

O/465/20

TRADE MARKS ACT 1994

IN THE MATTER OF
TRADE MARK APPLICATION NO. 3458772
BY ATTRACTIONS OF SNOWDONIA LIMITED
TO REGISTER AS A TRADE MARK:



IN CLASSES 16, 25, 32, 35 & 39

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 60001311
BY PREMIUM QUALITY FOODS LTD

BACKGROUND AND PLEADINGS

1. On 16 January 2020, Attractions of Snowdonia Limited (“the applicant”) applied to register the trade mark displayed on the cover page of this decision, under number 3458772 (“the application”). It was accepted and published in the Trade Marks Journal on 24 January 2020 in respect of the following goods and services:

Class 16: Printed matter; photographs; postcards; prints; stationery; books; posters; brochures.

Class 25: Clothing; footwear; headgear.

Class 32: Beers; non-alcoholic beverages; soft drinks.

Class 35: Advertising; marketing; business management; discount card administration and promotion.

Class 39: Travel arrangement; travel services; travel information; reservation services.

2. On 31 January 2020, the application was opposed by Premium Quality Foods Ltd (“the opponent”) by way of the fast track opposition procedure. The opposition is brought under sections 5(1), 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and is directed only against those goods specified in class 32 of the application.

3. The opponent relies upon its United Kingdom trade mark number 3203712 (“the earlier mark”), which consists of the following:



4. The earlier mark was filed on 22 December 2016 and was registered on 17 March 2017 in respect of '*drinking water*' in class 32.

5. The opponent's mark is an earlier mark, in accordance with Section 6 of the Act. However, as it has not been protected for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within Section 6A of the Act.

6. The opponent contends that the applied-for mark is, in the first instance, identical or, in the alternative, similar to its earlier mark, in so far as they share the common word "SNOWDONIA". Moreover, the opponent argues that the contested goods are identical or similar to those protected by its earlier mark. Based upon these factors, the opponent submits that there exists a likelihood of confusion and requests that the application be refused in respect of class 32.¹

7. The applicant filed a counterstatement denying the grounds of opposition. The applicant argues that its mark is significantly different to that of the opponent. In this regard, the applicant contends that the competing marks are visually, aurally and conceptually different. On this basis, the applicant denies that there is a likelihood of confusion.

8. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) stipulates that:

"(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit."

¹ No opposition has been raised in relation to the goods and services in classes 16, 25, 35 and 39 of the application.

9. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No leave was sought in respect of these proceedings.

10. The opponent is unrepresented, while the applicant has been professionally represented by Francis McEntegart throughout these proceedings. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard only if (i) the Office requests it, or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary. Only the opponent filed written submissions in lieu of an oral hearing. This decision is taken following a careful perusal of the papers, keeping all submissions in mind.

DECISION

Section 5(1) and Section 5(2)(a)

11. Section 5(1) of the Act reads as follows:

“(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected.”

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

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

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

[...]

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

13. In order for claims under Section 5(1) and Section 5(2)(a) of the Act to succeed, the competing trade marks are required to be identical. The question of when a mark may be considered identical to another was addressed in *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, where the Court of Justice of the European Union (“CJEU”) held that:

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

14. While the competing trade marks share the common word “SNOWDONIA”, there are differences between the respective marks which would not be entirely overlooked by consumers. In addition to the word “SNOWDONIA”, the contested mark includes the word “ERYRI” and contains the number “360”, presented with an arrow device striking through its centre from left to right. These elements have no counterparts in the earlier mark. Furthermore, the earlier mark includes the words “pure drinking water”, a blue mountain range device and a blue oval surround, none of which is replicated in the application. These differing elements contribute to the respective identities of the competing marks and cannot simply be discounted; they are not so insignificant that they would go unnoticed by the average consumer. The contested mark does not reproduce the earlier mark without any modification or addition. **Accordingly, I find that the marks are not identical and the claims under Sections 5(1) and 5(2)(a) of the Act fail in their entirety.**

Section 5(2)(b)

15. Section 5(2)(b) of the Act 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.”

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

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

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

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

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

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

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

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

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

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

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

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

17. In the judgment of the CJEU in *Canon Kabushiki Kaisha v Metro Goldwyn Mayer Inc*, 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”.

