

**O/556/19**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATIONS NO. UK00003278857 AND NO.  
UK00003298300 BY**

**JUNIUS HEALTH LIMITED**

**TO REGISTER THE FOLLOWING MARKS:**

**SPA**

**IN CLASSES 29 AND 30**

**AND**

**JUNIUS SPA**

**IN CLASS 32**

**IN THE MATTER OF CONSOLIDATED OPPOSITIONS THERETO**

**UNDER NO. 412926 AND 413094 BY**

**S.A. SPA MONOPOLE, COMPAGNIE FERMIERE DE SPA, EN ABREGE S.A.  
SPA MONOPOLE N.V.**

## BACKGROUND AND PLEADINGS

1. On 22 December 2017, Peachtree Nutrition Limited applied to register the trade mark **SPA** in the UK (“the First Application”). The First Application was published for opposition purposes on 30 March 2018. The applied for specification (as amended) is as follows:

Class 29      Jellies, jams, compotes, preserves; gluten free dairy alternative desserts; chilled gluten free dairy alternative desserts; desserts made from dairy alternative milk products; gluten free dairy artificial milk based desserts; gluten free dairy alternative yoghurt desserts; dairy alternative yoghurts; gluten free dairy alternative fruit desserts; fruit salads; preserved, processed, frozen, dried and cooked fruits; preparations made from fruits; dairy substitutes; non-dairy and dairy alternative yoghurt drinks; preparations made from prepared, dried, desiccated or processed coconut; soya; soya yoghurt; preparations made from nuts; snack foods; salads; soups; fermented foods; fermented fruits and vegetables; fermented vegetables (kimchi); fermented vegetable foods [kimchi]; fermented soybeans (natto); fermented soybeans; fermented bean curd; salted and fermented seafood (jeotgal); fermented tofu; fermented non-dairy and dairy alternative milk; cooked dishes consisting of fermented vegetables, fermented fruits, fermented sauces and fermented pastes; all of the aforesaid being phytonutrient based or nutrient dense goods with no added granulated or refined sugars.

Class 30      Gluten free desserts; gluten free puddings; gluten free puddings for use as desserts; gluten free prepared desserts; gluten free dairy alternative rice puddings; gluten free dairy alternative cheesecakes; gluten free muesli desserts; dairy alternative ice cream desserts; dairy alternative ices and ice creams; dairy alternative frozen yogurt; foodstuffs made a sweetener for sweetening desserts; foodstuffs made of honey, including raw honeycombs, natural honey, natural ripe honey and bee products; snack foods and snack bars made from cereal, oats, muesli, granola, coconut, and corn; popcorn; gluten free bread, sandwich wraps and

pancakes; tapioca; sago; rice cakes; cocoa; dressings for food; food dressings [sauces]; salad dressings; dressings for salad; salad dressings containing cream; sauces (condiments); condiments; wasabi; miso [condiment]; kombucha; fermented sauces and pastes; kimchijeon [fermented vegetable pancakes]; fermented hot pepper paste (gochujang); all of the aforesaid being phytonutrient based or nutrient dense goods with no added granulated or refined sugars.

2. On 20 March 2018, Peachtree Nutrition Limited applied to register the trade mark **JUNIUS SPA** in the UK (“the Second Application”). The Second Application was published for opposition purposes on 13 April 2018. Registration is sought for the following goods:

Class 32 Fruit and vegetable juices; juice shots containing fruit and vegetable juices; fermented drinks; Douzhi (fermented bean drink); fermented Kombucha drinks.

3. In July 2018, the owner details were updated to Junius Health Limited (“the applicant”).

4. The applications were opposed by S.A. Spa Monopole, Compagnie fermiere de Spa, en abrege S.A. Spa Monopole N.V. (“the opponent”). The oppositions were commenced on 27 June 2018 and 13 July 2018 respectively. The oppositions are based upon sections 5(2)(b) and 5(3) of the Trade Marks Act 1994 (“the Act”). The opponent relies on the following trade marks for the purposes of both grounds of opposition:



UK registration no. 1263376  
 (“the First Earlier Mark”)

Filing date 25 March 1986; registration date 23 March 2001

Relying on all goods for which the mark is registered, namely:

Class 32 Natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; all included in Class 32.

