

**O/855/21**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3514346  
IN THE NAME OF SUNDAY SELTZER COMPANY LTD  
IN RESPECT OF THE TRADE MARK**

The logo for Sunday Seltzer Co. features the word "SUNDAY" in a large, stylized, outlined font. Below it, the words "SELTZER CO" are written in a smaller, simpler, outlined font.

**IN CLASS 33**

**AND**

**OPPOSITION THERETO UNDER NO. 600001494  
BY BEST COAST BEVERAGE AG**

**AND IN THE MATTER OF INTERNATIONAL TRADE MARKS REGISTRATION  
NO. 1540978**

**IN THE NAME OF BEST COAST BEVERAGE AG  
IN RESPECT OF THE TRADE MARK**

**SUNDAYS**

**IN CLASSES 25, 32 & 33**

**AND**

**THE CONSOLIDATED OPPOSITION THERETO UNDER NO. 422537  
BY SUNDAY SELTZER COMPANY LTD**

## **Background and pleadings**

### 1. Sunday Seltzer Company Ltd



3514346. It

was accepted and published in the Trade Marks Journal on 11 September 2020 in respect of the following goods:

*Class 33: Alcoholic beverages containing fruit; Alcoholic beverages of fruit; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic beverages (except beer); Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages except beers; Alcoholic beverages, except beer; Alcoholic carbonated beverages, except beer; Beverages (Alcoholic -), except beer; Pre-mixed alcoholic beverages, other than beer-based; Alcoholic beverages containing fruit; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic carbonated beverages, except beer; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic preparations for making beverages; Alcoholic punches; Alcopops; Beverages (Alcoholic -), except beer; Beverages containing wine [spritzers]; Beverages (Distilled -); Cider; Ciders; Cocktails; Dry cider; Fruit (Alcoholic beverages containing -); Grain-based distilled alcoholic beverages; Low alcoholic drinks; Natural sparkling wines; Naturally sparkling wines; Pre-mixed alcoholic beverages; Pre-mixed alcoholic beverages, other than beer-based; Prepared alcoholic cocktails; Prepared wine cocktails; Red wine; Red wines; Rose wines; Rum [alcoholic beverage]; Rum punch; Rum-based beverages; Sparkling fruit wine; Sparkling grape wine; Sparkling red wines; Sparkling white wines; Sparkling wine; Sparkling wines; Spirits; Spirits [beverages]; Still wine; Sweet cider; Table wines; White wine; White*

*wines; Wine; Wine coolers [drinks]; Wine punch; Wine-based drinks; Wines.*

2. Best Coast Beverage AG (“Best Coast”) oppose the trade mark on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). This opposition has been allocated opposition no. 600001494

## SUNDAYS

*Class 32: Non-alcoholic beverages; mineral and aerated waters; fruit beverages and fruit juices; syrups and other preparations without alcohol for making beverages.*

*Class 33: Alcoholic beverages except beers; alcoholic preparations for making beverages; spirits [beverages].*

3. This mark has a UK designation date of 2 June 2020 and claims priority from 5 March 2020. This mark was accepted and published in the Trade Marks Journal on 23 October 2020. Whilst it has not yet been granted protection in the UK, by virtue of its earlier priority date, once protection has been granted this UK designation of Best Coast’s International Trade Mark Registration will constitute an earlier mark under section 6 of the Act.
4. Best Coast argues that the respective goods are similar and that the marks are similar, and that as such there exists a likelihood of confusion between the marks.
5. Sunday filed a counterstatement denying the claims made.
6. On 22 December 2020, Sunday filed its own opposition against Best Coast’s earlier trade mark relied upon within the opposition 494. This opposition has been allocated opposition no. 422537 and will be referred to as “opposition 537” within these proceedings. Opposition 537 is filed against all goods covered by

Best Coast's earlier mark, including classes 32 and 33 relied upon within opposition 494, in addition to the class 25 goods as below:

*Class 25: Clothing, footwear, headwear; bathing trunks; bathing suits; shirts; trousers; hats; caps; sports jerseys; pullovers; tee-shirts.*

