

O-473-19

TRADE MARKS ACT 1994

IN THE MATTER OF UK APPLICATION NO 3347918
BY NO GUNK NO JUNK LIMITED:

**NOGUNK
NOJUNK**

AND

THE OPPOSITION THERETO UNDER NO 600001045 BY
THE S&L AGENCY LTD.

Background and pleadings

1. On 23 October 2018, NO GUNK NO JUNK LIMITED (the applicant) applied to register the above trade mark in classes 5, 29, 31 and 32. The specification reads as follows:¹

Class 5

Ayurvedic medicine ; Acne cleansers [pharmaceutical preparations]; Acne cream [pharmaceutical preparations]; Acne creams [pharmaceutical preparations]; Acne medication; Acne medications; Allergy capsules; Allergy medication; Allergy medications; Allergy relief medication; Allergy tablets; Almond milk for pharmaceutical purposes; Almond oil for pharmaceutical purposes; Almonds (Milk of -) for pharmaceutical purposes; Aloe vera gel for therapeutic purposes; Aloe vera preparations for pharmaceutical purposes; Aloe vera preparations for therapeutic purposes; Amino acids for medical purposes; Antiallergic medicines; Anti-allergy sprays; Antibacterial clay preparations; Antibacterial facial cleanser; Antibacterial gels; Antibacterial handwashes; Antibacterial soap; Antibiotic dermatological products; Antidiabetic pharmaceuticals; Antidiabetic preparations; Anti-diabetic preparations; Antifungal medication; Antifungal preparations; Antihistamines; Antimicrobial clay; Antimicrobial facewashes; Anti-microbial preparations; Anti-oxidant food supplements; Antioxidant pills; Anti-oxidant supplements; Antioxidants; Anti-oxidants for dietary use; Anti-oxidants obtained from herbal sources; Antiseptics; Balms for medical purposes; Balms for pharmaceutical purposes; Bath salts for medical purposes; Bath (Therapeutic preparations for the -); Bread products for diabetics; Caffeine preparations for medical use; Caffeine preparations for stimulative use; Calcium supplements; Cardiovascular preparations; Castor oil [for medical purposes]; Chinese traditional medicinal herbs; Cholesterol reducers; Clay for pharmaceutical use; Clay for treating skin conditions; Coconut oil for medical purposes; Cod liver oil; Collagen for medical purposes; Cough syrups; Cough tablets; Creams for dermatological use; Cultures for medical use; Decoctions of medicinal herb; Dental rinse; Diabetic bread adapted for medical use; Diabetic fruit juice beverages adapted for medical

¹ *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).*

use; Dietary and nutritional supplements; Dietary fiber; Dietary fiber to aid digestion; Dietary fibre; Dietary food supplements; Dietary food supplements used for modified fasting; Dietary supplement drink mixes; Dietary supplemental drinks; Dietary supplements; Dietary supplements and dietetic preparations; Dietary supplements consisting of vitamins; Dietary supplements consisting primarily of calcium; Dietary supplements consisting primarily of iron; Dietary supplements consisting primarily of magnesium; Dietary supplements for humans; Digestive enzymes; Disinfectant soap; Diuretics for detoxification purposes; Ear drops; Edible fish oils for medical purposes; Epsom salts; Evening primrose oil for medical use; Exogenous antigens; Extracts of hops for pharmaceutical purposes; Extracts of medicinal herbs; Extracts of medicinal plants; Ferments for pharmaceutical purposes; Fiber (Dietary -);Fibre (Dietary -);Flaxseed dietary supplements; Flaxseed for pharmaceutical purposes; Flaxseed meal for pharmaceutical purposes; Flaxseed oil dietary supplements; Food for diabetics; Food for medically restricted diets; Food supplements; Food supplements consisting of amino acids; Food supplements consisting of trace elements; Food supplements for dietetic use; Food supplements for medical purposes; Food supplements for non-medical purposes; Health food supplements for persons with special dietary requirements; Health food supplements made principally of minerals; Health food supplements made principally of vitamins; Herb teas for medicinal purposes; Herbal extracts for medical purposes; Herbal medicine; Herbal supplements; Herbal tea for medicinal use; Homeopathic anti-inflammatory ointments; Homeopathic medicines; Homeopathic pharmaceuticals; Homeopathic supplements; Indicators for medical diagnosis; Insulin; Iodine; Linseed dietary supplements; Linseed for pharmaceutical purposes; Linseed meal for pharmaceutical purposes; Linseed oil dietary supplements; Liquid vitamin supplements; Medicated shampoo; Medicated skin creams; Medicated soap; Medicinal herb extracts; Medicinal herb infusions; Medicinal herbal extracts for medical purposes; Medicinal herbs; Medicinal herbs in dried or preserved form; Medicinal infusions; Medicinal mud; Medicinal oils; Medicinal ointments; Medicinal preparations for stimulating hair growth; Medicinal roots; Milk ferments for pharmaceutical purposes; Milk of almonds for pharmaceutical purposes; Mineral food supplements; Mineral nutritional supplements; Mineral salts for baths; Mineral supplements; Multivitamin preparations; Multivitamins; Nutritional supplement energy bars; Nutritional supplement meal replacement bars for boosting energy; Nutritional supplements; Oil (Cod liver -);Oils (Medicinal -);Pain relief preparations; Pancreatic hormone preparations; Pharmaceutical agents affecting metabolism; Pharmaceutical

preparations for the prevention of autoimmune diseases; Pharmaceutical preparations for the prevention of diabetes; Pharmaceutical preparations for the prevention of diseases of the cardio-vascular system; Pharmaceutical preparations for the prevention of diseases of the endocrine system; Pharmaceutical preparations for the prevention of diseases of the genitourinary system; Pharmaceutical preparations for the prevention of diseases of the immune system; Pharmaceutical preparations for the prevention of diseases of the metabolic system; Pharmaceutical preparations for the prevention of diseases of the musculo-skeletal system; Pharmaceutical preparations for the prevention of diseases of the nervous system; Pharmaceutical preparations for the prevention of diseases of the respiratory system; Pharmaceutical preparations for the treatment of gout; Pharmaceutical preparations for the treatment of inflammatory diseases; Pharmaceutical preparations for treating asthma; Pharmaceutical preparations for treating diabetes; Pharmaceutical preparations for treating digestive system disorders; Pharmaceutical preparations for treating respiratory diseases; Pharmaceutical preparations for treating skin disorders; Pills for tinnitus treatment; Plant and herb extracts for medicinal use; Prebiotic supplements; Preparations for the treatment of asthma; Preparations for treating colds; Preparations for use in naturopathy; Preparations of vitamins; Probiotic preparations for medical use; Probiotic preparations for medical use to help maintain a natural balance of flora in the digestive system; Probiotic supplements; Sugar substitutes for diabetics; Trace element preparations for human use; Vitamin and mineral food supplements; Herbs (Medicinal -);Herbs (Smoking -) for medical purposes; Herbs for medicinal purposes; Chinese traditional medicinal herbs; Extracts of medicinal herbs; Medicinal herbs; Medicinal herbs in dried or preserved form; Smoking herbs for medical purposes; Homeopathic anti-inflammatory ointments; Homeopathic medicines; Homeopathic pharmaceuticals; Homeopathic supplements.

Class 29

Algae prepared for human foods; Almond butter; Almond jelly; Almond milk; Almond milk for culinary purposes; Almond milk-based beverages; Almonds, ground; Almonds (Prepared -);Aloe vera prepared for human consumption; Anchovy; Anchovy fillets; Apple butter; Apple puree; Aromatized fruit; Arrangements of cut fruit; Arrangements of processed fruit; Artichoke paste; Artichokes, preserved; Baked beans; Banana chips; Beans; Beans, preserved; Beverages consisting primarily of milk; Beverages consisting principally of milk; Beverages having a milk base; Beverages made from milk; Beverages made from

