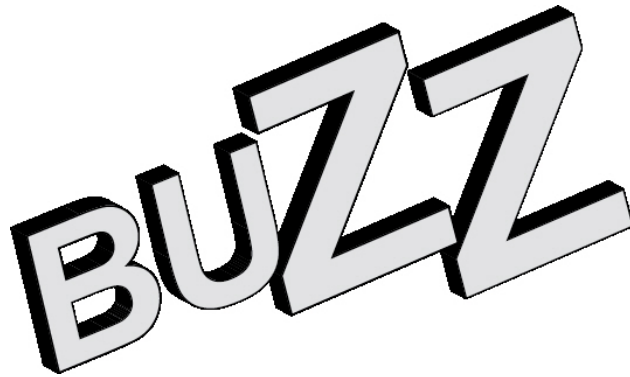


O-391-17

**TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NO. 3155037
BY KHATIJAH SHAH
TO REGISTER THE TRADE MARK:**



BUZZ

IN CLASS 32

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 406982 BY BOOST JUICE HOLDINGS PTY LTD**

Background and pleadings

1. On 15 March 2016, Khatijah Shah (“the applicant”) applied to register the trade mark



for the following goods:

Class 32 Aerated mineral waters; Aerated water; Aerated water (Preparations for making-); Aerated water [soda water]; Alcohol free beverages; Aloe juice beverages; Aloe Vera drinks, non-alcoholic; Aloe Vera juices; Beer; Beverages (Non-alcoholic -); Carbonated water; Fruit beverages; Fruit beverages and fruit juices; Fruit flavoured drinks; Fruit juice; Fruit juice beverages (Non-alcoholic -); Fruit juice concentrates; Fruit juices and fruit drinks; Fruit nectars, non-alcoholic; Fruit-based beverages; Fruit-flavoured beverages; Fruit-flavoured beverages; Ginger ale; Ginger beer; Grape juice; Basil Seed Drinks.

The application was published for opposition purposes on 15 April 2016.

2. The application is opposed by Boost Juice Holdings Pty Ltd (“the opponent”). The opposition was filed on 14 July 2016 and is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against the all of the goods in the application. The opponent relies upon its UK trade mark registration number 3124601 (series of two), shown below, which has a filing date of 28 August 2015 and for which the registration procedure was completed on 27 November 2015:

- (i) BANANA BUZZ
- (ii) Banana Buzz

The opponent relies upon all of the goods for which the earlier mark is registered, namely:

Class 32 Fruit juices; Vegetable juices; Fruit smoothies; Vegetable smoothies; Beverages consisting principally of fruit; Beverages consisting principally of vegetable; Beverages containing both fruit and vegetable juice; Beverages containing non-dairy milks; Fruit flavoured beverages; Vegetable flavoured beverages; Energy drinks; Concentrated fruit juice; Concentrated vegetable juice; Cordials; Frozen fruit beverages; Frozen vegetable beverages; Smoothies containing grains and oats; Fruit extracts; Vegetable extracts for use in beverages; Bottled waters; Flavoured water; Flavoured mineral water; Carbonated water; and other non-alcoholic beverages.

3. Given its date of filing, the opponent's trade mark qualifies as an earlier mark in accordance with s. 6 of the Act.

4. In its notice of opposition, the opponent claims that the goods at issue are identical and that "[it] would not be uncommon in the relevant market for Fruit Juices to be marketed under a common element of the Mark, with differing prefix names (e.g. Strawberry Buzz, Orange Buzz). Therefore the relevant consumer would likely be confused between Fruit Juices of differing types all being marketed under the common element Buzz".

5. The applicant filed a counterstatement denying the claims. As these are the only comments I have from the applicant, they are reproduced in full, and as written, below:

"1) BUZZ- is made with real Fruit Juice infused with Basil Seeds a 'Non-dairy' juice with 'No Bananas' and bottled in glass vessel the juice can be consumer over a 12hr period.

'Banana buzz'- is made with Banana, Yogurt, Milk, ice etc served at a Bar in a McDonalds type milkshake cup, I would assume that this smoothie should be consumed within a couple of hrs, if not 1hr.

