

O/015/21

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION
NO. 3354277 BY
JAMES BROWN
TO REGISTER:**

COAST Beer Co

AS A TRADE MARK IN CLASS 32

AND

**OPPOSITION THERETO
UNDER NO. 415636
BY
COAST DRINKS LTD**

Background and Pleadings

1. James Brown (“the applicant”) applied to register the trade mark shown on the front page of this decision in the United Kingdom on 17 November 2018. It was accepted and published in the Trade Marks Journal on 30 November 2018 in respect of the following goods:

Class 32
<i>Craft beer; Beer; Alcohol-free beers; Craft beer; Craft beers; De-alcoholised beer; De-alcoholized beer; Low alcohol beer; Low-alcohol beer; Non-alcoholic beer; Non-alcoholic beers.</i>

2. Coast Drinks Ltd (“the opponent”) opposes the application on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition concerns all of the applicant’s goods in Class 32.
3. The opponent is the proprietor of the European Union Trade Mark (EUTM) registration 17586181 for the word:

COAST

The mark was filed on 12 December 2017 and registered on 29 March 2018 for various goods in Class 32.

4. The opponent in its TM7 claims that the word “COAST” is the dominant and distinctive element of the applicant’s mark, which is identical to the earlier mark, and that the words “Beer Co” “are completely non-distinctive and should, therefore, be disregarded or given little weight in any comparison”. It also contends that the contested goods covered by the applicant’s specification are highly similar to its goods. Therefore, registration of the contested mark should be refused under Section 5(2)(b) of the Act.

5. The applicant filed a defence and counterstatement, which subsequently amended¹ denied the claims on two grounds. First, the applicant claims that there is no real risk of confusion. Second, the applicant states that “we have not filed an application in respect of non alcoholic beverages and our application clearly includes “beer” is an entirely different product for an entirely different consumer”.
6. Both parties filed evidence, and only the opponent provided written submissions in these proceedings, which I shall refer to as and when necessary in my decision.
7. Neither party requested a hearing. Thus, this decision has been taken following a careful consideration of the papers.
8. In these proceedings, the opponent and the applicant are litigants in person.

Proof of Use

9. The proof of use provisions are contained in Section 6A of the Act, the relevant parts of which read:

Section 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.

¹ The amendment was to delete/change two aspects, which the Tribunal had pointed out were not pertinent to these proceedings.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application. [...]”

10. The EUTM registration 17586181 was registered on 29 March 2018. Thus, the registration was under five years old at the time that the applicant’s mark was filed on 17 November 2018, and proof of use is not relevant in these proceedings as per Section 6A of the Act. This is one of the points that required the applicant’s counterstatement to be amended, as the applicant initially requested that proof of use be provided.

Evidence

11. The opponent filed a witness statement, dated 25 November 2019, of Mr Richard Watson, the director of Coast Drinks Ltd, a position he has held since 2016. Mr Watson states that the applicant’s goods (or at least the alcohol free and the other versions of the beer it sells) are “wholly contained by the broad terms in [their] mark”, specifically its non-alcoholic drinks/beverages term. Mr Watson further states that “[b]eer and non-alcoholic beers are sold as substitutes and/or are in competition with beers.” In addition, he states that the non-alcoholic versions of beers are produced by the same or similar undertakings and are sold “alongside each other or are at least in the same aisle in supermarket” [sic]. Mr Watson provided three exhibits, labelled as exhibits RW1, RW2, and RW3. The contents of these exhibits, so far as are considered necessary, are briefly detailed below:

- a) Exhibit RW1 consists of an undated website extract from the online supermarket Ocado, demonstrating the regular and the non-alcoholic version of Peroni beer. This shows that both products appear under the same virtual aisle of “Beer, Wine & Spirits> Beer>Lager>Multipacks”.

- b) Exhibit RW2 consists of an article dated 13 May 2019 from the 'Evening Standard' website titled '*Health-conscious Britons boost alcohol-free drink sales to record high*'. The article describes the growth of sales of non-alcoholic beer, wine and spirits and the switch of a group of consumers from alcoholic to low or no-alcoholic products. One source within the article is quoted as saying that the market for low alcohol wine and beer has increased ten-fold since 2009.