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

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

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

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. *Treat* was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because

the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

20. 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 für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

21. The goods to be compared are:

Opponent's goods	Applicant's goods
Class 32: Drinking water.	Class 32: Beers; non-alcoholic beverages; soft drinks.

22. '*Drinking water*' in the specification of the earlier mark is clearly a non-alcoholic beverage. As such, this term would fall within the scope of the applicant's broader term '*non-alcoholic beverages*' and is, therefore, identical in accordance with the principle outlined in *Meric*.

23. The term '*soft drinks*' in the applicant's specification refers to cold, non-alcoholic beverages², to be distinguished from those containing alcohol. Although it is my

² <https://www.collinsdictionary.com/dictionary/english/soft-drink>

understanding that many soft drinks are carbonated, in my judgement there is nothing that would preclude the opponent's '*drinking water*' from falling within the more general category of '*soft drinks*' in the mind of the average consumer. Therefore, I find these goods identical under the principle in *Meric*. Even if I am wrong in this regard, it remains the case that there will be an overlap in users, use, method of use and trade channels, rendering the goods highly similar.

24. '*Beers*' in the applicant's specification refers to a popular alcoholic beverage, most commonly brewed from cereal grains. In a general sense, this term and the opponent's '*drinking water*' are similar in so far as they are both beverages and are, therefore, consumables by mouth. However, it is considered that the more precise natures of the respective goods are markedly different: beer is an alcoholic beverage which is produced from a brewing process using cereal grains as raw materials, while drinking water is a non-alcoholic, colourless, transparent and odourless liquid. I am also of the view that the uses and intended purposes of the respective goods are different: beer is typically consumed for pleasure or socialising by those over the age of 18, while drinking water has no such age restriction and is consumed for refreshment and to maintain good health. While there may be common trade channels for the respective goods – such as convenience stores, supermarkets, restaurants and bars – they would not typically be found in the same area of those outlets and there is no competition between them. Further, the respective goods are not complementary in the sense described in *Boston Scientific*;³ water is undoubtedly used in the manufacturing process of beer, however, the goods are not indispensable to one another in such a way that consumers may think that the responsibility for them lies with the same undertaking. In this connection, the GC found in *Les Éditions Albert René v OHIM*, Case T-336/03, that "the mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar". In light of the above, I do not consider that consumers would regard these goods as similar. However, if I am wrong in this finding, then at their highest, the goods overlap in nature and method of use, resulting in a very low level of similarity between the goods.

³ *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

The average consumer and the nature of the purchasing act

25. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see *Lloyd Schuhfabrik Meyer*, Case C-342/97).

26. 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.”

27. The majority of the goods at issue in these proceedings are non-alcoholic beverages (accounting for the opponent's '*drinking water*' and the applicant's '*non-alcoholic beverages; soft drinks*'). The average consumer of such goods will be the general public at large. The goods are everyday consumable items which fulfil the purpose of providing hydration or refreshment and are likely to be purchased frequently. Further, the goods are likely to be purchased without an overly considered thought process as, overall, they are relatively inexpensive. The goods are typically sold in supermarkets and convenience stores, where the goods are likely to be selected from shelves or chilled cabinets. In these circumstances, visual considerations would dominate. The goods are also sold in restaurants and bars where there will be an oral component to the selection process, such as requests to bar or waiting staff. However, while the goods may be ordered orally in such circumstances, I still consider that the selection process would include a visual

inspection of the soft drinks pump or drinks lists, prior to the order being placed.⁴ Considered overall, I am of the view that the purchasing process for the goods would be predominantly visual in nature, though aural considerations will play their part. Taking the above factors into account, I find that the level of attention of the general public in respect of these goods would be low to medium.

28. The average consumer of the remaining goods in the applicant's specification, namely, 'beers', will be a member of the adult general public. Many of my findings above will hold true for these goods, though there will be some differences. On average the goods are likely to be purchased relatively frequently for the purposes of enjoyment or socialising. Moreover, when choosing these goods, consumers will take into account such things as personal taste, cost, type and alcoholic content before selecting the products. The purchasing process for these goods (irrespective of the arena of the purchase) will largely reflect that outlined above; however, the visual inspection prior to ordering in public houses and bars will, in this case, be of the bottle, can, beer pump or drinks lists. In light of these factors, I find that the level of attention paid by the adult general public would be medium.

