

O-343-18

**TRADE MARKS ACT 1994
IN THE MATTER OF APPLICATION NO. 3201231
BY COOKINPELLETS UK LIMITED
TO REGISTER THE TRADE MARK:**



IN CLASS 11

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 408881
BY RED BULL GMBH**

Background and pleadings

1. On 8 December 2016, an application was filed to register the trade mark shown below (number 3201231):



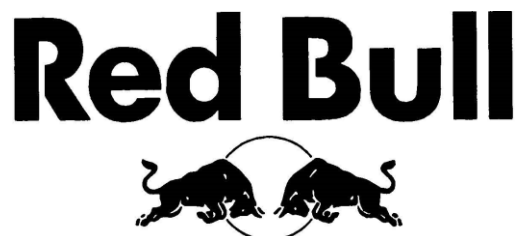
The application was subject to an assignment after filing and now stands in the name of CookinPellets UK Limited ("the applicant"). Nothing turns on this and I need say no more about it. The application was published for opposition purposes on 23 December 2016 for the following services:

Class 11 Barbecue smokers and grills, pellet smokers and grills.

2. The application is opposed by Red Bull GmbH ("the opponent"). The opposition was filed on 23 March 2017 and is brought under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). Under each of these grounds, the opposition is directed against all of the goods in the application.

3. Under s. 5(2)(b), the opponent relies upon the following trade marks:

i) International trade mark (EU) ("IR(EU)") 1115937 for the trade mark:



The trade mark has an international registration date of 5 May 2011 and the EU was designated on 7 March 2013. Protection in the EU was granted on 5 August 2014. The mark is registered for a wide range of goods and services in classes 1-24, 26, 27, 30, 31, 33-40, 42, 44 and 45. The opponent relies upon all of the goods and services for which the mark is registered.

ii) UK trade mark number 3129030 for the trade mark **RED BULL**. The trade mark was filed on 22 September 2015 and was entered in the register on 18 December 2015. It is registered for a range of goods and services in classes 25, 28, 30, 32, 33, 34, 41 and 43. The opponent relies upon all of the goods and services for which the mark is registered.

4. The opponent claims that the marks are visually, aurally and conceptually identical or similar and that the goods and services are identical or similar. The opponent claims that the earlier mark has a “significant reputation” for certain non-alcoholic beverages. It asserts that there is a likelihood of confusion, including the likelihood of association.

5. Under s. 5(3), the opponent relies upon UK trade mark number 3129030, the details of which are given at paragraph 3(ii), above. Under this ground, the opponent relies upon “non-alcoholic beverages, energy drinks, clothing, footwear, headgear”. The opponent claims that the earlier mark has a reputation in the UK such that use of the mark applied for would cause the relevant public to believe that there is an economic connection between the applicant and the opponent, where no such connection exists. It claims that there would be an unfair commercial advantage to the applicant as it would free ride on the reputation of the opponent. The opponent also claims that use of the mark applied for would cause detriment to the distinctive character of its marks through the dilution or blurring of the marks’ distinctive character. It claims that if the goods provided under the application were inferior or did not comply with “the Opponent’s brand values”, the reputation of the opponent’s mark would be tarnished and consumers would be less inclined to purchase the opponent’s goods.

6. Given their dates of filing, both of the above marks qualify as earlier marks in accordance with s. 6 of the Act. As neither mark had completed its registration process more than 5 years before the publication date of the application in suit, they are not subject to the proof of use provisions contained in s. 6A of the Act. The opponent can, as a consequence, rely upon all of the goods and services it has identified.

7. The opponent further claims under s. 5(4)(a) of the Act that the sign **RED BULL** has been used throughout the UK since 1995 in respect of “non-alcoholic drinks, soft drinks, bags, apparel, headgear, footwear and model cars”. The opponent claims that it has acquired goodwill under the signs and that use of the application would constitute a misrepresentation to the public resulting in damage to the opponent’s goodwill.