- c) Exhibit RW3 consists of a website extract dated 20 November 2018 from the 'Drinks Insight Network' website titled '*Seven of the best-selling non-alcoholic beers in the UK*'. As the title suggests, the article ranks the seven best non-alcoholic beers providing some specifics for each of them. A number of them are clearly well-known beer brands.

12. The applicant filed evidence in the form of a witness statement, dated 27 April 2020, of Mr James Brown, who has been the director of Coast Beer Co Ltd since 2019. Mr Brown asserts product differentiation between soft drinks and non-alcoholic beers, highlighting that they "are absolutely never placed next to each other so there can be no chance of confusion by the consumer" (Exhibits E and F). Mr Brown claims that non-alcoholic beers are an adult product, as opposed to soft drinks, conforming to different regulatory and age restrictions as well as targeting a different audience (Exhibits D, G, and H). Further, Mr Brown submits that the opponent has no intention to market its products claiming long-term trade inactivity (Exhibits A, B, and C). Mr Brown, as the director of Coast Beer Co Ltd, refers to the successful operations and marketing of their (his company's) brand (Exhibits K, L, M, N, O). The contents of these exhibits, so far as are considered necessary, are briefly detailed below:

- a) Exhibit A, Exhibit B and Exhibit C consist of the opponent's balance sheets from years 2016, 2017, and 2018, respectively. Exhibit A shows that COAST Drinks Ltd was dormant in 2016. Exhibit B

shows that the capital and reserves amounted to £2,463, while they reached the amount of £3,554 in 2018 as shown in Exhibit C.

- b) Exhibit D consists of the 'Low Alcohol Descriptors Guidance', published 13 December 2018, by the Department of Health and Social Care. The Guidance sets out "the appropriate use of low alcohol descriptors, to support the alcohol and retail industries in marketing their products responsibly".
- c) Exhibit E and Exhibit F consist of undated in-store supermarket photographs. The Exhibit E shows a "Zero Zone" aisle containing non-alcoholic beers, such as Heineken and Erdinger, with price labels appearing in Euros. The Exhibit F shows soft drinks shelf supermarket stock, such as Fanta, Dr Pepper and Dr Fizz.
- d) Exhibit G consists of the Tesco PLC Policy, dated 17 January 2020, on 'Table of Age-restricted products', where alcohol and zero-alcohol branded products are listed as being age-restricted products.
- e) Exhibit H consists of three screenshots, dated 10 July 2019, 14 June 2019, and 28 April 2019, respectively, showing Twitter responses by Tesco and Waitrose & Partners in which it is explained why non-alcoholic beer is considered to be a product for adults.
- f) Exhibit K and Exhibit L consist of undated images demonstrating the get-up of the applicant's Coast Beer Co can.
- g) Exhibit M consists of an undated screenshot from an online article from the website goodhousekeeping.com, showing that the Coast Beer Co Hazy IPA is recommended as the top non-alcoholic beer.

- h) Exhibit N consists of an undated screenshot from the Tesco website depicting the product Coast Beer Co Hazy IPA.
- i) Exhibit O consists of an undated screenshot from the online website coastbeer.co.uk showing online and in-store points of sale of the Coast Beer Co products.

13. The opponent, in reply, submitted a witness statement, dated 31 August 2020, of Mr Richard Watson. In that, Mr Watson counterargues that non-alcoholic beers and alcoholic mixers, such as tonic water and soda water, are grouped and sold together (Exhibit A). Mr Watson also submits that alcohol-free and soft drinks and mixers can be sold together, resulting in confusion (Exhibit B). He states that its commercial activities began in August 2020 (Exhibit C). Mr Watson asserts that “the applicant is using the word ‘Coast’ on its own, without the word Beer Co” (Exhibit D). The contents of these exhibits, so far as are considered necessary, are briefly detailed below:

- a) Exhibit A consists of a photograph taken on August 29 (the year is not specified) at Highbury Vintners, which is a speciality drinks shop in London. The photograph shows the Coast Beer Co Hazy IPA on the top shelf of the in-store fridge and the Fever-Tree tonic water at the bottom of it.
- b) Exhibit B consists of a screenshot from the website www.drinksaisle.co.uk where alcohol-free drinks and soft drinks are categorised under the ‘No & Low’ website section.
- c) Exhibit C consists of a screenshot of: the Coast Drinks commercial website, depicting bottles of soda water and maple soda; the Coast Drinks Instagram account; the Coast Drinks inventory software illustrating sales orders.

d) Exhibit D consists of an undated screenshot of the applicant's Coast Beer Co Instagram account in which the name of the account appears as "C/O/A/S/T" underneath the profile picture of the account. In addition, the account is populated with pictures of the Coast Beer Co products.