Distinctive character of the earlier mark

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

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

⁴ *Simonds Farsons Cisk pic v OHIM*, T-3/04

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).”

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

“38. The Hearing Officer cited *Sabel v Puma* at paragraph 50 of her decision for the proposition that ‘the more distinctive it is, either by inherent nature or by use, the greater the likelihood of confusion’. This is indeed what was said in *Sabel*. However, it is a far from complete statement which can lead to error if applied simplistically.

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

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

32. I have no submissions from either party regarding the distinctiveness of the earlier mark and neither have they requested to file evidence in this matter (as is required in fast tract opposition proceedings). Consequently, I am only able to consider the distinctiveness of the earlier mark on the basis of its inherent characteristics.

33. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods or services, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will be somewhere in the middle.

34. The earlier mark is figurative and consists of a number of elements. At the centre of the mark appear the words "snowdonia pure". In my view, the word "snowdonia" would be perceived by consumers as a geographical reference. I accept that there is no evidence before me to demonstrate that there is a current UK-wide reputation for the production of drinking water in the region of Snowdonia. However, the Snowdonia area is a national park notorious throughout the UK for its mountain range and drinking water is often sourced from mountainous regions. The word "pure" would be perceived by consumers as an allusive reference to drinking water which is free from contamination. When taken in combination, the words "snowdonia pure" allude to a characteristic of the goods, i.e. pure water from Snowdonia, though they are not grammatically correct. The remaining words in the earlier mark, namely, "drinking water", are directly descriptive of the goods for which the mark is registered. The device, stylisation and colour combination contribute to the distinctiveness of the mark yet are unremarkable. The mountain range device is considered decorative when applied to drinking water and the oval device would be perceived by consumers as a border. Given that the individual components of the earlier mark are all low in distinctiveness, albeit to differing degrees, the distinctive character of the mark rests with the totality of the mark, i.e. all of the individual components together as a whole. In light of the above, taking the mark as a whole, the various components and weighing one up against the other, overall, I find that the earlier mark possesses a low to medium level of inherent distinctive character.

Comparison of trade marks

35. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

36. Therefore, it would be wrong to artificially dissect the trade marks, though 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 hence contribute to the overall impressions created by the marks.

37. The competing trade marks are as follows:

Earlier trade mark	Applicant's mark
	

38. Under Section 5(2)(b), the opponent has submitted that the competing trade marks are similar on the basis of the shared word “SNOWDONIA”. Contrary to the view of the opponent, the applicant has contended that the marks are “significantly different” and has submitted that the respective marks are “conceptually, visually and aurally different”.

39. The earlier mark is figurative and comprises a number of elements. Presented in the centre of the mark are the words “snowdonia pure” in an unremarkable, albeit bold and red, font. Above the words appears a blue and white mountain range device. Emanating from the device is an incomplete blue oval device, which acts as a rough surround for the words. Below these elements, the words “drinking water” are presented in a blue, script typeface. These words are much smaller in size. Each individual element contributes to the overall impression of the mark, however, due to its relative size, boldness and position within the configuration of the mark, as well as the fact that the eye is naturally drawn to elements that can be read,⁵ the term “snowdonia pure” has a degree more impact than the other elements. Given their relative position and size, as well as their descriptive nature, less weight will be attributed to the words “drinking water”. The mountain range device, blue oval device and colour combination, while still contributing to the overall impression, will be perceived as decorative and provide a smaller contribution to the overall impression of the mark.