7. Opposition 537 is based on sections 3(1)(b) and 3(1)(d) of the Act. Sunday states the earlier mark consists of an ordinary dictionary word, which is subject to widespread "...public and commercial use...". Sunday claims that the earlier mark SUNDAYS therefore has become generic and lacks any inherent distinctive character and should be refused under section 3(1)(b). Sunday also argues that the earlier mark is "...commonly associated with, and used in, the alcoholic beverage industry in the United Kingdom market ..." and UK consumers have been exposed to and become accustomed to use of the word 'Sunday' by the alcohol industry. Sunday argues on this basis that the mark should be refused for all goods as registered under section 3(1)(d).
8. Best Coast filed a counterstatement denying the claims made.
9. On 19 April 2021, the Tribunal wrote to the parties and informed them of the consolidation of opposition 494 and opposition 537, including the consolidation of the evidence rounds.
10. Only Sunday filed evidence in these consolidated proceedings. This will be summarised to the extent that it is considered appropriate. Best Coast filed written submissions which will not be summarised but will be referred to as and where appropriate during this decision. No hearing was requested and so this decision is taken following a careful perusal of the papers.
11. Best Coast is represented by Beck Greener LLP. Sunday is not represented.
12. 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 upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

## **Evidence**

13. Sunday filed two witness statements in these proceedings, both in the name of Elvin Els, described in the statement as the director of Sunday. The statement explains that Mr Els has worked in the alcohol industry for over ten years. Mr Els introduces 19 exhibits across the two statements, namely Exhibit A – Exhibit S.<sup>1</sup>
14. Exhibits A, B and G include various articles and promotional materials. These appear to be directed at a UK audience due to the locations recommended within the same. The articles provided at Exhibit A and Exhibit G recommend bars for a ‘Sunday Session’. Exhibit B advertises ‘Little Creatures Sunday Sessions’ offering music, a barbecue and craft beers. Exhibit A is undated, and Exhibit B is dated Sunday 10 September 2017. Exhibit G is dated 18 April 2016.
15. Exhibits C, and E include promotional advertisements from a bar and a restaurant for a ‘Sunday Funday’ event. The bar at Exhibit C is clearly located in London, but it is less clear where the restaurant mentioned at Exhibit E is located. Neither exhibit is dated. Exhibit F is a page offering drinking glasses for sale marked up with the wording ‘Sunday Funday’. The glasses are for sale in GBP and the copyright notice on the page states ‘1999-2021’. Exhibit D is an article listing several bars and food establishments in Manchester with the ‘Best Deals’ for a Sunday Funday. There are references to enjoying a ‘Sunday Sesh’ and to 2 for 1 drink offers and happy hours. The article is dated 2 August 2019.
16. Exhibit H and Exhibit I comprise lists of earlier marks on the UK register including the word ‘Sunday’ or ‘Sundays’ in classes 25, 32, 33 and 43. Exhibit J includes two examples of pale ale being sold using the word ‘Sunday’ in their names and one bottle of wine named ‘Sunday Bay’, as well as examples of clothing featuring the word ‘Sunday’ or ‘Sundays’ on the front. The examples appear to be aimed at the UK consumer being listed in GBP. The examples are undated.

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<sup>1</sup> Exhibit G appears to be missing and instead 2 Exhibit Fs are provided. From the contents witness statement and the order of exhibits provided, it appears that the second ‘Exhibit F’ is intended to be Exhibit G, and I will refer to it as such within this decision.

17. Exhibit K provides a comparison of the two marks, and Exhibit L is a webpage requesting shipping details with the heading Sundays Hard Seltzer. Switzerland appears in the country/region box and Mr Els states this page evidences that Best Coast's goods are only available in the same.

18. Exhibits M, N and O are articles discussing various aspects of the alcohol market in the UK, and exhibits P, Q, R & S are further articles discussing the trends in the market for alcoholic and non-alcoholic beverages including those categorised by the articles as 'craft' beverages. I keep in mind that both applications within these consolidated opposition proceedings concern various categories of alcoholic and non-alcoholic beverages generally, and not simply the 'craft' beverage sector. Whilst I have considered these exhibits I do not find it necessary to provide a more detailed summary.

### **Decision**

19. The success of opposition 494 filed by Best Coast relies on its earlier mark being granted protection in the UK. This in turn is dependent on that same mark withstanding the challenge filed by Sunday by way of opposition 537. I therefore find it appropriate to begin by considering opposition 537. If this succeeds, it will no longer be necessary to consider opposition 494. If opposition 537 fails, I will go on to consider the merits of opposition 494 filed by Best Coast.