2) BUZZ- is a drink available to buy from Retailers & small supermarkets as a bottled Fruit juice with Basil seed this trade is regarded as (off-Trade).

Banana buzz- is a made to order Milk-shake/smoothie drink only available once a mix of ice, yogurt and milk and banana has been blended to create a smoothie this is known as (on-Trade).

3) BUZZ- fruit juice with basil-seed is formulated, processed and bottled at source and sold thru retail outlets (off-Trade).

Banana Buzz only produced and only available once a customer has ordered from a specific Bar (on-Trade).

To summarries Buzz has no intention of introducing a 'Banana' flavour into the range as it simply would not work eg. Banana juice or juicing a Banana would be very difficult to produce. Furthermore BUZZ does not plan to prefix the name of any fruit(s) to the brand name 'BUZZ' (eg Strawberry Buzz, Orange Buzz etc). It is unfair to say there is confusion for the consumer between buying a Fruit juice drink from a retailer (off-Trade), or ordering a made-to-order Smoothie from a bar (on-Trade). Today's consumers are far more astute than Boost are giving them credit for".

6. The opponent has been represented throughout by Pure Ideas Ltd; the applicant is a litigant in person. Only the opponent filed evidence; it also filed written submissions during the evidence rounds. Neither party asked to be heard and neither party filed written submissions in lieu of a hearing. I have read all of the papers carefully and I will bear both parties' comments in mind, referring to them, as necessary, below.

The opponent's evidence

7. The evidence consists of the witness statement of Anthony Williams, the opponent's representative, along with two exhibits. Exhibit 1 consists of prints from www.pizzaexpress.com showing their 'cook at home' products. It is said to be dated 16

November 2016 (i.e. after the application date). Exhibit 2 consists of prints from www.basiljuice.co.uk, said to be presented on the applicant's website. It is also said to be dated 21 November 2016. I do not intend to describe the evidence further here but will refer to it below as I consider appropriate.

Preliminary issue

8. In his counterstatement, the applicant describes the different goods offered by the parties, including the different ingredients. He also describes the way in which the products are sold, asserting that his goods form part of the off-trade, whereas the opponent's goods are on-trade products. I am not familiar with this use of on- and off-trade in relation to non-alcoholic drinks, as described by the applicant. However, that is of little import. For reasons which I will now explain, the applicant's points about the difference in the actual goods offered by the parties will, as a matter of law, have no bearing on the outcome of this opposition (although the nature of the purchasing act is a matter to which I must have regard and which I consider, below).

9. A trade mark registration is essentially a claim to a piece of legal property (the trade mark). Every registered mark is entitled to legal protection against the use, or registration, of the same or similar trade marks for the same or similar goods/services if there is a likelihood of confusion. Once a trade mark has been registered for five years, section 6A of the Act is engaged and the opponent can be required to provide evidence of use of its mark. Until that point, however, the mark is entitled to protection in respect of the full range of goods and services for which it is registered.

10. The mark relied on by the opponent had not been registered for five years at the date on which the application was published. Consequently, despite the applicant's request for evidence of use in his counterstatement, the opponent is not required to prove use for any of the goods for which its mark is registered (the applicant was advised of this in the tribunal's letter of 21 September 2016). The earlier mark is entitled to protection against a likelihood of confusion with the applicant's mark based on the

'notional' use of the earlier mark for all the goods listed in the register. This concept of notional use was explained by Laddie J. in *Compass Publishing BV v Compass Logistics Ltd* ([2004] RPC 41) like this:

"22. [...] It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place".

11. So far as Mr Shah's claimed use of the applied for mark is concerned, in *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited* (Case C-533/06), the Court of Justice of the European Union ("CJEU") stated at paragraph 66 of its judgment that when assessing the likelihood of confusion in the context of registering a new trade mark it is necessary to consider all the circumstances in which the mark applied for might be used if it were registered. As a result, even though the applicant has given certain assurances about the way in which the mark will be used, and the goods upon which it will be used, my assessment must take into account only the applied-for mark (and its specification) and any potential conflict with the earlier trade mark. Any differences between the actual goods provided by the parties, or differences in their trading styles, are irrelevant unless those differences are apparent from the applied-for and registered marks.

