

BL O/546/22

TRADE MARKS ACT 1994

IN THE MATTER OF UK APPLICATION NO 3608630  
IN THE NAME OF GRENADE (UK) LTD  
IN RESPECT OF THE TRADE MARK:

**CHERRY BOMB**

AND

AND OPPOSITION THERETO UNDER NO 427356  
BY SNEAK ENERGY LIMITED

## BACKGROUND AND PLEADINGS

1. On 11 March 2021, Grenade (UK) Ltd (“the applicant”) applied to register the trade mark CHERRY BOMB in class 32 for ‘non-alcoholic beverages; sports drinks; post and pre workout recovery drinks; energy and sports drinks’.<sup>1</sup>
2. The application was published on 25 June 2021, following which Sneak Energy Limited (“the opponent”) filed an opposition against all the goods in the application.
3. The opposition is based on section 5(4)(a) of the Act. The opponent relies on the unregistered sign CHERRY BOMB, which it claims has been used throughout the UK since 2018. Use of the sign is claimed in respect of ‘supplements in powder form for enhancing human energy levels, powdered energy drink mixes, energy drinks and powdered energy mixes.’
4. The pleadings are as follows:

*“The Applicant is seeking to use the identical trade mark CHERRY BOMB in relation to the sale of identical/similar products to those that have been sold by the Opponent in the UK since March 2018.*

*Due to the extensive use that the Opponent has made of its CHERRY BOMB trade mark throughout the UK, the Opponent has built up substantial goodwill in the trade mark, such that customers seeing the CHERRY BOMB trade mark recognise it as indicating the particular energy drinks of the Opponent.*

*The Opponent submits that such is the goodwill that it has built up in the CHERRY BOMB trade mark that the use of the identical trade mark by the Applicant in relation to the sale of identical/similar products, would amount*

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<sup>1</sup> International Classification of Goods and Services for the Purposes of the Registration of Marks under the Nice Agreement (15 June 1957, as revised and amended).

*to a misrepresentation that would be likely to deceive customers and be likely to result in damage to the Opponent's business.”*

5. The applicant filed a counterstatement in which it denies the opponent's claim.
6. The opponent filed evidence. The applicant did not file evidence, but filed submissions in lieu of a hearing. Neither side requested a hearing. I make this decision following careful consideration of the papers before me.
7. The applicant is represented by Barker Brettel LLP. The opponent is represented by Addleshaw Goddard LLP. Both sides seek an award of costs in their favour.

### **Opponent's evidence**

Witness statement by David Woodmansey and exhibits DW1-DW3

8. Mr Woodmansey is the opponent's Chief Operations Officer, a position he has held since March 2018. His statement is dated 24 January 2022.
9. I will refer to this evidence as necessary throughout this decision.
10. 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, although the UK has left the EU.

### **DECISION**

11. Section 5(4)(a) of the Act states that:

5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met...

(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.

12. In *Reckitt & Colman Products Limited v Borden Inc. & Ors* [1990] RPC 341, HL, Lord Oliver of Aylmerton described the 'classical trinity' that must be proved in order to reach a finding of passing off:

"First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that the goods or services offered by him are the goods or services of the plaintiff. Thirdly, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."<sup>2</sup>

Halsbury's Laws of England Vol. 97A (2021 reissue) provides further guidance with regard to establishing the likelihood of deception. In paragraph 636 it is noted (with footnotes omitted) that:

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<sup>2</sup> Page 406.

“Establishing a likelihood of deception generally requires the presence of two factual elements:

- (1) that a name, mark or other distinctive indicium used by the claimant has acquired a reputation<sup>1</sup> among a relevant class of persons; and
- (2) that members of that class will mistakenly infer from the defendant's use of a name, mark or other indicium which is the same or sufficiently similar that the defendant's goods or business are from the same source<sup>2</sup> or are connected.

While it is helpful to think of these two factual elements as two successive hurdles which the claimant must surmount, consideration of these two aspects cannot be completely separated from each other.

