

BL O/903/22

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NUMBER 3655948
BY THE LIVE GREEN COMPANY SPA (LIVE GREEN)
TO REGISTER THE TRADE MARKS:**

THE LIVE GREEN CO



IN CLASSES 29 and 30

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NUMBER 428345
BY SAVENCIA SA**

Background and Pleadings

1. On 16 June 2021, The Live Green Company SPA (Live Green) (“the applicant”) applied to register in the UK the trade marks shown on the cover page of this decision, under number 3655948 (“the contested mark”). The contested mark was published in the Trade Marks Journal for opposition purposes on 27 August 2021, in respect of goods in Classes 29 and 30.¹

2. On 22 November 2021, SAVENCIA SA (“the opponent”) filed a notice of opposition. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). Within its Form TM7, the opponent indicated that the opposition is directed against all the goods in the application.

3. The opponent relies upon its UK trade mark number 3609290, the details of which are as follows:



Filing date: 12 March 2021

Registration date: 16 July 2021

4. For the purposes of these proceedings, the opponent relies upon all the goods in Classes 29, 30 and 32 of its registration.²

5. The opponent claims that the marks at issue are highly similar, and the respective goods are identical or highly similar. In its counterstatement the applicant denies that the marks and the respective goods are sufficiently similar for a likelihood of confusion to occur.

6. Given the respective filing dates, the opponent’s mark is an earlier mark, in accordance with section 6 of the Act. However, as it had not been registered 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. As a consequence, the opponent

¹ These will be listed in the goods comparison

² These will be listed in the goods comparison.

may rely upon all of the goods for which the earlier mark is registered without having to establish genuine use.

7. Neither party filed evidence. The opponent is professionally represented by Mewburn Ellis LLP; the applicant is professionally represented by Stobbs. Both parties were given the option of an oral hearing but neither requested to be heard on this matter. Only the opponent chose to file written submissions in lieu of a hearing. This decision is taken following a careful review of the papers before me, keeping all submissions in mind.

8. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark case law.

DECISION

Section 5(2)(b)

9. Sections 5(2)(b) and 5A of the Act read 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.

[...]

5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

10. I am guided by the following principles which are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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

11. Section 60A of the Act provides:

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

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

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

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

12. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the CJEU stated at paragraph 23 of its judgment:

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

13. In *Kurt Hesse v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case C-50/15 P, the CJEU stated that complementarity is capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (“GC”) stated that “complementary” means:

“82 ... there is a close connection between [the goods], in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking...”.

14. Additionally, the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] R.P.C. 281 for assessing similarity between goods and services also include an assessment of the channels of trade of the respective goods or services.

15. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch) at [12] Floyd J said:

"... 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."

16. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Merici')*, the GC stated that:

"29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

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

18. The competing goods are as follows:

Opponent's goods	Applicant's goods
Class 29 Preserved, dried, cooked, frozen and prepared fruits and	Class 29 Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and

