

O/078/12

IN THE MATTER OF APPLICATION NO 2544291
IN THE NAME OF BALTIC BEER COMPANY LTD

AND

OPPOSITION THERETO UNDER NO 101124
BY BRITISH BEER & PUB ASSOCIATION

Background


1. Application No 2544291 stands in the name of Baltic Beer Company Ltd (“Baltic”) and seeks registration of the following trade mark:

VIRU BEAUTIFUL BEER

2. Registration is sought in respect of the following goods:

Lager; beer; ale; stout; porter; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages.

3. Following publication on 30 July 2010 in the *Trade Marks Journal*, notice of opposition to the registration of the application was filed by British Beer & Pub Association (“British”). British bases its opposition on grounds under section 5(2)(b), 5(3) and 5(4)(a) of the Act relying on trade mark No 2387585, a registration of a series of two marks as follows:

Mark	Application Date	Registration Date	Specification of goods
	22.3.2005	14.10.2005	<p>16: Printed matter and publications; books, magazines, newsletters, brochures, leaflets and pamphlets; menus; engravings, photographs, postcards, posters and wallcharts; calendars and diaries; beer mats, coasters and table place mats; stationery, including pens, pencils, erasers, rulers, files, folders, loose leaf binders, note books, note pads and writing paper; wrapping paper, bottle bags and bottle envelopes and wrappers made of cardboard or paper; decals, labels, stickers and transfers, including such items for application to bottles, drinking glasses and windows; marketing material</p> <p>18: Leather and imitations of leather, and goods made of these materials; bags, including barrel bags, holdalls, backpacks and rucksacks; umbrellas</p>

			25: Clothing; footwear; headgear; T-shirts and sweatshirts; jumpers, pullovers and sweaters; baseball caps 32: Beers; lagers; ale, porter and stout
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4. In respect of the objection raised under section 5(3), British puts its claim as follows:

“The Opponent is a trade association. If a member of the trade (i.e. the Applicant) registered and uses a similar trade mark in respect of identical or similar goods to the Opponent’s registered trade mark, they will gain an unfair advantage because the public is likely to assume that the member of the trade’s goods have been approved by or otherwise endorsed by the trade association (i.e. the Opponent)”

As for the objection raised under section 5(4) of the Act, British claim to have used its mark in respect of all goods for which it is registered since March 2005.

5. Baltic filed a counter-statement in which it denies the grounds of opposition in their entirety.

6. Both parties filed evidence. Neither party requested to be heard and neither filed written submissions in lieu of attendance, although submissions were filed earlier in the proceedings. I therefore give this decision after a review of all the papers before me.

Decision

7. I consider first, the ground of opposition based on section 5(2)(b) of the Act. This section reads as follows:

“5(2) A trade mark shall not be registered if because -

- (a) ...
- (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark.”

8. An “earlier trade mark” is defined in section 6 of the Act. It states:

“6.-(1) In this Act an "earlier trade mark" means -

- (a) a registered trade mark, international trade mark (UK) or Community trade mark 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,
- (b) a Community trade mark which has a valid claim to seniority from an earlier registered trade mark or international trade mark (UK), or
- (c) a trade mark which, at the date of application for registration of the trade mark in question or (where appropriate) of the priority claimed in respect of the application, was entitled to protection under the Paris Convention or the WTO agreement as a well known trade mark.

(2) 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.

(3) A trade mark within subsection (1)(a) or (b) whose registration expires shall continue to be taken into account in determining the registrability of a later mark for a period of one year after the expiry unless the registrar is satisfied that there was no *bona fide* use of the mark during the two years immediately preceding the expiry.”

9. In these proceedings, British relies on the registered trade mark shown in paragraph 3 above. It is for a series of two marks which differ only as to the colour in which they are presented and which I will refer to in the singular unless otherwise necessary. The mark qualifies as an earlier trade mark under the above provisions but is not subject to proof of use, as per *The Trade Marks (Proof of Use, etc) Regulations 2004*, as it had not been registered for five years at the date of the publication of the application now under consideration.

