admiral Nelson's" the earlier mark EU 14329254 also contains significant figurative elements which take it further from the Applicant's mark. Since the goods in the specifications of both earlier marks are identical, EU 16756652 clearly represents the Opponent's best case; In the interests of procedural economy I shall therefore confine my assessment to this mark.

Comparison of goods

10) In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

11) 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 users of the respective goods or services;
- b) The physical nature of the goods or acts of services
- c) The respective trade channels through which the goods or services reach the market
- d) 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;

e) 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.

12) In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05 (“*Meric*”), 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 the 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 (Case T-104/01 *Oberhauser v OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM — Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42)”.

13) In *Boston Scientific Ltd v OHIM* (“*Boston*”), Case T-325/06, the General Court said:

“82 It is true that goods are complementary if 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...”

14) When it comes to understanding what terms used in specifications mean and cover, the guidance in the case-law is to the effect that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”¹ and that I must also bear in mind

¹*British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281

that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning². I will make the comparison with reference to the Applicant's goods. I will go through them term by term, but grouping them as it is useful and reasonable to do so (see the comments of the Appointed Person in *Separode* BL O-399-10).

15) The Opponent began its submissions on similarity of goods by listing those of the Applicant's goods in Class 33 which it said were either expressly categories of spirits or which were specific types of spirits. With the exception of *vermouth*, which is a fortified wine more appropriately grouped with wine, and *alcoholic aperitifs*, which I shall consider next, I agree that all the following goods fall within the ambit of the Opponent's *spirits*, and are identical:

Absinthe; Aguardiente [sugarcane spirits]; Arak; Arak [arrack]; Arrack; Arrack [arak]; Blended whisky; Bourbon whiskey; Brandy; Cachaca; Calvados; Canadian whisky; Cherry brandy; Chinese spirit of sorghum (gaolian-jiou); cooking brandy; Gaolian-jiou [sorghum-based Chinese spirits]; Gin; Distilled rice spirits [awamori]; Distilled spirits; Distilled spirits of rice (awamori); extracts of spiritous liquors; Fermented spirit; Kirsch; Korean distilled spirits (soju); Malt whisky; Potable spirits; Rum; Rum [alcoholic beverage]; Rum infused with vitamins; Rum punch; Rum-based beverages; Scotch whisky; Shochu (spirits); Sorghum-based Chinese spirits; Spirits; Spirits and ... ; Spirits [beverages]; Sugar cane juice rum; Vodka; Whiskey; Whiskey [whisky]; Whisky. I would add that, as spirits, Grappa and Nira [sugarcane-based alcoholic beverage] also fall within this category.

16) The online Oxford English Dictionary defines an aperitif as "*an alcoholic drink taken before a meal to stimulate the appetite*", and this is how the term would be generally understood. *Alcoholic aperitifs* could therefore cover alcoholic drinks which were not spirits; however, it also includes the Opponent's *spirits*, spirits commonly being drunk as aperitifs. *Alcoholic aperitifs too*, therefore, is identical with the Opponent's *spirits* under the principle explained in *Meric*. The same applies to *aperitifs*.

² *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

17) The Opponent then proposed a further list from the contested Class 33 specification which it asserted were “broad categories of alcoholic beverages which could include spirits and/or rum specifically as ingredients”; as a result, it argued, these were identical to the goods covered by the earlier marks “as *the two cannot be dissected from each other*”. The mere fact that spirits constituted an ingredient of a product would not in itself make that product identical to spirits (though it may give rise to similarity). Nevertheless, I consider the following can in any case be classified as spirits, and are identical to the Opponent’s *spirits*: *Baijiu [Chinese distilled alcoholic beverage]; Beverages (Distilled -); Distilled beverages; Digesters [spirits]; Schnapps;*

18) Although the word “liquor” may sometimes be used loosely in casual speech to refer to alcoholic drinks in general, in its more specific descriptive sense it denotes distilled spirits. The following are identical with the Opponent’s *spirits*: *Chinese brewed liquor (laojiou); Chinese mixed liquor (wujiapie-jiou); Chinese white liquor (baiganr); Chinese white liquor [baiganr]; Flavored tonic liquors; Ginseng liquor; Hulless barley liquor; Japanese liquor containing herb extracts; Japanese liquor containing mamus hi-snake extracts; Japanese liquor flavoured with Japanese plum extracts; Japanese liquor flavoured with pine needle extracts; Japanese regenerated liquors (naos hi); Japanese sweet rice-based mixed liquor (shiro-zake); Japanese sweet rice-based mixed liquor [shiro-zake]; Japanese white liquor (shochu); Japanese white liquor [shochu]; Red ginseng liquor; liquors; Tonic liquor containing herb extracts (homeis hu); Tonic liquor containing mamushi-snake extracts (mamushi-zake); Tonic liquor flavoured with Japanese plum extracts (umeshu); Tonic liquor flavoured with pine needle extracts (matsuba-zake).*

19) *Liqueurs* are defined in *Collins English Dictionary* as “any of several highly flavoured sweetened spirits such as kirsch or cointreau, intended to be drunk after a meal”, and are thus identical with the Opponent’s *spirits* in accordance with *Meric*. The term would also include beverages made to serve as liqueurs by the addition of spirits such as whisky to cream, for example, in which case they would routinely be sold under the brand of the spirits in question, and would be highly similar to spirits. The applicant’s *Alcoholic egg nogg; Anise [liqueur]; Anisette; Anisette [liqueur];*

Blackcurrant liqueur; Coffee-based liqueurs; Cream liqueurs; Curacao; Digesters [liqueurs]; Herb liqueurs; Liqueurs; Liqueurs containing cream; Peppermint liqueurs; Scotch whisky based liqueurs are therefore either identical or highly similar to the Opponent's *spirits*.

20) The following terms may all include *spirits*, and are identical under the principle explained in *Meric*: *Alcohol (Rice-); Alcoholic beverages containing fruit; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic cordials; Alcoholic energy drinks; Alcoholic essences; Alcoholic extracts; Alcoholic fruit beverages' Alcoholic fruit cocktail drinks; Alcoholic fruit extracts; Beverages (Alcoholic -), except beer; Cocktails; Cordials [alcoholic beverages]; Fruit (Alcoholic beverages containing-); Fruit extracts, alcoholic; Prepared alcoholic cocktails; Prepared wine cocktails; Rice alcohol.*

21) The following are all broad categories of alcoholic beverages which can contain spirits: *Alcoholic aperitif bitters; Alcoholic bitters; Aperitifs with a distilled alcoholic liquor base; Alcoholic carbonated beverages, except beer; Alcoholic jellies; Alcoholic punches; Alcoholic tea-based beverage; Alcopops; Bitters Fortified wines; Liquor-based aperitifs; Pre-mixed alcoholic beverages; Pre-mixed alcoholic beverages, other than beer-based; Preparations for making alcoholic beverages; Sherry.* As I have observed, the mere fact that spirits constituted an ingredient of a product would not in itself make that product identical to spirits (though it may give rise to similarity, as discussed below).

