O/0289/26

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION 1760883
IN THE NAME OF TEA TONIC PTY LTD

FOR THE FOLLOWING TRADE MARK:

IN CLASSES 21 AND 30

IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 447254 BY

GEORGE WILLIAMSON & CO LTD

BACKGROUND AND PLEADINGS

1. On 13 September 2023, TEA TONIC PTY LTD ("the holder") applied to protect International Registration 1760883 ("the IR") in the United Kingdom for the trade mark shown on the cover page to this decision. The IR claims a priority date of 24 March 2023 from an earlier registration.[1] The application was published for opposition purposes on 2 February 2024 in respect of the following goods:

Teapot stands; teapots; tea infusers; articles of glass for household use; articles of glass for kitchen use; articles of glassware; decorative glassware; decorative household containers of glass; decorative objects (ornaments) made of glass; decorative pots of glass; domestic glassware; drinking glass holders; drinking glasses; glass containers; glass cups; glass flasks (containers); glass pots; glass stemware; glass tableware; glass vials (receptacles); glass, unworked or semi-worked (except building glass); glasses (drinking vessels); glassware; glassware for domestic use; glassware for household purposes; glassware for kitchen purposes; hollow glass containers for domestic use; hollow glass containers for household use; hollow glass containers for kitchen use; hollow glassware for domestic use; hollow glassware for household use; hollow glassware for kitchen use; tea sets; tea cosies; tea balls; tea canisters; tea bag rests; tea caddies; tea strainers; tea filters; tea services (tableware); drinking cups; kitchen utensils; coffee mugs; mugs; coffee cups; cups; insulated cups; tableware (other than knives, forks and spoons); tableware in the form of glassware; household utensils; domestic kitchen containers; kitchen containers; canteens (containers for beverages); containers for beverages; containers for domestic use; containers for foodstuffs; containers for household or kitchen use; containers for household use for storage purposes; containers for storage purposes (household or kitchen use); cosies for containers; domestic containers for beverages; domestic containers for food; drinking containers; food storage containers; heat insulated containers for beverages; heat insulated containers for drinks; heat-insulated containers; heat-insulated containers for beverages; holders for containers for household or kitchen use; household containers;

[1] AU 2344489

insulated containers; kitchen containers for water; steel decanters (household containers); storage containers for domestic use; tanks (containers) for household use; thermally insulated domestic containers; water bottles (containers); drink bottles; non-electric tea warmers; holders for teabags; non-electric tea urns; storage chests for domestic use; parts, fittings and accessories in this class for the aforesaid goods. (Class 21)

Tea, herbal teas, tea-based beverages, herbal tea-based beverages, iced tea and iced herbal tea; herb tea-based beverages not for medical purposes; kelp tea; kombucha tea; tea essence; tea substitutes; chocolate based beverages and chocolate flavoured beverages; sugar, natural sweeteners and artificial sweeteners for culinary purposes; flour and preparations made from cereals; biscuits, bread, pastry, cakes and confectionery. (Class 30)

2. On 1 May 2024, George Williamson & Co Ltd ("the opponent") opposed the application, in its entirety, under section 5(2)(b) of the Trade Marks Act 1994 ("the Act").

3. For the purpose of its opposition, the opponent relies upon the following trade mark series and the goods set out below[2] for which it is registered:

United Kingdom Trade Mark ("UKTM") 2386565:

T-TONIC

T-tonic

t-tonic

(series of 3)

[2] In its Notice of Opposition, the opponent originally indicated that it intended to rely upon all goods for which its mark is registered (see Q5) though in its statement of use it declared that it had used its mark only in relation to those goods I have laid out at paragraph 3 (see Q7a). The holder noted the discrepancy in its counterstatement (paragraph 3). I have listed here only the goods for which use is claimed.

Filing date: 9 March 2005
Registration date: 26 August 2005

Tea; flavourings for teas; flavoured teas (Class 30)
Non-alcoholic beverages flavoured with tea. (Class 32)

4. In its Notice of Opposition, the opponent submits that the identity and/or similarity between the parties' goods and the high similarity between their respective marks gives rise to a likelihood of confusion. It also completed a statement of use in respect of the goods set out above.

5. In its counterstatement, the holder denies the opponent's allegations concerning the similarity or identity of the parties' goods and that the respective marks are similar. It also put the opponent to proof of the goods relied upon.

6. The opponent is represented by Atkinson & Company Intellectual Property Limited and the holder by Wilson Gunn. Both parties filed evidence during the course of the proceedings and, whilst neither party requested a hearing, both elected to file written submissions in lieu. This decision is taken following a careful perusal of the papers.

Relevance of EU Law

7 . The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Decision

8. Section 5(2)(b) of the Act reads as follows:

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

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

9. Under the provisions laid out in section 6 of the Act, the opponent's trade mark clearly qualifies as an earlier mark. Given the respective dates at play, in accordance with section 6A of the Act, the opponent's mark is subject to the proof of use requirements. The relevant period for assessing use is the five-year period ending on the priority date claimed by the IR, namely 25 March 2018 to 24 March 2023.