10. In determining the question under Section 5(2)(b), I take into account the guidance provided by the European Court of Justice (ECJ) in *Sabel v Puma AG* [1998] R.P.C. 199, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] R.P.C. 117, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R 77, *Marca Mode CV v Adidas AG* [2000] E.T.M.R.723, *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* C-120/04 and *Shaker di Laudato & C. Sas v OHIM* C-334/05 (Limoncello), as cited with approval in *Och-Ziff Management Europe Ltd and Oz Management LP v Och Capital LLP, Union Investment Management Ltd and Ochoki* [2010] EWCH 2599 (Ch). It is clear from these cases that:

- (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, in certain circumstances, be dominated by one or more of its components;
- (f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;
- (g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings 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 causes the public to 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

11. Under its ground of opposition under section 5(2) of the Act, British relies on its earlier mark insofar as it is registered for goods in class 32. The respective goods to be compared are, therefore:

Baltic's application

Lager; beer; ale; stout;
porter; mineral and aerated waters
and other non-alcoholic drinks;
fruit drinks and fruit juices; syrups and
other preparations for making beverages

British's earlier mark

Beers; lagers; ale; porter and stout

12. In *British Sugar Plc v James Robertson & Sons Ltd* [1996] RPC 280 ("TREAT"), Jacob J said (at 289):

"When it comes to construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade. After all, a trade mark specification is concerned with use in trade."

He went on (at 295) to set out the following factors as being relevant to the question of similarity of services without reference to the classes in which they may fall:

- (a) the respective uses of the respective services;
- (b) the respective users of the respective services;
- (c) the nature of the services;
- (d) the respective trade channels through which the services are marketed;
- (e) the extent to which the respective services are competitive. This inquiry may take into account how those in trade classify the services, for instance whether market research companies put them into the same or different sectors.

13. Subsequently, in *Canon Kabushiki Kaisha v MGM Inc* the ECJ stated:

"23. In assessing the similarity of the goods or services concerned.....all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, *inter alia*, their nature, their end users and their method of use and whether they are in competition with each other or are complementary."

14. In Case T-420/03 – *El Corte Inglés v OHIM- Abril Sanchez and Ricote Sauger* (Boomerang TV) the CFI commented:

"96.....Goods or services which are complementary are those where 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 the production of those goods or provision of those services lies with the same undertaking (Case T14169/03 Sergio Rossi v OHIM – Sissi Rossi (SISSI ROSSI) [2005] ECR II-685, paragraph 60, and judgment of 15 March 2006 in Case T-31/04 *Eurodrive Services and Distribution v OHIM – Gomez Frias* (euroMASTER), not published in the ECR, paragraph 35)."

15. As both specifications include beer, lager, ale, stout and porter, these goods are clearly identical. The application also seeks registration of non-alcoholic drinks which

would include e.g. non-alcoholic beer and lager etc. and thus these are highly similar goods to those of the earlier mark.

16. Like the goods of the earlier mark, *mineral and aerated waters* and *fruit drinks and fruit juices* are used as drinks to quench the thirst. Each is sold in supermarkets in close proximity and each is also sold e.g. in bars or restaurants and other licensed premises as well as off licenses. The respective goods may differ in the way they are produced and one is not indispensable for the other even though there are occasions when they can be mixed (e.g. lager with lime juice, beer with lemonade). Any similarity with the goods of the earlier mark is low.

17. That leaves *syrups and other preparations for making beverages*. These goods are not drinks of themselves but rather are an ingredient used to make or add to a drink. They are not, as far as I am aware, sold in e.g. bars or other licensed premises and, whilst they are sold in supermarkets, they are most likely to be displayed in a different area to the goods of the earlier mark. In my view, they are not similar to any of the goods of the earlier mark.

