

**O/527/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003505991  
BY BREWDOG PLC TO REGISTER THE FOLLOWING TRADE MARK**

**Tiger Strike**

**IN CLASS 33**

**AND**

**IN THE MATTER OF OPPOSITION THERETO  
UNDER NO. 421850 BY JEFFREY JOSHUA LAWRENCE**



<p>3) UK00003140526</p> <p style="text-align: center;"><b>Tiger Spirits</b></p> <p>Filing date: 14 December 2015 Date of entry in register: 25 March 2016</p>	<p>Class 33: <i>Spirits</i></p>
<p>4) UK00003304609</p> <p style="text-align: center;"><b>Tiger Tequila</b></p> <p>Filing date: 18 April 2018 Date of entry in register: 13 July 2018</p>	<p>Class 33: <i>Alcoholic beverages (except beers); Alcoholic cocktails; Spirits; Spirits [beverages]; Spirits and liquors; Distilled spirits.</i></p>
<p>5) UK00003174628</p> <p style="text-align: center;"><b>Tiger Vodka</b></p> <p>Filing date: 14 July 2016 Date of entry in register: 9 December 2016</p>	<p>Class 33: <i>Alcoholic beverages (except beers); Alcoholic cocktails; Beverages (Alcoholic -), except beer; Cocktails; Spirits and liqueurs; Spirits [beverages]; Vodka.</i></p>
<p>6) UK00003452277</p> <p>Series of two:</p> <p style="text-align: center;"><b>Tiger Whisky</b> <b>Tiger Whiskey</b></p> <p>Filing date: 17 December 2019 Date of entry in register: 13 March 2020</p>	<p>Class 33: <i>Whisky; Whiskey [whisky].</i></p>

4. The Opponent claims that the Applicant's mark is visually, aurally and conceptually similar to each of the Opponent's marks, and that the respective goods are identical or similar, leading to a likelihood of confusion.
5. The Applicant filed a defence and counterstatement, denying the grounds.
6. Evidence has been filed by the Opponent only.
7. Written submissions in lieu of a hearing have been filed by both parties.
8. The Opponent is not legally represented<sup>1</sup>; the Applicant is represented by Lawrie IP Limited.

### **Preliminary Issues**

#### 9. Section 6A

Section 6A of the Act provides that where the registration date of the earlier mark is more than 5 years prior to the publication date of the applied-for mark, the opponent may be required to prove use of the earlier mark. In the instant case, Section 6A is not engaged because all of the registration dates of the earlier marks are less than 5 years prior to the application date of the applied-for mark, i.e. 29 June 2020. Consequently, the Opponent is entitled to rely upon its marks in respect of all of the goods for which they are registered.

#### 10. Exhibit AW-15

The Opponent has adduced an online article authored by Eric D. Morton<sup>2</sup> published by 'Clearsky Law Group' dated 29 May 2017, to support its argument that there is a likelihood of association between the Applicant's mark and the Opponent's 'family' of marks. This Tribunal is not bound by commentary from

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<sup>1</sup> The Opponent is represented by Angela Woolford (sales manager of The Shropshire Gin Co Ltd, of which the Opponent is sole director) to the extent that she has filed the pleadings on the Opponent's behalf.

<sup>2</sup> described as 'a former professor of trademark law who was also the supervising attorney at the California Western School of Law Trademark Clinic'.

academics/practitioners (or any legal authorities) based on Intellectual Property practice in the USA and is not obliged to take this material into account.

11. Exhibits AW-17 and AW-18

The Opponent has adduced photographs of: gin menus on which the Opponent's Tiger Gin is listed; and Tiger Gin Products on which the mark is displayed, in support of its argument that there is 'high visual similarity' between the marks. The Tribunal's assessment of the degree, or absence, of visual similarity between the respective marks is based on the marks as registered, not as they in fact appear on the goods. These exhibits are therefore irrelevant and cannot be taken into account for that assessment.

**Opponent's evidence**

12. The Opponent's evidence comes from Miss Angela Woolford, 'business consultant acting as the Appointed Representative' of the Opponent. Miss Woolford's Witness Statement is dated 22 March 2021. There are 40 exhibits, marked AW-1A, B, C etc to AW-18.

13. Exhibit AW-1

This exhibit comprises a page from the Opponent's website, <http://tigergin.co./awards/> accessed 20 February 2020. The following text is shown:



14. There is no information on what awards have been given or by whom, or by whom Tiger Gin is 'recognised as one of the best Gins in the world'. Taken in isolation, these appear to be laudatory statements about the Opponent's goods.

