

O/475/21

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3467019
IN THE NAME OF BLUE TREE LIMITED
IN RESPECT OF THE TRADE MARK**

ROCK STAR

IN CLASS 33

AND

**OPPOSITION THERETO UNDER NO. 420805
BY ROK STARS PLC**

Background and pleadings

1. Blue Tree Limited (“the applicant”) applied to register the trade mark no. 3467019 for the mark ROCK STAR in the UK on 14 February 2020. It was accepted and published in the Trade Marks Journal on 6 March 2020 in respect of the following goods:

Class 33: Alcoholic beverages (except beers); spirits; liqueurs; wine; cocktails; alcopops; low alcoholic drinks; alcoholic extracts; alcoholic essences; alcoholic beverages containing fruits; bitters.

2. ROK Stars Limited, formerly ROK Stars PLC (“the opponent”) oppose the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This is on the basis of its four earlier UK trade mark registrations as set out in the table below:

Territory	Trade Mark	Registration number	Registration date	Goods registered
UK	ROK PILSNER	3322777	05 October 2018	Class 32: Beverages, beers, ale, lager, pilsner, stout and porter; non-alcoholic beers.
UK	ROK ALE	3323023	05 October 2018	Class 32: Beverages, beers, ale, lager, pilsner, stout and porter; non-alcoholic beers.
UK	ROK Beer	3323027	05 October 2018	Class 32: Beverages, beers, ale, lager, pilsner, stout and porter; non-alcoholic beers.


UK	ROK IPA	3323024	05 October 2018	Class 32: Beverages, beers, ale, lager, pilsner, stout and porter; non-alcoholic beers.
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3. The opponent argues that the respective goods are similar and that the marks are highly similar, and that as such, there will be a likelihood of confusion.
4. The opponent also opposes the application on the basis of section 5(4)(a) of the Act. The opponent claims it has made use of the sign 'ROK Stars' in respect of the distribution and wholesale of beers, wine, gin, vodka, rum, Irish whiskey and energy drinks, throughout the UK since 1 June 2013, and that as such it has built up goodwill in the mark in respect of these goods. The opponent claims that the applicant's use of the similar mark ROCK STARS would result in a misrepresentation to the consumer that "the applicant is connected to or endorsed by the Opponent." The opponent pleads that this misrepresentation will lead to damage to its goodwill.
5. The applicant filed a counterstatement denying any basis for the refusal of its mark under either section 5(2)(b) or section 5(4)(a) of the Act. The applicant submits the marks present a very different visual, aural and conceptual impression, and have very distinct concepts of a rock or boulder, and a rock star. The applicant submits the spelling of the marks further differentiates them, and that there will be no likelihood of confusion. Further, the applicant has put the opponent to proof of any goodwill held in the sign ROK Stars, and of any misrepresentation, and states "the Applicant is not making any misrepresentation with the intent to trade off the Opponent's reputation".
6. Both sides filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary.
7. Neither party filed written submissions, but both parties appear to have made various submissions within the witness statements filed. As far as the witness

statements include arguments and opinions these will not be considered as evidence of fact within these proceedings. No hearing was requested and so this decision is taken following a careful perusal of the papers.

8. The applicant is represented in these proceedings by Nash Matthews LLP. The opponent has not appointed professional representation.
9. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case law of EU courts.

Evidence

10. The opponent's evidence comprises a witness statement in the name of James Lee Kendrick, Director of the opponent, and five exhibits, namely Exhibit JLK1 to Exhibit JLK5.
11. In the witness statement, Mr Kendrick confirms the opponent changed its name from 'The Great Big Production Company PLC' to 'ROK Stars PLC' on 21 November 2011, and then to 'ROK Stars Limited' on 4 November 2020. He explains that the opponent owns subsidiaries including ROKiT Drinks Limited, who use the mark 'ROK Stars' in addition to what Mr Kendrick refers to as the "ROK Stars logo" (¹) in respect of distribution and wholesale of beers, wines, gin, vodka, rum, Irish whiskey and energy drinks, including in respect of the following goods:

- Oval vodka, since 2011
- ROK Natural energy, since 2011

¹ Exhibit JLK1

- ABK Beers, since May 2013
- Bogart's Real English Gin, since 2014
- UB Real Irish Whiskey, since 2014
- Graffiti Wines, since April 2017

12. Mr Kendrick states the ROK Stars logo as shown above, and the identifier ROK were deliberately used by ROKiT Drinks Limited "to directly associate and benefit from the goodwill of the ROK Stars brand value within the industry due to the global presence of identity of ROK Stars."

