

O-088-14

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO 2640718  
BY  
PETER WILLIAM JACKSON**

**TO REGISTER THE TRADE MARK**

**London Bridge**

**IN CLASS 32**

**AND**

**THE OPPOSITION THERETO  
UNDER NO 104648  
BY  
SURINDER KUMAR**

## BACKGROUND

1. On 2 November 2012, Peter William Jackson (the applicant) applied to register the above trade mark in class 32 of the Nice Classification system<sup>1</sup> for :

### **Class 32**

Shandy, low or non-alcoholic beers.

2. Following publication of the application, on 21 December 2012, Surinder Kumar (the opponent) filed a notice of opposition against the registration of the application.

3. The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (the Act). The opponent relies upon United Kingdom trade mark registration no 2610322 for a series of two marks:

Mark details and relevant dates	Goods relied upon
<div style="display: flex; justify-content: space-around;">   </div> <p>Filed: 17 February 2012</p> <p>Registered: 25 May 2012</p>	<p><b>Class 33</b></p> <p>Alcoholic beverages</p>

4. In its statement of grounds the opponent states:

*“The earlier trade mark contains the words LONDON BRIDGE, which are identical to the mark of the Opposed Application. The words LONDON BRIDGE are the dominant and distinctive elements of the earlier trade mark...”*

*The earlier trade mark is registered for “alcoholic beverages” in class 33. The goods covered by the Opposed Application include “shandy”, which is a drink containing beer; therefore this term is identical to the goods covered by the earlier trade mark. The term “low alcoholic beers” in the Opposed Application is also identical to the goods covered by the earlier trade mark...Finally, the term “non-alcoholic beers” within the Opposed*

<sup>1</sup> International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

*Application is highly similar to goods covered by the earlier trade mark. Non-alcoholic beers are typically sold alongside alcoholic beverages, both in bars and in retail outlets. Such products are often manufactured by the same entity and they often bear the same trade mark."*

5. The applicant filed a counterstatement on 17 April 2013. It denies the grounds on which the opposition is based. It states:

*"In the "Cross-search list - Class 33" published on the IPO Website...It is quite clearly stated that:*

*"Low or non-alcoholic beer is not similar to alcoholic beverage in Class 33;"and*

*"Shandies in Class 32 are not similar goods to any alcoholic beverages in Class 33."*

*As my application has now been limited to "Shandies, Low and non-alcoholic beer" this application is different to the existing mark, and clearly is not infringing any of the earlier marks rights."*

6. Both parties filed evidence in these proceedings, neither side requested a hearing. Only the opponent filed submissions in lieu of a hearing.

## **EVIDENCE**

7. The opponent's evidence consists of a witness statement from Katy Jane Fuggle of Swindell & Pearson, dated 2 July 2013; attached to the witness statement are 11 exhibits.

8. The applicant's evidence consists of a witness statement from Peter William Jackson, dated 6 September 2013, attached to which are 9 exhibits.

9. The opponent's evidence focuses on the nature of beer compared to the applicant's goods in its class 32 specification. Since the opponent's specification does not include beer (a fact later acknowledged in the opponent's submissions dated 24 December 2013), I need not summarise the evidence here.

10. The applicant's evidence is focused on a number of other registrations for goods in classes 32 and 33, and a number of disputes between companies in this area of business, as reported by the news media.

11. It has long been established that state of the register evidence of this type does not assist the applicant. It does not indicate whether the marks are being used, or give any indication of the goods on which there is use, or what agreements may be in place between those parties. It is not, therefore, an indicator of whether or not there will be confusion in the market place in relation to the respective trade marks.<sup>2</sup>

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<sup>2</sup> see Jacob J in *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281 and the General Court in *Zero Industry Srl v Office of Harmonisation in the Internal Market (Trade Marks and Designs)(OHIM)*, Case T-400/06 and *GfK AG v Office of Harmonisation in the Internal Market (trade Marks and Designs)(OHIM)*, Case T-135/04

Press reports of disputes between other drinks manufacturers are not relevant to these proceedings. Consequently, I need not summarise the evidence here.

