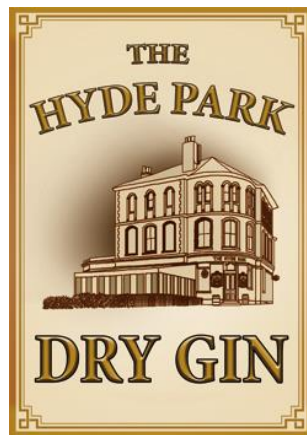


O-569-17

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3220103 BY
BOUTIQUE COFFEE BRANDS LTD**

TO REGISTER THE TRADE MARK:



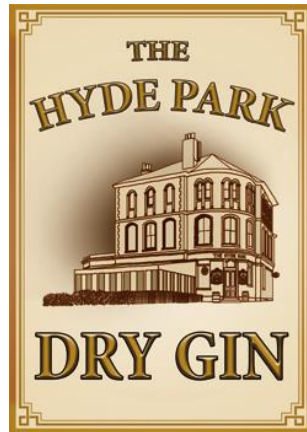
**FOR GOODS AND SERVICES
IN CLASSES 30, 32, 33, 35 and 43**

AND

**IN THE MATTER OF OPPOSITION TO ITS REGISTRATION
IN CLASSES 30, 32, 33 AND 43
UNDER NO. 60000670
BY
SPIRITS INTERNATIONAL BV**

BACKGROUND

1) On 21 March 2017 Boutique Coffee Brands Ltd (“the Applicant”) applied to register the following trade mark:



The application was published for opposition purposes on 31 March 2017. Registration is sought for goods and services in five classes, but only the following are opposed in these proceedings:

Class 30: *Confectionery such as gin flavoured liqueur chocolates, cakes and desserts.*

Class 32: *Beers; syrups and other preparations for making beverages.*

Class 33: *Alcoholic beverages, especially gin. Prepared alcoholic cocktails containing gin; gin-based drinks.*

Class 43: *Restaurant and bar services, provision of food and drink; provision of alcoholic beverages, beers, wines and ales.*

2) The application is opposed by Spirits International BV (“the Opponent”). The opposition, which is directed against the goods and services shown above, is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), for the purposes of

which the Opponent relies upon UK registration no. 3113096 for the following mark (“the earlier mark”):

HYDE PARK CORNER

The earlier mark is registered for the following goods, which are relied on for the purposes of this opposition:

Class 33: *Scotch Whisky.*

The earlier mark was filed on 12 June 2015 and registered on 30 October 2015. The significance of these dates is that (1) the Opponent’s mark constitutes an earlier mark in accordance with section 6 of the Act, and (2) it is not subject to the proof of use conditions contained in section 6A of the Act, its registration process having been completed less than five years before the publication of the Applicant’s mark.

3) The Opponent is represented by Marks & Clerk LLP. The Applicant is not professionally represented. The Opponent claims that the mark applied for is similar to the earlier mark, that it is registered for identical or similar goods and services, and that there consequently exists a likelihood of confusion, including a likelihood of association between them. The Applicant filed a notice of defence and counterstatement, denying the grounds of opposition.

4) Rules 20(1)-(3) of the Trade Marks Rules (“TMR”) (the provisions which provide for the filing of evidence) do not apply to fast track oppositions, but Rule 20(4) does. It reads:

“(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit.”

The net effect of these provisions is that parties are required to seek leave in order to file evidence (other than proof of use evidence, which is not relevant in this case) in

fast track oppositions. Neither side sought leave to file evidence in these proceedings.

5) Rule 62(5) (as amended) of the Trade Marks Rules 2008 (as amended by the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013) (“the Rules”) provides that arguments in fast track proceedings shall be heard orally only if (1) the Office requests it or (2) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise written arguments will be taken. Neither side requested a hearing. The Applicant’s counterstatement, in the form of a letter appended to its notice of defence, contains what amount to submissions. The Opponent filed written submissions in lieu of a hearing. I therefore give this decision after a careful review of all the papers before me.

SECTION 5(2)(b)

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

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

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

7) The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) 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 will wrongly 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

8) The Applicant argues in its counterstatement that the Opponent's specification in Class 33 is irrelevant to the comparison with the Applicant's specification in Classes 30, 32 and 43, the earlier mark being registered for Class 33 only. This argument is misconceived. In assessing whether there is a likelihood of confusion I must make my comparison of goods and services on the basis of the principles laid down in the case law, which I set out below.

9) In the judgment of the 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”.