### **Opposition 537**

#### **Legislation**

20. Section 3(1) is set out below:

#### **Section 3(1)**

"3.— Absolute grounds for refusal of registration

(1) The following shall not be registered—

(a) signs which do not satisfy the requirements of section 1(1).

(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.”.

### **Section 3(1)(d)**

#### **The Principles of Section 3(1)(d)**

21. In *Telefon & Buch Verlagsgesellschaft GmbH v OHIM*, Case T-322/03, 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 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)."

22. In view of the case law above, under section 3(1)(d) I am to consider if, on the relevant date, namely on 5 March 2020, the relevant consumer of the goods would have considered it customary in the course of trade for the opposed mark to be used to designate the goods for which the mark has been filed.

23. The relevant consumer in respect of Best Coasts earlier alcoholic goods will be primarily members of the general public over the age of 18. The relevant public in respect of the non-alcoholic beverages and clothing will also include members of the general public, but these will not be limited to those over the



age of 18. There will also be a group of professional consumers of the goods, including those who purchase the goods to stock bars, restaurants, or clothing stores, either for others or for their own businesses, and these consumers are likely to hold more knowledge about the particular goods than the general public at large.

24. I consider the evidence filed by Sunday with a view to establishing its case under section 3(1)(d). I firstly consider that Sunday has provided three examples of beverages using the word 'Sunday' as a trade mark, or as part of a trade mark. The examples show two pale ales and one wine. In addition Sunday has provided two examples of the word Sunday or Sundays being used on the front of t shirts and one example of Sundays being used on the front of a hooded sweatshirt. Although the evidence appears to be directed at the UK by way of the currency shown, it is not dated, and so it is not possible to confirm that the examples provided are from prior to the relevant date. However, even if I were to consider this evidence as being from prior to the relevant date, the use of SUNDAY or SUNDAYS appears to either designate the commercial origin of the product, or to be decorative. This evidence does not contribute to a picture that the use of the marks has become customary in the beverage or clothing trade to designate the goods. In support of this, I note the comments made in *Nude Brands Ltd v Stella McCartney Ltd*, [2009] EWHC 2154 Ch, in which Floyd J. stated that:

“29. Whilst the use by other traders of the brand name NUDE in relation to perfume may give those traders relative rights to invalidate the mark, it does not give those rights to any defendant. I am not at this stage persuaded that this evidence has a bearing on any absolute ground of invalidity. It certainly does not go as far as establishing ground 7(1)(d) - customary indication in trade. Ground 7(1)(b) is concerned with the inherent character of the mark, not with what other traders have done with it. The traders in question are plainly using the mark as a brand name: so I do not see how this use can help to establish that the mark consists exclusively of signs or indications which may serve to indicate

the kind or quality or other characteristics of the goods, and thus support an attack under 7(1)(c).”

25. I also acknowledge the state of the register evidence filed, and Sunday’s argument that this suggests the element SUNDAY or SUNDAYS are commonly used in the beverage industry. However, I find this evidence again to be of no assistance to the Sunday’s case. Evidence of other companies owning a registered trade mark including the element ‘SUNDAY’ or ‘SUNDAYS’, without further context, does not help to show that a mark has become customary in the course of trade, not least due to the fact that there is no supporting evidence that these marks are, or ever have been, used in the course of trade to designate the goods for which they are registered. Further, if the use of these marks as trade marks was evidenced, I find the points made in *NUDE* above would apply. I acknowledge Sunday’s argument that the state of the UK register suggests that the mark ‘SUNDAY’ or ‘SUNDAYS’ alone is not registrable, by virtue of this element not being registered alone to date. However, I cannot infer that SUNDAYS alone is not registrable under section 3(1)(d) on the basis. The reasons for registering this element in combination with others may be varied for each mark on the register, and may include the branding preferences of the proprietors themselves. Further, I am to assess this case on its own merits, and not on the basis of any supposed precedent set by the register to date.

26. I also consider the articles and promotional material provided in evidence showing the use of the word ‘Sunday’ in the context of a ‘Sunday Session’ or a ‘Sunday Funday’. Firstly, I note this use is in relation to or in the promotion of bar or restaurant services, rather than in relation to the goods filed by Best Coast themselves. Secondly, all of the use of the word ‘Sunday’ appears to be in respect of events or offers available on a Sunday. The use of ‘Sunday Session’ appears to simply make reference to a drinking session that will take place on a Sunday. The use of ‘Sunday Funday’ also references events, offers or venues that are open on a Sunday, for a fun day out, which may involve consuming alcohol. The examples provided simply show the word Sunday being used to depict the day of a week that the advertised services are

provided. This does not contribute towards a picture that it has become customary in the trade to use 'Sunday' or 'Sundays' to depict the goods as filed by Best Coast. For this reason it is not necessary to consider how much of the evidence provided shows this use taking place prior to the relevant date.

