

o/812/21

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK3500808

BY BRENDAN BENNETT

TO REGISTER THE TRADE MARKS:

TWO DAYS

two days

IN CLASS 33

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 422173

BY BETTER BEVERAGE COMPANY LTD

Background and pleadings

1. On 15 June 2020, Brendan Bennett (“the applicant”) applied to register the trade marks shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 10 July 2020. The applicant seeks registration for the following goods:

Class 33: Pre-mixed alcoholic beverages, other than beer-based; Prepared alcoholic cocktails.

2. The application was opposed by Better Beverage Company Ltd (“the opponent”) on 8 October 2020. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies on UK registration 3482033 and the following trade marks:

DAYS

Days

Filing date: 16 April 2020

Registration date: 10 August 2020

Relying upon all of the goods for which the earlier mark is registered, namely:

Class 32: Beer; Beer and brewery products; Beer-based beverages; Beers; Alcohol-free beers.

3. The opponent claims that there is a likelihood of confusion because its marks are highly similar to the applicant’s marks and claims the shared element ‘DAYS’ means that the applicant’s marks might be considered to be a sub-brand. The opponent is opposing all goods for which the applicant seeks protection. It states that the goods applied for by the applicant are highly similar to and conflict directly with the opponent’s goods. It states the goods would be viewed in the same shops and retail channels. They also state that the marks are phonetically and conceptually similar.

4. The applicant filed a counterstatement denying the similarity of the marks. It states that its marks contain additional elements that distinguish it from the opponent’s marks. It claims that the utilisation of the common word ‘DAYS’ is the only feature

shared in common and that this alone is not sufficient to create a likelihood of confusion. It states that there are significant visual, phonetic and conceptual differences between the marks which outweigh the common feature.

5. The applicant claims that visually and phonetically the word 'TWO' is entirely missing from the opponent's marks and this is of particular significance in comparing the elements which are particularly visible and easy to detect.

6. The applicant also claims that conceptually, the marks differ as their marks 'TWO DAYS/two days' hang together to refer specifically to a period of 48 hours. It claims that the opponent's marks are the plural of 'day' and refer to an indeterminable period and could be viewed as any number of days. It submits that the registration of 'DAYS/Days' does not entitle the opponent to prevent all uses of a simple word such as theirs.

7. The applicant refers to case law to submit that their prefix of 'TWO' cannot be discounted when comparing the marks. It claims that 'TWO' provides objective and specific meaning to 'DAYS' and cannot be said to be negligible within the overall impression.

8. With regard to the goods which are in contention, the applicant puts forward decision O-555-14 of the UK IPO Tribunal, which involved gin against beer and ale products, in support of its claims that the goods at issue in this matter are not similar. The applicant states that the goods are not complementary. It is claimed that the goods are capable of meeting identical needs but that consideration is paid by the consumer in selecting their drinks. The applicant goes on to say that this selection can be based on a type of alcohol, flavours, ingredients amongst others and that there is no risk that a consumer would mistakenly select a beer when searching for alcoholic cocktails or pre-mixed spirits based drinks. They claim the opposing goods would not be stocked beside each other.

9. The applicant is represented by MBM Commercial LLP and the opponent is represented by S & P Legal.

10. Both parties provided evidence in support of their claims which I do not propose to detail here however, I will refer to it as necessary throughout the decision. Neither

party requested a hearing and the opponent submitted submissions in lieu. This decision is therefore taken following careful perusal of the papers.

11. 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)

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

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

(a)...

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

13. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark, international trade mark (UK) or Community trade mark or international trade mark (EC) which has a date of IR for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and

which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b) subject to its being so registered.”

14. The trade marks upon which the opponent relies qualify as earlier trade marks because they were applied for at an earlier date than the holder’s marks pursuant to section 6 of the Act. The opponent’s marks are not subject to the proof of use requirements pursuant to section 6A of the Act. This is because they had not been registered for more than 5 years at the filing date of the application in issue. The opponent can, therefore, rely upon all of the goods which it has identified.

Section 5(2)(b) case law

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

(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 and Services

16. 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."

17. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 of its judgment that:

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

18. 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.

19. In *Gérard Meric v Office for Harmonisation in the Internal Market* ('Meric'), Case T-133/05, the General Court ("the GC") stated that:

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

20. For the purposes of considering the issue of similarity of goods and services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

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

"...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers

may think that the responsibility for those goods lies with the same undertaking”.

22. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings.

