

o/550/22

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003710127

BY MY CHU LIMITED

TO REGISTER THE TRADE MARK:

CHU Gummies

IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600002101

BY ANGELA TANT

BACKGROUND AND PLEADINGS

1. On 14 October 2021, MY CHU LIMITED (“the applicant”) applied to register the trade mark shown on the cover page of this decision in the UK. The application was published for opposition purposes on the 5 November 2021. The applicant seeks registration for the following goods:

Class 5 Protein supplements; Dietary supplements promoting fitness and endurance; Nutritional supplements; Vitamin supplements; Pharmaceutical preparations containing caffeine; Caffeine preparations for stimulative use; Caffeine preparations for medical use; Pharmaceutical sweets.

2. The application was opposed by Angela Tant (“the opponent”) on 23 December 2021. The opposition is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opponent relies upon the following trade mark:

CHU

UK registration no. UK00003429564

Filing date 18 September 2019; Registration date 13 December 2019.

Relying upon some of the goods for which the earlier mark is registered, namely:

Class 5 Gum for medical purposes; chewing gum for medical purposes; medicated chewing gum; medicated sugar free chewing gum; medicated dental health gum; analgesic gum; nicotine gum; gum to assist smoking cessation; caffeine gum; gum to treat erectile dysfunction; neutraceutical gum; vitamin gum; fruit gums and gum sweets for medical use; breath fresheners for medical use; medicated mints (candies); chewing gum for the prevention or treatment of nausea or travel sickness.

3. The opponent claims that there is a likelihood of confusion because the marks are similar, and the goods are identical or similar.

4. The applicant filed a counterstatement denying the claims made.

5. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20 (4) shall continue to apply. Rule 20 (4) states that:

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

6. The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No leave was sought to file any evidence in respect of these proceedings.

7. Rule 62 (5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken.

8. The opponent is represented by Harrison IP Limited, and the applicant is represented by Neo Percept IP limited. A hearing was neither requested nor considered necessary, however both parties filed submissions in lieu. This decision is taken following a careful perusal of the papers.

9. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

DECISION

10. Section 5(2)(b) reads as follows:

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

(a)...

(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.”

11. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

“6(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark ... or international trade mark (UK) ... which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

[...]”

12. Section 6A of the Act states:

“(1) This section applies where

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a),
(aa) or (ba) in relation to which the conditions set out in section 5(1),
(2) or (3) obtain, and
- (c) the registration procedure for the earlier trade mark was completed
before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

[...]”

13. The trade mark upon which the opponent relies qualifies as an earlier trade mark because it was applied for at an earlier date than the applicant’s mark pursuant to section 6(1)(a) of the Act. As the opponent’s mark has not completed its registration process more than 5 years before the filing date of the mark in issue, it is not subject to proof of use pursuant to section 6A(1) and (1A) of the Act. The opponent is entitled to rely upon all of the goods for which the mark is registered.

Section 5(2)(b) case law

14. 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:

- (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.

Comparison of goods

15. The competing goods are as follows:

Opponent's goods	Applicant's goods
<p><u>Class 5</u> Gum for medical purposes; chewing gum for medical purposes; medicated chewing gum; medicated sugar free chewing gum; medicated dental health gum; analgesic gum; nicotine gum; gum to assist smoking cessation; caffeine gum; gum to treat erectile dysfunction; nutraceutical gum; vitamin gum; fruit gums and gum sweets for medical use; breath fresheners for medical use;</p>	<p><u>Class 5</u> Protein supplements; Dietary supplements promoting fitness and endurance; Nutritional supplements; Vitamin supplements; Pharmaceutical preparations containing caffeine; Caffeine preparations for stimulative use; Caffeine preparations for medical use; Pharmaceutical sweets.</p>

medicated mints (candies); chewing gum for the prevention or treatment of nausea or travel sickness.	
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16. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the 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.”

17. Guidance on this issue has come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

- (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

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut for 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.”

19. 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.”

20. In *Beautimatic International Ltd v Mitchell International Pharmaceuticals Ltd and Another*, [2000] F.S.R. 267 (HC), Neuberger J. (as he then was) stated that:

“I should add that I see no reason to give the word “cosmetics” and “toilet preparations”... anything other than their natural meaning, subject, of course, to the normal and necessary principle that the words must be construed by reference to their context.”

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

“... 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 the responsibility for those goods lies with the same undertaking.”

22. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C. noted, as the Appointed Person, in *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL-0-255-13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense – but it does not follow that wine and glassware are similar goods for trade mark purposes.” Whilst on the other hand: “... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

Whilst on the other hand:

“... it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together.”