Decision

Section 5(2)(b): legislation and case law

12. The opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

[...]

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

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

13. 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.

The principles:

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

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

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

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

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

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

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

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

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

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

(k) if the association between the marks creates a risk that the public 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

14. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, the CJEU stated at paragraph 23 of its judgment:

“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”.

15. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- a) The respective users of the respective goods or services;
- b) The physical nature of the goods or acts of services;

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

16. The General Court (“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 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”.

17. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

Carbonated water; fruit juice; fruit-flavoured beverages; fruit flavoured drinks; fruit juice concentrates

18. “Carbonated water”, “fruit juice”/“fruit juices” and “fruit-flavoured beverages” appear in both specifications: these goods are identical. “Fruit flavoured drinks” and “fruit juice concentrates” also have direct counterparts in the opponent’s specification, although expressed in slightly different terms (“fruit flavoured beverages” and “concentrated fruit juice”). These goods are also identical.

Aerated mineral waters; Aerated water; Aerated water [soda water]

19. All of these terms fall within the opponent’s “bottled waters”, or vice versa. They are identical on the principle outlined in *Meric*.

Beverages (Non-alcoholic -); alcohol free beverages

20. These very broad terms encompass all of the goods in the opponent’s specification: the goods are identical under *Meric*.

Grape juice

21. This term is included in “fruit juices” in the opponent’s specification: the goods are identical, based on the principle in *Meric*.

Fruit beverages

22. This includes the “frozen fruit beverages” included in the opponent’s specification. These goods are identical, based on the principle outlined in *Meric*.

Fruit juice beverages [non-alcoholic]; fruit drinks; fruit nectars, non-alcoholic; fruit-based beverages

23. These are drinks which contain fruit juice but which are not exclusively made of fruit juice: they are usually more diluted and may contain other ingredients such as sugar or sweeteners. In my view, they are included in the opponent's "fruit flavoured beverages" and are thus identical. If I am wrong and they do not readily fall within any of the specific beverages identified in the opponent's specification, they are certainly caught by the earlier mark's wide term "other non-alcoholic beverages". The goods are identical.

Aerated water (Preparations for making)

24. I have no submissions from either party to explain the meaning of this term, though the opponent claims that it is identical to "bottled waters", "carbonated water" and "non-alcoholic beverages". It seems to me that the term does not mean either carbonated water or bottled water itself but suggests, instead, something which is added to water before carbonation, such as a juice concentrate or cordial. These terms figure in the opponent's specification and preparations for making aerated water, if not identical to them, must be highly similar to both, given that the goods are similar in nature, purpose and method of use. They share users and channels of trade and there may be a competitive relationship between the goods.

Aloe juice beverages; Aloe Vera drinks, non-alcoholic; Aloe Vera juices; ginger ale; ginger beer; basil seed drinks

25. None of these terms has a direct counterpart in the beverages specified in the opponent's specification. However, all fall within the earlier specification's wide term "other non-alcoholic beverages". They are identical based on the principle in *Meric*.

Beer

26. Beer can be alcoholic or non-alcoholic and the applicant's term includes both types. As a consequence, it encompasses "other non-alcoholic drinks" in the earlier specification, or vice versa. The goods are identical under *Meric*. I acknowledge that the alcoholic beers in the specification, notionally speaking, may not be identical to the opponent's goods. However, any difference in nature is only to the extent that they are alcoholic versions of otherwise identical drinks. They share purpose, users, channels of trade and method of use and are in competition. Alcoholic beers would still be highly similar to non-alcoholic beverages (which includes non-alcoholic beers).

The average consumer and the nature of the purchasing act

27. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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".

28. I have explained, above, why the applicant's comments regarding the specific products offered by the parties are not relevant. It has made no other submissions regarding the identity of the relevant average consumer.