8. The applicant filed a counterstatement denying the grounds of opposition. It disputes whether the marks are visually, aurally or conceptually similar. It accepts some similarity between the goods in the specification applied for and those in class 11 of IR(EU) 1115937. The applicant acknowledges that the opponent has “a significant reputation within the UK for non-alcoholic beverages within class 32” but points out that the application is for goods in class 11. Regarding the ground under s. 5(3), the applicant adds that the application would not be able to take advantage of the earlier mark because they are not identical or similar. In respect of s. 5(4)(a), the applicant suggests that it is “illogical to suggest that the very dissimilar mark of the applicant for use with totally dissimilar goods could be mistaken by the public as to be associated in any way with the well known and distinguished earlier marks”.

9. Both parties seek an award of costs.

10. Both parties filed evidence. Both parties also filed written submissions during the evidence rounds. Neither party requested a hearing and neither filed submissions in lieu of attendance. The applicant is not professionally represented; the opponent is represented by Clarke Willmott LLP.

11. I will consider first the position under s. 5(2)(b) in respect of IR(EU) 1115937. If the opposition fails, in whole or in part, under that ground and that trade mark, I will go on to consider the remaining grounds and mark.

Evidence

12. I have read all of the evidence carefully but, for reasons which will become apparent, I do not intend to record it in detail at this juncture. The key points are summarised below.

Opponent's evidence

13. This consists of what is described as the affidavit of Jorge Jacobo Casals Ide, with twelve exhibits. Mr Casals Ide's evidence is not notarised and there is no indication of whether this would be an acceptable format for an affidavit in Austria, where the opponent has its address. The evidence does, however, include a statement of truth, is in the first person and is signed and dated. The applicant not having challenged the validity of the evidence, Mr Casals Ide's evidence will be treated as a witness statement.

14. Mr Casals Ide is the Regional IP Counsel Europe for the opponent, a position which he has held since 2008. He has, he states, access to the books and records held by the opponent in the ordinary course of business.

15. Mr Casals Ide states that "the RED BULL ENERGY DRINK®" was first launched in Austria in 1987.¹ It was launched in Hungary in 1992 and Scotland in 1994, following which there was a "large scale international rollout" which began in 1994 in Germany and the UK.² "RED BULL ENERGY DRINK®" is said to be sold in 172 countries.³ Mr Casals Ide states that the drink is sold "under the famous RED BULL trademark [sic] and RED BULL trade dress".⁴ He is not specific as to the particular marks, though the image shown is reproduced below:

¹ §1.

² §3 and exhibit 1.

³ Ibid.

⁴ §2.



16. The expansion of the opponent's business is described. The opponent is said to have sold 1 million units of energy drinks in Austria in 1987 and over 2 billion units in the EU in 2016 under the trade mark "RED BULL".⁵ UK figures show rising sales from over 348 million in 2012 to over 380 million in 2016.

17. Market share data is provided for the EU in 2016.⁶ The lowest figure is the UK, where market share is 27.7%, although the opponent is said to have had at least a 25% share of the UK market since 2012.⁷ Mr Casals Ide further explains that only three brands of energy drink in the UK have more than a ten per cent share in the market (the others being Lucozade, with 33%, and Monster, with 14%).⁸

18. Weighted distribution figures for 2009 are given for various countries, including the UK (99%), France (100%) and Germany (92%).⁹ Mr Casals Ide explains that this means that almost all retailers of energy drinks in these countries sold the opponent's goods.

19. Mr Casals Ide explains that the opponent's "marketplace penetration is focused on TV, cinema and radio".¹⁰ EU and UK media expenses are provided for the period 2012 to 2016.¹¹ In this period, over €85 million was spent annually in the EU and over €12

⁵ §5.

⁶ §6.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ §7.