<p>vegetables; jellies; jams; compotes; fruit marmalades; crystallized fruits; candied fruits; dried fruits; frozen fruits; fruit snacks; dried coconuts; sultanas; fruit zest; fruit salads; fruits in syrup; fruit pulp; fruit slices; fruits preserved in alcohol; fruit powders; fruit pastes; fruit desserts; fruit chips; fruit spreads; milk and other dairy products; milk-based desserts; cream-based desserts; yoghurts; drinking yoghurts; mousses (dairy products); creams (dairy products); dessert creams; butter; cheese; cottage cheese; milk drinks with milk predominating; milk drinks containing fruit; milk products or substitutes based on rice, soya, almond, oats, coconut and hazelnuts; rice milk (milk substitute); soya milk (milk substitute); almond milk; coconut milk; milk drinks based on rice, soya, almond, oats, coconut and hazelnuts; yoghurts based on rice, soya, almond, oats, coconut and hazelnuts; cream (milk product) based on rice, soya, almond, oats, coconut and hazelnuts; desserts based on milk substitutes; vegetable products, namely sliced vegetables, grated vegetables, vegetables in the shape of blocks, vegetable spreads, vegetable-based spreads, vegetable salads; vegetable-based cream; vegetable-based butter; vegetable-based yoghurt; cheese substitute; yoghurt substitute based on vegetable fat; cream substitute based on vegetable fat; butter substitute based on vegetable fat.</p> <p>Class 30 Flours and preparations made from cereals; bread; gingerbread; biscuits; cakes; pastry; confectionery; almond paste; almond-based confectionery; fruit pastes (confectionery); lollipops (confectionery); candies; sweets; chewing gum, not for medical use; ice cream; sorbets and other edible ices; ice (frozen water); ice cream</p>	<p>cooked fruits and vegetables; jellies, jams, compotes; eggs; milk, cheese, butter, yogurt and other milk products; oils and fats for food; legume-based snacks; edible seeds; seeds, prepared; plant-based milk substitutes; dairy desserts; desserts made from milk products; fruit desserts; burgers; meat burgers; vegetable burgers; meat products being in the form of burgers; prepared vegetable dishes; prepared meals consisting primarily of vegetables; prepared vegetable products; snack foods based on vegetables; vegetable-based cream; vegetable extracts for culinary purposes; soy-based snack foods; soya-based beverages used as milk substitutes; fruit snacks; tofu-based snacks; fruit based snack foods; preserved, frozen, dried and cooked fruits and vegetables; dairy desserts; meat substitutes; nut-based snack foods; plant-based milk substitutes; potato-based snack foods; soy milk-based beverages; soya-based beverages used as milk substitutes; soy-based snack foods; tofu-based snacks; vegetable-based meat substitutes; vegetable-based snack foods; burgers consisting primarily of plant-based food; burgers consisting of legume; food products made from plant-based food; food products made from legume; cooked meals consisting principally of plant-based food; cooked foods consisting primarily of legume.</p> <p>Class 30 Coffee, tea, cocoa and artificial coffee; rice, pasta and noodles; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; chocolate; ice cream, sorbets and other edible ices; sugar, honey, treacle; yeast, baking-powder; salt, seasonings, spices, preserved herbs; vinegar, sauces and other condiments; ice [frozen water]; pancakes; batter for making pancakes; savoury pancakes; frozen pancakes; processed seeds for use as a seasoning; seasonings; food seasonings; flavorings and seasonings; ice creams; prepared desserts [confectionery]; ice cream desserts; pancake mixes; instant pancake mixes;</p>
---	---

consisting wholly or partly of yoghurt; frozen yoghurt (ice cream); breakfast cereals containing fruit; spices, culinary herbs, flavourings (not essential oils), seasonings; honey; molasses syrup; fruit sauces; sweet sauces; cocoa products; rice cake; cake; custard; puddings; chocolate mousses; rice cakes; rice pudding; semolina cakes; clafoutis (desserts); caramel creams; cocoa-based drinks; coffee-based drinks; chocolate-based drinks; tea-based drinks; tea; iced tea; tea substitutes; tea extracts; tea leaves; fruit coulis; ice creams based on rice, soya, almond, oats, coconut and hazelnuts; ice creams based on rice, soya, almond, oats, coconut and hazelnuts; frozen yoghurts made of rice, soya, almond, oat, coconut and hazelnut (edible ice cream); pastry made of rice, soya, almond, oat, coconut and hazelnut; confectionery based on rice, soya, almond, oats, coconut and hazelnuts; oat-based foods; mousses (desserts) based on rice, soya, almond, oats, coconut and hazelnuts.

Class 32

Mineral and aerated waters and other non-alcoholic drinks ; fruit drinks; fruit juices; non-alcoholic fruit extracts; fruit nectars; fruit juice concentrates; vegetable juices (drinks); fruit sorbets (drinks); syrups and other preparations for making beverages; fruit-flavoured lemonades, smoothies ; tea-flavoured non-alcoholic drinks; iced fruit drinks; frozen flavoured water; non-alcoholic drinks based on rice, soya, almond, oats, coconut and hazelnuts; vegetable juices (drinks); coconut water; vegetable juices based on rice, soya, almond, oats, coconut and hazelnuts; fruit drinks based on rice, soya, almond, oats, coconut and hazelnuts; almond milk (drink).

savoury pancake mixes; doughs, batters, and mixes therefor; soya based ice cream products; food preparations based on grains; prepared desserts [confectionery]; prepared foodstuffs in the form of puddings; soya based ice cream products; soya-based ice cream substitutes; soy-based ice cream substitute; vegetable based coffee substitutes; pancakes consisting principally of plant-based food; vegan ice cream; vegan prepared desserts [confectionery]; vegan puddings; pancakes consisting principally of legume.