14. That concludes my summary of the evidence filed, insofar as I consider it necessary. However, one final point to note is that both parties have referred in their witness statements to an agreement between the applicant and another undertaking. I have not detailed any of this in my evidence summary as it has no bearing on whether the average consumer will be confused between the use of the two marks the subject of this dispute.

Preliminary Issues

15. In its submissions, the opponent pointed to its earlier opposition, dated 19 June 2019, against the applicant's UK trade mark 3363899, which was filed on 30 December 2018 and published on 15 March 2019, for the figurative mark:



The application was subsequently withdrawn on 26 September 2019 by the applicant. Whilst noting this information, I should highlight that I must determine the matter on the basis of the marks before me, the comparison of which differs from the preceding application.

16. I should also add that the evidence about the trade activity or inactivity are similarly not relevant, particularly bearing in mind that there is no requirement for the opponent to file evidence of proof of use as per Section 6A of the Act delineated previously. The opponent is entitled to rely on the goods for which the mark is registered.

Decision

17. The relevant statutory provisions are as follows:

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

“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”.

18. An “earlier trade mark” is defined in Section 6(1) of the Act:

“In this Act an ‘earlier trade mark’ means –

a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

references in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered.”

19. Under the provisions outlined above, the opponent’s trade mark clearly qualifies as an earlier mark.

20. The following principles, considered in this opposition, stem from the decisions of the European 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 BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P).

- 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.

Comparison of Goods

21. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

- (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

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

22. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In *Canon Kabushiki Kaisha*, the Court of Justice of the European Union (CJEU) stated 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 complementary.”²

23. Guidance on this issue was also given by Jacob J (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] RPC 281. At [296], he identified the following relevant factors:

- “(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;

² Paragraph 23.

(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.”

24. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU held that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods or services. The General Court clarified the meaning of “complementary” goods or services in *Boston Scientific Ltd v OHIM*, Case T-325/06:

“...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.”³

25. The General Court confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, paragraph 29, that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another, or vice versa:

“In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general

³ Paragraph 82.

category, designated by trade mark application (Case T-388/00 *Institut fur 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”.

26. In *Sky v Skykick* [2020] EWHC 990 (Ch), Lord Justice Arnold considered the validity of trade marks registered for, amongst many other things, the general term ‘computer software’. In the course of his judgment he set out the following summary of the correct approach to interpreting broad and/or vague terms:

“[...] the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

27. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J (as he then was) gave the following guidance on construing the words used in specifications:

“[...] 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.”⁴

28. The competing goods to be compared are shown in the following table:

Opponent’s Goods	Applicant’s Goods
<p><u>Class 32</u> <i>Tonic water; Tonic water [non-medicated beverages]; Soda water; Soft drinks; Colas [soft drinks]; Low calorie soft drinks; Fruit-flavored soft drinks; Non-carbonated soft drinks; Soft drinks flavored with tea; Concentrates for use in the preparation of soft drinks; Beverages (Non-alcoholic -); Non-alcoholic drinks; Carbonated non-alcoholic drinks; Fruit beverages (non-alcoholic); Fruit extracts (Non-alcoholic -); Non-alcoholic cocktail mixes; Cocktails, non-alcoholic; Non-alcoholic beverages; Non-alcoholic cocktails; Water; Carbonated water; Sparkling water; Water (Seltzer -); Ginger ale; Ginger beer; Non-alcoholic cocktail bases; Bitter lemon.</i></p>	<p><u>Class 32</u> <i>Craft beer; Beer; Alcohol-free beers; Craft beer; Craft beers; De-alcoholised beer; De-alcoholized beer; Low alcohol beer; Low-alcohol beer; Non-alcoholic beer; Non-alcoholic beers.</i></p>

29. In the Notice of Opposition, the opponent states that the goods:

“covered by the contested application are wholly contained within broader terms contained in the earlier registration and/or are highly similar to the goods covered by the earlier right.”