### **SPA**

UK registration no. 1446727

("the Second Earlier Mark")

Filing date 8 November 1990; registration date 11 August 1995

Relying on all goods for which the mark is registered, namely:

Class 32 Natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; all included in Class 32.

### **SPA**

UK registration no. 2348781

("the Third Earlier Mark")

Filing date 12 November 2003; registration date 24 December 2004

Relying on all goods for which the mark is registered, namely:

Class 32 Natural mineral waters; fruit flavoured mineral waters; soft drinks made with spring and/or mineral waters; preparations in crystal form for making lemonade; soda water, bitter lemon, dry ginger ale, cola, quinine tonic water, ginger beer, grapefruit crush, orange crush, lemonade, drinks containing mixtures of lime and lemon juice, American ginger ale, lime juice cordial, blackcurrant flavour cordial, orange squash, peppermint cordial, all being non-alcoholic drinks for sale in the Counties of West Glamorgan, Mid Glamorgan, South-Glamorgan, and Gwent.

5. Under section 5(2)(b) the opponent claims that there is a likelihood of confusion because the respective goods are identical or similar and the marks are similar. The oppositions under section 5(2)(b) were directed at the Second Application in its entirety and at the First Application in respect of the following goods only:

Class 29 Milk and milk products; yoghurt drinks; coconut milk; coconut milk [beverage]; almond milk; soya milk; fermented milk.

Class 30 Cocoa and chocolate beverages.

6. On 25 September 2018, the applicant filed a Form TM21B to amend the specification of the First Application. It removed all of the opposed terms from its specification, with the exception of the terms “yoghurt drinks” and “fermented milk” which were amended as follows:

Class 29 Non-dairy and dairy alternative yoghurt drinks; fermented non-dairy and dairy alternative milk.

7. On 5 October 2018, the Registry wrote to the opponent to inform it of the amendments to the specification of the First Application and to enquire as to whether these amendments were sufficient for the opposition to be withdrawn. No response was received from the opponent and so the opposition proceeds in respect of these terms only.

8. Under section 5(3) the opponent claims a reputation in respect of all goods for which the earlier marks are registered. The opponent claims that use of the applicant’s marks would, without due cause, take unfair advantage of, or be detrimental to, the distinctive character and/or reputation of the earlier marks.

9. The applicant filed counterstatements denying the claims made and putting the opponent to proof of use of the earlier marks.

10. The applicant is represented by Elkington and Fife LLP and the opponent is represented by Marks & Clerk LLP. The opponent filed evidence in the form of the

witness statement of Tatiana Goeminne dated 12 February 2019. The applicant filed evidence in the form of the witness statement of Maria Donna King dated 11 April 2019. The opponent did not file evidence in reply. No hearing was requested, but both parties filed written submissions in lieu. This decision is taken following a careful perusal of the papers.

## **EVIDENCE**

### **The Opponent's Evidence**

11. As noted above, the opponent filed evidence in the form of the witness statement of Tatiana Goeminne dated 12 February 2019, which was accompanied by 9 exhibits. Ms Goeminne is a board member of the opponent and General Counsel for the opponent's parent company. I have read Ms Goeminne's evidence in its entirety and, in particular, I note as follows:

- a) SPA branded water has been sold in the UK since 1971.
- b) The opponent won the European Quality Natural Mineral Water Quality Award in 2009<sup>1</sup>.
- c) The following table shows the products exported to the UK and the resulting revenue generated<sup>2</sup>:

<b>Year</b>	<b>Volume (Litres)</b>	<b>Revenue (EUR)</b>
2007	4,200,189.12	1,040,335.28
2008	3,115,054.32	693,476.22
2009	2,348,485.32	554,742.89
2010	1,900,989.00	571,705.71
2011	1,971,196.80	587,849.74
2012	2,088,845.28	617,911.30
2013	2,643,251.04	757,137.48
2014	2,484,140.28	801,596.35
2015	1,235,626.80	366,654.46
2016	1,209,363.60	349,510.01
2017	1,091,889.60	301,922.02
2018	1,003,349.76	252,583.33
2019	103,368.00	29,555.42
<b>Total:</b>	<b>25,395,748.92</b>	<b>6,924,980.21</b>

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<sup>1</sup> Witness statement of Tatiana Geominne, para. 9

<sup>2</sup> Witness statement of Tatiana Geominne, para. 10

d) The First Earlier Mark is used for sub-products sold in the UK under the following variants<sup>3</sup>:



e) Over 8 million litres of product have been exported to the UK, amounting to revenue of over €2.5million between 2013 and 2018<sup>4</sup>.

f) Invoices dated between 31 October 2013 and 1 February 2018 confirm that over 7,000 units were delivered to UK based distributors<sup>5</sup>. The product descriptions refer to the Second and Third Earlier Marks.

12. The opponent filed written submissions in lieu of a hearing. Whilst I do not propose to summarise those here I have taken them into consideration and will refer to them below where necessary.

### **The Applicant's Evidence**

13. As noted above, the applicant's evidence consists of the witness statement of Maria Donna King dated 11 April 2019, which is accompanied by 3 exhibits. Ms King is the Director of the applicant. I have read Ms King's evidence in its entirety and, in particular, I note as follows:

a) An article entitled "Bottled water sales soar in UK retail market" dated 15 March 2017 states "The total value of the bottled water market in retail was

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<sup>3</sup> Witness statement of Tatiana Geominne, para. 12

<sup>4</sup> Witness statement of Tatiana Geominne, para. 12

<sup>5</sup> Exhibit TG3

£2.7bn” and goes on to list the top 5 UK plain water brands as Evian, Highland Spring, Buxton, Nestle Pure Life and Volvic<sup>6</sup>.

b) The annual accounts for Highland Spring mineral water in the year ending 31 December 2017 confirm that their sales had risen to 301.1million litres, which represented 9.5% of the total UK packaged water market<sup>7</sup>.

14. The applicant filed written submission in lieu of a hearing. Whilst I do not propose to summarise those here I have taken them into consideration and will refer to them below where necessary.

## **DECISION**

15. Section 5(2)(b) of the Act 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.”

16. Section 5(3) of the Act states:

“5(3) A trade mark which -

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<sup>6</sup> Exhibit 1 to the witness statement of Maria Donna King

<sup>7</sup> Exhibit 2 to the witness statement of Maria Donna King



(a) is identical with or similar to an earlier trade mark, shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom (or, in the case of a European Union trade mark or international trade mark (EC), in the European Union) and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark.”

17. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, an 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

(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.”

18. The trade marks upon which the opponent relies qualify as earlier trade marks under the above provisions.

### **Proof of Use**

19. The first issue is whether, or to what extent, the opponent has shown genuine use of the earlier marks. The relevant statutory provisions are as follows:

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

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 period of five years ending with the date of publication.

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

(3) The use conditions are met if –

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

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

(4) For these purposes –

(a) use of a trade mark includes use in a form differing in elements which do not alter the distinctive character of the mark in the form of which it was registered, and

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

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

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

20. Section 100 of the Act is also relevant, which reads:

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

21. According to section 6(3)(a) of the Act, the relevant period in which genuine use must be established is the five-year period ending on the date of publication of the applied for mark. The relevant period in respect of the First Application is 31 March 2013 to 30 March 2018 and in respect of the Second Application is 14 April 2013 to 13 April 2018.