29. The opponent states that “[the] goods of both applications are aimed at the general public, the consumer of fruit juice drinks— this is the relevant public”. I agree: the goods at issue are a range of non-alcoholic beverages, preparations for making beverages and, in the applicant’s specification, beer. I consider that the average consumer of the goods at issue is a member of the general public, though in the case of alcoholic beer that will be an adult over 18.

30. In my experience, the goods at issue are sold through a range of retail shops, the most significant of which are likely to be supermarkets and their online equivalents. They are also sold in cafés, restaurants, bars and public houses. In retail premises, the goods at issue will be displayed on shelves, where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a web page. In outlets such as cafés, bars and restaurants, the goods are likely to be on display, for example, in bottles or in fridges visible to customers. They may also be shown on drinks menus, where the trade mark will be visible. While I do not discount that there may be an aural component in the selection and ordering of the goods in eating and drinking establishments, this is likely to take place after a visual inspection of the bottles or a drinks menu (see *Simonds Farsons Cisk plc v Office for Harmonization in the Internal Market (Trade Marks and Designs)* (OHIM), Case T-3/04 (GC)). The selection of the goods at issue will, therefore, be primarily visual, although aural considerations will play a part.

31. The level of attention paid to the purchase of the goods at issue is likely to vary. Soft drinks (e.g. mineral and aerated waters, fruit juices), concentrated juices, cordials and preparations for making these beverages are reasonably inexpensive purchases selected routinely, and potentially frequently, from supermarket shelves and their online equivalents. As some attention will be paid to, for example, flavour, it will not be the most casual of purchases. I find that the attention paid to the selection process for these goods is likely to be fairly low (between low and medium). Beers, both alcoholic and non-alcoholic, tend to cost more than soft drinks and the average consumer is likely to

be attentive to the level of alcohol, as well as taking care to choose a particular type or flavour of beer. These goods will be purchased with an average level of attention.

Comparison of trade marks


32. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

33. 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”.

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

35. The trade marks to be compared are as follows:

Opponent's trade mark (series of two)	Applicant's trade mark
<p data-bbox="388 396 613 428">BANANA BUZZ</p> <p data-bbox="404 506 597 537">Banana Buzz</p>	

36. I have no submissions from the applicant regarding the similarity of the marks. The opponent submits that the marks are “very highly similar”. In particular, it states that:

“The general public are assumed to be English speaking and will therefore recognise the English language word ‘buzz’. The general public will also recognise the English word ‘Banana’ as a wholly descriptive element. In the Opponent’s mark ‘BUZZ’ is the non-dominant but distinctive element, performing an independent role. As such the general public will give the distinctive element (BUZZ) more weight when assessing the likely origin of the goods, and in the present case the distinctive element is identical to the Applicant’s mark”.

37. As fair and notional use would permit use of either of the earlier series of marks in upper case, lower case or title case, there is no material difference between them. I will, therefore, focus on the first of the marks and refer to them in the singular, though my comments should be taken as referring equally to both marks.

38. The earlier mark is a plain word mark consisting of the words “BANANA” and “BUZZ”. In relation to the goods at issue, “BANANA” is likely to be perceived as describing the ingredients or flavour and, thus, as having little or no distinctive character. The overall impression is, therefore, dominated by the word “BUZZ”.

39. The applicant's mark is a figurative mark consisting of the word "BUZZ", set on the diagonal. The letters "ZZ" are in a slightly larger font than the letters "BU" but that does not, in my view, prevent the mark from easily being recognised as the word "BUZZ". The word is presented in grey, in a three dimensional typeface. The overall impression of the mark is dominated by the word itself, while the stylisation plays a secondary role.

40. Visually, there is an obvious similarity between the marks because of the shared word "BUZZ". There are differences between them because of the stylisation in the application and the additional word "BANANA" in the earlier mark. However, bearing in mind my assessment of the overall impressions, I consider that there is a reasonably high degree of visual similarity between the marks.

