

**O/543/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. UK00003449148**

**BY BLETCHLEY PARK TRUST LIMITED**

**TO REGISTER:**

**HOME OF THE CODEBREAKERS**

**AS A TRADE MARK IN CLASS 32**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**

**UNDER NO. 419832**

**BY ENCODER BREWERY LIMITED**

## BACKGROUND

1. On 4 December 2019 Bletchley Park Trust Limited (“the applicant”) applied to register the trade mark displayed on the cover page of this decision. The applicant’s mark was published for opposition purposes on 13 December 2019. The applicant initially sought registration for goods and services in classes 9, 14, 16, 28, 32, 33, 35, 41 and 43.
2. On 13 March 2020, the applicant’s mark was opposed by Encoder Brewery Limited (“the opponent”). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and was originally brought against the applicant’s goods in classes 32 and 33 only. The opponent originally relied upon the following trade marks:

CODEBREAKER

EUTM no. 16415283<sup>1</sup>

Filing date 27 February 2017; Registration date 13 June 2017

Relying on the following goods:

Class 32: Beers; Malt beer; Ales; Lagers; Stout; Porter; Non-alcoholic beer.  
 (“the opponent’s first mark”)

CODEBREAKER

UK registration no. 3178235

Filing date 3 August 2016; Registration date 4 November 2016

Relying on the following goods:

Class 32: Beers; malt beers; ales; lagers; stouts and porters; non-alcoholic  
 beers, ales, stouts and porters.

(“the opponent’s second mark”)

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<sup>1</sup> Although the UK has left the EU and the EUTM relied upon by the opponent now enjoys protection in the UK as a comparable trade mark, the EUTM remains the relevant right in these proceedings. That is because the application was filed before the end of the Implementation Period and, under the transitional provisions of the Trade Marks (Amendment etc.) (EU Exit) Regulations 2019, I am obliged to decide the opposition on the basis of the law as it stood at the date of application

CODEBREAKER

UK registration no. 3373926

Filing date 3 August 2016; Registration date 4 November 2016

Relying on the following goods:

Class 32: Alcoholic beverages, except beer; low alcoholic drinks; spirits; liqueurs; distilled beverages; gin; whisky; rum; vodka; brandy; cider; wine; alcoholic extracts; fruit extracts; bitters; pre-mixed alcoholic beverages, other than beer-based.

("the opponent's third mark")

3. In response to the opposition, the applicant applied to change the details of its application by amending its class 32 goods and class 35 services while also removing its class 33 goods. Despite the amendments to the applicant's specification, the opponent maintained its opposition against the class 32 goods.
4. On 9 April 2021, the applicant requested that the unopposed goods and services be divided from the application and registered under a separate trade mark. This application was accepted and, on 29 April 2021, the parties were informed by way of official letter that the goods and services in classes 9, 14, 16, 28, 35, 41 and 43 of the application would be divided into a separate trade mark, being UK registration no. 3634458. In the same letter, the parties were informed that the opposition proceedings would continue in relation to application no. 3449148.
5. As a result of the above, the goods for which the applicant now seeks to register under application no. 3449148 (and those which remain opposed by the opponent) are as follows:

Class 32: Mineral and aerated waters.

6. Also, as a result of the amended specification, namely the removal of the goods applied for in class 33, the opponent no longer relies on its third mark. In its amended notice of opposition, the opponent claims that as a result of the

similarities of the marks, and the identity and close similarity of the goods, there exists a likelihood of confusion on the part of the public, including a likelihood of association. The applicant filed a counterstatement denying the claims made.

7. Neither party filed evidence. A hearing took place before me on 22 June 2021, by video conference. The applicant was represented by Mr Benhamin Longstaff of Hogarth Chambers, instructed by Brandsmiths SL Limited, who have represented the applicant in these proceedings since 18 October 2020. The opponent was represented by Mr Jan-Caspar Rebling of STOBBS, who have represented the opponent throughout these proceedings.
  
8. 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 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.

## **DECISION**

### **Section 5(2)(b): legislation and case law**

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

“(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 or association with the earlier trade mark.”

10. Section 5A of the Act states as follows:#

“Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

11. 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.

12. The opponent’s marks qualify as earlier trade marks under the above provisions. As the opponent’s marks had not completed their registration process more than 5 years before the application date of the applicant’s mark, they are not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely on all goods and services for which its marks are registered.

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.