12. The applicant's evidence also includes information regarding the tax bands for alcoholic and low/non-alcoholic beverages and prints from the cross search list on the IPO's website. Guidelines relating to tax are not relevant to the matters before me. I will refer to the IPO's cross search list below when dealing with the comparison of goods.

13. I will refer to both parties' submissions as necessary below.

## **DECISION**

14. The opposition is brought under section 5(2)(b) of the Act which reads as follows:

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

(a)...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, or there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

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

"6.-(1) In this Act an "earlier trade mark" means -

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

16. The opponent's mark is an earlier mark, which is not subject to proof of use because, at the date of publication of the application, it had not been registered for five years.<sup>3</sup>

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<sup>3</sup> See section 6A of the Act (added by virtue of the Trade Marks (Proof of Use, etc.) Regulations 2004: SI 2004/946) which came into force on 5th May 2004.

## Section 5(2)(b) case law

17. In his decision in *La Chemise Lacoste SA v Baker Street Clothing Ltd* - BL O/330/10 (approved by Arnold J in *Och-Ziff Management Europe Ltd v Och Capital LLP* [2011] FSR 11), the Appointed Person, Mr Geoffrey Hobbs QC, expressed the test under this section (by reference to the Court of Justice of the European Union (CJEU) cases mentioned) on the basis indicated below:

### The CJEU cases

*Sabel BV v Puma AG* [1998] RPC 199; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* [1999] RPC 117; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* [2000] F.S.R. 77; *Marca Mode CV v Adidas AG & Adidas Benelux BV* [2000] E.T.M.R. 723; *Matratzen Concord GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-6/01; *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH* C-120/04; *Shaker di L. Laudato & C. Sas v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* C-334/05 P.

### The principles

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

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

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

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

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

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 causes the public to wrongly believe that the respective goods [or services] come from the same or economically-linked undertakings, there is a likelihood of confusion.”

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

18. In accordance with the above cited case law, I must determine who the average consumer is and also identify the nature of the purchasing process. The average consumer is reasonably well informed and reasonably circumspect and observant but with a level of attention likely to vary according to the category of goods. The attention paid is likely to vary depending on price and, to some extent, the nature of the goods and the frequency of the purchase.

19. The average consumer is a member of the general public.<sup>4</sup> The goods are made available through a variety of trade channels. They may be bought in a supermarket or off licence, where the selection is likely to be made by the consumer from a shelf. They may also be bought from a website or mail-order catalogue, where the consumer will also select the goods visually. They may also be sold through bars, clubs and public houses, where the goods may be requested orally, from a member of staff. In considering this point I bear in mind the comments of the Court of First Instance (now the General Court) in *Simonds Farsons Cisk plc v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*<sup>5</sup> when it said:

“In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant’s goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual marketing channel. In addition, even though consumers can

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<sup>4</sup> For goods where the alcohol content exceeds 0.5% ABV the average consumer will be over 18 years of age.

<sup>5</sup> T-3/04

order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.”

20. Consequently, even though the purchase of these goods in a bar may involve an aural element, the selection will be made, primarily, from the display of goods on shelves, in fridges and on optics at the back of the bar. Accordingly, the purchase of such goods is primarily visual, though I do not discount an aural element. The level of attention paid to the purchase will vary depending on the nature of the goods. As a general rule the goods are fairly low value, reasonably frequent purchases. However, they also include single malt whisky, expensive/vintage wines and champagne which may give rise to a higher level of attention being paid. In any event the level of attention paid will be that necessary to achieve inter alia, the correct flavour, strength and variety. Accordingly, the average consumer will pay a reasonable level of attention.