15. Exhibit AW-1A

This exhibit comprises, inter alia, according to Miss Woolford's Witness Statement: 'an email sent to me by the opponent dated 10 July 2020 showing the 44 current awards as at that date. Please note that item 41 on that list is for Tiger Vodka'. I note that the header of the email indicates that the email was sent both from and to [tigergin@icloud.com](mailto:tigergin@icloud.com):

From: Tiger Gin [tigergin@icloud.com](mailto:tigergin@icloud.com) EXHIBIT  
Subject: Fwd: Gin Awards List with and without dates  
Date: 10 Jul 2020 at 15:22:57  
To: Tiger Gin [tigergin@icloud.com](mailto:tigergin@icloud.com)

16. The list indicates that the awards were given between 2016 and 2020, but the precise dates have not been provided. This list has been compiled by, and sent from and to, the Opponent itself. Taken in isolation, without evidence of the awards from the awarding bodies/organisations themselves, it is therefore of little probative value.

17. Pages 3-11 of the exhibit 11 comprise print-outs of web pages from the site [www.monde-selection.com](http://www.monde-selection.com), accessed 21 March 2021. In the 'About us' pages provided, 'Monde Selection' states that it was founded in Brussels; describing itself as 'The International Quality Institute' and claiming to 'bring together more than 80 internationally renowned experts' to evaluate 'the quality of the culinary, health and beauty culture all over the world'.

18. Six of the web pages focus on the Opponent's products i.e. three pages are headed 'Tiger Gin – Grand Gold Quality Award 2019 from Monde Selection'; three pages are headed 'Tiger Vodka - Grand Gold Quality Award 2020 from Monde Selection'. The pages feature a photograph each of the Opponent's 'Tiger Gin' and 'Tiger Vodka' with the respective marks shown prominently beneath the

photographs. It is not possible to ascertain whether the 2020 award for Tiger Vodka was received before or after the filing date of the applied-for mark, i.e. 29 June 2020.

19. Also included in the exhibit is an email dated 7 June 2019, from 'Monde Selection' to the Opponent thanking them 'for attending the Monde Selection's Annual Awards Ceremony'.

20. The remaining pages of the exhibit relate to the above-mentioned 'Annual Awards Ceremony Rome 2019' and indicate that Tiger Gin was the winner of the 'Prize of the Jury 2019' in the category of 'Spirits & Liqueurs'. A picture of the product bearing the Tiger Gin mark is shown. The web pages are in English, indicating that the intended audience includes geographical areas where English is spoken. No information is provided as to how and to whom the results of the awards ceremony are publicised. The fact that the Opponent's product has received an award from an organisation based in Brussels does not, on its own, indicate that its mark enjoys enhanced distinctiveness.

21. Exhibits AW-1B to AW-1J

This exhibit comprises various emails indicating that the Opponent has won awards. It is noted that all are dated after the filing date of the applied-for mark i.e. 29 June 2020:

- Email dated 16 July 2020 from the 'Helsinki International Beverage Competition';
- Email dated 29 July 2020 from Agile Media Ltd – Drinks International;
- Email dated 29 July 2020 from 'Beverage Testing Institute';
- Email dated 4 August 2020 from 'The International Wine & Spirit Competition';
- Email dated 8 August 2020 from the 'SIP Awards International Spirits Competition';
- Email dated 18 August 2020 from 'Wine Country Network';
- Email dated 7 September 2020 apparently confirming that the Opponent has won an award in the '2020 Bartender Spirits Awards';

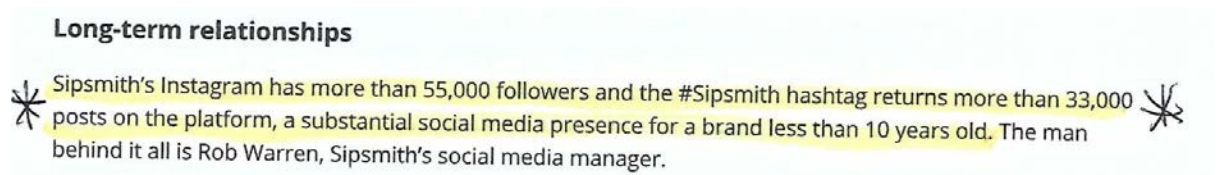
- Email dated 16 November 2020 apparently confirming that the Opponent has won an award from the 'USA Spirits Ratings';
- Email dated 30 November 2020 from 'Europe Trophy'.

22. Exhibits AW-2 to AW-2D

These exhibits have, according to Miss Woolford's Witness Statement, been adduced to demonstrate the Opponent's social media presence in respect of its Tiger Gin mark.

23. Exhibit AW-2

comprises an online article from 'Beveragedaily.com' titled 'How influencer marketing is buoying craft spirits brands', dated 19 October 2018 and 'Last updated on 22 October 2018'. The Opponent has highlighted the following excerpt about the gin brand, Sipsmith:



24. Exhibit AW-2A

This exhibit comprises pages from the website of Sipsmith Gin outlining the creation of the brand in 2009. The Opponent has adduced this, and the previous exhibit, in an effort to demonstrate that Tiger Gin has earned a much greater social media following in a shorter period of time than Sipsmith gin has achieved.

