

**O/676/18**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003278854 BY  
JUNIUS HEALTH LIMITED  
TO REGISTER:**

**POW**

**AS A TRADE MARK IN CLASSES 29, 30 AND 32**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 600000872 BY  
POW FOOD LIMITED**

## BACKGROUND AND PLEADINGS

1. On 21 December 2017, Junius Health Limited (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on 23 February 2018.

2. The application was opposed under the fast track opposition procedure by POW Foods Limited (“the opponent”). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is based on the earlier UK Trade Mark registration no. 3265686 for the following mark:



3. The opponent’s mark has an application date of 24 October 2017 and a registration date of 27 April 2018.

4. The following goods and services are relied upon in this opposition:

**Class 5** Food supplements; dietary and nutritional supplements; nutritional and dietary supplements, namely, functional foods for use as nutritional and dietary supplements; vitamin and mineral supplements; dietetic foodstuffs for medical purposes; dietetic infusions for medical use; dietetic preparations adapted for medical use; dietetic preparations for children; dietetic foodstuffs for invalids; food supplements for dietetic use; foodstuffs for diabetics; protein dietary supplements.

**Class 29** Fish; poultry and game; meats; dairy substitutes; jellies; jams; compotes; fruit and vegetable spreads; seafood and molluscs; frozen fruits; vegetables, preserved; meat extracts; processed fruits, fungi and vegetables (including nuts and pulses); dried fruit; vegetables, cooked; vegetables, dried; edible oils and fats; avocado oil; hemp oil; coconut oil.

- Class 30 Bakery goods; sugars; natural sweeteners; sweet coatings and fillings; bee products; energy bars, not based on cereals; mustard; processed grains, starches, and goods made thereof; baking preparations and yeasts; ready-made baking mixtures; mixes for the preparation of bread; rusks; snack food products consisting of cereal products; honey; vinegar; salts, seasonings, flavourings and condiments; muesli; cereals; tapioca; bread; gluten-free bread; rice; dry and liquid ready-to-serve meals, mainly consisting of pasta; pasta-based prepared meals; prepared pasta meals; noodle-based prepared meals; guarana powder.
- Class 31 Fresh fruit and vegetables; raw and unprocessed cereals and seeds; agricultural and aquacultural crops, horticulture and forestry products.
- Class 35 Retail services in relation to: food supplements, dietary and nutritional supplements, nutritional and dietary supplements, namely, functional foods for use as nutritional and dietary supplements, vitamin and mineral supplements, dietetic foodstuffs for medical purposes, dietetic infusions for medical use, dietetic preparations adapted for medical use, dietetic preparations for children, dietetic foodstuffs for invalids, food supplements for dietetic use, foodstuffs for diabetics, protein dietary supplements, fish, poultry and game, meats, dairy substitutes, jellies, jams, compotes, fruit and vegetable spreads, seafood and molluscs, frozen fruits, vegetables, preserved, meat extracts, processed fruits, fungi and vegetables (including nuts and pulses), dried fruit, vegetables, cooked, vegetables, dried, edible oils and fats, avocado oil, hemp oil, coconut oil, bakery goods, sugars, natural sweeteners, sweet coatings and fillings, bee products, energy bars, not based on cereals, mustard, processed grains, starches, and goods made thereof, baking preparations and yeasts, ready-made baking mixtures, mixes for the preparation of bread, rusks, snack food products consisting of cereal products, honey, vinegar, salts, seasonings, flavourings and condiments, muesli, cereals, tapioca, bread, gluten-free bread, rice, dry

and liquid ready-to-serve meals, mainly consisting of pasta, pasta-based prepared meals, prepared pasta meals, noodle-based prepared meals, guarana powder, fresh fruit and vegetables, raw and unprocessed cereals and seeds, agricultural and aquacultural crops, horticulture and forestry products.

Class 43 Catering services.