The question whether deception is likely is one for the court, which will have regard to:

- (a) the nature and extent of the reputation relied upon,
- (b) the closeness or otherwise of the respective fields of activity in which the claimant and the defendant carry on business;
- (c) the similarity of the mark, name etc used by the defendant to that of the claimant;
- (d) the manner in which the defendant makes use of the name, mark etc complained of and collateral factors; and
- (e) the manner in which the particular trade is carried on, the class of persons who it is alleged is likely to be deceived and all other surrounding circumstances.

In assessing whether deception is likely, the court attaches importance to the question whether the defendant can be shown to have acted with a

fraudulent intent, although a fraudulent intent is not a necessary part of the cause of action”.

### **Relevant date**

14. In terms of the relevant date for assessment of this ground, in *Advanced Perimeter Systems Limited v Multisys Computers Limited*,<sup>3</sup> Mr Daniel Alexander QC, sitting as the Appointed Person, quoted with approval the summary made by Mr Allan James, acting for the Registrar, in *SWORDERS Trade Mark*:<sup>4</sup>

‘Strictly, the relevant date for assessing whether s.5(4)(a) applies is always the date of the application for registration or, if there is a priority date, that date: see Article 4 of Directive 89/104. However, where the applicant has used the mark before the date of the application it is necessary to consider what the position would have been at the date of the start of the behaviour complained about, and then to assess whether the position would have been any different at the later date when the application was made.’”

15. There is no claim for earlier use by the applicant and so the relevant date for assessment of the opponent’s claim under this ground is the date of application of the contested CHERRY BOMB trade mark, namely, 11 March 2021.

### **Goodwill**

16. The concept of goodwill was considered by the House of Lords in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217:

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one

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<sup>3</sup> BL O-410-11

<sup>4</sup> BL O-212-06

thing which distinguishes an old-established business from a new business at its first start.”

17. The opponent must show that it had goodwill in a business at the relevant date and that the sign relied upon, CHERRY BOMB, is associated with, or distinctive of, that business.

18. The opponent’s witness, Mr Woodmansey, states that the opponent has, since 2018, sold a range of energy drinks. The opponent sells these drinks through its own website, www.sneakenergy.com. He says:

*“5...the Opponent sells its energy drinks in a range of different flavours. Whilst some of these flavours are directly descriptive of the flavour of the particular energy drink, e.g. SOUR APPLE, STRAWBERRY WATERMELON and RASBERRY LEMONADE, the Opponent also uses a range of more distinctive flavour names, which are not directly descriptive of the individual flavours, which would be considered to be sub-brands, e.g. BUBBLEGUM MILLIONS, NEON PUNCH and PURPLE STORM.*

*One of these distinctive sub-brands that forms part of the SNEAK energy drinks range is CHERRY BOMB. The CHERRRY BOMB brand has been used in relation to the sale of an energy drink powder product that is sold in tubs and sachets, and is mixed with water by the customer. This sub-brand has been used by the Opponent since the launch of the energy drink business in March 2018. Since this time, the CHERRY BOMB energy drink has become one of the leading products sold by the Opponent.”*

19. The opponent submits that the CHERRY BOMB product has remained in its top four products. It provides the following turnover figures for products ‘sold under the CHERRY BOMB sub-brand’:

<b>Year</b>	<b>Turnover</b>
2018	£35,182

2019	£271,394
2020	£818,610
2021	£258,458

20. An undated image taken from the opponent’s website shows the packaging of its goods. I have added the black circle to show the placement of CHERRY BOMB on the product. The CHERRY BOMB product appears as follows: <sup>5</sup>



21. The opponent provides 34 invoices which show sales of the CHERRY BOMB product between March 2018 and February 2021. It states that personal details have been removed but:

*“8...the geographic locations in the UK showing where the customers reside have been left in to show the extensive customer base throughout the UK.”*

22. The invoices show sales throughout the UK including Wales, Scotland and all of England.

23. The product appears on the sales invoice in the following forms:

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<sup>5</sup> See exhibit DW1.



1	 <p><b>SNEAK CHERRY BOMB</b> 400g SKU: SN01KEFCB400</p>	<p>£29.99 × 1      £29.99</p>
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And :

3	 <p><b>CHERRY BOMB</b> STACK SKU: SN01KEFCB400-STACK</p>	<p>£26.65 × 3      £79.95</p>
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24. A unit of the cherry bomb product is priced at between £26.95 and £35. 'Taster packs' can be bought, in multiples of three, with the selected flavours shown on the invoices.