25. Exhibits AW-2B and AW-2C

These exhibits comprise, respectively, screenshots of the Opponent's Instagram and Twitter accounts highlighting the numbers of posts/tweets and followers as at 20 February 2020 and 4 September 2020. On 20 February 2020, the Opponent had published 1,137 posts and had 72.4k followers on its Instagram account; by 4 September 2020, 1,325 posts had been published and there were 83.9k followers. On 20 February 2020, the Opponent had 90.7k followers on Twitter; by 4 September 2020 there were 96k followers. Another screenshot, undated, indicates that the Twitter handle '@tigergin' was first registered in May 2015 and



shows 4,420 tweets and 18.1k followers. Wayback prints showing the numbers of followers for these accounts as at 29 June 2020, i.e. the date of filing of the applied-for mark, would have been more informative. The numbers provided for 4 September 2020 cannot be taken into account. Relevant dates aside, it is not possible to discern from this evidence the number of followers based in the UK.

26. Exhibit AW-2D

This exhibit comprises four printouts from the Facebook page for Tiger Gin. Pages 1 and 2 are annotated in hand-writing, 'Facebook 'About' Extract 2 printed 17/4/17' but are otherwise undated; page 1 indicates that there are 25,000 'Tiger's' (sic) which are, according to Miss Woolford's Witness Statement, 'followers'.

27. Page 3 is dated 20 February 2020 and shows 1,000,174 followers as at that date. Page 4 is dated 4 September 2020 (after the filing date of the applied-for mark) and cannot, therefore, be taken into account, but shows 1,012,058 followers.

28. Exhibit AW-3

This exhibit comprises, according to Miss Woolford's Witness Statement, copies of 4 pages from the magazine GQ, intended to demonstrate that the Opponent has 'been advertising in prestigious magazines such as GQ since launch in March 2016'. Page 1 shows the front cover of the May 2016 edition of the magazine. Pages 2-4 appear to show parts of advertising feature which includes an image of the Opponent's Tiger Gin, amongst other brands of spirits. The Tiger Gin mark is clearly visible. But for the Opponent having annotated the pages 'GQ May 2016', 'GQ May 2016' and 'GQ Advertisement - run in April/May & June 2016 editions of the magazine' (in hand-writing), there is nothing on the page to indicate the dates of the advertisements or where they were published. No figures are provided as to the magazine's UK readership.

29. Exhibit AW-4

This exhibit comprises a link to an article in GQ magazine, dated 15 December 2020, titled 'The 79 best gins for the perfect gin and tonic'. The Opponent's 'Tiger Gin' is at number 5. It is noted that this evidence is dated after the filing date of the applied-for mark.

30. Exhibits AW-5 to AW-8H

These exhibits relate to attendance at events to promote the Opponent's goods.

31. Exhibit AW-5

This exhibit includes email correspondence, dated 11 February 2019, from 'riverstreetevents.co.uk' confirming the Opponent's attendance at the 'BBC Good Food Show Birmingham Winter 2019'. Also included in this exhibit: is an invoice, addressed to 'The Shropshire Gin Company Limited trading as Tiger Gin', dated 2 July 2018, for the sum of £1,295.00 for attendance at 'BBC Good Food Winter: 2018'; and two photographs relating to attendance at these BBC shows.

32. Exhibit AW-6

This exhibit includes emails between 6 April and 2 July 2017 between the Opponent's company and 'Imbibe Live' concerning the company's attendance at 'Imbibe Live 2017', together with an invoice for attendance at the event. Imbibe Live appears to be a trade fair for the drinks industry. This exhibit also includes the results of a Microsoft Bing search for 'Imbibe live' which shows that the Imbibe Live website describes the event as 'the leading UK on-trade<sup>3</sup> event' in the drinks industry.

33. Exhibit AW-7

This exhibit comprises emails concerning the 'Goodwood Racecourse Festival of Food and Racing', dated between 21 and 23 May 2018. The email of 21 May 2018 is an internal email from Miss Woolford to the Opponent relaying details of a phone call regarding the arrangements on the day of the festival. Included in the trail are photographs of a Gin menu, featuring Tiger Gin, and Tiger Gin product

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<sup>3</sup> The on-trade market includes hospitality outlets like bars, restaurants, coffee shops, clubs, hotels etc., as opposed to retail outlets and supermarkets which are 'off-trade'.

display stands. The email of 23 May 2018, with the subject line 'May Racing Goodwood 2018', appears to be both from and to 'enquiries@therarebrandmarket.com' and begins 'Dear Lovely Gin Brands'; it is presumed that the recipients have been blind-copied in to the email. The body of the email indicates that the recipients are attendees at the festival and provides details of the event.

