BL O/0476/26

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION No. 4041631
BY AOUNGO INTERNATIONAL TRADING LIMITED
TO REGISTER THE FOLLOWING TRADE MARK:

IN CLASSES 5, 30 AND 32

-AND-

THE OPPOSITION THERETO UNDER No. 450113
BY VITASOY INTERNATIONAL HOLDINGS LIMITED

Background and pleadings

1. On 20 April 2024, AOUNGO INTERNATIONAL TRADING LIMITED (**"the Applicant"**) applied to register the trade mark shown on the cover page of this decision in the UK. It was accepted and published in the Trade Marks Journal on 12 July 2024. Registration is sought for the following goods:

> Class 5
>
> Greases for medical purposes; Mustard oil for medical purposes; Medical preparations; Medicinal beverages; Digestives for pharmaceutical purposes; Cod liver oil; Dietetic foodstuffs for medical purposes; Dietetic food adapted for medical use; Nutritional supplements; Medicines for human purposes; Medicinal tea; Food for babies; Protein dietary supplements; Dietary supplements for human beings; Dietary supplements with a cosmetic effect; Pharmaceutical sweets.
>
> Class 30
>
> Coffee; Cocoa; Milk chocolate; Tea; Molasses for food; Royal jelly; Oat porridge; High-protein cereal bars; Cereal based foodstuffs for human consumption; Sugars; Oatmeal; Oat-based food for human consumption; Cereal bars.
>
> Class 32
>
> Beer; Aerated water [soda water]; Nut and soy based beverages; Alcohol free beverages; Fruit juice; Lemonade; Fruit-based beverages; Non-alcoholic fruit juice beverages; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic cocktails; Carbonated water; Soda water; Dilutable preparations for making beverages; Powders for effervescing beverages; Drinking waters; Water enhanced with minerals; Vegetable juice.

2. On 10 October 2024, Vitasoy International Holdings Limited (**"the Opponent"**) opposed the application in its entirety, under section 5(2)(b) of the Trade Marks Act

1994 (**"the Act"**).[1] The opposition was initially based on four earlier trade mark registrations: VITA, VITASOY (two separate registrations), and VITASOY (figurative). However, on 28 July 2025, the Opponent amended its pleadings to rely on only two of those registrations, namely its UK trade mark registrations for VITA and VITASOY (figurative), the details of which are set out below. It relies on all goods for which those trade marks are registered. It also limited its opposition based on the VITA mark to the underlined goods in Class 5 above, and all goods in Classes 30 and 32. The opposition based on the VITASOY (figurative) mark remains directed at all the goods applied for.

Representation of the mark:	VITA
Type of mark:	word mark
Registration Number:	1465275
Filing date:	24 May 1991
Registration date:	17 November 2000
Registered goods: <u>Class 32</u> Non-alcoholic fruit juice drinks; all made from or including sugar cane, guava and mango; all included in Class 32; but not including any drinks made from or including lime flavouring.	

Representation of the mark:	Vitasoy
Type of mark:	figurative
Registration Number:	3702185
Filing date:	30 November 2020[2]
Registration date:	8 April 2022
Registered goods: A variety of goods in Classes 29, 30 and 32, which are set out in full at paragraph 32 of this decision.	

[1] 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.

[2] The mark was filed in the UK pursuant to Article 59 of the Withdrawal Agreement between the UK and the EU (2019/C 384 I/01), therefore it retains its original EU filing date from EUTM application number 18346604.

3. By virtue of their earlier filing dates, the trade marks upon which the Opponent relies qualify as earlier trade marks pursuant to section 6 of the Act. The figurative VITASOY mark had not been registered for more than five years at the filing date of the contested application, therefore it is not subject to the use conditions pursuant to section 6A of the Act, and accordingly, the Opponent may rely on all the goods for which that trade mark is registered without having to show any use at all. However, as the VITA mark had been registered for more than five years at the relevant date, it is subject to the use conditions pursuant to section 6A of the Act. Accordingly, the Opponent made a statement that it has used the VITA mark in relation to all the goods for which that mark is registered.

4. The Opponent claims that the competing marks are similar and that the respective goods are identical or similar, giving rise to a likelihood of confusion.

5. The Applicant filed a defence and counterstatement denying the claims and requested that the Opponent prove use of the VITA registration.

6. Only the Opponent filed evidence and submissions during the evidence rounds. Although the Applicant referred to evidence accompanying its counterstatement (listed as certificates for what appear to be VITA GROW registrations in Hong Kong), no such evidence was filed. Nor was any such material submitted during the evidence rounds in these proceedings.[3] Therefore, the only evidence I have to consider is the Opponent's. A hearing was not requested, and neither party elected to file submissions in lieu of a hearing. I therefore make this decision following a careful consideration of the papers before me.

7. The Opponent is represented by Baker Botts (UK) LLP and the Applicant is represented by BEST IP LTD.[4]

EVIDENCE FILED

8. The Opponent's evidence is provided in the witness statement of Hoi Wai Maria Elms, dated 24 July 2025, and is accompanied by ten exhibits labelled HWME-1 to

[3] I note that even if such evidence were filed, certificates of trade mark registrations in another jurisdiction do not have any bearing on the decision before me under section 5(2)(b) of the Act.
[4] At the commencement of these proceedings the Applicant represented itself, however, it appointed BEST IP LTD as its representative on 14 August 2025.

HWME-10. Ms Elms is the Group General Counsel of the Opponent, a position she has held since 20 October 2023. Her evidence has been filed to prove use of the VITA trade mark registration.