The average consumer and the nature of the purchasing decision

18. As far as alcoholic beverages are concerned, these are goods which will be bought by the general public who, given the legal restrictions applicable to the sale of alcohol, are over 18. The remaining goods are such as will also be bought by the general public but with no age barrier. Alcoholic beverages are sold through a range of channels including general retail premises such as shops and supermarkets and more specific outlets such as off-licenses. In each of these stores, the goods are normally displayed on shelves for self-selection. The goods are such as are also available in e.g. bars and restaurants where they will be displayed behind the bar or where the trade mark will appear on dispensers at the bar and on menus etc. With the exception of *syrups and other preparations for making beverages* which are goods likely only to be sold in supermarkets or other general stores, the same outlets also sell the remaining goods of Baltic's application (and in the same way) although non-alcoholic drinks, waters and fruit based beverages are likely to be sold from different, though nearby, shelves in a store.

19. In *Simonds Farsons Cisk plc v Spa Monopole* Case T-3/04, the Court of First Instance (now the General Court) said:

“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.”

20. Whilst the goods may be ordered orally, it is likely to be in the context of a visual inspection of e.g. the bottles containing the goods, prior to them being ordered. I

consider the selection process for all of the respective goods primarily to be a visual one though not to the extent that oral considerations can be ignored. The goods are everyday ones of relatively low cost but ones to which the average consumer will pay a reasonable level of attention when selecting them, given that they are for personal consumption.

Comparison of marks

21. The marks to be compared are as follows:

Baltic's application	British's earlier mark
VIRU BEAUTIFUL BEER	

22. It is well established that the average consumer is considered to be reasonably well informed, circumspect and observant but perceives trade marks as wholes and does not pause to analyse their various details. In addition, the average consumer rarely has the chance to make direct comparisons between trade marks but must, instead, rely on the imperfect picture of them he may have kept in mind. In reaching a conclusion on similarity, I must identify what I consider to be the distinctive and dominant elements of the respective trade marks and, with that conclusion in mind, I must go on to compare the respective trade marks from a visual, aural and conceptual perspective.

23. British, via its professional representative Robert Gaunt, referred me to the decision of the General Court in *NEC Display Solutions Europe GmbH v OHIM T-501/08* regarding how to approach the issue of similarity. The case of *Medion AG v Thomson multimedia Sales Germany & Austria GmbH*, Case 120/04 provides key guidance on how to approach issues of similarity involving composite marks as follows:

“29. In the context of consideration of the likelihood of confusion, assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see *Matratzen Concord*, paragraph 32).

30. However, beyond the usual case where the average consumer perceives a mark as a whole, and notwithstanding that the overall impression may be dominated by one or more components of a composite mark, it is quite possible that in a particular case and earlier mark used by a third party in a composite sign including the name of the company of the third party still has

an independent distinctive role in the composite sign, without necessarily constituting the dominant element.

31. In such a case the overall impression produced by the composite sign may lead the public to believe that the goods or services at issue derive, at the very least, from companies which are linked economically, in which case the likelihood of confusion must be held to be established.

32. The finding that there is a likelihood of confusion should not be subject to the condition that the overall impression produced by the composite sign be dominated by the part of it which is represented by the earlier mark.

33. If such a condition were imposed, the owner of the earlier mark would be deprived of the exclusive right conferred by Article 5(1) of the directive even where the mark retained an independent distinctive role in the composite sign but that role was not dominant.

34. This would be the case where, for example, the owner of a widely-known mark makes use of a composite sign juxtaposing this mark and an earlier mark which is not itself widely known. It would also be the case if the composite sign was made up of the earlier mark and a widely-known commercial name. In fact, the overall impression would be, most often, dominated by the widely-known mark or commercial name included in the composite sign.

35. Thus, contrary to the intention of the Community legislator expressed in the 10th recital in the preamble to the directive, the guarantee of the earlier mark as an indication of origin would not be assured, even though it still had an independent distinctive role in the composite sign.

36. It must therefore be accepted that, in order to establish the likelihood of confusion, it suffices that, because the earlier mark still has an independent distinctive role, the origin of the goods or services covered by the composite sign is attributed by the public also to the owner of that mark.”

