

O-440-20

TRADE MARKS ACT 1994

IN THE MATTER OF  
TRADE MARK APPLICATION NO. 3388726  
BY IGNACIO CARBALLIDO  
TO REGISTER AS A TRADE MARK:

**LOS AMANTES**

IN CLASSES 32, 33 & 43

AND

IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 416968  
BY BODEGAS MARTIN CODAX SA

## **BACKGROUND AND PLEADINGS**

1. On 2 April 2019, Ignacio Carballido (“the applicant”) applied to register the trade mark **LOS AMANTES**, under number 3388726 (“the application”). It was accepted and published in the Trade Marks Journal on 19 April 2019 in respect of the following goods and services:

Class 32: Beers; mineral and aerated waters and other non-alcoholic beverages; non-alcoholic beverages with mezcal aromas or mezcal flavourings; beers with mezcal aromas or mezcal flavourings.

Class 33: Alcoholic beverages (except beers); mezcal and alcoholic beverages made from mezcal.

Class 43: Provision of food and drink; temporary accommodation.

2. On 12 July 2019, Bodegas Martin Codax SA (“the opponent”) filed a notice of opposition. The opposition is brought under Section 5(2)(a) of the Trade Marks Act 1994 (“the Act”) and is directed against the goods in class 33 of the application only.

3. The opponent relies upon its European Union trade mark number 10753151, **LOS AMANTES** (“the earlier mark”). The earlier mark was filed on 30 April 2012 and was entered into the register on 3 September 2012. It is registered in respect of ‘wines’ in class 33.

4. Given the respective filing dates, the opponent’s mark is an earlier mark, in accordance with Section 6 of the Act. As it had been registered for more than five years at the filing date of the application, it is subject to the proof of use requirements as specified in Section 6A of the Act. In its notice of opposition, the opponent claimed that the earlier mark has been used in relation to the goods for which the mark is registered, namely, ‘wines’.

5. The opponent contends that the competing trade marks are identical. Moreover, the opponent argues that the respective goods are very similar; in this regard, the

opponent submits that “wines are obviously alcoholic beverages and mezcal and alcoholic beverages made from mezcal could be considered similar to some extent to wines as both are alcoholic beverages”. The opponent claims that “both are directed to the same public and both could be acquired and consumed in the same type of places”. These factors, the opponent contends, will result in a likelihood of confusion. Accordingly, the opponent submits that registration of the application would be contrary to Section 5(2)(a) of the Act.

6. The applicant filed a counterstatement denying the grounds of opposition. Although the applicant concedes that the competing trade marks are identical, the applicant disputes that the respective goods are confusingly similar. In this connection, the applicant argues that “wines are different products to mezcal and alcoholic beverages made from mezcal”. On this basis, the applicant submits that there is no likelihood of confusion. In its counterstatement, the applicant indicated that it would require the opponent to provide proof of use of its mark.

7. The applicant has been professionally represented throughout these proceedings by Oakleigh IP Services Limited, while the opponent has been represented since the evidential rounds by Briffa.<sup>1</sup> Only the opponent filed evidence in these proceedings, though the applicant did file brief written submissions during the evidential rounds. Neither party filed written submissions in lieu of an oral hearing. Both parties were given the option of a hearing but neither asked to be heard on this matter. Therefore, this decision is taken following a careful perusal of the papers, keeping all submissions in mind.

## **EVIDENCE**

### **Opponent’s evidence**

8. The opponent’s evidence consists of a witness statement dated 21 January 2020 of María Garrido, together with Exhibits PB01 to PB06. Ms Garrido is the Director of

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<sup>1</sup> Prior to the evidential rounds, the opponent was represented by Miguel Fernandez-Ayala. However, Briffa was subsequently appointed as the opponent’s legal representative by virtue of Form TM33P dated 7 January 2019.

Sales and Marketing of the opponent company, a position she has held since May 2003, and has worked in the wine industry for over 16 years.