DECISION

PROOF OF USE

9. Although, due to its limited specification, the VITA trade mark registration does not represent the Opponent's best case in terms of similarity of the goods (the VITASOY registration having a broader specification), for the sake of completeness, I will begin by assessing whether the earlier VITA trade mark registration has been put to genuine use, for the goods for which it is registered.

Proof of use legislation

10. The relevant statutory provisions are as follows:

Section 6A

(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.

[...]

(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.

Section 100[5]

"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."

Proof of use case law

11. The law relating to genuine use of a registered trade mark was summarised by Arnold LJ in *easyGroup Ltd v Nuclei Ltd & Ors*[6] as follows:

"105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU [Court of Justice of the European Union] 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*

[5] Section 100 of the Act makes it clear that the trade mark proprietor bears the burden of proving genuine use of its trade mark. In this regard see *Ferrari SpA v DU*, C–721/18, at paragraphs 73 to 83.
[6] [2023] EWCA Civ 1247.

(Trade Marks and Designs) [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v 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. […] 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].

107. […] The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of

effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office [EU:C:2020:166*] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33]. In *Awareness Ltd v Plymouth City Council [2013] RPC 24* Daniel Alexander QC sitting as the Appointed Person said:

> 19. For the tribunal to determine in relation to what goods or services there has been genuine use of the mark during the relevant period, it should be provided with clear, precise, detailed and well-supported evidence as to the nature of that use during the period in question from a person properly qualified to know. …
>
> 22. … it is not strictly necessary to exhibit any particular kind of documentation but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal … comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaking, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

12. In *Awareness Ltd,* the Appointed Person goes on to say that:

> "28. […] Broad statements purporting to verify use over a wide range by reference to the wording of a trade mark specification when supportable only in respect of a much narrower range should be critically considered […]."

13. The genuine use provision is not there to assess economic success or large-scale commercial use.[7] An assessment of genuine use is a global assessment, which includes looking at the evidential picture as a whole, not whether each individual piece of evidence shows use by itself.[8]

14. Therefore, the Opponent can rely on its earlier trade mark for the word VITA only to the extent that the evidence filed establishes that it had been put to genuine use in the UK in respect of the goods for which it is registered (set out below for ease of reference), within the five years leading up to the date on which the contested trade mark application was filed. The relevant period in which the Opponent must establish use of the earlier mark is therefore **21 April 2019 to 20 April 2024.**

> Class 32
>
> Non-alcoholic fruit juice drinks; all made from or including sugar cane, guava and mango; all included in Class 32; but not including any drinks made from or including lime flavouring.

15. Before turning to the evidence, I make clear that the goods are, in essence, *"non-alcoholic fruit juice drinks."* Albeit the limitation indicates that they are made from or including particular ingredients, that does not alter their essential nature as fruit juice drinks. Further, the specification excludes non-alcoholic fruit juice drinks made from or including lime flavouring.

Evidence

16. Unless I indicate otherwise, the evidence detailed is dated within the relevant period. Ms Elms states that the evidence consists of the following (referring to the Opponent as 'VIHL'):

(1) *"print-outs from the websites of various UK retailers showing non-alcoholic fruit juice drinks sold under the VITA trade mark"*[9] (Exhibit HWME1).

[7] MFE Marienfelde GmbH v OHIM, Case T-334/01.
[8] New Yorker SHK Jeans GmbH & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), Case T-415/09, paragraph 53.
[9] Witness Statement, paragraph 6.

(i) This evidence includes one image of a 'VITA' mango juice drink for sale in 2021 (see the left column of the table below), however, the rest of the 'VITA' drinks listed for sale are varieties of 'VITA' tea drinks, predominantly listings for a lemon tea drink (see the right column of the table below), but also tea-based drinks with the following flavourings: chrysanthemum tea, Ceylon tea, honey lemon tea and Japanese peach tea – as I will explain, these goods do not fall within the registered specification which cover *fruit juice drinks*).

(2) *"details of a social media competition run by VIHL in June 2022 on the Instagram account at vitasoy_uk in relation to non-alcoholic fruit juice drinks marketed and sold under the VITA trade mark"*[10] (Exhibit HWME-2).

(i) Prizes included keyrings and Ceylon tea and lemon tea drinks (see image below). The Instagram advertising spend was £60,[11] and *"a total of 112 followers shared the competition to their own story".*[12]

[10] Ibid. at [7].
[11] Exhibit HWME-2 page 3.
[12] Exhibit HWME-2 page 4.

(ii) I note that whilst the goods are described as fruit juice drinks in the narrative of the witness statement, they are all tea products that do not fall within the natural meaning of the registered term fruit juice drinks.

(3) *"a print-out from www.amazon.co.uk showing a lemon tea drink (i.e. a non-alcoholic fruit juice drink) under the VITA trade mark available for purchase by consumers in the United Kingdom. While the print-out is dated 2 July 2025, I confirm that the drink was available on amazon.co.uk during the applicable date range and I refer in particular and in support to the customer reviews dated 7 September 2019 and 3 February 2021 in the "Top reviews from the United Kingdom" section."*[13] (Exhibit HWME-3).

