

O/107/21

TRADE MARKS ACT 1994

IN THE MATTER OF:
TRADE MARK APPLICATION NO. 3441891
BY JOULES BREWERY LIMITED TO REGISTER



IN CLASS 32

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 419173
BY ONE ASSET LTD

BACKGROUND AND PLEADINGS

1. Joules Brewery Limited ('the applicant') applied to register a series of two marks



and



in the United Kingdom ('UK') on 5 November 2019.

Unless it is necessary to distinguish between the two marks in the series, I will refer to the marks in the singular. It was accepted and published in the Trade Marks Journal on 22 November 2019 in respect of the following goods:

Class 32: *Lager; beer.*

2. On 20 January 2020, One Asset Ltd ('the opponent') opposed the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). This is on the basis of its earlier trade mark listed in the table below¹ and the opposition is directed against all goods in the application. The details of the earlier mark and the goods relied upon are as follows:

| | |
|---------------------------|--|
| Earlier Trade Mark | UK Trade Mark ('UKTM') no. 3325460 for  |
| Goods relied upon | Class 32: <i>Alcohol free beverages.</i> |
| Relevant dates | Filing date: 18 July 2018 Date of publication: 05 October 2018 Date of registration: 15 November 2019 |

3. The opponent argues that the respective goods are identical (or highly similar, in the alternative) and that the marks share distinctive word elements and are highly similar. The opponent also considers that the shared "*monkey-based imagery*" reinforces the conceptual similarity between the marks. The opponent submits

¹For the avoidance of doubt, given the dates of its filing, this mark qualifies as an 'earlier mark' in accordance with section 6 of the Act.

there is a likelihood of confusion (including of association²) and, therefore, requests the contested mark is refused in its entirety and that an award of costs is made in their favour.

4. The applicant filed a counterstatement denying the ground of opposition. In the counterstatement, the applicant refers to the previous history of the mark and they emphasise the difference between the goods (the opponent's covering alcohol free beverages - they specifically refer to it being a CBD infused beverage - versus the applicant's beer and lager) and their trade channels. The applicant also considers that the common element, 'GREEN MONKEY', is represented "*very differently*". On 24 March 2020, the applicant also filed a Form TM21B restricting their specification to read as follows:

Class 32: *Lager; beer; none of the aforesaid being non-alcoholic, alcohol free and/or de-alcoholised and not including shandy or non-alcoholic cider.*

5. The opponent maintained their opposition against the amended specification filed by the applicant. Whilst neither party filed evidence nor requested a hearing in these proceedings, the opponent filed final written submissions instead of a hearing. These will not be summarised but will be referred to as and where appropriate during this decision.
6. Both parties are professionally represented; Marks & Clerk LLP for the opponent and TR Intellectual Property Ltd for the applicant.
7. Although the UK has left the European Union ('EU'), section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

² Which I assume is association in the sense set out in paragraph [13], point K, below.

PRELIMINARY ISSUES

History of the marks

8. In its counterstatement, the applicant states that:

- They have used their mark since as early as 2014 in relation to beer and lager;
- They previously applied to register an identical mark (No. 3065281) on 22 July 2014;
- The opponent knew of their prior application when the opponent filed their mark;
- The opponent would also have been aware that the applicant was using their mark at the time the opponent filed their mark.

9. In response, the opponent, in its written submissions, states:

- That the applicant's previous mark was refused following opposition by a third party;
- That the applicant attempted to oppose the opponent's earlier mark, but was unsuccessful;
- That earlier use is not a valid ground for defence;
- That the unsubstantiated claim that the opponent knew of the earlier use is also not relevant as if they had enforceable earlier rights the applicant would have been able to successfully oppose the earlier mark.

10. I agree with the opponent that the points raised by the applicant have no bearing on this matter. Tribunal Practice Notice 4/2009 makes clear that there is no basis in law for a defence to succeed purely on the basis of the existence of earlier use, or an even earlier mark (which in this case the even earlier mark was refused anyway), the proper course of action being to seek to oppose or invalidate the earlier mark the subject of these proceedings (which was done, but failed).

Similarly, the point about knowledge also has no bearing as the applicant has neither claimed any form of acquiescence, let alone substantiated it.

Earlier mark citation

11. The applicant highlights that during the examination stage of its application, the Examiner raised, but then waived, the opponent's earlier mark as a potential notification which could cause a likelihood of confusion. The opponent also provided documentation from the examination process showing this. However, this is not relevant to my determination as I must consider the matter afresh.