EVIDENCE

The opponent's evidence

10. The opponent's evidence comes in the form of a witness statement from Mr Edward Charles Magor. Mr Magor is a Director of both the opponent and Williamson Fine Teas Limited. His statement is dated 24 April 2025 and is accompanied by nine exhibits (ECM1 – ECM9). I take the following from the opponent's evidence:

- Williamson Fine Teas is a subsidiary company of George Williamson & Co. Limited. The opponent's T-TONIC trade mark has been held by George Williamson & Co. Limited since 2013 and, prior to this, was registered to Williamson Tea Holdings Ltd. As per an agreement with the opponent, the mark has been in "continuous use" by Williamson Fine Teas[3] since its registration in 2005.

[3] Mr Magor explains that "The T-TONIC registration, along with unregistered rights and goodwill, have recently been transferred to Williamson Fine Teas".

- Marketing and sales campaigns have been carried out directly and via wholesale retailers “throughout the world”, with “notable” campaigns undertaken in the UK and Europe.

- In 2015 a redesign of packaging and marketing materials was commissioned, with the redesign’s launch taking place in 2017.[4]

- Examples of the opponent’s T-TONIC products feature in blog posts published on its website.[5] Goods such as its *T-Tonics – Black Tea with Berry Infusion* and *T-Tonics – Black Tea with Peach* are featured. All enclosed blogs were published in 2017.

- A further blog on the opponent’s website, dated 7 July 2017, announces a collaboration with Liz Earle Wellbeing magazine, in which subscribers have the chance to win a tea caddy and teabags, alongside a packet of “vitalizing and boosting T-Tonics, a new range of fruit and flavour-filled teas and infusions exclusive to Williamson Tea.”

- A number of social media posts are featured in evidence promoting the opponent’s T-Tonics goods. An Instagram[6] post dated 7 August 2017 features Apple and Spice (T-Tonic) teabags, whilst an Instagram post from 9 October 2017 invites readers to “Get fruity”, with the post explaining “our #ttonics are available online and are a subtle mix of black tea and natural flavourings”. A further Instagram post, dated 5 April 2018, reads “Celebrating a bit of spring today with our T Tonics!”, with a photograph of a brewing cup of tea positioned alongside. Finally, Mr Magor encloses a Facebook post from 27 November 2016 from the account *Sheldrick Wildlife Trust* promoting the opponent’s new range of T-Tonics.

- The opponent has sold its T-TONIC goods in the UK and internationally using direct online sales, sales online to trade, physically at trade shows and fairs and via

[4] Examples are enclosed at ECM1.
[5] ECM3
[6] All Instagram posts originate from the account williamson_fine_teas.

wholesalers (including Cotswold Fayre in the UK) and retailers.

- UK retailers which have sold the opponent's T-TONIC products include Ocado, John Lewis, Harvey Nichols and Selfridges. Mr Magor submits that "products are also currently and have previously been available directly from www.williamsontea.com". Prints from the Wayback Machine show archived screenshots of the opponent's website. Screenshots from 18 June 2017, 5 December 2017 and 9 January 2019 show *T-TONIC Flavoured Teas* as a category available in the opponent's online 'shop'. A screenshot from 9 January 2019 displays a range of the opponent's T-Tonic Flavoured Teas and, dated 17 January 2022, a screenshot shows a "Black Tea with Apple & Spice" under the *Teabags* heading with the description beneath reading "…this T-Tonic is full of flavour". The price is £3.05. A screenshot from 23 March 2023 shows the "Teabags" section of the opponent's site, wherein seven products are displayed. Two of these appear consistent with the T-TONIC packaging shown in other exhibits, though the text on the products is difficult to make out and the descriptions simply say "BLACK TEA WITH PEACH" or "BLACK TEA WITH APPLE & SPICE". A screenshot retrieved in March 2024 shows the opponent's T-TONIC BERRY INFUSION teabags available to purchase from *https://botiga.co.uk*.

- A "non-exhaustive" summary of 2017 invoices is enclosed at Exhibit ECM7, of which I note that eight refer to shipments to UK addresses (wholesalers/independent outlets). Goods include T-Tonic Apple & Spice, T-Tonic Berry Fusion and T-Tonic Cleansing Mint. All invoices are dated prior to the relevant period (with dates ranging from 20 January 2017 to 13 December 2017). Outside of these invoices, there are a range of screenshots from what appears to be an online e-commerce account. For ease, I produce below a table capturing the UK orders shown in the account:[7]

Order no.	Date	Customer / Location	Goods
150596	25.11. 2019	Xianyxy Cao, St Albans	Black Tea with Peach (Qty 5); Black Tea with Berry Infusion (Qty 5); Black Tea with Apple & Spice (Qty 5)

[7] I have excluded details of orders to destinations outside of the UK and those exported to such destinations (though I keep in mind that the orders were shipped to UK locations).