Class 29 of the contested application

Preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; milk, cheese, butter, yogurt and other milk products; plant-based milk substitutes; dairy desserts; desserts made from milk products; fruit desserts; vegetable-based cream; soy milk-based beverages; soya-based beverages used as milk substitutes; fruit snacks; fruit based snack foods

19. The above contested goods, although worded slightly differently, have direct equivalents in the opponent's specification. Accordingly, I find the competing goods are identical due to their identical or near-identical wording.

Prepared vegetable dishes; prepared vegetable products

20. The above contested goods are included in the broad term *preserved, dried, cooked, frozen and prepared vegetables* contained in the opponent's goods and therefore are considered identical in line with the principle set out in *Meric*.

Prepared meals consisting primarily of vegetables; snack foods based on vegetables; vegetable burgers; legume-based snacks; vegetable-based meat substitutes; vegetable-based snack foods; burgers consisting primarily of plant-based food; burgers consisting of legume; food products made from plant-based food; food products made from legume; cooked meals consisting principally of plant-based food; cooked foods consisting primarily of legume

21. The above contested goods all contain vegetables as an ingredient and therefore have a point of similarity with the *opponent's preserved, dried, cooked, frozen and prepared vegetables* on the basis that the opponent's goods will be eaten as part of the contested goods. However, I find the nature of the competing goods to be different and they are unlikely to be found in the same aisle of a retail establishment. Furthermore, I do not consider the goods to be in competition nor are they complementary. Accordingly, I find that the goods at issue are only similar to a low degree.

Burgers

22. A *burger* is a flat round mass of minced meat or vegetables, which is fried and often eaten in a bread roll. Whilst *burgers* typically contain or consist predominantly of meat there are many non-meat *burgers* available, including those made from beans, for example. Therefore, as the contested goods can include vegetables as a main ingredient, I find they have a point of similarity with the opponent's *preserved, dried, cooked, frozen and prepared vegetables*. However, I find the nature of the competing goods to be different and furthermore, they are unlikely to be found in the same aisle of a retail establishment. Furthermore, I do not consider the goods to be in competition. Therefore, I find the goods to be only similar to a low degree.

Vegetable extracts for culinary purposes

23. *Vegetable extract* is a concentrated liquid obtained from dried vegetables and can be used to flavour savoury dishes. As such, I find that there is a point of similarity between the contested goods and the opponent's *preserved, dried, cooked, frozen and prepared vegetables and flavourings (not essential oils)*. However, the nature of the goods at issue is different, and the goods are unlikely to be found in the same aisle of a retail establishment. Furthermore, the goods are not in competition, nor are they complementary. Accordingly, I find the goods at issue to be only similar to a low degree.

Oils and fats for food

24. *Oils and fats for food* is a broad term relating to edible oils and fats such as sunflower oil, palm oil and butter, etc. Accordingly, the contested term encompasses the term *butter* contained in the opponent's goods and therefore these goods are considered identical in line with the principle set out in *Meric*.

Soy-based snack foods

25. Soy (soya) derives from the soy (soya) bean. The term *snack* refers to a small amount of food eaten between meals, which is often ready-to-eat, requiring very little, if any preparation. On this basis, I consider that 'yoghurt', may be consumed

as a snack. Accordingly, I find that the contested term encompasses *yoghurts based on soya* contained in the opponent's list of goods, and therefore are considered identical in line with the principle set out in *Meric*.

Tofu-based snacks

26. Tofu, also known as bean curd, derives from the soy (soya) bean and is generally sold in solid white blocks of varying softness. Tofu has many uses, including as a meat or cheese (dairy) substitute. The term *snacks* refer to small amounts of food eaten between meals which are often ready-to-eat, requiring very little, if any preparation. Therefore, on this basis, 'cheese', can be viewed as a healthy snacking option on the basis that it can be eaten on its own or with crackers or bread, for example. Accordingly, I find that the contested *tofu-based snacks* encompass *cheese substitute* contained in the opponent's list of goods and therefore these goods are considered identical in line with the principle set out in *Meric*

Seeds; seeds, prepared

27. Broadly speaking edible *seeds*, such as those contested, derive from flowers, fruit and vegetables, and like fruit, *seeds* are packed with vitamins and provide a good source of fibre. Furthermore, like fruit, seeds can be eaten as a healthy snack, added to salads or used in cooking. As such, I find that the contested goods are similar to at least a low degree to the opponent's *fruit snacks*. The competing goods at issue have a similar purpose, will be sold through the same channels, and will most likely be found in the same aisle of a retail establishment. Moreover, they may have a competitive relationship.