DECISION

Section 5(2)(b)

12. This opposition is based upon section 5(2)(b) of the Act which reads as follows:

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

...

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

13. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) ('OHIM')*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P 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 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

14. In the judgment of the Court of Justice of the European Union ('CJEU') in *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer*, 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”.

15. The relevant factors for assessing similarity were identified by Jacob J. (as he then was) in *British Sugar Plc v James Robertson & Sons Limited (“Treat”)* [1996] RPC 281. At paragraph [296], he identified the following:

“(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.”*

16. With the above factors in mind, the goods for comparison are as follows:

| | |
|--------------------------|--|
| Opponent's goods | Class 32: Alcohol free beverages. |
| Applicant's goods | Class 32: Lager; beer; none of the aforesaid being non-alcoholic, alcohol free and/or de-alcoholised and not including shandy or non-alcoholic cider. |

17. The opponent claims that the goods covered by the amended specification of the applied-for mark remain similar to the goods covered by their earlier mark. They refer to several EU and UK opposition and cancellation decisions to show that at least a medium degree of similarity exists between non-alcoholic beverages and “beer” (of which “lager” is a subset). They adduce attachments of four of these decisions as follows:

- a. Attachment 1: EU Cancellation No. 000015059 GOLDEN HORSE (Appeal No. R1167/2019-4, decision dated 17 December 2019)

- b. Attachment 2: UK Opposition No. OP000411025 CLUB TROPICANA (Appeal to the Appointed Person, Decision No. O-482-19 dated 16 August 2019)
- c. Attachment 3: EU Opposition No B3004796 HELLO FRESH (Appeal No. R 267/2020-4 dated 13 August 2020)
- d. Attachment 4: EU Opposition No. B3074298 FRESH ENERGY (dated 23 July 2020)

Whilst these previous decisions are context-specific and are not binding upon the decision before me, they are nevertheless useful to bear in mind.

18. In its counterstatement the applicant focuses on the distinction between beer and lager, with “*alcohol free beverages*”, particularly alleging the opponent’s product is a CBD infused drink. They further state that the goods are unlikely to be sold through similar trade channels as the “*Applicant’s products are sold through its brewery and its own public houses. The Opponent’s ... likely ... sold on-line or from a pharmacy*” [sic].

Lager; beer; none of the aforesaid being non-alcoholic, alcohol free and/or de-alcoholised and not including shandy or non-alcoholic cider.

19. The applicant’s specification is specific, covering alcoholic lager and beer. Whilst the element ‘CBD’ in the earlier mark points towards the goods sold under it being a beverage containing CBD (cannabidiol), I must make a notional assessment based on the full range of goods for which the mark is registered, one which covers not only typical soft drinks, but also fruit-based drinks (like non-alcoholic fruit-based beer) and other non-alcoholic/de-alcoholised versions of lager, beer and cider. The notional (as opposed to actual) assessment also applies to the trade channels for the goods. It is also important to stress that the earlier mark is not subject to the proof of use provisions contained in section 6A of the act, so the opponent is entitled to rely on all of the goods for which it is registered.

20. Whilst the applicant's limitation "*none of the aforesaid being...*" reduces the overlap with the opponent's "*Alcohol free beverages*" (to the extent that one side's goods are alcoholic, the other's not), both goods are still consumable beverages likely served in receptacles or on tap. Focusing particularly on the comparison between beer and lager and their alcohol free equivalents, the nature and production between the parties' goods differs to the extent that one contains alcohol and the other does not, although part of the production process may be the same and the end product (alcohol aside) will still be similar. There is also overlap in consumption for pleasure and their flavour, though a differentiation where the beverages are consumed specifically for their intoxicating effect (or lack of). Some users (namely those over the legal age for consuming alcohol), producers and distribution channels may also be shared. The beverages may be available to purchase online or in-store and served in pubs, breweries and restaurants etc. Although the beverages will likely be listed on menus and websites and situated in aisles and behind bars based on their alcohol content, they will nevertheless be in reasonably close proximity. There is additionally an element of competition where alcohol free beverages (particularly alcohol free beer and lager) are offered and marketed as an alternative to their alcoholic equivalent.

21. Whilst I recognise that some goods covered by the opponent's specification may carry a low (or even no) degree of similarity to the applicant's "*Lager; beer; none of the aforesaid being non-alcoholic, alcohol free and/or de-alcoholised and not including shandy or non-alcoholic cider*", for the reasons explained above, the applicant's specification covers some goods which are of what I consider to be a medium degree of similarity.

Average consumer and the purchasing act

22. I next consider who the average consumer is for the contested goods and the way in which those goods are purchased. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the

average consumer's level of attention is likely to vary according to the category of goods in question³.

23. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

24. The average consumer of the goods at issue are members of the general public. As the applicant's beverages are alcoholic and consumers ought to be over the legal age for consuming alcohol, there will be a shared consumer where the opponent's consumers are also over this minimum legal age. The goods will be available through several trade channels; including online and physical premises like pubs, restaurants, and retail outlets (such as supermarkets). While the purchase of the contested goods will be a primarily visual experience⁴, I will not ignore the aural component completely as sometimes when ordering a beverage the marks are not always visible. Beverages may vary slightly in price, but they are generally low-cost goods purchased frequently. The average consumer will take some care in their selection as the type of beverage, its flavour, ingredients (including alcohol content) are considerations that will be kept in mind. Overall, I consider that a medium degree of care and consideration will be deployed in the selection of the competing goods. I note the applicant's point that the actual trade channels of the parties differ, however, as stated earlier, I must consider the matter on a notional basis, based on the goods which the respective specifications cover.

³ See *Lloyd Schuhfabrik Meyer*, Case C-342/97.

⁴ See also the General Court at paragraphs [58-59] in *Simonds Farsons Cisk pic v OHIM* Case T-3/04


Comparison of marks

25. It is clear from *Sabel BV v Puma AG*, particularly paragraph [23], that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated 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.”

26. 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.

27. The respective trade marks are shown below:

| Earlier trade mark | Contested trade mark |
|---|--|
|  |  |

28. The opponent submits that the contested mark is highly similar visually to its earlier mark as it “*wholly contains*” the same dominant word elements in a bold typeface (‘GREEN MONKEY’) alongside monkey-based imagery, including presentation in a similar shade of green. The opponent considers their ‘CBD’ element is descriptive of a “*potential additive or ingredient of the goods*” and that, besides this, there are only minimal stylistic differences and monkey imagery used. They further state that the marks are highly phonetically similar and identical or highly similar conceptually since the green monkey aspect evokes a shared concept around a green “*simian or primate creature*”. The opponent argues that the ‘CBD’ element does not set the marks apart conceptually.

29. The applicant does not analyse the marks in detail but submits that the ‘GREEN MONKEY’ elements are represented “*very differently*” and that the ‘CBD’ element references the opponent’s product.

Overall impression

The applicant’s contested mark

30. The contested mark consists of ‘GREEN MONKEY’ in a stylised block uppercase font across two lines. The ‘G’ element forms a graphic like component as it is stylised to a silhouette of a monkey, with its tail curved in a crescent shape. The mark is filed as a series of two, with the only difference being that one version is in black and the other in a dark green. The phrase ‘GREEN MONKEY’ plays a key role in the overall impression, with the graphic G component reinforcing the monkey imagery.

The opponent’s earlier mark

31. The opponent’s mark is a green device mark consisting of a heavily graphic monkey face surrounded by leaves and wording to the side. The wording is in block uppercase font and reads ‘GREEN MONKEY’ in bold and spread across two lines, with the ‘CBD’ element beneath in a narrower stylisation on the third line. Even though the device is larger, I still consider the phrase ‘GREEN MONKEY’ and the

monkey device to play a roughly equal role in the overall impression. I find the 'CBD' element plays a more secondary role given its representation on the third line of the wording and that it is likely to be seen as descriptive.

Visual comparison

32. There is clearly some similarity between the two marks as they both contain the phrase 'GREEN MONKEY' in bold uppercase font and across two lines. Whilst the first mark in the applicant's series is in black and white, registration of a mark in black and white covers use of that mark in any colour⁵, thus, this apparent difference in colour is not a material difference. The marks also coincide insofar as they both use a monkey at their beginning/forefront, although I accept those representations are very different, as the applicant points out. The monkey in the contested mark also creates a difference in how the respective G's of 'GREEN MONKEY' look. Overall, I consider the visual similarity to be between low and medium.

Aural comparison

33. As the figurative elements of both marks are unlikely to be articulated, they are not subject to a phonetic assessment. The shared phrase 'GREEN MONKEY' is phonetically identical and most likely articulated as 'gri-n--mun-kee'. Due to its placement on the third line and that it will likely be seen as descriptive, the 'CBD' will, in most cases, not be articulated. If it were, the earlier mark would be articulated as 'gri-n--mun-kee--see-bee-dee'. Therefore, in the most likely scenario, I consider there is aural identity but, even in the less likely scenario, there is still a high similarity.