9. Ms Garrido explains that the opponent is a winery based in Galicia, northwest Spain, and was founded in 1986. She further explains that, amongst other things, the opponent produces Albariño wine, for which the Galicia region is most renowned. According to Ms Garrido, the earlier mark is used as the name for one such wine sold by the opponent. As “young” wines, Ms Garrido says, the goods are produced and sold in one year only; previous vintages are not currently being produced or sold by the opponent. Example bottles of the wine (with vintages from 2013 to 2016) are evidenced,<sup>2</sup> which show the earlier mark prominently displayed on the back label of the bottles:



10. Further examples of wines bearing the earlier mark are evidenced<sup>3</sup> (with vintages of 2017 and 2018), which display the mark on the front and back labels of the bottles:

<sup>2</sup> Exhibit PB05

<sup>3</sup> Exhibit PB06



11. Ten invoices from 23 April 2014 to 11 August 2016 are exhibited,<sup>4</sup> as are eight invoices from 17 April 2017 to 29 March 2019.<sup>5</sup> Ms Garrido states that the invoices relate to the sales of wine by the opponent under the earlier mark to customers in Germany, Poland and Estonia. Although the invoices are in Spanish, Ms Garrido provides a helpful list of English translations.<sup>6</sup> Ms Garrido says that a total of 44,821 bottles of wine bearing the earlier mark have been produced between 2 April 2014 and 2 April 2019. No sales figures have been provided, nor has Ms Garrido offered any indication as to the scale of the wine market in the EU or the relative market share enjoyed by the opponent. Nevertheless, the following figures relating to “LOS AMANTES” wines sold by the opponent can be extrapolated from the invoices:

Year	No. of bottles	Turnover
2014	327	€824.25
2015	1,290	€3,358.20
2016	1,008	€2,769.48
2017	2,484	€6,917.40
2018	1,386	€4,115.47
2019	252	€756
Total	6,747	€18,740.80

<sup>4</sup> Exhibit PB03

<sup>5</sup> Exhibit PB04

<sup>6</sup> Witness statement of Ms Garrido, paragraph 16

12. Ms Garrido provides a decision of the EUIPO dated 30 May 2019.<sup>7</sup> She says that use of the earlier mark has previously been assessed by the EUIPO, which found that genuine use of the mark had been demonstrated in respect of ‘wines’ in class 33. Ms Garrido explains that genuine use of the mark was assessed for a period between 1 November 2012 and 31 October 2017. The decision appears to relate to cancellation number 17261C of the EUIPO in relation to the earlier mark, in which an unrelated third party sought revocation of the same. The application for revocation was partially upheld, though the trade mark remained registered in respect of ‘wines’ in class 33. In accordance with Ms Garrido’s testimony, the EUIPO considered whether the earlier mark had been put to genuine use during the period she describes; the Cancellation Division concluded that the opponent had put the mark to genuine use in relation to ‘wines’ in class 33. A letter from the EUIPO dated 11 September 2019 is also evidenced.<sup>8</sup> The letter confirms that the aforementioned decision of the EUIPO to partially revoke the earlier mark had become final. I would clarify at this early stage that, while I have read the decision and note the findings therein, the decision of the EUIPO provided by Ms Garrido will not be determinative as this Tribunal is not bound by decisions of the Cancellation Division. Whether the opponent has made genuine use of its earlier mark must be assessed from the evidence before me and all the relevant factors, which I must consider in this decision.

13. That concludes my summary of the evidence insofar as I consider necessary.

## **DECISION**

### **Proof of use**

14. I must firstly deal with the issue of whether, or to what extent, the opponent has shown genuine use of its earlier mark. The relevant statutory provisions are as follows:

“Raising of relative grounds in opposition proceedings in case of non-use

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<sup>7</sup> Exhibit PB01

<sup>8</sup> Exhibit PB02

6A-(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (b) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period .

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5) In relation to a European Union trade mark or international trade mark (EC), any reference in subsection (3) or (4) to the United Kingdom shall be construed as a reference to the European Community.