34. Exhibit AW-8

This exhibit comprises emails dated 19-23 May 2016 concerning an order of 12 bottles of Tiger Gin by the 'Gin Festival'. It is not possible to discern from this exhibit the scale of the event i.e. geographical location or level of attendance.

35. Exhibit AW-8A

This exhibit comprises an email, dated 6 December 2016, from Miss Woolford to the Haslemere Herald thanking volunteers who helped at the recent Haslemere Christmas Market, in which Tiger Gin participated, and enquiring about obtaining a copy of the Herald including the write-up of the event.

36. Exhibit AW-8B

This exhibit comprises an email trail dated 26 - 27 March 2017 in which 'Off Licence News' thanks Miss Woolford for supporting a recent 'Think Gin' event, to be chronicled in a 'special 6 page write-up'. It is presumed that Off Licence News is a trade publication dedicated to the drinks trade; and that 'Think Gin' is a trade fair. A copy of the 'special 6 page write-up' to accompany this email would have strengthened the probative value of this evidence.

37. Exhibit AW-8C

This exhibit comprises an email from 'Love Food Live' to Tiger Gin, dated 4 April 2017, regarding 'Hatfield Food Festival 2-4 June'. Miss Woolford states in her Witness Statement that the email confirms Tiger Gin's attendance at the festival. However, in my view, the following wording indicates that the email is an invitation to register to exhibit, rather than a confirmation of attendance:

Dear Exhibitor,

With just over 13 weeks to go until the Hatfield Food Festival, spaces are filling up fast. Don't miss out on your chance to exhibit and download your form from our website today.

38. Exhibit AW-8D

This exhibit comprises three emails. The email of 24 February 2017 is from an adviser from the Department of International Trade to Miss Woolford and advises on the number of gin samples needed for a forthcoming 'Food Expo' event. The location of the event is not mentioned. The second email, dated 26 April 2017, contains no text but includes a photograph, undated, of a product display stand for Tiger Gin at a trade fair. The prices are expressed in Euro which suggests that the event is outside the UK. Neither the event nor its location can be discerned from the photograph. The email of 8 December 2017 is from the Director of 'Natural Health Ltd' to Miss Woolford enquiring about ordering 4 cases of gin. The content of the email indicates that this contact was acquired at a DIT meeting the previous year.

39. Exhibit AW-8E

This exhibit comprises an email, dated 3 July 2017, from 'The Pheasant', a public house in Surrey, thanking Tiger Gin for their participation at a Gin Festival on 1 July 2017. No information is provided on the number of attendees at the event.

40. Exhibit AW-8F

This exhibit relates to the Guildford Cathedral Christmas Gift & Food Fair 17-18 November 2017. It comprises an invoice, dated 20 April 2017, in respect of booking a stand for The Shropshire Gin Company to attend; and an email, dated 2 October 2017, from the organiser attaching a flyer advertising the event. No information is given on the number of estimated or actual attendees.

41. Exhibit AW-8G

This exhibit comprises emails, dated 30 May and 31 July 2019, related to a gin festival on 16 August 2019, at the Rowbarge public house in Berkshire, UK. The email exchanges are between the Rowbarge and Tiger Gin. In the email of 30 May 2019, The Rowbarge state that they estimate 'over 350 people turning up just for the evening'.

#### 42. Exhibit AW-8H

This exhibit comprises an email, dated 5 May 2019, from the Oakley Arms, a public house in Stafford, UK, inviting Tiger Gin to participate in a gin festival on 20 July 2019. It is stated in the email that over 200 attendees are anticipated.

#### 43. Exhibit AW-9

This exhibit comprises a photograph of staff manning a trade stand for Tiger Gin. A header across the top of the photograph reads: 'The OFFICIAL Shrewsbury Food Festival gin'. Although the photograph is of poor quality, the backdrop to the stand shows a poster featuring a bottle of Tiger Gin next to a tiger. The staff are each holding a bottle of the gin. Miss Woolford states that this festival took place in 2016 and 'is widely acclaimed and well attended by both trade professionals and consumers'. No information is provided on the number of attendees.

#### 44. Exhibit AW-10

This exhibit comprises a screenshot from the Twitter account for Tiger Gin, dated 23 October 2018. The post shows a photograph of what appears to be a bottle of Tiger Gin and a bottle of Tiger Vodka next to an 'order of service' for the 'Q Awards 2018'. The following text accompanies the image:



45. Miss Woolford states, in her Witness Statement, that 'Tiger Gin also sponsors the prestigious music 'QMagazine Q awards'.

46. Exhibit AW-11

According to Miss Woolford's Witness Statement, Tiger Gin has sponsored the Telford Tigers Ice Hockey team. This exhibit comprises a photograph of the Telford Tigers, an online article from Shropshire Live and printouts of pages from the National Ice Hockey League website.