or containing milk; Beverages made from yoghurt; Beverages made from yogurt; Beverages made with yoghurt; Beverages made with yogurt; Birds eggs and egg products; Black currants, processed; Blackberry jam; Blackcurrants, processed; Blanched nuts; Blended butter; Blended cheese; Blended oil [for food];Blended oil for food; Blended vegetable oils for culinary purposes; Blocks of boiled, smoked and then dried bonitos (katsuo-bushi);Blue cheese; Bone oil for food; Bottled fruits; Bottled sliced fruits; Bottled vegetables; Broad beans; Broccoli; Broth; Broth concentrates; Broth [soup];Butter; Butter (Chocolate nut -);Butter (Cocoa -);Butter (Coconut -);Butter for use in cooking; Butter made of nuts; Butter oil; Butter (Peanut -);Butter preparations; Butter substitutes; Butter with herbs; Buttercream; Buttermilk; Caesar salad; Camellia seed oil for food; Cancoillotte; Candied fruit; Candied fruit snacks; Candied fruits; Candied nuts; Canned beans; Canned cooked meat; Canned fish; Canned fruits; Canned peanuts; Canned processed olives; Canned pulses; Canned quail eggs; Canned seafood; Canned sliced fruits; Canned sliced vegetables; Canned soups; Canned spinach; Canned tomatoes; Canned vegetables; Canola oil; Canola oil for food; Carrots; Cashew nut butter; Cashew nuts (Prepared -);Cassava chips; Casseroles [food];Cheddar cheese; Cheese; Cheese containing herbs; Cheese containing spices; Cheese dips; Cheese fondue; Cheese in the form of dips; Cheese mixtures; Cheese powder; Cheese products; Cheese spreads; Cheese sticks; Cheese substitutes; Cheese-based snack foods; Cheeses; Cheonggukjang jjigae [Korean dish consisting primarily of tofu with rich soybean paste];Chia seed oil for food; Chicharron; Chilli beans; Chilli oil; Chipped potatoes; Chips [french fries];Chips (Fruit -);Chips (Potato -);Chocolate nut butter; Chorizo; Chowder; Clam juice; Clarified butter; Coated peanuts; Cocktail onions; Cocoa butter; Cocoa butter for food; Cocoa flavored milk beverages; Coconut butter; Coconut chips; Coconut, desiccated; Coconut fat; Coconut flakes; Coconut milk; Coconut milk [beverage];Coconut milk for cooking; Coconut milk for culinary purposes; Coconut milk powder; Coconut milk used as beverage; Coconut milk-based beverages; Coconut oil; Coconut oil and fat [for food];Coconut oil for food; Coconut powder; Coconut shrimp; Coconut-based snacks; Codfishes, not live; Coffee cream in the form of powder; Coffee creamer; Coffee creamers; Coffee whiteners consisting principally of dairy products; Coleslaw; Colza oil for food; Common plaice fish, not live;Common plaice, not live; Compote; Compotes; Concentrated butter;Concentrates (Broth -);Condensed milk; Cooked beans; Cooked dish consisting primarily of fermented vegetable, pork and tofu (kimchi-jjigae);Cooked dish consisting primarily of rich soybean paste and tofu (cheonggukjang-jjigae);Cooked dish consisting primarily of soybean paste and tofu

(doenjang-jjigae);Cooked dish consisting primarily of stir-fried beef and fermented soy sauce (Sogalbi);Cooked fruits; Cooked olives; Cooked spinach;Cooked truffles; Cooked vegetables; Cooking fats; Cooking oil; Cooking oils; Corn fats; Corn oil; Corn oil [for food];Corn oil for food; Cottage cheese; Cottage cheese fritters; Cottage cheese preparations; Cows' milk; Cranberry compote; Cranberry jam; Cranberry sauce [compote];Cream; Cream, being dairy products; Cream cheese; Cream [dairy products];Cream powder; Cream (Whipped -);Creamers for beverages; Creme fraiche; Crisps; Crushed sesame; Crystallised Fruit; Crystallised ginger; Crystallized fruit; Crystallized fruits; Crystallized ginger; Crystallized gingers; Cucumber Kimchi [Oi-sobagi];Curd; Curd cheese; Curdled milk; Currants; Custard style yoghurts; Cut fruits; Cut vegetables; Dairy desserts; Dairy products; Dairy products and dairy substitutes; Dairy puddings; Dairy spreads; Dairy-based beverages; Dairy-based dips; Dairy-based spreads; Dairy-based whipped topping; Dates; Dehydrated vegetables; Desiccated coconut; Desserts made from milk products; Desserts of yogurt; Doenjang jjigae [Korean dish consisting primarily of tofu with soybean paste];Double cream; Dried bamboo fungus; Dried bamboo shoot; Dried bamboo shoots; Dried beans; Dried chinese cabbage; Dried coconuts; Dried cranberries; Dried dates; Dried durians; Dried edible algae; Dried edible black fungi; Dried edible day-lily buds; Dried edible mushrooms; Dried edible seaweed; Dried edible seaweed (hoshi-wakame);Dried edible tremella fuciformis; Dried eggs; Dried figs; Dried flakes of laver for sprinkling on rice in hot water (ochazuke-nori);Dried fruit; Dried fruit mixes; Dried fruit products; Dried fruit-based snacks; Dried fruits; Dried fruits in powder form; Dried funghi; Dried herring roe; Dried lentils; Dried lichee; Dried mangoes; Dried milk; Dried milk for food; Dried milk powder; Dried nuts; Dried okra; Dried olives; Dried pawpaws; Dried persimmon (Got-gam);Dried pieces of agar jelly (kanten);Dried pineapples; Dried pulses; Dried shiitake mushrooms; Dried soya beans; Dried strawberries; Dried truffles [edible fungi];Dried turnip; Dried vegetables; Dried vegetables in powder form; Dried whelk meat; Drinking yoghurt; Drinking yoghurts; Drinking yogurts; Drinks based on yoghurt; Drinks based on yogurt; Drinks made from dairy products; Dry whey; Duck eggs; Edible crystallised fruits; Edible crystallized fruits; Edible dried flowers; Edible fat-based spreads for bread; Edible fats; Edible nuts; Edible oils and fats; Edible oils derived from fish [other than cod liver oil];Edible seaweed; Edible seeds; Edible sunflower seeds; Eggs; Eggs (Powdered -);Evaporated milk; Extra virgin olive oil; Extra virgin olive oil for food; Extracts for soups; Extracts of vegetables [juices] for cooking; Extra-virgin olive oil; Falafel; Fat (Coconut -);Fermented bamboo shoots boiled and preserved in salt

(menma);Fermented bean curd; Fermented fruits; Fermented milk; Fermented soybeans; Fermented soybeans (natto);Fermented tofu; Fermented vegetable foods [kimchi];Fermented vegetables; Fermented vegetables (kimchi);Ferments (Milk -) for culinary purposes; Fish; Fish in olive oil; Flavored nuts; Flavoured edible oils; Flavoured milk; Flavoured milk beverages; Flavoured milk drinks; Flavoured yoghurts; Flaxseed oil for culinary purposes; Flaxseed oil for food; Food preparations predominantly of milk;Food products made from fish;Frozen bamboo shoots;Frozen eggs;Frozen fish;Frozen fruits; Fruits (Crystallized -);Fruits in preserved form;Fruits, tinned;Garlic butter;Garlic paste; Garlic [preserved];Garlic-based spreads;Gelatine;Ghee;Gherkins;Goat cheese; Goat milk; Grapeseed oil;Green split-peas;Grilled vegetables;Ground almonds;Ground nuts;Groundnut oil;Guacamole;Guava paste;Hard cheese;Hazelnut spread;Hazelnut spreads;Hazelnuts, prepared;Hemp milk used as a milk substitute;Honey butter;Hummus;Hummus chick pea paste;Hummus [chickpea paste];Instant soup;Kale chips;Kefir;Kefir [milk beverage];Kelp [processed];Kimchi [fermented vegetable dish];Kimchi jjigae [Korean dish consisting primarily of fermented vegetables, pork and tofu];Kiwifruit flakes;Lactic acid bacteria drinks;Lactic acid drinks;Legume salads;Legume-based snacks;Legume-based spreads;Lemon curd;Lemon juice for culinary purposes;Lemon spread;Lentils; Lentils, preserved;Linseed oil for culinary purposes;Linseed oil for food; Linseed oils [edible];Liquid eggs;Low fat dairy spreads;Low fat yoghurts; Low-fat potato chips;Low-fat potato crisps;Milk;Milk (Albumin -);Milk based beverages [milk predominating];Milk based drinks [milk predominating];Milk beverages; Milk beverages containing fruits;Milk beverages, milk predominating; Milk beverages with cocoa;Milk beverages with high milk content;Milk curds; Milk drinks; Milk drinks containing fruits;Milk ferments for culinary purposes;Milk of almonds for culinary purposes;Milk powder for food purposes; Milk powder for nutritional purposes; Milk products;Milk shakes;Milk solids; Milk substitutes;Milk tea, milk predominating;Milk-based beverages;Milk-based beverages containing coffee;Milk-based beverages containing fruit juice;Milk-based beverages flavored with chocolate;Milkshakes;Miso soup;Mixed vegetables;Mozzarella sticks;Mushrooms, prepared;Mushrooms, preserved;Mushrooms puree;Nut oils;Nut oils for food;Nut paste spreads;Nut toppings; Nut-based food bars; Nut-based meal replacement bars;Nut-based snack foods;Nut-based spreads;Nuts being cooked;Nuts being preserved;Nuts, prepared;Oat milk;Oils and fats;Oils for food;Olive oil;Olive oil for food;Olive puree;Olives, [prepared];Olives, preserved;Olives stuffed with almonds;Olives stuffed with feta cheese in sunflower