Meat, fish, poultry and game; meat extracts; eggs; meat burgers; meat products being in the form of burgers

28. Although the above contested goods are all edible products, I find that they have no relevant factors in common with the opponent's goods. The mere fact that all the goods at issue can be classed as foodstuffs, or may be in competition, for example, meat burger versus a burger made from vegetables, these factors alone are insufficient to find similarity. The food industry encompasses a wide range of foods

having very different natures, for example, foodstuffs of animal origin, foodstuffs of plant origin, and foodstuffs with specific purposes, such as seasonings and natural sweeteners. Furthermore, the foodstuff products might be manufactured by different undertakings specialised in a specific field within the food industry. While it is acknowledged that a wide range of different food products can be found in the same retail outlet, such as a supermarket, consumers are aware that the food being sold can originate from a multitude of different undertakings. Therefore, although the above contested goods are all food products, they have different natures and satisfy different nutritional purposes to the opponent's goods. Moreover, they differ in their usual producers and are not complementary, in the sense that one product is indispensable for the use of the other. Consequently, I find that the contested goods and the opponent's goods are dissimilar.

Class 30 of the contested application

Tea; cocoa; flour and preparations made from cereals; bread, pastries and confectionery; ice cream, sorbets and other edible ices; honey; seasonings; flavorings; spices; preserved herbs; ice [frozen water]; ice creams; soya based ice cream products; soy-based ice cream substitute; prepared desserts [confectionery]; prepared foodstuffs in the form of puddings; vegan ice cream; vegan prepared desserts [confectionery]; vegan puddings

29. The above contested goods all have direct equivalents in the opponent's specification. Accordingly, I find the competing goods are identical either due to their identical/near-identical wording or based on the *Meric* principle.

Rice

30. *Rice* can be used to produce a variety of dishes, including *rice pudding*, contained in the opponent's goods. Therefore, despite these goods having a different nature and being found in different areas of a supermarket, there is some similarity between their purpose. Consumers could choose between buying *rice* to make *rice pudding* or they could buy ready-made *rice pudding*, meaning that the goods may be in competition and may target the same users. Accordingly, I find the goods to be similar to a low degree.

Sauces

31. The above contested term is a broad term which encompasses the terms *fruit sauces* and *sweet sauces* contained in the opponent's goods and therefore these goods are considered identical in line with the principle set out in *Meric*.

Preparations based on grains

32. A grain is a small hard seed. One of the main types of grain crops are cereals. As such, I find that the contested goods overlap with the opponent's *preparations made from cereals* and therefore I consider them to be identical in line with the principle set out in *Meric*.

Coffee; Artificial coffee; vegetable based coffee substitutes

33. The contested goods refer not only to brewed drinks prepared from roasted coffee beans, artificial coffee and vegetable-based coffee substitutes, but also to actual coffee, artificial coffee and substitute coffee products. The opponent's *coffee-based drinks* are drinks which have *coffee* as their main ingredient, presented in different ways, such as, with milk or ice, etc. Accordingly, I find that the contested goods are included in the opponent's *coffee-based drinks* and therefore these goods are identical in line with the principle set out in *Meric*.

Tapioca and sago

34. The above contested goods are starchy products, usually ground, and can be used in baking and cooking. Likewise, *flours and preparations made from cereals* contained in the opponent's list of goods are also starchy products that are usually ground and can be used in cooking and baking. Furthermore, the competing goods have a similar nature and purpose and can overlap in methods of use. In addition, they will be sold through the same channels, and will most likely be found in the same aisle of a retail establishment. Accordingly, I find that the goods at issue are similar to at least a medium degree.

Chocolate

35. *Chocolate* is a food product made from roasted and ground cacao seed kernels, available as a liquid, solid or paste. The opponent's *chocolate-based drinks* are generally hot or cold drinks made from melted chocolate and milk. The goods at issue can all be produced by the same undertakings, target the same public and have the same distribution channels. Accordingly, I find that the goods similar to at least a medium degree.

Sugar

36. The contested goods are added to food and drink predominantly as a sweetener in order to enhance flavour. *Molasses syrup*, included in the opponent's list of goods is a by-product obtained during the sugar-making process and like *sugar*, *molasses syrup* can be used as a sweetener to enhance the flavour of food and drink. Additionally, like *sugar*, it can be used as a preserving agent. Therefore, the goods at issue have a similar nature and purpose and can share the same distribution channels and consumers. Accordingly, I find that the goods are similar to a slightly lower than medium degree.