Pharmaceutical sweets

23. I consider that the opponent’s “gums and gum sweets for medical use” and “medicated mints (candies)” fall within the broader category of “pharmaceutical sweets” in the applicant’s specification. I consider them identical on the principle outlined in *Meric*.

Caffeine preparations for stimulative use

24. I consider that the opponent’s “caffeine gum” falls within the broader category of “caffeine preparations for stimulative use” in the applicant’s specification. I consider them identical on the principle outlined in *Meric*.

Protein supplements; Dietary supplements promoting fitness and endurance; Nutritional supplements; Vitamin supplements

25. I consider that the above goods overlap with the opponent’s “nutraceutical gum”. The definition of nutraceuticals is “a food or substance in food, which is used in healthcare”.¹ Therefore, I consider that nutraceutical gum would have medical or health benefits. I note that Collins Dictionary states that “examples of nutraceuticals are antioxidants, isoflavonoids to improve arterial health, anticyanins. You can get vitamin C in a fresh orange or in a pill- both are nutraceuticals”. Therefore, I consider that the goods overlap in purpose because they have a nutritional and/or medical benefit. I also consider that there would be an overlap in distribution channels as the same undertakings, such as a health and beauty retail outlet or pharmacy, would sell all of the goods. I also consider that all of the goods would be sold and located down the same aisle of a supermarket. There would be limited overlap in method of use, as they are both to be used orally. However, the applicant’s goods would be consumed, whereas the opponent’s goods are only to be chewed and then disposed of. I do not

¹ <https://www.collinsdictionary.com/dictionary/english/nutraceutical>

consider that they overlap in nature. I do not consider that they are complementary, but they may to some extent be in competition. Consequently, I consider that the goods are similar to a medium degree.

Pharmaceutical preparations containing caffeine; Caffeine preparations for medical use

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

27. Albeit I can determine that “caffeine gum” in the opponent’s specification would be gum which contains caffeine, it is not clear what this substance would be used for, where it would be purchased or who would distribute such goods on face value.

28. Therefore, by taking into account that the term appears in a class 5 classification, which is for pharmaceutical, medical or veterinary goods, I consider that caffeine gum is likely to be used for medical purposes. Therefore, I consider that the applicant’s above goods would overlap with the opponent’s “caffeine gum”. To some extent they would overlap in nature as they all contain the ingredient caffeine. I also consider that they would overlap in user and purpose as they would all be used by the general public to treat or help with a medical issue. I also consider that there would be an overlap in distribution channels as the same undertakings, such as a health and beauty retail outlet or pharmacy, may sell all of the goods. There would be a limited overlap in

method of use if the applicant's goods are to be taken orally. I do not consider that they are complementary, but they may to some extent be in competition. Consequently, I consider that the goods are similar to a medium degree.

The average consumer and the nature of the purchasing act

29. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. 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.”

30. The applicant submits that the average consumer for their goods are “professional fitness personnel and bodybuilders” because they designed for a “specific purpose of improving endurance in activities such as high intensity training”. I disagree. I consider that the average consumer for all of the goods will be members of the general public, including those who go to the gym and those who are dedicated to their fitness. These goods are easily accessible to the general public, with aisles dedicated to these goods in the supermarket, health and beauty retail outlets and pharmacies. The cost of the goods in question is likely to vary, however, on balance it is likely to be relatively low. The majority of the goods will be purchased relatively frequently. The average consumer will take various factors into consideration such as the cost, quality, and the suitability for their specific needs. Furthermore, because of the ingredients, such as the vitamins that the supplements contain, which may improve the user's health as

well as their fitness performance, I consider that the level of attention paid during the purchasing process will be above medium.

31. The goods are likely to be obtained by self-selection from the shelves of a retail outlet, supermarket or online equivalent. Visual considerations are, therefore, likely to dominate the selection process. However, I do not discount that there may also be an aural component to the purchase through advice sought from a sales assistant or representative.

Comparison of the trade marks

32. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated, at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

34. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
CHU	CHU Gummies

35. The opponent's mark consists of the word CHU. There are no other elements to contribute to the overall impression which lies in the word itself.

36. The applicant's mark consists of the words CHU Gummies. I note that the word 'Gummies' may be descriptive of the form of the applicant's supplements and pharmaceutical sweets, for which the mark is applied for. However, I bear in mind that in the recent appeal decision by Philip Harris, sitting as the Appointed Person, in *Purity Wellness Group Ltd v Stockroom (Kent) Ltd*, Case BL-O/115/22, it was determined that "descriptiveness does not of itself render an element negligible or aurally invisible". Consequently, while not negligible in the overall impression, it will be accorded less attention and less distinctive significance than the word 'CHU'.