- (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. The competing goods are as follows:

The opponent's goods	The applicant's goods
<p><i>The opponent's first mark:</i></p> <p><u>Class 32</u> Beers; Malt beer; Ales; Lagers; Stout; Porter; Non-alcoholic beer.</p> <p><i>The opponent's second mark:</i></p> <p><u>Class 32</u> Beers; malt beers; ales; lagers; stouts and porters; non-alcoholic beers, ales, stouts and porters.</p>	<p><u>Class 32</u> Mineral and aerated waters.</p>

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

"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".

16. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

- (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.

17. At the hearing, both parties made detailed submissions regarding the goods comparison. I do not intend to reproduce those submissions here but have taken them into account in making the following assessment. Further, both parties referred me to a number of both UK and EU case law. While the content of these decisions is noted, I am not bound by any of the decisions referred to and the goods comparison I must make is a notional assessment based on the terms contained in the parties' specifications.

18. I do not consider that the applicant's goods are identical with any of the goods relied upon by the opponent. However, I do consider there to be a level of similarity between the applicant's goods, being "mineral and aerated waters" and "non-alcoholic beer" that is present in both opponent's marks' specifications, albeit expressed slightly differently in the opponent's second mark ("non-alcoholic beers"). While both goods are drinks, I do not necessarily consider this to result in



an overlap in nature between them. Non-alcoholic beer is an alternative to beer that contains a number of flavourings and additives. Mineral water on the other hand, is water that is taken from a mineral spring, bottled and then sold to consumers. Aerated water simply refers to water that is carbonated. While water may be flavoured, it is my view that on the ordinary reading of the applicant's terms, they do not contain any flavourings/additives. The method of use for these goods will all be the same as they are drinks that will commonly be consumed from bottles or glasses. Given the broad user base for both parties' goods, there can be said to be an overlap in user in that someone who drinks non-alcoholic beer is also likely to drink mineral or aerated water. Having said that, not all users who drink mineral or aerated waters will drink non-alcoholic beer. Therefore, I consider any overlap in user to be a limited one. As for the purpose of these goods, I am of the view that there is an overlap between them. This is because, while mineral or aerated water will commonly be drunk to hydrate the drinker or to quench their thirst, they may also be drunk for their taste. While non-alcoholic beers will commonly be drunk for its taste, it can also be drunk to hydrate the drinker or to quench their thirst. Further, I consider that both parties' goods may be drunk for socialising purposes by a user who is out with friends but not drinking alcohol. For this same reason, I consider there to be an element of competition between these goods. For example, a user who is out with friends at a pub or restaurant but is not drinking alcohol may choose to order a non-alcoholic beer over a bottle of aerated water, or vice versa. I do not consider that an undertaking who produces mineral or aerated water would also produce and sell non-alcoholic beers, neither do I consider that the goods will be located in the same sections of larger retail outlets or under the same categories on retailer's websites meaning that there is no overlap in trade or distribution channels. Finally, I do not consider there to be any complementary relationship between them. On the basis that I have found an overlap in method of use, purpose and a limited overlap in user together with a competitive relationship between them, I consider these goods to be similar to a medium degree.

19. While submissions from the opponent went on to discuss a level of similarity between "mineral and aerated water" in the applicant's specification and "beers" in the opponent's marks' specifications, I do not consider it necessary to consider this

further here. This on the basis that I do not consider that it will put the opponent in a better position than the above comparison in respect of “non-alcoholic beer”.

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

20. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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.”

21. The applicant submits that the average consumer would be a typical consumer of alcoholic and non-alcoholic drinks. The opponent submits that the average consumer is simply a member of the public. The goods at issue in these proceedings are non-alcoholic drinks which are available to purchase by consumers under the age of 18. I, therefore, agree with the opponent's submissions and find that the average consumer is a member of the general public at large and not limited to those over the age of 18 only.

22. The goods at issue are most likely to be sold through a range of retail outlets such as supermarkets, off-licences, specialist suppliers and their online equivalents. The goods will also be sold in restaurants, bars and public houses. In retail outlets, the goods at issue will be displayed on shelves, where they will be viewed and self-selected by the consumer. A similar process will apply to websites, where the consumer will select the goods having viewed an image displayed on a webpage.

In outlets such as restaurants, bars and public houses, the goods are likely to be on display, for example, behind the counter at bars or on drinks menus. While I do not discount there may be an aural component in the selection and ordering of the goods in eating and drinking establishments, this is likely to take place after a visual inspection of the goods or a menu. The selection of the goods at issue will, therefore, be primarily visual, although I do not discount that aural considerations may play a part.