139632	12.11.2019	Suhail Dada, London	Black Tea with Apple & Spice (Qty 8); Black Tea with Berry Infusion (Qty 1); Black Tea with Peach (Qty 1)
141114	-[8]	Martina Kozusnikova, London	Black Tea with Peach (Qty 1); Black Tea with Berry Infusion (Qty 1); Black Tea with Apple & Spice (Qty 1)
141439	12.11.2019[9]	Pawel Pol, Cheshire	Black Tea with Apple & Spice (Qty 2); Black Tea with Berry Infusion (Qty 2)
151385	15.01.2020	Louise Forman, Market Bosworth	Black Tea with Berry Infusion (Qty 1)
152717	18.05.2020	Nicola Marsh (Tea Dynamics Ltd), Berkshire	Black Tea with Peach (Qty 4); Black Tea with Apple & Spice (Qty 4); Black Tea with Berry Infusion (Qty 4)
156055	15.07.2021	Helen Darby, Plymouth	Black Tea with Peach (Qty 6); Black Tea with Apple & Spice (Qty 6)
156916	19.12.2021	Susan Sansby, Cambridgeshire	Black Tea with Peach (Qty 1)
158732	12.12.2022	Ann Taylor, Essex	Black Tea with Peach (Qty 3)
158755	15.12.2022	Adam Thornton, Lancashire	Black Tea with Peach (Qty 1)
159051	15.02.2023	Rosi Hacon, London	Black Tea with Peach (Qty 10)
159194	20.03.2023	Aneta Naskrecka, Watford	Black Tea with Peach (Qty 1)

- At Exhibit ECM8, Mr Magor encloses a promotional leaflet, which appears to have been created in 2017. Mr Magor explains that the leaflet was circulated amongst wholesalers and retailers. Various Williamson Tea products are displayed, including some of its T-Tonic tea bags such as Yerba Mate & Green Tea, Black Tea & Peach and Kenyan Sunset.

- Within an email exchange between Mr Magor and a buyer from Waitrose, Mr Magor is advised that "Whilst T-Tonics in their current format did not make it into the range for the October range review, I am happy to review them again with you and discuss the different formats to make these more accessible to the Waitrose range.[10]" In a later message, the representative confirms that "I have implemented the new cost for the 2

[8] Due to the highlighting applied to the relevant text, I am unable to make out the date.
[9] The order was placed in November 2019 – from what I can tell the date is 12th.
[10] 22 August 2016

Williamson Tea lines"[11], though there is no mention of T-Tonics specifically. In the following year[12], the same representative advises that "I am meeting with my Merchandiser to discuss 2018 range change opportunities on 30th October, following this meeting, I will be able to give you a better indication of the ranging opportunities for Elephant Caddies and T-Tonics." Further correspondence between Mr Magor and Optimum Buying (on behalf of World Market) shows Mr Magor setting out the opponent's 2017 range[13], including its T-Tonics goods which he describes as "Our special fruit infusions and flavored teas". Mr Magor states that "We'd be delighted to show the World Market buyer some products". There is also an exchange between Mr Magor and an account manager at Cotswold Fayre in March/April 2018 in which Mr Magor is asked to check various product details including outer barcodes, for a range of products including several Williamson Tea -Tonic teabags (Black & Peach, Berry Infusion, Apple & Spice). In 2019, Mr Magor was engaging with Buyers Mindset regarding distribution of the opponent's sample products. The representative advises Mr Magor that "I have had buyers keen to see samples come back to me… I would recommend that you put at least one sample of each of your main range and T-Tonics". Addresses are then provided for buyers at, for example Morrison Supermarkets Ltd, Tesco House and CLF Distribution Ltd.[14]

11. That concludes my summary of the opponent's evidence, insofar as I consider it necessary.

Holder's evidence

12. The holder filed evidence in the form of a witness statement from Mr Alexander Thompson of Wilson Gunn dated 25 June 2025. Mr Thompson's statement is accompanied by five exhibits (AT1-AT5). I provide a short summary of the evidence below:

[11] 28 September 2016
[12] 23 October 2017
[13] 27 February 2017
[14] The body of the email explains that "Simply Fresh are interested but would want to go through CLF distribution"

- A screenshot shows the first five pages of results generated by a search for “tea tonic” in the “books” category of Amazon.co.uk, carried out in June 2025. Results include publications such as *Tonics & Teas: Traditional and modern remedies that make you feel amazing; Healing Sips: The Essential Guide to Herbal Teas & Tonics* and *Heineman’s Encyclopedia of Juices, Tonics and Teas*.

- Extracts from third party websites show various use of “tea/tonic” in relation to their respective goods. These include, for example, *Women’s Tea Tonic*[15], *Tonic Herbal Teas*[16] and *Winter Cold & Flu Tonic Loose Tea.*[17]

- Examples of articles using the word “tonic” in relation to teas are enclosed at Exhibit AT3. Headlines include, for example*, “Tea is a real tonic”*[18]*, “Tea isn’t just a brain-expanding tonic – it’s a whole way of life”*[19] and *“Tea, a tonic for high blood pressure: Three cups a day to help counteract cardiovascular disease”*[20]*.*

- Mr Thompson also directs me to third party use of “tea tonic” or “tonic tea” in respect of recipes for various teas or infusions. Directions to create “TEA TONIC SCHWARTZ” are displayed on the Schwartz website, claiming that “one sip will shake off any winter chills and warm you up from the inside out”. Twinings provides directions to create a “Cleanse Green Tea & Tonic”, reading “Quench your thirst with this refreshing and tart green tea tonic.” The website of SIMPLE VEDA provides a recipe for “Ginger Lemon Tonic Tea”.

- Finally, Mr Thompson refers to a definition of ‘tonic’, retrieved from the Google Oxford Languages dictionary tool. The primary definition offered is a noun meaning a *medicinal substance taken to give a feeling of vigour or well-being.*

[15] *https://broughtyblends.co.uk*
[16] *www.naviorganics.uk*
[17] *https://alchemytea.co.uk*
[18] Daily Express, 7 November 2009
[19] The Telegraph, 30 December 2020 (according to the URL)
[20] Mail Online, 27 April 2013

Genuine use

13. The relevant statutory provisions are as follows:

> "6(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.
>
> (3) The use conditions are met if –
>
> (a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or
>
> (b) the earlier trade mark has not been so used, but there are proper reasons for non- use.
>
> (4) For these purposes –

a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services."