24. In *Grupo El Prado Cervera, SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-117/02* it was stated:

“51 The Court notes in that regard that the target public will not generally consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark (see to that effect, *BUDMEN*, cited above, paragraph 53; see, also Case T-10/03 *Koubi v OHIM-Flabesa CONFORFLEX*) [2004] ECR-II-0000, paragraph 60”.

25. In *CureVac GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-80/08* it was stated:

“49 In addition, while it is true that the consumer normally attaches more importance to the first part of words where it is more pronounced (see, to that

effect, judgment of 27 February 2008 in Case T-325/04 *Citigroup v OHIM – Link Interchange Network (WORLDBLINK)*, not published in the ECR, paragraph 82), it remains the case that the public will not generally consider a descriptive or weakly distinctive element forming part of a complex mark to be the distinctive and dominant element of the overall impression conveyed by that mark (see *ECHINAID*, paragraph 29 above, paragraph 54 and the case-law cited).

26. In *Jose Alejandro SL v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM), Anheuser-Busch Inc Intervening* (Case T-129/01) [2004] ETMR 15 the court said:

“53 Accordingly, the suffix MEN in the mark claimed is likely to carry a suggestive or even descriptive connotation for the relevant public that the clothing, footwear and headwear covered by that mark are intended for male customers. The Court notes that the public will not generally consider a descriptive element forming part of a complex mark as the distinctive and dominant element of the overall impression conveyed by that mark.”

27. The mark applied for consists of the three words VIRU BEAUTIFUL BEER. As far as I am aware, the word VIRU has no meaning in the English. The words BEAUTIFUL BEER ‘hang together’ as a term or phrase. In his witness statement on behalf of Baltic, Alastair John Rawlence, a trade mark attorney employed by William A Shepherd & Son, Baltic’s legal representatives in these proceedings, submits the term BEAUTIFUL BEER is a non-distinctive phrase for beer products and, at AJR 1, exhibits a number of extracts from an Internet search in support of his claim. The exhibit consists of six documents which he says were retrieved as a result of a search for the words BEAUTIFUL BEER. As Mr Tighe, for British, points out in his evidence, 3 of the 6 documents provided are taken from US websites. A fourth document extols the merits of the Devon town of Beer. There is also a printout from the ohbeautifulbeer.com website which may or may not be a UK website. Here, ‘ohbeautifulbeer’, which, of course, differs from ‘beautifulbeer’, appears as part of a logo at the top of the page or as part of the domain name. That leaves an extract from an article published in *The Telegraph* on 9 December 2006. The article is entitled “Beautiful beer lost in the vaults since 1869”. The article is incomplete and so I cannot tell whether there are any other uses of the term Beautiful Beer within it or whether the title of the article has any descriptive relevance. This evidence does not support Mr Rawlence’s claim that the phrase is a non-distinctive one. In any event, despite his claim, his client, Baltic, also submits that the words BEAUTIFUL BEER make up a laudatory phrase with a very low level of distinctiveness. For its part, British submits the phrase is not one that would naturally be used in a generic or descriptive sense by consumers.

28. As a word with no known meaning, VIRU is a distinctive element of the mark. It is also the dominant element within the mark. This is partly because of its position at the beginning of the mark but also because the words BEAUTIFUL BEER describe beer which is aesthetically pleasing or highly enjoyable and are likely to be given little if any significance or weight by the average consumer in relation to beer or beer related goods.

29. The words BEAUTIFUL BEER also appear in the earlier mark. In this case, the words appear one above the other and with the word BEER in much larger font. They will still be read together as constituting a single term. These words appear below a device in the form of a capital letter B where what appear to be hops take the place of the more usual voids within the letter. Whilst hops are associated with certain drinks which use them in their production, the device is also the distinctive element of the mark given the somewhat unusual presentation. The letter B and hop device is proportionately much larger than the words appearing below it and it is this element of the mark which is the dominant element of it.