25. With regard to advertising, the opponent states that it does not rely on traditional advertising but conducts promotion through *Twitter* and *Instagram*.

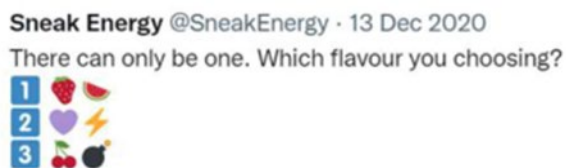
26. For example, these two advertisements appeared on the opponent's Twitter feed:



27. And:

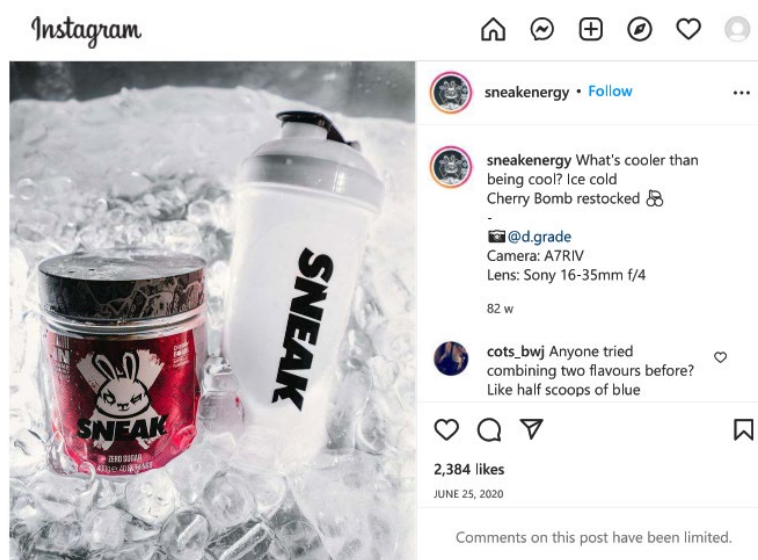
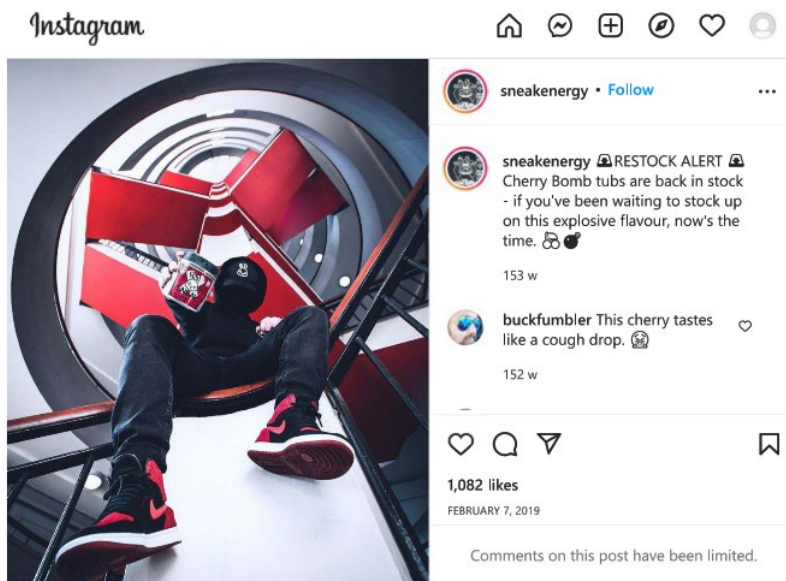


28. The opponent also tweets on its own page, for example:



29. The following three examples appeared on the opponent's Instagram page:





30. In terms of the level of goodwill that it is necessary for the opponent to show in order to get its passing off claim off the ground, I rely on the guidance in *Smart Planet Technologies Inc. v Rajinda Sharma*,<sup>6</sup> in which Mr Thomas Mitcheson QC, as the Appointed Person, reviewed the following authorities about the establishment of goodwill for the purposes of passing-off: *Starbucks (HK) Ltd v British Sky Broadcasting*

<sup>6</sup> BL O/304/20.