¹¹ Ibid.

million in the UK. Videos of commercials are provided at exhibit 2. Overall marketing expenses are provided for the EU and UK for the period 2012 to 2016.¹² They show annual spend in excess of €400 million in the EU and over €60 million in the UK. It is explained that the marketing expenses include media expenses as well as marketing materials such as flyers, uniforms and retail displays, examples of which are provided at exhibit 3. The opponent's sponsorship of a range of events, including music and sporting events, between 2013 and 2016 is shown with some repetition. There are also retail displays and advertisements which show drinks packaging with the mark as shown at paragraph 15, above.

20. The opponent's "brand value" is described, with its position in a number of rankings between 2011 and 2016 provided.¹³ It is consistently the most valuable Austrian brand and within the top 100 brands worldwide. A number of other ratings are referenced but no further detail is provided. "Trial & awareness studies" are referred to at §11 and there is some overview information at exhibit 6. This evidence does not assist: there is no indication of the questions asked to determine "spontaneous" or "aided" awareness and there has, in any event, been no request for permission to file survey evidence. Additional studies from 2002 to 2012 are mentioned but suffer from the same defects as well as, in some instances, not being concerned with the marks at issue in these proceedings.¹⁴

21. Mr Casals Ide gives the number of "fans" of the opponent's Facebook site but does not give dates or the geographical spread of these fans.¹⁵ YouTube following is also given but is not broken down by territory.¹⁶ The number of page views of the opponent's website is provided for 2015 but, again, there is no breakdown by territory.¹⁷ The current (at the date of the statement) website is provided at exhibit 7. The words "RED BULL" are visible on the first page; a cap showing the mark below is at p. 232:

¹² §8.

¹³ §10 and exhibit 5.

¹⁴ §12.

¹⁵ §13.

¹⁶ *Ibid.*

¹⁷ §14.



22. Mr Casals Ide claims that the opponent has “acquired a significant reputation in the media sector and as the organizer of both cultural and sport events”.¹⁸ A number of “brand extensions”, such as “RED BULL MOBILE” and “RED BULL Records” are described, and a clothing catalogue is exhibited.¹⁹ Other sporting and cultural ventures in which the opponent is involved, such as Formula One racing and a music academy, are described.²⁰ Undated website evidence is provided at exhibit 10 and a video regarding a freefall record attempt at exhibit 11. A list of events and artists is included at exhibit 12.

Applicant’s evidence

23. This consists of the witness statement of Michael H Hall, the Company Secretary of the applicant. Mr Hall states that he has held that position since 1998. He makes a number of submissions in his witness statement, which I will not summarise here but will bear in mind.

24. Mr Hall exhibits the results of two Google internet searches. The first is a search for “red bull”.²¹ Both word and image results are shown; many of the results appear to be linked to the opponent. The second set of search results are from a search for “red bull bbq grills”, amongst which results the applicant’s website appears to be shown.²²

¹⁸ §15 (p. 29).

¹⁹ §§16-23; exhibit 9.

²⁰ §4; §§24-41.

²¹ Annex 2.

²² Annex 3.

Opponent's evidence in reply

25. This consists of the witness statement of Daniel Berry, a solicitor at the opponent's professional representatives. Most of his statement consists of submission, which I will not record here but bear in mind.

26. At exhibit DB1 is a print from thetrademarkninja.com, dated 5 July 2016. There is a reference to what appears to be the applicant's trade mark, although the claimed and actual dates of application are not consistent. The blogger comments "that name sounds familiar, I wonder if the company is going to face any opposition". The exhibit adds nothing.

27. DB2 includes copies of two pages from the applicant's annex 3. The opponent has highlighted search results which are connected to the opponent. It provides two Facebook prints from its website showing the relevant videos.

28. That concludes my summary of the evidence, to the extent that I consider necessary.

Decision

Section 5(2)(b)

29. 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”.

30. 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. The principles are:

(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

31. I note that the applicant points out in its counterstatement that the opponent does not market goods in class 11. However, the earlier mark is not subject to the proof of use provisions, which means that whether there has been use by the opponent on the goods in its registration is not a factor which has any bearing on this decision. The assessment is notional: that means that the similarity of the goods and services is assessed only on the basis of what appears in the respective specifications.²³ Accordingly, the considerations below take into account only the terms in the specifications themselves and how they may be construed, and not whether either party has so far conducted any business in respect of those goods and services.

32. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) confirmed in that, even if goods/services are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

“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 fur 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”.

33. Registration is sought for “barbecue smokers and grills, pellet smokers and grills” in class 11. “Smoker” plainly has multiple meanings, the most relevant of which from the *Oxford Dictionary of English* defines “smoker” as “a person or device that smokes fish or

²³ See: *Compass Publishing BV v Compass Logistics Ltd* ([2004] RPC 41) at [22]; *Roger Maier v ASOS* ([2015] EWCA Civ 220 at [78] and [84]; *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited* (Case C-533/06) at [66].

meat”.²⁴ The parties have provided no evidence or submissions which would lead me to believe that this is not an appropriate interpretation of the term in the specification. I adopt it.

34. The earlier mark contains, in class 11, the term “apparatus for [...] cooking”. Barbecue smokers and grills, and pellet smokers and grills, all fall under the broad term “apparatus for [...] cooking”. As the case law above shows, as one term falls within the broader category covered by the earlier term, these goods are identical.

35. As the above goods are identical, the opponent’s position cannot be improved by comparing its other goods and services with the goods in the application. I do not intend to do so.

The average consumer and the nature of the purchasing act

36. It is necessary for me to determine who the average consumer is for the respective parties’ goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. 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 services in question: *Lloyd Schuhfabrik*.

37. 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

²⁴http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0784540?rskey=DiKbzP&result=1 [accessed 30 May 2018].

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”.

38. The opponent submits that the average consumer is the general public, who will display an average level of attention to the purchase.²⁵ The applicant has made no specific submissions on the point.

39. Given my findings, above, regarding the similarity of the goods, the relevant consumer is the average consumer of the identical goods in class 11.

40. I agree with the opponent that the average consumer of the goods at issue includes members of the general public. However, there is no evidence on the point and the specifications are not limited in any way. It seems to me that, absent evidence or submissions to the contrary, there is likely to be a second group of consumer, namely a professional purchasing and using these goods in the course of their own business.

41. The purchase of the goods at issue, for both groups of average consumer, is likely to be predominantly visual, with the consumer viewing the goods in retail premises, on websites and in advertisements, brochures and catalogues. I do not discount, however, that there may be an aural aspect to the purchase, as a result of, for example, word of mouth recommendations or discussions with sales personnel.

42. In terms of the level of attention which will be paid to the purchase, the goods at issue do not strike me as being likely to be bought with particular frequency. The consumer will wish to ensure that the goods are of the correct size and capacity, and are adapted to the particular purpose desired. For the professional user, compatibility

²⁵ Written submissions, §19.

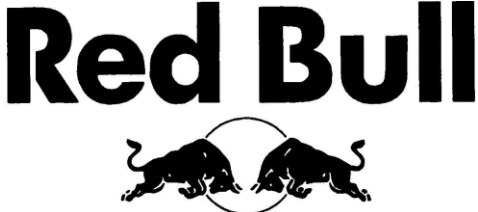

with existing equipment may also be a factor. Both groups are likely to pay a reasonably high degree of attention when purchasing the goods.

Comparison of trade marks

43. It is clear from *Sabel* (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 (“CJEU”) stated at paragraph 34 of its judgment in *Bimbo*, 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”.

44. 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. Due weight must be given to any other features which are not negligible and therefore contribute to the overall impressions created by the marks. The marks to be compared are:

Opponent's mark	Applicant's mark
	

45. The opponent refers to the judgment of the GC in *Honda Motor Europe Limited v OHIM*, Case T-363/09, in which the court stated:

“30. [...] according to settled case-law, where a trade mark is composed of verbal and figurative elements, the former are, in principle, more distinctive than the latter, because the average consumer will more readily refer to the goods in question by quoting their name than by describing the figurative element of the trade mark”.