23. The competing goods are as follows:

Opponent Goods	Applicant Goods
Class 32: Beer; Beer and brewery products; Beer-based beverages; Beers; Alcohol-free beers.	Class 33: Pre-mixed alcoholic beverages, other than beer-based; Prepared alcoholic cocktails.

24. The majority of the evidence provided by both parties makes specific references to the actual goods currently being sold/launched by both parties. As mentioned above in this decision, the opponent’s marks are not subject to the proof of use requirements because they had not been registered for more than 5 years at the filing date of the application in issue. The opponent can, therefore, rely upon all of the goods which it has identified, and my comparison must be undertaken on the goods as registered/applied for.

25. The applicant’s goods ‘Pre-mixed alcoholic beverages, other than beer-based; Prepared alcoholic cocktails’ will cover a range of beverages including pre-mixed cocktails, gin and tonics and rum and coke amongst others. The opponent’s goods are ‘beer; beer and brewery products; beer-based beverages; beers; alcohol free beers’ and I would consider that these cover goods such as ales and lagers as well as beer which has been pre-mixed with other things like shandy, radlers and tequila flavoured

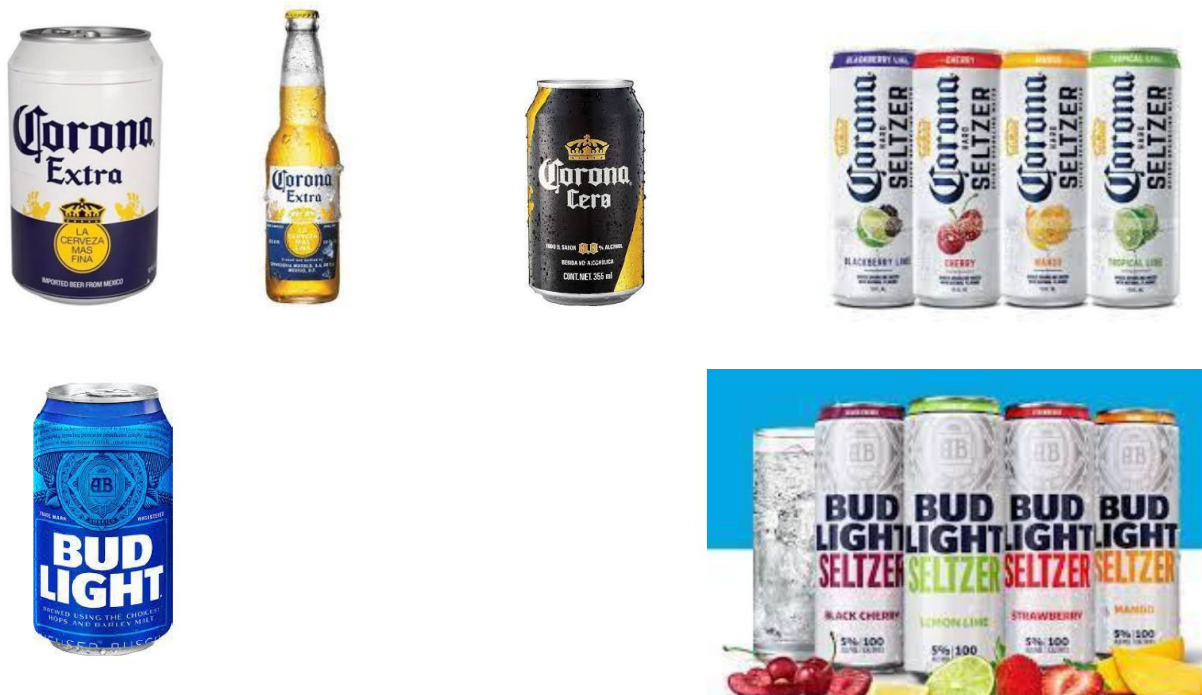
beers. I note that these goods will differ in what they are made from and in their production processes. The consumer will likely be the same, being members of the public over the age of 18 and the purpose will also be shared; that of quenching thirst, enjoying with a meal or by itself for the enjoyment of the taste of alcohol. Each of the goods at issue could be sold in cans or bottles but I do not discount that beer can be sold on tap/pump also. I believe that these goods will be sold in the same areas in supermarkets/shops and this view is reinforced by the pictures shown below, provided in Exhibit MG5 from the opponent's witness statement.



26. I note that the applicant has stated within its own witness statement that product types are separated by category and has provided pictures from a different supermarket showing differentiation between spirits and beer-based products being displayed in different aisles. The applicant does accept that the goods may be grouped more closely together in smaller convenience stores, and, for the purposes of this comparison, I must consider all possible purchase methods. I consider that most stores will group alcoholic products in the same aisle or in a number of aisles that are side by side. The opponent has provided clear examples of stores that stock the competing goods very closely together.