22) Although many consumers may be aware that spirits are used as an ingredient in the production of *Fortified wines* and *Sherry*, they will not regard these drinks as spirits, but rather as having their own particular nature, taste and method of production, closer to that of wine. The same applies in respect of *Vermouth*. Similarly, although distilled alcohol may be used in the production of bitters (*Alcoholic aperitif bitters, Alcoholic bitters* and *Bitters*) the consumer will not regard

these drinks as spirits, but rather as mixers having their own particular nature, taste and method of production. Vermouth is often used, and bitters are almost invariably used, as mixers with spirits to make cocktails; but as the General Court pointed out at paragraph 55 in *Yilmaz v OHIM*, Case T-584/10, the existence of alcoholic cocktails does not remove the fundamental differences between the different drinks. I shall discuss below the case law of the General Court in which it pointed out that, owing to their different ingredients and methods of production, different “families” of drinks have traditionally been produced by different producers; and that the consumer is conscious of this, and of the practice whereby drinks in different “families” are still marketed under different brands, and will expect this to be the case. Nothing in the evidence filed in this case leads me to believe that these considerations do not apply in respect of the UK consumer. The consumer will not expect to find fortified wines, sherry, vermouth or bitters marketed under the same brand as spirits.

23) I shall therefore include *Fortified wines, Sherry, Vermouth, Alcoholic aperitif bitters, Alcoholic bitters* and *Bitters* in the drinks I shall consider in paragraph 24 below. The other types of drink listed in paragraph 21 above, on the other hand, all consist of, or include within their ambit, pre-mixed drinks and cocktails; where these pre-mixed concoctions contain spirits, their spirits component will play a prominent part in the consumer’s perception of their nature, purpose and taste; they are routinely sold under the brand of the spirits producer³. They therefore have a high degree of similarity with the Opponent’s *spirits*.

24) *Low alcoholic drinks* would consist of long drinks such as low alcohol cider and wine in class 33. Producers of long drinks such as cider and beer sometimes produce low alcohol versions of these drinks under the same brands as those of the full alcohol version. The point about spirits is that they are high alcohol drinks. As I shall discuss later, producers of spirits may sometimes market premixed drinks consisting of spirits and a soft drink mixer under the same brand as that of the spirit in question. The effect of such premixed drinks, however, is to produce long drinks of normal alcoholic content. *Low alcoholic drinks* in Class 32 can therefore be taken to

³ As reflected in the exhibits discussed in paragraphs 38-39 below.

cover drinks such as low alcohol cider or wine; I shall therefore include them in my assessment in paragraph 24 below.

25) The Opponent submitted that the remaining goods covered by the contested application in class 33 were all fermented alcoholic drinks, such as wine and mead or alcoholic drinks containing wines or mead. I consider the goods falling into this category to be as follows: *Acanthopanax wine (Ogapiju)*; *Amontillado*; *Aperitif wines*; *Beverages containing wine [spritzers]*; *Black raspberry wine (Bokbunjaju)*; *Cider*; *Ciders*; *Cooking wine*; *Dessert wines*; *Dry cider*; *Fruit wine*; *Grape wine*; *Hydromel [mead]*; *Japanese sweet grape wine containing extracts of ginseng and cinchona bark*; *Korean traditional rice wine (makgeoli)*; *Low-alcoholic wine*; *Mead [hydromel]*; *Mulled wine*; *Mulled wines*; *Natural sparkling wines*; *Naturally sparkling wines*; *Perry*; *Piquette*; *Red wine*; *Red wines*; *Rose wines*; *Sangria*; *Sparkling fruit wine*; *Sparkling grape wine*; *Sparkling red wines*; *Sparkling white wines*; *Sparkling wine*; *Sparkling wines*; *Still wine*; *Strawberry wine*; *Sweet cider*; *Sweet wine*; *Sweet wines*; *Table wines*; *White wine*; *White wines*; *Wine*; *Wine-based aperitifs*, *Wine-based drinks*, *Wine coolers [drinks]*; *Wine punch*; *Wines*; *Wines of protected appellation of origin*; *Wines of protected geographical indication*; *Yellow rice wine*. Sake is a fermented drink which I consider should be included in this category, and the same would apply in respect of *Sake substitutes*. I have explained above why, in addition to *Low alcoholic drinks*, I also consider that *Fortified wines*, *Sherry*, *Vermouth*, *Alcoholic aperitif bitters*, *Alcoholic bitters* and *Bitters* should fall within this category of goods for the purposes of comparison of similarity.

26) The Opponent submitted that these goods were similar to the *spirits* covered by the earlier marks, since they were all alcoholic drinks drunk as a matter of taste and in order to obtain the effect of alcohol. The purpose of the goods was therefore similar. They were also similar in nature at the general level in as much as both were alcoholic drinks. In addition, they would often be sold in the same places, such as down the same aisles in supermarkets and in pubs and bars. The Opponent directed me to a decision of Mr Geoffrey Hobbs Q.C., sitting as the Appointed Person, in *Balmoral Trade Mark* [1998] R.P.C. 297, as authority for the proposition that wine and whisky (and, by extension, spirits) should be regarded as similar goods. That decision, however, was reached in the context of the UK market twenty-

one year ago and, more significantly, predates not only the CJEU's decision in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* but also the more recent case law of the General Court, which I discuss below. Shared distribution channels, as emphasized by the Opponent in the present proceedings, were a significant factor in the decision in *Balmoral*, but have been accorded a different weight in cases decided subsequently by the General Court.