Treacle

37. Treacle is a thick, sweet, sticky liquid that is obtained when sugar is processed. It is used in making cakes and puddings. I find this to be similar to at least a medium degree to the opponent's *molasses syrup*. Both are sweet viscous substances and used as a way of adding sweetness to a dish so have a similar nature and purpose. In addition, both goods will be sold through the same channels, most likely be found in the same aisle of a retail establishment and will have a competitive relationship.

Pancakes; savoury pancakes; frozen pancakes; pancakes consisting principally of plant-based food; pancakes consisting principally of legume.

38. In general, the contested goods are a type of sweet or savoury thin flat cake, prepared from batter that may either contain eggs, milk and butter or in the case of the plant-based and legume variety, may contain egg, milk or butter substitutes. Although *pancakes* are a type of flatbread or quick bread, they are also commonly

categorised as a type of pastry or cake. As such, I find that the contested goods are similar to a medium degree to the opponent's *bread; cakes and pastry* as they have a similar nature and purpose and may coincide in their producers, distribution channels and end users. In addition, the goods will most likely be found in the same aisle of a retail establishment and can have a competitive relationship.

Pasta and noodles

39. The main ingredient in the above contested goods is *flour*, which is included in the opponent's list of goods. Whilst these goods have a different nature and will be found in different locations in a supermarket, there is some similarity between their purpose on the basis that consumers could choose to buy *flour* in order to make their own *pasta and noodles*, or they could choose to buy ready-made *pasta and noodles*, meaning that the goods can target the same users. As such, these goods could be in competition. Accordingly, I find the goods to be similar to a low degree.

Salt

40. *Salt* is a seasoning added to food to enhance flavour. Therefore, the contested goods are included in the opponent's broad term *seasonings*. As such, these goods are considered identical in line with the principle set out in *Meric*.

Pancake mixes; instant pancake mixes; savoury pancake mixes; doughs, batters, and mixes therefor

41. In general, the main ingredient of the above contested goods is *flour* which is included in the opponent's list of goods. These goods can be produced by the same undertakings, target the same end consumers and use the same distribution channels. Furthermore, *flour* and the above contested goods can be in competition with each other given that consumers can choose whether to purchase the ready-made batter, doughs and mixes or to use a separate mix of flour and other ingredients. Accordingly, I find that the goods at issue are similar to a slightly lower than medium degree.

Vinegar and other condiments

42. The above contested goods are products that would be added to food to enhance flavour. Likewise, the opponent's *seasonings* are also added to food to enhance flavour. Accordingly, the competing goods at issue will likely overlap in purpose, users, method of use and trade channels. Therefore, I find that the goods are similar to a slightly lower than medium degree.

Yeast, baking powder

43. *Yeast* is used as a raising agent (leavening) when baking goods such as bread. *Baking powder* is a dry chemical raising agent which is also used in baking to create light and fluffy textured baked goods. During the baking process *yeast* or *baking powder* will be combined with the opponent's *flour* where the baked goods require a raising agent. As such, I find that the competing goods overlap in their purpose and method of use. Furthermore, they may be sold through the same channels, and will most likely be found in the same aisle of a retail establishment. Accordingly, I find the goods at issue to be similar to a low degree.

The average consumer and the nature of the purchasing act

44. 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).

45. 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.”

46. The average consumer for the parties’ goods at issue will be a member of the general public. The goods are everyday foodstuffs which are likely to be purchased frequently, at low cost. The main focus of attention will be use and flavour, although some attention may be paid to allergy information, calories, fat and salt content. The goods will be purchased primarily visually, selected from the shelves of a retail outlet or from an online equivalent. That said, I do not discount that there may be an aural component to the purchase of the goods given that advice may be sought from a sales assistant. I find that the average consumer will pay a medium degree of attention during the purchasing process.

Comparison of the marks

47. It is clear from *Sabel BV v. Puma AG* 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 them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, that:

“34. [...] 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.”