(5A) In relation to an international trade mark (EC) the reference in subsection (1)(c) to the completion of the registration procedure is to be construed as a reference to the publication by the European Union Intellectual Property Office of the matters referred to in Article 190(2) of the European Union Trade Mark Regulation.

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

15. The onus is on the opponent, as the proprietor of the earlier mark, to show use made of the mark because Section 100 of the Act states:

“If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

16. Pursuant to Section 6A of the Act, the relevant period for assessing whether there has been genuine use of the earlier mark is the five-year period ending with the filing date of the application in issue, i.e. 3 April 2014 to 2 April 2019.

17. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J summarised the law relating to genuine use as follows:



“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single

undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

18. During the evidential rounds, the applicant argued that the opponent’s evidence centres “around the revocation decision of EU 010753151” and that “there is no use shown of the earlier right in the United Kingdom”. In the view of the applicant, “the opponent has failed to substantiate their purported earlier right’s genuine use in the jurisdiction of interest, namely the United Kingdom”. However, since the opponent’s earlier relied upon mark is an EUTM, I take into account the Court of Justice of the European Union (“CJEU”) comments in *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, whereby it stated that:

“36. It should, however, be observed that..... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as the reference point for all consideration of whether a Community trade mark has been put to genuine use.”

And

“50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national trade mark.”

And

“55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).”

The court held that:

“Article 15(1) of Regulation No 207/2009 of 26 February 2009 on the Community trade mark must be interpreted as meaning that the territorial borders of the Member States should be disregarded in the assessment of whether a trade mark has been put to ‘genuine use in the Community’ within the meaning of that provision.

A Community trade mark is put to ‘genuine use’ within the meaning of Article 15(1) of Regulation No 207/2009 when it is used in accordance with its essential function and for the purpose of maintaining or creating market share within the

European Community for the goods or services covered by it. It is for the referring court to assess whether the conditions are met in the main proceedings, taking account of all the relevant facts and circumstances, including the characteristics of the market concerned, the nature of the goods or services protected by the trade mark and the territorial extent and the scale of the use as well as its frequency and regularity.”

19. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited*, [2016] EWHC 52, Arnold J. reviewed the case law since the *Leno* case and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issues in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument was not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open

the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that "genuine use in the Community will in general require use in more than one Member State" but "an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State". On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use."

20. The General Court ("GC") restated its interpretation of *Leno Marken* in Case T-398/13, *TVR Automotive Ltd v OHIM* (see paragraph 57 of the judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union.

21. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods at issue in the Union during the relevant 5 year period. In making the required assessment I am required to consider all relevant factors, including:

- i) The scale and frequency of the use shown
- ii) The nature of the use shown
- iii) The goods and services for which use has been shown
- iv) The nature of those goods/services and the market(s) for them
- v) The geographical extent of the use shown

### Form of the mark

22. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the CJEU found that:

“31. It is true that the ‘use’ through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas ‘genuine use’, within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, ‘use’ within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish ‘use’ within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the ‘use’ of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term 'genuine use' within the meaning of Article 15(1)". (emphasis added)

23. In *Nirvana Trade Mark*, BL O/262/06, Mr Richard Arnold Q.C. (as he then was) as the Appointed Person summarised the test under s.46(2) of the Act as follows:

"33. .... The first question [in a case of this kind] is what sign was presented as the trade mark on the goods and in the marketing materials during the relevant period...

34. The second question is whether that sign differs from the registered trade mark in elements which do not alter the latter's distinctive character. As can be seen from the discussion above, this second question breaks down in the sub-questions, (a) what is the distinctive character of the registered trade mark, (b) what are the differences between the mark used and the registered trade mark and (c) do the differences identified in (b) alter the distinctive character identified in (a)? An affirmative answer to the second question does not depend upon the average consumer not registering the differences at all."