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

“114.....The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversammlung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-

9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

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

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

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

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

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

*Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

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

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

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

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

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

### **Form of the mark**

24. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union (“CJEU”) found that (my emphasis):

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

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

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

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

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

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

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

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

26. Although this case was decided before the judgment of the CJEU in *Colloseum*, it remains sound law so far as the question is whether the use of a mark in a different form constitutes genuine use of the mark as required. The later judgment of the CJEU

must also be taken into account where the mark is used as registered, but as part of a composite mark.

27. Where the opponent's marks have been used as registered this will, clearly, be use upon which the opponent can rely. The opponent has also used the First Earlier Mark in the following variants:



28. These are both use of the First Earlier Mark as registered, combined with additional wording i.e. REINE/INTENSE and presented in a circular outline. There is also a difference in the size of the elements in the First Earlier Mark as the wording is much larger in these variants relative to the device. As per *Colloseum* cited above, use in combination with additional matter is acceptable variant use. I also do not consider the alteration to the sizing of the device and word elements of the mark to alter its distinctive character. Consequently, this is use upon which the opponent may rely.

### **Sufficient Use**

29. An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself<sup>8</sup>.

30. As indicated in the case law cited above, use does not need to be quantitatively significant in order to be genuine. The assessment must take into account a number of factors in order to ascertain whether there has been real commercial exploitation of the mark which can be regarded as "warranted in the economic sector concerned to

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<sup>8</sup> *New Yorker SHK Jeans GmbH & Co KG v OHIM*, T-415/09



maintain or create a share in the market for the goods or services protected by the mark”.

31. The opponent has sold over 8 million litres of natural mineral water to the UK, amounting to revenue of over €2.5million between 2013 and 2018. The opponent has also provided invoices which demonstrate that over 7,000 units were delivered to UK based distributors between October 2013 and February 2018. Taking the evidence as a whole into account, I am satisfied that the opponent has demonstrated genuine use of its earlier marks during the relevant period.

### **Fair Specification**

32. I must now consider whether, or the extent to which, the evidence shows use of the goods relied upon.

33. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*, BL O/345/10, Mr Geoffrey Hobbs Q.C. as the Appointed Person summed up the law as being:

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

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

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

iv) In cases of partial revocation, pursuant to section 46(5) of the Trade Marks Act 1994, the question is how would the average consumer fairly describe the services in relation to which the trade mark has been used; *Thomas Pink* at [53].

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

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

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

35. The opponent's evidence relates to the sale of natural mineral waters. There is nothing before me to suggest that the opponent sells a broader range of goods in the UK than this. Consequently, I consider a fair specification for all three earlier marks to be:

**Section 5(2)(b)**

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

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

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

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

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

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

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

(g) a lesser degree of similarity between the goods or services may be offset by a 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 to mind the earlier mark, 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**

37. In light of my findings above, the competing goods are as follows:

<b>Opponent's goods</b>	<b>Applicant's goods</b>
<u>Class 32</u> Natural mineral water.	<b>The First Application</b> <u>Class 29</u> Non-dairy and dairy alternative yoghurt drinks; fermented non-dairy and dairy alternative milk.

	<p><b>The Second Application</b></p> <p><u>Class 32</u></p> <p>Fruit and vegetable juices; juice shots containing fruit and vegetable juices; fermented drinks; Douzhi (fermented bean drink); fermented Kombucha drinks.</p>
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38. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

39. 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 uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

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

41. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

42. All of the goods covered by the applicant's specifications are, essentially, soft drinks. They are the same in nature in that they are all types of soft drink, although their specific natures will differ (with the opponent's goods being water and the applicant's goods being mainly plant and yoghurt based). There will also be overlap in use and method of use. There will be an overlap in trade channels and users. There will also be a degree of competition between them. I consider the goods to be similar to at least a medium degree.