13. Turnover figures for "beverages" in the UK are provided in respect of the years 2013 to 2019 as below:

- (i) 2013 - £9,215
- (ii) 2014 - £126,268
- (iii) 2015 - £327,102
- (iv) 2016 - £710,779
- (v) 2017 - £1,427,705
- (vi) 2018 - £869,715
- (vii) 2019 - £1,872,930

14. The figures are not broken down into types of beverage sold.

15. Exhibit JLK2 provides various texts described in the witness statement as Press Announcements. Mr Kendrick states these announcements "have been distributed globally for many years". No details of where, when, or if the announcements provided were also published to the public have been provided. Many of the press announcements discuss the opponent's import and export and new ventures in overseas territories, as well as finance ventures. The articles mention territories all over the world including Switzerland, Spain, Portugal, Hong Kong, Japan, China and the US. In addition, the press announcements provide some background information into the opponent's activity in the UK as follows:

- The opponent made ABK beer available online in the UK 2016;

- The opponent planned to “push [its] portfolio of ABK Beer, Bogart’s Gin, Bogart’s Vodka and [its] new range of Graffiti Wines into the UK market, to capitalise on what’s been a good start to [its] UK sales of [its] ABK Beer on Amazon”, following the appointment of Mark Jones as CEO of ROKiT Drinks UK at the end of 2016;
- The opponent made ABK Beer available on draught in the UK in 2017, offering it “to pubs and clubs across the UK”;
- The opponent began to offer Graffiti Wine for sale in the UK around April 2017;
- The opponent began to offer ABK Pilsner on its ‘Export Beer Roster’ in 2017 as it continued to develop its export business including in the UK;
- Graffiti Wines offered by the opponent sponsored the Scottish Entertainment and Hospitality Awards 2017;
- The opponent’s ABK Fels Pilsner made its UK debut at Splendour Festival in Nottingham in July 2017;
- The opponent agreed an exclusive distribution agreement under ROKiT Drinks with Dunns Food and Drink (wholesaler) in Scotland in 2017;
- The opponent, via its ROKiT Drinks division reached an exclusive agreement with Freemans Event Partners Oktoberfest in 2017 to supply ABK Barvarian Beer to events across the UK in October, spanning 24 cities and reaching 250,000 people;
- The opponent won an award for its beer tap handle design at the World Beer Championships in 2017.

16. All of the press announcements begin with the use of ‘ROK Stars announce’, and explain a little about ROK Stars PLC. It is often detailed that the activities being announced are being undertaken by ‘ROKiT Drinks Division’, and some examples of these statements are below:

- “ROK Stars, the consumer goods and environmental technologies development company, has announced its ROKiT Drinks division has signed an exclusive agreement with Alicante-based premium spirits

importer Central Hisumer for the distribution of ROK's super premium Bogart's Gin across Spain, Portugal and Andorra." (8 October 2014)

- "ROKiT Drinks, the beverages division of ROK Stars PLC, has today announced its ABK Bavarian Beer is now available in Hong Kong via import partner Eurasia Global Services." (17 June 2015)
- ROKiT Drinks, the beverages division of ROK Stars PLC, has today announced it will increase export volumes to 10 containers per month of its ABK Bavarian Beer to the United States, starting in September." (17 August 2015)
- "ROK Stars PLC ... has announced its ROKiT Drinks division will debut its all-new Fels Beer at the Beer at the Splendour Festival in Nottingham on Saturday 22nd July" (12 July 2017)
- "ROK Stars PLC ... has announced its ROKiT Drinks division has reached an exclusive agreement to supply ABK Bavarian Beer to all Freemans Event Partners Oktoberfest 2017 events across the UK throughout October" (26 September 2017)

17. The press announcements provided discuss the appointment of new Regional Sales Directors for ROKiT Drinks division. The sales director for London and the South East of England announced on 23 April 2018 is quoted as saying:

"With my 20 years' experience in the drinks industry, I'm delighted to have joined the team at ROK and am keen to get to grips with the sales of our portfolio of award-winning drinks in the UK market."

18. The regional sales director for ROKiT Drinks in Scotland is mentioned in an announcement dated 23 August 2017, discussing the new Exclusive Distribution agreement with Dunns Food & Drinks with ROKiT Drinks in Scotland. A spokesperson for Dunns is quoted as saying:

“The ROKiT Drinks portfolio of ABK Beer, Borgart’s Gin and Vodka and Graffiti Wines is an outstanding collection of unique brands – each with a story to tell – and one we feel will be of great interest to our customers. We look forward to an exciting future with these brands in Scotland.”

19. Exhibit’s JLK3 includes a similar style of press announcement as above, described as a “ROK Stars News release” by Mr Kendrick in his witness statement. This discusses the appointment of Jimmy White MBE, described as a “snooker legend”, as a brand ambassador for the opponent in 2013, and explains he will begin by wearing the OVAL Vodka branding at the German Masters snooker tournament in Berlin that year.

20. Exhibit JLK4 is again described as a “ROK Stars News release” by Mr Kendrick in his witness statement and describes the “personal endorsement deal” signed by snooker player Ronnie O’Sullivan. The news release explains that a press conference was held at a London hotel to confirm Ronnie O’Sullivan would defend his World Champion title. It explains the press conference was “sponsored by Rok Stars’ Oval Vodka brand”, and that the endorsement deal was announced during the conference. The news release is dated 26 February 2013.