14. Section 100 of the Act is also relevant. It reads:

"If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it."

15. In *easyGroup Ltd v Nuclei Ltd & Ors*,[21] Arnold LJ summarised the law relating to genuine use as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp* v *Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v*

[21] [2023] EWCA Civ 1247

Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at[36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase

of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”

16. Proven use of a mark which fails to establish that "the commercial exploitation of the mark is real" because the use would not be "viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark" is, therefore, not genuine use.

17. For completeness, I begin by acknowledging that some of the evidence suggests that the opponent's T-TONICS mark is used alongside its figurative Williamson Teas mark on packaging, for example. It is clear from the findings of the Court of Justice of the European Union ("CJEU") in *Colloseum Holdings*[22] that use of a mark will generally encompass both independent use and its use "as part of another mark taken as a whole or in conjunction with that other mark". I see no reason why this approach would not be applicable here. On that basis, I find this is acceptable use of the mark relied upon.

18. I do not intend to reproduce my earlier summary of the opponent's evidence. The burden of proving use lies firmly with the opponent and, to my mind, its evidence at large does face some shortcomings. Its evidence lacks any insight into the goods' turnover or market share, for example, and several of its exhibits fall outside of the relevant period. The opponent's website blogs, for example, pre-date the start of the relevant period, as do a number of its social media posts. Invoices concerning sales to wholesalers and independent retailers are all dated in 2017. As for the promotional leaflet Mr Magor encloses, it was dated in 2017 and there is no clarification of when or how widely the leaflet was distributed. Mr Magor has also not made clear how much the opponent has invested into the promotion of its mark. As the holder has noted in its submissions, the evidence is also absent of any sales figures pertaining to the goods sold under the earlier mark.

19. All that being said, I have archived screenshots of the opponent's website being active within the relevant period showing its T-TONICS goods available to peruse and purchase, with the goods displayed in £GBP. Mr Magor has also enclosed order details

[22] *Colloseum Holdings AG v Levi Strauss & Co.,* Case C-12/12

from what appears to be the opponent's online commerce account, showing fulfilled orders of its T-Tonic goods to customers across the UK. I have no reason to doubt that these are non-exhaustive, as indicated by Mr Magor. Whilst the orders may not specify T-Tonics, given that the imagery and the goods' descriptions marry up with the depiction of the opponent's T-TONICS products shown throughout the evidence, I am willing to accept that the orders shown here represent sales of these goods. As for the opponent's engagement with buyers, I keep in mind that much of the correspondence pre-dates the relevant period, though the later exchanges indicate that the opponent was actively continuing conversations in this regard and was in receipt of guidance suggesting that it provide samples of its T-Tonic range to third party buyers. Notwithstanding the deficiencies identified above, I remind myself that use does not have to be quantitively significant, and on balance I am satisfied that the opponent made use of the earlier mark in the UK during the relevant period. Precisely which goods the evidence shows use of is a matter I turn to now.

20. I must now consider whether, or the extent to which, the evidence shows use of the earlier mark in relation to the goods relied upon. In *Euro Gida Sanayi Ve Ticaret Limited v Gima (UK) Limited*,[23] Mr Geoffrey Hobbs Q.C. (as he then was) as the Appointed Person summed up the law as being:

> "In the present state of the law, fair protection is to be achieved by identifying and defining not the particular examples of goods or services for which there has been genuine use but the particular categories of goods or services they should realistically be taken to exemplify. For that purpose the terminology of the resulting specification should accord with the perceptions of the average consumer of the goods or services concerned."

21. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors,*[24] the Court of Appeal set out the proper approach to partial revocation, as follows:

[23] BL O/345/10
[24] [2017] EWCA Civ 1834

“245. First, it is necessary to identify the goods or services in relation to which the mark has been used during the relevant period.

246. Secondly, the goods or services for which the mark is registered must be considered. If the mark is registered for a category of goods or services which is sufficiently broad that it is possible to identify within it a number of subcategories capable of being viewed independently, use of the mark in relation to one or more of the subcategories will not constitute use of the mark in relation to all of the other subcategories.

247. Thirdly, it is not possible for a proprietor to use the mark in relation to all possible variations of a product or service. So care must be taken to ensure this exercise does not result in the proprietor being stripped of protection for goods or services which, though not the same as those for which use has been proved, are not in essence different from them and cannot be distinguished from them other than in an arbitrary way.

248. Fourthly, these issues are to be considered having regard to the perception of the average consumer and the purpose and intended use of the products or services in issue. Ultimately it is the task of the tribunal to arrive at a fair specification of goods or services having regard to the use which has been made of the mark.

249. This approach does strike an appropriate balance. It gives effect to the clear intention of the EU legislature that marks must actually be used or, if not used, be subject to revocation. […] It is also fair to proprietors for it does not require a proprietor to prove that he has used his mark in relation to all possible variations of the goods or services covered by its registration but only those which are sufficiently distinct to constitute coherent categories or subcategories. I am also satisfied that it gives appropriate protection to the legitimate interest of a proprietor in being able in the future to extend his range of goods or services within the scope of the terms describing the goods or services for which its mark

is registered."

