

O/817/21

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3505157
BY ANHEUSER-BUSCH LLC
TO REGISTER THE TRADE MARK**

U L T R A

IN CLASS 32

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 421555
BY AMSTEL BROUWERIJ B.V.**

Background and pleadings

1. Anheuser-Busch LLC (“**the Applicant**”) applied to register the figurative mark
U L T R A as a UK trade mark in respect of the following goods:

Class 32: *Beers; non-alcoholic beers; low alcohol beers.*

2. The application was filed on 26 June 2020, and that is “**the relevant date**” for the purposes of these opposition proceedings. The application was published for opposition purposes on 24 July 2020, and on 24 September 2020, Amstel Brouwerij B.V. (“**the Opponent**”) filed a Form TM7 to oppose the registration. The opposition is based on grounds under sections 3(1)(b), 3(1)(c) and 3(1)(d) of the Trade Marks Act (“**the Act**”). The Opponent seeks rejection of the whole application, claiming as follows:

(i) Under section 3(1)(b), The word 'ultra' will be readily understood by the average consumer as an everyday English word with meanings including 'extra', 'super', 'very', or 'extremely'. The mark will immediately be perceived as a promotional or laudatory term which, when used in respect of the goods applied for, suggests they are superlative or have some positive or favourable characteristic. The Opponent submits that the plain, unremarkable typeface does not add any distinctive character.

As the Applicant's mark wholly consists of the descriptive word “ULTRA”, the average consumer will not perceive the Applicant's Mark to be a mark of origin for the Applicant's goods.

(ii) Under section 3(1)(c), the word “ULTRA” may serve to designate the quality, value or some other characteristic of the goods, for example ultra high or good quality, ultra low alcohol or low calorie, ultra thirst quenching or ultra light/strong/pleasant flavour (among others). The Opponent submits that the average consumer will immediately perceive the word “ULTRA” to be a promotional or laudatory term which suggests that the goods to which it is applied are superlative or have some positive or superior characteristic. As it is a

descriptive term, the word “ULTRA” is used or should be available to be used by other traders without improper motive for similar class 32 goods.

(iii) Under section 3(1)(d) the mark consists of a sign which is customary in the current language or in the bona fide and established practices of the trade in respect of the Applicant's goods and similar alcoholic drinks. The term “ULTRA” is used extensively by traders in respect of beers and similar alcoholic drinks as a generic term to indicate certain characteristics of the goods to which it is applied, including in particular an 'ultra' low alcohol or low calorie content of the goods.

3. The Applicant filed a Form TM8, notice of defence and counterstatement in which it set out the text of the Act under section 3(1)(b), (c) and (d) and responded to the Opponent's claims as follows:

(i) Under section 3(1)(b) the Applicant denies that the mark is devoid of any distinctive character when assessed with reference to the goods in Class 32 and denies that the mark will be seen as a promotional or laudatory term.

(ii) Under section 3(1)(c) the Applicant denies that the mark has a descriptive meaning in respect of the goods and denies that it designates the quality, value or any other characteristics of the goods.

(iii) Under section 3(1)(d) the Applicant denies the mark consists of a sign which is customary in the current language or in the bona fide and established practices of the trade in respect of the goods covered in the Application and similar alcoholic drinks.

Representation and papers filed

4. Osborne Clark LLP acts for the Opponent in these proceedings; Stobbs for the Applicant. During the evidence rounds, both parties filed evidence in chief, with the Opponent also filing evidence in reply. Neither party filed submissions during the evidence rounds. At the request of the Applicant an oral hearing was arranged, which took place before me by video conference on 21 September 2021, and where the parties were represented by Mr Julius Stobbs and Dr Stuart Baran, Counsel for the Opponent. Skeleton arguments were filed in advance of the hearing. At the hearing,

and as a result of the preliminary matter discussed below, the Opponent was invited to file supplemental submissions. These were filed on 5 October 2021.

Preliminary matter

5. The evidence in chief filed by the Applicant consists principally of examples of how its mark has been used, however, no claim of acquired distinctiveness was made either in the notice of defence and counterstatement, nor during the evidence rounds. In the Applicant's skeleton arguments, filed with the tribunal on 17 September 2021, the Applicant explicitly addressed the matter of acquired distinctiveness for the first time. On 20 September 2021, the day preceding the hearing, the Applicant wrote to the tribunal explaining that although it considered that a claim of acquired distinctiveness was included in its counterstatement, specifically, within the statement that its mark is distinctive, for the avoidance of doubt, an amended defence and counterstatement was filed.

6. At the hearing, the parties set out their positions with regards to two points:

- (i) whether the claim of acquired distinctiveness was included in the originally filed notice of defence and counterstatement;
- (ii) if it was not, whether the amended notice of defence and counterstatement should be admitted to the proceedings.