21. Exhibit JLK5 includes further press releases, this time detailing awards won by the opponent’s products. These explain:

- The opponent’s ABK Bavarian Beers won three Gold Medals at the Beverage Testing institute’s ‘World Beer Championships’ in Chicago in 2014;
- The opponent’s portfolio of Bavarian Beers were awarded 6 Gold medals by the German Agricultural society in 2015;
- The opponent’s ABK Beer won a Gold Medal at the European Beer Star Awards in 2015, two in 2017, and one in 2018;

- The opponent's ABK Beer was awarded a further four gold medals by the German Agricultural Society in 2016, a further two in 2017 and a further seven in 2018;
- The opponent's ABK's Hell and Edel beers won first place in a blind tasting contest at the Great International Beer, Cider, Mead and Sake Competition;
- The opponent's ABK Hell Beer was rated exceptional by Tastings.com and was rated 'Gold' and 'Love It' at the New York International Beer Competition in 2018;
- The opponent's Bogart's Gun was rated exceptional by Tastings.com in 2018, and along with Bogart's Irish Whiskey was awarded Craft Spirits gold medals at 'Craft Competition' also in 2018;
- The Opponent's ABK Beer was awarded 2 International Beer Challenge Gold Medals at the International Beer Challenge blind tasting competition in London in 2018;

22. The applicant's evidence consists of a Witness Statement in the name of Benjamin Bolt, identified as Director of the applicant. The witness statement submits that beer is a distinctly different product to other alcohol. The statement introduces a single exhibit, namely Exhibit BB1. This exhibit comprises pages from two websites, namely drinksupermarket.com and Sainsburys.co.uk. Both webpages are marked up to highlight the beer and cider as falling within its own section separated from other types of alcohol. In the page from drinksupermarket.com the sections are separated into 'whisky', 'champagne and sparkling', 'wine', 'spirits' and 'liqueurs' as well as 'beer and cider' and 'mixers and soft drinks', 'big and miniatures', 'gifts and accessories' and 'favourite brands'. On Sainsburys.co.uk the sections under 'Drinks' include (amongst other soft drink categories) 'sports energy and wellbeing', 'beer and cider', 'wines', 'champagne and sparkling wine', 'spirits and liqueurs', and 'low & no alcohol'. The screenshots provided are both dated 18 January 2021.

Proof of use

23. As none of the earlier marks relied upon under Section 5(2)(b) of the Act had been registered for over five years at the date on which the application was filed, namely 14 February 2020, Section 6A of the Act does not apply, and no proof of use of the earlier marks is required.

DECISION

Section 5(2)(b)

24. Section 5(2)(b) of the Act is 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”.

Section 5A

25. Section 5A of the Act is as follows:

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

The Principles

26. 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.

The principles

(f) 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;

(f) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods and services

27. Section 60A of the Act provides:

“(1) For the purpose of this Act goods and services-

(f) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the "Nice Classification" means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975."

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

- (f) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

29. In the judgment of the CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 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”.

30. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the General Court (“GC”) stated that:

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

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

“...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”.

32. The case law provides further guidance on how the wording of goods and services as registered and filed should be interpreted within the comparison. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“... Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of ‘dessert sauce’ did not include jam, or because the ordinary and natural description of jam was not ‘a dessert sauce’. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.”

33. With these factors in mind, the goods for comparison are below:

Opponent’s earlier goods	Contested goods
Class 32: Beverages, beers, ale, lager, pilsner, stout and porter; non-alcoholic beers.	Class 33: Alcoholic beverages (except beers); spirits; liqueurs; wine; cocktails; alcopops; low alcoholic drinks; alcoholic extracts; alcoholic essences; alcoholic beverages containing fruits; bitters.

34. The opponent’s goods include the term ‘beverages’. I understand beverages to mean all types of drinks. I therefore consider that the ordinary and natural meaning of this term includes the alcoholic beverages as covered by the

application in class 33. I note also that the categorisation of goods into classes serves an administrative purpose, and it is not the method by which I should assess if goods are similar to each other.

35. However, in *Altecnic Ltd's Trade Mark Application*² the Court of Appeal decided that “*the Registrar is entitled to treat the Class number in the application as relevant to the interpretation of the scope of the application, for example, in the case of an ambiguity in the list of the specification of goods.*”

36. In addition, in *Pathway IP Sarl (formerly Regus No. 2 Sarl) v Easygroup Ltd (formerly Easygroup IP Licensing Limited)*, [2018] EWHC 3608 (Ch), the late Mr Justice Carr considered whether it was appropriate to take the class(es) in which the trade mark was registered into account in revocation or invalidation proceedings when deciding whether a description covered the goods/services shown in the evidence. After considering the judgments of the High Court in the *Omega 1* [2010] EWHC 1211 (Ch) and *Omega 2* cases [2012] EWHC 3440 (Ch), the judge stated that in his (provisional) view, the class number should be taken into account where the meaning of the disputed term is not otherwise sufficiently clear and precise. In particular the judge stated that where “*the words chosen may be vague or could refer to goods or services in numerous classes [of the Nice classification system], the class may be used as an aid to interpret what the words mean with the overall objective of legal certainty of the specification of goods and services.*”