oil;Olives stuffed with pesto in sunflower oil;Olives stuffed with red peppers;Olives stuffed with red peppers and almonds;Onions, preserved;Orange and ginger marmalade;Organic coconut oil for culinary purposes;Organic milk;Organic nut and seed-based snack bars;Palm oil for food;Peanut butter; Peanut milk;Peanut oil [for food];Peanut paste; Peanuts, prepared; Peanuts, processed; Peas, preserved;Peas, processed; Pectin for culinary purposes; Peeled carrots;Peeled potatoes;Peeled tomatoes;Peeled vegetables; Pickled cucumbers;Pickled eggs;Pickled fruits;Pickled gherkins; Pickled hot peppers;Pickled jalapenos;Pickled onions;Pickled peppers; Pickled radishes;Pickled vegetables;Pickles;Potato chips; Potato crisps; Powdered fruits;Powdered goat milk;Powdered milk;Powdered milk for food purposes; Powdered nut butters;Powdered soya milk; Pre-cut vegetables;Pre-cut vegetables for salads;Prepared almonds;Prepared coconut; Prepared dried fruit mixes; Prepared fruits;Prepared macadamia nuts; Prepared meals consisting primarily of vegetables; Prepared meals consisting principally of vegetables; Prepared meals consisting substantially of seafood; Prepared nuts ;Prepared onions;Prepared peppers; Prepared pine nuts; Prepared pistachio; Prepared pistachios;Prepared rootstocks; Prepared salads; Prepared vegetable dishes ;Prepared vegetable products; Prepared walnuts; Prepared watermelon seeds; Preserved and flattened oranges; Preserved beans; Preserved chilli peppers; Preserved chopped chilli peppers, not being seasonings or flavorings; Preserved fish; Preserved fruits; Preserved garlic;Preserved jujubes; Preserved mushrooms;Preserved nuts; Preserved olives;Preserved peas; Preserved plums;Preserved potatoes; Preserved pulses; Preserved sausages; Preserved soy beans for food;Preserved soya beans; Preserved soya beans for food;Preserved soybeans for food; Preserved truffles; Preserved vegetables;Preserved vegetables (in oil);Preserves made from vegetables; Preserves, pickles;Pressed fruit paste;Processed almonds; Processed apples; Processed apricots;Processed artichokes;Processed asparagus; Processed avocados;Processed bean sprouts;Processed beans; Processed bee pupae for human consumption;Processed bee pupae, for human consumption;Processed beetroots;Processed beets; Processed betel nuts;Processed black currants;Processed blackcurrants; Processed blueberries;Processed brussel sprouts;Processed brussels sprouts; Processed cabbage;Processed cactus for food;Processed cheese; Processed cherries;Processed chia seed for food;Processed chickpeas;Processed coconut;Processed collard greens;Processed dates;Processed edible cordyceps;Processed edible flowers;Processed edible flowers in crystallised

form;Processed edible flowers in crystallized form;Processed, edible seaweed;Processed edible seaweed;Processed edible seeds;Processed eggplant;Processed eggs;Processed fish;Processed fish products for human consumption;Processed fruits;Processed fruits, fungi and vegetables (including nuts and pulses);Processed grape leaves;Processed legumes;Processed lemongrass;Processed lemons;Processed lychee fruit;Processed mangos;Processed meat;Processed meat products;Processed mustard greens;Processed nuts;Processed olive puree;Processed olives;Processed onions;Processed oranges;Processed papayas;Processed parsnips;Processed peaches;Processed peanuts;Processed peas;Processed pepperoncinis;Processed peppers;Processed pignoli;Processed pimientos;Processed plantain seeds;Processed potatoes;Processed Pulses;Processed quinces;Processed roots;Processed seafood;Processed seeds;Processed shallots [used as a vegetable, not seasoning];Processed soya beans;Processed soybeans;Processed spirulina;Processed sunflower seeds;Processed sweet potatoes;Processed tomatoes;Processed vegetables;Processed walnuts;Processed watermelon seeds;Processed yams;Prosciutto;Protein milk;Prunes;Pulp (Fruit -);Pumpkin seed oil for food;Purple sweet potato chips;Quick-frozen vegetable dishes;Radish cubed kimchi (kkakdugi);Raisins;Rapeseed oil for food;Raspberry jam;Ready grated cheese;Rice milk;Rice milk for culinary purposes;Rice milk for use as a milk substitute;Ripened cheese;Ripened cheeses;Roast chestnuts;Salads (Fruit -);Salads (Vegetable -);Salted and fermented seafood (jeotgal);Salted cashews;Salted nuts;Salted vegetables;Salt-fermented sea urchin roe;Sauerkraut;Savory butters;Seafood extracts;Seafood products;Seasoned nuts;Seaweed extracts for food;Seed butters;Seeds, prepared;Seeds (Processed -);Seeds (Processed sunflower -);Sesame oil;Sesame oil for food;Sheep milk;Shelled nuts;Shredded coconut;Skimmed milk;Sliced fruit;Snack food (Fruit-based -);Snack foods based on legumes;Snack foods based on nuts;Snack foods based on vegetables;Snack mixes consisting of dehydrated fruit and processed nuts;Snack mixes consisting of processed fruits and processed nuts;Snacks of edible seaweed;Soft cheese;Soft white cheese;Soft-ripened cheeses;Soup;Soy bean oil [for food];Soya bean milk;Soya milk;Soya yoghurt;Soybean oil;Spiced nuts;Spinach [prepared];Split peas;Spreads consisting mainly of eggs;Spreads consisting mainly of fruits;Spreads consisting of hazelnut paste;Sultanas;Sunflower oil for food;Sunflower seeds, prepared;Tofu;Tomato extracts; Tomato paste; Tomato preserves; Tomato purée; Tomatoes

[preserved];Vegetable burgers; Vegetable chips; Vegetable crisps; Vegetable extracts for cooking; Vegetable pastes; Vegetable powders; Vegetable puree; Vegetable salads; Vegetable soup preparations; Vegetable spreads; Vegetable stock; Vegetables (Prepared -);Vegetables, preserved; Vegetables preserved in oil; Vegetables, tinned; Vegetarian sausages; Walnut kernels; Weed extracts for food;Yams; Yellow split peas; Yoghurt; Yoghurt based drinks; Yoghurt beverages; Yoghurt desserts; Yoghurt drinks; Yoghurt made from goats milk; Yoghurt-based beverages; Yoghurts; Yogurt; Yogurt drinks; Yogurt-based beverages.

Class 31

Agricultural and aquacultural crops, horticulture and forestry products; Agricultural grains for planting; Agricultural seeds; Algae for human consumption; Almonds [fruits];Aloe vera, fresh, for food; Aloe vera plants; Apples (Fresh -);Asparagus (Fresh -);Barley; Beans, fresh; Bee pollen (Raw -);Beet, fresh; Berries, fresh; Berries, fresh fruits; Berries (Raw -);Betel nuts, fresh; Cherries (Fresh -);Chestnuts, fresh; Chicory, fresh; Chillies; Citrus fruit; Cocoa beans, raw; Coconut shells; Coconuts; Corn (Unprocessed -);Courgettes (Fresh -);Crop seeds; Cucumbers, fresh; Culinary herbs (Fresh -);Edible flaxseed, unprocessed; Edible linseed, unprocessed; Edible nuts [unprocessed];Edible sesame, unprocessed; Flax [linseed] plant seeds; Flax [linseed] plants; Flax meal [fodder];Fresh adzuki beans; Fresh almonds; Fresh apple mangos; Fresh apples; Fresh apricots; Fresh artichokes; Fresh arugula; Fresh asparagus; Fresh avocados; Fresh balloon flower root (Doraji); Fresh bamboo shoots; Fresh bananas; Fresh basil; Fresh bean sprouts; Fresh beans; Fresh beetroots; Fresh beets; Fresh bell peppers; Fresh berries; Fresh black raspberry (Bokbunja);Fresh blackberries; Fresh blackcurrants; Fresh blood oranges; Fresh blueberries; Fresh bok choy; Fresh boysenberries; Fresh Brazil nuts; Fresh brussel sprouts; Fresh cabbage; Fresh carambolas; Fresh carrots; Fresh cashew apples; Fresh cashew nuts; Fresh champignons; Fresh chanterelles; Fresh cherries; Fresh cherry tomatoes; Fresh chervil; Fresh chestnuts; Fresh chick peas; Fresh chickpeas; Fresh chillies; Fresh chives; Fresh cilantro; Fresh citrus fruit; Fresh citrus fruits; Fresh cloudberrries; Fresh coconuts; Fresh cola nuts; Fresh corn; Fresh cranberries; Fresh cucumbers; Fresh culinary herbs; Fresh currant; Fresh dates; Fresh edible aloe vera; Fresh edible cacti; Fresh edible mushrooms; Fresh eggplants; Fresh fava beans; Fresh fern (Gosari);Fresh fruits; Fresh fruits and vegetables; Fresh fruits, nuts, vegetables and herbs; Fresh funghi; Fresh garden herbs; Fresh garlic; Fresh ginger; Fresh ginkgo nuts; Fresh ginkgo nuts; Fresh ginseng; Fresh goji berries; Fresh golden berries; Fresh