5. The opponent argues that the respective goods and services are identical or similar and that the marks are similar.

6. The applicant filed a counterstatement denying the claims made. On 30 July 2018, the applicant amended its specification, which now reads as follows:

Class 29 Gluten free non-dairy desserts; gluten free non-dairy chilled desserts; gluten free artificial milk based desserts; fermented foods; fermented tofu; cooked dishes consisting of fermented sauces and fermented pastes; all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

Class 30 Gluten free desserts; gluten free puddings; gluten free puddings for use as desserts; gluten free prepared desserts; non-dairy ice cream desserts; non-dairy ices and ice creams; non-dairy frozen yogurt; dressings for food; food dressings [sauces]; salad dressings; dressings for salad; kombucha; fermented sauces and pastes; kimchijeon [fermented vegetable pancakes]; fermented hot pepper paste (gochujang); all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

Class 32 Juices; fruit juices; fruit beverages; fruit drinks and fruit juices; beverages consisting principally of fruit juices; non-alcoholic beverages containing fruit and vegetable juices; juice shots containing fruit and vegetable juices; fermented drinks; Douzhi (fermented bean drink); fermented Kombucha drinks; coconut water.

7. Only the applicant's goods in classes 29 and 30 are opposed. On 2 August 2018, the tribunal wrote to the opponent to seek confirmation as to whether the applicant's amendment would allow the opposition to be withdrawn. On 15 August 2018, the opponent confirmed that it wished to proceed with the opposition notwithstanding the amendment made to the applicant's specification.

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

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

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

10. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate costs; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary, but both parties filed written submissions in lieu.

11. The opponent is represented by Humphreys & Co. The applicant was initially represented by IPCONSULT, and later by Elkington & Fife LLP. This decision is taken following a careful perusal of the papers.

## **DECISION**

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

“5(2) A trade mark shall not be registered if because –

(a)...

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

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

13. 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.”

14. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. However, as the earlier mark had not completed its registration process more than 5 years before the publication date of the application in issue in these proceedings, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods it has identified.

## Section 5(2)(b) – case law

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

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 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 to mind the earlier mark, is not sufficient;

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

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

### **Comparison of goods**

16. The opponent has confirmed that it wishes to rely upon all goods and services for which the earlier mark is registered. However, in my view, it is the goods in classes 29, 30 and 31 which contain the strongest comparison with the applicant's specification. I have, therefore, only used the goods in classes 29, 30 and 31 for the purposes of the following comparison as they represent the opponent's best case:

<b>Opponent's goods</b>	<b>Applicant's goods</b>
<u>Class 5</u>	<u>Class 29</u>



Food supplements; dietary and nutritional supplements; nutritional and dietary supplements, namely, functional foods for use as nutritional and dietary supplements; vitamin and mineral supplements; dietetic foodstuffs for medical purposes; dietetic infusions for medical use; dietetic preparations adapted for medical use; dietetic preparations for children; dietetic foodstuffs for invalids; food supplements for dietetic use; foodstuffs for diabetics; protein dietary supplements.

Class 29

Fish; poultry and game; meats; dairy substitutes; jellies; jams; compotes; fruit and vegetable spreads; seafood and molluscs; frozen fruits; vegetables, preserved; meat extracts; processed fruits, fungi and vegetables (including nuts and pulses); dried fruit; vegetables, cooked; vegetables, dried; edible oils and fats; avocado oil; hemp oil; coconut oil.