46. Whilst I bear in mind the case law referred to by the opponent, the court cannot be said to have laid down an inviolable rule that words in a mark are always dominant over devices, not least because of the CJEU's comments in *L&D SA v OHIM* [2008] ETMR 62, that:

“55 Furthermore, inasmuch as L & D further submits that the assessment of the Court of First Instance, according to which the silhouette of a fir tree plays a predominant role in the ARBRE MAGIQUE mark, diverges from the case-law of the Court of Justice, it need only be stated that, contrary to what the appellant asserts, that case-law does not in any way show that, in the case of mixed trade marks comprising both graphic and word elements, the word elements must systematically be regarded as dominant.”

47. The opponent submits that the words “Red Bull” are the dominant element of the earlier mark.²⁶ It claims that the same words are the most distinctive element of the application “as they are not descriptive of the goods and constitute the first two words when reading the mark from right to left”, whereas the words “BBQ GRILLS” are of negligible significance.²⁷ The device in the application, according to the opponent, “only reinforces the semantic meaning of the words ‘RED BULL’ in the Sign”.²⁸ As a consequence, the opponent claims that the marks are visually and aurally identical or highly similar, and conceptually identical.²⁹

48. The applicant argues in its counterstatement that the device of a bull’s head in the application is “visually distinct from the Earlier Marks of the opponent which incorporate two fighting bulls in profile. The text element within the Sign of the applicant further differentiates it from the Earlier Marks”. It argues that “[the] aural element from the text within any mark is obviously secondary to a primary visual element” and that the earlier marks “are of two fighting bulls in profile this is conceptually different to the Sign of the applicant which is of a smiling caricature head of a single bull”.

49. The earlier mark consists of the words “Red Bull”, in a slightly stylised but unremarkable bold typeface, presented in black. Underneath the words are two charging bulls, in profile facing one another. They are in black and occupy a smaller proportion of the mark than the words. Behind the bulls is a black circular line upon which the bulls are superimposed. Given their relative size, I consider that the words “Red Bull” dominate the overall impression. The device of bulls on a circle plays a lesser role, though it still makes some contribution to the distinctiveness and overall impression of the mark.

50. The mark for which registration is sought comprises the words “RED BULL BBQ GRILLS”, presented in capital letters in a bold but otherwise ordinary font, in dark red. In

²⁶ Written submissions, §17.1.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Idem, 17.2-17.3.

the middle, between the words “BULL” and “BBQ”, is a device of a bull’s head. It is somewhat cartoonish in appearance, and is in two shades of red, with grey horns and a yellow ring through its nose. The device extends above and below the line of the words. In terms of the overall impression, whilst I accept that words are often dominant over devices, the unusual depiction of the bull’s head and its relative size mean that the words “RED BULL” and the device of a bull both play important roles in the overall impression, though the words are marginally more dominant. I agree with the opponent that the words “BBQ GRILLS” are likely to be given little or no trade mark significance and will play a very small role.

51. There is an obvious point of visual similarity between the marks because of the shared words “Red Bull”/“RED BULL”. However, the respective bull devices are quite different: the opponent’s mark features two bulls, in lifelike outline, whilst the device in the applied-for mark is a cartoonish bull’s head. There is also some difference because of the additional words “BBQ GRILLS” in the application though, as I indicated above, these words have little or no distinctiveness. The marks are visually similar to a medium degree.

52. The devices in the marks will not be verbalised. The earlier mark will be articulated as “Red Bull”. The later mark might be articulated in full but, as “BBQ GRILLS” has little or no distinctive character, it is more likely that it will be referred to as “RED BULL” only. If the former, the marks are aurally similar to a medium degree; if the latter, the marks are aurally identical.

53. Both marks share the same concept of a red bull. The devices do not introduce other elements: they both represent bulls. There is some difference because of the words “BBQ GRILLS” in the application. However, bearing in mind my assessment of the overall impression, I consider that the marks are, if not conceptually identical, conceptually similar to a very high degree.