27. The goods could also be displayed near to each other in bars and restaurants. I also note, again from Exhibit MG5, the opponent has shown that there are a number

of brands/undertakings which sell differing types of alcoholic beverages, for example Corona and Bud Light:



This demonstrates that it is possible for brand manufacturers not to simply focus on one type of alcoholic product, but to develop of range of products under a primary brand name.

28. I note the applicant has referred to the previous UK IPO decision O/555/14 and the finding of low similarity between beer versus wine and gin. I am not bound by previous decisions of the Tribunal but they can indeed be used for guidance. I consider in this instance the goods in contention are 'Pre-mixed alcoholic beverages, other than beer-based; Prepared alcoholic cocktails' rather than wine and gin. The O/555/14 decision is now around 7 years old and I consider that times and markets have changed. I have also considered the UK IPO decision O/475/21 which compared class 32 goods against class 33 goods, as we have here in this case, and found there to be between a low and high degree of similarity.

29. All of the above goods are beverages which will have similar appearances and consistency. I also consider that pre-mixed alcoholic beverages will often contain similar alcohol percentages to that of beer and beer-based products. I also believe there to be some competition between the competing goods as consumers may enter a bar or supermarket undecided on what drink they will choose and will opt for one

over the other in order to achieve the same purpose. Considering the similarities in nature, purpose, consumers and competition, I find the goods similar to a medium degree.

Average consumer and the purchasing act

30. 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.

31. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [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.”

32. I think that the relevant consumer of both the applicant's and the opponent's alcoholic goods will be primarily the general public over the age of 18. There may also be a portion of professional consumers purchasing the goods on behalf of a business, or for the purpose of running a business themselves.

33. It is my view that a significant portion of members of the general public over the age of 18 will purchase the goods fairly frequently, either in a retail or hospitality environment. The professional public will likely purchase these in a retail or wholesale

environment, or via distributors. The price point of beers and pre-mixed alcoholic drinks is usually relatively low.

34. The method of purchase will likely be in a retail setting and the consumer – both public and professional- will largely rely on a visual inspection of the goods. Where the goods are purchased in a hospitality setting, this will be predominantly visual with marks most likely being displayed on and chosen from a drinks menu or displayed on the bottles or boards visible behind the bar. However, as verbal orders will often be placed, aural considerations cannot be completely discounted. Professional consumers may also place aural orders however, they are likely to have viewed the products prior to this.

35. When purchasing alcoholic beverages, the public may consider matters such as quality, origin and taste but the purchase will still be undertaken with no more than a medium level of care.

36. For professional consumers, I find the level of attention paid will be enhanced due to the increased responsibility of purchasing these goods on behalf of a business, and the increased liability that will come with serving or selling the goods to consumers. It is my view that the professional consumer will pay at least a medium level of attention in respect of the goods.

Comparison of the marks

37. 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 Court of Justice of the European Union 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.”

38. 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.

39. The respective trade marks are shown below:

Earlier marks	Contested mark
<p>DAYS</p> <p>Days</p>	<p>TWO DAYS</p> <p>Two days</p>

40. The earlier marks consist solely of the words ‘DAYS’ and the overall impression therefore lies in that word.

41. The contested marks consist of the words ‘TWO DAYS’. In my opinion these two words hang together as a unitary term. Each word is about the same length and can be said to be co-dominant. In terms of distinctiveness, whilst a unitary term, the first word could be seen by the average consumer to represent a number/quantity of units whilst the second word will be seen as more distinctive as it has no obvious link to the goods in question.

42. The applicant has claimed that the opponent uses its earlier marks in a variety of ways and colours, however, for the purposes of this matter I need only consider the marks at issue as they have been filed and registered. The opponent's earlier marks relied upon are plain word marks, and it is those marks that I must compare with the contested marks

43. The earlier marks are comprised of one word containing four letters. The contested marks are two words, with three and four letters consecutively. The entirety of the earlier marks is encompassed within the contested marks identically. The contested marks differ visually in the additional word 'TWO' which forms the beginning of those marks. I therefore consider the marks to be visually similar to no more than a medium degree.

44. The opponent marks comprise of a single word from the English language which will be given its ordinary dictionary pronunciation. The same can be said for the two words that make up the contested marks. Given the earlier marks are once again wholly encompassed within the contested marks but will be spoken second, I find the marks to be verbally similar to no more than a medium degree.