27) In *The Coca-Cola Company v OHIM (MEZZOPANE)*, Case T-175/06, the GC compared beer, ale and porter with wine, noting the difference in colour, taste, smell, ingredients and production methods. It considered that the relevant consumer would consider beer and wine as two distinct products, not belonging to the same family of alcoholic beverages. It found that they were not complementary but that they competed, to a certain extent, because they were both capable of meeting identical needs (consumption during a meal or as an aperitif). However, the Court said that it must be accepted that the average consumer would consider it normal for the two types of product to come from different undertakings, since the perceived differences between them would also make it unlikely that there would be an expectation that the same undertaking would produce and market the two types of beverage. The Court noted that, in Austria, there is a tradition of producing both beer and wine and that this is done by different undertakings⁴. Its conclusion was that there was little similarity between wines and beers (that there was any similarity at all was purely by reason of the possible competition mentioned above).

28) In *MEZZOPANE* above the General Court did not refer to proximity of sale – but it did do so in *Bodegas Montebello, SA v OHIM Bodegas Montebello, SA v OHIM*, Case T-430/07, in which it compared wine and rum, finding that they are not composed of the same ingredients, that their method of production is different, and that the end products are different as regards their taste, colour and smell. Consequently, the public perceived wine and rum as being different in nature. The Court observed that the alcoholic content of the two products is very different and that even though the wine and rum might share distribution channels, they will not generally be sold on the same shelves. It considered that competition or

⁴ As will, become clear below, I see no difference between the perceptions of the Austrian and UK consumer in this respect. See also footnote 4 on page 15 below.

complementarity were not a factor, and concluded that wine and rum are clearly distinguished by their nature, method of production, provenance, use and alcoholic content, with the overall result that there was no similarity between them.

29) It is clear from the decisions discussed above (and also from the Court's decision in *Yilmaz v OHIM* discussed in paragraph 32 below) that the General Court, while applying the classic *Canon* factors, also considers it important to recognize that the European consumer perceives alcoholic drinks as falling into distinct "families", depending, amongst other things, on their characteristics, strength, price and occasions of use, and that the perceived differences between them would also make it unlikely that there would be an expectation that the same undertaking would produce and market types of beverage falling into different families of drinks; in other words, the consumer considers it normal for these different families of drinks to be produced by different producers, and will expect this to be the case. I have found nothing in the evidence filed in this case to lead me to believe that these considerations do not apply in respect of the UK consumer. Applying these criteria, and bearing in mind in particular the decision of the General Court in *Bodegas Montebello, SA v OHIM Bodegas Montebello, SA v OHIM* and of the High Court in *Whyte & MacKay Ltd v Origin Wine UK Ltd and Dolce Co Invest Inc* [2015] EWHC 1271 (Ch) (at paragraph 46), I find that there is only a low degree of similarity between the Opponent's *spirits* and those goods of the Applicant's Class 33 specification which I have listed in paragraph 25 above.

30) The Opponent's submissions with regard to Class 32 were as follows. Alcoholic drinks in Class 32, such as beers, barley wine etc. were similar to the goods covered by the earlier marks, being alcoholic beverages for consumption often made from the same ingredients (such as fruit and/or cereals), often sold in close proximity to each other in retail outlets and appearing side-by-side on drinks menus in restaurants and bars. They therefore shared the same end consumer. All such goods could be sold from the same premises and produced by the same manufacturer. The non-alcoholic drinks in Class 32 were also similar to the goods covered by the earlier marks as they were all beverages for consumption by the general public. They were often sold in close proximity to each other in retail outlets, were commonly served in public houses, bars, bistros and restaurants and also appeared side-by-side on

drinks menus in restaurants. The Opponent pointed out that the Applicant had itself said that intended to produce sell all these from the same premises.

31) To back its contentions the Opponent referred to a number of documents appended as exhibits to a witness statement of 12 November 2018 by Ms Tanya Elizabeth Waller, who stated that she is a registered trade mark attorney at HGF Limited, the Opponent's representatives in these proceedings. In support of its submission that that the same manufacturer could often produce both alcoholic and non-alcoholic drinks the Opponent referred to **Exhibit TEW1** to Ms Waller's witness statement. This consisted of an article taken from *The Guardian* website in the UK regarding Coca-Cola's proposed expansion into alcoholic drinks. Although Coca-Cola were proposing to launch the new product in Japan initially, the Opponent argued, the article showed that in recent times, well-known non-alcoholic beverage producers could expand into alcoholic beverages and that such expansion had global potential since it had been reported in the UK. The Opponent contended further that there were numerous other examples of companies who produce both alcoholic and non-alcoholic drinks for their consumers, and these were shown at **Exhibit TEW2**; consumers were therefore aware that the same company could and did produce both types of products.

32) The Opponent continued as follows: It was well known that spirits were generally served with a non-alcoholic mixer such as lemonade, cola or water, etc. **Exhibit TEW3** highlighted that there was an intrinsic link between the sales of the two products, as it was stated that "the growth in sales of rum ... are providing a sales boost to the category" of soft drinks. **Exhibit TEW4** also showed that the choice of mixer used was a topic carefully considered by consumers. As a result, there was a clear link in the marketplace, and for the consumer, between rum, spirits and soft drinks. Quoting from **Exhibit TEW3**, the Opponent pointed out that soft drink menus were evolving across on-premises, including a broader range of sophisticated, premium, adult-focused soft drinks, where consumers could get the same quality offer in line with an outlet's spirits or beer menus. Consumers, the Opponent said, were increasingly expecting to see non-alcoholic versions of their alcoholic drinks being produced by the same manufacturer – choosing, for example,

the alcoholic version when they aren't driving and the non-alcoholic version when they are.

33) In *Yilmaz v OHIM*, Case T-584/10 the General Court compared the spirit tequila with *beers* and also with *mineral and aerated waters and other non alcoholic drinks, fruit drinks and fruit juices, and syrups and other preparations for making beverages* in Class 32⁵. The Court found (at paragraph 51) that the differences between tequila and beer were even clearer and more substantial than the differences between wine and beer established by the Court in *MEZZOPANE*, with the result that those differences made it even more unlikely that the relevant public would believe that the same undertaking would produce and market the two types of beverage at the same time.

34) The Court also found (at paragraph 66) that that the differences between tequila and mineral and aerated waters and other non alcoholic drinks, fruit drinks and fruit juices, and syrups and other preparations for making beverages were even clearer and more substantial than the differences between those products and wine established by the Court in *MEZZOPANE* – again, with the result that those differences made it even more unlikely that the relevant public would believe that the same undertaking would produce and market the two types of beverage at the same time.