10) 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 users of the respective goods or services;

b) The physical nature of the goods or acts of services

c) The respective trade channels through which the goods or services reach the market

d) 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;

e) 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.

11) In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05 (“*Meric*”), 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 the 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 (Case T-104/01 *Oberhauser v OHIM — Petit Liberto (Fifties)* [2002] ECR II-4359, paragraphs 32 and 33; Case T-110/01 *Vedial v OHIM – France Distribution (HUBERT)* [2002] ECR II-5275, paragraphs 43 and 44; and Case T-10/03 *Koubi v OHIM — Flabesa (CONFORFLEX)* [2004] ECR II-719, paragraphs 41 and 42)”.

12) In *Boston Scientific Ltd v OHIM* (“*Boston*”), Case T-325/06, the General Court said:

“82 It is true that goods are complementary if 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...”

13) When it comes to understanding what terms used in specifications mean and cover, the guidance in the case-law is to the effect that “in construing a word used in a trade mark specification, one is concerned with how the product is, as a practical matter, regarded for the purposes of the trade”¹ and that I must also bear in mind that words should be given their natural meaning within the context in which they are used; they cannot be given an unnaturally narrow meaning².

14) These being fast track proceedings, in which neither side applied for leave to file evidence, I have no evidence addressed to the issue of similarity of goods and services. In the absence of any evidence to assist me, I must form my own view on the similarity or otherwise of the respective goods and services. In so doing so I must have regard to the factors set out in the case law outlined above, and am able to draw upon commonly known facts. I will make the comparison by reference to the Applicant’s services.

Class 30: *Confectionery such as gin flavoured liqueur chocolates, cakes and desserts.*

15) Confectionery, cakes and desserts at large on one hand and alcoholic beverages on the other are not similar. They have different natures, characters, purposes and distribution channels; their methods of production and manufacturing origins are different; nor are they in competition with each other, confectionery products, cakes and desserts being aimed at a much broader section of the general public than alcoholic beverages. The fact that there is some consumer overlap is insufficient to confer similarity. Nor can the fact that alcohol may be an ingredient in chocolates, cakes or desserts goods be enough in itself for them to be considered similar. A limited degree of complementarity in goods such as liqueur chocolates would not be sufficient to give rise to more than a low degree of similarity.

¹*British Sugar Plc v James Robertson & Sons Limited (Treat)* [1996] R.P.C. 281

²*Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another* [2000] FSR 267

Class 32: *Beers; syrups and other preparations for making beverages.*

16) While the Opponent's *Scotch whisky* and the Applicant's *beers* may both be described as alcoholic beverages, they differ as regards their ingredients, method of production, colour, smell and taste, with the result that the average consumer perceives them to be different in nature. While it is true that they may be consumed in the same places and on the same occasions and satisfy the same need (to experience the relaxing effect of alcohol), they will not be seen as belonging to the same family of alcoholic beverages; the consumer perceives them as very distinct products. Though both may be obtained through the same retail outlets and licensed premises, they are not, for example, normally displayed on the same shelves in the areas of supermarkets and other outlets selling drinks. Beer, a long drink, may be drunk to quench thirst, a purpose for which whisky, a short drink with a much higher alcoholic content, is totally unsuited. The degree of competition between them must be regarded as limited³. The degree of similarity between the Applicant's *beers* and the Opponent's *Scotch whisky* is low.

17) The nature, intended purpose and method of use of preparations for making non-alcoholic drinks are all quite different from those of the Opponent's *Scotch whisky*. Nor are they in competition with each other or complementary. The existence of some overlap of consumers, these consisting largely of the general public, is much too general a connection to give rise to similarity. There is no material similarity between the Applicant's *syrups and other preparations for making [non-alcoholic] beverages* and the Opponent's *Scotch whisky*.

18) The Applicant's *preparations for making beverages* might include preparations for making alcoholic beverages sold to the general public. There may be some overlap with consumers of the Opponent's goods, and there may be a very limited degree of competition in the sense that some users may choose to make their own spirits rather than purchasing the finished product. The nature of the products, their purpose and method of use, however, are quite different. There is only a very low

³ See on this the observations of the General Court in Case T-584/10, *Mustafa Yilmaz v OHIM*, at paragraph 57.

degree of similarity between the Applicant's *preparations for making* [alcoholic] *beverages* and the Opponent's *Scotch whisky*.

Class 33: *Alcoholic beverages, especially gin. Prepared alcoholic cocktails containing gin; gin-based drinks.*

19) The Opponent's *Scotch whisky* falls within the ambit of the Applicant's *alcoholic beverages*. These goods are therefore identical under the guidance in *Meric*.