**Comparison of goods**

21. The goods to be compared are as follows:

The opponent’s goods	The applicant’s goods
<p><b>Class 33</b></p> <p>Alcoholic beverages</p>	<p><b>Class 32</b></p> <p>Shandies, Low and non-alcoholic beer.</p>

22. In its counterstatement the applicant submits:

*“In the “Cross-search list - Class 33” published on the IPO Website...It is quite clearly stated that:  
 “Low or non-alcoholic beer is not similar to alcoholic beverage in Class 33;” and “Shandies in Class 32 are not similar goods to any alcoholic beverages in Class 33.”  
 As my application has now been limited to “Shandies, Low and non-alcoholic beer” this application is different to the existing mark, and clearly is not infringing any of the earlier marks rights.”*

23. In paragraph 6 of his witness statement Mr Jackson states:

*“The cross search list specifically differentiates between the following types of drink: Beer, Alcopops, Low or non-alcoholic beer, Low or non-alcoholic wine, cider or perry, Wine, Cider and Perry, Spirits and liqueurs. The Application refers to all elements of the cross search list and reinforces the differences between the drinks types referred to, shandies, low and non-alcoholic beers are expressly different to beers as they are referred to separately in the cross search list.”*

24. In *Proctor & Gamble Company v Simon Grogan*, O-176-08, Anna Carboni, sitting as the appointed person, referred to *Caremix*<sup>6</sup> and said:

“32. The International Classification system also applies to Community trade marks. Rule 2(4) of Commission Regulation 2868/95/EC implementing the Regulation on the Community trade mark (40/94) states as follows:

(4) The classification of goods and services shall serve exclusively administrative purposes. Therefore, goods and services may not be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification, and goods and services may not be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

33. It is thus made plain under the Community trade mark system that class numbers are irrelevant to the question of similarity of goods and services.

34. There is no similarly plain provision in the Act or the Directive. The Court of Appeal has held that, although the purpose of classifying goods and services is primarily administrative, that does not mean that the class numbers in an application have to be totally ignored in deciding, as a matter of construction, what is covered by the specification: *Altecnic Ltd's Trade Mark Application (CAREMIX)*<sup>7</sup>. But neither the Court of Appeal, nor the ECJ, nor any other court or tribunal in the United Kingdom, has gone so far as to state that class numbers are determinative of the question of similarity of goods in the case of national trade marks. On the contrary, they are frequently ignored.”

25. The cross search list is a guide to be used during the examination process and does not form part of the test to be applied when considering whether or not there is a likelihood of confusion through the eyes of the average consumer, the principles of which I have provided at paragraph 17 above.

26. With regard to the interpretation of terms within a specification, I take into account the views of Neuberger J in *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267, where he stated:

“I should add that I see no reason to give the word "cosmetics" and "toilet preparations" or any other word found in Schedule 4 to the Trade Mark Regulations 1994 anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context. In particular, I see no reason to give the words an unnaturally narrow meaning simply because registration under the 1994 Act bestows a monopoly on the proprietor.”

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<sup>6</sup> *Altecnic Ltd's Trade Mark Application (CAREMIX)* [2002] R.P.C. 639

<sup>7</sup> *Ibid*



27. With regard to interpreting terms in specifications, I will bear in mind the guidance provided in *Treat*:

In “construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of trade”. Words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning.”

28. In *YouView TV Ltd v Total Ltd* when<sup>8</sup> 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.”

29. Factors which may be considered include the criteria identified in *British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281 (hereafter *Treat*) for assessing similarity between goods and services:

- (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 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, taking into account how goods/services are classified in trade.

30. And the comments of the CJEU in *Canon* in which it stated, at paragraph 23 of its judgment:

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<sup>8</sup> [2012] EWHC 3158 (Ch) at [12]

“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.”

31. I also bear in mind the decision in *El Corte Inglés v OHIM Case T-420/03*, in which the court commented:

“96...goods or services which are complementary are those where 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 the production of those goods or provision of those services lies with the same undertaking (*Case T-169/03 Sergio Rossi v OHIM-Sissi Rossi* [2005] ECR II-685)”

32. In his witness statement Mr Jackson states:

*“8. Low-alcoholic beers are differentiated from normal beers by their alcoholic content (by definition). However, in this Application, the key difference is to High Alcoholic Drinks, Spirits and Liqueurs as defined in Class 33 and low-alcoholic drinks in Class 32, NOT the similarity between Alcoholic Beers and Low-alcoholic beers, within Class 32.”*

33. The opponent’s specification for alcoholic beverages does not include beer, which is in class 32. It does, by definition, include beverages containing varying amounts of alcohol. It is not limited to short drinks, high in alcohol, such as, inter alia, whiskey, gin and vodka but also includes mid range alcoholic drinks such as wine and longer drinks such as cider and perry. It also includes all of the low and lower alcohol equivalents of these drinks which are also included in class 33.