37. Whilst I therefore find the class number has no bearing on the possible similarity of the goods, and whilst the comments made by the late Mr Justice Carr above concerned different circumstances to those which I am considering in these proceedings, I note that when the earlier registrations were filed in 2018, the wording beverages covered a broad range of goods falling within several possible classes. With consideration to the *Altecnic Ltd's Trade Mark Application*, as well as the more recent comments made by the the late Mr Justice Carr, it is my view that I may use the class number 32 to

² *Altecnic Ltd's Trade Mark Application* [2002] RPC 34 (COA)

aid my interpretation of what the term 'beverages' in the opponent's specification of goods will cover in this instance, and I find this to be all drinks that fall within class 32. I find the opponent appears to agree with this approach, on the basis of its pleadings that the goods are similar, rather than identical.

38. I will therefore continue with my assessment of the similarity of the goods on this basis.

Contested goods: *Alcoholic beverages (except beers); alcoholic beverages containing fruits;*

39. The applicant's goods *Alcoholic beverages (except beers)* as well as *alcoholic beverages containing fruits;* will provide protection for a range of beverages including ciders. I note that the nature of cider differs to that of beer in the sense that the drinks are made from different things. Cider is made from apples, whereas beer is generally made from hops and yeast. In addition, the production methods and entities providing the products will generally differ. However, both are beverages, usually containing a similar percentage of alcohol, and both often have a similar appearance and consistency. The intended consumer will be shared, namely members of the general public over the age of 18. In addition, the intended purpose of both drinks is the same, either for quenching thirst, consuming with a meal or by itself for enjoyment of the taste or the alcohol. Both drinks will be both sold in cans, bottles, or from taps. The drinks will be sold in the same quantities, such as in pints or half pints from a tap or pump, and both beer and cider are often served in the same type of receptacle. These will also be displayed in the same areas of supermarkets as well as near each other where drinks are displayed in a hospitality setting, and my own experience of how these drinks are grouped together by retailers is reinforced by the applicant's evidence provided. As the goods serve the same purpose, there is a level of competition between them, as consumers may enter a supermarket or bar, pub or restaurant undecided on which drink they will choose and opt for one over the other to enjoy or quench their thirst. Considering these factors, I find

the applicant's above goods similar to at least the opponent's goods *beers* to a high degree.

Contested goods: *low alcoholic drinks*

40. The applicant's low alcoholic drinks include all types of low alcohol drinks falling in class 33, including low alcohol ciders. I note the opponent's '*beverages*' in class 32 may include low alcohol beers, and also that non-alcoholic beers are included specifically within the opponent's goods. For the reasons given above, I find the low alcohol cider and low or no alcohol beer will share many similarities in terms of the method of use as with the more alcoholic versions above. I also find the intended purpose of the drinks, namely for enjoying a beverage that is typically alcoholic but without encountering the effects of alcohol, either for enjoyment or the taste or for quenching thirst, will also be shared. These goods will both be served in the same pubs, bars and restaurants, and will also very likely be placed next to each other or at least very near each other in the low or no alcohol section of supermarket shelves, and again my own experience of this is reinforced by the applicant's own evidence which shows a specific '*no and low alcohol*' section separate to other soft drinks in Exhibit BB1. There will be a degree of competition between the goods, in that the consumer may choose between a low or no alcohol beer or cider. Overall, I find these goods to be similar to a high degree to those covered by the opponent.

Contested goods: *spirits; liqueurs; wine; cocktails; bitters*

41. Again, the above goods covered by the applicant's specification will be served at the same premises as the opponent's beers and beverages, namely restaurants, pubs and bars, as well as being sold in supermarkets and off-licences. Broadly, both the opponent's beers and applicant's alcoholic beverages may be purchased for the purpose of enjoying the taste and the effects of the alcohol, and there may be a level of competition between the beverages, as the shared intended consumers, namely members of the

general public over the age of 18, may choose between a type of alcoholic beverage depending on what catches their eye or takes their fancy in the moment. However, there are also considerable differences between the opponent's goods including beers and the applicant's goods listed above. They will be sold in different measures, will generally contain a considerably different percentage of alcohol, will be served in different receptacles and will be made from different basic ingredients. Although the goods may be placed near each other in supermarkets, it is unlikely they will be sold on the same shelves. I do not find the goods to be complementary, and the goods will also be produced using different methods. This reasoning extends to the opponent's goods namely *ale, lager, pilsner, stout and porter; non-alcoholic beers*. I find these goods to be similar to the applicant's goods above to a low degree.