Class 30

Bakery goods; sugars; natural sweeteners; sweet coatings and fillings; bee products; energy bars, not based on cereals; mustard; processed grains, starches, and goods made thereof; baking preparations and yeasts; ready-

Gluten free non-dairy desserts; gluten free non-dairy chilled desserts; gluten free artificial milk based desserts; fermented foods; fermented tofu; cooked dishes consisting of fermented sauces and fermented pastes; all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

Class 30

Gluten free desserts; gluten free puddings; gluten free puddings for use as desserts; gluten free prepared desserts; non-dairy ice cream desserts; non-dairy ices and ice creams; non-dairy frozen yogurt; dressings for food; food dressings [sauces]; salad dressings; dressings for salad; kombucha; fermented sauces and pastes; kimchijeon [fermented vegetable pancakes]; fermented hot pepper paste (gochujang); all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

made baking mixtures; mixes for the preparation of bread; rusks; snack food products; honey; vinegar; salts, seasonings, flavourings and condiments; muesli; cereals; tapioca; bread; gluten-free bread; rice; dry and liquid ready-to-serve meals, mainly consisting of pasta; pasta-based prepared meals; prepared pasta meals; noodle-based prepared meals; guarana powder.	
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Class 31

Fresh fruit and vegetables; raw and unprocessed cereals and seeds; agricultural and aquacultural crops, horticulture and forestry products.

17. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union (“CJEU”) in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

18. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

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

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

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

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

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

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

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

“...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”.

22. In *Sanco SA v OHIM*, Case T-249/11, the General Court indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. *chicken* against *transport services for chickens*. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes.”

Whilst on the other hand:

“.....it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.

23. For the purposes of considering the similarity of goods, 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 and *BVBA Management, Training en Consultancy v Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs [30] to [38]).

24. I have lengthy submissions from the opponent and the applicant on the similarity of the goods which I do not propose to reproduce here. However, I have taken them all into consideration in reaching my decision.

#### Class 29

*Gluten free non-dairy desserts; gluten free non-dairy chilled desserts; gluten free artificial milk based desserts (all being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

25. It is the opponent's case that these goods are identical to "dairy substitutes", "jellies", "jams", "compotes", "tapioca" and "bakery goods" in the opponent's specification. The desserts listed in the applicant's specification are all dairy-free and therefore presumably contain dairy substitutes. However, in my view, it would extend the meaning of "dairy substitutes" too far to consider it identical to any products that are dairy free. In my mind, "dairy substitutes" are alternatives to dairy products in their ordinary form (as opposed to those that have been made into another product such as a dessert).

26. "Jellies" are a dessert product and typically contain no gluten or dairy. I therefore agree with the opponent that "jellies" in the opponent's specification fall within the broader category of "gluten free non-dairy desserts" in the applicant's specification and are therefore identical on the principle outlined in *Meric*.

27. “Jams” and “compotes” in the opponent’s specification may, in some circumstances, form part of dessert products but they would not be considered dessert products on their own. I do not, therefore, consider that there is any similarity between these and the dessert items listed in the applicant’s specification. I understand that “Tapioca” is also used in some dessert products. However, it would not be considered a dessert product on its own. I do not, therefore, see any similarity between it and the desserts listed in the applicant’s specification.

28. “Bakery goods” in the opponent’s specification will, of course, include cake and pastry based dessert products. These do fall within the dessert market and may be selected by consumers as a dessert course or sweet snack. They will, therefore, be in competition with other dessert items such as those contained in the applicant’s specification. They are all likely to be purchased from the same trade channels (such as supermarkets or specialist dessert cafes). I therefore consider these goods to share a medium degree of similarity.

*Fermented foods (being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

29. This will include fermented vegetables. As fermenting vegetables is a method of preserving them, these will fall within “vegetables, preserved” in the opponent’s specification. These goods will, therefore, be identical on the principle outlined in *Meric*. If I am wrong in finding that they are identical then they will be highly similar.

*Fermented tofu (being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

30. It is the opponent’s case that this is identical to “vegetables, preserved” or “processed fruits, fungi and vegetables (including nuts and pulses)” in its own specification. Tofu is made from processed soybeans which would undoubtedly themselves fall within the category of “processed fruits, fungi and vegetables (including nuts and pulses)”. However, the fact that a particular product is used as part of another is not sufficient to show that the finished goods containing that component is similar to the product in its original form because the nature, intended purpose and the

customers of those goods may be very different<sup>1</sup>. Processed fruit and vegetables, on its ordinary meaning, will be frozen or canned fruit and vegetables which are still recognisable as their original form. They will have very similar uses, users, method of use and trade channels as unprocessed fruit and vegetables. However, tofu is a source of protein often used as a meat substitute and is therefore likely to have different uses and methods of use to preserved fruit and vegetables. I do not, therefore, consider that these goods are similar or if they are similar, then they will only be similar to a low degree.