(i) The lemon tea product images included in the print-out are the same as those shown in paragraph 16(1) above (in the right-hand column of the table). The print-out also includes images of VITASOY products and provides background information on the VITASOY and VITA brands, stating that VITASOY's story began in 1940 and that the brands originated in Hong Kong, where they are said to be *"well known by Hong Kong people"*. The biography identifies its *"hero products"* (which I take to mean its principal product lines) as including VITASOY Soya Drink, VITASOY Malted Soy Drink, VITA Lemon Tea Drink, and VITA Chrysanthemum Tea Drink.[14] Once again, the *lemon tea drink* products (and the *soya drink* products for that matter) do not fall within the natural meaning of the registered fruit juice drinks despite the narrative statement describing *"a lemon tea drink"* as a *"a non-alcoholic fruit juice drink".*

(ii) In this regard, I note that the Amazon listing categorises the lemon tea drink under *"Grocery > Drinks > Tea > Fruit & Herbal Tea > Herbal Tea"* (where it is ranked 1,801st in the herbal tea category on Amazon), and displays suggestions for other brands within the same category, namely other tea and iced-tea drinks. The ingredients listing states that the lemon tea drink contains sugar and is composed of 40% natural tea extracts and 0.5% lemon juice.

[13] Ibid. at [8]
[14] Exhibit HWME-3, page 4.

(4) *"promotion[s] for non-alcoholic fruit drinks bearing the VITA trade mark"*[15] (Exhibits HWME-4 and HWME-5)

(i) These promotions were run in 2021 and 2022 respectively by food retailers (all based in various London boroughs and districts) specialising in products from Asian countries. The images mainly consist of photos taken in-store of products displayed on shelves. The images are (for the most part) extremely poorly reproduced rendering them indecipherable. I am able to determine from page 2 of Exhibit HWME-5 that one of the products included in the 2022 promotion appears to be the mango juice product, though the product description has not been translated into English, and the other products shown are various VITASOY products, as well as the 'VLT' lemon tea drink and the chrysanthemum tea drink. That promotion was run in 4 stores in London for a 7 day period resulting in the sale of 306 cases of product with no breakdown as to what those products were.[16]

(5) *"photographs from VIHL's sponsorship of the Cambridge University Chinese Society "Stitches" Variety Show in 2023 that shows students with non-alcoholic fruit juice drinks bearing the VITA trade mark"*[17] (Exhibit HWME-6).

(i) Only three products are featured, namely a VITASOY soy drink, the 'VLT' lemon tea drink and the chrysanthemum tea drink. Once again, these are products which do not fall within the natural meaning of the registered fruit juice drinks despite being described as such in the narrative of the witness statement.

(6) *"posts from the Instagram account at vitasoy_uk showing Vitasoy's mini-block competition that features non-alcoholic fruit juice drink bearing the VITA trade mark"*[18] (Exhibit HWME-7).

(i) The promotion is for the give-away of collectable *"mini-blocks"* which are described as 'figurines',[19] essentially they appear to be figurines in the form of the Opponent's soy drinks and tea-based drinks; of the other prizes available

[15] Witness Statement at [9]-[10].
[16] Exhibit HWME-5, page 1.
[17] Witness Statement at [11]
[18] Ibid. at [12].
[19] Exhibit HWME-7, page 9.

under the competition were packs of the Opponent's 'VLT' lemon tea drink and 'Vitasoy Regular' drinks.

(ii) These are products which do not fall within the natural meaning of the registered fruit juice drinks despite being described as such in the narrative of the witness statement.

(7) *"posts from the Instagram account of SOP International Ltd, a UK retailer, between 14 April and 1 July 2022 advertising non-alcoholic fruit juice drinks bearing the VITA trade mark"* (Exhibit HWME-8)

(i) Four products are included in the post, namely, a Ceylon lemon tea drink, a chrysanthemum tea drink, the 'VLT' lemon tea drink, and a peach tea drink.

(ii) These are products which do not fall within the natural meaning of the registered fruit juice drinks despite being described as such in the narrative of the witness statement.

(8) *"At Exhibit HWME-9 is a print-out from en.wikipedia.org that discusses the VITA brand. I have included the print-out to show the varieties of fruit juice flavours, including sugar cane, guava and mango that are and have been available, including in the applicable date range and in the United Kingdom. It also shows the non-alcoholic fruit juice drinks that are "teas", the lemon variety of which (as can be seen from the ingredients list at Exhibit HWME-3) contains sugar."*[20]

(i) Although it is dated 2 July 2025 and therefore outside the relevant period, it nonetheless provides background information about the brand and its product lines, I therefore take it into account.

(ii) The following information is provided (the underlining is as it appears in the evidence):

[20] Witness Statement at [14]

WIKIPEDIA
The Free Encyclopedia

Vita (brand)

Vita (Chinese: 維他) is a food and beverage brand name owned by the Hong Kong company Vitasoy.[1] First introduced in 1976 as a series of flavored fruit drinks, the brand later expanded to include the world's first ready-to-drink lemon tea beverage.[2][3] Vita-brand beverages are now available in a variety of countries.[4]

Different beverages, such as fruit juice, tea, milk, and water are marketed under the Vita brand, while high-protein soy milk drinks are sold under the name Vitasoy.

Variants

Introduced

Website

Vita brand

Type	Flavor
Fruit Juice	Apple, grape, blackcurrant, guava, lemonade, mango, sugarcane juice, lychee
Tea	Ceylon lemon, chrysanthemum, green, honey chrysanthemum, honey lemon, Thai lemon, Japanese pear, jasmine, lemon (VLT), lime & lemon, peach
Milk	Chocolate milk, Hong Kong-style milk tea
Water	Distilled water

(iii) Once again, the tea products do not fall within the natural meaning of the registered fruit juice drinks despite being described as such in the narrative of the witness statement. The table provides a clear illustration of this as the *"lemon (VLT)"* drink is categorised under *"tea"* as opposed to *"fruit juice"*. Whilst the tea drinks listed may contain sugar as an ingredient, that does not render them *"sugarcane juice"* drinks either.