35) I have found nothing in the evidence filed in this case which leads me to believe that the considerations applied in *Yilmaz v OHIM* should not apply to the comparison between the Opponent's *spirits* and the goods of the Applicant's specification in Class 32. It is true that nowadays large conglomerates may own among their holdings different producers of (or production facilities producing), drinks in what the General Court has characterised as different "families of drinks". This does not mean, however, that those consumers who are aware of that fact will infer that the same brand or brands will be applied across those different families of drinks within

⁵ For the sake of procedural economy the relevant public was defined by reference to the average German consumer, but the Court observed (at paragraph 42) that it was of little importance whether the relevant public was defined by reference to average German or European consumer. Moreover, the applicant had not invoked the existence of factors, such as specific consumption habits in certain Member States other than Germany, which could have an impact on how the similarity of the goods was perceived.

such a group. On the contrary, they will be aware that, as the general Court pointed out, owing to their different ingredients and methods of production, the different families of drinks have traditionally been produced by different producers. The consumer is conscious of this, and of the practice whereby drinks in different “families” are still marketed under different brands, and will expect this to be the case. This state of affairs is well illustrated by the respective brands apparent on the various products depicted throughout Exhibits TEW2 to TEW6 of the Opponent’s evidence.

36) I see nothing in the report in Exhibit TEW1 on Coca-Cola's planned launch of an “alcopop” in Japan to alter my view, as I have described it above, of consumer perceptions in the UK. It is not in any case clear from the article that the Coca-Cola corporation plans to market its alcopop under the Coca-Cola Brand. Whether or not this is the case, however, I note that Coca-Cola Japan’s president is quoted as saying (at page 4 of the Opponent’s evidence) that the company would probably sell its alcoholic drinks only in Japan because of the unique and special qualities of that market.

37) I accept the proposition, which the opponent supports with Exhibit TEW3, that a growth in the sales of rum (or any other spirit) will boost sales of such soft drinks as may be used with it as mixers; but such a link is not in itself sufficient to establish complementarity within the meaning of the case law⁶. As the General Court pointed out at paragraphs 55 and 70 in *Yilmaz v OHIM*, the existence of alcoholic cocktails and premixed drinks which mix alcoholic beverages with a non-alcoholic ingredient does not remove the fundamental differences between those goods. Thus, as the General Court had already found in Case T-296/02 *Lidl Stiftung v OHIM*, the fact that cola is often used as a mixer drink with rum did not make those drinks similar.

38) Moreover, the court went on to observe – tellingly – that undertakings offering their alcoholic beverages mixed with a non-alcoholic ingredient so as to sell them as

⁶ See, for example, the comments of Daniel Alexander, QC, sitting as the Appointed Person, at paragraphs 18 and 20 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.

pre-mixed drinks do not sell that non-alcoholic ingredient separately under the same or a similar mark as the alcoholic beverage at issue. The evidence provided by the Opponent is perfectly consistent with this finding. Thus, Exhibit TEW6 shows (at pages 69 and 73) the product description and packaging of a pre-mixed rum and cola drink. The packaging bears the “Captain Morgan” figurative Mark of the rum producer together with the words “Original Spiced Gold and Cola”. Here, the mixed drink is being sold under the banner of the rum mark, the soft drink element being referred to simply by the generic word “cola”.

39) While I accept that the Opponent’s evidence may indicate that consumers might sometimes be quite discerning about mixers, this does not in itself point to similarity. In this context Exhibit TW5 is instructive. It consists of an article from April 2018 reporting the launch of a canned gin and tonic drink by the gin distillery Portobello Road and the mixer brand Franklin & Sons. It is significant that the drink cans shown in the photograph which accompanies the article (on page 66 of the evidence) bear the names both of the gin producer and of the tonic water producer respectively. In co-branding in this way the distillery associates its name with the alcoholic component of the drink, and the mixer producer with its soft drink component. This is not an example of a soft drinks producer marketing an alcoholic drink under its soft drink brand. It confirms rather than challenges the finding of the General Court referred to above.

40) To summarise: I consider that the *MEZZOPANE* criteria, as applied by the General Court to the comparison of goods in *Yilmaz v OHIM*, are applicable to the comparison between the Opponent’s *spirits* and the goods of the Applicant’s specification in Class 32. Applying these criteria, I find that there is at best only a low or, as regards non-alcoholic drinks, very low degree of similarity between the Opponent’s *spirits* and any of the goods of the Applicant’s Class 32 specification.

The average consumer and the purchasing process

41) 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*. 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.”

42) The average consumer of the non-alcoholic beverages in the Opponent’s Class 32 specification consists of the general public. The average consumer of alcoholic beverages, including spirits and beer consists of adult members of the general public. The goods will be sold either in shops, supermarkets and off-licences or online (where the mode of selection will be primarily visual) or in licensed premises such as pubs and restaurants (where they will be ordered verbally, but may be visible on optics or otherwise displayed behind the bar). The purchasing process is therefore largely a visual one, but I shall not ignore the potential for oral use of the mark in my assessment.

43) The degree of care and attention paid in the selection process will vary slightly between the more discerning purchaser and the less careful purchaser who makes a snap decision at the bar or in the shop. Some expensive spirits may involve relatively careful selection, and I accept that the Opponent’s evidence may indicate that consumers may sometimes be comparatively discerning about mixers and soft drinks; but both will often be impulse purchases, which may increase the scope for imperfect recollection. Generally speaking, given the cost and frequency of purchase, I consider the degree of care and attention overall for the goods at issue to be average, neither higher nor lower than the norm.

Comparison of the marks

44) 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.”

It would be wrong, therefore, to dissect the trade marks artificially, 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.

45) The marks to be compared are shown below:

The opposed mark	The earlier mark
Lord Nelson	ADMIRAL NELSON'S

The overwhelming majority of the British Public would recognise immediately which historical character is being referred to when the word “Nelson” is used on its own. He is one of the most famous characters in English history and is commemorated in

one of London's most famous landmarks. By virtue of his fame he is usually referred to simply by his surname. More formally, he can be referred to by his titles as Lord Nelson, Admiral Nelson, or Admiral Lord Nelson; whichever of these is used, it will be immediately and virtually universally recognised who is meant. In both cases the competing marks will be seen as specifying this particular historical figure by means of his title and surname. In neither case is the respective title an insignificant part of the mark, and in both cases it makes some contribution to the mark's distinctive character; but in the context of the marks as a whole it is in both cases the surname NELSON, identifying the individual in question, on which most of the distinctive weight falls.