31. Similarly, although the fermentation process has the effect of preserving the tofu, it cannot be said to be the same as a preserved vegetable. The method of use and uses will be different. There may be some overlap in trade channels and users on a superficial level, although this alone is not enough to create similarity between the goods. The nature of the goods will be similar to a certain degree as they are both fermented products. I consider these goods to be similar to a low degree.

32. The opponent has also argued that the applicant's goods are similar to "yeast" and "vinegar" in the opponent's specification. Although yeast may be used in the fermentation process, as noted above, this does not of itself mean that it can be considered similar to the end product. I have considered the uses, users, trade channels, method of use and whether the goods are in competition or complementary and, in the absence of any submissions to assist me, I do not consider there to be any similarity between the goods. If there is any similarity, then they will only be similar to a low degree. I also do not consider that the applicant's goods are similar to any of the opponent's other goods.

*Cooked dishes consisting of fermented sauces and fermented pastes (being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

33. The opponent's case is that this is similar to "dry and liquid ready-to-serve meals, mainly consisting of pasta" in class 30 of the opponent's specification. The uses of

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<sup>1</sup> *Les Editions Albert Rene v OHIM*, Case T-336/03

these goods will be the same (that is, both are quick, ready made meals), the users are likely to be the same (consumers who do are looking to purchase a quick meal rather than one that requires cooking from scratch) and their methods of use are likely to overlap. These goods may also be sold in the same area of a supermarket and there may be an element of competition between them. Consequently, I consider these goods to be highly similar.

### Class 30

*Gluten free desserts; gluten free puddings; gluten free puddings for use as desserts; gluten free prepared desserts (all being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

34. As noted above, “jellies” in the opponent’s specification are a dessert product which typically contain no gluten. They will have the same uses, users, trade channels and methods of use as “gluten free desserts” in the applicant’s specification. I therefore consider these goods to be highly similar.

35. The opponent states that the applicant’s goods are identical to “bakery goods”, “ready-made baking mixtures”, “baking preparations and yeasts”, “jams”, “compotes” and “tapioca” in the opponent’s specification. As noted above “jams”, “compotes” and “tapioca” may in some circumstances form part of a dessert, but they are not desserts in themselves. I do not, therefore consider them to be similar to the applicant’s goods or, if they are similar, they would be similar to only a low degree. I can see no reason why the applicant’s goods would be considered identical to “ready-made baking mixtures” or “baking preparations and yeast”.

36. In my view, the opponent’s best case lies in the similarity between the applicant’s goods and “bakery goods” in its own specification. As noted above, “bakery goods” will include cakes and pastry based products which fall within the dessert market. They may be selected by consumers as a dessert course or sweet snack. There will, therefore, be competition between the goods, they will have the same uses and users and they will all be available through the same channels. I therefore consider these goods to be similar to a medium degree.



*Non-dairy ice cream desserts; non-dairy ices and ice creams; non-dairy frozen yogurt (all being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

37. The opponent argues that these goods are identical to “dairy substitutes” in the opponent’s specification. For the reasons outlined above, I do not agree with the opponent’s argument on this point. For the same reasons outlined above, I consider there to be a medium degree of similarity between “bakery goods” in the opponent’s specification and the applicant’s goods.