(9) *"At Exhibit HWME-10, is a series of invoices sent to SOP International Limited, Grafton House, ICON Harlow, Third Avenue, Harlow, Essex CM19 5AW. These*

invoices show non-alcoholic fruit juice drinks bearing the VITA trade mark and evidence the shipping of those non-alcoholic fruit juice drinks to SOP International Limited for retail in the United Kingdom during the relevant period."[21]

(i) These consist of invoices from Vitasoy Holdings (Malta) Limited to SOP International and the accompanying bills of lading for the shipment of the invoiced goods from Vitasoy International Holdings Ltd in Hong Kong to SOP International in the UK. With the exception of the 'VITA' mango juice drink (which is covered by the registration), the invoices and bills of lading relate to the sale and/or shipment of various flavours of 'VITA' tea drinks (predominantly the lemon tea variety), and various flavours of 'VITASOY' soy drinks, neither of which falls within the natural meaning of the registered term.

(ii) As regards the 'VITA' mango juice drink, it first appears in a bill of lading dated 21 December 2021, which shows that, among comparatively large quantities of tea-flavoured drinks and soy drinks shipped to SOP International, there were also 95 cartons of 'VITA' mango juice drink sold under invoice number 9078/21. However, as this is merely a bill of lading and no corresponding invoice is provided, there is no financial information as to the commercial value of that shipment. The 'VITA' mango juice drink appears only once more, in relation to invoice No. 9081/23, dated 11 January 2024, where a sale of 20 cartons was made to SOP International.[22] As the invoice has been redacted by Ms Elms, the price paid for the mango juice drink is unknown, with only the total invoice amount provided, which includes the sale of comparatively large quantities of various tea-flavoured drinks and soy drinks.

17. The goods for which use must be shown are a limited variety of *"non-alcoholic fruit juice drinks"*. Therefore my first criticism of the evidence concerns the identification of the relevant goods for which use must be shown. In this regard, as I have outlined above, I note that, when Ms Elms refers to examples of *"non-alcoholic fruit drinks bearing the VITA trade mark"*, she is, with the exception of scant evidence relating to a 'VITA' mango juice drink, in fact referring to evidence of tea-based beverages which,

[21] Ibid. at [15]
[22] Invoice No. 9081/23 and its accompanying packing list, data sheet and bill of lading are set out in pages 28 to 34 of Exhibit HWME-10.

in their natural meaning, are not fruit juices. Some of these tea-based beverages have fruit flavourings (primarily lemon and peach), but they are not fruit juices *per se*. Although the products shown in the exhibits are described by Ms Elms as *"fruit drinks"*, the exhibits themselves consistently identify the products as tea drinks rather than as fruit juice drinks or fruit drinks – this is apparent not only from the product listings and product promotions, but also from how they are referred to by consumers and retailers alike, and even in the way they are referenced in invoices and shipping documents.

18. It is my interpretation that a fruit juice drink consists principally of fruit, unlike the tea-based drinks in evidence, in which tea is the principal ingredient and the fruit content is minimal and refers to the flavouring of the product, rather than to the type of product. The evidence relating to those tea-based drinks is therefore not evidence on which the Opponent can rely, as such goods are not covered by the registration. In other words, the relevant goods for which use must be shown are non-alcoholic fruit juice drinks (of which the mango juice drink is an example), not tea-based beverages merely flavoured with fruit. By way of illustration, a cola drink may be flavoured with fruit such as cherry, but that does not make it a fruit drink or a fruit juice drink; it remains a cola drink.

19. My second criticism is that the evidence relating to the mango juice product is severely limited: apart from a shipping document and a single invoice (the latter being in any event redacted), it shows only that 115 cartons were supplied during the relevant period to a single UK-based importer.

20. Thirdly, the evidence is fundamentally lacking in financial information, meaning I am unable to determine the turnover nor the value of the relevant goods during the relevant period. These are details which should have been readily available to the Opponent, yet they have not been provided. The only evidence of marketing expenditure is £60, spent in relation to the promotion of tea-based drinks. Furthermore, the limited invoices provided relate to the sale of multiple goods under more than one brand (VITASOY and VITA), and the breakdown of the value of sales per item has been redacted, with only the total invoice value shown, therefore without a breakdown, I cannot even determine the value of the sales of the relevant goods which count towards genuine use.

21. My fourth criticism relates to the promotional materials. Any promotional material which appears to include the discounted sale of the mango juice product is insufficiently detailed, as there is no breakdown of which products were sold as a result of the promotion – the 306 cases sold across the 4 London-based stores could all have all been the VITASOY drinks for example. Accordingly, this material does not establish promotion of the mango juice product. I also have reservations as to whether the 'mini-blocks' promotion could properly be regarded as the promotion of a drink product, and any drink product referenced in this promotion is in any event not the relevant fruit juice products for which use must be shown.

22. As for the Instagram competition run by the Opponent, unfortunately it relates to products not covered by the specification and therefore is not evidence on which the Opponent can rely; in any event, it appears to have had a very limited reach.

23. Finally, the geographical spread of the sale of goods appears limited. While I note that the Opponent's lemon tea drink is available from the national online retailer Amazon, that evidence is excluded for the reasons already given about the type of product being sold. Even if I were able to determine from the poorly reproduced images what products were stocked by the other UK retailers, any such evidence is, in any event, limited to specialist Asian food retailers based in London, with no indication of a wider geographical spread of stockists.