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

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

Opponent's mark	Applicant's marks
	<p>1. THE LIVE GREEN CO</p>  <p>2.</p>

Overall impression

50. The Opponent's mark is a figurative mark featuring the phrase 'LIVE GREEN' centrally positioned within the mark. These words are presented in white capital letters, with the 'L' on the left and 'N' on the right slightly enlarged in comparison to the other letters. Above the words are stylised leaves, and below the words are stylised leaves and a flower which in turn sits above a figurative white outreached hand. The words and figurative elements are all contained within a dark brown circle background. I find the phrase 'LIVE GREEN' to be the most dominant element of the mark due to its size, central position, and the fact that the words span the width of the mark. Furthermore, I keep in mind *MigrosGenossenschafts-Bund v EUIPO*, T-68/17, where it was stated that:

“...in the case of a mark consisting of both word and figurative elements, the word elements must generally be regarded as more distinctive than the figurative elements, or even as dominant, since the relevant public will keep in mind the word elements to identify the mark concerned, the figurative elements being perceived more as decorative elements...”

51. Slightly less dominant are the figurative leaves and outstretched hand. However, these elements still contribute to the overall impression of the mark. I find that the brown background circle will have little impact on the consumer.

52. The contested mark is a series of two. The first in the series (1) consists of the words, 'THE LIVE GREEN CO' presented in black standard upper-case letters without any stylisation. The second in the series (2) consists of the same words,

however, they are presented in a stylised upper and lower-case typeface, which are shaped to make the words appear as though they are presented in an invisible circle. In both instances, the overall impression is contained in the phrase 'THE LIVE GREEN CO / the LIVE GREEN co.', however, as the words 'The/the' and 'Co/co' will merely be perceived as a company identifier they have no distinctiveness and therefore, I find I find the distinctive elements of the marks to be the words 'LIVE GREEN'. The circular stylistic aspect in the second (2) mark makes only a minor contribution.

53. With regard to the similarity of the marks, in its counterstatement the applicant states the following:

"The Applicant denies that the Applicant's mark [sic] is visually, Aurally, or conceptually similar to the Opponent's trade marks [sic], whether as alleged by the Opponent or at all."

Visual comparison

54. The opponent submits the following:³

"Visually, the parties' marks are similar to a high degree. The dominant and distinctive element of the Opponent's Mark is the phrase 'LIVE GREEN', which is entirely reproduced in the Applicant's mark THE LIVE GREEN CO. The overall impression is weighted in favour of the elements LIVE GREEN since the words 'THE' and 'CO.' in the Applicant's mark have no trade mark significance. Instead, they merely function as the definite article and an indicator that the goods originate from a company respectively. Consequently, the dominant and distinctive elements within the parties' marks are identical. It is noted that the Applicant's Mark is a word mark for THE LIVE GREEN CO. Notional and fair use of this word mark would allow it to be presented in any font or case, including the stylisation used in the Opponent's Mark."

³ Written submissions in lieu.

55. Visually, the marks coincide insofar as they share the same two words, 'LIVE GREEN', being the only word elements contained in the opponent's mark. The competing marks are visually different in that the applicant's marks contain the additional elements 'THE/the' positioned at the beginning of the marks, and 'CO/co.' positioned at the end of the marks. Furthermore, the applicant's second mark in the series, is presented in a stylised font. Additionally, the figurative elements present in the opponent's mark are not replicated in the applicant's marks. Accordingly, weighing up the similarities with the differences, keeping in mind that both trade marks contain the words 'LIVE GREEN', I find the marks to be visually similar to a medium degree.

Aural comparison

56. The opponent submits the following:⁴

"Aurally, the Applicant's Mark and the Opponent's Mark are identical or similar to a high degree. The marks have two and four syllables respectively. However, the two overlapping syllables 'LIVE' and 'GREEN' are presented in the same order and the consumer may not pronounce the non-distinctive syllables 'the' and 'co.' (company). The marks would therefore have identical or at least highly similar pronunciation."

57. The applicant's marks consist of four syllables, namely 'THE-LIVE-GREEN-CO / the-LIVE-GREEN-co'. The opponent's mark consists of two syllables, namely 'LIVE-GREEN'. Aurally, the entirety of the opponent's mark is the same as the applicant's second and third syllables with the only difference coming in the presence of the first and last syllable in the applicant's mark. The figurative elements in the opponent's mark would not be articulated. Taking this into account, whilst bearing in mind the overall impression of the marks, I find that the marks are aurally similar to at least a medium degree.

⁴ Written submissions in lieu.

Conceptual comparison

58. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

59. The opponent submits the following:⁵

“Conceptually, the marks are identical or similar to a high degree. Marks are deemed to be conceptually similar when they evoke the same idea or the same concept.