24. Although this case was decided before the judgment of the CJEU in *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as registered. The later judgment of the CJEU must also be taken into account where the mark is used as registered, but as part of a composite mark.



25. In *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19, Mr Philip Johnson, as the Appointed Person, found that the use of the mark *dreams* qualified as use of the registered word-only mark DREAMS. This was because the stylisation of the word did not alter the distinctive character of the word mark. Rather, it constituted an expression of the registered word mark in normal and fair use.

26. Throughout its evidence, the opponent has used the earlier mark as registered, as well as the following signs:



and



27. I note that the opponent's mark is in word-only format and can nominally be used in any standard typeface. Given that the evidenced mark is presented in a basic, block font, I consider this to be an acceptable variant use of the mark as registered. As the opponent's mark is a word-only mark, the distinctive character of the mark lies in the words themselves. Neither the configuration of the word "LOS" above the word "AMANTES" nor the curvature of the words alter the distinctive character of the mark. Further, the words are not stylised to any material extent and are effectively presented as plain words. Accordingly, to my mind, the presentation does not alter the distinctive character of the mark.

## Sufficient use

28. Proven use of a mark which fails to establish that “*the commercial exploitation of the mark is real*” because the use would not be “*viewed as warranted in the economic sector concerned to maintain or create a share in the [European Union] for the goods or services protected by the mark*” is therefore not genuine use.

29. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.<sup>9</sup>

30. As indicated in the case law cited above, use does not need to be quantitatively significant to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as “warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark”.

31. Although I have no submissions from either of the parties to assist me on the matter, I believe the market for wines in the EU to be remarkably large, numbering in the millions – if not billions – of euros per annum. In this connection, the turnover figures which can be discerned from the opponent’s evidence are modest; insofar as is apparent from the evidence, the opponent’s market share for wines bearing the earlier mark is very small. The opponent has not provided any evidence or submissions regarding the marketing of its goods, relative market share or a complete picture of finances relating to the earlier mark. Nevertheless, as outlined above, use does not have to be quantitatively significant to be genuine. The evidence does demonstrate that the opponent has used its earlier mark in relation to the goods for which the mark is registered, and this use falls within the relevant period. The opponent has sold goods bearing the earlier mark to customers in different areas of the EU, namely, Germany, Poland and Estonia. Despite a relatively low number of goods sold during the relevant period and modest turnover figures, I do not consider the opponent’s use of the earlier mark to be merely token. I have taken on board that the

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<sup>9</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09

products bearing the earlier mark are “young” wines which are typically only sold in their particular vintage years and are not mass produced. Further, I have considered that the market for wines across the EU is extremely competitive. I am of the view that the opponent has attempted to create and maintain a market for its goods under the earlier mark. Taking the evidence as a whole into account, I am satisfied that the opponent has demonstrated genuine use of its earlier mark during the relevant period.

#### Fair specification

32. I must now consider whether, or the extent to which, the evidence shows use of the opponent’s mark in relation to the goods relied upon. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

“In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned.”

33. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors* [2016] EWHC 3103 (Ch), Mr Justice Carr summed up the law relating to partial revocation as follows.

“iii) Where the trade mark proprietor has made genuine use of the mark in respect of some goods or services covered by the general wording of the specification, and not others, it is necessary for the court to arrive at a fair specification in the circumstance, which may require amendment; *Thomas Pink Ltd v Victoria's Secret UK Ltd* [2014] EWHC 2631 (Ch) (“Thomas Pink”) at [52].