42. I note that the opponent's broad goods, namely '*beverages*' in class 32 will also cover items including the non-alcoholic versions of the applicant's drinks above, such as non-alcoholic wines, spirits and cocktails. Whilst I note this will increase the similarity with the applicant's goods above in terms of the appearance of the goods, the way they are served, and even the basic ingredients, I find this will also reduce the similarity in other respects. The intended purpose will differ to a degree, with the alcoholic beverages being enjoyed partly for the effects of the alcohol, and the non-alcoholic beverages being chosen to avoid these effects. Further, it is unlikely there will be much competition between the goods for this reason. The items are unlikely to be placed next to each other in supermarkets and are likely to be separated on drinks menus on the basis of the alcoholic and non-alcoholic content, and my experience of this is again supported by the applicant's evidence. I therefore do not find the category of '*beverages*' covered by the opponent to increase the similarity with the applicant's goods listed above, which remains at best at a low degree.

Contested goods: *alcopops*

43. I find the applicant's goods 'alcopops' are more similar to the opponent's beers than the applicant's other types of alcohol above in some respects. The goods will often be sold in similar sized bottles, and contain a similar percentage of alcohol to beers. However, they will not be available via tap in hospitality settings, and they will generally have a different appearance, often appearing as a brightly coloured or white liquid. Again, there may be a degree of competition with the opponent's beers and similar alcoholic beverages, in that the consumer may choose either of these drinks instead of the other, particularly knowing they both share a similar level of alcohol. Whilst they will be placed near each other in shops, they will be unlikely to be next to each other or on the same shelves, and the goods will be made from different ingredients, with alcopops tending to be spirit based drinks. The production methods will also therefore be different. There will be an overlap in intended consumers, those being the general public over the age of 18, but the goods will not be complementary. Overall, I find the goods to be similar to a medium degree.

Contested goods: *alcoholic extracts; alcoholic essences;*

44. The above goods are extracts and essences made from alcohol, which may be for the purpose of adding to alcoholic beverages or other consumable goods, or for mixing with alcoholic and non-alcoholic drinks. Whilst I note the possibility that these may be purchased by the general public in supermarkets, for mixing into cocktails for example, they might also be purchased by those in the industry for making drinks or food items. These goods will likely be sold in different types of receptacle to the opponent's goods and I find it unlikely these will be next to each other in retail shops. I do not find these goods will be complementary to the opponent's as I do not believe the consumer will believe the goods will be provided by the same undertakings responsible for the opponent's goods, and the goods will not be in competition. At best, I find a low degree of similarity between these goods and those protected under the earlier mark.

Comparison of marks

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

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

46. It would be wrong, therefore, to artificially dissect the trade marks, although, it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

47. The respective trade marks are shown below:

Earlier marks	Contested trade mark
ROK PILSNER	ROCK STAR
ROK ALE	
ROK Beer	

ROK IPA	
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48. All four of the opponent's earlier marks are made up of two words, namely ROK followed by a word depicting a type of alcoholic beverage, as covered by the opponent's specification of goods. Due to the descriptive nature of the second element of all four earlier marks, in addition to the placement of this element at the end of the mark, the second word plays a lesser role in the overall impression of all four of the opponent's earlier marks.

49. The contested application consists of the two words ROCK and STAR, which hang together to reference a ROCK STAR. The overall impression of the mark is held in the combination of the two words, and the mark as a whole.

Visual comparison

50. The marks coincide visually through the use of the initial two letters RO in the same position in each of the marks. Both the earlier marks and the contested marks also both include the letter K in a similar position, although this is the fourth letter of the contested mark and the third letter of each of the earlier marks. Both the earlier marks and the contested marks include a second word. Arguably the most visually similar of the earlier marks is the mark ROK IPA, with the 'A' placed as the third letter of the second word, and the 'P' resembling an 'R' to some extent. However, visually the word 'IPA' and 'STAR' bear little resemblance. Considering the similarities and the differences between the earlier marks and the contested marks, I find them visually similar to slightly below a medium degree at best. If the descriptive elements of the earlier marks were to be disregarded by the consumer, I would still find the marks visually similar to slightly below a medium degree,

due to the differences in the initial work ROCK/ROK and the inclusion of STAR in the contested mark which would not be ignored.

Aural comparison

51. Whilst the earlier marks may be pronounced in full, it is also possible that the descriptive element of the earlier marks will not be verbalised by the consumer. The contested mark will be verbalised in full in the two syllables ROCK-STAR. The earlier marks (whether pronounced in full or as ROK only) coincide verbally in the first syllable ROK / ROCK which will be pronounced identically, and differ either due to the addition of the second syllable 'STAR', or where the earlier marks are pronounced in full, the change in the second syllable to 'ALE' and 'Beer', the second and third syllables to 'PILS-NER', or the second, third and fourth syllable of the letters 'I-P-A'. In all instances, I find the marks to be verbally similar to a medium degree.

Conceptual comparison

52. The applicant claims that conceptually, the marks differ, and that the contested mark will convey the concept of a rock star, which is far removed from rock or boulder that will be conceptually associated with opponent's mark.