### **The average consumer and the nature of the purchasing act**

43. 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 determine the manner in which the goods are likely to be selected by the average consumer. 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.”

44. The average consumer for the goods will be a member of the general public. The goods are likely to be fairly inexpensive and purchases are likely to be fairly frequent. However, various considerations will still be taken into account during the purchasing process such as flavour and nutritional properties. I consider that a medium degree of attention will be paid during the purchasing process.

45. The goods are likely to be obtained by self-selection from the shelves of a retail outlet or online equivalent, or from a drinks menu in a restaurant or cafe. Visual considerations are likely to dominate the selection process. However, I do not discount

that there will also be an aural component to the purchase of the goods given that orders may be placed verbally.

### **Comparison of trade marks**

46. 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. 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.”

47. 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.

48. The respective trade marks are shown below:

<b>Opponent's trade marks</b>	<b>Applicant's trade marks</b>
	SPA (the First Application)



 <p>(the First Earlier Mark)</p> <p>SPA</p> <p>(the Second and Third Earlier Marks)</p>	<p>JUNIUS SPA</p> <p>(the Second Application)</p>
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### Overall Impression

49. The First Earlier Mark consists of the word SPA in a slightly stylised font presented below the device of a man who appears to be jumping over the wording. The eye is naturally drawn to the wording but, given the size of the device, they play an approximately equal role in the overall impression. The Second and Third Earlier Marks consist of the word SPA. There are no other elements to contribute to the overall impression which lies in the word itself.

50. The First Application consists of the word SPA. There are no other elements to contribute to the overall impression which lies in the word itself. The Second Application consists of the words JUNIUS SPA. The overall impression lies in the combination of these words, with the word JUNIUS playing a greater role due to the at best, low distinctiveness of the word SPA.

### Visual Comparison

#### *The First Application and the First Earlier Mark*

51. Visually, the marks coincide in the presence of the word SPA which appears identically in both marks. The stylisation of the word in the First Earlier Mark is minimal

and would be covered by notional use of the First Application. The point of visual difference between the marks is the presence of the device of a man in the First Earlier Mark. Overall, I consider the marks to be visually similar to a medium degree.

*The First Application and the Second and Third Earlier Marks*

52. Visually, the marks all consist of the word SPA. This is the only element of the marks. They are, clearly, identical.

*The Second Application and the First Earlier Mark*

53. Visually, the marks coincide in the presence of the word SPA which appears identically in both marks. As noted above, the stylisation of the word in the First Earlier Mark is not a point of significant difference. The differences are created by the presence of the device of a man in the First Earlier Mark which has no counterpart in the Second Application, and the presence of the word JUNIUS in the Second Application which has no counterpart in the First Earlier Mark. I consider the marks to be similar to a low to medium degree.

*The Second Application and the Second and Third Earlier Marks*

54. Visually, the marks coincide in the presence of the word SPA which appears identically in all of the marks. However, the point of visual difference is the presence of the word JUNIUS in the Second Application which has no counterpart in the opponent's marks. I consider the marks to be visually similar to a medium degree.

Aural Comparison

*The First Application and the First Earlier Mark*

55. Aurally, only the word element of the First Earlier Mark will be pronounced. The marks will, therefore, be aurally identical.

*The First Application and the Second and Third Earlier Marks*

56. The work SPA will be pronounced identically in all three marks. The marks are aurally identical.

*The Second Application and the First Earlier Mark*

57. As noted above, only the word element of the First Earlier Mark will be pronounced. The word SPA will be pronounced identically in both marks. The point of aural difference is the word JUNIUS in the Second Application which has no counterpart in the First Earlier Mark. I consider the marks to be aurally similar to a medium degree.

*The Second Application and the Second and Third Earlier Marks*

58. The same aural comparison applies as set out above in relation to the First Earlier Mark. The marks will be aurally similar to a medium degree.