22. This approach was approved by the Supreme Court in *Skykick*[25], subject to the proviso that it must be seen in light of more recent guidance by the CJEU that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods or services capable of being viewed independently is their purpose and intended use.[26]

23. In *Property Renaissance Ltd (t/a Titanic Spa) v Stanley Dock Hotel Ltd (t/a Titanic Hotel Liverpool) & Ors,*[27] the late Carr J pointed out that it is not the task of the court to describe the use made by the trade mark proprietor in the narrowest possible terms unless that is what the average consumer would do; for example, in *Pan World Brands v Tripp Ltd (Extreme Trade Mark)*[28] it was held that use in relation to holdalls justified a registration for luggage generally.

24. The opponent seeks to rely upon *tea, flavourings for teas, flavoured teas* and *non-alcoholic beverages flavoured with tea*. On reflection of its evidence as a whole, and having due regard to the goods sold in the orders displayed in its e-commerce account, and those featured throughout the evidence (albeit with much material being outside of the relevant period), to my mind the evidence shows use of the mark in relation to tea only, specifically *flavoured tea*. I do not see anything within the evidence to support a finding of use in respect of the remaining goods. Whilst the opponent may therefore clearly rely upon *flavoured teas*, I must now consider whether it is entitled to rely upon *tea* at large. The purpose of tea, generally speaking, will be to satisfy a consumer's thirst or provide a comforting beverage, for example. The same is likely to be true of the narrower *flavoured teas*. Consequently, I do not consider flavoured teas to be an independent subcategory of the wider term. Applying the guidance set out above, and being particularly mindful of the goods' purpose and intended use, I am satisfied that the

[25] *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36
[26] See, for example, *Ferrari SpA v DU* (Joined Cases C-720/18 and C-721/18) EU:C:2020:854; [2021] Bus LR 106, at paragraphs 36-53
[27] [2016] EWHC 3103 (Ch) at [47]
[28] [2008] RPC 2

exhibited use of the mark in respect of flavoured teas signifies use in respect of tea at large. For the purpose of the present proceedings, I find a fair specification would therefore include both *tea* and *flavoured teas* in class 30.

Section 5(2)(b)

25. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*:[29]

> (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, in certain circumstances, be dominated by one or more of its components;

[29] [2025] UKSC 25

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and

(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

26. The applied-for goods are set out at paragraph 1 of this decision, whilst I have found above that the opponent may rely upon *tea* and *flavoured teas* for the purpose of the present proceedings.

27. For the avoidance of doubt, I have reviewed both parties' submissions concerning the similarity of the goods. I will not reproduce these here but will instead refer to them only where it appears necessary.

28. In my comparison of the parties' goods, I will consider factors including their nature, intended purpose, method of use, trade channels and whether they are in competition or are complementary.[30]

29. As for when goods can be considered identical, in *Gérard Meric v Office for Harmonisation in the Internal Market,*[31] 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 fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

30. In *Kurt Hesse v OHIM*,[32] 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)*[33], 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 that the responsibility for those goods lies with the same undertaking".

31. For the purpose of a comparison it is permissible to group goods together, where appropriate.[34]

Teapot stands; teapots; tea infusers; tea sets; tea cosies; tea balls; tea canisters; tea bag rests; tea caddies; tea strainers; tea filters; tea services (tableware); non-electric

[30] *Canon*, Case C-39/97; *Treat*, [1996] R.P.C. 281
[31] Case T- 133/05
[32] Case C-50/15 P
[33] Case T-325/06
[34] *Separode Trade Mark* BL O-399-10 (AP)

tea warmers; holders for teabags; non-electric tea urns

32. The above goods are clearly deliberately designed to be compatible with *tea* or, more generally, the process of preparing tea. Whilst there is some broad coincidence in the overarching purpose of the goods, their respective (immediate) uses are rather distinct. The users of the goods are likely to be the same; a consumer purchasing tea will likely require goods which are designed to be compatible with or used alongside tea, for example. Any coincidence in trade channels is likely to be in fairly broad terms only and, to my mind, the goods are not typically sold in any real proximity (though I accept there are exceptions to this). The goods are not competitive and, whilst they are compatible, I do not take the view that they will be necessarily indispensable to one another, at least not to the extent described in the case law set out above. Whilst there may be some circumstances in which the goods are offered by a single undertaking, generally I would expect consumers to expect the goods to originate from distinct origins. As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amalia Mary Elliot*[35], whilst wine glasses are almost always used with wine, it does not follow that wine and glassware are similar goods for trade mark purposes. Applying due weight to the relevant factors, I do not find the goods similar.