46) Considered in themselves the words LORD and ADMIRAL represent quite different and distinct concepts. When placed as a title before the name NELSON, however, though they still represent an element of conceptual difference, that difference is very largely outweighed by the conceptual identity of the individual they are applied to. Overall, there is a high degree of conceptual similarity between the marks.

47) Similar considerations apply to the visual and oral comparison of the marks. The pronunciation of all the words in the competing marks is perfectly straightforward. Both visually and orally the initial words LORD and ADMIRAL are obviously quite different; but, being simply familiar titles placed before an identical and very famous name, the attention they receive will be limited by comparison. The use of a possessive S is by no means uncommon in trade marks and will excite little attention; it will not contribute substantially to the differentiation of the marks. Nor, since both marks are word marks, does the use of upper or lower case letters play a role. Overall, there is at least a medium degree of both visual and oral similarity between the marks.

The distinctiveness of the earlier mark

48) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, either on the basis of inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v.*

Puma AG, paragraph 24). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *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).”

49) I have no evidence of acquired distinctiveness to consider. This leaves the question of inherent distinctive character. “Admiral Nelson’s” is neither descriptive nor allusive of the goods protected by the earlier mark, except in the remote sense that the drinking of spirits, and rum in particular, has traditionally been associated with seafarers and the Royal Navy. I consider that the mark has an average degree of inherent distinctive character.

Likelihood of Confusion

50) In a witness statement dated 14 January 2019 Ms Jacqueline Tolson states that she is a certified trade mark attorney at ip21 Limited, the Applicant's representatives

in these proceedings. In support of her submission that a number of live trade mark registrations containing the element NELSON “readily co-exist” on the Register and in the marketplace” she appends, as Exhibit JT1, an extract from the EUIPO database, *TMview*, showing the results of a search for marks on the UK Register containing the word NELSON in class 33, and in Exhibit JT2, print-outs from the websites of a number of the brand owners identified in the search results submitted in Exhibit JT1 as evidence that the trade mark registrations containing the word NELSON also co-exist in the marketplace. I understand the contention that the marks “readily co-exist” to amount to an assertion that marks containing the word NELSON can co-exist without confusion in the relevant sectors of the market for drinks in Class 33.

51) Since mere co-existence on the register is in any case insufficient to establish that the average consumer has been educated to distinguish between marks of different proprietors containing the same element, I will consider whether the evidence of use in the marketplace submitted by the Applicant can assist me. In so doing I bearing in mind the observations of Kitchen LJ in *Roger Maier and Another v ASOS*, [2015] EWCA Civ 220 (at paragraph 80) and Millett LJ in *The European Limited v The Economist Newspaper Ltd* [1998] FSR 283. There are several reasons why I do not accept that this evidence assists the Applicant’s case. In the first place, there is no evidence before the Tribunal that the Opponent has yet used its earlier mark on the UK market (the Applicant itself points out in its final submissions that “the Opponent’s goods have not been found available for sale in the UK”). Thus, there has in any case been no opportunity to establish co-existence on the market between the Opponent’s mark and any other mark.

52) Secondly, even if the object were simply to establish that marks containing the element NELSON can co-exist on the market for goods in Class 32, all that the evidence in Exhibit JT2 establishes is that goods appear to have been offered under the respective marks in the UK on 13 January 2019, when the print-outs were printed. It does not establish for how long and in what quantities relevant goods may have been offered under these respective marks on the UK market. Thirdly, even if that were established, all the marks listed (other than the Applicant’s mark) contain a further element taking the mark conceptually beyond a simple reference to Nelson

("Cape Nelson", "Nelson Bay by Selfried", "NELSON'S BLOOD", "Nelson's Gold", "NELSON'S REVENGE"). They are thus not on all fours with the marks I have to compare in these proceedings. Finally, I think it worth noting that only one of the marks – "NELSON'S BLOOD" (shown as an expired mark in Exhibit JT1) – is shown apparently being used in connection with a drink ("a blend of rum and spices") falling within the ambit of the Opponent's *spirits*. The others relate to wines or beer (or, in the case of the drink bottle depicted on page 6 of the evidence, an indeterminate beverage).

53) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

54) I have found the earlier mark to have an average degree of inherent distinctiveness. I have found at least a medium degree of visual and aural similarity and a high degree of conceptual similarity between the opposed mark and the earlier mark. Although there are conceptual differences between the words LORD and ADMIRAL, both marks consist of a simple reference to a very famous historical figure, and this will form a strong conceptual link and hook. Bearing in mind my findings on the average consumer and the purchasing process, I consider that in respect of those of the Applicant's goods which I have found to be identical with, or highly similar to, those of the earlier mark, there is a likelihood that at least a substantial proportion of the relevant public will directly confuse them. Even where the differences between the marks are noticed, however, the consumer will conclude from their use on identical or highly similar goods that they are variant marks of the same or economically linked undertakings; in this case there will be indirect confusion. **Accordingly, I find there will be direct or indirect confusion in respect of the following goods of the mark applied for in Class 33:**

Class 33: *Absinthe; Aguardiente [sugarcane spirits]; Alcohol (Rice -); Alcoholic aperitifs; Alcoholic beverages containing fruit; Alcoholic beverages, except beer;*

Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic carbonated beverages, except beer; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic cordials; Alcoholic egg nog; Alcoholic energy drinks; Alcoholic essences; Alcoholic extracts; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic fruit extracts; Alcoholic jellies; Alcoholic punches; Alcoholic tea-based beverage; Alcopops; Anise [liqueur]; Anisette; Anisette [liqueur]; Aperitifs; Aperitifs with a distilled alcoholic liquor base; Arak; Arak [arrack]; Arrack; Arrack [arak]; Baijiu [Chinese distilled alcoholic beverage]; Beverages (Alcoholic -), except beer; Beverages (Distilled -); Blackcurrant liqueur; Blended whisky; Bourbon whiskey; Brandy; Cachaca; Calvados; Canadian whisky; Cherry brandy; Chinese brewed liquor (laojiou); Chinese mixed liquor (wujiapie-jiou); Chinese spirit of sorghum (gaolian-jiou); Chinese white liquor (baiganr); Chinese white liquor [baiganr]; Cocktails; Coffee-based liqueurs; Cooking brandy; Cordials [alcoholic beverages]; Cream liqueurs; Curacao; Digesters [liqueurs and spirits]; Distilled beverages; Distilled rice spirits [awamori]; Distilled spirits; Distilled spirits of rice (awamori); Extracts of spiritous liquors; Fermented spirit; Flavored tonic liquors; Fruit (Alcoholic beverages containing -); Fruit extracts, alcoholic; Gaolian-jiou [sorghum-based Chinese spirits]; Gin; Ginseng liquor; Grappa; Herb liqueurs; Hulless barley liquor; Japanese liquor containing herb extracts; Japanese liquor containing mamushi-snake extracts; Japanese liquor flavored with Japanese plum extracts; Japanese liquor flavored with pine needle extracts; Japanese regenerated liquors (naoshi); Japanese sweet rice-based mixed liquor (shiro-zake); Japanese sweet rice-based mixed liquor [shiro-zake]; Japanese white liquor (shochu); Japanese white liquor [shochu]; Kirsch; Korean distilled spirits (soju); Liqueurs; Liqueurs containing cream; Liquor-based aperitifs; Malt whisky; Nira [sugarcane-based alcoholic beverage]; Peppermint liqueurs; Potable spirits; Pre-mixed alcoholic beverages; Pre-mixed alcoholic beverages, other than beer-based; Preparations for making alcoholic beverages; Prepared alcoholic cocktails; Prepared wine cocktails; Red ginseng liquor; Rice alcohol; Rum; Rum [alcoholic beverage]; Rum infused with vitamins; Rum punch; Rum-based beverages; Schnapps; Scotch whisky; Scotch whisky based liqueurs; Shochu (spirits); Sorghum-based Chinese spirits; Spirits; Spirits and liquors; Spirits

[beverages]; Sugar cane juice rum; Tonic liquor containing herb extracts (homeishu); Tonic liquor containing mamushi-snake extracts (mamushi-zake); Tonic liquor flavored with japanese plum extracts (umeshu); Tonic liquor flavored with pine needle extracts (matsuba-zake); Vodka; Whiskey; Whiskey [whisky]; Whisky.

55) In respect of the Applicant's goods which I have found to be of low or very low similarity with the goods of the earlier mark, I do not consider that there will be either direct or indirect confusion. In reaching this conclusion I have been mindful of the guidance developed in its case law by the General Court, and which I have discussed above, regarding the consumer's perception of alcoholic drinks as falling into distinct families which he or she expects to find marketed under different brands. With this guidance in mind I consider that the consumer is likely to regard the similarity of the Applicant's mark to the earlier mark as a coincidence when it is used on those categories of goods which I have found to be of low or very low similarity with those of the Opponent. **Accordingly, I find there will be no confusion in respect of any of the Applicants goods in Class 32 or of the following goods of the Applicant's specification in Class 33:**

Class 33: *Acanthopanax wine (Ogapiju); Alcoholic aperitif bitters, Alcoholic bitters Amontillado; Aperitif wines; Beverages containing wine [spritzers]; Bitters; Black raspberry wine (Bokbunjaju); Cider; Ciders; Cooking wine; Dessert wines; Dry cider; Fortified wines; Grape wine; Hydromel [mead]; Japanese sweet grape wine containing extracts of ginseng and cinchona bark; Korean traditional rice wine (makgeoli); Low alcoholic drinks; Low-alcoholic wine; Mead [hydromel]; Mulled wine; Mulled wines; Natural sparkling wines; Naturally sparkling wines; Red wine; Red wines; Sake; Sake substitutes; Sangria; Sherry; Sparkling fruit wine; Sparkling grape wine; Sparkling red wines; Sparkling white wines; Sparkling wine; Sparkling wines; Still wine; Strawberry wine; Sweet cider; Sweet wine; Sweet wines; Table wines; Vermouth; White wine; White wines; Wine; Wine coolers [drinks]; Wines; Wines of protected appellation of origin; Wines of protected geographical indication; Yellow rice wine; Wine punch; Wine-based aperitifs; Wine-based drinks.*

An amended specification

56) In paragraphs 16, 20, 21 and 22 above I have discussed a number of items (such as *Alcoholic beverages (except beer)*, *Alcoholic cocktails*, *Aperitifs* etc.) which may include spirits or which (like *Alcoholic punches* or *Pre-mixed alcoholic beverages*) may contain spirits, and on that basis found identity or high similarity with the Opponent's goods. Such goods may also, however, be completely free of spirits – being, for example, exclusively wine-based. I have therefore given thought to whether the Applicant's specification in Class 33 could be amended so as to avoid confusion. I have concluded that confusion can be avoided if the items in question are qualified by the following exclusion: "*None of the aforesaid including or containing spirits*". I therefore direct that the specification be amended accordingly before proceeding to registration as shown below. Despite some spirits content I have found *Fortified wines*, *Sherry*, *Vermouth*, *Alcoholic aperitif bitters*, *Alcoholic bitters and Bitters* to have a low similarity with the Opponent's goods. These will not be subject to the limitation.

Outcome

57) The opposition has partially succeeded in respect of the Applicant's specification in Class 33, which may therefore proceed to registration only in the following amended form:

Class 33: *Alcohol (Rice-); Alcoholic aperitifs, Alcoholic beverages containing fruit; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic carbonated beverages, except beer; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic cordials; Alcoholic energy drinks; Alcoholic essences; Alcoholic extracts; Alcoholic fruit beverages' Alcoholic fruit cocktail drinks; Alcoholic fruit extracts; Alcoholic jellies; Alcoholic punches; Alcoholic tea-based beverage; Alcopops; Aperitifs; Beverages (Alcoholic -), except beer; Cocktails; Cordials [alcoholic beverages]; Fruit (Alcoholic beverages containing-); Fruit extracts, alcoholic; Pre-mixed alcoholic beverages; Pre-mixed alcoholic beverages, other than beer-based; Preparations for making alcoholic beverages; Prepared alcoholic cocktails; Prepared*

wine cocktails; Rice alcohol; None of the aforesaid including or containing spirits; Acanthopanax wine (Ogapiju); Alcoholic aperitif bitters; Alcoholic bitters; Amontillado; Beverages containing wine [spritzers]; Bitters; Black raspberry wine (Bokbunjaju); Cider; Ciders; Cooking wine; Dessert wines; Fortified wines; Grape wine; Hydromel [mead]; Japanese sweet grape wine containing extracts of ginseng and cinchona bark; Korean traditional rice wine (makgeoli); Low alcoholic drinks; Low-alcoholic wine; Mead [hydromel]; Mulled wine; Mulled wines; Natural sparkling wines; Naturally sparkling wines; Red wine; Red wines; Sake; Sake substitutes; Sangria; Sherry; Sparkling fruit wine; Sparkling grape wine; Sparkling red wines; Sparkling white wines; Sparkling wine; Sparkling wines; Still wine; Strawberry wine; Sweet cider; Sweet wine; Sweet wines; Table wines; Vermouth; White wine; White wines; Wine; Wine-based aperitifs; Wine-based drinks; Wine coolers [drinks]; Wine punch; Wines; Wines of protected appellation of origin; Wines of protected geographical indication; Yellow rice wine.