Conceptual Comparison

*The First Application and the First Earlier Mark*

59. The word SPA will be given its ordinary dictionary meaning and will be identical for both marks. The presence of the device of a man in the First Earlier Mark acts as a point of conceptual difference. The marks are conceptually similar to a medium degree.

*The First Application and the Second and Third Earlier Marks*

60. The marks are conceptually identical.

*The Second Application and the First Earlier Mark*

61. The word JUNIUS is likely to be viewed as a made-up or foreign language word (or possibly a foreign language name). It is unlikely to be attributed any particular

meaning by the consumer. The presence of this in the Second Application, combined with the presence of the device of a man in the First Earlier Mark will act as points of conceptual difference. I consider the marks to be conceptually similar to a low degree.

*The Second Application and the Second and Third Earlier Marks*

62. The point of conceptual difference between the marks is the presence of the word JUNIUS in the Second Application which has no counterpart in the Second and Third Earlier Marks. I consider the marks to be conceptually similar to no more than a medium degree.

**Distinctive character of the earlier trade marks**

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

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

64. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words with no allusive qualities. A mark’s distinctive character may be enhanced by virtue of the use made of it.

65. The opponent has filed evidence to show that the distinctive character of the earlier marks has been enhanced through use. Whilst I recognise that use of the marks has not been insignificant, I am not satisfied that the evidence is sufficient to demonstrate enhanced distinctiveness. The figures provided in the opponent’s evidence show that between 2007 and 2019 revenue amounted to almost €7million. However, over a period of 13 years this amounts to just over €500,000 each year. Clearly, part of these sales relate to the period after the relevant date. In any event, the applicant’s evidence shows that for the year 2017, the bottled water market in the UK amounted to over £2.7billion. The sales demonstrated by the opponent are fairly low given the size of this market. Whilst I recognise that a European award was won by the opponent in 2009, no information is provided about the voters for this award or whether it was publicised in the UK. I do not consider that the opponent has demonstrated that the distinctiveness of the earlier marks has been enhanced through use.

66. I now turn to the inherent distinctiveness of the opponent’s marks. The Second and Third Earlier Marks consist of the word SPA. The Cambridge English dictionary defines the word SPA as:

“A town where water comes out of the ground and people come to drink it or lie in it because they think it will improve their health.”

“A place where people go in order to become more healthy, by doing exercises, eating special food, etc.”<sup>9</sup>

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<sup>9</sup> <https://dictionary.cambridge.org/dictionary/english/spa>

67. In my view, a significant proportion of average consumers will attribute the first definition to the word SPA. For those consumers, the word SPA will be descriptive of the geographic origin of the goods. Whilst it may be descriptive, section 72 provides that all registered marks must be attributed a degree of distinctive character. Consequently, I consider the Second and Third Earlier Marks to have a low degree of inherent distinctive character. Given the presence of the addition of the device of a man in the First Earlier Mark, I consider it to be inherently distinctive to a medium degree.

### **Likelihood of confusion**

68. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier marks, the average consumer for the goods in issue and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

69. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10 direct and indirect confusion were described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person:

“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.”

70. I will proceed on the basis of the Second and Third Earlier Marks as these represent the opponent’s best case, returning to the First Earlier Mark only if it is necessary.

#### The First Application

71. I have found the Second and Third Earlier Marks to be visually, aurally and conceptually identical to the First Application. I have found the Second and Third Earlier Marks to have a low degree of inherent distinctive character. I have found the average consumer to be a member of the general public who will select the goods primarily by visual means (although I do not discount an aural component). I have concluded that a medium degree of attention will be paid during the purchasing process for the goods. I have found the goods to be similar to at least a medium degree.