gooseberries; Fresh grape tomatoes; Fresh grapefruits; Fresh grapes; Fresh green split-peas; Fresh guavas; Fresh hazelnuts; Fresh herbs; Fresh horseradish root; Fresh jackfruit; Fresh kale; Fresh khorasan wheatgrass; Fresh kiwi fruit; Fresh leafy Asian vegetables; Fresh leeks; Fresh legumes; Fresh lemons; Fresh lentils; Fresh lettuce; Fresh limes; Fresh mangos; Fresh melons; Fresh mint; Fresh mulberries; Fresh mushrooms; Fresh napa cabbage (Baechu); Fresh nuts; Fresh oats; Fresh okra; Fresh olives; Fresh onions; Fresh oranges; Fresh oregano; Fresh oriental melon (Cham-oe); Fresh papayas; Fresh parsley; Fresh parsnips; Fresh passion fruit; Fresh peaches; Fresh peanuts; Fresh peas; Fresh pecans; Fresh peppers; Fresh perilla leaves (Shiso); Fresh pine mushroom; Fresh pine nuts; Fresh pineapple guavas (feijoa); Fresh pineapples; Fresh pistachio nuts; Fresh plantains; Fresh plants; Fresh plum tomatoes; Fresh plums; Fresh pomegranates; Fresh potatoes; Fresh pulses; Fresh pumpkins; Fresh quince; Fresh radicchio; Fresh rambutans; Fresh raspberries; Fresh redcurrants; Fresh rosemary; Fresh sage; Fresh sapodillas; Fresh sapotes; Fresh scallions; Fresh seaweed; Fresh shallots; Fresh shiitake mushrooms; Fresh soy beans; Fresh soya beans; Fresh Spanish limes; Fresh spinach; Fresh star fruit; Fresh strawberries; Fresh strawberry guavas; Fresh string beans; Fresh sugar-apples; Fresh sweet potatoes; Fresh tangerines; Fresh thyme; Fresh tomatoes; Fresh truffles; Fresh vegetables; Fresh walnuts; Fresh water chestnuts; Fresh wax apples; Fresh waxberries; Fresh wheat; Fresh wheatgrass; Fresh white carrots (arracacha); Fresh wine grapes; Fresh yams; Fresh zucchini; Fruit bushes; Fruit, fresh; Fruit plants; Fruit residue [marc]; Fruit seeds; Garden herbs, fresh; Garden salads; Garlic [fresh]; Garlic, fresh; Grains [cereals]; Grains [seeds]; Grapefruits; Grapes, fresh; Hazelnuts; Hazelnuts, fresh; Herbs, dried, for decoration; Herbs (Fresh -); Herbs, fresh (Garden -); Lemons, fresh; Lentils, fresh; Lettuce, fresh; Lichees, fresh; Melons; Mixed fruits [fresh]; Mushrooms, fresh; Mushrooms, fresh, for food; Natural edible plants [unprocessed]; Natural seeds; Nettles; Nuts [fruits]; Oats; Olives, fresh; Onions; Onions, fresh; Onions, fresh vegetables; Oranges; Oranges, fresh; Organic fresh fruit; Organic fresh herbs; Organic fresh vegetables; Peanuts, fresh; Peanuts, unprocessed; Pears, fresh; Peas, fresh; Plant seeds; Pomegranates; Pomelos, fresh; Potatoes, fresh; Raw apples; Raw apricots; Raw artichokes; Raw asparagus; Raw avocados; Raw beans; Raw beets; Raw blueberries; Raw cabbage; Raw cereals [unprocessed]; Raw cocoa beans; Raw coconuts; Raw corn; Raw dates; Raw fruit; Raw fruits; Raw garlic; Raw ginger; Raw grain; Raw herbs; Raw horseradish root; Raw lemons; Raw mushrooms; Raw nut kernels; Raw nuts; Raw oats; Raw olives; Raw onions; Raw oranges; Raw peaches; Raw peppers;

Raw potatoes; Raw quince; Raw red beans; Raw sugar cane bagasses; Raw timber; Raw tomatoes; Raw vegetables; Raw wheat; Raw zucchini; Rhubarb; Rhubarb, fresh; Rice bran [animal feed]; Rice meal for forage; Rice, unprocessed; Root vegetables [fresh]; Roots for food; Rye; Rye seed; Salad crops; Salad vegetables [fresh]; Seaweed for human or animal consumption; Seeds; Seeds for vegetables; Spinach, fresh; Strawberries [fresh]; Sugar cane; Sunflower seeds; Tomatoes [fresh]; Unprocessed algae for human consumption; Unprocessed apples; Unprocessed apricots; Unprocessed artichokes; Unprocessed asparagus; Unprocessed avocados; Unprocessed barley; Unprocessed beans; Unprocessed beets; Unprocessed blueberries; Unprocessed brown algae (Hijiki seaweed); Unprocessed buckwheat; Unprocessed cabbage; Unprocessed cereal seeds; Unprocessed cereals; Unprocessed coconuts; Unprocessed corn; Unprocessed dates; Unprocessed edible laver; Unprocessed edible seaweeds; Unprocessed flax seeds; Unprocessed foxtail millet; Unprocessed fruits; Unprocessed garlic; Unprocessed ginger; Unprocessed ginseng; Unprocessed grain; Unprocessed grains for eating; Unprocessed herbs; Unprocessed hops; Unprocessed Japanese barnyard millet; Unprocessed kelp (Kombu seaweed); Unprocessed laver; Unprocessed lemons; Unprocessed lychee fruit; Unprocessed mushrooms; Unprocessed nuts; Unprocessed oats; Unprocessed oil seeds; Unprocessed olives; Unprocessed onions; Unprocessed oranges; Unprocessed peaches; Unprocessed peppers; Unprocessed potatoes; Unprocessed proso millet; Unprocessed quince; Unprocessed quinoa; Unprocessed rice; Unprocessed sea lettuce (Aosa seaweed); Unprocessed seaweed (Wakame); Unprocessed seeds for agricultural use; Unprocessed shallots; Unprocessed sorghum; Unprocessed spirulina; Unprocessed sugar beets; Unprocessed sugar crops; Unprocessed sweet corn ears [husked or unhusked]; Unprocessed tea leaves; Unprocessed teff; Unprocessed tomatoes; Unprocessed vegetables; Unprocessed wheat; Unprocessed zucchini; Vegetable seeds; Vegetables, fresh; Watermelon, fresh; Wheat; Wheat bran; Herbs (Fresh -); Herbs, fresh (Garden -); Culinary herbs (Fresh -); Dried herbs for decoration; Fresh culinary herbs; Fresh fruits, nuts, vegetables and herbs; Fresh garden herbs; Fresh herbs; Garden herbs, fresh; Organic fresh herbs; Potted fresh herbs; Raw herbs; Seeds for growing herbs; Unprocessed herbs; Wreaths of dried herbs for decoration.