30. The two earlier marks making up the series differ only as regards the colour in which they are presented. I take note of the comments made in *Specsavers International Healthcare Limited & Others v Asda Stores Limited* [2010] EWHC 2035 (Ch), where Mann J stated:

“119. It is not clear to me that this is a debate which advances the case very much, but the position seems to me to be as follows. As a matter of principle the exercise involves comparing the offending sign with the registered mark and assessing the likelihood of confusion or association. The two things have to be compared. Since we live in a visual world, and signs are visual, some form of appearance has to be considered. If the registered mark is unlimited to colour then it is registered for all colours. This means that the colour of the offending sign becomes irrelevant. It will not be possible to say that its colour prevents there being an infringement. At this point one can take one of two courses, each of which ought to have the same result. The first is to imagine the registered mark in the same colour as the offending sign. The second is to drain the colour from the offending sign. Either way one then has the material for comparison. One could even imagine them both in a third colour. It does not matter. So in a sense both Mr Purvis and Mr Bloch are right. As a matter of visual convenience it seems to me to be easier to imagine the registered mark in a colour than to imagine the offending sign drained of colour, and I propose to adopt that course.”

31. From a visual perspective, as both marks contain the words BEAUTIFUL BEER there is a degree of similarity between them. There are also, however, very strong visual differences, given the other elements within each mark and the style of their presentation.

32. From an aural perspective the marks are, potentially, somewhat closer as both contain the words BEAUTIFUL BEER and the ‘B’ and hop device appearing within the earlier mark is unlikely to be articulated by the average consumer: he will, instead, refer to the mark as BEAUTIFUL BEER.

33. As I have noted above, the word VIRU is not, as far as I am aware, a known word in the English language. It is likely, therefore, to be treated as an invented word and is unlikely to bring any particular image to mind. The words BEAUTIFUL BEER bring to mind beer that looks attractive and/ or has a pleasing taste. As these words appear in both marks, there is a similarity between them from the conceptual perspective.

Distinctive character of the earlier mark

34. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings *Windsurfing Chiemsee v Huber and Attenburger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

35. In his witness statement dated 11 April 2011, Mr Tighe states that British is a trade association, founded in 1904, which represents the UK beer and pub sector. It has (at the date of his witness statement) 58 members accounting for 96% of the beer brewed in the UK. Mr Tighe states the primary function of British is the representation of its members to government by way of the political process and lobbying. It also promotes beer and supports pubs “as the home of responsible drinking”. It also runs schemes to improve the sector’s environmental position.

36. Mr Tighe states that in 2003, British agreed to fund a campaign to improve the quality of beer dispensed in pubs and to increase public awareness of beer. The campaign incorporated a public relations programme centred around BEAUTIFUL BEER accreditation. He states that a pub achieving accreditation as a BEAUTIFUL BEER pub indicated the staff were knowledgeable in matching beer and food and that there was a quality in the serving of the beer. Mr Tighe states that some pubs “probably still are” accredited. A website, no longer in use, was developed to support the scheme. In addition, the campaign was promoted through videos, t-shirts, glasses and carrier bags which were given away at unspecified events. Examples of these promotional items are exhibited at Exhibit 2. Mr Tighe states the promotional costs of the campaign were as follows:

Year to end September:	£
2004	158,937
2005	281,350
2006	249,923
2007	221,212
2008	111,643
2009	15,211

37. Mr Tighe states British has now re-launched use of its earlier mark as part of another accreditation scheme in conjunction with another organisation called Cask Marque. This new scheme has two parts: a new trade certification scheme to improve the quality of draught beer sold in pubs and an accreditation scheme for the best beer pubs in the country. The scheme re-launched sometime in 2011.