24. In summary, the evidence has many shortcomings and is insufficiently solid, such that the Opponent has failed to satisfy the use conditions necessary to rely on its VITA trade mark registration in these opposition proceedings. I therefore proceed with my assessment of the opposition, based solely on the Opponent's reliance of its VITASOY trade mark registration.

Claim under section 5(2)(b) – Legislation and Case Law

25. Section 5(2)(b) of the Act states:

> 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".

26. I am guided by the principles applicable to the assessment of the likelihood of confusion, as cited with approval by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25. These 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 Office for Harmonisation in the Internal Market ("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

27. In *Gérard Meric v OHIM,*[23] ("*Meric*"), the General Court held to the effect that goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application and vice versa.

28. When considering whether goods are similar, all the relevant factors relating to the goods should be taken into account. According to the judgement of the Court of Justice

[23] Case T- 133/05

of the European Union ("CJEU") in *Canon,*[24] and the guidance from Jacob J. (as he then was) in the *Treat* case,[25] those factors include, *inter alia*:

(1) the physical nature of the goods;
(2) their intended purpose;
(3) their method of use;
(4) who the users of the goods are;
(5) the trade channels through which the goods reach the market;
(6) in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and
(7) whether they are in competition with each other (taking into account how those in trade classify goods, for instance whether market research companies put them in the same or different sectors);
or
(8) whether they are complementary to each other.

29. Complementary means that *"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"*.[26] Complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity,[27] and it can be clearly distinguished from 'use in combination' – the latter being where goods are merely used together, whether by choice or convenience (e.g. wine and wine glasses[28]), this means that they are not essential for each other.

30. Section 60A(1)(a) of the Act provides that goods are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice

[24] Case C-39/97, paragraph 23.
[25] *British Sugar PLC v James Robertson & Sons Ltd.,* [1996] R.P.C. 281 – the *"Treat"* case.
[26] *Boston Scientific Ltd v OHIM,* Case T-325/06, paragraph 82
[27] *Kurt Hesse v OHIM*, Case C-50/15 P
[28] As Mr Daniel Alexander Q.C. noted as the Appointed Person in *Sandra Amalia Mary Elliot v LRC Holdings Limited,* BL O/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."*

Classification, nor dissimilar to each other on the ground that they appear in different classes under the Nice Classification.

31. When interpreting the terms in a specification I bear in mind:

(a) that it is *"necessary to focus on the core of what is described* [... and that] *trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise",* although *"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* [and services] *in question"*;[29]

(b) 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"*;[30]

(c) the following applicable principles of interpretation:

> *"(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.*
> *(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.*
> *(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.*
> *(4) A term which cannot be interpreted is to be disregarded."*[31]

[29] *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), paragraphs 11 - 12
[30] *Pathway IP Sarl (formerly Regus No. 2 Sarl) v Easygroup Ltd (formerly Easygroup IP Licensing Limited),* [2018] EWHC 3608 (Ch), paragraph 94
[31] See *Sky v Skykick* [2020] EWHC 990 (Ch), paragraph 56 (wherein Lord Justice Arnold, in the course of his judgment, set out a summary of the correct approach to interpreting broad and/or vague terms)

32. The relevant competing goods are set out below:

Class	Opponent's goods	Applicant's goods
5		Greases for medical purposes; Mustard oil for medical purposes; Medical preparations; Medicinal beverages; Digestives for pharmaceutical purposes; Cod liver oil; Dietetic foodstuffs for medical purposes; Dietetic food adapted for medical use; Nutritional supplements; Medicines for human purposes; Medicinal tea; Food for babies; Protein dietary supplements; Dietary supplements for human beings; Dietary supplements with a cosmetic effect; Pharmaceutical sweets.
29	Milk, milk drinks, eggs and other dairy products; milk-based beverages; nut-based milk; rice milk; legumes-based milk; wheat milk; oat milk; grain milk; coconut milk; almond milk; milk-based beverages flavoured with chocolate; soymilk, soya bean based food beverage used as a milk substitute; soya bean milk in liquid and solid form, and other milk substitutes; tofu; soya bean curd; soya bean-based food products including sausage, cheese, yogurt, preserves, dairy puddings and desserts, and dips; meats, fish (not live), poultry (not live) and game;	

	meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams; edible oils and fats; preserves; preparations made from soya bean curd or protein for making soya milk; food products made from textured vegetable protein derived from soya beans; food products derived from nuts, legumes, herbs, fruits or vegetables; vegetable dips; soya-based meat substitutes; vegetarian sausage; vegetable-based food preparations.	
30	Coffee; tea; cocoa; sugar; tapioca; sago; artificial coffee; flour and preparations made from cereals; food products derived from cereals and grains; bread, biscuits, cakes, pastry and confectionery; ices; honey; treacle; yeast, baking-powder; salt; mustard; pepper; vinegar; sauces (condiments); spices; salad dressings; mayonnaise; ice cream; tea and tea drinks; coffee and coffee drinks; coffee substitutes; cocoa and chocolate drinks; seasonings; custard; herbal drinks; herbal-based syrups, powders, extracts, concentrates and other preparations for making carbonated and non-carbonated non-alcoholic drinks and beverages.	Coffee; Cocoa; Milk chocolate; Tea; Molasses for food; Royal jelly; Oat porridge; High-protein cereal bars; Cereal based foodstuffs for human consumption; Sugars; Oatmeal; Oat-based food for human consumption; Cereal bars.