27. Considering the sum of the evidence filed, I find this falls considerably short of showing that the sign SUNDAYS has become customary in the current language or in the bona fide and established practices of the trade to designate Best Coats goods. I do not find that the consumer would have any expectation that the contested mark SUNDAYS would be used by the trade to designate the applied for goods, or any characteristic of the same.

28. As it has not been evidenced that the use of SUNDAYS has become customary in the trade to depict the goods covered by Best Coast's application, I find the opposition on the basis of section 3(1)(d) fails.

### **Section 3(1)(b)**

29. Next, I will consider the opposition based on section 3(1)(b) of the Act.

### **The Principles of Section 3(1)(b)**

30. The principles to be applied under article 7(1)(b) of the CTM Regulation (which is now article 7(1)(b) of the EUTM Regulation, and is identical to article 3(1)(b) of the Trade Marks Directive and s.3(1)(b) of the Act) were conveniently summarised by the CJEU in *OHIM v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) as follows:

"29..... the fact that a sign is, in general, capable of constituting a trade mark does not mean that the sign necessarily has distinctive character for the purposes of Article 7(1)(b) of the regulation in relation to a specific product or service (Joined Cases C-456/01 P and C-457/01 P *Henkel v OHIM* [2004] ECR I-5089, paragraph 32).

30. Under that provision, marks which are devoid of any distinctive character are not to be registered.

31. According to settled case-law, for a trade mark to possess distinctive character for the purposes of that provision, it must serve to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (*Henkel v OHIM*, paragraph 34; Case C-304/06 P *Eurohypo v OHIM* [2008] ECR I-3297, paragraph 66; and Case C-398/08 P *Audi v OHIM* [2010] ECR I-0000, paragraph 33).

32. It is settled case-law that that distinctive character must be assessed, first, by reference to the goods or services in respect of which registration has been applied for and, second, by reference to the perception of them by the relevant public (*Storck v OHIM*, paragraph 25; *Henkel v OHIM*, paragraph 35; and *Eurohypo v OHIM*, paragraph 67). Furthermore, the Court has held, as OHIM points out in its appeal, that that method of assessment is also applicable to an analysis of the distinctive character of signs consisting solely of a colour per se, three-dimensional marks and slogans (see, to that effect, respectively, Case C-447/02 P *KWS Saat v OHIM* [2004] ECR I-10107, paragraph 78; *Storck v OHIM*, paragraph 26; and *Audi v OHIM*, paragraphs 35 and 36).

33. However, while the criteria for the assessment of distinctive character are the same for different categories of marks, it may be that, for the purposes of applying those criteria, the relevant public's perception is not necessarily the same in relation to each of those categories and it could therefore prove more difficult to establish distinctiveness in relation to marks of certain categories as compared with marks of other categories (see Joined Cases C-473/01 P and C-474/01 P *Proctor & Gamble v OHIM* [2004] ECR I-5173, paragraph 36; Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 34; *Henkel v OHIM*, paragraphs 36 and 38; and *Audi v OHIM*, paragraph 37)."

31. Again, the position under 3(1)(b) must be assessed from the perspective of the average consumer, who is deemed to be reasonably observant and circumspect: *Matratzen Concord AG v HuklaGermany SA*, Case C-421/04. The

relevant consumer of the goods has been set out in relation to section 3(1)(d) above.