*Group Plc*,<sup>7</sup> *Reckitt & Colman Product v Borden*<sup>8</sup> and *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.*<sup>9</sup> He concluded:

“.. a successful claimant in a passing off claim needs to demonstrate more than nominal goodwill. It needs to demonstrate significant or substantial goodwill and at the very least sufficient goodwill to be able to conclude that there would be substantial damage on the basis of the misrepresentation relied upon.”

31. Sufficient goodwill does not necessarily mean the level must be large. It is clear from case law that a small business which has more than a trivial goodwill can protect signs which are distinctive of that business under the law of passing off even though its goodwill and reputation may be small.<sup>10</sup>

32. The location of any goodwill associated with the opponent is also important. In *Starbucks (HK) Limited and Another v British Sky Broadcasting Group Plc & Others*,<sup>11</sup> Lord Neuberger (with whom the rest of Supreme Court agreed) stated that:

“47...I consider that we should reaffirm that the law is that a claimant in a passing off claim must establish that it has actual goodwill in this jurisdiction, and that such goodwill involves the presence of clients or customers in the jurisdiction for the products or services in question. And, where the claimant's business is abroad, people who are in the jurisdiction, but who are not customers of the claimant in the jurisdiction, will not do, even if they are customers of the claimant when they go abroad.”

33. In short, customers in the UK are required for the opponent to establish goodwill.

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<sup>7</sup> [2015] UKSC 31, paragraph 52.

<sup>8</sup> [1990] RPC 341, HL.

<sup>9</sup> [1980] R.P.C. 31.

<sup>10</sup> See *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590; *Stannard v Reay* [1967] FSR 140 (HC) and *Teleworks v Telework Group* [2002] RPC 27 (HC); (COA).

<sup>11</sup> [2015] UKSC 31,

34. The applicant submits that the opponent has not provided an indication of the size of the relevant market for energy drinks, nor has it provided 'evidence of the volume of advertising in the relevant market'. It relies on *August Storck KG*<sup>12</sup> in support of the first of these points. In that case the court was deciding the factors necessary for establishing whether a mark has become distinctive due to the use made of it and was not making findings on the evidential requirements for proving goodwill. Consequently, it is not on all fours with the matter to be decided here, and for which I will follow the well-established cases providing guidance on the assessment of goodwill.

35. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)*,<sup>13</sup> Pumfrey J. stated:

"27. There is one major problem in assessing a passing off claim on paper, as will normally happen in the Registry. This is the cogency of the evidence of reputation and its extent. It seems to me that in any case in which this ground of opposition is raised the registrar is entitled to be presented with evidence which at least raises a prima facie case that the opponent's reputation extends to the goods comprised in the applicant's specification of goods. The requirements of the objection itself are considerably more stringent than the enquiry under s.11 of the 1938 Act (see *Smith Hayden & Co. Ltd's Application (OVAX)* (1946) 63 R.P.C. 97 as qualified by *BALI Trade Mark [1969] R.P.C. 472*). Thus the evidence will include evidence from the trade as to reputation; evidence as to the manner in which the goods are traded or the services supplied; and so on.

28. Evidence of reputation comes primarily from the trade and the public, and will be supported by evidence of the extent of use. To be useful, the evidence must be directed to the relevant date. Once raised, the applicant must rebut the prima facie case. Obviously, he does not need to show that passing off will not occur, but he must produce sufficient cogent evidence

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<sup>12</sup> T402/02, paragraph 71.

<sup>13</sup> [2002] RPC 19 (HC).

to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

36. However, in *Minimax GmbH & Co KG v Chubb Fire Limited*,<sup>14</sup> Floyd J. (as he then was) stated that:

“[The above] observations are obviously intended as helpful guidelines as to the way in which a person relying on section 5(4)(a) can raise a case to be answered of passing off. I do not understand Pumfrey J to be laying down any absolute requirements as to the nature of evidence which needs to be filed in every case. The essential is that the evidence should show, at least prima facie, that the opponent's reputation extends to the goods comprised in the application in the applicant's specification of goods. It must also do so as of the relevant date, which is, at least in the first instance, the date of application.”

37. In other words, in assessing the opponent's evidence I must consider what the evidence as a whole shows me in terms of the goodwill vested in the opponent's business and its associated sign or signs. I am not going to refuse the evidence out of hand because a particular type of evidence has not been filed.