⁴ Paragraph 12.

30. In the Notice of Defence and Counterstatement, the applicant states that:

“We have not filed an application in respect of non alcoholic beverages and our application clearly includes “beer” is an entirely different product for an entirely different consumer.”

31. In its submissions, the opponent claims that “alcohol-free beers, de-alcoholised beer, de-alcoholized beer, non-alcoholic beer and non-alcoholic beers are wholly contained by the following broad terms in the Opponent's Earlier Mark: 'Beverages (non-alcoholic), Non-alcoholic drinks, carbonated non-alcoholic drinks, non-alcoholic beverages’”. Further, the opponent asserts similarity between the contested goods “*Craft beer; Beer; Craft beers; Low alcohol beer; Low alcohol beers*” and “*Non-alcoholic drinks*” and “*Non-alcoholic beverages*” of the earlier mark.

32. Applying the principles laid down in the case law, as delineated above, and in particular taking into account the *Meric* principle, the contested goods “*Alcohol-free beers; De-alcoholised beer; De-alcoholized beer; Non-alcoholic beer; Non-alcoholic beers*” are encompassed by the opponent’s goods “*Non-alcoholic beverages*” and “*Non-alcoholic drinks*”. The opponent’s goods can fairly be taken to cover a broad range of non-alcoholic beverages and drinks in Class 32, including all the non-alcoholic versions of beer. Therefore, they are identical, or else highly similar.

33. In making the above finding, I note that many of the points made by the applicant are focused upon a comparison between beer (and non-alcoholic beer) and what are, essentially, soft drinks such as soda waters and fizzy pop. However, the points are rendered mute given my interpretation of the term non-alcoholic drinks/beverages above. It is therefore not necessary to determine whether the applicant’s goods are also similar to such soft drinks.

34. I next turn to the rest of the applicant’s specifications: “*Craft beer; Beer; Craft beers; Low alcohol beer; Low-alcohol beer*. As described above, the

opponent's goods "*Non-alcoholic beverages*" and "*Non-alcoholic drinks*" cover the non-alcoholic versions of beer. The goods overlap in nature with the only difference being that alcohol is present in the applicant's goods, while it has been removed in the opponent's goods. There is also an overlap in purpose in that the goods offer pleasurable drinking experiences or quench thirst, albeit with the intoxicating effects of alcohol in the applicant's goods. The goods share the same method of use (the drinking of beverages) and are sold in similar receptacles. Whilst the goods might not be sold side by side, they may be in reasonably close proximity. Support for this can be seen at least in Exhibit RW1 with Peroni beer (of both types) being grouped together in the same virtual aisle. In any event, I note from the applicant's own evidence that he considers non-alcoholic variants of beer to be an adult product in the same way as alcoholic beer (and the witness provides Exhibits G and H in support). Therefore, the applicant appears to accept that such goods are displayed together and sold as adult products. The evidence also shows that they are frequently made by the same producers. Further, the goods at issue are marketed or consumed at similar places, such as bars, public houses and restaurants. Thus, there will be an element of competition between these goods. More specifically, consumers could choose to drink alcoholic beverages or their non-alcoholic equivalents. In this regard, I find a medium degree of similarity between the goods at issue.

Average Consumer and the Purchasing Act

35. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes 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 in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97. In *Hearst Holdings & Anor v A.V.E.L.A. Inc & Ors*, [2014] EWHC 439 (Ch), Birss J described the average consumer in these terms:

“The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”⁵

36. The goods at issue (or at least where there is conflict) include low/no alcohol beer and alcoholic beer. Although minors may form part of the general public and may be regarded as being eligible to consume non-alcoholic beer,⁶ the retailers, in reality, appear to restrict the sale of such goods away from minors. The applicant stressed this in paragraph 2 of its witness statement⁷ and filed relevant evidence (Exhibit H), supporting this premise. Therefore, the average consumer for the respective goods will largely be adult members of the public.

37. All of the goods may be sold through a range of channels. They may be purchased in retail premises, such as supermarkets and off-licence stores, online or by mail order. In retail premises, the goods at issue will be displayed on shelves, where they will be viewed and self-selected by the consumers. Similarly, for the online stores, the consumers will select the goods relying on the images displayed on the relevant web pages. They may also be sold through bars, clubs, restaurants and public houses,

⁵ Paragraph 60.