Distinctive character of the earlier trade mark

54. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585. In *Lloyd Schuhfabrik*, 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-2779, 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)".

55. The opponent claims that the earlier mark has an enhanced level of distinctive character because of the use which has been made of it in respect of the goods and services for which it is registered. The applicant acknowledges what it refers to as the opponent's "significant reputation within the UK for non-alcoholic beverages".³⁰ However, the IR(EU) under consideration is not registered in class 32 (the proper class for energy drinks) and there is no evidence of sales of goods or services other than energy drinks. In respect of the goods in class 11 for which the mark is registered, there is no evidence to support a finding of enhanced distinctiveness.

56. As far as the mark's inherent distinctiveness is concerned, the words "Red Bull" are not highly allusive of the goods, nor indeed of the meat which they are used to cook, since "bull" is not the usual way to refer to beef. The device is, however, suggestive of cattle. As a whole, the mark is inherently distinctive to a medium degree.

Likelihood of confusion

57. There is no simple formula for determining whether there is a likelihood of confusion. The factors considered above have a degree of interdependency (*Canon* at [17]). I must make a global assessment of the competing factors (*Sabel* at [22]), considering the various factors from the perspective of the average consumer and deciding whether the average consumer is likely to be confused. In making my assessment, I must keep in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

58. Confusion can be direct (where the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but

³⁰ Counterstatement, §2.3.

puts the similarity that exists between the marks/goods down to the responsible undertakings being the same or related). The concept of indirect confusion was explained by Mr Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10 as follows:

“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”.

59. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C., as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

60. I will proceed on the basis of the position most favourable to the applicant, i.e. that the marks are visually and aurally similar to a medium degree and conceptually similar to a very high degree. The earlier mark has a medium level of inherent distinctive character. The goods are identical and they will be bought with a reasonably high level of attention. The goods will also be purchased through mainly visual means, which means that the visual similarity between the marks carries particular weight in the overall assessment of confusion. Given the differences between the marks, particularly

the differences in the presentation of the words and the different representations of bulls, I think it is unlikely that the consumer will make a mistake and think that one mark is the other mark, even when the concept of imperfect recollection is borne in mind. There is no likelihood of direct confusion.

61. That leaves indirect confusion. As Mr Mellor's comments above, indicate, it is possible for marks to share a common element without there being any confusion on the part of the consumer: in those cases, the consumer might call the earlier mark to mind but not assume that there is any material association between the marks. Again, it is a question of balancing the competing factors. I bear in mind that the purchase will be made with a reasonably high level of attention, which makes confusion less likely. However, this is a notional test in class 11, not one based on actual use by the opponent, and the goods at issue are identical: that is a factor which points towards confusion. Whilst there are presentational differences sufficient to avoid a simple mistake on the part of the consumer, the level of aural similarity and the absence of a material conceptual distinction between the marks will, for identical goods, lead the average consumer to conclude that the goods are produced by the same or an economically linked undertaking. There is a likelihood of indirect confusion.

Final remarks

62. As the opposition has been successful in its entirety based upon the earlier IR(EU) and s. 5(2)(b), there is no need to consider the remaining mark or grounds as it would not materially improve the opponent's position.

Conclusion

63. The opposition has succeeded in full. The application will be refused.

Costs

64. The opponent has been successful and is entitled to a contribution towards its costs. Given the date on which these proceedings were launched, the award of costs is governed by Tribunal Practice Notice (“TPN”) 2 of 2016. Using that TPN as a guide, but bearing in mind that the applicant filed only very light evidence, I award costs to the opponent on the following basis:

Official fees	£200
Preparing the Notice of Opposition and considering the counterstatement:	£200
Preparing evidence and considering and commenting on the other party’s evidence:	£600
Written submissions:	£300
Total:	£1300

65. I order CookinPellets UK Limited to pay Red Bull GmbH the sum of **£1300**. This sum is to be paid within fourteen days of the expiry of the appeal period or within fourteen days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 7th day of June 2018

**Heather Harrison
For the Registrar
The Comptroller-General**