53. I agree that the contested mark will convey to the consumer the clear concept of a rock star, namely an individual that is famous for their music or stage persona, generally performing to audiences either with a band or alone.

54. I also agree that the earlier marks will, to at least to some consumers, convey the concept of a rock, namely a stone or boulder as described. I also find that for some consumers the earlier marks will convey the concept of a music genre, namely rock music. I do not find the misspelling of the word rock as ROK in the earlier mark will prevent the marks from conveying either meaning at least a portion of consumers. However, I find that for some consumers, the three letters ROK may be viewed instead as an acronym with no particular

meaning. In respect of the second words in the earlier marks, I find these will convey to the consumer a type of alcoholic beverage.

55. In all instances I find the concepts of the earlier marks and the contested mark to be distinct from each other, although I note that the concept of a genre of music will be closer to the concept of a rock star than the concept of a rock as a stone or boulder, or where ROK conveys no meaning. Where the earlier mark conveys a stone or boulder and a type of alcohol, or a type of alcohol only, I find the marks to be conceptually dissimilar. Where the earlier marks convey a music and a type of alcohol to the consumer, I find at best that the marks will be conceptually similar to a low degree due a reference to music being, to varying extents, present in both marks.

Average consumer and the purchasing act

56. 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*.

57. 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.”

58. Before making a decision on the likelihood of confusion, I must first identify the relevant consumer of the goods. The relevant consumer of both the applicant’s and the opponent’s goods will be primarily the general public over the age of 18, although there will be a portion of consumers who may be under 18 where the opponent covers non-alcoholic beverages in class 32. There may also be a portion of professional consumers purchasing the goods on behalf of a business, or for the purpose of running a business themselves. It is my view that a significant portion of members of the general public over the age of 18 (and under 18 in respect of non-alcoholic beverages) will purchase the goods fairly frequently, either in a retail or hospitality environment. The professional public will likely purchase these in a retail or wholesale environment, or via distributors. I note the price point for the goods may range from the inexpensive to the very expensive, but this is not determinative of a high level of care in respect of all goods in these categories, and I find the choice of which alcoholic or non-alcoholic beverage to purchase is not one that will be undertaken by the public with a particularly heightened level of care. However, in respect of alcoholic beverages, the general public may consider various factors when purchasing the goods, including quality, geographical origin, taste and alcoholic content, and I find they will likely pay an average level of attention when making such a purchase. In respect of some of the non-alcoholic goods covered by the class 32 *beverages*, I find the general public as the consumer may pay a low degree of attention, particularly in respect of every day soft drinks. However, in respect of the goods in this category such as non-alcoholic beers, wines and spirits for example, the attention paid is also likely to be average. In respect of professionals, I find the level of attention paid will be enhanced due to the increased responsibility of purchasing these goods on behalf of a business, and the increased liability that will come with serving or selling the goods to consumers. It is my view the professional consumer will pay an above average level of attention in respect of the goods.

59. Where these goods are purchased in a retail environment, the consumer will rely predominantly on the visual inspection of the goods. Where the goods are purchased in a café, bar, restaurant, pub or nightclub, again this will be predominantly visual with marks most likely being displayed on and chosen from a drinks menu³ or displayed on the bottles or boards visible behind the bar. However, as verbal orders will often be placed, aural considerations cannot be completely discounted⁴. I find that professionals may also make predominantly visual purchases, although on occasion orders may be placed over the phone and so I also cannot completely disregard the aural comparison in respect of professionals.

Distinctive character of the earlier trade mark

60. 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

³ See the decision of the General Court in case T-187/17, *Anton Riemerschmid Weinbrennerei und Likörfabrik GmbH & Co. KG v EUIPO*

⁴ See the decision of the General Court in *Stock Polska sp. z o.o. v EUIPO*, case T-701/15, in which it was found verbal ordering should be considered.

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).”

61. The earlier marks consist of the word ROK followed by a word which describes a type of beverage covered by the specification of goods registered. It is the element ROK in the earlier marks that shares similarity with the contested mark, and whilst the word ROK inherently has no meaning, it is my view this may be considered as a misspelling of the word ‘rock’ by the consumer. However, even though I find a meaning may be attributed to this word (either relating to a stone or a music genre as above), the meaning is neither descriptive nor allusive of the goods themselves. I do not find the fact that the word rock appears to be misspelt adds to the distinctiveness of the earlier marks. Where the mark ROK conveys no meaning to consumers, although it is made up it is a relatively short mark at only three letters, which may be viewed as an acronym.
62. Whilst I note for completeness that the earlier marks may be used in respect of goods for which the second word is not necessarily directly descriptive, for example, it is possible that ‘ROK IPA’ may be used in relation to a soft drink, I still find the consumer will view the second element as descriptive or allusive of a characteristic of the goods, for example as an indication of flavour, and so in all circumstances I find the second element adds little, if anything, to the distinctiveness of the earlier marks. Overall, I find the earlier marks to be inherently distinctive to a medium degree.
63. The opponent has filed no evidence of use of the earlier marks for the goods registered, and I therefore do not find the distinctiveness of the earlier marks has been enhanced through use.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion.