23. In my view, mineral and aerated waters are everyday beverage products that will be purchased regularly. However, non-alcoholic beers are not everyday beverages and are, instead, likely to be purchased on a semi-regular basis. The costs of the goods at issue will be inexpensive. When selecting non-alcoholic beers, the average consumer is likely to consider such things as the origin of the goods, its flavour/ingredients, nutritional information and use by/best before dates. However, when selecting bottled waters, the average consumer is likely to have lesser considerations and will consider whether they are selecting still or sparkling water and may, in certain circumstances, consider the source of the water the goods. The average consumer is, for the most part, likely to pay an average degree of attention when selecting the goods. However, I am of the view that in some circumstances, such as when an average consumer is selecting a bottle of water at the checkout of a supermarket for example, the degree of attention may be lower than average.

### **Distinctive character of the earlier marks**

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in

Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-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).”

25. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use made of it.

26. The opponent has not pleaded that its marks have acquired enhanced distinctiveness, nor has it filed any evidence to that effect. Therefore, I only have the inherent position to consider. The opponent’s marks are identical and are word only marks consisting solely of the word, ‘CODEBREAKER’. The opponent submits that this would likely be understood by the average consumer to mean ‘espionage’, mystery and problem solving. The opponent also submits that it is an extremely unusual word that, in the context of the goods for which it is registered, is original and creative and, as a result, is distinctive to possibly a high (but not the highest) degree. Firstly, I am not convinced that the average consumer would take these specific meanings from the word ‘CODEBREAKER’. Instead, I consider that it will simply be seen as a reference to someone or something that cracks codes. Secondly, while ‘CODEBREAKER’ is not descriptive or allusive of the goods for which it is registered, I do not consider it to be an extremely unusual word. Instead, I am of the view that, from a trade mark sense, it is not particularly remarkable.

Overall, I consider that the opponent's marks enjoy a medium degree of inherent distinctive character.

### Comparison of marks

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

28. 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.”

29. 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.

30. The respective trade marks are shown below:

The opponent's marks	The applicant's mark
CODEBREAKER (the opponent's first mark)	HOME OF THE CODEBREAKERS
CODEBREAKER (the opponent's second mark)	

31. I have submissions from both parties regarding the comparison of the marks. While I do not propose to reproduce these submissions here, I will, if necessary, refer to them below.

### Overall Impression

32. The applicant's mark is a word only mark made up of the words 'HOME OF THE CODEBREAKERS'. I am of the view that 'HOME OF THE' are words that qualify the word 'CODEBREAKERS', being the subject of the phrase. I do not consider that they will be overlooked entirely but I do find that they will play a lesser role in the overall impression of the mark, which will be dominated by the word 'CODEBREAKERS', which forms the distinctive element of the mark. Turning to the opponent's marks, I have set out above that they are identical and are made up of the word 'CODEBREAKER'. This is the only element of the marks that contribute to their overall impressions.

### Visual Comparison

33. Both marks contain the word 'CODEBREAKER', although I note that the applicant's mark refers to it in the plural, being 'CODEBREAKERS'. The remaining elements that are present in the applicant's mark, being 'HOME OF THE' are absent from the opponent's marks. The differences sit at the front of the applicant's mark, being the part that average consumers tend to focus.<sup>2</sup> While the additional elements constitute a visual difference, I am of the view that this will be limited by the fact that they play a lesser role in the overall impression of the applicant's mark. Taking all of this into account, I consider that the marks are similar to between a medium and high degree.

### Aural Comparison

34. The opponent submits that as a result of the average consumer's tendency to shorten long trade marks, the words 'HOME OF THE' will not be pronounced. I do

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<sup>2</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

not agree that this will be the case for every average consumer on the basis that 'HOME OF THE' are not descriptive words (as was the case in the proceedings referred to me by the opponent, being *Harrys Pubbar and Harry's New York Bar v OHIM*, Case T-711/13). However, given the nature of the applicant's goods, being goods that may be ordered verbally at a restaurant or a bar, I find that some average consumers will omit the words 'HOME OF THE' but that some will not.

35. For the average consumers who will pronounce 'HOME OF THE', I find that both parties' marks will be pronounced in the ordinary way. The entire aural element of the opponent's marks is pronounced within the applicant's mark. While the aural identity falls at the end of the applicant's mark, it is, in my view, a significant point of similarity given its dominance in the marks. Further, while I appreciate that the applicant's mark is longer than the opponent's, it is not considerably so. Overall, I consider that the marks are aurally similar to between a medium and high degree.

36. For those average consumers who will not pronounce 'HOME OF THE', I consider the marks to be aurally similar to a very high degree. This is on the basis that the only difference between them is the letter 'S'.