⁶ Section 191 of the Licensing Act 2003 states that:

“alcohol” means spirits, wine, beer, cider or any other fermented, distilled or spirituous liquor, but does not include—

(a) alcohol which is of a strength not exceeding 0.5% at the time of the sale or supply in question”.

⁷ In his witness statement, Mr Brown states that “[a]lcohol-free beer, despite not containing alcohol is without doubt an adult product and cannot but be purchased in supermarkets, bars or other stores by anyone under the age of 18 years old and ID must be provided if the customer looks under the age of 25 years old [...]”.

where the goods are displayed on, for example, shelves behind the bar, and may be requested orally from a member of staff. In this regard, I bear in mind the Case T-3/04, *Simonds Farsons Cisk Plc v OHIM*, where the Court of First Instance (now the General Court) stated that:

“[...] as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant’s goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.”

38. Consequently, even if these goods can be ordered orally in the premises exemplified above, a visual inspection of the bottles/pumps containing the goods is most likely to occur. Although these goods are not particularly costly, the average consumer may examine the product to ensure that they select the correct type, flavour, etc., of beverage. Therefore, the selection process is predominantly a visual one, but aural considerations will also play their part. In this regard, the average consumer is likely to pay a reasonable (but not high) level of attention to selecting the goods at issue.

Comparison of Trade Marks

39. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in

mind their distinctive and dominant components. The CJEU stated 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.”

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

41. The marks to be compared are:

Earlier mark	Contested mark
COAST	COAST Beer Co

42. The opponent submits that:

“The Contested Mark contains the Earlier Mark, COAST, in its entirety. The only additional elements in the Contested Mark as the words ‘Beer’ and ‘Co’. These words are descriptive when used in relation to goods in class 32 or are non-distinctive. The marks are clearly visually, phonetically and conceptually identical or similar to a high degree.” [sic]

43. The earlier mark consists of the dictionary word “COAST” in capital letters and a standard font, and the applied for mark consists of the words “COAST Beer Co”, in uppercase and capital letters and a standard font.

Registration of a word mark protects the word itself presented in any normal font and irrespective of capitalisation.⁸

44. For the opponent's mark, the overall impression resides in the whole word. Regarding the applied for mark, the word "COAST" is at the beginning followed by the two words "Beer Co", which are likely to be seen as descriptive by the average consumer. As a result, they will play a lesser role in the overall impression, while "COAST" will be seen as the dominant element of the mark.
45. Visually, the first of the three words, namely "COAST", in the applied for mark comprises the whole of the earlier mark. I also bear in mind that the opponent's mark is short, as opposed to the applied for mark. Whilst just a rule of thumb, the beginning of a mark usually has more impact.⁹ The applied for mark contains the words "Beer Co" that add to the visual difference. Overall, the marks are visually similar to at least a medium degree.
46. Aurally, the shared word "COAST" will be identically articulated in both marks. In my view, the average consumer will pronounce the words "Beer Co" in the applied for mark. Taking this into account, there is at least a medium degree of aural similarity between the marks.
47. Conceptually, the opponent, in its submissions, offered a dictionary definition of the word "COAST" to mean "[...] the part of the land adjoining or near the sea" or to "cove easily without using power". The average consumer will know the meaning of this well-known and ordinary English word. Both marks contain the same word of the same concept despite the added concepts of "Beer Co" in the applied for mark. Therefore, there is a high degree of conceptual similarity between the marks.

⁸ See *Bentley Motors Limited v Bentley 1962 Limited*, BL O/158/17, paragraph 16.

⁹ Cases T-183/02 and T-184/02, *El Corte Inglés, SA v OHIM*.

Distinctive Character of the Earlier Trade Mark

48. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97, paragraph 22 and 23, the CJEU stated that:

“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).”

49. Whilst the opponent has provided some evidence of its activities, the material filed does not assist. First, the evidence is from after the relevant date of 17 November 2018. Second, even if it was from before the relevant date, it is minimal to say the least. Thus, I have only the inherent distinctiveness of the earlier mark to consider. As noted above, the earlier mark is the well-known and ordinary English word “COAST”, which has no real suggestive or allusive significance in relation to the goods for which it

is registered. However, I do not consider that the word is highly distinctive or fanciful in the same way an invented word might be. I consider the distinctive character to be medium.