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the

services in relation to which the trade mark has been used; *Thomas Pink* at [53].

v) It is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do. For example, in *Pan World Brands v Tripp Ltd* (Extreme Trade Mark) [2008] RPC 2 it was held that use in relation to holdalls justified a registration for luggage generally; *Thomas Pink* at [53].

vi) A trade mark proprietor should not be allowed to monopolise the use of a trade mark in relation to a general category of goods or services simply because he has used it in relation to a few. Conversely, a proprietor cannot reasonably be expected to use a mark in relation to all possible variations of the particular goods or services covered by the registration. *Maier v Asos Plc* [2015] EWCA Civ 220 ("Asos") at [56] and [60].

vii) In some cases, it may be possible to identify subcategories of goods or services within a general term which are capable of being viewed independently. In such cases, use in relation to only one subcategory will not constitute use in relation to all other subcategories. On the other hand, protection must not be cut down to those precise goods or services in relation to which the mark has been used. This would be to strip the proprietor of protection for all goods or services which the average consumer would consider to belong to the same group or category as those for which the mark has been used and which are not in substance different from them; *Mundipharma AG v OHIM* (Case T-256/04) ECR II-449; EU:T:2007:46."

34. I begin by reminding myself that the goods for which the opponent must demonstrate genuine use are 'wines'. From Ms Garrido's evidence, it is clear that the opponent has used its earlier mark as registered in relation to white wines, specifically of the Albariño variety. As previously stated, there are numerous invoices containing references to wines bearing the earlier mark. In keeping with the case law above, while a trade mark proprietor should not be allowed a monopoly for a general category of goods or services because of use in relation to a few, the task before me is not to

describe the use made by the opponent in the narrowest possible terms. White wine would fall under the broader category of ‘wines’ and, in my view, consumers would consider white wines to belong to the same group of goods as ‘wines’. Accordingly, I find that the opponent may rely upon its specification of ‘wines’ in class 33.

### **Section 5(2)(a) – legislation and case law**

35. Section 5(2)(a) of the Act reads as follows:

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

(a) it is identical with an earlier trade mark and is to be registered for goods or services 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.”

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

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

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a 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.

### **Identity of the marks**

37. In order for claims under Section 5(2)(a) of the Act to succeed, the competing trade marks are required to be identical. The question of when a mark may be considered identical to another was addressed in *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, where the CJEU held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where, viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

38. The parties are agreed that the marks are identical. I agree: the competing trade marks both consist of the words “LOS AMANTES” in word only format with no other elements. The contested mark reproduces, without any modification or addition, all the elements of the opponent’s earlier mark. As such, the opposition under Section 5(2)(a) of the Act may proceed.

### **Comparison of goods**

39. 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”.

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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



unnaturally so as to produce a narrow meaning which does not cover the goods in question."

42. In *Avnet Incorporated v Isoact Limited*, [1998] F.S.R. 16, Jacob J. (as he then was) stated that:

"In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributable to the rather general phrase."

43. The GC confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

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

44. The goods to be compared are:

<b>Opponent's goods</b>	<b>Applicant's goods</b>
Class 33: Wines	Class 33: Alcoholic beverages (except beers); mezcal and alcoholic beverages made from mezcal.

45. The opponent has argued that the respective goods of the competing trade marks are very similar. In this regard, the opponent has highlighted that wines are alcoholic beverages. For her part, Ms Garrido submitted that these goods are identical. Moreover, it is the opponent's contention that the applicant's '*mezcal and alcoholic*

*beverages made from mezcal* are similar to its *wines* as both are alcoholic beverages, both are “directed at the same public” and both “could be acquired and consumed in the same type of places”.

46. I have no submissions from the applicant regarding the similarity of *wines* and *alcoholic beverages (except beers)*. However, contrary to the opponent’s argument, the applicant has contended that *wines* and *mezcal and alcoholic beverages made from mezcal* are “different products”, intimating that the goods are not confusingly similar.

47. To my mind, as an alcoholic beverage, the term *wines* in the opponent’s specification falls within the scope of the broader term *alcoholic beverages (except beers)* in the specification of the application. Therefore, I find these goods identical under the principle outlined in *Meric*.