Class 32

32 Aerated fruit juices; Aerated juices; Aerated mineral waters; Aerated water; Aerated water (Preparations for making -);Aerated water [soda water];Aerated waters; Alcohol free beverages; Alcohol free cider; Aloe vera drinks, non-alcoholic; Aloe vera juices; Apple juice beverages; Apple juice drinks; Barley wine [Beer];Barley wine [beer];Beverages consisting of a blend of fruit and vegetable juices; Beverages consisting principally of fruit juices; Beverages containing vitamins; Beverages (Non-alcoholic -); Bitter lemon; Blackcurrant juice; Bottled drinking water; Bottled water; Brown rice beverages other than milk substitutes; Coconut juice; Coconut water; Coconut water as a beverage; Coconut water as beverage; Concentrated fruit juice; Cranberry juice; Distilled drinking water; Drinking mineral water; Drinking spring water; Drinking water; Drinking water with vitamins; Energy drinks; Energy drinks containing caffeine; Essences for making non-alcoholic drinks, not in the nature of essential oils; Extracts for making non-alcoholic beverages; Flavored waters; Flavoured waters; Frozen fruit drinks; Fruit drinks; Fruit juice; Fruit juice beverages (Non-alcoholic -);Fruit juice drinks; Fruit juices; Fruit smoothies; Fruit squashes; Fruit-based beverages; Ginger beer; Grape juice; Grapefruit juice; Green vegetable juice beverages; Guava juice; Juice drinks; Juice (Fruit -);Juices; Lemon barley water; Mango juice; Melon juice; Mineral water; Mixed fruit juice; Mung bean beverages; Non-alcoholic beers; Non-alcoholic beverages; Non-alcoholic drinks; Nutritionally fortified beverages; Nutritionally fortified water; Orange juice; Pomegranate juice; Red ginseng juice beverages; Root beer; Smoothies; Smoothies containing grains and oats; Smoothies [fruit beverages, fruit predominating];Smoothies [non-alcoholic fruit beverages];Soft drinks flavored with tea; Vegetable smoothies; Watermelon juice.

2. The application was published on 9 November 2018, following which it was opposed under the fast track opposition procedure by The S&L Agency Ltd (the opponent).

3. The opponent bases its case on section 5(2)(b) of the Trade Marks Act 1994 (the Act). It relies upon the following Trade Marks:

Mark details and relevant dates	Goods relied upon
<p>UKTM: 3323126</p> <p>NO GUNK</p>	<p>Class 3</p> <p>Aftershave; Aftershave creams; Aftershave lotions; Aftershave gels; Aftershave balms; Aftershave</p>

Filed: 7 July 2018

Registered: 11 January 2019


moisturising cream; Aftershave preparations; Aftershave emulsions; Aromatics; Aromatics [essential oils]; Aromatics for perfumes; Aromatics for fragrances; Bath and shower foam; Bath and shower gel; Bath and shower preparations; Bath and shower oils [non-medicated]; Cosmetic preparations for bath and shower; Bath oils; Bath oils for cosmetic purposes; Aromatic oils for the bath; Beauty masks; Facial beauty masks; Beauty serums; Beauty serums with anti-ageing properties; Body cream; Body mask cream; Face and body creams; Scented body creams; Body mask powder; Face and body masks; Body oil; Body oil spray; Body and facial oils; Body massage oils; Cedarwood perfumery; Cedarwood (Essential oils of -); Citron [Essential oils of -]; Cleansing foam; Skin cleansing foams; Body cleansing foams; Cleansing gels; Combing oil; Body scrub; Cosmetic body scrubs; Facial scrubs [cosmetic]; Exfoliating scrubs for cosmetic purposes; Hand scrubs; Foot scrubs; Face scrub; Exfoliating body scrub; Cosmetic creams and lotions; Cosmetic creams for firming skin around eyes; Cosmetic hair lotions; Cosmetic hand creams; Cosmetic kits; Cosmetic oils; Cosmetic sun oils; Skin care oils [cosmetic]; Cosmetic preparations; Cosmetic preparations for baths; Cosmetic sunscreen preparations; Cosmetic suntan preparations; Cosmetic hair care preparations; Cosmetic sun-protecting preparations; Cosmetic hair dressing preparations; Cosmetic preparations against sunburn; Sun blocking preparations [cosmetics]; Skin care (Cosmetic preparations for -); Cosmetic preparations for skin renewal; Cosmetic preparations for body care; Cosmetic preparations for the care of mouth and teeth; Cosmetic preparations for the hair and scalp; Make-up preparations for the face and body; Facial peel preparations for cosmetic use; After-sun preparations for cosmetic use; Sun care preparations for cosmetic use; Aloe vera preparations for cosmetic


purposes; Cosmetic products for the shower; Cosmetics; Cotton balls for cosmetic purposes; Day creams; Eau de parfum; Eaux de toilette; Eau de Cologne; Perfume; Perfumery; Perfume oils; Perfumed powder; Solid perfumes; Perfumed soaps; Perfumed toilet waters; Perfumery and fragrances; Perfumery, essential oils; Body deodorants [perfumery]; Body deodorants; Personal deodorants; Deodorants for personal use; Essences for skin care; Essential oils; Exfoliating scrubs for the body; Exfoliating scrubs for the face; Exfoliating scrubs for the feet; Exfoliating scrubs for the hands; Facial cleansers; Facial cleansers [cosmetic]; Hair balm; Hair care masks; Hair care preparations; Hair care preparations, not for medical purposes; Hair conditioners; Conditioners for treating the hair; Hair cosmetics; Hair dressings for men; Hair fixing oil; Hair moisturisers; Hair oil; Oils for hair conditioning; Hair serums; Hairstyling serums; Hair care serums; Hair spray; Hair styling spray; Hand oils (Non-medicated -); Lip balm; Lip conditioners; Lip cosmetics; Moisturising skin creams [cosmetic]; Moustache wax; Natural oils for perfumes; Natural oils for cosmetic purposes; Natural perfumery; Oils for cosmetic purposes; Natural essential oils; Oils for perfumes and scents; Pre-shaving preparations; Shaving preparations; Shaving sticks [preparations]; Preparations for use before shaving; Preparations for use after shaving; Hair removal and shaving preparations; Refill packs for cosmetics dispensers; Refill packs for shampoo dispensers; Refill packs for hand soap dispensers; Refill packs for hair fixer dispensers; Refill packs for shower gel dispensers; Refill packs for body cleansing product dispensers; Refill packs for skin care cream dispensers; Scented oils; Shaving gel; Toiletries; Antiperspirants [toiletries]; Roll-on deodorants [toiletries]; Mousses [toiletries] for use in styling the hair; Skin care oils [non-medicated]; Hand gels; Hand cleansers; Hand cleaning preparations; Hair styling

preparations; Hair styling gel; Hair styling waxes; Styling paste for hair; Styling sprays for the hair; Beard balm; Beard oil; Shampoos; Conditioners for use on the hair; Conditioners in the form of sprays for the scalp; Face masks.

Class 30

Chai tea; Black tea; Chocolate; Cocoa beverages with milk; Chocolate powder; Chocolate-based beverages; Coffee; Cocoa products; Herb teas, other than for medicinal use; Fruit teas; Flavoured coffee; Herbal preparations for making beverages; Sage tea; Vegetal preparations for use as coffee substitutes; Peanut brittle; Nougat; Orange based confectionery; Cereal-based snack food; Cereal-based meal replacement bars; Snack food products consisting of cereal products; Snack foods made from wheat; Snack foods made of whole wheat; Snacks manufactured from muesli; Tortilla chips; Frozen yogurt confections; Frozen dairy confections; Dairy ice cream; Breakfast cereals; Breakfast cereals containing a mixture of fruit and fibre; Breakfast cereals containing fruit; Breakfast cereals containing honey; Breakfast cereals flavoured with honey; Ready-to-eat cereals; Food dressings [sauces]; Food condiment consisting primarily of ketchup and salsa; Herb sauces; Sauces for chicken; Sauces for pizzas; Ready-made sauces; Spicy sauces; Marinades; Marinades containing herbs; Biological honey for human consumption; Honey; Herbal honey; Honey substitutes; Natural honey; Molasses for food; Raw sugar; Edible salt; Herbal flavourings for making beverages; Sauces; Spiced salt; Cereal-based snack bars; Granola-based snack bars; Snack bars containing a mixture of grains, nuts and dried fruit [confectionery]; High-protein cereal bars; Cereal bars; Cereal bars and energy bars; Cereal based food bars; Cereal based energy bars; Ready-to-eat cereal-derived food bars; Biscuits;