32. Sunday submits that Best Coast's mark is a dictionary word, used to describe a day of the week. Sunday states that the mark is used extensively in this regard, and that it is also used by Christians to denote a day of rest and worship, and that it is part of the weekend which is "...universally associated with time-off, celebrations, partying, drinking, relaxing and sporting." It is submitted by Sunday that the wide public and commercial use of the word means it has, on its own, become generic and lacks any inherent distinctive character.
33. Best Coast argues within its submissions that Sunday's claim under 3(1)(b) is not an independent claim to that under section 3(1)(d). I note the reference in Sunday's pleadings under this ground to the mark having "...become generic..." through wide commercial use, and I accept that it is not relevant for me to consider this pleading any further. However, I note that there are some differences in the pleadings put forward under this ground by Sunday, including that it is a dictionary word and that wide public use means it lacks any inherent distinctive character. As such I will assess this ground on it on its own merits.
34. I accept that the word SUNDAYS will have an inherent meaning to consumers, and I accept that this meaning will be a day of the week, or multiples of this day by virtue of the 's' at the end of the mark. I also note some consumers may view the 's' at the end of the mark as indicating possession. Further, I accept that it is a word that will be commonly used by consumers in general conversation. Whilst I also accept Sunday's submission that this day of the week will have different sentiment to different groups of people, be it as a day of rest or worship for those of Christian faith or otherwise, in the context of the relevant consumer I do not find this to be particularly relevant.
35. However, the fact a mark has a meaning within the English language does not preclude it from being used as an indication of commercial origin of the goods or preclude it from registration by virtue of section 3(1)(b). Many words that are used in the English language are also used as trade marks to indicate

commercial origin. With reference to the goods for which the mark has been filed, namely those in classes 25, 32 and 33, is my view that there is nothing about the inherent characteristics of the word SUNDAYS that renders it incapable as acting as an indicator of origin in respect of the same. In my view, the public use of the word to indicate a day of a week does not make this so, nor does the fact that it forms part of the weekend, which, at such time, some members of the general public may choose to increase their drinking habits. I therefore find the opposition under section 3(1)(b) fails.

36. As the opposition filed by Sunday has failed in its entirety, I will now consider the opposition 494 as filed by Best Coast.

### **Opposition 494**

#### **Section 5(2)(b)**

37. 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”.

38. 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

39. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

### *The principles*

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible

that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

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

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

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



## **Proof of use**

40. The only earlier mark within these proceedings has not yet been granted protection within the UK, and as such it is not yet subject to use requirements set out under section 6A of the Act.

## **Comparison of the goods**

41. Section 60A of the Act provides:

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

(a) 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.”

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

(a) The respective 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.

43. In the judgment of the Court of Justice of European Union (“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”.

44. 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 General Court (“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”.

45. 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.”

46. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, the GC stated that:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by 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”.

47. The goods for comparison are outlined in the table below:

<b>Earlier goods relied upon</b>	<b>Contested goods</b>
<p>Class 32: Non-alcoholic beverages; mineral and aerated waters; fruit beverages and fruit juices; syrups and other preparations without alcohol for making beverages.</p> <p>Class 33: Alcoholic beverages except beers; alcoholic preparations for making beverages; spirits [beverages].</p>	<p>Class 33: Alcoholic beverages containing fruit; Alcoholic beverages of fruit; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic beverages (except beer); Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages except beers; Alcoholic beverages, except beer; Alcoholic carbonated beverages, except beer; Beverages (Alcoholic -), except beer; Pre-mixed alcoholic beverages, other than beer-based; Alcoholic beverages containing fruit; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages of fruit; Alcoholic carbonated beverages, except beer; Alcoholic cocktail mixes; Alcoholic cocktails; Alcoholic cocktails in the form of chilled gelatins; Alcoholic coffee-based beverage; Alcoholic fruit beverages; Alcoholic fruit cocktail drinks; Alcoholic preparations for making beverages;</p>

	<p>Alcoholic punches; Alcopops; Beverages (Alcoholic -), except beer; Beverages containing wine [spritzers]; Beverages (Distilled -); Cider; Ciders; Cocktails; Dry cider; Fruit (Alcoholic beverages containing -); Grain-based distilled alcoholic beverages; Low alcoholic drinks; Natural sparkling wines; Naturally sparkling wines; Pre-mixed alcoholic beverages; Pre-mixed alcoholic beverages, other than beer-based; Prepared alcoholic cocktails; Prepared wine cocktails; Red wine; Red wines; Rose wines; Rum [alcoholic beverage]; Rum punch; Rum-based beverages; Sparkling fruit wine; Sparkling grape wine; Sparkling red wines; Sparkling white wines; Sparkling wine; Sparkling wines; Spirits; Spirits [beverages]; Still wine; Sweet cider; Table wines; White wine; White wines; Wine; Wine coolers [drinks]; Wine punch; Wine-based drinks; Wines.</p>
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48. The earlier mark covers the goods *Alcoholic beverages except beers* in class 33. These goods are identical to all of the contested goods either self-evidently, or in line with the principles set out in *Meric*, with the exception of those below:

*Alcoholic cocktails in the form of chilled gelatins; Alcoholic preparations for making beverages;*

49. The earlier mark covers *alcoholic preparations for making beverages*. This is identical to the applicant's *alcoholic preparations for making beverages*.