48. *Mezcal and alcoholic beverages made from mezcal* in the applicant’s specification refers to a distilled alcoholic beverage made from the agave plant, or other alcoholic beverages made from the same. *Wines* in the opponent’s specification refers to an alcoholic beverage made from fermented grapes. The purpose of both goods is to be consumed for enjoyment or refreshment. Moreover, while the specific natures of these goods may vary to a degree (the former being made from the agave plant and the latter from grapes), both are alcoholic beverages. In this regard, it is considered that the method of use is also common to both goods. The respective users of the goods are likely to be the same, namely, those seeking pleasure or refreshment from an alcoholic beverage. Further, I am of the view that the way in which the goods reach the market are likely to be through the same trade channels. While I accept that, in certain circumstances, mezcal could be found in more specialist alcohol retailers, those retailers are likely to also offer wine. Additionally, it is possible that mezcal could be found in more general establishments, such as supermarkets, which typically also offer wines. The goods are both self-selected by consumers and, in practice, are likely to be found in the same localities in retail establishments; although the goods may not be found on precisely the same shelves, wines and mezcal – as well as beverages made therefrom – would be displayed together within an alcoholic beverages section. I also note that the goods may be purchased in establishments such as public houses

and bars, which are likely to offer both goods. I do not consider the goods competitive to any meaningful degree; it is possible that consumers could select mezcal over wine, or vice versa, though I do not believe that this would ordinarily be the case. The goods are not complementary in the sense described in case law. In light of the above, I find that the goods in comparison are similar to a medium to high degree.

### **The average consumer and the nature of 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 (see *Lloyd Schuhfabrik Meyer*, Case C-342/97).

50. 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.”

51. In *Simonds Farsons Cisk plc v OHIM* Case T-3/04 the GC said:

“58 In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel.

In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.

59 Moreover, and above all, it is not disputed that bars and restaurants are not the only sales channels for the goods concerned. They are also sold in supermarkets or other retail outlets (see paragraph 14 of the contested decision), and clearly when purchases are made there, consumers can perceive the marks visually since the drinks are presented on shelves, although they may not find those marks side by side.”

52. Given that the goods at issue are alcoholic beverages, the average consumer will be a member of the adult general public. While of course it would depend on the particular individual, on average the goods are likely to be purchased fairly frequently for the purposes of enjoyment or when socialising. The cost of such goods will vary but would not typically require a significant outlay. The purchasing of the goods will ordinarily be led by individual taste or preference and, therefore, it is not considered to be a dramatically important choice for the consumer. Consumers will, however, wish to ensure they are selecting, for example, the correct type, origin or flavour of the goods. In supermarkets and other retail establishments, the goods will be obtained by self-selection and are likely to be purchased after perusing the shelves. If purchased from their online equivalents, the goods will also be self-selected and purchased after viewing information on the internet. Where the goods are sold in public houses and bars, there will be an oral component to the selection process. However, there is nothing to suggest that the goods are sold in such a manner as to preclude a visual inspection. Consequently, while the goods may be ordered orally in public houses and bars, it is likely to be in the context of, for example, a visual inspection of the bottle or drinks lists, prior to the order being placed. Considered overall, I am of the view that the purchasing process for the goods at issue would be predominantly visual in nature, though aural considerations will play their part. Taking the above factors into account, I find that the level of attention of the adult general public in respect of these goods would be medium.

## **Distinctive character of the earlier mark**

53. 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).

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).”

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

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in

*Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

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

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

56. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods or services, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will be somewhere in the middle. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion. The distinctive character of a mark can be enhanced by virtue of the use made of it.