	<p>Chocolate biscuits; Orange based pastry; Biscuits for human consumption made from cereals; Biscuits containing fruit; Cereal products in bar form; Granola bars; Rice-based snack food; Bars based on wheat; Oat bars; Muesli bars; Granola-based snack foods; Chocolate-based meal replacement bars; Cereal preparations coated with sugar and honey.</p>
<p>UKTM: 3178758</p>  <p>Filed: 5 August 2016 Registered: 18 November 2016</p>	<p>Class 3</p> <p>Aftershave; Aftershave balm; Aftershave creams; After-shave gel; After-shave lotions; Aftershave moisturising cream; Aromatics [essential oils];Aromatics for fragrances; Aromatics for perfumes; Bath and shower gels, not for medical purposes; Bath oils for cosmetic purposes; Beauty masks; Beauty serums; Body cream; Body lotions; Body mask powder; Body oil; Body oil spray; Cedarwood (Essential oils of -);Cedarwood perfumery; Citron (Essential oils of -);Cleansing foam; Cleansing gels; Combing oil; Cosmetic body scrubs; Cosmetic creams and lotions; Cosmetic creams for firming skin around eyes; Cosmetic hair lotions; Cosmetic hand creams; Cosmetic kits; Cosmetic oils; Cosmetic preparations; Cosmetic preparations for body care; Cosmetic preparations for skin renewal; Cosmetic preparations for the hair and scalp; Cosmetic products for the shower; Cosmetics; Cotton balls for cosmetic purposes; Day creams; Eau de parfum; Eaux de toilette; Essences for skin care; Essential oils; Exfoliating scrubs for cosmetic purposes; Exfoliating scrubs for the body; Exfoliating scrubs for the face; Facial cleansers;Facial cleansers [cosmetic];Hair balm; Hair care masks; Hair care preparations, not for medical purposes; Hair conditioners; Hair cosmetics; Hair dressings for men; Hair fixing oil; Hair moisturisers; Hair oil; Hair serums; Hair spray;Hand oils (non-medicated-);Lip balm; Lip</p>

	<p>conditioners; Lip cosmetics; Moisturising skin creams [cosmetic];Moustache wax; Musk [natural];Musk [perfumery];Natural oils for cosmetic purposes; Natural oils for perfumes; Natural perfumery; Oils for cosmetic purposes; Oils for perfumes and scents; Oils for the body [cosmetics];Perfume; Perfume oils; Perfumed soap; Perfumery, essential oils, cosmetics, hair lotions; Pre-shaving preparations; Refill packs for hair fixer dispensers; Refill packs for shampoo dispensers; Refill packs for skin care cream dispensers; Scented oils; Shaving gel; Skin care oils [non-medicated];Toiletries.</p>
<p>EUTM: 017915777</p>  <p>Filed: 11 June 2018 Registered: 12 October 2018</p>	<p>Goods in classes 3 and 30 which are identical to those in the specification of the first mark relied on, namely 3323136, itemised above.</p>

4. The applicant filed a counterstatement in which it denied the ground raised by the opponent.

5. 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.”

6. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. Neither side made such a request, although the opponent filed evidence with its notice of opposition for the purpose of showing genuine use which is permitted by the Rules.

7. 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 cost; otherwise, written arguments will be taken.

8. Neither party requested to be heard, nor did they file submissions. I make this decision based on careful consideration of the papers before me.

DECISION

9. 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.”

10. The opponent's plain word mark NO GUNK was filed before the contested application, though it was published after the application was filed. In accordance with section 6(2) above, this mark qualifies as an earlier mark. The opponent's other two

marks on which it relies were both applied for and registered before the date on which the contested application was made. None of the earlier marks is subject to proof of use. This is because, at the date of publication of the application, they had not been registered for five years.²

The opposition

11. Section 5(2)(b) of the Act states:

“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.”

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

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

² 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.

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

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

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

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

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

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

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

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

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

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

Comparison of goods

13. When making the comparison, all relevant factors relating to the goods in the specification should be taken into account. In *Canon*, the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

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

14. Guidance on this issue has also come from Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Ltd* (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.

15. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*,³ the General Court (GC) stated that:

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

16. In *Kurt Hesse v OHIM*,⁴ 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 OHIM*,⁵ the GC 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”.

17. The purpose of examining whether there is a complementary relationship between goods is to assess whether the relevant public is liable to believe that responsibility for the goods lies with the same undertaking or with economically connected

³ Case T- 133/05

⁴ Case C-50/15 P

⁵⁵ Case T-325/06

undertakings. As Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amalia Mary Elliot v LRC Holdings Limited* BL O/255/13:

“18. ... 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”.

18. I also bear in mind Mr Alexander’s comments in the same case, where he warned against applying too rigid a test when considering complementarity:

“20. In my judgment, the reference to “legal definition” suggests almost that the guidance in *Boston* is providing an alternative quasi-statutory approach to evaluating similarity, which I do not consider to be warranted. It is undoubtedly right to stress the importance of the fact that customers may think that responsibility for the goods lies with the same undertaking. However, 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. I therefore think that in this respect, the Hearing Officer was taking too rigid an approach to *Boston*”.

19. The opponent submits the following in its statement of grounds:

“The applicant’s goods and services are extremely similar. The applicant’s goods in class 5 relate to medicated cosmetics and personal care products, and our earlier registration in class 3 relates to non-medicated cosmetics and personal care products.

Furthermore, the applicant’s goods in classes 29, 31, and 32 broadly relate to food and drink products, which are very similar to our earlier registered rights in class 30 for a variety of food and drink products.”

20. Before considering the competing goods in this case it is necessary to highlight that the list of goods in the applicant’s specification is considerable and that the

opponent has simply indicated that its own goods are similar to all of the applicant's goods, without further explanation. I find this particularly surprising since the opponent's goods are not in the same classes as those of the applicant. Whilst this does not mean that there is no similarity between them, it does require some analysis of where such similarity may arise.

21. At this point in the decision I do not intend to engage in a good by good comparison of these competing classes but will instead identify some areas where I find that there is likely to be some degree of similarity. I will return to the remaining goods later in the decision if necessary.

Facial cleansers

22. All three of the earlier rights relied upon by the opponent contain the term 'facial cleansers [cosmetic]' in class 3. The applicant's specification in class 5 includes, inter alia, 'antibacterial facial cleansers' in class 5. Whilst there are some differences between these goods, one being cosmetic, whilst the other has a medicinal property, they are all facial cleansers which are likely to be used by the same consumers, are likely to be similar in nature and may be in competition. They may also be displayed in fairly close proximity on a website page or in a store. Consequently, I find these goods to be similar to at least a medium degree.

Herbal teas

23. The opponent's earlier marks UKTM3323126 and EUTM17915777 contain the term 'herbal teas (other than for medicinal use)' in class 30, while the application includes 'herbal tea for medicinal use' in class 5. The nature of these goods is the same, all being in the form of herbal teas which will be drunk by the consumer. They are, to some extent, in competition. In my experience it is not uncommon for herbal tea to be sold by reference to its beneficial properties, and whilst some of the applicant's teas will be sold in particular retail establishments specialising in health and wellbeing, such as health food shops, it is equally likely that some may be sold in, for example, supermarkets, where they are likely to be alongside those sold by the opponent. There is also a degree of complementarity to the extent that the consumer may believe both parties' herbal teas to originate from the same undertaking. I find there to be at least a medium degree of similarity between these goods.

Nut based foods

24. The applicant has applied for 'nut based snack foods' in class 29. The opponent's earlier marks UKTM3323126 and EUTM17915777 contain the term 'peanut brittle' in class 30. The nature of these goods is similar to the extent that both contain nuts as one of the principal ingredients. They are likely to be in competition and there is likely to be an overlap in terms of consumers. They are unlikely to be displayed in close proximity or reach the market through the same trade channels and I find these good to have a low degree of similarity.

Beverages

25. The application contains the term 'beverages, non-alcoholic' in class 32, whilst the opponent's earlier marks UKTM3323126 and EUTM17915777 contain the terms, 'cocoa beverages with milk' and 'chocolate based beverages', in class 30. Whilst these would appear, prima facie, to be identical goods, in accordance with the decision in *Meric*, such a finding would disregard the classes in which these goods are either registered or for which registration is sought. I bear in mind the decision in *Altecnic Ltd's Trade Mark Application*,⁶ in which the court held that it is permissible to take into account the class number specified by the applicant when assessing the meaning of the descriptions of goods/services included in the application.