Articles of glass for household use; articles of glass for kitchen use; articles of glassware; decorative glassware; decorative household containers of glass; decorative objects (ornaments) made of glass; decorative pots of glass; domestic glassware; drinking glass holders; drinking glasses; glass containers; glass cups; glass flasks (containers); glass pots; glass stemware; glass tableware; glass vials (receptacles); glass, unworked or semi-worked (except building glass); glasses (drinking vessels); glassware; glassware for domestic use; glassware for household purposes; glassware for kitchen purposes; hollow glass containers for domestic use; hollow glass containers for household use; hollow glass containers for kitchen use; hollow glassware for domestic use; hollow glassware for household use; hollow glassware for kitchen use; drinking cups; kitchen utensils; coffee mugs; mugs; coffee cups; cups; insulated cups; tableware (other than

[35] *Sandra Amalia Mary Elliot v LRC Holdings Limited* BL O/255/13

knives, forks and spoons); tableware in the form of glassware; household utensils; domestic kitchen containers; kitchen containers; containers for domestic use; containers for foodstuffs; containers for household or kitchen use; canteens (containers for beverages); containers for beverages; containers for household use for storage purposes; containers for storage purposes (household or kitchen use); cosies for containers; domestic containers for beverages; domestic containers for food; drinking containers; food storage containers; heat insulated containers for beverages; heat insulated containers for drinks; heat-insulated containers; heat-insulated containers for beverages; holders for containers for household or kitchen use; household containers; insulated containers; kitchen containers for water; steel decanters (household containers); storage containers for domestic use; tanks (containers) for household use; thermally insulated domestic containers; water bottles (containers); drink bottles; storage chests for domestic use; parts, fittings and accessories in this class for the aforesaid goods. (Class 21)

33. I will start by acknowledging that some of the aforementioned goods are able to be used with the opponent's *tea*, to store it for example or to drink it from. However, the goods listed here lose the inherent compatibility attributable to the goods discussed in the previous paragraph, and I must be mindful not to construe their meaning too narrowly. The goods will likely be purchased by the same consumers, but for a different purpose. The goods' physical nature is not similar and, to my knowledge, the trade channels are generally distinct and the goods are not typically sold alongside one another. The goods are not competitive and, whilst I have acknowledged that there may be circumstances in which the goods are used in conjunction with one another, I do not consider them indispensable. Even where the above goods are used with *tea*, for example, the purpose of examining whether there is a complementary relationship 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.[36] Weighing all considerations, I find the parties' goods are not similar.

[36] See, for example, *Sanco SA v OHIM,* Case T-249/11

34. In class 30, both parties' specifications include the term *tea*. These goods are clearly identical.

35. Applying the principle set out in *Meric* I find the following goods, for which registration is sought, are encompassed by the opponent's *tea*: *herbal teas*, *iced tea and iced herbal tea*, *kelp tea*, *tea essence*, *kombucha tea*. These goods are to be regarded as identical.

Tea-based beverages, herbal tea-based beverages; herb tea-based beverages not for medical purposes; tea substitutes

36. The above goods, if not encompassed by the opponent's *tea*, are to my mind at least highly similar. I note that the holder has admitted that these are identical or "closely similar" to the opponent's goods. The goods will be selected for the same purpose and by the same consumers and they are likely to share some (albeit, limited) physical characteristics insofar as all are consumable liquid products. The goods are likely to reach the market via the same trade channels and may occupy competitive roles. Though it may not always be the case, it would not seem unreasonable for the consumer to expect the goods to be offered by a shared or related undertaking.

Chocolate based beverages and chocolate flavoured beverages

37. The above goods are likely to be purchased for the same reason as the opponent's goods. The users are likely to be shared and, whilst the above beverages clearly have a different flavour, there will inevitably be some degree of similarity in the goods' physical nature. The trade channels are likely to be the same, for the most part, and, on account of their shared purpose, the goods may be competitive insofar as the consumer may ponder which beverage best suits their mood, for example. The goods are not indispensable and, to my knowledge, are not typically offered by a single undertaking. Applying due weight, I find the goods are similar to at least a medium degree.

Sugar, natural sweeteners and artificial sweeteners for culinary purposes; flour and preparations made from cereals

38. The use of the above goods is distinct from the use of the opponent's goods, with the above being (generally speaking) preparations or ingredients which are added to others to create a finished consumable product. The goods are likely to be selected by the same consumers but there is little opportunity for similarity in their physical nature and any coincidence in trade channels is likely to be in fairly broad terms only. The goods are not competitive, nor are they complementary. Whilst I accept that sugar or sweeteners, for example, can be added to tea, this does not amount to an indispensable relationship and the respective undertakings are likely to be distinct. I find the goods dissimilar.

Biscuits, bread, pastry, cakes and confectionery. (Class 30)

39. The above goods are ready-made foodstuffs. Whilst I accept that both parties' goods are consumable products, their respective uses are not the same, with the holder's goods generally used to satiate the user's hunger. The goods are likely to be purchased by the same consumers and may broadly utilise the same trade channels. However, the goods are not competitive and I do not consider them to be complementary. Notwithstanding the opportunities for coincidence in the relevant factors, I find the goods are not similar.

40. Given that some degree of similarity between the parties' goods is necessary for the finding of a likelihood of confusion,[37] the opposition falls at this juncture in respect of those goods which I have found not to be similar.

Comparison of marks

41. 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

[37] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA

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 *Bimbo SA v OHIM*,[38] 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."

42. 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.

43. The competing trade marks are laid out for ease in the table below:

Opponent's mark	Holder's mark
T-TONIC T-tonic t-tonic (series of 3)	

44. The opponent's series comprises variations of T-TONIC, with the difference between

[38] Case C-591/12P

the marks being only in the respective letter-casing. I find the mark's overall impression resides in its entirety, in the combination of both T- and TONIC. Given that nothing hangs on the variation in letter casing, I find it appropriate to make a single finding in respect of all marks in the opponent's series when comparing the respective marks.