32	Beer, ale and porter, mineral and aerated waters and other non-alcoholic drinks; syrups and other preparations for making beverages; plant-based drinks and beverages; soya bean-based non-alcoholic drinks and beverages; distilled drinking water and mineralized water; soya bean-based and non-soya bean-based cereal and grain drinks; black bean drinks, oat drinks, sesame drinks, rice drinks, coconut drinks, almond drinks, fruit drinks, vegetable drinks, cereal-based drinks, legume-based drinks, nut-based drinks, and grain-based drinks; soya bean-based, fruit-based, vegetable-based, cereal-based, legume-based, nut-based, and grain-based syrups, powders, extracts, concentrates and other preparations for making carbonated and non-carbonated non-alcoholic drinks and beverages; non-alcoholic beverages containing plant-based juices, namely, soy bean juices, rice juices, black bean juices, coconut juices, almond juices, sesame juices, and oat juices; non-alcoholic plant-based extracts used in the preparation of beverages, namely soy bean extracts, rice extracts, black bean extracts, coconut extracts, almond extracts, sesame	Beer; Aerated water [soda water]; Nut and soy based beverages; Alcohol free beverages; Fruit juice; Lemonade; Fruit-based beverages; Non-alcoholic fruit juice beverages; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic cocktails; Carbonated water; Soda water; Dilutable preparations for making beverages; Powders for effervescing beverages; Drinking waters; Water enhanced with minerals; Vegetable juice.

	extracts, and oat extracts; non-alcoholic plant juice beverages, namely soy beverages, rice beverages, black bean beverages, coconut beverages, almond beverages, sesame beverages, and oat beverages; fruit drinks and fruit juices in this class; vegetable drinks and vegetable juices in this class; soft drinks.	

33. The Applicant's terms are set out under their class headings below, grouped where the same reasoning applies.[32]

Class 5

Medicinal beverages; Medicinal tea

34. Insofar as the term *"medicinal beverages"* includes herbal teas and other herbal drinks, which are typically consumed for their perceived or intended therapeutic or health-supporting properties, I consider these goods to be **identical** to both the Opponent's *"tea"* and *"herbal drinks"* in class 29 under the principle outlined in *Meric*. The Applicant's *"medicinal tea"* is likewise *Meric* identical to the Opponent's goods for the same reasons. **In the alternative, the goods are at least highly similar**. They share the same nature (tea and herbal drinks) and method of use, and may also overlap in purpose, insofar as both may be consumed for therapeutic effects, for example to support digestion or to detox the body, albeit they may have differing strength or potency of the same active ingredient – for example, the Applicant's goods may having a greater strength or potency than the Opponent's to increase their therapeutic effect.

[32] See *Separode Trade Mark* BL O/399/10, paragraph 5, with regard to grouping goods and services together.

Dietetic foodstuffs for medical purposes; Dietetic food adapted for medical use; Food for babies

35. The terms *"dietetic foodstuffs for medical purposes"* and *"dietetic food adapted for medical use"* refer to foods specially formulated or prepared to meet particular nutritional requirements arising from a medical condition, including the prevention or treatment of disease. Such goods may include products designed to provide or supplement nutrition (potentially as a sole source of nourishment for a patient) and are likely to be provided under medical supervision; they are therefore specifically formulated to improve or maintain a patient's health. This distinguishes them from ordinary foodstuffs and reflects their recognition as products directed to health-related needs.

36. *"Food for babies"* within the meaning of Class 5 are foods specifically formulated for the nutritional needs of infants and are not intended for general consumption, thereby distinguishing them from ordinary food products.

37. These above goods are **dissimilar** to the Opponent's general foodstuffs included in its Class 29 and Class 30 specification. The latter include ordinary food products intended for general consumption, whereas dietetic foods for medical use and food for babies are specifically formulated to meet particular nutritional or health-related needs. This creates clear differences in their purpose, nature, and method of use; the Applicant's goods are also more likely to reach consumers through specialised channels, including pharmacies or under medical supervision, and, in the case of food for babies, in dedicated aisles of food retailers. They are unlikely to be in competition with the Opponent's Class 29 and 30 goods; although they are nonetheless foodstuffs and may be consumed in conjunction with ordinary foodstuffs, they are not complementary in the sense described in the case law.

Nutritional supplements; Protein dietary supplements; Dietary supplements for human beings; Dietary supplements with a cosmetic effect

38. The purpose of these products is to supplement the normal diet by providing concentrated amounts of particular nutrients, such as vitamins, minerals or other substances (such as protein), that have a nutritional and/or physiological effect on the body (for example, to improve muscle mass or skin health and appearance). I bear in

mind that nutritional and dietary supplements are not limited to pills and powders and may be incorporated into food products, so that the food itself serves as the supplement. Protein-enriched cereal bars, or breakfast cereals fortified with vitamins and minerals, are examples of such foods.

39. To the extent that the terms *"Nutritional supplements; Protein dietary supplements; Dietary supplements for human beings; Dietary supplements with a cosmetic effect"* can, within their notional use, encompass nutritionally fortified foods derived from cereals and grains, I consider there to be overlap with the Opponent's *"food products derived from cereals and grains"* contained in Class 30. In that regard, the goods may share the same nature and method of use, overlap in users, and be displayed on neighbouring shelves in retail outlets; for example, fortified cereal bars are likely to be sold alongside or in close proximity to ordinary cereal bars. There may also be a degree of competition between the respective products. Taking these factors into account, I find the goods **similar to a low to medium degree.**

Mustard oil for medical purposes; Cod liver oil

40. These goods are likely to encompass ingestible and/or topical oils used for therapeutic purposes in a medical context, rather than in a culinary context. Accordingly, they would not fall within the Opponent's Class 29 *"edible oils and fats"*, even where they are capable of being ingested. The competing goods differ in purpose, and may also differ in nature and method of use, for example where the Applicant's goods are presented in capsule form to be taken with water. They may reach consumers through specialised channels, including pharmacies or health stores, and/or where they are available in large retail outlets such as supermarkets, they would not be stocked in close proximity to ordinary culinary oils. They are neither in competition with nor complementary to the Opponent's goods. I therefore find the goods to be **dissimilar**.