47. The photograph is undated and shows what appears to be a large cardboard cut-out of a bottle of Tiger Gin positioned on the left-hand side of the team. The article, dated 12 March 2020, with a photograph of the team, celebrates the Telford Tigers' win against the Peterborough Phantoms. The webpages, accessed 15 March 2021, show that the Telford Tigers are at the top of the national league. It is not evident when the photograph was taken. Miss Woolford states that 'being in a national league means national exposure of the sponsors', however no information has been given on the numbers of spectators attending/watching the matches. This exhibit does not demonstrate how the Opponent's mark has been used in the course of the sponsorship, e.g. whether it is displayed on the players' kit, promotional materials, along the spectator stands, on the screen when matches are televised/live-streamed etc. It is also not clear for how long Tiger Gin has sponsored the team or, indeed, whether it did at the relevant date.

48. Exhibit AW-12

This exhibit comprises a selection of press articles about Tiger Gin. The first of these was published 2 March 2016 in the Shropshire Star. The article anticipates the launch of Tiger Gin and enumerates the trade and retail outlets through which the goods will be available. All are Shropshire-based stockists.

49. The second is an article, by Shropshire Live, which appears to be an online local news broadcaster, dated 29 April 2016 about Tiger Gin. It highlights the International Spirits Challenge (ISC) award, notes that Tiger Gin has 'amassed a following of 20,000 people on social media' and that it is stocked by 'over 100 local bars, restaurants and other outlets'.

50. The third is an article published 22 February 2017, in the Ludlow Food Festival Blog, titled 'Cool Britannia: The Great British Tiger Gin'. An image of a bottle of Tiger Gin is positioned at the head of the article. The article opens with a laudatory paragraph about Tiger Gin and underlines its recognition from the International Spirits Awards as 'being one of the best gins in the world'. The remainder of the article comprises what might be described as a 'quick fire' interview with the Opponent himself on Tiger Gin and the forthcoming Ludlow Food Festival.
51. The fourth article was published 16 June 2017 by Shropshire Live and focuses on a 'new Shrewsbury Gin Trail' to be launched at Shrewsbury's annual food festival 24 June 2017. There is a mention of Tiger Gin: 'Shropshire has its own artisan gin distillers, including the famous Tiger Gin'. A bottle of Tiger Gin is visible in the accompanying photograph.
52. The fifth and sixth articles, dated 20 November 2018 and 25 March 2020, respectively, are reviews of the Opponent's 'Ruby Tiger Gin' published in 'theginkin.com', which appears to be a blog/website dedicated to gin. Each review includes two images of the product, in which the Tiger Gin mark is visible. The reviews are favourable and direct the reader to links to stockists of the product '@masterofmalt' and 'the Gin Kin shop'.
53. These articles demonstrate media coverage at a local or 'niche' level only. This material, on its own, is insufficient to support a finding that the Opponent's mark 'Tiger Gin' enjoys enhanced distinctiveness in the perception of UK consumers (i.e. throughout the UK).
54. Exhibit AW-13
- This exhibit comprises reviews of Tiger Gin. The 'Gin Kin' review of Tiger Gin, dated 4 November 2019, includes three images featuring bottles of Tiger Gin, on which the mark is visible, and speaks favourably of the product. A link to a stockist 'the Drink Shop' is included.

55. The remaining reviews are by the 'Gin Guide', 'ginwithginger.co.uk' and 'myhelpfulehints.co.uk'. The 'Gin Guide' review is undated, although the year 2020 has been referenced in the review. The latter two reviews were accessed 17 March 2021 but are undated. The Tribunal is unable to ascertain whether these reviews were published before or after the filing date of the Applicant's mark i.e. 29 June 2020. They are therefore of little assistance.

56. Exhibit AW-14

This exhibit comprises print-outs from the online video platform 'Vimeo' showing that two videos have been uploaded. The pages were accessed 17 March 2021. The first video is titled 'Tiger Gin – Ludlow Spring Festival' and is shown as having been uploaded '3 years ago', which places it at a date before the filing date of the Applicant's mark. The second video is shown as having been uploaded by 'Mixology Group' on 2 August 2018. The videos appear to have had, respectively, 22 and 870 views as at 17 March 2021. It is not possible to establish from this exhibit how many views there had been up to the 29 June 2020 and what proportion of viewers were UK-based.

57. Exhibit AW-15

This exhibit has been addressed above at paragraph [10].

58. Exhibit AW-16

Comprises product listings from the websites of third-party retailers selling the Opponent's goods. The majority of these are of little assistance because they are undated.