7. I reached the following conclusions:

- (i) There is an overriding interest in having clarity in proceedings and parties should be expected to make clear where acquired distinctiveness is claimed in order to allow the other party to respond to the claim.
- (ii) The Applicant's claim to acquired distinctiveness was not made clear in the notice of defence and counterstatement, indeed, as pointed out by the Opponent, the Applicant's counterstatement set out the relevant parts of the statute when responding to each of the grounds under section 3(1)(b), (c), and (d), but did not include the text of the proviso to section 3(1), on acquired distinctiveness.

(iii) However, in order to afford the Applicant its best defence in circumstances where there is a degree of ambiguity, and noting the permissive power under Rule 62, I consider that the amended notice of defence and counterstatement should be admitted in these proceedings.

(iv) I considered that any disadvantage to the Opponent may be remedied through the provision of an opportunity to file further submissions and/or evidence in response to the claim to acquired distinctiveness. In the circumstances, the Opponent agreed to file further submissions and a date of two weeks from the date of the hearing was set for these to be filed with the tribunal.

EVIDENCE

The Opponent's evidence

8. The Opponent's evidence in chief is comprised of a witness statement dated 16 February 2021 by Marie Louise Judith van de Braak, together with Exhibits MLB1 to MLB7. Ms van de Braak is the Global Trademark Director at Heineken International B.V. and is authorised to sign for, and act on behalf of the Opponent. The Opponent's evidence in reply comprises a second witness statement of Ms van de Braak, dated 14 July 2021, together with Exhibits MLB8 to MLB17.

9. Exhibit MLB1 of the Opponent's evidence includes dictionary definitions of the word "ULTRA". In the hearing, Dr Baran highlighted both the main definition and the British English definition contained within the Collins English Dictionary:

"PREFIX

Ultra- is added to adjectives to form other adjectives that emphasise that something or someone has a quality to an extreme degree.

[emphasis]

...a wide range of ultra-modern equipment

...am ultra-ambitious executive

in British English

PREFIX

1. Beyond or surpassing a specifies extent, range, or limit

ultramicroscopic

2. extreme or extremely

Ultramodern”

10. The remainder of the Opponent’s evidence shows examples of use of the word “ULTRA” on beers and other alcoholic and non-alcoholic beverages. MLB7 shows use of the words “premium” and “extra” on beer.

11. In its evidence in reply, the Opponent provides screen shots from a range of online retailers where the word “ultra” is used in respect of mainly household and toiletry products, with some examples of food and drinks bearing the term.

The Applicant’s Evidence

12. The Applicant’s evidence is comprised of a witness statement dated 16 April 2021 by Pieter Van Den Bulck, together with Exhibits PVDB1 to PVDB17. Mr Van Den Bulck is the Global Director of Intellectual Property of Anheuser-Busch InBev sa/nv and is authorised to act on behalf of the Applicant. In his witness statement Mr Van Den Bulck provides sales figures for the ULTRA brand, between 2018 and February 2021. These show annual sales of between £500,000 and £2.4 million. Mr Van Den Bulck also provides figures on the volume of ULTRA beer produced, which is stated to be approximately 7 million bottles and/or cans in 2018 and 6.5 million bottles and/or cans in 2019. The witness statement does not state exactly when in 2018 the use of the mark commenced; however, the Exhibits show use from September, with articles referring to the launch of the product dating from 14 September. I also note that the Applicant’s social media accounts are stated to have launched in September that year.

13. The exhibits provided by the Applicant show the way the mark ^{U L T R A} appears on the Applicant’s goods and in promotional material, for example:



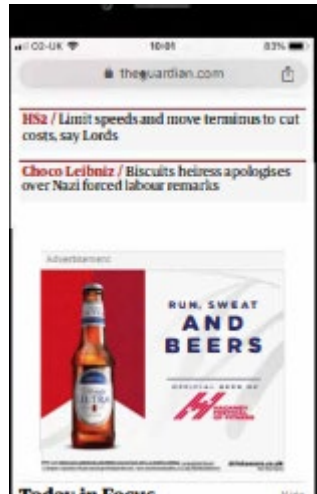
14. Mr Van Den Bulck indicates that ULTRA beer has been sold in the big four supermarkets (Morrisons, Asda, Tesco and Sainsburys) and is currently sold in Coop and Ocado, with supporting evidence provided for this at PVDB3. Evidence is also provided to show how the Applicant's beer has been promoted. There are two television advertisements, evidenced by two images of pages from YouTube which indicate that the videos were uploaded on October 2018. However, no indication is provided of where and when the advertisements appeared on UK television.⁵ Examples of physical advertisements on billboard and banners are provided, as well as digital advertisements, for example:



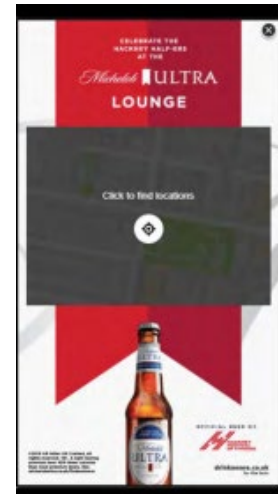
¹ Exhibit PVDB1.
² Exhibit PVDB3.
³ Exhibit PVDB3.
⁴ Exhibit PVDB8.
⁵ Exhibit PVDB5.
⁶ Exhibit PVDB11.
⁷ Exhibit PVDB7.