*Dressings for food; food dressings [sauces]; salad dressings; dressings for salad (all being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

38. The Oxford English Dictionary defines “condiment” as:

“Anything of pronounced flavour used to season or give relish to food, or to stimulate the appetite.<sup>2</sup>”

39. Consequently, I consider that these goods all fall within the broader category of “salts, seasonings, flavourings and condiments” in the opponent’s specification. I, therefore, consider these goods to be identical on the principle outlined in *Meric*. If I am wrong in this finding, then they will be highly similar.

*Kombucha (being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

40. In its written submissions in lieu, the opponent stated as follows:

“On one particular point of clarification, the Opponent notes that *kombucha* can be both (1) a fermented tea drink, as well as (2) a combination of yeasts and

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<sup>2</sup> <http://www.oed.com/view/Entry/38536?rskey=TBPh3e&result=1#eid>

bacteria used with food. The Opponent presumes that here the Applicant uses the term *kombucha* in the latter sense given that it has been specified in class 30 as opposed to 32.”

41. In its written submissions in lieu, the applicant stated as follows:

“The fermented food term “kombucha” is “*a fermented, slightly alcoholic, lightly effervescent, sweetened black or green tea drink commonly intended as a functional beverage for its supposed health benefits*” (Wikipedia)”. (original emphasis)

42. Class 30 includes tea based products and so the applicant’s explanation as to what is meant by the term “kombucha” is not at odds with its inclusion in class 30 (as suggested by the opponent). I can see no reason why this product would be considered similar to any of the goods listed in the opponent’s specification.

*Fermented sauces and pastes; fermented hot pepper paste (gochujang) (all being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

43. The opponent states that these goods are identical to “salts, seasonings, flavourings and condiments” and “processed vegetables” in the opponent’s specification. In light of the definition of “condiment” above, I agree that these goods will be considered identical on the principle outlined in *Meric*. If I am wrong then they will be highly similar.

*Kimchijeon [fermented vegetable pancakes] (being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars)*

44. The opponent states that this product is identical to “processed vegetables” in its own specification. The ordinary meaning of “processed vegetables”, is vegetables that have been processed in some way to extend their shelf-life (such as canned or frozen). In my view, this definition cannot be extended to include any product that is made from vegetables. The users, uses and methods of use of these goods are different. In the

one case, people are buying vegetables in their original state and in the other they are buying a pre-made item which consists of vegetables that have already been cooked and used to create a secondary product. For the same reasons identified for tofu (above), I do not consider these goods to be similar or, if they are, they will be similar to only a low degree.

45. This is also the same for “vegetables, preserved”, “vegetables, dried” and “fresh fruit and vegetables” in the opponent’s specification. Even “vegetables cooked” in the opponent’s specification, to my mind, means vegetables that have been cooked but remain in their original form. Again, I do not think it possible to extend this definition any further so that it includes the applicant’s goods. Consequently, I do not consider there to be any similarity between these goods. However, if I am wrong in my finding then they will be similar to only a low degree. I also do not consider there to be any similarity between the applicant’s goods and any of the other goods in the opponent’s specification.

46. As some similarity between the goods is necessary to engage the test for likelihood of confusion<sup>3</sup>, the opposition can only proceed in respect of those goods for which there is some degree of similarity.

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

47. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties’ goods. I must then determine the manner in which these goods are likely to be selected by the average consumer. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the

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<sup>3</sup> *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA

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.”

48. In its Statement of Grounds of Opposition, the opponent stated:

“9. The notional average consumer in this case comprises professionals in catering industry and the general public, who is reasonably well informed and reasonably observant and circumspect (Case C-342/97, *Lloyd Schuhfabrik Meyer v. Klijsen Handel Lloyd*, para. 26). The average consumer will pay an average level of attention to the purchase act of the goods in suit.

10. Even if professionals were to pay a higher level of attention, the conditions are to be judged by the lowest level of attention (see, e.g. Case T-535/14, *The Cookware Company Ltd v. OHIM*, para. 27).

11. The purchase act is likely to be visual but aural considerations cannot be ignored because of recommendations and so on.”