26. On the same point, I also take account of *Pathway IP Sarl (formerly Regus No. 2 Sarl) v Easygroup Ltd (formerly Easygroup IP Licensing Limited)*,⁷ in which Carr J. considered when it was appropriate to take the class(es) in which the trade mark was registered into account in revocation or invalidation proceedings when deciding whether a description covered the goods/services shown in the evidence. After considering the judgments of the High Court in the *Omega 1* [2010] EWHC 1211 (Ch) and *Omega 2* cases [2012] EWHC 3440 (Ch), the judge made the following provisional judgment:

⁶ [2002] RPC 34 (COA)

⁷ [2018] EWHC 3608 (Ch)

“(i) the class number should only be taken into account where the meaning of the disputed term is not sufficiently clear and precise;

(ii) where the term is sufficiently clear and precise on its face, the fact that the description covers goods/services that may also be (or should have been) registered in other classes is irrelevant to the scope of protection afforded to the term, or to questions of use of the mark in relation to those goods/services;

(iii) Where the term is not sufficiently clear and precise, the class number may be relied on to construe the proper scope of the registration, i.e. to narrow the possible meanings of the registered description to only goods/services falling in the registered class(es).”

27. In *Pathway v Easygroup* this meant that ‘rental of office equipment’ in class 35 had been correctly construed as covering only rental services proper to this class. Therefore, use of the mark in relation to rental of photocopying machines was relevant. However, use of the mark in relation to rental of office furniture was irrelevant because those rental services were not proper to class 35. By contrast, the registered description ‘provision of office facilities’ was sufficiently clear and precise on its face that it was unnecessary to resort to the class number to construe the meaning of the words. Therefore, the registered mark covered the provision of any office facilities, irrespective of whether such services were proper to class 35.

28. I note that the Pathway decision was considering terms in specifications to make an assessment of use shown in evidence, which is slightly different to the situation before me. However, it is analogous to a situation such as this where both parties are, at this stage, entitled to rely on the terms contained within their respective specifications.

29. In this case, bearing in mind the decision above, the non-alcoholic beverages in class 32 cannot include ‘cocoa beverages with milk’ and ‘chocolate based beverages’ which are proper to class 30. The beverages in class 30 may be selected as an alternative to the beverages in class 32 of the application and to that extent may share

users and are likely to be used either for the enjoyment of their own flavours or to satisfy thirst. They are unlikely to reach the market through the same channels and are unlikely to be displayed in close proximity in a shop or on a website. They are not complementary but may be in competition. I find these goods to have a low degree of similarity.

The average consumer and the nature of the purchasing act

30. In accordance with the case law, I must determine who the average consumer is for the services at issue and also identify the manner in which those services will be selected in the course of trade.

31. 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*⁸, Birss J. described the average consumer in these terms:


“60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The word ‘average’ denotes that the person is typical. The term ‘average’ does not denote some form of numerical mean, mode or median.”

32. The goods for which I have found there to be any similarity are normal everyday goods provided to members of the general public. The purchase is likely to be primarily visual, the consumer encountering such goods online, through a catalogue or in a bricks and mortar store. The goods are fairly low cost and fairly frequent purchases. The consumer is likely to pay at least an average degree of attention to the purchase, as they will need to ensure the goods are fit for their particular purpose, for example, a facial cleanser may need to be for a particular skin type and food goods may be checked by the consumer for particular ingredients or nutritional value.

⁸ [2014] EWHC 439 (Ch)

Comparison of marks

33. Given the obvious differences between the three earlier rights relied upon by the opponent, I will consider each of the opponent’s marks in turn:

Opponent	Applicant
NO GUNK	

34. 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 components⁹, 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.

35. The applicant’s mark is the words NO GUNK presented above the words NO JUNK. All of the words are the same size and are presented in a fairly standard typeface. The first ‘NO’ at the start of the mark and the last work ‘JUNK’ are green, the other two words are black. The colour differences will be noticed by the average consumer but it is the words which make the larger contribution to the overall impression of the mark.

36. The opponent’s mark is the words NO GUNK presented in upper case and in plain black typeface with no additional stylisation. The overall impression of the opponent’s mark rests in the whole mark.

37. Visual similarity rests in the fact that both marks include the words ‘NO GUNK’. It is the entirety of the earlier mark and the first two words of the application. The differences between the marks are the additional words ‘NO JUNK’ which have no

⁹ Sabel v Puma AG, para.23

equivalent in the application and also the fact that the first and last words are green in colour. I find these marks to be visually similar to a medium degree.

38. With regard to aural similarity, the colouring of the two words NO and JUNK in the application have no effect on the pronunciation of that mark. The words that make up both the mark applied for and the opponent's earlier right are ordinary English words with which the average consumer will be familiar. The first half of the applicant's mark is identical to the opponent's earlier mark. The application includes the additional words 'NO JUNK', which doubles the length of the mark overall and provides a rhyming element. These marks are aurally similar to a medium degree.

39. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.¹⁰ The assessment must be made from the point of view of the average consumer who cannot be assumed to know the meaning of everything.¹¹

40. Both marks contain the words 'NO GUNK' which will be seen by the average consumer as meaning free from gunk or, in other words, not containing anything unpleasant, sticky or messy. To that extent, the marks share a degree of conceptual similarity. In addition to 'NO GUNK', the applicant's mark includes the words 'NO JUNK' which simply adds an additional element which will be taken to mean that the goods are free from rubbish. The addition of the words NO JUNK in the application do not change the conceptual meaning, which in the case of both marks will be seen as a reference to the fact that the parties' goods are in some way cleaner, healthier or free from additives or chemicals compared to other goods which are available. I find these marks to be conceptually similar to a fairly high degree.

Opponent	Applicant
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¹⁰ 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.

¹¹ See the comments of Anna Carboni, sitting as the Appointed Person in *Chorkee*, *BL O/048/08*, paragraphs 36 and 37.



41. My analysis of the application is the same as that reproduced at paragraph 31 above.

42. The opponent's mark comprises the words 'NO GUNK' in a block typeface. The 'O' is presented in red with a line through it diagonally from top right to bottom left, in the style of a prohibitive traffic sign. The rest of the letters are in a blue/green colour. Below these words, in a smaller font and a different typeface, are the words 'Just Funk!' They are black and not stylised in any significant way. The stylisation of the mark as a whole will be noticed, as will the smaller words 'Just Funk!' but it is the larger words 'NO GUNK' which play the larger role in the overall impression of the mark.


43. Visual similarity rests on the inclusion of the words 'NO GUNK' in each of the marks. Those words are presented differently in the two marks. The application includes the words 'NO JUNK' below those words, whilst the opponent's mark has the additional words 'Just Funk!', presented in a smaller typeface below the words, 'NO GUNK'. They have no equivalent in the application. I find these marks to be visually similar to a medium degree.

44. With regard to aural similarity, the stylisation in both marks will not be pronounced. The words that make up both the mark applied for and the opponent's earlier right are ordinary English words with which the average consumer will be familiar. The first half of the applicant's mark is identical to the first half of the opponent's earlier mark. The application includes the additional words 'NO JUNK', which doubles the length of the mark overall and provides a rhyming element. The opponent's mark includes the additional words 'Just Funk' which though smaller in size will still be pronounced by the average consumer. Both marks are four syllables long, with similar rhythm, though

the earlier right lacks the repetition of the first and third syllables. The marks are aurally similar to a medium degree.

45. Conceptually, both marks contain the words 'NO GUNK' which will be seen by the average consumer as meaning free from gunk or in other words, not containing anything unpleasant, sticky or messy. To that extent, the marks share a degree of conceptual similarity. In addition to 'NO GUNK', the applicant's mark includes the words 'NO JUNK' which adds an additional element which will be taken to mean that the goods are free from rubbish. It enhances, but does not change the conceptual message which is that the goods are in some way cleaner, healthier or free from additives or chemicals.

46. The additional element in the earlier mark is 'Just Funk! Which has a number of meanings but in this case is likely to be seen as referring to the style of music or more broadly as something cool. This additional element clearly adds a different conceptual message which is not present in the application. Overall, I find these marks share a medium degree of conceptual similarity.

Opponent	Applicant
	

47. My analysis of the application is the same as that reproduced at paragraph 31 above.

48. The opponent's mark comprises a round device above the words 'NO GUNK' in a block typeface. The device appears to be a black outline image of a goat wearing a black tie, with a quiff hairstyle and beard. This image is placed within a circle, outlined in the same blue/green colour as the word 'GUNK'. The device has a prominent

position being presented above the word and taking up about half of the overall mark. Turning to the words, the 'O' of 'NO' is presented in red with a line through it diagonally from top right to bottom left, in the style of a prohibitive traffic sign. The rest of the letters are in a blue/green colour. Below these words, in a smaller font and a different typeface, are the words 'Just Funk!' They are black and not stylised in any significant way. The words and the device make a roughly equal contribution to the overall impression of the mark.

49. Visual similarity rests on the inclusion of the words 'NO GUNK' in each of the marks. Those words are presented differently in the two marks. The application includes the words 'NO JUNK' below those words, whilst the opponent's mark has a noticeable goat device and the additional words 'Just Funk!', which have no equivalent in the application. I find these marks to be visually similar to a low degree.