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15. At Exhibit PVDB13, various industry articles about the launch of the product in the UK are produced. The dates of the articles range from 14 September 2018 to 5 September 2019.

16. Exhibit PVDB14 comprises five customer reviews from Amazon, made between January and September 2019. The Applicant's mark is visible in the website address bar:

<https://www.amazon.co.uk/Michelob-Ultra-Superior-Light-Lager/product-reviews/B1>

17. Exhibit PVDB15 indicates that the Applicant's Michelob Ultra won an award for best alcohol brand of the year at the Asian Trade Awards in November 2019. No further information is provided on the nature of these awards.

18. Exhibits PVDB16 and PVDB17 feature search results from supermarket websites for the word "beer" preceded by "ultra"; "low alcohol"; "light"; "premium"; and "0% alcohol".

⁸ Exhibit PVDB8.
⁹ Exhibit PVDB7.
¹⁰ Exhibit PVDB7.

The Legislation

19. Section 3 of the Act deals with the so-called “absolute grounds” for refusal of registration based on the inherent characteristics of the trade mark concerned, and provides as follows:

“3.- (1) The following shall not be registered-

(a) [...]

(b) trade marks which are devoid of any distinctive character,

(c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,

(d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

The Case Law

20. Although the UK has left the EU, section 6(3)(a) of the European (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Trade Marks Act 1994 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 and the related EU legislation.

21. The case law under section article 7(1)(c) of the EU Trade Mark Regulation (which corresponds to section 3(1)(c) of the Act) was set out by Arnold J. in *Starbucks (HK) Ltd v British Sky Broadcasting Group Plc*¹¹ (with most case notes omitted) as follows:

“91. The principles to be applied under article 7(1)(c) of the CTM Regulation were conveniently summarised by the CJEU in Agencja Wydawnicza Technopol sp. z o.o. (C-51/10 P) [2011] E.T.M.R. 34 as follows:

“33. A sign which, in relation to the goods or services for which its registration as a mark is applied for, has descriptive character for the purposes of Article 7(1)(c) of Regulation No 40/94 is – save where Article 7(3) applies – devoid of any distinctive character as regards those goods or services...

36. ... due account must be taken of the objective pursued by Article 7(1)(c) of Regulation No 40/94 . Each of the grounds for refusal listed in Article 7(1) must be interpreted in the light of the general interest underlying it.

37. The general interest underlying Article 7(1)(c) of Regulation No 40/94 is that of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely used by all traders offering such goods or services.

38. With a view to ensuring that that objective of free use is fully met, the Court has stated that, in order for OHIM to refuse to register a sign on the basis of Article 7(1)(c) of Regulation No 40/94 , it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes.

39. By the same token, the Court has stated that the application of that ground for refusal does not depend on there being a real, current or serious

¹¹ [2012] EWHC 3074 (Ch).

need to leave a sign or indication free and that it is therefore of no relevance to know the number of competitors who have an interest, or who might have an interest, in using the sign in question. It is, furthermore, irrelevant whether there are other, more usual, signs than that at issue for designating the same characteristics of the goods or services referred to in the application for registration.

And

46. As was pointed out in paragraph 33 above, the descriptive signs referred to in Article 7(1)(c) of Regulation No 40/94 are also devoid of any distinctive character for the purposes of Article 7(1)(b) of that regulation. Conversely, a sign may be devoid of distinctive character for the purposes of Article 7(1)(b) for reasons other than the fact that it may be descriptive.

47. There is therefore a measure of overlap between the scope of Article 7(1)(b) of Regulation No 40/94 and the scope of Article 7(1)(c) of that regulation, Article 7(1)(b) being distinguished from Article 7(1)(c) in that it covers all the circumstances in which a sign is not capable of distinguishing the goods or services of one undertaking from those of other undertakings.

48. In those circumstances, it is important for the correct application of Article 7(1) of Regulation No 40/94 to ensure that the ground for refusal set out in Article 7(1)(c) of that regulation duly continues to be applied only to the situations specifically covered by that ground for refusal.