Conceptual comparison

34. The average consumer will see the figurative monkey elements and phrase 'GREEN MONKEY' in both marks as evoking a shared concept. That is, a monkey

⁵ *Specsavers International Healthcare Limited & Others v Asda Stores Limited*, Case C-252/12

coloured green. The additional letters 'CBD' may be recognised by some average consumers, as the opponent puts it, a "*common acronym used to describe the hemp derivative, Cannabidiol*", and whilst this potentially creates a conceptual difference, it is a descriptive concept. Given this, I still consider the marks to be highly similar conceptually.

Distinctive character of the earlier mark

35. The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, the greater the likelihood of confusion (see *Sabel*). In *Lloyd Schuhfabrik Meyer & Co. GmbH* 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)."

36. Registered trade marks can possess various degrees of inherent distinctive character, ranging from low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words. The distinctiveness of a mark can be enhanced by virtue of the use made of it. No evidence has been filed, so I only have the inherent characteristics of the mark to consider. The opponent's mark consists of a monkey device and the phrase 'GREEN MONKEY' which appears arbitrary to the goods at issue as it is neither descriptive nor allusive. Nevertheless, I acknowledge the 'CBD' element, as aforementioned, may be understood by some consumers as a reference to cannabidiol, that could be an ingredient of the goods (beverages). Overall, I consider there is a reasonably high (but not the highest) level of inherent distinctiveness; this finding applies to the mark as a whole, and, also, to the common element, the words 'GREEN MONKEY'⁶.

Likelihood of confusion

37. 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. I point particularly to the principles I referred to above in paragraph 13. One of these is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier trade mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be 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 they have retained in their mind.

38. There are two types of possible confusion: direct (where 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

⁶ This point is relevant given that it is the distinctiveness of the common element that really matters, as per Mr Iain Purvis Q.C as the Appointed Person in *Kurt Geiger v A-List Corporate Limited*, BL O-075-13 (particularly paragraphs [38-39])

marks/goods down to the responsible undertakings being the same or related). The distinction between these was explained by Mr Iain Purvis Q.C (sitting as the Appointed Person) in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C.:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.

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

- (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).*
- (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.)*
- (c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”*

39. Earlier in this decision I concluded that:

- The applicant's goods have a medium degree of similarity to the opponent's coverage in the earlier mark;
- The average consumer is a member of the general public paying a medium level of attention selecting the goods in a primarily visual way (albeit I have not ignored the aural impact too);
- The competing trade marks are visually similar to a low to medium degree, but aurally identical or, if CBD is articulated, aurally similar to a high degree;
- There is a high degree of conceptual similarity since both marks evoke a concept around green monkeys; some consumers may see an added secondary concept for the earlier mark (and thus a point of difference with the contested mark) based on cannabidiol, although this is likely to be seen as descriptive;
- The earlier mark is inherently distinctive to a reasonably high degree.

Notwithstanding the principle of imperfect recollection, and taking all of the above factors into account, I consider the differences between the marks (particularly visually, with the differing monkey devices) will be sufficient to enable the average consumer to differentiate between them. I do not consider the marks will be directly confused.

40. In considering whether there is a likelihood of indirect confusion, I bear in mind that the three categories of indirect confusion identified by Mr Purvis QC above are just illustrative – he stated that indirect confusion ‘tends’ to fall in one of them. Nevertheless, even if one recalls the visual differences, I consider that the shared and reasonably highly distinctive ‘GREEN MONKEY’ element on goods (beverages) that are of medium similarity will lead the average consumer to think that the marks come from the same or a related undertaking. The difference in the graphical elements will then, consequently, be put down to some form of brand variation. Although the ‘CBD’ element in the opponent's mark is a point of difference, if understood, it could be descriptive of the goods and viewed as a

Green Monkey brand specific to cannabidiol beverages, for instance. Consequently, I find a likelihood of indirect confusion between the marks.

CONCLUSION

41. The opposition under section 5(2)(b) of the Act has succeeded in full. Subject to any successful appeal against my decision, the application will be refused for the full range of goods applied for.

COSTS

42. The opponent has been successful and is entitled to a contribution towards its costs. I bear in mind that the relevant scale is contained in Tribunal Practice Notice 2/2016. I award costs to the opponent as follows:

| | |
|---|------|
| Official fees: | £100 |
| Preparing a statement and considering the other side's statement: | £200 |
| Preparing final written submissions in lieu of a hearing: | £300 |
| Total: | £600 |

43. I therefore order Joules Brewery Limited to pay One Asset Ltd the sum of £600. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 19th day of February 2021

B Wheeler-Fowler
For the Registrar