64. Prior to reaching a decision under Section 5(2)(b), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 26 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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 they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held in the earlier marks will have an impact on the likelihood of confusion. I must consider that the likelihood of confusion may be increased where the distinctive character held in the earlier mark is high and may be less likely where it is low. I must remember that the distinctive character of the earlier mark may be inherent, but that it may also be increased through use, and that the distinctiveness of the common elements is key.⁵ I must keep in mind that a lesser degree of similarity between the goods and services may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that both the degree of attention paid by the average consumer and how the goods or services are obtained will have a bearing on how likely the average consumer is to be confused.

65. I consider at this point that there are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the

⁵ See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.

differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.⁶

66. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, Mr James Mellor Q.C. (as he then was), 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.

67. I found goods to range from highly similar to similar to a low degree at best. I found the earlier marks to be inherently distinctive to a medium degree, and that the distinctiveness is held in the first element of the earlier marks, namely 'ROK'. I found the marks to be aurally similar to a medium degree, and visually similar to slightly below a medium degree, and to either be conceptually dissimilar, or at best to be conceptually similar to a low degree. I found the average consumer will consist of both members of the general public as well as professionals. I found the goods will primarily be purchased visually, but that aural considerations cannot be disregarded, and that dependent on the consumer and the goods, the level of attention will vary from low to above average.

68. Firstly, I have considered the position in respect of direct confusion. With consideration to all of the relevant factors, including the high level of similarity in respect of some of the goods and the medium level of inherent distinctiveness of the earlier marks, and keeping in mind the consumers imperfect recollection, and the varying level of attention paid, it is my view that the differences between the marks both visually and aurally mean the consumer will not directly confuse one mark for another. In addition, whilst I find that these factors alone will be enough to avoid a likelihood of direct confusion in this instance, I also find that the strong conceptual hook of a 'rock star' in the contested mark will mean the consumer will remember and

⁶ *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

consider the mark in its entirety, and help to distinguish it from the earlier marks which will convey the concept of a music genre, a stone or boulder, or have no particular meaning. Overall, I find no likelihood of direct confusion between the marks.

69. In respect of the likelihood of indirect confusion, I consider that the first element of the earlier marks is similar to the first element in the contested mark, and that the first element of the earlier marks will likely be viewed by at least a significant part of the relevant public as a misspelling of the word 'rock'. I note again that the similar elements, namely 'rok' and 'rock' hold a medium level of inherent distinctive character in respect of the goods. I also consider again that the marks are similar both aurally to a medium degree, and visually to a slightly below medium degree, and that the goods are in some instances, highly similar.

70. However, I consider that in this instance the element 'rock' in the contested mark will hang together with the element 'star' to create a new meaning in the same. In this respect, I consider the comments made by the judge in *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), when considering the impact of the CJEU's judgment in *Bimbo*, Case C591/12P, on the court's earlier judgment in *Medion v Thomson* as below:

"18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.

19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there

are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.

20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).”

71. It is my view that the element ROCK in the contested mark does not play an independent role in the mark, and the consumer would not consider this element in isolation as an indication of origin. Further, I consider that adding (or removing) the element ‘STAR’ to the mark in this way, resulting in a new meaning being given to the contested mark, would not be viewed as a natural brand extension by the consumer in this instance. Considering all of the relevant factors, I do not believe there is a likelihood that the consumer will be confused into thinking that the element ROK in the earlier marks, and ROCK in the later mark is an indication that the goods derive from the same economic undertaking. I therefore do not find a likelihood of indirect confusion exists between the marks.

72. For completeness, I have also considered the likelihood of confusion should ‘beverages’ be found to be identical to all of the applied for goods. I find that even if identity were found between the same, with consideration to all of the other factors in this case, I would still not find a likelihood of direct or indirect confusion between the marks.

73. As I have found neither a likelihood of direct nor indirect confusion, the opposition under section 5(2)(b) of the Act must fail in respect of all of the goods.

Section 5(4)(a)

Legislation

74. Section 5(4)(a) states:

“(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,

(aa)

(b)

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

The principles

75. In *Discount Outlet v Feel Good UK*, [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the Jif Lemon case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “a *substantial number*” of the Claimants' customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer PLC* [2012] EWCA Civ 1501, [2013] FSR 21).”

Goodwill

76. As is set out in the case law above, the first element that must be established in order for a claim to be successful under section 5(4) of the Act is that the cancellation applicant held goodwill in the sign at the relevant date. The relevant date is the date on which the application was filed, namely 14 February 2020.

77. In *South Cone Incorporated v Jack Bessant, Dominic Greensmith, Kenwyn House and Gary Stringer (a partnership)* [2002] RPC 19 (HC), 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 to satisfy the hearing officer that it is not shown on the balance of probabilities that passing off will occur.”

78. In *Minimax GmbH & Co KG v Chubb Fire Limited* [2008] EWHC 1960 (Pat) 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.”