Greases for medical purposes

41. The above are oily preparations likely to encompass products such as medicated ointments and salves, which are applied topically for therapeutic purposes, for example, to soothe, heal or treat skin conditions. These goods are therefore used in a medical context, rather than as greases for industrial, household or culinary use. This

creates clear differences in their purpose, nature and method of use when compared with the Opponent's Class 29 *"edible oils and fats"*. They would reach consumers through specialised channels, such as pharmacies. They are neither competing nor complementary goods. The respective goods are therefore **dissimilar**.

Medical preparations; Digestives for pharmaceutical purposes; Medicines for human purposes; Pharmaceutical sweets.

42. The above are **dissimilar** to the food and drink products included in the Opponent's registration. The Opponent's products are intended for general consumption, whereas the Applicant's goods are pharmaceutical in nature, used to prevent or treat illness. This creates clear differences in their purpose, nature and method of use; although certain varieties of the Applicant's goods may be available through the same retail channels as the Opponent's goods, such as supermarkets, they would nonetheless be stocked in separate aisles to the Opponent's goods, and would be purchased with a medical intention to treat an illness or ailment; in other cases, they may only be available on prescription, and would therefore reach consumers through more specialised channels such as pharmacies or be provided under the medical supervision of a doctor. They are not competing goods and, although *"pharmaceutical sweets"* may resemble confectionery (bearing in mind that the Opponent's registration covers the term *"confectionery"* in Class 30), they are used for their pharmaceutical function and are not for general consumption. The respective goods are also not complementary. Finally, the Opponent has not identified any specific goods falling within the notional use of its registered terms which would lead me to find any degree of similarity with the contested goods.

Class 30

Coffee; Cocoa; Tea; Sugars

43. The above are self-evidently **identical** to the Opponent's *"coffee; cocoa; tea; sugar."*

Oat porridge; High-protein cereal bars; Cereal based foodstuffs for human consumption; Oatmeal; Oat-based food for human consumption; Cereal bars.

44. The above are all examples of food products derived from cereals and grains and are therefore **identical**, under the *Meric* principle, to the Opponent's *"food products derived from cereals and grains"*.

Molasses for food

45. Molasses is a sweet syrup. The Opponent's *"treacle"* is also a sweet syrup derived from molasses. I therefore consider the competing goods to be **identical** under the *Meric* principle.

Milk chocolate

46. The above is a form of confectionary and therefore it is **identical** to the Opponent's *"confectionary"* under the *Meric* principle.

Royal jelly

47. The above is an edible product derived from bees. The Opponent's *"honey"* is likewise an edible, bee-derived product, therefore in terms of their nature, both are natural substances produced by bees and fall within the same broad category of bee-derived food products. As to purpose and method of use, both are eaten, either on their own or as additions to food or drink, and are commonly associated with nutritional or health-related benefits. The users of the goods will overlap, consisting of consumers seeking natural food products or food products with perceived nutritional benefits. As regards trade channels, whilst honey would be a more readily available product, being sold by a variety of food retailers, both goods are also sold through the same types of outlets, such as health food shops, and would likely be found within the same or adjacent locations. While they are not strictly substitutable, there is a degree of competition between the goods because they may be perceived as alternatives by consumers seeking the benefits of bee-derived products. Although they may be consumed together, they are not complementary in the sense described in the case law. Taking all these factors into account, I find the goods to be **similar to a medium degree**.

Class 32

Beer; Nut and soy based beverages; Alcohol free beverages; Fruit juice; Fruit-based beverages; Non-alcoholic fruit juice beverages; Vegetable juice.

48. The above terms appear identically or are self-evidently **identical** to the following goods contained in the Opponent's Class 32 specification:

> *"Beer; soya bean-based non-alcoholic drinks and beverages; nut-based drinks; non-alcoholic drinks; fruit drinks and fruit juices in this class; vegetable drinks and vegetable juices in this class."*

Aerated water [soda water]; Carbonated water; Soda water; Drinking waters; Water enhanced with minerals

49. *"Aerated water [soda water]"* is self-evidently **identical** to the Opponent's *"aerated waters"*. Since *"carbonated water"* and *"soda water"* are types of aerated waters, they too are **identical** to the Opponent's registered term on the principle outlined in *Meric*. *"Drinking waters; Water enhanced with minerals"* are self-evidently **identical** to the Opponent's *"distilled drinking water and mineralized water"*.

Lemonade

50. The above is a type of soft drink and is therefore **identical** to the Opponent's *"soft drinks"* under the *Meric* principle.

Non-alcoholic soda beverages flavoured with tea; Non-alcoholic cocktails;

51. These are both encompassed by the Opponent's *"non-alcoholic drinks"*, and are therefore **identical** according to *Meric*.

Dilutable preparations for making beverages

52. The above is a broad category of goods which encompass the Opponent's following goods, rendering them **identical** according to *Meric*:

> *"soya bean-based, fruit-based, vegetable-based, cereal-based, legume-based, nut-based, and grain-based syrups, powders, extracts, concentrates and other*

preparations for making carbonated and non-carbonated non-alcoholic drinks and beverages"

Powders for effervescing beverages

53. The above are self-evidently **identical** (or identical according to the principle outlined in *Meric*) to the Opponent's *"[…] powders […] for making carbonated […] beverages"*.