38. In terms of the exhibits themselves, the applicant submits that the opponent's first exhibit is undated and should be disregarded. It is undated, but it shows powdered energy drinks in the same form shown on the opponent's social media feeds for dates in the relevant period,<sup>15</sup> so nothing turns on exhibit DW1.<sup>16</sup>

39. The applicant accepts that the opponent sells a powdered formula product under the SNEAK brand. I agree. The evidence shows that the opponent operates a business selling, in particular, powdered energy drinks and that this has been the case

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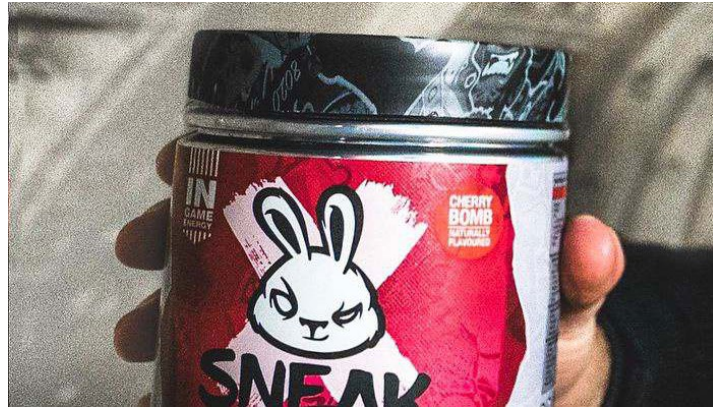
<sup>14</sup> [2008] EWHC 1960 (Pat).

<sup>15</sup> See exhibit DW3.

<sup>16</sup> The exhibit also contains images of ready to drink cans of energy drink, but these do not include a CHERRY BOMB can, and, consequently, do not help the opponent's case.



since 2018.<sup>17</sup> The primary brand used on the goods is the word SNEAK, with a device of a rabbit head above the word SNEAK. The opponent sells a powder product, so branded with the additional sign 'CHERRY BOMB' displayed in a circle to the right of the rabbit device. This is considerably smaller than the word SNEAK, as below:



40. The opponent's second exhibit is prints from a number of sales made in the UK, through its website. Sales of the product are listed as SNEAK CHERRY BOMB or CHERRY BOMB. Mr Woodmansey describes the invoices as 'a selection of copy orders from the electronic records of the business'. Invoices are shown for customers in Scotland, Wales and throughout England and show a consistent, though fairly small, level of sales throughout the UK in the relevant period. The total of all invoices filed by the opponent, which show sales of its Sneak Cherry Bomb product, amounts to a little less than £1500 for the period March 2018 to February 2021.

41. This is the sum total of conclusions I can draw from the opponent's evidence, which could certainly have been better marshalled. For example, it is clear from the opponent's evidence that it sells its goods in at least the UK and the US. An Instagram post, dated 21 June 2018, shows that, "*sneakenergy Cherry Bomb flavor is back in stock...all new orders will be dispatched same day if ordered before 10pm UK/ 7pm US.*" However, the opponent has not provided a breakdown of figures which show me how much of its claimed turnover relates to the UK and which to the US. A total turnover figure has been provided without further explanation.

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<sup>17</sup> Images contained in exhibit DW1 which show ready to drink cans of energy drink are not dated and do not include a can showing 'CHERRY BOMB'.

42. The social media pages routinely show American spelling and date configurations. The number of likes can be seen on the Instagram pages but it is not clear where these originate from and the opponent has not provided numbers of followers for its Twitter page at all. The same is true of website traffic, for which figures have not been provided. Whilst there are a few examples of advertisements posted by the opponent on its Twitter feed and Instagram page, I have no information with regard to how many UK consumers have been reached by these means or what the level of engagement was.

43. Routinely, in trade mark cases before this tribunal, such social media and website evidence is part of a bigger picture of evidence, but in this case, the opponent only relies on social media for its product advertising, and on its own website for its sales. In that context I would have expected a more detailed picture of its customers and an advertising strategy could have been easily available from the opponent's electronic records. This is particularly so for a business which is four years old (so is not relying of historic data) and claims to have sold in excess of £1m worth of its product in the three years and two months for which data is provided.