79. The opponent has claimed it holds goodwill in the sign ‘ROK Stars’ respect of the distribution and wholesale of beers, wine, gin, vodka, rum, Irish whiskey and energy drinks, and claims the sign has been used throughout the UK, with the date of first use given as 1 June 2013.

80. From the evidence provided, it appears the opponent, namely ROK Stars Limited, runs at least the majority, if not all of its drinks business via its

subsidiary company ROKiT Drinks Limited. Within the witness statement, it is stated that ROKiT Drinks Limited, along with other subsidiaries “have used” the mark “ROK Stars” in addition to the “ROK Stars logo” (which makes no reference to the wording ROK Stars) in respect of the services claimed.

81. Sales figures are provided in respect of the “turnover for beverages” in the UK, although these have not been broken down any further into types of beverage sold, or into wholesale or distribution services. However, the evidence provides a list of the types of drinks sold by the opponent, as well as a number of press announcements regarding distribution agreements and the supply of products by the opponent to events in the UK. From this information, it appears on balance that at least a good portion of the opponent’s UK business in the UK concerns beer, and it appears from the evidence as a whole that I may attribute at least a portion of the figures provided to the wholesale and distribution of beer in the UK.

82. However, whilst it may be possible for me to attribute some of the opponent’s turnover to the services as claimed, I am unable to find evidence that the services are offered under the sign ‘ROK Stars’. I note the press announcements provided give some insight into the activities of the opponent and its subsidiary ROKiT Drinks Limited, and these announcements do refer consistently to ‘ROK Stars’ making the announcement, often beginning with “ROK Stars announce..”. However, the announcements provided appear to be for the purpose of sending to the press, rather than stories published to the industry. It is not clear how many, if any of these announcements were picked up and published in the UK or sent to UK consumers in the industry. If they were, it is unclear if the reference to ‘ROK Stars’ would have remained in the published articles, which mostly discuss the activities of the ROKiT Drinks division. I find this is also the case in respect of the “ROK Stars news releases” discussing the sponsorship deals the opponent has struck with the opponent. It is also unclear if the sponsorship deals would be viewed by the consumer as relating to the sign ROK Stars.

83. Whilst I acknowledge that the professional consumer will clearly pay attention to the company they are dealing with, it appears from the evidence that in the UK this company will likely be ROKiT Drinks Limited and not ROK Stars Limited (or as it was formally known, ROK Stars PLC). Whilst the witness statement explains that ROKiT Drinks Limited has used the sign 'ROK Stars', no evidence of how this sign is used by ROKiT Drinks Limited, or of how or when it would be viewed by the consumer, has been provided. It is not clear if the sign will have been used in relation to all or any of the business undertaken in the UK, or if it has been used to distinguish the services of the opponent. There is no evidence that this sign appears on paperwork issued to UK consumers or that it is displayed during the offering of services by the opponent in the UK, and there is no evidence that the sign is used when (or if) the activities of ROKiT Drinks are reported in the UK industry or mainstream press. References to exclusive distribution agreements in the evidence clearly state that these are in the name of ROKiT Drinks, and so I see no reason for UK consumers to associate this trade with the sign ROK Stars. Further, I note a spokesperson for Dunns Food & Drinks, with whom a distribution agreement has been made, references the "ROKiT Drinks Portfolio". I note that the opponent's goods have won awards and are likely to be well regarded, but I do not have any evidence that the awards relating to these products will result in goodwill being generated in the UK, under the sign ROK Stars, in relation to the services for the wholesale and distribution of the goods as claimed. Whilst I therefore find the opponent, under its subsidiary company ROKiT Drinks Limited, has likely been engaged in the wholesale and/or distribution of various beverages in the UK for a number of years, there is a fundamental lack of evidence showing the use of the sign ROK Stars in relation to these activities. I acknowledge that, as set out in the case law, there are no absolute requirements for particular types of evidence to be filed to establish goodwill in a sign. However, I find that evidencing how the sign is used in relation to the services claimed, as well as showing the extent of the use of the sign in which the opponent claims to hold goodwill, are fundamental to the establishment of a prima facie case for the opponent. From the evidence I have been provided, I cannot find the opponent has established a prima facie case that it holds any goodwill in the sign ROK Stars in the UK.

84. As I have been unable to find that the opponent holds any goodwill in respect of the sign as claimed in the UK, the opposition under section 5(4)(a) must fail.

Final Remarks

85. The opponent has been unsuccessful both on the basis of its opposition under section 5(2)(b) and section 5(4)(a). As such, the opposition has failed, and the application may proceed to registration in its entirety.

COSTS

86. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £900 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Reviewing the TM7 and preparing and filing the TM8 and counterstatement	£350
Considering the evidence filed and preparing and filing its own evidence	£550

87. I therefore order ROK Stars Limited to pay Blue Tree Limited the sum of £900. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 22nd day of June 2021

**Rosie Le Breton
For the Registrar**