57. As the opponent has filed evidence demonstrating that its mark has been used in the marketplace for wines, consideration must be given as to whether the use shown has enhanced the distinctive character of the mark as far as the relevant public is concerned. I note that the opponent has submitted that it has produced a total of 44,821 bottles of wine bearing the earlier mark within the relevant period.<sup>10</sup> From the evidence, I have determined that 6,747 bottles have been sold within the relevant period, with total turnover for these sales calculated to be a little under €19,000. The sale of 6,747 bottles of wine is not inconsequential, though it is certainly a modest figure when accounting for the size of the EU wine industry as a whole. In my view, it

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<sup>10</sup> Witness statement of Ms Garrido, paragraph 21

is a multi-billion-euro industry. No specific details have been provided by the opponent to indicate its market share; nevertheless, from the figures that have been provided, I am able to reason that the opponent's sales represent a figure of less than 0.1% of the market share. Further, the opponent has not provided any narrative or evidence of its social media presence or advertising and marketing expenditure. In any event, the opponent has not evidenced any sales of goods to customers in the UK and, consequently, has not demonstrated that the average UK consumer has been exposed to its mark. I do not consider that the opponent has established to any extent how strongly the mark identifies with the goods. Therefore, there is nothing before me to support a finding that the inherent distinctiveness of the earlier mark has been enhanced through use.

58. Turning to the inherent qualities of the earlier mark, the mark consists of the words "LOS AMANTES" in word-only format. There are no other elements within the mark. Together, the words mean 'the lovers' in Spanish. While it is possible that some consumers who are more versed in the Spanish language would understand the mark to mean 'the lovers', I am unconvinced that this would be the case for the vast majority of consumers in the UK. While the average UK consumer is considered to have some appreciation for the more commonly understood European languages, in my view "LOS AMANTES" is not a term which the average UK consumer would be familiar with. To my mind, it is more reasonable to find that the average consumer would perceive this word as an invented term.<sup>11</sup> For the average consumer, the mark would neither be descriptive nor allusive. The distinctive character of the mark resides in its totality. As consumers would perceive the earlier mark as an invented term, I find that the earlier mark has a high level of inherent distinctive character.

### **Likelihood of confusion**

59. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. One such factor is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of

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<sup>11</sup> See *Matratzen Concord GmbH v OHIM*, Case C-3/03

similarity between the respective goods, and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

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

61. Earlier in this decision I concluded that:

- The opponent had established genuine use of the earlier mark in relation to '*wines*' in class 33;
- Where not identical, the respective goods of the competing marks are similar to a medium to high degree;
- Average consumers of the goods are likely to be adult members of the general public whom would demonstrate a medium level of attention during the purchasing act;
- The purchasing process for the goods at issue would be predominantly visual in nature, though I have accepted that it will include an aural element in certain circumstances;
- The competing trade marks are identical;
- The earlier mark possesses a high level of inherent distinctive character.



62. In consideration of all the above factors, I am satisfied that there will be a likelihood of direct confusion. Given the identical nature of the marks, the respective goods being similar to a medium to high degree or identical, and consumers paying no more than medium level of attention when purchasing those goods, it is certainly reasonable to conclude that the average consumer will mistake one mark for the other.

## **CONCLUSION**

63. The partial opposition under Section 5(2)(a) of the Act has succeeded. Subject to any successful appeal against my decision, the application will be refused in respect of the following goods:

Class 33: Alcoholic beverages (except beers); mezcal and alcoholic beverages made from mezcal.

64. The mark will become registered in relation to the following goods and services which were not opposed:

Class 32: Beers; mineral and aerated waters and other non-alcoholic beverages; non-alcoholic beverages with mezcal aromas or mezcal flavourings; beers with mezcal aromas or mezcal flavourings.

Class 43: Provision of food and drink; temporary accommodation.

## **COSTS**

65. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2016. This decision has been taken from the papers without an oral hearing. The opponent filed evidence in these proceedings but did not file written submissions in lieu of a hearing. In the circumstances I award the opponent the sum of **£800** as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Preparing a statement and considering the applicant's counterstatement	£200
Preparing evidence	£500
Official fee	£100
<b>Total</b>	<b>£800</b>

66. I therefore order Ignacio Carballido to pay Bodegas Martin Codax SA the sum of **£800**. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an unsuccessful appeal, within twenty-one days of the conclusion of the appeal proceedings.

**Dated this 11th day of September 2020**

**James Hopkins**  
**For the Registrar,**  
**The Comptroller General**