45. The holder's mark is figurative, comprising a number of different components. Within a black, oval border sits a side-profile of what appears to be a female person, populated entirely in black, with a teapot positioned on top of her head. Within the teapot is a black square with white text, irregularly positioned, reading "TEA TONIC". Whilst I keep in mind that, generally speaking, consumers tend to be drawn to the parts of marks that can be read, particularly given the proportionate sizing of the marks' respective elements and the unusual nature of a depiction of a woman with a teapot on her head, I find the mark's overall impression will reside predominantly in its device element, though the word element nonetheless plays a significant role. The mark's border element is likely to be less impactful.

46. Visually, both marks incorporate the word TONIC, with both marks' preceding word elements beginning with (or being solely) T; T-TONIC in the opponent's series and TEA TONIC in the holder's mark. The words are the only element in the earlier mark, whereas in the holder's mark 'TEA TONIC' is just one of a number of elements, specifically the image of the woman with a teapot on her head and the oval border. Notwithstanding the identity between the marks' initial letter 'T' and their TONIC element, having regard to my findings concerning the marks' overall impressions, I find the marks' visual similarity is of a low degree.

47. Aurally, the opponent's mark is likely to comprise three syllables; TEE-TON-IC. Given that the consumer is unlikely to attempt to articulate any of the figurative elements in the holder's mark, it will likely comprise the same three syllables; TEE-TON-IC. I find the marks are aurally identical.

48. The mark's conceptual impression must be judged from the perspective of the average consumer. In the earlier mark, the meaning of the word *tonic* will be readily

understood meaning, broadly speaking, a drink or liquid with soothing or medicinal properties. The preceding T- element may simply be seen as an acronymic unit or, more likely, where used in respect of tea,[39] it will likely be perceived as a shortening of TEA, particularly as the terms are expressed in the same way phonetically. On that basis, the mark will inevitably impress a concept of a tonic, either absent of any further insight where the T- is meaningless or, more likely, a tea which is to some extent similar to a tonic, where T- is perceived as an abbreviation of TEA. Turning to the holder's mark, the words TEA TONIC promote a concept of a tea with tonic-like properties. The mark's teapot device reinforces this concept, though it is unusually positioned on top of a woman's head, which introduces a further concept absent of any counterpart. Allowing for variation in interpretation of the earlier mark, and having kept in mind my findings concerning the marks' overall impression, I find the marks conceptually similar to between a medium and fairly high degree.

Average consumer and the purchasing act

49. 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*[40].

50. The average consumer of the goods at issue in the present proceedings is likely to be a member of the general public. The goods are typically selected from the shelves of a traditional retail outlet or an online equivalent, which suggests that the mark's visual weight is likely to be the greatest. That said, given that suggestions may be made by peers or retail assistants, for example, I do not overlook the significance of the mark's aural impression. The cost of the goods is not typically of a high degree and the purchase will likely be made fairly frequently, with the consumer alive to considerations

[39] Whilst conceptual comparisons are usually done without reference to the goods at issue, the consumer nonetheless looks to the goods to inform the meaning of the mark, particularly where there is a link between the conceptual meaning of the mark and the goods to which it is affixed. (See *EMILIANA*, BL O/052/22 and *LIGHT VITAMIN*, BL O/1174/25).
[40] *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97

such as quality and flavour when approaching its selection. Having due regard to all factors, I find the average consumer is likely to apply a medium degree of attention to its purchase.

Distinctive character of the earlier trade mark

51. In *Lloyd Schuhfabrik Meyer,* 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 *WindsurfingChiemsee 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)."

52. 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 descriptive or allusive qualities. The distinctive character of a mark can

be enhanced by virtue of the use that has been made of it.

53. I note here the comments of the parties in regard to the earlier mark's distinctiveness. The opponent alleges that its mark is "distinctive in its nature of having an unexpected order of words to conventional use… it is submitted the mark T-TONIC has low to medium distinctiveness". The holder, in turn, directs me toward its evidence, summarised above, to reinforce its submission that "T-", perceived as the word tea, and TONIC are descriptive and non-distinctive elements when assessed in relation to the relevant goods. It concludes that the earlier mark possesses (at best) a very low degree of inherent distinctive character.

54. In my consideration of the earlier mark's conceptual position, I found the most likely interpretation of the T- element in the opponent's series to be an alternative expression of the word tea (particularly as it will be used in respect of these goods). The word *tonic*, generally meaning a medicinal or healing drink, is not particularly detached from the nature of the goods available under the earlier mark and creates some allusive connotations, suggesting for example that the tea itself is soothing in some way. To my mind, the mark's distinctiveness is largely attributed to its abbreviated T- element and the hyphenated combination of T and TONIC. I am not satisfied that the order of these elements has any material impact on the marks' distinctiveness as the opponent has indicated. Naturally where the consumer does not perceive T- as an expression of tea and views it as simply a meaningless acronym rather than a descriptive element, the mark's inherent distinctiveness is slightly enhanced, though not to any material degree. Weighing all findings, I consider the mark inherently distinctive to no more than a medium degree.