Class 43: *Restaurant and bar services, provision of food and drink; provision of alcoholic beverages, beers, wines and ales.*

20) The Applicant's *provision of food and drink* consists of services provided by persons or establishments whose aim is to prepare food and drink for consumption, and includes its *restaurant and bar services*. In the same way, its *provision of alcoholic beverages, beers, wines and ales* includes its *bar services*. These services involve the supply of alcoholic beverages – in the case of bar services, as the primary purpose. In respect of both the goods and the services, the average consumer is likely to be the same, and there is an overlap in channels of trade. The purpose of both alcoholic beverages and the establishments providing the opponent's services are to quench thirst and to provide the relaxing effect of alcohol. Consumers can choose to drink at home or in licensed premises, so to that extent there can be said to be an element of competition between alcoholic beverages and bar, restaurant and similar services. However, the social and entertainment component offered by these establishments will also normally play a significant role, and this will be reflected in the price, so such competition is limited.

21) On the other hand, alcoholic beverages are obviously different in nature from services for the provision of food and drinks, such as restaurant and bar services. The method of use of the respective goods and services is also manifestly different. Overall, I find that there is a low degree of similarity between *Scotch whisky* on one hand and *restaurant and bar services* or the Applicant's other Class 43 services on the other hand.

The average consumer and the purchasing process

22) 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*. 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.”

23) The average consumer of alcoholic beverages, including spirits and beer, and of preparations for making alcoholic beverages, is, or includes, members of the (adult) general public. The goods will be sold either in shops and supermarkets, off-licences or online, where the mode of selection will be primarily visual, or in licensed premises such as pubs and restaurants, where they will be ordered verbally, but may be visible on optics or otherwise displayed behind the bar. In *Simonds Farsons Cisk plc v OHIM* Case T-3/04 the court stated:

“58. In that respect, as OHIM quite rightly observes, it must be noted that, even if bars and restaurants are not negligible distribution channels for the applicant's goods, the bottles are generally displayed on shelves behind the counter in such a way that consumers are also able to inspect them visually. That is why, even if it is possible that the goods in question may also be sold by ordering them orally, that method cannot be regarded as their usual

marketing channel. In addition, even though consumers can order a beverage without having examined those shelves in advance they are, in any event, in a position to make a visual inspection of the bottle which is served to them.

59. Moreover, and above all, it is not disputed that bars and restaurants are not the only sales channels for the goods concerned. They are also sold in supermarkets or other retail outlets (see paragraph 14 of the contested decision), and clearly when purchases are made there consumers can perceive the marks visually since the drinks are presented on shelves [...].”

The purchasing process is therefore largely a visual one, but I shall not ignore the potential for oral use of the mark in my assessment.

24) The degree of care and attention paid in the selection process will vary slightly between the more discerning purchaser and the less careful purchaser who makes a snap decision at the bar or in the shop. Some expensive spirits may involve relatively careful selection, but alcoholic drinks normally involve no more than a reasonable amount of attention, and will often be impulse purchases. This may increase the scope for imperfect recollection. Generally speaking, given the cost and frequency of purchase, I consider the degree of care and attention to be average, neither higher nor lower than the norm. This also applies to the purchase of syrups and other preparations for making beverages, at any rate when purchased by members of the public.

25) The average consumer of restaurant and bar services and of services for the provision of food and drink and alcoholic beverages will also normally be a member of the general public. The degree of care and attention used in choosing to dine at an expensive restaurant will normally be higher than that of someone taking advantage of bar services for a quick sandwich or drink, or even a social night out; but in general the degree of care and attention will be average, neither higher nor lower than the norm. The purchasing process for such services, including signage, advertisements, directories, etc. is largely a visual one, but I shall not ignore the potential for oral use of the mark, such as word-of-mouth recommendation, in my assessment.

26) Confectionery products are everyday items and their average consumer will consist of the general public. Their purchase will usually be casual, which increases the scope for imperfect recollection. The process of selecting confectionery will nowadays typically be by self-service, and sometimes online, but it may also, although less frequently, be bought over the counter. As a result, the visual aspect will normally be more important, but both visual and aural aspects may have a role to play.

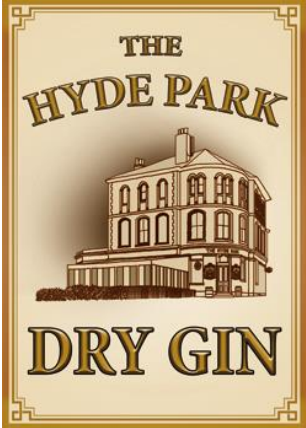
Comparison of the marks

27) It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

It would be wrong, therefore, to dissect the trade marks artificially, 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.