49. In its written submissions in lieu, the applicant stated:

“We submit that the average consumer in this case will include consumers of both general and specialised foodstuffs and related goods. The applicant’s goods are clearly intended for healthy living, and the average consumer will also be health conscious and reasonably circumspect.

The goods at issue are both general purpose consumer products and more specialised goods. The level of attention of the relevant consumer will therefore be at the low-to-medium level for the more general goods, and slightly higher for the specialised goods.”

50. The average consumer in these proceedings will be either a member of the general public or a business user in the food industry. Although the goods are all consumer

goods, they are not everyday items such as bread or milk, meaning they will be purchased fairly infrequently but will still be of fairly low cost. The average consumer is likely to pay an average degree of attention when purchasing the goods in issue.

51. The goods are, in my experience, most likely to be obtained by self-selection from the shelves of a retail outlet or online equivalent. Consequently, visual considerations are likely to dominate the selection process. However, I do not discount that there may be an aural component to the purchase of the goods, given that advice may be sought from sales assistants or representatives.


### **Comparison of trade marks**

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

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

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

54. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
	<p data-bbox="1059 360 1134 394">POW</p>

55. I have lengthy submissions from both parties on the similarity of the marks, which I do not propose to reproduce here. However, I have taken them all into consideration in reaching my decision.

56. The applicant's mark consists of the made-up word "POW" presented in capital letters. There are no other elements to contribute to the overall impression, which is contained in the word itself. The opponent's mark also consists of the made-up word "POW" in block white capital letters on a blue/grey circular background. The "O" in the opponent's mark is actually a white circle with the word "food" in the centre in blue/grey lowercase font. Although the "O" does not appear in traditional form, consumers are likely to read it as an O because of its position between two other letters with the result that it creates a made-up word that consumers will recognise as having a particular meaning (as explained below). The words "POWER OF WELLNESS" appear below the word "POW" in smaller white capitalised font. The word "POW" is presented in larger letters than the rest of the wording in the opponent's mark and therefore plays a greater role in the overall impression of the mark. The words "food" and "POWER OF WELLNESS", and the circular background play a lesser role in the overall impression of the mark.

57. Visually, both marks contain the made-up word "POW". The difference lies in the additional wording in the opponent's mark and its presentation on a circular background. The Court of Appeal has stated on two occasions following the CJEU's judgment in *Specsavers*<sup>4</sup> (see paragraph 5 of the judgment of the Court of Appeal in

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<sup>4</sup> *Specsavers International Healthcare Limited & Others v Asda Stores Limited*, Case C-252/12

*Specsavers* [2014] EWCA Civ 1294 and *J.W. Spear & Sons Ltd v Zynga, Inc* [2015] EWCA Civ 290 at paragraph 47) that registration of a trade mark in black and white covers use of the mark in colour. Consequently, the differences created by the colour of the text and the circular background in the opponent's mark will not assist the applicant's case. I consider there to be a medium degree of visual similarity between the marks.

58. Aurally, the word "POW" in both marks will be pronounced identically. The difference between the marks is created by the addition of the words "food" and "POWER OF WELLNESS" in the opponent's mark. I consider there to be a medium degree of aural similarity between the marks.

59. Conceptually, the word "POW" in both marks will be recognised as indicating something powerful (such as a heavy blow as described by the applicant). This impression will be enhanced in the case of the opponent's mark by the addition of the words "POWER OF WELLNESS". I, therefore, consider there to be a high degree of conceptual similarity between the marks.

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

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

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not

contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

61. 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. As the opponent has not filed any evidence to show that its mark has enhanced its distinctiveness through use, I have only the inherent position to consider.

62. In its Statement of Grounds of Opposition, the opponent stated:

“The Opponent’s earlier trade mark is possessed of a moderate to high degree of distinctive character given that the dominant “POW” element has no meaning that relates to the goods specified.”

