

O/0508/23

TRADE MARKS ACT 1994

**IN THE MATTER OF TRADE MARK APPLICATION NO. 3689083
BY CHINA GUIJIU GROUP CO., LIMITED**

TO REGISTER:

**中国
贵酒**

AS A TRADE MARK IN CLASS 33

AND

**IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 429900 BY
GUIZHOU GUIJIU CO., LTD**

BACKGROUND AND PLEADINGS

1. On 2 September 2021, China Guijiu Group Co., Limited (“the applicant”) applied to register the mark shown on the front cover of this decision as a trade mark in the United Kingdom in respect of the following goods:

Class 33

Grain-based distilled alcoholic beverages; Fruit extracts, alcoholic; Cocktails; Spirits [beverages]; Rice alcohol; Brandy; Vodka; Cider; Whisky; Digesters [liqueurs and spirits].

2. On 5 January 2022, the application was opposed by Guizhou Guijiu Co., Ltd (“the opponent”). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and concerns all the goods in the application. The opponent is relying on International Registration (“IR”) No. 1635569:



3. The IR was designated for protection in the UK on 8 July 2021 and protection was granted on 22 March 2022 for the following goods:

Class 33

Alcoholic fruit beverages; alcoholic beverage containing fruits; alcoholic drinks, except beer; liqueurs; liquor (beverage); alcoholic beverages, except beer; rice alcohol; edible alcohol; distilled alcoholic beverage; cooking wine.

4. The IR qualifies as an earlier mark under the provisions of section 6(1)(a) of the Act. As it completed its registration process after the date of application for the contested mark, it is not subject to the proof of use provisions in section 6A of the Act and the opponent may rely on all the goods listed above.

5. The opponent claims that the marks are highly similar and submits that a significant proportion of the general population in the UK speak and read the Chinese language in its various forms. It states that the earlier mark is presented in calligraphy style and means “*precious; expensive; the short call of Guizhou Province*”. The contested mark is presented in simple standard font. The top two pictograms mean “China”; the fourth “liquor”; and the third is the same as the earlier mark. It claims that the third character is the dominant and distinctive element of the mark, as the others are non-distinctive. To the Chinese-speaking population, the marks would be visually and aurally highly similar and conceptually identical. The opponent also claims that the section of the population that does not speak any Chinese language would identify visual similarities between the marks, “*particularly as these are Chinese sourced products and both the Applicant and the Opponent being Chinese entities*”.¹ The opponent also claims that the goods are identical, as they are all forms of alcoholic beverage. As a result, there exists a likelihood of confusion on the part of the public.

6. The opponent also opposed the application under section 3(6) of the Act. However, as it did not file any evidence in chief, this ground was deemed withdrawn, in accordance with Rule 20(3) of the Trade Marks Rules 2008 (SI 2008 No. 1797). The Registry wrote to the opponent informing it of this decision on 27 June 2022 and no objections were received.

7. The applicant filed a defence and counterstatement. It admits that the goods are identical or similar but denies that the marks are similar, and disagrees with the opponent’s claims about the level of understanding of Chinese languages among the UK population.

8. The applicant filed written submissions on 3 October 2022. The opponent filed evidence in reply in the form of a witness statement dated 1 December 2022 from Inshing Hu, a trade mark attorney at Jiangsu New & High Trademark Agency, the Chinese trade mark representatives of the opponent. There are two exhibits. The first of these is a judgment of the High Court of the Hong Kong Special Administrative Region in proceedings between the two parties, which Mr Hu submits goes to the issue

¹ Statement of grounds, paragraph 4.

of whether the marks are similar. I have read this exhibit carefully and do not see how the position in Hong Kong, where a significant proportion of the population undoubtedly will be able to understand the characters, has a bearing on the likelihood of confusion in the UK. The second exhibit consists of extracts from a Chinese/English dictionary showing the definitions of the marks and the Wikipedia entry for the province of Guizhou.

9. Neither side requested a hearing or filed written submissions in lieu. In these proceedings, the opponent is represented by HGF Limited and the applicant by the Trade Marks Bureau.