55. I turn now to consider whether the evidence shows that the distinctiveness of the earlier mark has been enhanced through use. For this purpose, it is the perception of the UK consumer which is key. The evidence does not give any real insight into the advertisement or promotion of the earlier mark, nor does it demonstrate any meaningful consumer exposure. The opponent has also failed to disclose how much of an

investment it has made in this regard. I have no indication of the reach of the social media posts the opponent has enclosed, not least how many UK followers or subscribers its account boasts. The blogs from the opponent's website are dated outside of the relevant period and, nonetheless, it is unclear just how many consumers viewed these posts or indeed the opponent's website at the relevant time. To my mind, the evidence falls short of establishing that the earlier mark's distinctiveness has been enhanced to any degree by virtue of its use. For the purpose of the present proceedings therefore, it is the marks' inherent distinctiveness to which I must be mindful.

Likelihood of confusion

56. In determining whether there is a likelihood of confusion, 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 services and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion. Conversely, the less distinctive it is, the lower the likelihood of confusion.

57. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and the goods and services down to the responsible undertakings being the same or related.

58. I take note of the comments made by Mr Iain Purvis Q.C., (as he then was) as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*,[41] where he explained that:

> "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

[41] Case BL O/375/10

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."

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)".

59. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*,[42] Arnold LJ approved Mr Purvis's formulation but added:

[42] [2021] EWCA Civ 1207

> "13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

60. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of my earlier conclusions. I also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind.

61. Throughout the course of my decision I have found the goods that remain at issue are identical or similar to at least a medium or at least a high degree. The average consumer is a member of the general public who will apply a medium degree of attention to its purchase, with the marks' visual impression likely to bear the greatest weight in the selection process. The earlier mark is inherently distinctive to no more than a medium degree. In that regard, I keep in mind that, in *Kurt Geiger v A-List Corporate Limited*,[43] Mr Iain Purvis KC 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. He said:

> "39. It is always important to bear in mind what it is about the earlier mark which gives it distinctive character. In particular, if distinctiveness is provided by an aspect of the mark which has no counterpart in the mark alleged to be confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.

[43] BL O-075-13

40. To take a simple example, a device mark for the word 'SOAP' presented with each letter intertwined with barbed wire would have considerable distinctive character even if registered for soap. However, this distinctiveness is provided entirely by the barbed wire element in the device, not by the word SOAP which is entirely descriptive. The high distinctive character of the device would not therefore increase the likelihood of confusion in the event of someone else using the word SOAP in a trade mark for soap but presenting the letters in the form of a fish."

62. I begin by considering a likelihood of direct confusion. To my mind, there are a number of visual differences between the marks which are unlikely to be overlooked by the average consumer. Not only are the word elements preceding 'TONIC' expressed differently (T vs TEA), but the holder's mark comprises a number of other creative elements which create a significant visual distinction. These differences are such that, in my view, even a lower than medium degree of attention on the consumer's part would be sufficient to recognise immediately that the marks were not the same. Notwithstanding that both marks' word elements begin with T, and both marks incorporate the word TONIC, I find the marks are not sufficiently similar for direct confusion to arise where the purchase is approached on visual terms. I acknowledge here, however, that I have found it possible that aural aspects may play a part in the purchasing process and that I have found the marks will be articulated identically. Whilst this may heighten the likelihood of the marks being directly confused, to my mind, it is unlikely that the purchase will be made *solely* on aural terms. There may be a combination, for example in circumstances where the consumer asks for the goods by reference to the mark, but even so, upon being presented with the goods it will be evident whether or not they are the correct goods (on repeat purchase, for example). For these reasons, I dismiss a likelihood of direct confusion.

63. It is made clear in the case law cited above that a finding of indirect confusion requires a *proper basis*. In making this assessment, I am particularly mindful of both the inherent distinctiveness awarded to the earlier mark and the distinctiveness of the marks' shared element. What the marks share is reference to TEA TONIC (or what will

likely be perceived as an alternative way to express the same). Given that tea is often considered to have a soothing or comforting effect, when considered in conjunction with the word TONIC, the definition of which I have already explored, the combination of the words themselves is not, to my mind, particularly distinctive. What I have found the greatest contributor to the earlier mark's distinctive character is its acronymic 'T' element and the hyphenation between this and the word TONIC. These elements are not replicated in the holder's mark which owes much of its distinctiveness to its figurative depiction and expresses TEA TONIC in their respective full spellings and as distinct words. In light of my considerations concerning the marks' distinctive character, and the distinctiveness of the similar word elements, I am not satisfied that the present circumstances here would take the consumer any further than one mark simply bringing the other to mind, even where identical goods are concerned. This is mere association, not indirect confusion.[44] The differences or alternations between the marks are not, in my experience, consistent with what will be perceived as a brand extension, for example, and the overlap in the parties' word element(s) is not sufficiently distinctive that the consumer would naturally conclude that the marks' origin must be at least related. Whilst I accept that Mr Purvis' examples are not intended to be exhaustive, I can see no further meaningful reason as to why the average consumer would indirectly confuse the parties' marks.

CONCLUSION

64. The opposition has failed. Subject to any successful appeal against my decision, the holder's IR will be protected for all goods applied for.

COSTS

65. The holder has been successful and is therefore entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice ("TPN") 1/2023. In accordance with that TPN, I award the holder costs as follows:

[44] *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17

Considering the Notice of Opposition and preparing a counterstatement:	£250
Considering the other side's evidence and preparing evidence:	£600
Preparing written submissions in lieu:	£350
Total:	**£1200**

66. I hereby order George Williamson & Co Ltd to pay TEA TONIC PTY LTD the sum of £1200. The above sum should 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 31st day of March 2026

Laura Stephens
For the Registrar