37. Visually, the marks coincide in the presence of the word CHU. However, the applicant's mark also contains the word 'Gummies'. I consider that this is a visual point of difference. I bear in mind that consumers pay more attention to the beginning of the marks. Consequently, I consider that the marks are visually similar to more than a medium degree.

38. Aurally, the opponent's mark will be pronounced as CH-EW and the applicant's mark will be pronounced as CH-EW GUM-MEEZ. As the marks overlap in the pronunciation of the first two syllables, I consider that the marks are aurally similar to a medium degree.

39. Conceptually, the applicant submits that the opponent's mark brings to mind the verb 'chew', whereas the applicant's mark "takes this imagery further by creating the image of chewing or eating gummies". I agree. Therefore, as they overlap in the conceptual meaning of CHU, I consider that the marks are conceptually similar to a medium degree.

Distinctive character of the earlier trade mark

40. 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 C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-2779, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promotion of 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).”

41. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

42. As the opponent has not filed any evidence to show that the distinctiveness of its mark has been enhanced through use, I only have the inherent position to consider.

43. As noted above, I consider that the average consumer would recognise the word CHU as an alternative way to write the verb 'chew'. I consider that this is allusive/suggestive of the way to consume and use the goods for which the opponent's mark is registered for. Consequently, I consider that the opponent's mark is inherently distinctive to between a low and medium degree.

Likelihood of confusion

44. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. It is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

45. The following factors must be considered to determine if a likelihood of confusion can be established:

- The opponent's mark consists of the word CHU. There are no other elements to contribute to the overall impression which lies in the word itself.
- The applicant's mark consists of the words CHU Gummies. While not negligible in the overall impression, the word 'gummies', due to its descriptive nature, will be accorded less attention/less distinctive significance than the word 'CHU'.
- I have found the marks to be visually similar to more than a medium degree.

- I have found the marks to be aurally and conceptually similar to a medium degree.
- I have found the opponent's mark to be inherently distinctive to between a low and medium degree.
- I have identified the average consumer as members of the general public, who will select the goods primarily by visual means, although I do not discount an aural component.
- I have concluded that above a medium degree of attention will be paid during the process due to the ingredients used in the parties' goods.
- I have found the parties' goods to vary from being identical or similar to a medium degree.

46. I recognise that the word CHU is allusive/suggestive of the way to consume the opponent's goods and therefore is inherently distinctive to between a low and medium degree. However, I bear in mind the decision of the CJEU in *L'Oréal SA v OHIM*, Case C-235/05 P, in which the court confirmed that weak distinctive character of the earlier trade mark does not preclude a likelihood of confusion.

47. Taking all of the factors listed in paragraph 45 into account, bearing in mind the principle of imperfect recollection, I recognise that there is potential for there to be direct confusion. This is particularly the case given the relatively high visual similarity (being more than a medium degree) between the marks and the predominantly visual purchasing process. As mentioned above, the average consumer will select the goods by visual means, whilst paying above a medium degree of attention. I also bear in mind that the beginnings of marks tend to make more of an impact than the ends. In these circumstances, I consider that for the significant proportion of average consumers who recognise the word CHU at the beginning of the applicant's mark, they may overlook the word 'Gummies' given its descriptive meaning of the form of the applicant's goods. Consequently, I consider there to be a likelihood of direct confusion between the two marks.

48. In the event that I am wrong in that regard, and for the sake of completeness, I will also assess if there is a likelihood of indirect confusion. Indirect confusion was

described in the following terms by Iain Purvis Q.C., sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: “The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.”

49. I consider that that the shared common use of the word CHU at the beginning of both marks will lead the average consumer to conclude that the marks originate from the same or economically linked undertakings. I consider that the average consumer will see the additional word ‘Gummies’ which is descriptive of the applicant’s goods, which could be sold in gummy form, and will perceive it as an alternative mark for a sub-brand of ‘CHU’. Therefore, as the average consumer will see the marks as being used by the same or economically linked undertakings, I consider there to be a likelihood of indirect confusion.

CONCLUSION

50. The opposition is successful in its entirety and the application is refused.

COSTS

51. Award of costs in fast track proceedings are governed by TPN 2/2015. The opponent has been successful and is entitled to a contribution towards her costs. In

the circumstances, I award the opponent the sum of **£500** as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Filing a Notice of opposition and considering the applicant's counterstatement	£200
Preparing and filling written submissions in lieu	£200
Official Fee	£100
Total	£500

52. I therefore order MY CHU LIMITED to pay Angela Tant the sum of £500. This sum is to be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 27th day of June 2022

L FAYTER
For the Registrar