28) The marks to be compared are shown below:

The opposed mark	The earlier mark
	<p data-bbox="874 517 1326 562" style="text-align: center;">HYDE PARK CORNER</p>

29) The opposed mark contains at its top the words THE HYDE PARK in capital letters with black borders and highlighting, which produce a somewhat three-dimensional effect; the word THE appears above, and (though still perfectly prominent) in letters smaller than the following line, HYDE PARK, which is slightly bowed above a line drawing of a building. The building is such as might, for example, represent the kind of public house or hotel built on the corner of a road in the latter part of the nineteenth or early twentieth century, although nothing in the mark explicitly identifies it as such. Beneath this picture the words DRY GIN appear in a straight line, in letters somewhat larger than those of the words above the image, but presented in the same stylisation. The whole mark, being surrounded by a simple two-line border with unobtrusive corner decoration, and presented in sepia, has the appearance of a label. Where the mark is applied to gin and gin-based products the words DRY GIN, being descriptive, would be accorded little distinctive weight by the consumer – though, even when descriptive, by virtue of their size they do make some contribution, along with the plain border and label-like appearance, to the overall visual impression of the mark. The mark’s distinctive weight, however, lies heavily on the words THE HYDE PARK and on the central picture device, which two elements together dominate the mark

30) The earlier mark consists simply of the words HYDE PARK CORNER. The words form a single phrase, since together they form the name of a well-known London landmark, no single word therefore dominating the others.

31) Visually, the prominent central device element in the opposed mark forms a very obvious point of difference from the earlier mark. A further difference lies in the fact that the opposed mark contains five words as opposed to the earlier mark's three, only two words coinciding in the two marks. On the other hand, those two coinciding words appear very prominently in what I have found to be a dominant and distinctive element of the opposed mark, and as the first two words of the earlier mark. I bear in mind that a mark applied for as a word mark is not limited as to colour. Consequently, the earlier mark may be used in any colour⁴, including that in which the opposed mark is presented. Taking all this into account, I consider that the overall degree of visual similarity between the marks lies between moderate and medium.

32) Device elements of a mark are not normally expressed orally. The opposed mark will be referred to orally as THE HYDE PARK or, possibly, simply as HYDE PARK. I also think it probable that the words GIN or DRY GIN will be used when the product is ordered orally – but this will be by way of describing the product, rather than specifying the brand; as such, the descriptive words DRY GIN will be accorded little weight in the context of oral use of the mark. The earlier mark will be referred to orally as HYDE PARK CORNER. The definite article in the opposed mark provides some difference between the marks, and the word CORNER in the earlier mark contributes a substantial element of difference between them. The words common to both marks, HYDE PARK, contribute a substantial element of similarity. Overall, there is a reasonably high degree of aural similarity between the marks.

33) In its comments on visual comparison, the Opponent submits that "*the building design is largely decorative and clearly intended to reinforce the place HYDE PARK*". In its comments on conceptual comparison, the Opponent submits that "*The building in the picture also appears to (possibly) be on a corner plot and that therefore*

⁴ See Kitchen LJ at paragraph 5 in *Specsavers International Healthcare Ltd & Ors v ASDA Stores Ltd & Anor* [2014] EWCA Civ 1294

increases the conceptual similarity with the Opponent's Mark". I cannot agree that the device element of the opposed mark is largely decorative. Though presented in smaller letters than the following line, the definite article in the opposed mark is perfectly prominent. I consider that THE HYDE PARK in the opposed mark, together with the depiction of the building, will suggest a public house or hotel called "The Hyde Park". Owing to their descriptive function, I do not consider that the words DRY GIN in the opposed mark will make much impression on the consumer in the context of the conceptual content of the mark.

34) Hyde Park Corner is a very well-known London landmark, being a major road junction at which some significant thoroughfares, including Piccadilly and Knightsbridge, converge at the south east corner of Hyde Park. Though obviously associated with Hyde Park, it is conceptually quite distinct from it. Overall, I consider that, though the words HYDE PARK represent an obvious element of conceptual similarity, the conceptual difference between HYDE PARK CORNER and THE HYDE PARK, understood as a public house or hotel, as reinforced by the pictorial element of the opposed mark, contribute a greater element of conceptual difference overall.