49. The situations specifically covered by Article 7(1)(c) of Regulation No.40/94 are those in which the sign in respect of which registration as a mark is sought is capable of designating a 'characteristic' of the goods or services referred to in the application. By using, in Article 7(1)(c) of Regulation No 40/94, the terms 'the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service', the legislature made it clear, first, that the kind, quality, quantity,

intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service must all be regarded as characteristics of goods or services and, secondly, that that list is not exhaustive, since any other characteristics of goods or services may also be taken into account.

50. The fact that the legislature chose to use the word ‘characteristic’ highlights the fact that the signs referred to in Article 7(1)(c) of Regulation No 40/94 are merely those which serve to designate a property, easily recognisable by the relevant class of persons, of the goods or the services in respect of which registration is sought. As the Court has pointed out, a sign can be refused registration on the basis of Article 7(1)(c) of Regulation No 40/94 only if it is reasonable to believe that it will actually be recognised by the relevant class of persons as a description of one of those characteristics.”

92. In addition, a sign is caught by the exclusion from registration in art.7(1)(c) if at least one of its possible meanings designates a characteristic of the goods or services concerned.¹²”

DECISION

22. Having set out the relevant law and legal principles, I now take stock in light of the claims and evidence in this case. My task here is to decide, whether, on 26 June 2020, when the Applicant applied for its trade mark, the mark **U L T R A** was descriptive of any characteristic of the goods applied for, devoid of any distinctive character in respect of those goods, or had become customary within the trade for the respective goods. The position must be assessed from the perspective of the average consumer, who is deemed to be reasonably observant and circumspect.¹³

¹² See *OHIM v Wrigley* [2003] E.C.R. I-12447 at [32] and *Kononklijke Nederland NV v Benelux-Merkenbureau* (C-363/99) [2004] E.C.R. I-1619; [2004] E.T.M.R. 57 at [97].

¹³ *Matratzen Concord AG v Hukla Germany SA*, Case C-421/04.

The average consumer

23. The goods covered by the Applicant's mark are "beers; non-alcoholic beers; and low alcohol beers". There does not appear to be any dispute that the average consumer of the goods is a member of the general public. The Applicant refers to the judgment in *Sazerac Brands LLC v Liverpool Gin Distillery Ltd*¹⁴ and submits that due to brand loyalty for alcoholic beverages, consumers will pay a higher than average degree of attention.

24. I agree with the parties that the average consumer for the goods at issue is the general public. In terms of the level of attention paid, the goods are relatively inexpensive and will be purchased reasonably frequently. I note the Applicant's reference to the case *Sazerac Brands LLC*, however, the goods there were bourbon whiskey, which differs in nature and price point to the goods in this case. Nevertheless, I consider that the relevant consumer of the Applicant's goods will pay attention to characteristics including the flavour and alcohol content. Therefore, I find the consumer will pay a medium degree of attention when purchasing the goods.

Decision on section 3(1)(c)

25. In reaching my decision, I note that section 3(1)(b) and 3(1)(c) are independent and have different general interests behind them but that, if a mark is found to be descriptive, it follows that it is also devoid of any distinctive character. I also keep in mind that it is possible for a mark not to fall foul of section 3(1)(c), but to still be objectionable under section 3(1)(b).¹⁵

26. The Applicant's mark, **U L T R A** is filed as a figurative mark. The figurative elements in the mark are confined to the letters being produced in a specific font, with spaces appearing to be approximately the width of a single letter, separating each of the letters in the word. I find that the figurative elements have at most a very minor

¹⁴ [2020] EWHC 2424.

¹⁵ *SAT.1 SatellitenFernsehen GmbH v OHIM*, Case C-329/02 P at paragraph 25.

impact on the distinctiveness of the mark, which I consider will be perceived by the average consumer as the word “ULTRA”.

27. At the hearing, Dr Baran highlighted aspects of the Opponent’s evidence which show the word “ULTRA” used in respect of various consumer goods, including those of the same or a similar nature to the Applicant’s goods. Of these examples, I note in particular Exhibit MLB2 and the examples of Moor Beer Company’s Nor’Hop Ultra Pale Ale; Michelob ULTRA, the packaging and description of which indicates that it contains 73 calories; and Strongbow’s Dark Fruit Ultra Low Alcohol Cider. On the other hand, I also note the Applicant’s evidence at PVDB16, which indicate no hits for “ULTRA BEER” on the websites of major UK supermarkets.

28. As the Opponent has set out, the word “ULTRA” has a clear meaning that will be familiar to members of the relevant public, who I agree will understand it as “very”; “really”; or as defined in Collins English Dictionary, as “extreme”; “extremely”. Each of these definitions share a common theme in that they evoke a positive message about the goods. The message conveyed by the word “ULTRA”, when seen in respect of beers is that the goods are enhanced versions of their type, for example, they contain an extremely low amount of alcohol, calories, or are “ULTRA pale” in respect of ale. While it may be the case that supermarket search tools do not show results for the term “ULTRA BEER”, I do not consider this relevant to the consumer’s understanding of the term “ULTRA” on the goods as issue. In this respect, I also recall that *“it is not necessary that the sign in question actually be in use at the time of the application for registration in a way that is descriptive. It is sufficient that the sign could be used for such purposes”*.