#### Conceptual Comparison

37. I have set out above that 'CODEBREAKER' will be seen as someone or something that cracks codes. I make the same finding in respect of the applicant's mark, however, note that it will be seen as a reference to at least two people or things that crack codes. The addition of 'HOME OF THE' in the applicant's mark will be considered, by the average consumer, to be a reference to the origin of the 'CODEBREAKERS' in that it is either where they live or where they were invented. From a trade mark point of view, the addition of 'HOME OF THE' carries a limited conceptual impact as it merely refers to the origin of the 'CODEBREAKERS'. Having said that, there is still a point of conceptual difference between the marks, although not a very significant one. Overall, I consider the marks to be conceptually similar to a high degree.

## **Likelihood of confusion**

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

39. I have found that the applicant's goods are similar to a medium degree with the opponent's goods. I have found that the average consumer for the goods at issue are members of the general public at large. I have found that the visual component will dominate the selection process of the goods, however, I do not discount the aural component. I have concluded that the average consumer will either pay a below average or an average degree of attention, depending on the goods selected. I have found that the opponent's marks enjoy a medium degree of inherent distinctive character and are visually similar to between a medium and high degree, aurally similar to either between a medium and high degree or a very high degree (depending on whether 'HOME OF THE' is pronounced or not) and conceptually similar to a high degree with the applicant's mark.

40. I have found that the word 'CODEBREAKER'/'CODEBREAKERS' plays a greater role in both parties' marks. I consider that the reference to CODEBREAKER in the singular in the opponent's marks and in the plural in the applicant's mark will be overlooked. Taking all of the above factors into account together with the principle



of imperfect recollection, I consider that the average consumer is likely to mistake the applicant's mark and the opponent's marks for one another. This is particularly the case where, in the event that the goods are requested orally, it is likely that the average consumer will order a bottle or glass of 'CODEBREAKER(S)', which would prompt the response as to whether the consumer wanted a bottle or glass of non-alcoholic beer or mineral/aerated water, This is likely to give rise to confusion on the part of the consumer. Consequently, I consider that there is a likelihood of direct confusion between the marks on goods that are similar to a medium degree, even taking into account instances where the average consumer pays an average degree of attention. However, if I am wrong on my finding of direct confusion, I will proceed to consider indirect confusion.

41. Indirect confusion involves recognition by the average consumer of the differences between the marks. In the present case, even if the differences between the marks are noticed, I have found the word CODEBREAKER/CODEBREAKERS to be the dominant and distinctive element of the parties' marks. I am of the view that the differences between the marks will be seen by the average consumer as indicative of alternative marks from the same or economically linked undertakings.<sup>3</sup> When confronted by the marks, it is likely that the average consumer will consider the CODEBREAKER/CODEBREAKERS element to be the reference to the undertaking that provides the goods, with the differences being indicative of a re-branding or alternative mark. For example, I consider it entirely plausible that the average consumer may consider 'CODEBREAKER' to be an updated and shortened re-branding of 'HOME OF THE CODEBREAKERS' branding. Further, I am of the view that the additional elements will be seen as non-distinctive additions that will be seen as a reference to the origin of the CODEBREAKERS brand, being its 'HOME', being the physical location of where goods sold under that branding are produced, for example. Consequently, I consider that there is a likelihood of indirect confusion in respect of those goods that I have found to be similar to a medium degree, even taking into account instances where the average consumer pays an average degree of attention. I also make this finding in respect of

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<sup>3</sup> Paragraphs 16 & 17 of *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10

circumstances where the average consumer pays a less than average degree of attention.

## CONCLUSION

42. The opposition succeeds in its entirety and the application is refused.

## COSTS

43. As the opponent has been successful, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In addition, the opponent requested a contribution of its costs in relation to the joint hearing in these proceedings that took place before me on 21 January 2021. I agree that the opponent should be entitled to a contribution of its costs in respect of that hearing on the basis that (1) the request of the applicant that resulted in that hearing was denied and (2) the applicant was late to that hearing, resulting in further unnecessary costs being incurred by the opponent. I consider it appropriate to award an additional £200 in respect of the hearing on 21 January 2021.

44. In the circumstances, I award the opponent the sum of **£1,400** as a contribution towards its costs. The sum is calculated as follows:

Preparing a statement and consider the applicant's counterstatement:	£300.00
Preparing for and attending a joint hearing:	£200.00
Preparing for and attending a hearing:	£800.00
Official fees:	£100.00
<b>Total:</b>	<b>£1,400</b>

45. I therefore order Bletchley Park Trust Limited to pay Encoder Brewery Limited the sum of £1,400. This sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 20<sup>th</sup> day of July 2021**

**A COOPER**

**For the Registrar**