The distinctiveness of the earlier mark

35) The degree of distinctiveness of the earlier mark must be assessed. This is because the more distinctive the earlier mark, either on the basis of inherent qualities or because of use made, the greater the likelihood of confusion (see *Sabel BV v. Puma AG*, paragraph 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)."

36) I have no evidence of acquired distinctiveness to consider. This leaves the question of inherent distinctive character. HYDE PARK CORNER is neither descriptive nor allusive of the goods protected by the earlier mark. I consider that it has a normal degree of inherent distinctive character.

Likelihood of Confusion

37) The factors assessed so far have a degree of interdependency (*Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, paragraph 17), a global assessment of them must be made when determining whether there exists a likelihood of confusion (*Sabel BV v. Puma AG*, paragraph 22). However, there is no scientific formula to apply. It is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused.

38) Overall, I have found that the degree of visual similarity between the competing marks lies between moderate and medium, and that there is a reasonably high degree of aural similarity between the marks. I have found that though the words HYDE PARK represent an obvious element of conceptual similarity, the conceptual difference between HYDE PARK CORNER and THE HYDE PARK, understood as a public house or hotel, as reinforced by the pictorial element of the opposed mark,

contribute a greater element of conceptual difference overall. I have found the earlier mark to have a normal degree of inherent distinctive character. I have found the average consumer of all the goods and services of the Applicant's specification to consist of, or include, members of the general public. I have found that the process of purchasing drinks, preparations for making beverages, confectionery, and food and drink services is in each case largely a visual one, but I do not ignore the potential for oral use of the mark in my assessment. I have found that although the choice of some expensive spirits and restaurants may involve relatively careful selection, purchases of alcoholic drinks and of food and drink services will normally involve an average degree of care and attention, and will often be impulse purchases, which may increase the scope for imperfect recollection. This also applies with regard to preparations for making drinks. I have found that confectionery products are usually casual purchases.

39) I consider that use of the marks on identical goods may cause the differences between them to be overlooked, giving rise to a likelihood of confusion. Where the marks are used on any other than identical goods, I do not consider that there is a likelihood of confusion. When the overall impression of the Applicant's compound word and figurative mark is compared with the Opponent's word mark, the common component HYDE PARK provides, it is true, an element of similarity; but the differences, particularly the conceptual difference, between HYDE PARK CORNER and THE HYDE PARK, as discussed above, together with the visual reinforcement of that conceptual difference by the opposed mark's device, mean that there are too many differences for the average consumer to overlook, when combined with the fact that the respective marks are not even used in relation to the same goods.

40) I have found the Applicant's *alcoholic beverages, especially gin* to be identical with the Opponent's *Scotch whisky* under the guidance in *Meric*. I must therefore consider whether the Applicant's specification in Class 33 could be amended so as to avoid confusion.

41) Gin and whisky both constitute high alcohol "short" drinks. To that extent they may be perceived to be similar in nature, belonging to the same broad family of alcoholic drinks, serving the same purpose with the same method of use. They

share the same channels of trade and, subject to the constraints of individual taste, are in a certain degree of competition with each other. On the other hand, they have a completely different taste, smell and colour and, although both involve distillation, their production processes are different. Even consumers who drink both will regard them as very distinctively different drinks. Overall, I think the degree of similarity between gin and whisky is not so great as to give rise to a likelihood of confusion between the opposed and earlier marks where they are used on gin (or gin-based drinks) and whisky respectively. I therefore consider that a likelihood of confusion can be avoided if the Applicant's specification in Class 33 is amended as follows:

Class 33: *Gin. Prepared alcoholic cocktails containing gin; gin-based drinks.*

Outcome

42) The opposition has partially succeeded in respect of the Applicant's specification in Class 33, which may therefore proceed to registration only in the following amended form:

Class 33: *Gin. Prepared alcoholic cocktails containing gin; gin-based drinks.*

43) The opposition has failed in respect of the other opposed goods and services, namely those in Classes 30, 32 and 42, for which the opposed mark may proceed to registration together with its specification in Class 35, which was unopposed.

Costs

44) Awards of costs in fast track opposition proceedings filed after 1 October 2015 are governed by Tribunal Practice Notice ("TPN") 2 of 2015. The Opponent has successfully opposed registration of the Applicant's mark for goods of the Opponent's specification. On the other hand, the Applicant has successfully defended the core of its own specification. The result might be regarded as a score draw. Neither side will be favoured with an award of costs.

Dated this 14th day of November 2017

**Martin Boyle
For the Registrar,
The Comptroller-General**