29. At this point, I remind myself of the findings of Mummery LJ in the *Now TV* case, *Starbucks HK Limited v. BSB Group plc*¹⁶ where the figurative mark “NOW” was invalidated in respect of primarily TV and telecommunication services. In his judgment Mummery LJ drew conclusions including that:

¹⁶ [2013] EWCA Civ 1465 at paragraphs 96 to 99.

(i) [...] the claimants chose as their trade mark a commonplace, easily understood, ordinary English word, which was also used by other undertakings in relation to other products or services;

(ii) [...] it must have been obvious to the claimants that, in making that choice, they were running the risk of invalidity on the ground that the message that was conveyed or could be conveyed by the everyday word to the average consumer designated a characteristic of that service.

(iii) [...] The trade mark would attract the custom of all those viewers who "want it now." The attraction is of having immediate and instant access to programmes of choice on demand rather than having to settle for waiting.

(iv) [...] when viewed from the position of the hypothetical average consumer of the claimants' service, the mark NOW would be understood as designating that attractive instant and immediate characteristic of the service for which it was registered. The mark NOW refers to more than just the service itself. It refers to something about the service, an appealing characteristic that will pull in the punters. What is that something if it is not the characteristic of delivering programmes of choice instantly on demand?"

30. In the case before me, I consider that when viewed from the perspective of the average consumer of "beers; non-alcoholic beers; and low alcohol beers", the mark **U L T R A** would be understood as designating an appealing characteristic of the goods, this being that they are extremely low in alcohol, calories, or are extremely pale ale. I therefore find the Applicant's mark to be contrary to section 3(1)(c) of the Act as it consists exclusively of a sign which may serve to designate the kind and quality of the goods. Indeed, it is difficult to see how **U L T R A** low alcohol beer / **U L T R A** low calorie beer / **U L T R A** light beer / **U L T R A** pale ale, could avoid a persistent risk of being perceived as innately directly descriptive. In such circumstances, any other sign present, such as a house mark, would be seen as the origin sign.

31. As set out in the case law at paragraph 21, the general interest underlying section 3(1)(c) is of ensuring that descriptive signs relating to one or more characteristics of the goods or services in respect of which registration as a mark is sought may be freely

used by all traders offering such goods or services. Taking account of the clear meaning of the mark U L T R A and the evidence that the term is used descriptively in relation to identical and similar goods, it is clear to me that other traders should be free to use this word in respect of their goods.

Decision on section 3(1)(b)

32. I have found the Applicant's mark to be objectionable under section 3(1)(c) for all of the goods applied for. If my decision is correct, it follows that the mark is also devoid of any distinctive character and therefore excluded from registration by section 3(1)(b) of the Act too. However, it is possible that the mark may be objectionable under section 3(1)(b) regardless of whether the mark is also considered descriptive.

33. Contrary to the Applicant's view, I consider that the Opponent's case under section 3(1)(b) is made separately to its case under section 3(1)(c). In this respect, I refer to the notice of opposition where the Opponent's states that "ULTRA" is a promotional or laudatory term which, when used in respect of the goods applied for, suggests they are superlative or have some positive or favourable characteristic. I also take note of the Opponent's reference to the *Extra* case¹⁷ which concerned Article 7(1)(b) of the EU Trade Mark Regulation, which is the equivalent to section 3(1)(b) of the Act.

34. Under the heading "Section 3(1)(b)" in its skeleton arguments, the Applicant refers to paragraphs 24 and 25 of the judgment of the Court of First Instance (now the General Court) in *UltraPlus*.¹⁸ Paragraphs 24 and 25 of the judgment deal specifically with descriptiveness of the mark *UltraPlus* with the court finding that the word "ultra", in those circumstances, would not designate a characteristic of the goods that the consumer would understand directly. In terms of the distinctiveness of *UltraPlus*, I note the findings of the court set out in paragraphs 47 and 48 where it found that:

"47. ...both of the words of which it is composed can be used to form comparatives and superlatives by being added to a noun or an adjective and are

¹⁷ T-553/14 *Wm. Wrigley Jr. Company v OHIM*.

¹⁸ Case T-360/00.

thus not normally used together in the same combination. In that respect, UltraPlus constitutes a syntactically unusual juxtaposition from a lexical point of view [...] and is perceptibly different from a lexically correct construction...