59. It is not possible to ascertain whether the following listings were published before or after the filing date of the applied-for mark, i.e. 29 June 2020:

- **Tanners Wine Merchants (tanners-wines.co.uk), Battlefieldbeers.co.uk, and House of Malt** – each of these retailers has



product listings for Tiger Gin, Tiger Vodka and Ruby Tiger Gin, accessed 17 March 2021;

- **Craftgins.co.uk, Billingtons, Amazon, ilovegin.com, thegininstall.co.uk, Ginsanity, and Virgin Wines** – each of these retailers has a product listing for Tiger Gin;
- **Thegininstall.co.uk** - product listing for Ruby Tiger Gin;
- **Addison Wines** - product listings for Ruby Tiger Gin and Tiger Vodka;
- **Master of Malt** – product listing for Tiger Vodka;
- **Just Miniatures** - Product listing for Tiger Vodka as a 'miniature' i.e. 5cl bottle.

60. Also included in this exhibit is a printout of a page from the 'Microbarbox' website, dated 13 March 2017, featuring cocktail recipes and tips. Although Tiger Gin, amongst other brands, is mentioned, there are no product listings.

61. Exhibits AW-17 and AW-18

These exhibits have been addressed above at paragraph [12].

62. The following Decision has been made after careful consideration of the papers before me.

**Decision**

**Section 5(2)(b) of the Act and related case law**

63. 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,

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

64. The following principles are derived from the decisions of the CJEU<sup>4</sup> 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 C120/04; *Shake 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;

(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;

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<sup>4</sup> Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

(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 and services**

### 65. Similarity of goods and services – Nice Classification

Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the ‘Nice Classification’ means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975.”

66. I must therefore be mindful of the fact that the appearance of respective goods in the same class is not a sufficient condition for similarity between those goods or services.

67. The General Court in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05 held that:

“29. ... 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”.

68. The Tribunal may group goods (or services) together for the purposes of assessment:

*Separode Trade Mark* BL O-399-10 (AP):

“The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision.”

69. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties’ goods and services must be taken into account:

“[23] “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”.

70. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281<sup>5</sup>, identified the following factors for assessing similarity of the respective goods and services:

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;

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<sup>5</sup> *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

(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.

71. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.<sup>6</sup>

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

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

73. The goods to be compared are as follows:

Opponent's marks:	Applied-for mark:
i) UK00003035040 Tiger Gin	<b>Class 33:</b>

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<sup>6</sup> *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.

<p><b>Class 33:</b> Gin</p> <p>ii) UK00003282454 Tiger Rum</p> <p><b>Class 33:</b> Rum; Rum [alcoholic beverage]; Rum-based beverages.</p> <p>iii) UK00003140526 Tiger Spirits</p> <p><b>Class 33:</b> Spirits</p> <p>iv) UK00003304609 Tiger Tequila</p> <p><b>Class 33:</b> Alcoholic beverages (except beers); Alcoholic cocktails; Spirits; Spirits [beverages]; Spirits and liquors; Distilled spirits.</p> <p>v) UK00003174628 Tiger Vodka</p> <p><b>Class 33:</b> Alcoholic beverages (except beers); Alcoholic cocktails; Beverages (Alcoholic -), except beer; Cocktails; Spirits and liqueurs; Spirits [beverages]; Vodka</p> <p>vi) UK00003452277</p> <p>Series of 2 marks: Tiger Whisky Tiger Whiskey</p> <p><b>Class 33:</b> Whisky; Whiskey [whisky].</p>	<p><i>Alcoholic beverages (except beer); spirits; distilled spirits; whisky; blended whisky; liqueurs; gin; vodka; rum.</i></p>
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74. My comparison will be made with the goods in respect of the fifth of the Opponent's marks, Tiger Vodka. Comparison of the Applicant's goods against the goods in respect of which the Opponent's remaining marks are registered will not reveal any greater level of similarity between the respective goods.
75. The Applicant's term *Alcoholic beverages (except beer)* is self-evidently identical with the following of the Opponent's terms: *Alcoholic beverages (except beer)*; *Beverages (Alcoholic -), except beer*. This term covers all of the terms in the Applicant's specification.
76. Consequently, all of the Applicant's goods are identical with the goods in respect of which the Opponent's mark, Tiger Vodka, is registered.

#### **Average consumer and the purchasing act**

77. 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 or services in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.
78. In *Hearst Holdings Inc*<sup>7</sup> Birss J. described the average consumer thus:

“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.”

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<sup>7</sup> *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).



79. I consider that the average consumer of the respective goods will be predominantly the general public. I appreciate that a smaller number of purchases will be made by professional consumers in the course of their business e.g. pubs/bars and restaurants.