The opposition has failed in respect of the whole of the Applicant's specification in Class 32, which may therefore proceed to registration in its entirety.

Costs

58) The Opponent has successfully opposed registration of the Applicant's mark for a broad swathe of goods in Class 33. On the other hand, the Applicant has successfully defended some of its specification in Class 33 and the whole of its specification in Class 32. Overall, the result might be regarded as a score draw. Neither side will be favoured with an award of costs.

Dated 10 June 2019

**Martin Boyle
For the Registrar,
The Comptroller-General**

Annex

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 -);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;Carbonated mineral water;Carbonated non-alcoholic 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;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];Essences for making non-alcoholic beverages;Essences for making non-alcoholic beverages [not in the nature of essential oils];Essences for making non-alcoholic drinks, not in the nature of essential oils;Extracts for making

beverages;Extracts for making non-alcoholic beverages;Extracts of hops for making beer;Extracts of unfermented must;Flavor enhanced water;Flavored beer;Flavored beers;Flavored mineral water;Flavored waters;Flavoured beers;Flavoured carbonated beverages;Flavoured mineral water;Flavoured waters;Frozen carbonated beverages;Frozen fruit beverages;Frozen fruit drinks;Frozen fruit-based beverages;Frozen fruit-based drinks;Fruit beverages;Fruit beverages and fruit juices;Fruit beverages (non-alcoholic);Fruit drinks;Fruit extracts (Non-alcoholic -);Fruit flavored drinks;Fruit flavored soft drinks;Fruit flavoured carbonated drinks;Fruit flavoured drinks;Fruit juice;Fruit juice bases;Fruit juice beverages;Fruit juice beverages (Non-alcoholic -);Fruit juice concentrates;Fruit juice for use as a beverages;Fruit juices;Fruit nectars;Fruit nectars, nonalcoholic;Fruit nectars, non-alcoholic;Fruit smoothies;Fruit squashes;Fruit-based beverages;Fruit-flavored beverages;Fruit-flavored soft drinks;Fruit-flavoured beverages;Functional water-based beverages;Ginger ale;Ginger beer;Ginger juice beverages;Glacial water;Grape juice;Grape juice beverages;Grape must, unfermented;Grapefruit juice;Green vegetable juice beverages;Guarana drinks;Guava juice;Honey-based beverages (Non-alcoholic -);Hop extracts for manufacturing beer;Hop extracts for use in the preparation of beverages;Hops (Extracts of -) for making beer;Iced fruit beverages;Imitation beer;India pale ales (IPAs);IPA (Indian Pale Ale);Isotonic beverages;Isotonic beverages [not for medical purposes];Isotonic drinks;Isotonic non-alcoholic drinks;Juice (Fruit -);Juices;Kvass [non-alcoholic beverage];Kvass [non-alcoholic beverages];Lager;Lagers;Lemon barley water;Lemon juice for use in the preparation of beverages;Lemon squash;Lemonade;Lemonades;Lime juice cordial;Lime juice for use in the preparation of beverages;Liqueurs (Preparations for making -);Lithia water;Low alcohol beer;Low calorie soft drinks;Low-alcohol beer;Low-calorie soft drinks;Malt beer;Malt syrup for beverages;Malt wort;Mango juice;Melon juice;Mineral enriched water [beverages];Mineral water;Mineral water [beverages];Mineral water (Non-medicated -);Mineral water (Preparations for making -);Mineral waters;Mineral waters [beverages];Mixed fruit juice;Mixed fruit juices;Mixes for making sorbet beverages;Mung bean beverages;Must;Nectars (Fruit -), non-alcoholic;Non-alcoholic beer;Non-alcoholic beer flavored beverages;Non-alcoholic beers;Non-alcoholic beverages;Non-alcoholic beverages containing fruit juices;Non-alcoholic beverages containing vegetable juices;Non-alcoholic carbonated beverages;Non-alcoholic cinnamon punch with dried persimmon (sujeonggwa);Non-

alcoholic cocktail bases;Non-alcoholic cocktail mixes;Non-alcoholic cocktails;Non-alcoholic cordials;Non-alcoholic drinks;Non-alcoholic flavored carbonated beverages;Non-alcoholic fruit cocktails;Non-alcoholic fruit drinks;Non-alcoholic fruit extracts;Non-alcoholic fruit extracts used in the preparation of beverages;Non-alcoholic fruit juice beverages;Non-alcoholic fruit punch;Non-alcoholic grape juice beverages;Non-alcoholic honey-based beverages;Non-alcoholic malt beverages;Non-alcoholic malt drinks;Non-alcoholic malt free beverages [other than for medical use];Non-alcoholic punch;Non-alcoholic punches;Non-alcoholic rice punch (sikhye); Non-alcoholic sparkling fruit juice drinks;Non-alcoholic vegetable juice drinks;Non-alcoholic wine;Non-alcoholic wines;Non-carbonated soft drinks;Nut and soy based beverages;Nutritionally fortified beverages;Nutritionally fortified water;Orange barley water;Orange juice;Orange juice beverages;Orange juice drinks;Orange squash;Orgeat;Pale ale;Part frozen slush drinks;Pastilles for effervescing beverages;Pineapple juice beverages;Pomegranate juice;Porter;Powders for effervescing beverages;Powders for the preparation of beverages;Powders used in the preparation of coconut water drinks;Powders used in the preparation of fruit-based beverages;Powders used in the preparation of fruit-based drinks;Powders used in the preparation of soft drinks;Preparation for making non-alcoholic beverages;Preparations for making aerated water;Preparations for making beverages;Preparations for making liqueurs;Preparations for making mineral water;Protein-enriched sports beverages;Quinine water;Ramune (Japanese soda pops);Red ginseng juice beverages;Rice-based beverages, other than milk substitutes;Root beer;Root beers;Root beers, non-alcoholic beverages;Saison beer;Sarsaparilla [non-alcoholic beverage];Seltzer water;Shandy;Sherbet beverages;Sherbets [beverages];Slush drinks;Smoked plum beverages;Smoked plum juice beverages;Smoothies;Smoothies containing grains and oats;Smoothies [fruit beverages, fruit predominating];Smoothies [non-alcoholic fruit beverages];Soda pops;Soda water;Soft drinks; Soft drinks for energy supply;Sorbets [beverages];Sorbets in the nature of beverages;Soy beverage;Soya-based beverages, other than milk substitutes;Soy-based beverages, not being milk substitutes;Sparkling water;Sports drinks;Sports drinks containing electrolytes;Spring water;Spring waters;Squashes [non-alcoholic beverages];Still water;Still waters;Stout;Stouts;Syrup for making beverages;Syrup for making lemonade;Syrups for beverages;Syrups for lemonade;Syrups for making beverages;Syrups for making