44. In short, I am unable to determine the quantum of the opponent's business in the UK and cannot reasonably conclude that the opponent had sufficient protectable goodwill in the UK at the relevant date. However, even if I am wrong in this and the opponent does have protectable goodwill in its business, it is necessary to ask in what that goodwill lies and that is an important factor here.

45. The words 'CHERRY BOMB' are not directly descriptive and are prima facie capable of acting as a sign which may be distinctive of the opponent's business. However, use must be for the purpose of distinguishing the opponent's goods from those of others (WILD CHILD) and I do not find that to be the case here.

46. The use shown in evidence of CHERRY BOMB is consistently use as a flavour of the opponent's powdered SNEAK energy drink. Use in this manner will have the effect of diminishing any distinctive meaning given to the words CHERRY BOMB in the mind of the consumer.



47. The opponent's own use supports such a finding. The opponent's advertising posted on Instagram on 7 February 2019 reads 'sneakenergy RESTOCK ALERT Cherry Bomb tubs are back in stock – if you've been waiting to stock up on this explosive flavour, now's the time.' A tweet from 13 December 2020 by the opponent reads, 'There can only be one. Which flavour you choosing?' emojis under the words relate to strawberry watermelon, purple storm and cherry bomb. Stock updates use terms such as 'Cherry Bomb flavor, back in stock'.

48. Furthermore, the opponent's own customers clearly see the term CHERRY BOMB as referring to a flavour of the opponent's SNEAK energy drink product. Mr Woodmansey includes customer comments from the opponent's *Twitter* feed, at exhibit DW3, some examples of which are:

Ashley Mae (Divinity) @AshleyMae176 · 16 Mar 2020  
Anyone got any recommendations for **sneak energy** what flavour to go for i can't decide if to get the tropikiller or the **cherry bomb**

49. And:

Daymo @LetsGoDaymo · 4 Jun 2020  
The Results are in for the **Sneak Energy** flavour poll!

1. **CHERRY BOMB** 🍒
2. Sour Apple 🍏
3. Blue Raspberry 🌀
4. Strawberry Watermelon 🍓🍉

Community giveaway will be opening soon, entries will close June 20th.  
More details to follow! Stay tuned for the tweet!!!!

50. And:

TGR\_Crimzon @TGR\_Crimzon · 19 Oct 2020  
Replying to @CelticHollow and @SneakEnergy  
The blue bubblegum millions flavour, blue raspberry and **cherry bomb** I've tried all 3 and they're all good! I started having them instead of a morning coffee strongly recommend **Sneak** to anyone looking for some clean **energy** with no crash 🙌 (this isn't an Ad lol I just love sneak)

51. And:

Lee @Symbiote95 · 12 Feb 2021

...

So after trying all the flavours I decided to go with Blue Raspberry! **Cherry bomb** was in very close second place

[@SneakEnergy](#) [#sneakenergy](#) [#blueraspberry](#)

52. Customers ordering the 'taster pack' choose the flavours they wish to include. These show as follows on the sales invoice:

	<b>TASTER PACK</b> FLAVOURS SKU: JIFFY-BAG Flavour 1: TROPIKILLA Flavour 2: STEALTH Flavour 3: CHERRY BOMB	£0.00 × 1	£0.00
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53. There is no evidence before me that indicates the consumers of the opponent's products perceive cherry bomb as anything other than a flavour of SNEAK energy drink. In other words, if I am wrong and the opponent does have a small degree of protectable goodwill, that goodwill is not identified by CHERRY BOMB and consequently, the CHERRY BOMB sign is not distinctive of that business.

54. In the absence of goodwill there can be no misrepresentation or damage. The opposition under section 5(4)(a) fails.

## **COSTS**

55. Grenade (UK) Ltd has been successful and is entitled to a contribution towards its costs which I award on the following basis, bearing in mind that there was no hearing:

Preparing statements and considering the other side's statements -	£300
Considering the other side's evidence and filing submissions -	£600
<b>Total</b>	<b>£900</b>

56. I order Sneak Energy Limited to pay Grenade (UK) Ltd the sum of £900. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

**Dated this 23<sup>rd</sup> day of June 2022**

**Al Skilton**

**For the Registrar,**

**The Comptroller-General**