80. The respective goods will be purchased either as sealed goods, for consumption at a time of the purchaser's choosing, from physical shops/supermarkets or online stores; or as 'ready-to-drink' beverages from a public house/bar or restaurant. Purchases made from physical shops will, in most cases, be visual in nature; the purchaser self-selecting the goods from shelves. Some purchases will be made aurally by way of requests to retail staff. In a pub or bar setting, the average consumer will order from the bar by way of aural request. There will, in many instances, nevertheless be a visual aspect to the purchasing act to the extent that the beer pumps/taps, spirit optics and bottles containing other beverages on display along or near the bar will be viewed before the purchaser makes their choice.<sup>8</sup> The average consumer may consider factors such as alcohol content and, in the case of wines, vintage and compatibility with certain foods. Some alcoholic goods, for example, champagnes and spirits, are expensive. Consequently, in my view, the level of attention displayed when purchasing the respective goods will be medium.

### Comparison of the marks

<b>Tiger Vodka</b>	<b>Tiger Strike</b>
Opponent's (earlier) mark	Applicant's (contested) mark

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<sup>8</sup> *Rani Refreshments FZCO v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-523/12 and *Simonds Farsons Cisk plc v OHIM*, Case T-3/04, both General Court.

81. Each of the Opponent's six earlier marks comprises the word 'Tiger' followed by the name of an alcoholic drink, (i.e. Gin, Rum, Spirits, Tequila, Vodka and Whisky/Whiskey). I have made a goods comparison in respect of the Opponent's mark, Tiger Vodka. A comparison of the remaining marks will not place the Opponent in any better position. Tiger Vodka will therefore be the focus of my comparison against the applied-for mark.

82. 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.”

83. 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.

84. The Opponent's mark comprises two word components, 'Tiger Vodka', in a plain uniform font with the first letter of each word in upper case. The overall impression of the mark resides in its entirety.

85. The Applicant's mark comprises two word components, 'Tiger Strike', in a plain uniform font with the first letter of each word in upper case. The overall impression of the mark resides in its entirety.

#### 86. Visual Comparison

The first word elements of each mark are visually identical. In the Opponent's mark 'Tiger' is followed by the word 'Vodka'; whereas in the Applicant's mark, 'Tiger' is followed by the longer word 'Strike'.

87. Courts have been willing to find similarity of marks where there is an identical verbal element that is shared by the respective marks, even though the remaining letters are different. The General Court in the case of *Lancome v OHIM*<sup>9</sup> considered the word marks 'ACNO FOCUS' and 'FOCUS' and concluded that there was a certain visual similarity between them by virtue of both marks containing the common element 'FOCUS'.

88. In *El Corte Inglés, SA v OHIM*, the General Court observed that the attention of the consumer is *usually* [my emphasis] directed to the beginning of a word mark<sup>10</sup>, but I am mindful that this is not an absolute rule.

89. Consequently, I find a medium level of visual similarity between the marks.

#### 90. Aural Comparison

The Opponent's mark has three syllables and will be articulated as 'tie-ga-vodka'. The Applicant's mark has two syllables and will be articulated as 'tie-ga-strike'. The first two syllables of the marks are aurally identical.

91. Consequently, I find the level of aural similarity between the marks to be medium.

#### 92. Conceptual comparison

The 'Tiger' element of the Opponent's mark will be understood by the average consumer as denoting the species of large wild cat with a striped coat. 'Vodka' will be understood as referring to the colourless alcoholic spirit often drunk with mixers.

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<sup>9</sup> Case T-466/08 *Lancôme Parfums et Beauté & Cie v OHIM* EU:T:2011:182, para [63].

<sup>10</sup> Cases T-183/02 and T-184/02 at para [83].

93. The 'Tiger' element of the Applicant's mark will be understood as outlined above.

The word 'Strike' has numerous meanings<sup>11</sup> including:

- To withdraw one's labour in protest (e.g. for better pay or working conditions); or
- To hit or attack an object or person forcefully or violently.

94. To my mind, the words 'Tiger Strike' conjure the idea of a tiger pouncing on, or lunging or swiping at, an object or person. Whereas the Opponent's mark involves the generic concept of 'tiger', the Applicant's mark invokes the idea of a tiger in an offensive or combative stance.

95. Consequently, I find a medium degree of conceptual similarity between the respective marks.

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

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

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

23. In making that assessment, account should be taken, in particular,

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<sup>11</sup> <https://dictionary.cambridge.org/dictionary/english/strike>, accessed 6 July 2021 at 12:05.

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).”

97. The Opponent’s mark is descriptive to the extent that the ‘Vodka’ element describes some of the goods in respect of which it is registered. The ‘Tiger’ element, however, neither alludes to nor describes the goods. ‘Tiger’ is a dictionary word, not an invented one. I therefore find that the earlier mark is *inherently* distinctive to a medium degree. In view of my subsequent finding on the likelihood of confusion between the Opponent’s Tiger Vodka and the Applicant’s mark, it is unnecessary for me to examine the position for enhanced distinctiveness of the mark Tiger Gin.