72. Taking all of the above factors into account, particularly the visual, aural and conceptual identity and the fact that there is at least a medium degree of similarity between the parties’ respective goods, I consider there to be a likelihood of direct confusion in respect of the First Application<sup>10</sup>. I consider this to be the case

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<sup>10</sup> Although I recognise that this claim may, more properly, have been pleaded under section 5(2)(a) given the identity of the marks in issue. Whilst section 5(2)(b) only requires the marks to be similar (and not identical), the opponent has gone beyond the threshold required to satisfy the test under section 5(2)(b) and consequently, the objection under 5(2)(b) is successful.

notwithstanding the fact that the earlier marks have only a low degree of inherent distinctive character.

### The Second Application

73. I have found the Second and Third Earlier Marks and the Second Application to be visually, aurally and conceptually similar to a medium degree. As noted above, I have found the earlier marks to be inherently distinctive to a low degree, the goods to be similar to at least a medium degree and the purchasing process to be predominantly visual (although I do not discount an aural component).

74. In my view, the low degree of inherent distinctiveness of the Second and Third Earlier Marks, in this case, mitigates the likelihood of confusion. I recognise that the low level of distinctiveness of the element which is common to the marks does not preclude a likelihood of confusion<sup>11</sup>. However, in *Whyte and MacKay*<sup>12</sup>, Mr Justice Arnold stated:

“...what can be said with confidence is that, if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion.”

75. A degree of caution is, therefore, required before finding that there is a likelihood of confusion on the basis of a common element that is low in distinctiveness.

76. Taking all of this into consideration, I consider that the visual, aural and conceptual differences between the marks, combined with the low degree of inherent distinctive character of the Second and Third Earlier Marks, is sufficient to avoid a likelihood of confusion. I do not consider that the consumer will mistakenly recall or misremember the marks as each other and I can see no reason why the average consumer would conclude that JUNIUS was a natural brand extension or variant when used in combination with the word SPA. It is far more likely that the consumer will view the use

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<sup>11</sup> *L'Oréal SA v OHIM*, Case C-235/05 P

<sup>12</sup> [2015] EWHC 1271 (Ch)



of the word SPA (when combined with another highly distinctive word i.e. JUNIUS) as a reference to the goods originating from an area known for its water source rather than as a reference to the opponent. I do not consider there to be a likelihood of direct or indirect confusion.

77. For the avoidance of doubt, as there is an even lower degree of similarity between the First Earlier Mark and the Second Application, I do not consider that this would put the opponent in any stronger position. Although the mark has a higher degree of distinctiveness than the Second and Third Earlier Marks, this is attributable to an element that has no counterpart in the Second Application (the device of a man). As it is the distinctiveness of the common element which is key, this does not assist the opponent<sup>13</sup>.

78. The opposition under section 5(2)(b) succeeds against the First Application but fails against the Second Application.

### **Section 5(3)**

79. I now turn to the opposition based upon section 5(3) of the Act. I bear in mind the relevant case law which can be found in the judgments of the CJEU in Case C-375/97, *General Motors*, Case 252/07, *Intel*, Case C-408/01, *Addidas-Salomon*, Case C-487/07, *L'Oreal v Bellure* and Case C-323/09, *Marks and Spencer v Interflora*. The conditions of section 5(3) are cumulative. Firstly, the opponent must show that the earlier marks have achieved a level of knowledge/reputation amongst a significant part of the public. Secondly, it must be established that the level of reputation and the similarities between the marks will cause the public to make a link between them, in the sense of the earlier mark being brought to mind by the later mark. Thirdly, assuming that the first and second conditions have been met, section 5(3) requires that one or more of the three types of damage claimed by the opponent will occur. It is unnecessary for the purposes of section 5(3) that the goods and services be similar, although the relative distance between them is one of the factors which must be assessed in deciding whether the public will make a link between them.

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<sup>13</sup> *Kurt Geiger v A-List Corporate Limited*, BL O-075-13

## Reputation

80. In *General Motors*, Case C-375/97, the CJEU stated:

“25. It cannot be inferred from either the letter or the spirit of Article 5(2) of the Directive that the trade mark must be known by a given percentage of the public so defined.