40. The contested mark is also figurative and consists of the words “SNOWDONIA 360 ERYRI”. The words “SNOWDONIA” and “ERYRI” are presented in a dark grey, rounded font. Although there is a degree of stylisation, particularly to the letters “A” and “R”, I am of the view that this would likely be overlooked by the average consumer. The number “360” is presented with a bright green outline and white interior, and accounts for a large proportion of the mark. An arrow device strikes through its centre from left to right in such a way that it becomes part of the number. Due to its interaction with the number, the arrow device would not go unnoticed by the average consumer. To the contrary, a consequence of the stylisation is that the number is rather striking, in my judgement. For these reasons, I am of the view that the stylised number “360”

⁵ *Wassen International Ltd v OHIM*, Case T-312/03

has more impact and dominates the overall impression of the mark. Due to the relative size and position of the word “SNOWDONIA”, as well as its descriptive nature, the word will be given much less weight in the overall impression of the mark. The word “ERYRI” means ‘Snowdonia’ in the Welsh language. Whether consumers attribute the word this meaning or not, due to its relative size and position within the mark, the word will play a reduced role in the overall impression.

41. Visually, the competing marks are similar insofar as they both contain the word “snowdonia/SNOWDONIA”. I do not consider the difference created by the use of lowercase and uppercase in the respective marks to be significant since notional and fair use allows marks to be presented in any standard font or case. In my view, the common word “snowdonia/SNOWDONIA” is the extent of visual similarity. There are clear points of visual difference between the competing marks. Firstly, the words “pure drinking water” are included in the earlier mark but have no counterparts in the contested mark. Moreover, the number “360” is prominently displayed in the contested mark but is not replicated in the earlier mark. The diverging figurative elements act as another significant difference between the marks. A final distinguishing point between the marks is the use of differing colours. In light of the above and bearing in mind my assessment of the overall impressions, I consider there to be a low degree of visual similarity between the marks.

42. Aurally, the earlier mark comprises five syllables, i.e. (“SNOW-DOW-NEE-AH-PURE”). To my mind, as the words “drinking water” merely describe the goods for which the mark is registered, consumers are extremely unlikely to articulate them. The aural identity of the contested mark will factor upon whether the geographical indications “SNOWDONIA” and “ERYRI” are articulated by consumers. Given their descriptive meaning, I am not convinced they would. Where consumers do not articulate these words, the mark will comprise three syllables, i.e. (“THREE-SIX-TEE”), resulting in no aural similarity between the competing marks. In circumstances where consumers do articulate the geographical indications, the mark will consist of ten syllables, i.e. (“SNOW-DOW-NEE-AH-THREE-SIX-TEE-EH-RUH-REE”). In this event, the first four syllables of the competing marks will be aurally indistinguishable, though the remainder of the marks will be entirely different in sound and length. Due to the marks only coinciding in the word “SNOWDONIA”, I consider there to be a low

to medium degree of aural similarity for these consumers. I have considered various alternatives to the pronunciation of the respective marks where the verbal elements are articulated in various combinations. However, I believe this results in an overly analytical assessment which I do not consider would be undertaken by the average consumer when first encountering the marks.

43. Conceptually, the words “snowdonia pure” in the earlier mark will be generally understood by consumers as an allusive reference to goods which originate from Snowdonia and are free from contamination. The words “drinking water” will be understood as a description of the goods. In totality, I am of the view that the verbal elements of the mark convey a clear concept to consumers of pure drinking water from Snowdonia. The blue and white mountain range device could serve to reinforce this message as an indication that the goods originate from a natural source. In respect of the contested mark, the words “SNOWDONIA” will be generally understood by consumers as a reference to Wales’ largest national park. The word “ERYRI” means ‘Snowdonia’ in the Welsh language. It is feasible that the Welsh speaking population constitutes a significant proportion of average consumers. However, considering that a trade mark registration is a national UK right, the majority of consumers would perceive it as an invented or non-English word and would not attribute it the Welsh meaning of Snowdonia. Therefore, the word would be understood as a reference to Snowdonia by some consumers and be conceptually neutral to others. The number “360” in the mark is unlikely to provide any conceptual meaning extraneous to the number itself. It is possible that the number will create a casual association in the mind of the consumer with 360 degrees, in the sense of having a full view of something. However, to my mind, there is nothing to suggest that this would be the case in the context of the goods in the application. The competing marks are conceptually similar insofar as they both indicate that the respective goods originate from Snowdonia. On this basis, and in consideration of my assessment of the overall impressions, I find the marks conceptually similar to a low to medium degree.

Likelihood of confusion

44. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be

borne in mind. One such factor is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

45. 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.