50. Sunday's remaining contested goods therefore comprise *alcoholic cocktails in the form of chilled gelatins*. I note Best Coast's earlier goods *alcoholic beverages except beers* will include beverage cocktails, and I note there will be a significant overlap in the core ingredients used in these goods and those filed by Sunday. However, whilst I note the reference to Sunday's goods being cocktails, it is my view they will not strictly be beverages as they will not be in liquid form, rather they will be alcoholic jellies. I therefore find the nature of these goods to differ from Best Coast's earlier goods. I find the goods will be targeted at the same consumers, namely the general public over the age of 18, and will be sold near, if not next to each other in retail stores. They will serve broadly the same purpose, that being for consumption for enjoyment of both the taste and the effects of alcohol. It is my view they will often be provided by the same entities and will share trade channels. I find there will also be a level of competition between the goods, as the consumer may opt for either an alcoholic beverage such as a cocktail, or alcoholic cocktails in the form of chilled gelatins, to serve or enjoy at a party for example. Overall, I find the applicant's contested goods *Alcoholic cocktails in the form of chilled gelatins* to be similar to the opponent's earlier *Alcoholic beverages except beers* to a high degree.


### **Comparison of marks**

51. 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.”

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

53. The respective trade marks are shown below:

Earlier trade mark	Contested trade mark
<b>SUNDAYS</b>	

54. The earlier mark comprises the single word SUNDAYS. The overall impression of the mark resides in the mark as a whole.

55. The contested mark comprises the large stylised word SUNDAY, and the smaller wording SELTZER Co. The most dominant and distinctive element of the mark is the large word SUNDAY and this element plays the largest role in the overall impression of the mark. Whilst the smaller wording is not negligible, ‘seltzer’ indicates a sparkling water,<sup>2</sup> which in the context of many of the goods may be considered an ingredient, and ‘co’ indicates ‘company’. This, along with

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<sup>2</sup> Seltzer is defined by Oxford English Dictionary as *An effervescent mineral water obtained near Nieder-Selters, containing sodium chloride and small quantities of sodium, calcium, and magnesium carbonates. Also an artificial mineral water of similar composition*  
<https://www.oed.com/view/Entry/175528?redirectedFrom=seltzer#eid> [accessed on 19 November 2021]

their much smaller size, means these elements play a far smaller role in the overall impression of the mark. The stylisation used for the word SUNDAY is not elaborate, and whilst it is not negligible, it plays a lesser role in the mark's overall impression than the wording itself.

### **Visual comparison**

56. Visually, the marks coincide through six of the seven letters of the only element in the earlier mark, and the dominant element of the later mark, namely the letters S-U-N-D-A-Y. The earlier mark is filed as a plain word mark and as such it may be used in a range of fonts, including one that is more similar to that used by the contested mark. The marks differ visually through the use of the additional 'S' at the end of the earlier mark, and through the use of the wording 'seltzer co' in much smaller font in the later mark. Overall, I find the marks to be visually similar to a high degree.

### **Aural comparison**

57. The earlier mark will be pronounced as the plural of the known English word SUNDAY, namely in two syllables as SUHN-DAYZ. I find it most likely that the elements that will be pronounced in the later mark will be SUNDAY SELTZER, due to the 'co' element indicating the word company. In these circumstances, the mark will be pronounced in the four syllables, namely SUHN-DAY-SELL-TZER. In these instances, the marks will be aurally similar to a medium degree. Where the 'co' element is pronounced, I find this will either be read as the shortened version 'co', or as the word company, namely COMP-A-NEE. In both cases, whilst this adds to the aural differences between the marks, I find they are still aurally similar to between a low and medium degree due to the verbal similarities at the beginning of each. Finally, I note there may be occasions where the contested mark is simply pronounced as SUHN-DAY, although I find this will be less common. On these occasions, the marks are aurally similar to a high degree.