48. Such a sign can be easily and instantly memorised by the relevant public and can enable it to repeat a positive experience of purchasing overware inasmuch as the sign is not already commonly used, as such, for that type of goods, which usage would prevent the consumer from distinguishing immediately and with certainty the applicant's goods from those of other undertakings."

35. I do not find the judgment in *UltraPlus* to be persuasive in respect of the distinctive character of the present mark. It is clear from the above extract that it was the combination of words, forming something *syntactically unusual* that was key in the Court's finding of distinctiveness. This is compared to the present case where the mark consists of the very minimally stylised single word *U L T R A* .

36. The Opponent refers to the judgment of the General Court in *Extra* in respect of which it submits the facts are almost identical to those in the current proceedings. At the hearing Mr Stobbs differentiated the word *Extra* from *ULTRA*, explaining that specific information is conveyed by the word *Extra*, which is a reference to an additional part or portion provided to the consumer. In comparison, the Applicant submits in its skeleton arguments that *ULTRA* "*introduces elements of conceptual intrigue*". The Opponent, in its skeleton arguments sets out paragraphs 20 and 21 of the General Court's judgment in *EXTRA*, including that "*the word 'extra' is an adjective meaning 'beyond or more than the usual, stipulated or specified amount or number; additional' and that it denotes a promotional or laudatory meaning for all the goods covered by the mark applied for.*" I note that the EUIPO Boards of Appeal whose decision was confirmed by the General Court in this case, provided additional reasoning as to the meaning of "Extra" in this context, stating:

"15... 'Extra' conveys a simple promotional and laudatory message, informing the relevant public that the goods applied for possess additional positive aspects which exceed the consumers' expectations. With respect thereto, it must be

observed that basic adjectives or nouns that can serve in trade to describe numerous different goods or services or both are those without distinctive character at all. 'Extra' is such a word. As mentioned above, it is a basic laudatory expression, encouraging the consumer to buy products or hire services, because it advertises additional or further qualities which go beyond those generally expected. The nature of goods or services involved is indifferent; the presence of the word 'Extra' simply informs the public that the goods offered are special, being endowed with a particularly high quality."

37. Having considered the submissions of the parties and the legal authorities cited, and recalling the definitions of the word "ULTRA" already considered above, I find the Applicant's mark to be devoid of any distinctive character. This is because when seen in relation to the Applicant's goods, "beers; non-alcoholic beers; and low alcohol beers", it will be viewed as a purely promotional statement about the goods, i.e. that they are enhanced or superior forms of their type. As highlighted by the Applicant, it is not necessary for a trade mark to convey a specific level of linguistic or artistic creativity or imaginativeness¹⁹. Keeping this in mind, I nevertheless find that the single, minimally stylised word U L T R A , used in respect of the Applicant's goods will not identify the products as originating from a particular undertaking, nor will it distinguish the Applicant's products from those of other undertakings.²⁰

Decision on section 3(1)(d)

38. Section 3(1)(d) prevents the registration of marks which consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the trade. In *Telefon & Buch Verlagsgesellschaft GmbH v OHIM*²¹, the General Court summarised the case law of the Court of Justice under the equivalent of s.3(1)(d) of the Act, as follows:

"49. Article 7(1)(d) of Regulation No 40/94 must be interpreted as precluding registration of a trade mark only where the signs or indications of which the mark

¹⁹ Case C-329/02 Sat. 1 para 41.

²⁰ Joined cases C-468/01 P and C-472/01 P *Procter and Gamble*, para. 32.

²¹ Case T-322/03.

is exclusively composed have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services in respect of which registration of that mark is sought (see, by analogy, Case C-517/99 Merz & Krell [2001] ECR I-6959, paragraph 31, and Case T-237/01 Alcon v OHIM – Dr. Robert Winzer Pharma (BSS) [2003] ECR II-411, paragraph 37). Accordingly, whether a mark is customary can only be assessed, firstly, by reference to the goods or services in respect of which registration is sought, even though the provision in question does not explicitly refer to those goods or services, and, secondly, on the basis of the target public's perception of the mark (BSS, paragraph 37).

50. With regard to the target public, the question whether a sign is customary must be assessed by taking account of the expectations which the average consumer, who is deemed to be reasonably well informed and reasonably observant and circumspect, is presumed to have in respect of the type of goods in question (BSS, paragraph 38).

51. Furthermore, although there is a clear overlap between the scope of Article 7(1)(c) and Article 7(1)(d) of Regulation No 40/94, marks covered by Article 7(1)(d) are excluded from registration not on the basis that they are descriptive, but on the basis of current usage in trade sectors covering trade in the goods or services for which the marks are sought to be registered (see, by analogy, Merz & Krell, paragraph 35, and BSS, paragraph 39).