45. Conceptually, the earlier marks 'DAYS' will convey the concept of multiple 24 hour periods of time.¹ There is however, no indication as to how many days the marks refer to. The word 'DAYS' could also be seen as a surname albeit not a common one. The contested mark conveys a message that relates to two 24 hour periods (or 'days'). I therefore find the marks to be conceptually similar to a high degree.

Distinctive character of the earlier marks

46. 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

¹ <https://www.collinsdictionary.com/dictionary/english/day>

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).”

47. The opponent did not file any evidence for and has made no claim of an enhanced level of distinctiveness in its earlier marks. I must therefore consider the position based on the inherent distinctiveness of the marks.

48. The opponent claims that their earlier marks are inherently distinctive to a high degree as ‘days’ is a unique and original word with no specific meaning in relation to the goods for which it is registered.

49. The opponent’s marks consist of the word ‘days’ which can be said to be an ordinary dictionary term that will be readily understood. There is a chance that a proportion of the average consumer may consider ‘Days’ to be a surname, albeit not a common surname e.g. Smith. The word does not directly describe the goods being provided and does not appear allusive or suggestive. Therefore, I find that the opponent’s earlier marks can be said to be inherently distinctive to a higher than average degree.

Likelihood of Confusion

50. There are two types of confusion that I must consider. Firstly, direct confusion i.e. where one mark is mistaken for the other. The second is indirect confusion which is where the consumer appreciates that the marks are different, but the similarities between the marks lead the consumer to believe that the respective goods or services originate from the same or a related source.

51. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“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.

52. I have found the earlier marks to be visually and aurally similar to the applicant’s marks to no more than a medium degree and conceptually similar to a high degree. I found the inherent distinctive character of the earlier marks to be higher than average. I found the attention paid by the average consumer, being a member of the general public over the age of 18 to be no more than medium but, for a professional consumer, at least a medium degree of attention would be paid during the purchase process. I also found the goods to be similar to at least a medium degree.

53. Given the differences between the marks: the additional word in the contested marks that is not reflected in the earlier marks and which forms the beginning of those

marks, I find that there will be no direct confusion. I believe the average consumer will recall the differences, the extra word, and will therefore be unlikely to mistake one mark for the other.

54. I must therefore consider the possibility of indirect confusion. Again, I take guidance from Mr Purvis in *L.A. Sugar Limited* where he stated:

“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”).

55. These examples are not exhaustive but provide helpful focus.

56. The applicant states that the examples provided in the opponent’s exhibit MG5 of the Corona and Bud Light brand extensions include prefixes that render the variations far from being the same brand – Corona Extra, Corona Cero, Corona Seltzer and that the variations of Bud Light are protected by separate UK trade mark registrations in distinct classes. It is not for the Tribunal to consider all the possible ways the opponent may extend their brand or what words they might/could use to do so. It is for me to

decide whether there is a likelihood of confusion between the marks in question in these proceedings.

57. I found earlier in my decision that the earlier marks have a higher than average level of inherent distinctive character. I consider that the use of 'DAYS' for the opponent's registered goods is unexpected and highly distinctive. I also find that in the event the average consumer perceives the word 'DAYS' to represent a surname then it would be reasonable for them to consider that it would be unlikely, as this is not a particularly common surname, that this word would be used on the goods at issue by another, completely separate undertaking. I therefore find that the average consumer is likely to believe these goods are provided by the same, or an economically linked undertaking, and that there is a likelihood of indirect confusion.

58. I also consider that the second example provided by Mr Purvis above could apply in this case. That is, that the addition of the word 'TWO' is the addition of a non-distinctive element to an earlier distinctive mark. I find that the average consumer would view it simply as an addition of a number/quantity. This would especially apply where the purchasing act is an aural one. The word 'TWO' would be heard and most likely be assumed to mean how many units a consumer would wish to purchase. The average consumer would not expect the word 'TWO' to change the concept of the brand.

Conclusion

59. The opposition succeeds entirely under section 5(2)(b) of the Act.

COSTS

60. The opponent has been successful and is entitled to a contribution towards its costs. Award of costs in proceedings are based upon the scale set out in Tribunal Practice Notice (TPN) 2/2016. After due consideration, I believe that an award of costs to the applicant is appropriate as follows:

Official fee	£100
Preparing the Notice of Opposition and Considering the counter statement	£350
Preparing evidence, reviewing applicant's evidence and preparing written submissions	£900
TOTAL	£1350

61. I therefore order Brendan Bennett to pay Better Beverage Company Ltd the sum of £1350. 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 2nd day of November 2021

L Nicholas
For the Registrar