#### 98. Family of marks

The Opponent has argued that the 6 earlier marks upon which it relies constitute a family of marks and that the average consumer would mistakenly assume the Applicant’s mark to be part of that family of marks. I bear in mind the CJEU decision in *Il Ponte Finanziaria SpA v OHIM*<sup>12</sup> in which it was held that:

“64. ... in order for there to be a likelihood that the public may be mistaken as to whether the trade mark applied for belongs to a ‘family’ or ‘series’, the earlier trade marks which are part of that ‘family’ or ‘series’ must be present on the market.

65 Thus, contrary to what the appellant maintains, the Court of First Instance did not require proof of use as such of the earlier trade marks but only of use of a sufficient

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<sup>12</sup> Case C-234/06

number of them as to be capable of constituting a family or series of trade marks and therefore of demonstrating that such a family or series exists for the purposes of the assessment of the likelihood of confusion. “

99. Of the 6 marks relied upon, only two of those marks, i.e. Tiger Gin and Tiger Vodka, appear in the Opponent’s evidence.<sup>13</sup> The evidence in relation to Tiger Vodka is very thin. In my view, the Opponent has not demonstrated use of a sufficient number of marks for the purpose of assessing likelihood of confusion based on the existence of a family of marks. The Opponent did not plead this point in its Statement of Grounds, in any event.

### **Likelihood of confusion**

100. Confusion can be direct or indirect. Mr Iain Purvis Q. C., as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*<sup>14</sup>. Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*<sup>15</sup>, the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that he has in his mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark before him but mistakenly matches it to the imperfect image of the earlier mark in his ‘mind’s eye’. Indirect confusion occurs when the average consumer recognises that the later mark is indeed different from the earlier mark, but, concludes that the later mark is economically linked to the earlier mark by way of being a ‘sub brand’, for instance.

101. Before arriving at my decision, I must make a global assessment taking into account all of the relevant factors, including the principles a) – k) set out above at [64].

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<sup>13</sup> The ‘Ruby Tiger Gin’ mark appears in the evidence, but is not included in the 6 marks relied upon.

<sup>14</sup> Case BL O/375/10 at [16].

<sup>15</sup> *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

102. When considering all relevant factors 'in the round', I must bear in mind that a greater degree of similarity between goods *may* be offset by a lesser degree of similarity between the marks, and vice versa.

103. I have found all of the Applicant's goods to be identical with the Opponent's goods under its mark, Tiger Vodka. I have found the marks to be visually, aurally and conceptually similar to a medium degree.

104. The Opponent's mark is inherently distinctive to a medium degree. The CJEU held in *Sabel*<sup>16</sup> that:

"24. The more distinctive the earlier mark, the greater will be the likelihood of confusion."<sup>17</sup>

105. In my view, the visual, aural and conceptual distinctions between the respective marks are sufficient to rule out *direct* confusion.

106. However, the following factors lead me to conclude that there will be *indirect* confusion between the marks:

- The fact that the goods are identical;
- The goods will be purchased with no more than a medium level of attention;

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<sup>16</sup> *Sabel BV v Puma AG* (C-251/95), [1998] E. T. M. R. 1 (1997) at [24].

<sup>17</sup> This principle was given an important qualification by Mr Iain Purvis Q.C, as the Appointed Person, in the decision of *Kurt Geiger v A-List Corporate Limited* BL O-075-13:

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

- The earlier mark is inherently distinctive to at least a medium degree.
- Consequently, I find that a significant proportion of average consumers will note the differences between the respective marks but conclude that the marks relate to economically-linked undertakings, e.g. 'Tiger Strike' might be perceived as a range or line of drinks under an overarching brand 'Tiger'.

### Final Remarks

107. The Opposition has succeeded and the application is refused.

### COSTS

108. I award the Opponent the sum of **£1,000** as contribution towards its costs, calculated as follows<sup>18</sup>:

Preparation of statement and consideration of the Applicant's statement:	£300
Official fee for 5(2)(b) only:	£100
Preparation of evidence:	£300 <sup>19</sup>
Written Submissions in lieu of hearing:	£300
<b>Total:</b>	<b>£1,000</b>

109. I therefore order BrewDog plc to pay to Jeffrey Joshua Lawrence **the sum of £1,000**. This sum is to be paid within twenty-one days of the expiry of the appeal

<sup>18</sup> Based upon the scale published in Tribunal Practice Notice 2/2016.

<sup>19</sup> The bulk of the evidence is focused on 'Tiger Gin', a mark which does not constitute the strongest comparator for the purposes of the opposition. Although some of the evidence relates to 'Tiger Vodka', it is scant.



period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 12<sup>th</sup> day of July 2021**

**Mx N. R. Morris**

**For the Registrar,**

**the Comptroller-General**