63. In its written submissions in lieu, the applicant stated:

“The earlier mark and the mark applied for both share a normal or medium inherent degree of distinctive character, as the mark applied for alludes to the goods having ‘powerful’, ‘appealing’ or ‘dramatic’ results, and the earlier mark means ‘the power of wellness’ relating to its ‘food’, with additional figurative elements.”

64. I must make an assessment of the inherent distinctiveness of the earlier mark as a whole. Although “POW” is a made-up word it is likely to be associated with the impression that something about the goods will make an impact (that is, that they are powerful in some way). The additional words “POWER OF WELLNESS” enhances



this impression. The word “food” in the opponent’s mark is descriptive of the goods and services for which it is registered. The distinctive character of the mark lies in the combination of its elements as a whole. I consider that the earlier mark has a medium degree of inherent distinctiveness.

### **Likelihood of confusion**

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

66. I have found the parties’ marks to be visually and aurally similar to a medium degree and conceptually similar to a high degree. I have found the earlier mark to have a medium degree of inherent distinctive character. I have identified the average consumer as a member of the public or a business user in the food industry, who will select the goods primarily by visual means (although I do not discount an aural component), and I have concluded that an average degree of attention will be paid during the selection process. Whilst keeping in mind the conceptual similarity of the marks, I consider that the visual and aural differences between the marks are sufficient to ensure that the marks will not be misremembered or mistakenly recalled as each other. This is particularly so given that I have found that the primary means of contact

with the marks will be visual. Consequently, I do not consider that there is a likelihood of direct confusion.

67. It now falls to me to consider the likelihood of indirect confusion. Indirect confusion was described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“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.”

68. As noted above, the marks are not visually identical. However, the word “POW” in both marks will convey an identical conceptual message. Bearing in mind my conclusions, summarised at paragraph 66 above, I consider that there will be an expectation on the part of the average consumer that the goods (that are either identical or share a medium or high degree of similarity) will come from the same or economically linked undertakings. There is, therefore, a likelihood of indirect confusion.

## **CONCLUSION**

69. The opposition has succeeded in relation to the following goods, for which the application is refused:

Class 29      Gluten free non-dairy desserts; gluten free non-dairy chilled desserts; gluten free artificial milk based desserts; fermented foods; cooked dishes consisting of fermented sauces and fermented pastes; all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

Class 30      Gluten free desserts; gluten free puddings; gluten free puddings for use as desserts; gluten free prepared desserts; non-dairy ice cream desserts; non-dairy ices and ice creams; non-dairy frozen yogurt; dressings for food; food dressings [sauces]; salad dressings; dressings for salad; fermented sauces and pastes; fermented hot pepper paste (gochujang); all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

70. The application will proceed to registration in respect of the following goods only:

Class 29      Fermented tofu; all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

Class 30      Kombucha; kimchi jeon [fermented vegetable pancakes]; all of the aforesaid being phytonutrient based or nutrient dense goods and excluding granulated or refined sugars.

Class 32      Juices; fruit juices; fruit beverages; fruit drinks and fruit juices; beverages consisting principally of fruit juices; non-alcoholic beverages containing fruit and vegetable juices; juice shots containing fruit and vegetable juices; fermented drinks; Douzhi (fermented bean drink); fermented Kombucha drinks; coconut water

## **COSTS**

71. Awards of costs in fast track opposition proceedings filed after 1 October 2015 are governed by Tribunal Practice Notice ("TPN") 2 of 2015. Using that TPN as a guide,

and as the opponent has been mostly successful, I award costs to the opponent on the following basis:

Filling a notice of opposition	£200
Filling written submissions	£200
Opposition fee	£100
<b>TOTAL</b>	<b>£500</b>

72. I order Junius Health Limited to pay POW Foods Limited the sum of £500. This sum is to be paid within 14 days of the expiry of the appeal period or, if there is an appeal, within 14 days of the conclusion of the appeal proceedings.

**Dated this 25<sup>th</sup> day of October 2018**

**S WILSON**

**For the Registrar**