38. In response to Baltic’s criticism of this evidence, Mr Tighe filed a further witness statement dated 23 September 2011. In it, he states that “the main objective of the original campaign was not to build a consumer brand per se but ultimately to develop

a campaign under the brand umbrella of [BEAUTIFUL BEER] to encourage more consumers to make beer their drink of choice on more occasions". Mr Tighe states British did not monitor brand recognition or reach. At exhibit 4, he introduces a printout of the first page of an Internet search carried out on 25 August 2011. He states the results of the search for the word BEAUTIFUL BEER brought back details of the award scheme "even though there has been little promotional activity since 2009". Mr Tighe states the original campaign ran between 2004 and 2009 and that all of British's members "will have been fully familiar" with the brand as "it was a member-driven and engaged project". He states that approximately 600 pubs throughout the UK achieved awards under the scheme and will still have their plaques.

39. At Exhibit 6, Mr Tighe introduces what he says is a list of news items published in the first 6 months of 2005. The list gives the title of the article, the name of the publication in which it appeared and whether it was a trade, regional or national publication (and, in some cases, its readership). There are 70 articles listed, only 9 of which include the term BEAUTIFUL BEER within the title. All of these were published in trade papers. None of the articles themselves have been exhibited.

40. Mr Tighe states the promotional costs he has provided were spent on the concept and design of the brand, the design, update and maintenance of the website, developing and implementing the award scheme and accreditation process as well as public relations events for journalists, photography and video costs, celebrity endorsement and associated costs.

41. British's earlier mark is registered in respect of various goods as set out in paragraph 3 above but is relied on under this ground of opposition only in respect of those goods falling within class 32. I have set out above, in some detail, the evidence filed showing use of the mark. That evidence relates solely to the setting up and running of an award scheme for the accreditation of those in the trade. The earlier mark is not registered in respect of any such services. There is no evidence that the mark has been used as an indicator of origin in relation to the goods for which is registered in class 32 (or indeed for any of the goods for which it is registered) nor is there any evidence that British, as a trade association, is trading in these or any other goods however, being a registered mark, there is a presumption that the earlier mark is a valid registration. As the earlier mark, in terms of these proceedings, is not subject to proof of use, the question of whether the use by British is use of the mark as registered is not an issue before me. The fact is that the evidence filed does not show any use of the mark on the relevant goods. Absent such evidence I am unable to find that the mark's distinctive character has been enhanced by its use.

Likelihood of confusion

42. In determining whether there is a likelihood of confusion, I must bear in mind a number of factors. There is the interdependency principle, whereby a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the goods and vice versa. I must take into account the distinctive character of British's trade mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the

goods, the nature of the purchasing process and the fact that the average consumer rarely has the opportunity to make direct comparison between trade marks but must, instead, rely upon the imperfect picture of them he has retained in his mind.

43. I have come to the conclusion that whilst there are some similarities between the respective marks there are also significant differences between them and, taking all matters into account, those differences outweigh the similarities. The common element is one that is descriptive and which is not descriptive of trade origin. In my view, there is no likelihood of either direct or indirect confusion. The opposition founded on section 5(2)(b) of the Act fails accordingly.

The objection under section 5(3) and 5(4)(a) of the Act

44. Both objections rely on use of the earlier mark in relation to all the goods for which the earlier mark is registered. As I have previously indicated, I have set out above, in some detail, the evidence which has been filed by British in support of its claims. There is no evidence of use in respect of any of the goods on which British relies. Absent such use, the objections founded on sections 5(3) and 5(4)(a) of the Act cannot hope to succeed and I decline to deal with them further.

Costs

45. Baltic has been successful and is entitled to a contribution towards its costs. In reaching my decision in this regard, I take into account the poor nature of the evidence which has been filed insofar as its relevance to the pleaded grounds is concerned which will have been reviewed in some detail by Baltic. I award costs as follows:

Preparing a statement and considering the other side's statement	£400
Preparing evidence and considering the Other side's evidence	£600
Total	£1000

46. I order British Beer & Pub Association to pay Baltic Beer Company Limited the sum of £1000. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of February 2012

**Ann Corbett
For the Registrar
The Comptroller-General**