26. The degree of knowledge required must be considered to be reached when the earlier mark is known by a significant part of the public concerned by the products or services covered by that trade mark.

27. In examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case, in particular the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it.

28. Territorially, the condition is fulfilled when, in the terms of Article 5(2) of the Directive, the trade mark has a reputation 'in the Member State'. In the absence of any definition of the Community provision in this respect, a trade mark cannot be required to have a reputation 'throughout the territory of the Member State. It is sufficient for it to exist in a substantial part of it.”

81. In determining whether the opponent has demonstrated a reputation for the goods in issue, it is necessary for me to consider whether the earlier marks will be known by a significant part of the public concerned with the goods. In reaching this decision, I must take all of the relevant factors into account including “the market share held by the trade mark, the intensity, geographical extent and duration of its use, and the size of the investment made by the undertaking in promoting it”.

82. As noted above, the earlier marks have clearly been used and that use is not insignificant. However, I am not satisfied that the evidence is sufficient to demonstrate a reputation for the goods. The opponent has provided no evidence of media coverage

of its marks in the UK and the market share that its sales represent (given the size of the market) is modest.

83. The oppositions under section 5(3) of the Act fail.

## **CONCLUSION**

84. The opposition against the First Application succeeds in its entirety and the application is refused for the following goods:

Class 29      Non-dairy and dairy alternative yogurt drinks; fermented non-dairy and dairy alternative milk.

85. The First Application will proceed to registration in respect of the following goods which were not subject to opposition:

Class 29      Jellies, jams, compotes, preserves; gluten free dairy alternative desserts; chilled gluten free dairy alternative desserts; desserts made from dairy alternative milk products; gluten free dairy artificial milk based desserts; gluten free dairy alternative yoghurt desserts; dairy alternative yoghurts; gluten free dairy alternative fruit desserts; fruit salads; preserved, processed, frozen, dried and cooked fruits; preparations made from fruits; dairy substitutes; preparations made from prepared, dried, desiccated or processed coconut; soya; soya yoghurt; preparations made from nuts; snack foods; salads; soups; fermented foods; fermented fruits and vegetables; fermented vegetables (kimchi); fermented vegetable foods [kimchi]; fermented soybeans (natto); fermented soybeans; fermented bean curd; salted and fermented seafood (jeotgal); fermented tofu; cooked dishes consisting of fermented vegetables, fermented fruits, fermented sauces and fermented pastes; all of the aforesaid being phytonutrient based or nutrient dense goods with no added granulated or refined sugars.

Class 30      Gluten free desserts; gluten free puddings; gluten free puddings for use as desserts; gluten free prepared desserts; gluten free dairy alternative rice puddings; gluten free dairy alternative cheesecakes; gluten free muesli desserts; dairy alternative ice cream desserts; dairy alternative ices and ice creams; dairy alternative frozen yogurt; foodstuffs made a sweetener for sweetening desserts; foodstuffs made of honey, including raw honeycombs, natural honey, natural ripe honey and bee products; snack foods and snack bars made from cereal, oats, muesli, granola, coconut, and corn; popcorn; gluten free bread, sandwich wraps and pancakes; tapioca; sago; rice cakes; cocoa; dressings for food; food dressings [sauces]; salad dressings; dressings for salad; salad dressings containing cream; sauces (condiments); condiments; wasabi; miso [condiment]; kombucha; fermented sauces and pastes; kimchijeon [fermented vegetable pancakes]; fermented hot pepper paste (gochujang); all of the aforesaid being phytonutrient based or nutrient dense goods with no added granulated or refined sugars.

86. The opposition against the Second Application fails in its entirety and the application will proceed to registration.

## **COSTS**

87. As the opponent has been successful in respect of the First Application and the applicant has been successful in respect of the Second Application, I do not consider that it would be appropriate to make an award of costs in this case.

**23 September 2019**

**S WILSON**

**For the Registrar**