41. Aurally, the earlier mark consists of a three-syllable word "BANANA" followed by a one-syllable word "BUZZ". The application is one syllable only ("BUZZ") but the stylisation in the application will not be verbalised in any way. Taking into account the relative weight of the various elements in the overall impression, I consider that the marks are aurally similar to a high degree.

42. The word "BUZZ" has a number of meanings, the most likely of which in relation to the goods at issue is something which "makes you feel very happy or excited for a short time".¹ The meaning of that word will be the same in both marks; even if the average consumer perceives a different meaning of "BUZZ", the same meaning will be attributed to the other mark. "BANANA" will be given its ordinary meaning of a tropical fruit but its inclusion does not alter the meaning of the common word "BUZZ". Taking into account my assessment of the overall impressions of the marks, the marks are conceptually similar to a high degree.

¹ <https://www.collinsdictionary.com/dictionary/english/buzz> [accessed 11 August 2017].

Distinctive character of the earlier trade mark

43 .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 Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In *Lloyd Schuhfabrik*, 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-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and

statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)".

44. I have no submissions from either party regarding the distinctiveness of the earlier trade mark. Although the opponent has filed evidence, all of it is dated after the application date and none of it goes to the use of the earlier mark. There has been no claim that the mark enjoys an enhanced level of distinctive character and the evidence provided would not enable me to make such a finding. Consequently, I have only the inherent position to consider. Invented words usually have the highest degree of distinctive character; words which are descriptive of the goods relied upon normally have the lowest. The word "BANANA" is descriptive of a characteristic of the goods; the word "BUZZ" is neither descriptive nor strongly allusive of the goods. I find that the earlier mark has an average degree of inherent distinctive character.

Likelihood of confusion

45. There is no simple formula for determining whether there is a likelihood of confusion. I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them (*Canon* at [17]) and considering the various factors from the perspective of the average consumer. In making my assessment, I must bear in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

46. There are two types of possible confusion: direct (where the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). The distinction between these was explained by Mr Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10. He said:

“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 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.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

47. The marks have a reasonably high degree of visual similarity. They are aurally and conceptually similar to a high degree. The earlier mark has an average level of inherent distinctiveness. The goods are identical and will be purchased either with a fairly low degree of attention, or with an average level of attention. Even in respect of those goods which are purchased with an average level of attention, I consider that there is a likelihood of confusion. As I indicated earlier, “BUZZ” is likely to be the most memorable part of “BANANA BUZZ”, given that the word “BANANA” is descriptive in relation to the opponent’s goods. The applicant’s mark is also dominated by the word “BUZZ”. In those circumstances, the average consumer may not recall the respective marks with sufficient accuracy to differentiate between them and s/he may misremember one mark for the other, assuming they are one and the same. However, even for the average consumer who is able to recall that one mark is “BANANA BUZZ” rather than “BUZZ” alone, the dominance of the word “BUZZ” in the earlier mark means that the average consumer is likely to assume that “BANANA BUZZ” is the banana version of the “BUZZ” beverages. As a consequence, the average consumer is likely to assume that the goods are produced by the same or economically linked undertakings. For the record, and in case of appeal, even in respect of goods which are highly similar, I do not consider that this slightly lower degree of similarity between the goods would be sufficient to offset the similarity between the marks, when combined with the (at best) average level of attention and average distinctive character of the earlier mark. There would still be a likelihood of confusion.

Conclusion

48. The opposition has succeeded in full. Subject to appeal, the application will be refused.

Costs

49. The opponent has been successful and is entitled to a contribution towards its costs. Although the opponent filed evidence, it was of no assistance to me in making this

decision and I make no award in respect of it. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice (“TPN”) 2 of 2016. Using that TPN as a guide but bearing in mind my comments, above, I award costs to the opponent on the following basis:

Official fees	£100
Preparing the Notice of Opposition and considering the counterstatement:	£200
Written submissions:	£300
Total:	£600

50. I order Khatijah Shah to pay Boost Juice Holdings Pty Ltd the sum of **£600**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 21st day of August 2017

**Heather Harrison
For the Registrar
The Comptroller-General**