50. With regard to aural similarity, neither the goat device in the early mark nor the stylisation in both marks will be pronounced. The words that make up both the mark applied for and the opponent's earlier right are ordinary English words with which the average consumer will be familiar. The first half of the applicant's mark is identical to the first half of the opponent's earlier mark. The application includes the additional words 'NO JUNK', which doubles the length of the mark overall and provides a rhyming element. The opponent's mark includes the additional words 'Just Funk' which though smaller in size will still be pronounced by the average consumer. Both marks are four syllables long, with similar rhythm. The marks are aurally similar to a medium degree.

51. Conceptually, both marks contain the words 'NO GUNK' which will be seen by the average consumer as meaning free from gunk or in other words, not containing anything unpleasant, sticky or messy. To that extent, the marks share a degree of conceptual similarity. In addition to 'NO GUNK', the applicant's mark includes the words 'NO JUNK' which simply adds an additional element which will be taken to mean that the goods are free from rubbish.

52. The additional elements in the earlier mark are 'Just Funk!' which has a number of meanings but in this case is likely to be seen as referring to the style of music or more broadly as something cool, and the goat device which adds an additional concept to

the mark and would certainly not go unnoticed by the average consumer. I find these marks share a fairly low degree of conceptual similarity.

Distinctive character of the earlier marks

53. The degree of distinctiveness of the earlier marks must be assessed. This is because the more distinctive the earlier mark, based either on inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 24). In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*,¹² the CJEU stated that:

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

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

¹² Case C-342/97

54. I have no evidence of the kind described in paragraph 23 of that decision, so can only make the inherent assessment described in paragraph 22.

55. The judgment of the CJEU in *Formula One Licensing BV v OHIM*¹³ indicates that a registered trade mark must be considered to have at least a minimum degree of distinctive character. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive to a characteristic of the goods/services, to those with high inherent distinctive character, such as invented words which have no allusive qualities (KODAK is the paradigm example). I put the opponent's mark plain word mark 'NO GUNK' at the low end of the scale because, for the goods provided, which are cosmetics in class 3 and food and drink goods in class 30, NO GUNK alludes to goods which are in some way healthier, cleaner or free from chemicals and additives.

56. The second earlier right relied on by the opponent has a degree of stylisation which reinforces the 'NO' part of the mark by including the red, prohibitive sign. It also includes the words 'Just Funk!'. Whilst the 'NO GUNK' element is low in distinctiveness, the additional words and stylisation will not go unnoticed so that, overall, I find this mark to possess a medium degree of distinctiveness.

57. The third earlier right includes a goat device with the words 'NO GUNK' above 'Just Funk!'. The combination of elements, in particular the fairly large distinctive device, means that this mark possesses a higher than average degree of distinctiveness.

Likelihood of confusion

58. 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 they have kept in their mind.¹⁴ I must also keep in mind the average consumer for the services, 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

¹³ Case C-196/11 P

¹⁴ *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V* paragraph 27

greater degree of similarity between the respective services and vice versa.¹⁵ However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. Confusion can be direct (which effectively occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same, but puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related).

59. The types of confusion were explained in *L.A. Sugar Limited v By Back Beat Inc*,¹⁶ by Mr Iain Purvis Q.C., sitting as the Appointed Person:

“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.”

60. With regard to direct confusion, the first of the earlier marks is the words ‘NO GUNK’. The application includes the additional words ‘NO JUNK’ and a degree of colour which serves to pick out the first and last words, which in my view points away from direct confusion. The other two earlier marks include the additional words, ‘Just Funk’ and the third includes the goat device as well. These clear differences, which will be noticed, also point away from a finding of direct confusion. The differences between

¹⁵ Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc, paragraph 17

¹⁶ BL O/375/10

the mark applied for and the earlier marks are such that I do not find that the average consumer would directly mistake the application for any of the three earlier marks relied on by the opponent and vice versa.

61. With regard to indirect confusion, I will consider each of the earlier marks against the application in turn.

62. The first of these is the opponent's 'NO GUNK' mark. The question here is whether the presence of the earlier mark, 'NO GUNK', in its entirety at the start of the mark applied for is sufficient, bearing in mind all of the other competing factors, to lead to a finding of indirect confusion.

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

64. I also bear in mind *Kurt Geiger v A-List Corporate Limited*,¹⁸ in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar. He said:

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

39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark

¹⁷ BL O/547/17

¹⁸ BL O-075-13

alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.”

65. Clearly, in this case the distinctiveness of the earlier mark does rest in an element which is present in the mark applied for. The words ‘NO GUNK’ are the entirety of the earlier mark and are reproduced in the later mark. The marks are visually and aurally similar to a medium degree and are conceptually highly similar. The average consumer is a member of the general public who will pay an, at least, average degree of attention to the purchase. With regard to the goods, there are no identical goods but I have identified some goods, in different classes to each other, which share a medium degree of similarity.

66. After careful consideration, I find that there will not be a likelihood of indirect confusion between these marks. Whilst ‘gunk’ can be considered to mean unpleasant or sticky I find that in the context of the relevant goods which are cosmetic, medicated and food/drink goods, the common element ‘NO GUNK’ in these trade marks will be seen as referring to a lack of, inter alia, additives, chemicals, flavourings or perfumes contained in those goods. In other words, the goods are in some way cleaner or healthier. Consequently, the similarity between the marks, namely the inclusion of the words ‘NO GUNK’, does not give rise to a situation where the common element is so strikingly distinctive that it could only be seen as originating from the opponent. The applied for mark adds the words, ‘NO JUNK’ which in combination with ‘NO GUNK’ creates a rhyming mark with a repeated first and third syllable.

67. These factors along with the colouring of the first and fourth words in the application result in a mark with a look and feel which is visually (and aurally) striking in elements which are not common with the earlier mark. Accordingly, the average consumer will not consider the common element to indicate goods being provided by the same or an economically linked undertaking. As a result, the average consumer will put the commonality down to a simple coincidental use of NO GUNK within the context of two different trade marks and is therefore unlikely to conclude that the common presence of such a term as ‘NO GUNK’, is as a result of the undertakings responsible for the marks being the same or being related.

68. The second mark relied on by the opponent is the 'NO GUNK Just Funk!' mark. Despite the fact that the 'NO GUNK' element plays the larger role in the overall impression of the earlier mark, that element is lower in distinctiveness. The addition of the words, 'Just Funk!', provide a point of difference and, in particular, an additional concept, which is not present in the application. The differences in the marks are not the sorts of differences which would lead the average consumer to believe one was a brand extension of the other. I find that the average consumer will put the commonality down to a simple co-incidental use of NO GUNK within the context of two different trade marks and is therefore unlikely to conclude that the common presence of such a term as 'NO GUNK', is as a result of the undertakings responsible for the marks being the same or being related.

69. With regard to the third earlier right relied upon by the opponent, I remind myself that the question is 'in what does the distinctiveness of the earlier mark rest?'. The shared element 'NO GUNK' is the least distinctive element of the earlier mark. The goat device and the additional words 'Just Funk!' are not present in the application, are distinctive elements, and would not be considered by the average consumer to be the types of variation identified by Mr Purvis in *LA Sugar*, which would point towards a same stable relationship between these undertakings. The average consumer will consider the use of 'NO GUNK' to be coincidental for goods which could be free from additives, chemicals and so on. There is no likelihood of indirect confusion between the application and the third earlier mark relied upon by the opponent.

70. I have found there to be no likelihood of confusion between the opponent's three marks and the application for goods where I have identified some similarity, between goods of different classes. Having reached such a conclusion, I do not intend to carry out an analysis of the remainder of the terms in the application as to do so would not put the opponent in any better position.

CONCLUSION

71. The opposition fails under section 5(2)(b) of the Act.

COSTS

72. The applicant has been successful and is therefore, in principle, entitled to a contribution towards its costs. As the applicant is unrepresented, at the conclusion of the evidence rounds the Tribunal invited it, in the official letter dated 11 April 2019, to indicate whether it wished to make a request for an award of costs, and if so, to complete a pro-forma including a breakdown of its actual costs, including providing accurate estimates of the number of hours spent on a range of given activities relating to the defence of the opposition; it was made clear to the applicant that if the pro-forma was not completed then no costs will be awarded. The applicant did not respond to that invitation. Consequently, I make no order as to costs.

Dated this 13th day of August 2019

Al Skilton

For the Registrar,

The Comptroller-General