DECISION

10. Section 5(2) of the Act is as follows:

“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.”

11. I am guided by the following principles, 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 BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (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-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):²

- 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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their 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;

² 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 Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to refer to the trade mark case-law of EU courts, although the UK has left the EU.

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

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

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

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

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

12. As the marks in this case feature Chinese characters, there is further relevant case law that I find it convenient to highlight from the outset. It is permissible to take into account the meaning of words that would only be understood by a minority ethnic group: see *Loutfi Management Propriété Intellectuelle SARL v AMJ Meatproducts NV & Halalsupply NV*, Case C-147/14. However, this is only likely to make a material difference where the ethnic group in question makes up a significant proportion of the average consumers of the goods and/or services in question: see, by analogy, *Aranynektár Termékgyártó és Kereskedelmi KFT v European Union Intellectual Property Office (EUIPO)*, Case T-503/15.

Comparison of goods

13. It is settled case law that I must make my comparison of the goods on the basis of all relevant factors. These may include the nature of the goods, their purpose, their users and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary: see *Canon*,

paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296]. Goods are complementary when

“... there is a close connection between them in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking.”³

14. The goods to be compared are shown in the table below:

Earlier goods	Contested goods
<u>Class 33</u> <i>Alcoholic fruit beverages; alcoholic beverage containing fruits; alcoholic drinks, except beer; liqueurs; liquor (beverage); alcoholic beverages, except beer; rice alcohol; edible alcohol; distilled alcoholic beverage; cooking wine.</i>	<u>Class 33</u> <i>Grain-based distilled alcoholic beverages; Fruit extracts, alcoholic; Cocktails; Spirits [beverages]; Rice alcohol; Brandy; Vodka; Cider; Whisky; Digesters [liqueurs and spirits].</i>

15. *Rice alcohol* appears in both specifications. In addition, all the contested goods are included in the opponent’s broader *Alcoholic beverages, except beer*. Where this is the case, the goods may be considered to be identical: see *Gérard Meric v OHIM*, Case T-133/05, paragraph 29. I find that the contested goods are identical to the earlier goods.

Average consumer and the purchasing process

16. In *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), Birss J (as he then was) described the average consumer in these terms:

³ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82.

“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 word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”⁴

17. The average consumer of both parties’ goods is an adult member of the general public. I accept that there will also be professional consumers. However, as they are more likely to pay a greater degree of attention when purchasing the goods they are less likely to be confused. I will therefore focus on the non-trade customer, who will purchase the goods from a retail outlet such as a supermarket or off-licence for consumption at home, or in licensed premises such as a bar, restaurant or club. In the first case, they may visit a physical shop or buy from a website where the mark will be visible on the physical product itself or an image of it. Even if the goods are stocked behind the counter and the average consumer must ask a sales assistant for them, the bottles will be visible. Consequently, I find that the purchasing process will be largely visual, although I do not completely discount the aural element.

18. If the consumer is buying the goods in licensed premises, aural considerations are likely to play a larger role as the customer will order by speaking to bar staff. It is also possible that the environment may be noisy, which would increase the likelihood of the mark being misheard, but, even then, the consumer may see the mark on bottles or optics behind the bar or on a drinks list: see *Anton Riemerschmid Weinbrennerei und Likörfabrik GmbH & Co. KG v EUIPO*, Case T-187/17. In my view, the visual aspect of the mark will still be significant.

19. The average consumer will want to ensure that the beverage they are purchasing is of their preferred type, flavour or strength, whatever the price, which will vary. I find that they would pay a medium degree of attention when buying the goods at issue.

⁴ Paragraph 60.



Comparison of marks

20. It is clear from *SABEL* (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 in *Bimbo* that:

“... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”⁵

21. It would be wrong, therefore, artificially to dissect the 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 marks.

22. The respective marks are shown below:

Earlier mark	Contested mark
	

⁵ Paragraph 34.