flavoured mineral waters; Syrups for making fruit-flavored drinks; Syrups for making non-alcoholic beverages; Syrups for making soft drinks; Syrups for making whey-based beverages; Syrups used in the preparation of soft drinks; Table water; Table waters; Tomato juice [beverage]; Tomato juice beverages; Tonic water; Tonic water [non-medicated beverages]; Unfermented preserved must; Vegetable drinks; Vegetable juice; Vegetable juices [beverage]; Vegetable juices [beverages]; Vegetable smoothies; Vegetable-based beverages; Vitamin enriched sparkling water [beverages]; Vitamin fortified non-alcoholic beverages; Water; Water (Lithia -); Water (Seltzer -); Watermelon juice; Waters; Waters [beverages]; Waters (Table -); Wheat beer; Whey beverages.

Class 33

Absinthe; Acanthopanax wine (Ogapiju); Aguardiente [sugarcane spirits]; Alcohol (Rice -); Alcoholic aperitif bitters; Alcoholic aperitifs; Alcoholic beverages containing fruit; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic bitters; Alcoholic carbonated beverages, except beer; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic cordials; Alcoholic egg nog; Alcoholic energy drinks; Alcoholic essences; Alcoholic extracts; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic fruit extracts; Alcoholic jellies; Alcoholic punches; Alcoholic tea-based beverage; Alcopops; Amontillado; Anise [liqueur]; Anisette; Anisette [liqueur]; Aperitif wines; Aperitifs; Aperitifs with a distilled alcoholic liquor base; Arak; Arak [arrack]; Arrack; Arrack [arak]; Baijiu [Chinese distilled alcoholic beverage]; Beverages (Alcoholic -), except beer; Beverages containing wine [spritzers]; Beverages (Distilled -); Bitters; Black raspberry wine (Bokbunjaju); Blackcurrant liqueur; Blended whisky; Bourbon whiskey; Brandy; Cachaca; Calvados; Canadian whisky; Cherry brandy; Chinese brewed liquor (laojiou); Chinese mixed liquor (wujiapie-jiou); Chinese spirit of sorghum (gaolian-jiou); Chinese white liquor (baiganr); Chinese white liquor [baiganr]; Cider; Ciders; Cocktails; Coffee-based liqueurs; Cooking brandy; Cooking wine; Cordials [alcoholic beverages]; Cream liqueurs; Curacao; Dessert wines; Digesters [liqueurs and spirits]; Distilled beverages; Distilled rice spirits

[awamori];Distilled spirits;Distilled spirits of rice (awamori);Dry cider;Extracts of spiritous liquors;Fermented spirit;Flavored tonic liquors;Fortified wines;Fruit (Alcoholic beverages containing -);Fruit extracts, alcoholic;Fruit wine;Gaolian-jiou [sorghum-based Chinese spirits];Gin;Ginseng liquor;Grape wine;Grappa;Herb liqueurs;Hulless barley liquor;Hydromel [mead];Japanese liquor containing herb extracts;Japanese liquor containing mamushi-snake extracts;Japanese liquor flavored with Japanese plum extracts;Japanese liquor flavored with pine needle extracts;Japanese regenerated liquors (naoshi);Japanese sweet grape wine containing extracts of ginseng and cinchona bark;Japanese sweet rice-based mixed liquor (shiro-zake);Japanese sweet rice-based mixed liquor [shiro-zake];Japanese white liquor (shochu);Japanese white liquor [shochu];Kirsch;Korean distilled spirits (soju);Korean traditional rice wine (makgeoli);Liqueurs;Liqueurs containing cream;Liquor-based aperitifs;Low alcoholic drinks;Low-alcoholic wine;Malt whisky;Mead [hydromel];Mulled wine;Mulled wines;Natural sparkling wines;Naturally sparkling wines;Nira [sugarcane-based alcoholic beverage];Peppermint liqueurs;Perry;Piquette;Potable spirits;Pre-mixed alcoholic beverages;Pre-mixed alcoholic beverages, other than beer-based;Preparations for making alcoholic beverages;Prepared alcoholic cocktails;Prepared wine cocktails;Red ginseng liquor;Red wine;Red wines;Rice alcohol;Rose wines;Rum;Rum [alcoholic beverage];Rum infused with vitamins;Rum punch;Rum-based beverages;Sake;Sake substitutes;Sangria;Schnapps;Scotch whisky;Scotch whisky based liqueurs;Sherry;Shochu (spirits);Sorghum-based Chinese spirits;Sparkling fruit wine;Sparkling grape wine;Sparkling red wines;Sparkling white wines;Sparkling wine;Sparkling wines;Spirits;Spirits and liquors;Spirits [beverages];Still wine;Strawberry wine;Sugar cane juice rum;Sweet cider;Sweet wine;Sweet wines;Table wines;Tonic liquor containing herb extracts (homeishu);Tonic liquor containing mamushi-snake extracts (mamushi-zake);Tonic liquor flavored with japanese plum extracts (umeshu);Tonic liquor flavored with pine needle extracts (matsuba-zake);Vermouth;Vodka;Whiskey;Whiskey [whisky];Whisky;White wine;White wines;Wine;Wine coolers [drinks];Wine punch;Wine-based aperitifs;Wine-based drinks;Wines;Wines of protected appellation of origin;Wines of protected geographical indication;Yellow rice wine.