34. Low alcoholic beer and shandy may be marketed as an alternative to other low alcohol drink products of the type included in the opponent’s specification, such as low alcohol cider and perry. The users and uses of the drinks will coincide as both will be selected by an average consumer seeking a drink with a lower than usual alcohol content. The channels of distribution are likely to be the same and the goods are in competition with each other, both being ‘long’ drinks, with a low alcohol content, as opposed to wine or spirits. The parties’ goods are likely to be sold in close proximity to each other whether they are purchased from a website, shelf or selected from a fridge behind a bar. Taking all of these factors into account there is a reasonable degree of similarity between these goods.

35. Non-alcoholic beer is clearly a drink which contains no alcohol. As such it may be considered to be equivalent to a soft drink. However, in making a comparison I must construe the words of the trade mark specification in the context of the way in which the product is regarded for the purposes of trade. A non-alcoholic beer is exactly that, a beer without alcohol, and will be marketed as such. These goods will be sold in close proximity to low alcohol beers and other low alcohol beverages (of the type included in the opponent’s specification), and at some level, are in competition with

each other. They are likely to be displayed in on the same or similar shelves or areas of a website via the same distribution channels. Taking all of these factors into account I find there to be a degree of similarity between these goods, though it is at a fairly low level.

**Comparison of marks**

36. The marks to be compared are as follows:

The opponent's mark	The applicant's mark
	<p data-bbox="884 748 1166 792">London Bridge</p>

37. In making a comparison between the marks, I must consider the respective marks' visual, aural and conceptual similarities with reference to the overall impressions created by them, bearing in mind their distinctive and dominant components<sup>9</sup>, but without engaging in an artificial dissection of the marks, because the average consumer normally perceives a mark as a whole and does not analyse its details.

38. The opponent's earlier registration is for a series of two marks. The first is presented in blue and gold, the second in black and white. Since neither of the opponent's marks, nor the applicant's mark is limited to colour the matter must be assessed on the similarity between the respective marks without regard to colour.<sup>10</sup> Consequently, I will base my comparison on the black and white mark which is the second in the series.

39. The opponent's mark consists of a shield shaped background. On top of the shield is a line drawing. It is difficult to distinguish, but could be London Bridge. To the sides of the shield are some curved lines/knotwork. Across the centre of the shield is a large scrolled banner on which the words 'London Bridge' are presented in title case. Below the banner are outlines of two horses facing each other. Below that, to the left of the shield, is a solid black heraldic griffon and to the right is a heraldic unicorn. At the bottom of the shield is another scroll banner which contains no wording or other matter. The shield shape and additional decoration and heraldic devices are not distinctive. All of the background material is the type of decoration which is found on labels and in my experience is not uncommon in the context of the

<sup>9</sup> *Sabel v Puma AG, para.23*

<sup>10</sup>*Specsavers International Healthcare Ltd v Asda Stores Ltd (No.2) [2011] FSR 1, Mann, J.*

goods at issue. It is the words London Bridge which are the dominant, distinctive element of the mark.

40. The applicant's mark consists of the two words London Bridge, in title case. No part of the words are stylised or emphasised in any way. The words hang together, the distinctiveness lying in the mark as a whole.

### **Visual similarities**

41. The visual differences between the marks are as a result of the background material in the opponent's mark, which I have described above. In the context of the goods at issue this is, in my experience, fairly common background decoration. It is often seen on bottle labels and pump clips, attached to draught pumps in public houses. The dominant and distinctive element of the opponent's mark and the totality of the applicant's mark are identical. Consequently, I find there to be a reasonable degree of visual similarity.

### **Aural similarities**

42. Both marks will be articulated as 'London Bridge', the marks are aurally identical.

### **Conceptual similarities**

43. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.<sup>11</sup> The assessment must be made from the point of view of the average consumer.