Likelihood of Confusion

50. In assessing the likelihood of confusion, I must adopt the global approach set out in the case law to which I have already referred in paragraph 20 of this decision. Such a global assessment is not a mechanical exercise. I must also have regard to the interdependency principle, that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks, and vice versa.¹⁰ It is essential to keep in mind the distinctive character of the opponent's trade mark since the more distinctive the trade mark, the greater the likelihood of confusion. I must also keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon imperfect recollection.¹¹

51. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other. Indirect confusion is where the consumer notices the differences between the marks but concludes that the later mark is another brand of the owner of the earlier mark or a related undertaking. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Iain Purvis Q.C., sitting as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different

¹⁰ See *Canon Kabushiki Kaisha*, paragraph 17.

¹¹ See *Lloyd Schuhfabrik Meyer*, paragraph 27.

from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: "The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark."

52. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, James Mellor Q.C., sitting as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

53. Earlier in this decision, I concluded that:

- a) Part of the specifications of the mark applied for are identical and part similar to a medium degree to the opponent's specifications for its registered mark;
- b) The average consumer for the goods will generally be an adult member of the general public, who will select the goods by predominantly visual means, but without dismissing the aural means, and will likely pay a reasonable (but not high) degree of attention to the selection of such goods;
- c) The competing marks have at least a medium degree of visual and aural similarity, and a high degree of conceptual similarity; and
- d) The opponent's mark is inherently distinctive to a medium degree. The opponent's use of its mark does not assist and so it cannot benefit from any enhanced distinctiveness.

54. In addition to the aforesaid factors, it is noteworthy in this case that the points of difference between the marks reside in elements that the average consumer will likely perceive as non-distinctive (“Beer Co”). This increases the significance of the word “COAST” in terms of what is most likely to be recalled. In my view, the differences do not outweigh the similarities between the marks. When taking all of the relevant factors into account together with the principle of imperfect recollection, I consider that the average consumer is likely to mistake the applicant’s mark and the opponent’s marks for one another. That is the case with both the identical goods and those with just a medium degree of similarity (given the type of relationship between them as described earlier).

55. If I am wrong on direct confusion, the average consumer, having identified that the marks are different, will assume that the respective marks originate from the same or economically linked undertakings. Notably, the consumer may perceive that the applicant’s goods, bearing the mark “COAST Beer Co”, to be a brand extension or variation of the “COAST” mark, or vice versa, particularly bearing in mind the descriptiveness of the points of difference. Consequently, I find there to be a likelihood of indirect confusion between the marks regarding the goods at issue.

Outcome

56. The opposition under Section 5(2)(b) of the Act has succeeded in its entirety. Subject to any appeal against this decision, the application will be refused.

Costs

57. The opponent has been successful and is entitled to a contribution towards its costs. The opponent was not professionally represented and submitted a completed cost proforma to the Tribunal on 17 December 2020,¹² outlining the number of hours spent on these proceedings. I set out below my assessment on the claim made. However, it should be noted that a costs award is intended to be a contribution towards costs rather than full compensation. I will make the award of costs on the basis of £19.00 per hour, which is the minimum rate of compensation allowed under The Litigants in Person (Costs and Expenses) Act 1975 (as amended). The sum is calculated as follows:

- a) The opponent claimed 1 hour for filing the Notice of Opposition and 1 hour for considering the forms filed by the other party. I consider this to be a reasonable claim.
- b) The opponent has claimed a total of 18 hours for preparing and filing evidence and written submissions while also considering those of the other party. I consider it would be excessive to award for all the hours claimed to have been expended. I will therefore award 14 hours in total.
- c) The opponent is also entitled to the official fee for filing the Notice of Opposition in the sum of £100.
- d) **The total award is £404** (16 hours at £19 per hour plus the official fee of £100).

58. I, therefore, order Mr James Brown to pay Coast Drinks Ltd the sum of £404. The above sum should be paid within twenty-one days of the expiry

¹² Although the opponent made a late submission of the cost pro-forma, I directed that it be allowed for these proceedings.

of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 8th day of January 2021

**Dr Stylianos Alexandridis
For the Registrar,
The Comptroller General**