52. Finally, signs or indications constituting a trade mark which have become customary in the current language or in the bona fide and established practices of the trade to designate the goods or services covered by that mark are not capable of distinguishing the goods or services of one undertaking from those of other undertakings and do not therefore fulfil the essential function of a trade mark (see, by analogy, Merz & Krell, paragraph 37, and BSS, paragraph 40)."

39. In its skeleton arguments, the Applicant submits that the Opponent has failed to specify a separate ground under section 3(1)(d), with the basis of the Opponent's objection here being that it views the Applicant's mark as being descriptive. I disagree

and refer to the Opponent's statement of grounds, which I consider makes the claim under section 3(1)(d) clear: "*The term 'ultra' is used extensively by traders in respect of beers and similar alcoholic drinks as a generic term to indicate certain characteristics of the goods to which it is applied...*".

40. As I have found the Opponent's claim under section 3(1)(d) to have been separately pleaded, I now turn to consider whether the Opponent has, through the evidence it has filed, established that the mark has become customary for "beers; non-alcoholic beers; and low alcohol beers". At paragraph 30 of her decision in *STASH*²², Professor Ruth Annand, as the Appointed Person, noted her view that "*there are two separate limbs of section 3(1)(d). A mark must be refused registration if, in relation to the goods or services applied for, it has become customary: (a) in the current language; or (b) in the bona fide and established practices of the trade.*" "Customary" is defined in the Cambridge Dictionary online as "usual". In the present case, given the extent to which the exhibits post-date the relevant date, there is not enough in the evidence to sustain an objection based on the then-current usage in the relevant sector. Even if the evidence were dated prior to the relevant date, I do not in any event consider it to be sufficient to show that the word "ULTRA" had become customary to designate "beers; non-alcoholic beers; and low alcohol beers".

Conclusion

41. The opposition under section 3(1)(b) and (c) succeeds. The opposition under section 3(1)(d) fails.

Acquired distinctiveness

42. As I have found the Applicant's mark to be contrary to section 3(1)(b) and (c) of the Act, I will now consider the Applicant's claim that its mark had acquired distinctiveness due to the use that has been made of it.

²² O/281/04.

43. Section 3(1) provides that if a mark has acquired a distinctive character through use before the date of application, registration shall not be refused under sections 3(1)(b), (c) or (d).

44. The Court of Justice of the European Union (“**the CJEU**”) provided guidance in *Windsurfing Chiemsee*²³, about the correct approach with regard to the assessment of the acquisition of distinctive character through use. The guidance is as follows:

“51. In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: 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 class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations.

52. If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof, identify goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages.

53. As regards the method to be used to assess the distinctive character of a mark in respect of which registration is applied for, Community law does not preclude the competent authority, where it has particular difficulty in that connection, from having recourse, under the conditions laid down by its own national law, to an opinion poll as guidance for its judgment (see, to that effect, Case C-210/96 Gut Springenheide and Tusky [1998] ECR I-4657, paragraph 37).”

²³ Joined cases C-108 & C-109/97.

45. The burden of establishing acquired distinctiveness rests on the Applicant.

46. The Applicant's evidence shows that the goods were launched in the UK around September 2018, so approximately two years prior to the relevant date. At the hearing, Mr Stobbs confirmed that beer bearing the mark ^{U L T R A}, a sub-brand appearing underneath the mark "Michelob" had been sold in all major UK supermarkets and via major online retailers, with around £4 million of sales since 2018. In terms of promotional activity, the evidence shows that the mark has been promoted via billboard advertisements, TV adverts, sponsorship of events, social media, through partnership with Spotify and via stalls where members of the public can try the product. Advertisements have been placed at major transport routes in and around London and also in Liverpool and Birmingham. In its skeleton arguments, the Applicant submits that the word "ULTRA" is prominent on packaging and in the promotional material. Various articles from the food and drinks industry confirm the launch of Michelob ULTRA.

47. Considering the Applicant's evidence alongside the *Windsurfing Chiemsee* criteria set out at paragraph 44, I find the use to have been geographically widespread through the Applicant's promotional activity and sales in major online and physical supermarkets. However, this use has been made over a relatively short period of time. Promotional activity has clearly taken place through various formats, but no figures are provided for the amount spent thereon. Moreover, I accept the Opponent's submissions that the dates and other important information about certain promotions are not clear, for example when television advertisements were shown and how long billboard advertisements were in place.

48. The evidence does not guide me to the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking. However, in this respect, I return to the point that the mark almost exclusively appears alongside the distinctive "Michelob" trade mark. While the Applicant has provided examples from industry publications about the launch of its beer, this is always referred to as "Michelob ULTRA" and there are no statements from chambers of commerce

and industry or other trade and professional associations as referenced in *Windsurfing Chiemsee* to guide to me whether **U L T R A** is viewed as a distinctive trade mark.