## Conceptual comparison

58. The earlier mark conveys the meaning of multiples of a day of the week, namely SUNDAY, falling after Saturday and prior to Monday and belonging to the weekend. Although it is not grammatically correct, to some, the 's' on the end of the word SUNDAY may also convey the concept of ownership, namely of something belonging to SUNDAY. The elements of the later mark convey the meaning of the same day of the week, namely Sunday, in addition to the concept of seltzer, that being carbonated water, and of a company. When considered as a whole, these elements each retain their individual meaning, with the additional layer of the mark being a company name. Overall, through the common meaning of SUNDAY I find the marks to be conceptually similar to at least a medium degree.

## Average consumer and the purchasing act

59. 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*.

60. 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.”

61. Before making a decision on the likelihood of confusion, I must first identify the relevant consumer. The relevant consumer of the similar and identical goods will be comprised primarily of members of the general public over the age of 18. 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 will purchase the goods fairly frequently, either in a retail or hospitality environment, whereas the professional public is more likely purchase these in a wholesale environment. I note the price point of the goods may range from relatively inexpensive to very expensive, but this will not mean that a high level of attention will be paid towards the goods generally, and I find the purchase will not be one undertaken by the public with a particularly heightened level of care. However, the general public will likely consider various factors when purchasing the goods, including the type, geographical origin, taste and alcoholic content, and so I find a medium level of attention will be paid. In respect of professionals, it is my view their attention 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 on to consumers. I find the professional consumer will pay at least between a medium and high level of attention when purchasing the goods.

62. Where these goods are purchased in a retail environment, the consumer will rely predominantly on the visual inspection of the goods on shelves. Where the goods are purchased in a café, bar, restaurant, pub or nightclub, again this will be predominantly visual with marks being displayed on and chosen from a drinks menu<sup>3</sup> or displayed on the bottles or boards visible behind the bar. However, verbal orders will often be placed in these scenarios, and as such aural considerations cannot be completely discounted.<sup>4</sup> I find that professionals will also make predominantly visual purchases, although on occasion orders

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

<sup>4</sup> 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.

may be placed verbally and so I also cannot completely disregard the aural comparison in respect of professionals either.

### **Distinctive character of the earlier trade mark**

63. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

64. The earlier mark is an ordinary English word conveying the meaning of the day of the week following Saturday and prior to Monday, occurring multiple times. To some I found this may convey the meaning of something belonging to that day of the week. The mark is not allusive or descriptive of any characteristic of

the goods for which is has been filed, nor is it laudatory. Overall, I find the mark to hold a medium level of inherent distinctive character in respect of the goods. No evidence has been filed by Best Coast and so I cannot find that the distinctiveness of the earlier mark has been enhanced through the use of the same.

## **GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion**

65. 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 39 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 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 by the earlier mark will have an impact on the likelihood of confusion, and that the likelihood of confusion may be increased where the distinctive character held by 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.<sup>5</sup> I must keep in mind that a lesser degree of similarity between the goods 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 are obtained will have a bearing on how likely the average consumer is to be confused.

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<sup>5</sup> 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.

66. 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 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.<sup>6</sup>

67. 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.

68. I found the goods to be either identical or similar to a high degree, and I found the earlier mark to hold a medium degree of distinctive character inherently. I found the marks to be similar visually to a high degree, and I found the marks will be aurally similar to a medium degree in their most likely pronunciation, but that there will also be occasions where the mark is pronounced in full, reducing the aural similarity to between a low to medium degree, and occasions where only the SUNDAY element of the contested mark is pronounced, rendering them aurally similar to a high degree. I found the marks to be conceptually similar to at least a medium degree, and that relevant consumer will comprise both members of the general public over the age of 18 and professionals. I found the general public will pay a medium degree of attention to the similar and identical goods, and that the professional public's degree of attention being between medium and high. I found that the purchasing process of the goods will be primarily visual, but that aural considerations cannot be ignored.

69. It is true that for the relevant goods, a part of the purchasing process will include the ordering of drinks within noisy bars or nightclubs. I consider that where the

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

degree of aural similarity between the marks is high, that fact alone may be sufficient to create a likelihood of confusion where the goods may be selected by visual means, but also ordered by word of mouth.<sup>7</sup> However, I consider that my assessment of likelihood of confusion should be made on the basis of the normal marketing conditions, and that within my global comparison I should give the respective weight to the aural, visual and conceptual comparisons with consideration to the circumstances in which the goods may be marketed.<sup>8</sup>