46. Earlier in this decision I concluded that:

- The applicant's '*non-alcoholic beverages*' and '*soft drinks*' are identical to the goods of the earlier mark, while '*beers*' is, at best, only similar to a very low degree;
- Average consumers of the goods at issue are likely to be members of the general public at large, though would be limited to adult members of the general public where the beverages are alcoholic;
- A medium level of attention would be demonstrated during the purchasing act by consumers of '*beers*', while a low to medium level of attention would be demonstrated during the purchasing act of the remaining goods at issue;
- The purchasing process for the goods at issue would be predominantly visual in nature, though I have accepted that it will include an aural element in certain circumstances;

- The overall impression of the earlier mark would not be dominated by any one element, the distinctiveness of the mark resting in its totality, though the words “snowdonia pure” may have a degree more impact;
- The overall impression of the contested mark would be dominated by the number “360”, while the words “SNOWDONIA” and “ERYRI” would play lesser roles;
- The competing marks are visually similar to a low degree and conceptually similar to a low to medium degree;
- Aural similarity would factor upon whether the words “SNOWDONIA” and “ERYRI” are articulated by consumers, the competing marks being aurally similar to a low to medium degree where they do, but aurally dissimilar where they do not;
- The earlier mark possesses a low to medium level of inherent distinctive character.

47. The opponent’s strongest case lies with those consumers who articulate the word “SNOWDONIA” within the contested mark. For these consumers, I remind myself that the marks are aurally similar to a low to medium degree.

48. Nevertheless, even taking this into account there are significant differences between the marks, as outlined previously, which would not be overlooked by the average consumer, namely, the additional word elements, distinct figurative elements and diverse colour combinations. To my mind, the only point of similarity between the competing marks is the word “snowdonia/SNOWDONIA”, which will be regarded as a geographical indication as to the origin of the goods and is too weak a common element alone for the average consumer to mistake one mark for the other, especially in light of the additional elements present in both marks.

49. Taking all the above factors into account, the various differences between the competing trade marks previously identified are, in my view, likely to be sufficient to avoid the average consumer mistaking one trade mark for the other. Therefore, even when factoring in the imperfect recollection of the consumer and the interdependency principle, **it follows that there will be no direct confusion.** For the sake of completeness, my conclusion would be the same for those consumers who do not articulate the word “SNOWDONIA” in the contested mark. For those consumers, the competing marks would be aurally dissimilar, in which case they would be even further distinguished. This factor points towards a lesser, rather than greater, risk of confusion.

50. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

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

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).”

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

52. Applying the principles from the above case law, due to the differences between the marks previously outlined, I do not believe that the average consumer will assume the opponent and the applicant are economically linked undertakings on the basis of the competing trade marks. I am unconvinced that the average consumer would assume a commercial association between the parties, or sponsorship on the part of the opponent, merely because of the shared word “snowdonia/SNOWDONIA”. This element is not so strikingly distinctive that consumers would assume that only the opponent would be using it in a trade mark; to the contrary, the word is descriptive as to the geographical origin of the goods. Furthermore, the addition of the number “360” and the word “ERYRI” to the descriptive word “SNOWDONIA” are not characteristic of any brand extensions with which consumers would be familiar. The same is true of the additional elements within the earlier mark. The differences between the marks and their respective overall impressions are not conducive to a logical brand extension. I find it unlikely that the competing trade marks would be perceived in this manner, even

for goods that I found to be identical. **Therefore, in my view, there is no likelihood of indirect confusion.**

CONCLUSION

53. The opposition under sections 5(1), 5(2)(a) and 5(2)(b) of the Act has failed. Subject to any successful appeal against my decision, the application will become registered in the UK for the full range of goods and services applied for.

COSTS

54. As the opposition has been unsuccessful, the applicant is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 2/2015. The decision has been taken from the papers without an oral hearing. The applicant did not file evidence in these proceedings nor did it file written submissions in lieu of a hearing. In the circumstances I award the applicant the sum of **£200** as a contribution towards the cost of considering the opponent's statement and preparing a counterstatement.

55. I therefore order Premium Quality Foods Ltd to pay Attractions of Snowdonia Limited the sum of **£200**. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an unsuccessful appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 23rd day of September 2020

James Hopkins
For the Registrar,
The Comptroller General