Market share held by the mark

49. At the hearing, Mr Stobbs confirmed that no market share information had been provided. The Opponent, in its supplemental submissions highlights that no split in turnover is provided by the Applicant for the year 2020 and so it is unclear what proportion of the stated sales of £590,000 occurred before the relevant date. As a result, the turnover figures that are clearly prior to the relevant date are £500,000 in 2018 and £2.4 million in 2019.

50. I note that the *Club Mirror* article included in the Applicant's Exhibit PVDB13 provides an indication of the size of the market for low-alcohol beer, where it states that "*In the 12 months to July 2018, consumers bought more than 61 million pints of low-alcohol beer, representing 34% growth on the same period last year*". However, it is not clear whether these figures refer only to sales in licenced establishments, or whether they include sales in supermarket, or other retail outlets. As such, any attempt to assess market share of the mark **U L T R A** on the basis of the information before me would risk straying into speculation, so I will not draw conclusions on this.

Conclusion on acquired distinctiveness

51. That **U L T R A** has been used together with "Michelob" does not prevent the Applicant's mark from acquiring distinctive character in its own right and in this respect, I recall the comments of the CJEU in *Société des Produits Nestlé SA v Mars UK Ltd*²⁴:

"The distinctive character of a mark referred to in Article 3(3) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks may be acquired in consequence of the use of that mark as part of or in conjunction with a registered trade mark."

²⁴ Case C-353/03.

52. However, in reaching a conclusion, I also keep in mind the comments of the General Court in *Audi AG, Volkswagen AG v OHIM*²⁵:

“73. in the advertising material submitted by the applicants and included in the administrative file, the sign TDI always appears with another mark belonging to the applicants, such as the trade marks Audi, VW or Volkswagen. The Court has, however, held on numerous occasions that advertising material on which a sign which is devoid of any distinctive character always appears with other marks which, by contrast, do have such distinctive character does not constitute proof that the public perceives the sign applied for as a mark which indicates the commercial origin of the goods (Shape of a beer bottle, cited in paragraph 41 above, paragraph 51, and Shape of a lighter, cited in paragraph 27 above, paragraph 77). In any event, by quoting an internet site indicating that the Spanish public perceives the sign TDI as an abbreviation which refers to the type of direct fuel-injection diesel engine, irrespective of the car manufacturer, the Board of Appeal established that, despite all the applicants’ advertising efforts in Spain, the relevant public did not perceive that sign as identifying the commercial origin of the goods in question, but as a descriptive and generic term.”

53. And the comments of Jacob J. (as he was then) in *British Sugar plc v James Robertson & Sons Limited*:²⁶

“I think the registrar was wrong to accept this evidence as demonstrating that the mark was “capable of distinguishing” for the purpose of the Act. Mere evidence of use of a highly descriptive or laudatory word will not suffice, without more, to prove that it is distinctive of one particular trader – is taken by the public as a badge of trade origin. This is all the more so when the use has been accompanied by what is undoubtedly a distinctive and well recognised trade mark. I have already described the evidence used to support the original registration. It was really no more than evidence of use. Now it is all too easy to be beguiled by such

²⁵ Case T-318/09.

²⁶ [1996] RPC 281(the Treat case).

evidence. There is an unspoken and illogical assumption that “use equals distinctiveness.”

54. Taking this into account, together with my analysis of the Applicant’s evidence, I find that the evidence filed by the Applicant is, in my view, insufficient to justify acceptance of the application on the basis of acquired distinctiveness and the opposition under sections 3(1)(b) and (c) of the Act succeed accordingly.

Overall conclusion

55. Although the opposition under section 3(1)(d) of the Act has failed, the opposition under section 3(1)(b) and (c) have succeeded and subject to any successful appeal, the Applicant’s mark will be refused in respect of the goods applied for in Class 32.

COSTS

56. As the Opponent has been successful, it is entitled to a contribution towards its costs. At the hearing, I invited counsel for the Opponent to make submissions on costs incurred through the late addition of the acquired distinctiveness claim in the proceedings. In its supplemental submissions, the Opponent confirmed that it seeks a cost award against the Applicant, whatever the result on the question of acquired distinctiveness but that this should be on the usual scale. I therefore make an award of costs on the basis of Annex A of the Tribunal Practice Notice (TPN) 2/2016. Applying the guidance of the TPN, I award costs to the Opponent on the following basis:

<i>Form TM7 fee</i>	£200
<i>Preparing a statement and considering the other side's statement and amended statement</i>	£600
<i>Preparing evidence and considering and commenting on the other side's evidence</i>	£800
<i>Preparing for and attending a hearing (including filing supplemental submissions filed after the hearing)</i>	£1,800
	TOTAL £3,400

57. I order Anheuser-Busch LLC to pay Amstel Brouwerij B.V. the sum of £3,400. The above sum should be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 4th day of November 2021

Charlotte Champion
For the Registrar