23. Both marks consist of Chinese characters, although the number of these differs. In considering the overall impression that the marks will make on the average consumer, I remind myself that the goods at issue are alcoholic beverages. These are goods that are purchased by the public as a whole, so would not be targeted at the Chinese-speaking community. Although the opponent submits that a significant proportion of the UK population understands Chinese languages, I have been presented with no evidence in support of this statement. In my view, the number of Chinese language speakers in the population of UK consumers of alcoholic beverages would not be significant enough to take into account.

24. The overall impression of the earlier mark is of a single Chinese character in calligraphy style. In other words, it gives the appearance of having been rendered by hand with a brush. The overall impression of the contested mark is of four Chinese characters arranged in two rows.

25. The opponent pleaded that the marks are highly similar, but this pleading was based on the argument that a significant proportion of the population would understand that the first, third and fourth characters in the contested mark were non-distinctive. I have dismissed this argument. The applicant submits that the marks are visually different and that identifying any similarities between the contested mark's third character and the earlier mark would require the kind of detailed analysis that would not be undertaken by the average consumer. In my view, the average consumer might identify some visual similarity, but this would be at a very low level.

26. The average consumer would not be able to pronounce either of the marks, and so there is no aural comparison to make. In addition, they would not bring a particular concept to the mind of the average consumer and so I consider that they are not capable of conceptual comparison.

Distinctive character of the earlier mark

27. In *Lloyd Schuhfabrik Meyer*, 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 Alternberger* [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).”

28. Registered trade marks possess varying degrees of inherent distinctive character. Marks that are suggestive of, or allude to, a characteristic of the goods or services would sit at the lower end of a spectrum of distinctiveness, while those marks that are invented words with no allusive qualities would sit towards the top. The opponent has not adduced any evidence of use of the mark and so I have only the inherent position to consider.

29. For the average consumer, the earlier mark is not descriptive or allusive of the opponent's goods. As the character consists of a relatively intricate arrangement of lines, I consider that this would not be easy to recall. Consequently, I find that the inherent distinctive character of the earlier mark is no more than average.

Conclusions on likelihood of confusion

30. There is no scientific formula to apply in determining whether there is a likelihood of confusion. It is a global assessment where a number of factors need to be borne in mind. I must also take account of the interdependency principle, i.e. that a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods or vice versa. I keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them they have in their mind.

31. While I found the goods to be identical, I found only a very low degree of visual similarity between the marks. The opponent pleaded that the goods in question are, in fact, Chinese-sourced products and so the consumer would pick up any visual similarities between the marks. However, I must base my assessment on the respective specifications and notional and fair use of the marks: see *Roger Maier & Anor v ASOS & Anor* [2015] EWCA Civ 200, paragraph 78. Both marks cover a variety of alcoholic beverages that could come from anywhere in the world.

32. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting 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 recognised 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).”

33. In *Liverpool Gin Distillery Limited & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ commented that:

“This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition.”⁶

34. Even taking into account the imperfect recollection of the average consumer and my finding that the goods are identical, I do not consider that the average consumer

⁶ Paragraph 12.

would mistake one mark for the other, given the difference in the number of the characters in the marks.

35. A finding of indirect confusion would require the average consumer to recognise a common element in the marks. In my view, the mere presence of Chinese characters would not be enough; they would have to identify the third character in the contested mark as the character present in the earlier mark. I do not believe this is likely, but if I am wrong in this, I do not consider that the addition of three further Chinese characters would be a sound basis for the average consumer to reach the conclusion that the contested mark is another brand of the opponent. These are goods that are bought by the general public who will not understand the meaning of the marks. I find that there is no likelihood of indirect confusion.

CONCLUSION

36. The opposition has failed, and Application No. 3689083 will proceed to registration.

COSTS

37. The applicant has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice No. 2/2016. In the circumstances, I award the applicant the sum of £500 which has been calculated as follows:

<i>Considering the opposition and preparing the counterstatement:</i>	£200
<i>Preparing written submissions during the evidence rounds:</i>	£300
TOTAL:	£500

38. I therefore order Guizhou Guijiu Co., Ltd to pay China Guijiu Group Co., Limited the sum of £500. 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 1st day of June 2023

**Clare Boucher,
For the Registrar,
Comptroller-General**