70. With the above factors in mind, I consider that it is possible that there will be a situation where these marks are misheard. I also consider that, in the case of alcoholic beverages, when placing orders over a bar or in a restaurant it is possible the consumer will opt to use a shortened version of the contested mark, namely SUNDAY, which increases the aural similarity between the marks, although I note that I found it is most likely the pronunciation of the contested mark will include at least the element 'seltzer'. However, I consider also that the visual similarity of the marks is high, and that the purchasing process is primarily visual. With consideration to the consumers imperfect recollection, I find the addition or omission of the 'S' on the word SUNDAY is something that may easily be forgotten or go unnoticed by the consumer, even considering the medium degree of attention paid. With careful consideration to all of the factors, it is my view that there will be a group of consumers, including the professional consumers, who will notice and recall the elements 'SELTZER CO' within the contested mark. To these consumers, there will be no likelihood of direct confusion between the same. However, I also find that there will be a significant group of consumers who fail to notice or recall the differences between the marks, including the omission or addition of the wording 'SELTZER CO'. I find these consumers will believe the contested mark to be the same as the earlier mark. In respect of these consumers, I find there is a likelihood of direct confusion. However, in case I am wrong, I will now consider if there is a likelihood of indirect confusion between the marks.

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<sup>7</sup> See the General Court decision in *Stock Polska sp. z o.o. v EUIPO*, case T-701/15

<sup>8</sup> See *Rani Refreshments FZCO v OHIM*, Case T-523/12

71. In respect of indirect confusion, Mr Ian Purvis Q.C. in *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10 set out some of the scenarios in which a likelihood of indirect confusion may apply. He stated:

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (“26 RED TESCO” would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as “LITE”, “EXPRESS”, “WORLDWIDE”, “MINI” etc.).

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension (“FAT FACE” to “BRAT FACE” for example).”

72. In this instance, the marks do not fall directly within one of the categories set out above. Whilst the circumstances of this case are similar to category B, I consider that the initial elements are not identical, and that there is the additional stylisation to consider. However, I note that the examples set out by Mr Purvis Q.C. were not intended to be an exhaustive list.

73. I consider the element of the marks that is shared is the word SUNDAY. In respect of this element of the mark, as mentioned above I find it would be very easy for the consumer to not notice or to misremember the addition or the

omission of the 's' at the end of the earlier mark. I note that the element SELTZER may easily be construed as descriptive of an ingredient or element of the goods, and that the 'co' in the contested mark will convey simply that this is a company to the consumer. I also note that the element SUNDAY plays the most dominant role in the overall impression of the contested mark, and that the element SUNDAYS is the earlier mark in its entirety. With consideration to all of the factors, I find that it is likely that even where the consumers notice the element SELTZER CO or the difference in the stylisation of SUNDAY/SUNDAYS, the same consumers are likely to believe the initial element of the marks is shared. With consideration to the identity and high similarity of the goods, as well as all of the other relevant factors in this case, I find it likely that these consumers will believe the later mark is simply a stylised version of the earlier mark complete with the company name. I therefore find there is a likelihood of indirect confusion between the marks in respect of all of the goods.

## **Final Remarks**

74. The opposition no. 422537 filed against UK designation of its International Trade Marks Registration no. 1540978 has failed in its entirety, and subject to a successful appeal, this mark will be granted protection in the UK.

75. International Trade Marks Registration no. 1540978 will be granted protection in the UK and, therefore, it will be an "earlier mark" within the meaning provided at section 6 of the Act. Therefore, the opposition no. 600001494 has been successful in its entirety, and subject to any successful appeal, application no. 3514346 will be refused for all goods filed.

## **COSTS**

76. Best Coast has been successful in both oppositions and is entitled to a contribution towards its costs. In the circumstances I award the Best Coast the sum of £1350 as a contribution towards the cost of the proceedings. As Best Coast did not file any evidence of their own but were required to consider the evidence from the other side, I have awarded under the scale for these



combined stages as set out within TPN 2/2016 in this instance. The sum is calculated as follows:

Prior to consolidation

**Opposition no. 422537**

Considering the other sides statement and preparing the counterstatement	£350
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**Opposition no. 600001494**

Official fee	£100
Preparing and filing the TM7F and considering the counterstatement	£200

Post consolidation

Considering the evidence filed	£300
Preparing and filing written submissions	£400

<b>Total</b>	<b>£1350</b>
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78. I therefore order Sunday Seltzer Company Ltd to pay Best Coast Beverage AG the sum of £1350. 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 22<sup>nd</sup> day of November 2021**

**Rosie Le Breton**

**For the Registrar**