[...]

The marks evoke the same idea because they coincide in the phrase ‘LIVE GREEN’, which is distinctive of the goods concerned. The remaining elements in the marks do not detract from this similarity. In particular, ‘the’ is a definite article and ‘co’. is a short form of ‘company’. These elements are non-distinctive and do not alter the conceptual impression.”

60. The words ‘LIVE GREEN’ contained in all of the competing marks will likely be perceived as a reference to ‘living a lifestyle that is environmentally conscious’, and implies that the respective goods are ‘green’, i.e. environmentally friendly and sustainable. Accordingly, as the competing marks all contain the words ‘LIVE GREEN’ they convey the same concept despite the additional words ‘The/the’ and ‘Co/co’ present in the applicant’s marks, which will merely be perceived as a company identifier. Furthermore, as to the figurative elements present in the opponent’s mark, I am of the view that they merely reinforce the concept of the words ‘LIVE GREEN’, on the basis that they are mainly leaves. I therefore find that all the elements of the opponent’s mark combine to create the concept of being environmentally conscious, as previously discussed and therefore, whilst the contested marks do not contain the same figurative elements, I find that they portray

⁵ Written submissions in lieu.

the same concept and the addition of 'The/the' and 'Co/co' to the contested marks do not detract from that concept, nor do they add a different concept. Accordingly, there is a very high degree of conceptual similarity between the marks.

Distinctive character of the earlier trade mark

61. The distinctive character of a trade mark can be measured only, first, by reference to the goods or services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, 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).

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).”

62. 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 which have no allusive qualities.

63. In their submissions,⁶ the opponent states that the earlier mark enjoys an enhanced distinctive character. However, while the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use. Consequently, I have only the inherent position to consider.

64. The earlier mark contains the phrase 'LIVE GREEN' which, as previously stated, will likely be perceived as a reference to 'living a lifestyle that is environmentally conscious', and implies that the respective goods are 'green', i.e. environmentally friendly/sustainable. Consequently, I find that the phrase 'LIVE GREEN' has an allusive nature. However, given the added figurative elements and the fact that a registered trade mark is deemed to have a degree of distinctiveness,⁷ the opponent's mark has a low degree of inherent distinctive character.

Likelihood of confusion

65. 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 mindful 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.

66. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods down to the responsible undertakings being the same or related.

⁶ Submissions in lieu.

⁷ *Formula One Licensing BV c OHIM*, Case C-196/11P

67. Earlier in the decision I concluded that the marks are visually similar to a medium degree, aurally similar to at least a medium degree and conceptually similar to a very high degree. I have found that the earlier mark has a low degree of inherent distinctive character for the goods at issue. Furthermore, I found the similarity between the goods to range from dissimilar to identical. I have identified the average consumer for the relevant goods to be in the main members of the general public who will pay a medium degree of attention during the purchasing process. I have found that the purchasing process will largely be visual, however, I have not discounted aural considerations.

68. The words 'LIVE GREEN' are present in all the competing marks. Nevertheless, the contested marks also contain 'THE/the' and 'CO.co.', which will merely be perceived as a company identifier and have no counterpart in the earlier mark. Furthermore, the figurative elements in the earlier mark, which have no counterparts in the contested marks, merely reinforce the 'LIVE GREEN' message, as previously discussed. As such, consumers are likely to recall the competing marks as 'LIVE GREEN' marks. With regard to the additional elements present in the marks, I am of the view that these will likely go unnoticed, be overlooked, or be forgotten. Accordingly, with all things considered, given the similarity of the marks and the similarity or identity between some of the goods, I find that the average consumer is unlikely to recall the differences between the marks resulting in the consumer confusing the marks for one another and therefore, there is a likelihood of direct confusion.

69. However, if I am wrong on this, I will now go on to consider indirect confusion.

70. 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.”

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

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

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

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

71. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that “a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion”. Arnold LJ agreed, pointing out that there must be a “proper basis” for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

72. I acknowledge that a finding of indirect confusion should not be made merely because the two marks share a common element. However, it is not sufficient that a

mark merely calls to mind another mark:⁸ this is mere association not indirect confusion.