44. In my view the average UK consumer of the goods at issue will be familiar with 'London Bridge'. However, I am mindful of the decision of Anna Carboni (sitting as the Appointed Person) in the *Chorkee* case (BL O-048-08), in which she concluded that the average consumer cannot be expected to know the meaning of everything. She stated in relation to the word CHEROKEE:

"36...By accepting this as fact, without evidence, the Hearing Officer was effectively taking judicial notice of the position. Judicial notice may be taken of facts that are too notorious to be the subject of serious dispute. But care has to be taken not to assume that one's own personal experience, knowledge and assumptions are more widespread than they are.

37. I have no problem with the idea that judicial notice should be taken of the fact that the Cherokee Nation is a Native American tribe. This is a matter that can easily be established from an encyclopedia or internet reference sites to which it is proper to refer. But I do not think that it is right to take judicial notice of the fact that the average consumer of clothing in the United Kingdom would be aware of this. I am far from

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<sup>11</sup> 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.

satisfied that this is the case. No doubt, some people are aware that CHEROKEE is the name of a native American tribe (the Hearing Officer and myself included), but that is not sufficient to impute such knowledge to the average consumer of clothing (or casual clothing in the case of UK TM no. 1270418). The Cherokee Nation is not a common subject of news items; it is not, as far as I am aware, a common topic of study in schools in the United Kingdom; and I would need evidence to convince me, contrary to my own experience, that films and television shows about native Americans (which would have to mention the Cherokee by name to be relevant) have been the staple diet of either children or adults during the last couple of decades.”

45. Even if the average consumer does not associate the parties’ respective marks with the London landmark, they will consider both marks to refer to a bridge in London. Accordingly, the marks are conceptually identical.

### **Distinctive character of the earlier mark**

46. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been used as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger Joined Cases C-108/97 and C-109/97* [1999] ETMR 585.

47. I have no evidence to consider in this case so need only consider the inherent distinctive character of the earlier mark. London Bridge has no meaning in respect of the goods, it is neither allusive or descriptive. As a consequence the mark enjoys a good degree of inherent distinctive character.

### **Likelihood of confusion**

48. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them he has kept in his mind.<sup>12</sup> I must also keep in mind the average consumer for the goods, the nature of the purchasing process and have regard to 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.

49. In respect of the interdependency principle and the distinctiveness of the earlier mark the opponent states in its submissions:

*“11...With the above in mind, it should be borne in mind that the mark identified by the Application is identical to the word element identified in the Registration. We submit that the goods covered by the Application are highly similar to those covered by the Registration. However, if the goods*

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<sup>12</sup> *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

*are not considered to be highly similar, we request that the Registrar considers the similarity of the marks with the above in mind. In addition the mark identified by the Registration is highly distinctive. With this in mind, we refer to the judgment in [Sabel] where it was stated that the more distinctive the earlier mark, the greater the risk of confusion. The Court held that marks with a highly distinctive character, either per se or because of the reputation they possess on the market, enjoy broader protection than marks with a less distinctive character.”*

50. I have found the marks to be reasonably similar visually and aurally and conceptually identical. I have found the earlier mark to have a good degree of inherent distinctive character. I have found low-alcohol beer and shandies to be reasonably similar to the opponent’s goods in class 33. I have found non-alcoholic beer to be similar to a low degree. I have identified the average consumer, namely a member of the general public (over 18 years of age for the purchase of goods containing alcohol) and have concluded that the level of attention will be reasonable to the extent that the purchaser will consider flavor, strength and variety.

51. Taking all of these factors into account, particularly the interdependency principle, the similarity of the marks is such that even a low level of similarity between the goods will, give rise to a likelihood of confusion.

## **CONCLUSION**

**52. The opposition succeeds under section 5(2)(b) of the Act for all of the goods opposed in class 32.**

## **COSTS**

53. The opposition having succeeded, the opponent, is entitled to a contribution towards its costs. In making an award I have taken into account that no hearing took place. I make the award on the following basis:

Preparing a statement and considering the other side's statement:	£200
Preparing and filing evidence:	£400
Official fee:	£200
Total	£800

54. I order Peter William Jackson to pay Surinder Kumar the sum of £800. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated 26<sup>th</sup> February 2014**

**Ms Al Skilton  
For the Registrar,  
the Comptroller General**