73. In the circumstances that the average consumer does notice the minor differences between the marks, I am mindful that the dominant and more distinctive elements of the marks at issue are the words 'LIVE GREEN' which are the only words contained in the opponent's mark. I find that the average consumer would regard this as the same company presenting its mark in two slightly different ways. It would be reasonable for the average consumer to see 'LIVE GREEN' as an abbreviated version of the full company name 'THE LIVE GREEN CO' and as previously stated, 'THE' and 'CO' present in the applicant's marks, though not negligible, do not add distinctiveness to the marks and would be seen merely as an indication of company status. Accordingly, with regard to the parties' goods that are identical and/or similar to a degree, the potential for the marks to be seen as alternative marks from the same or economically linked undertakings is greatly magnified. I am satisfied that consumers would assume a commercial association between the parties, or sponsorship by one of the parties, due to the shared element 'LIVE GREEN'. Consequently, I consider there to be a likelihood of indirect confusion. This is so even bearing in mind the earlier mark's low level of inherent distinctive character. In reaching this conclusion I note that a degree of caution is required before finding a likelihood of confusion on the basis of common elements which are either descriptive or are low in distinctive character.⁹ Nevertheless, I maintain that there is a likelihood of confusion. Furthermore, as 'THE' and 'CO' are weak in distinctive character, their addition to the words 'LIVE GREEN' does little to alter the distinctiveness of the mark as a whole to the extent that consumers would see it as an entirely different undertaking.

Conclusion

74. The opposition under section 5(2)(b) is partially successful in respect of the following goods, for which the application is refused:

⁸ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

⁹ *Nicoventures Holdings Limited v The London Vape Company Ltd* [2017] EWHC 3393 (Ch) and *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch)

Class 29 Preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; milk, cheese, butter, yogurt and other milk products; oils and fats for food; legume-based snacks; ; edible seeds; seeds, prepared; plant-based milk substitutes; dairy desserts; desserts made from milk products; fruit desserts; burgers; vegetable burgers; prepared vegetable dishes; prepared meals consisting primarily of vegetables; prepared vegetable products; snack foods based on vegetables; vegetable-based cream; vegetable extracts for culinary purposes; soy-based snack foods; soya-based beverages used as milk substitutes; fruit snacks; tofu-based snacks; fruit based snack foods; preserved, frozen, dried and cooked fruits and vegetables; dairy desserts; meat substitutes; nut-based snack foods; plant-based milk substitutes; potato-based snack foods; soy milk-based beverages; soya-based beverages used as milk substitutes; soy-based snack foods; tofu-based snacks; vegetable-based meat substitutes; vegetable-based snack foods; burgers consisting primarily of plant-based food; burgers consisting of legume; food products made from plant-based food; food products made from legume; cooked meals consisting principally of plant-based food; cooked foods consisting primarily of legume.

Class 30 Coffee, tea, cocoa and artificial coffee; rice, pasta and noodles; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; chocolate; ice cream, sorbets and other edible ices; sugar, honey, treacle; yeast, baking-powder; salt, seasonings, spices, preserved herbs; vinegar, sauces and other condiments; ice [frozen water]; pancakes; batter for making pancakes; savoury pancakes; frozen pancakes; processed seeds for use as a seasoning; seasonings; food seasonings; flavorings and seasonings; ice creams; prepared desserts [confectionery]; ice cream desserts; pancake mixes; instant pancake mixes; savoury pancake mixes; doughs, batters, and mixes therefor; soya based ice cream products; food preparations based on grains; prepared desserts [confectionery]; prepared foodstuffs in the form of puddings soya based ice cream products; soya-based ice cream substitutes; soy-based ice cream substitute; vegetable based coffee substitutes; pancakes consisting principally of plant-based food; vegan ice cream; vegan prepared desserts [confectionery]; vegan puddings; pancakes consisting principally of legume.

75. The application can proceed to registration in respect of the following goods for which the opposition has been unsuccessful:

Class 29 Meat, fish, poultry and game; meat extracts; eggs; meat burgers; meat products being in the form of burgers.

Costs

76. On balance, although the opponent has not been wholly successful, it has nevertheless successfully opposed a substantial number of the applied for goods. I therefore consider it appropriate to award the opponent a contribution towards its costs, bearing in mind the relevant scale contained in Tribunal Practice Notice 2/2016. Accordingly, I award the Opponent the sum of £650 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee for the opposition	£100
Preparing a statement of grounds and considering the counterstatement	£250
Preparing submissions in lieu of a hearing	£300
Total	£650

77. I therefore order The Live Green Company SPA (Live Green) to pay SAVENCIA SA the sum of £650. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 18th day of October 2022

Sam Congreve
For the Registrar