Conclusions on the goods comparison

54. I have found that some of the applied-for goods in Class 5 are dissimilar to the Opponent's goods. Since some similarity between the goods is required for the purposes of a section 5(2)(b) claim, the opposition must fail in respect of the dissimilar goods identified above,[33] namely:

Class 5

Greases for medical purposes; Mustard oil for medical purposes; Medical preparations; Digestives for pharmaceutical purposes; Cod liver oil; Dietetic foodstuffs for medical purposes; Dietetic food adapted for medical use; Medicines for human purposes; Food for babies; Pharmaceutical sweets.

55. I will therefore proceed to consider a likelihood of confusion only in relation to the goods I have found to be identical and those I have found to be similar.

The average consumer and the nature of the purchasing process

56. Trade mark questions, including the likelihood of confusion, must be viewed through the eyes of the average consumer of the goods and services in question. It is therefore necessary to determine who the average consumer of the goods and services is, and how the consumer is likely to select them. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.[34]

[33] See *Waterford Wedgwood plc v OHIM* – C-398/07 P (case of the CJEU); and *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA, paragraph 49.
[34] *Lloyd Schuhfabrik Meyer,* Case C-342/97.

The word ‘average’ merely denotes that the person is typical,[35] which in substance means that they are neither deficient in the requisite characteristics of being well informed, observant and circumspect, nor top performers in the demonstration of those characteristics.[36]

57. In *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, at [15]-[20], where he pointed out the following in relation to the average consumer:

> (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
>
> (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
>
> (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
>
> (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and tribunals to determine such issues so far as possible without the need for evidence;
>
> (e) The average consumer’s level of attention varies according to the category of goods or services in question; and

[35] *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), paragraph 60
[36] *Schutz (UK) Ltd v Delta Containers Ltd* [2011] EWHC 1712, paragraph 98

(f) The average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

58. The average consumer is a member of the general public. The goods are purchased relatively frequently and are generally low in cost. The average consumer will take into account factors such as ingredients, dietary requirements and flavour when selecting the goods; however, the selection of the goods does not involve an overly considered thought process. Consequently, a medium degree of attention is paid during the purchasing process. Whilst some of the goods still at issue include medicinal beverages and medicinal teas, I do not consider that these attract more than a medium degree of attention as they are normally used for relatively mild health issues, such as aiding digestion.

59. The goods are self-selected from the shelves of retail outlets or their online equivalents. Accordingly, the purchasing process is predominantly visual. However, I do not discount an aural component, given that advice may be sought from retail assistants.

Comparison of marks

60. I have already set out the principles gleaned from established case law with regard to comparing competing marks. I also note that the Court of Justice of the European Union ("CJEU") stated in *Bimbo SA v OHIM*,[37] 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."

[37] Case C-591/12P, at paragraph 34.

61. 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.

62. The marks being compared are shown below:

Earlier Mark	Contested mark
	

Overall impression

63. The earlier mark is registered in black and white and consists of the word VITASOY, presented in a stylised font arranged along a slight arch. The V has a sweeping curve, and the letter O contains a leaf device. Although VITASOY is presented as a single word, it will be perceived as VITA-SOY (with a natural break) particularly since SOY is readily recognisable and retains its ordinary, independent meaning.

64. The stylisation of the letter V is decorative and does not confer any notable distinctive character. The remaining letters are presented in a relatively plain font, albeit arranged along a slight arch, and are similarly unremarkable. The leaf device within the letter O merely reinforces the word SOY (indicating plant-based products), and will be perceived as a decorative element which is neither striking nor original and has only a negligible impact on the overall impression.

65. Since the verbal element of a mark is particularly likely to dominate the overall

impression where the figurative element is banal or decorative,[38] and bearing in mind my findings about the stylised elements of the earlier mark, I consider that it is the verbal elements which dominate the overall impression of the earlier mark.

66. As for the word SOY, it is likely that the average consumer may perceive it as a descriptor of the goods (i.e. soy-based products). As such, this word will be accorded less attention than the word VITA and has limited relative weight in the overall impression.

67. The contested mark has been applied for in colour. It consists of the word VITA positioned above the word GROW and, since the average UK consumer reads from left to right and top to bottom, it will be perceived as VITA GROW. The words appear in white on a simple orange badge device.

68. The words are presented in a relatively plain font and do not have any notably distinctive stylisation. While the mark features a badge device, it is a simple shape and acts merely as a decorative background to the words. It is therefore the verbal elements that dominate the overall impression of the mark.

69. The words VITA and GROW will be perceived as separate elements and do not combine to form a unitary expression with a meaning different from their individual components.

Visual comparison

70. The earlier mark is registered in black and white – I note that colour is an implicit component of a trade mark registered in black and white (i.e. it is not extraneous matter) and that the Court of Appeal has stated that registration of a trade mark in

[38] See *Fakro v EUIPO*, Case T-457/15, at [61]-[62]. Also see *Migros-Genossenschafts-Bund v EUIPO – Luigi Lavazza (CReMESPRESSO)*, Case T-189/16, wherein the General Court stated at [52]: *"according to well-established case-law, in the case of a mark consisting of both word and figurative elements, the word elements must generally be regarded as more distinctive than the figurative elements, or even as dominant, since the relevant public will keep in mind the word elements to identify the mark concerned, the figurative elements being perceived more as decorative elements".*

black and white covers use of the mark in any colour,[39] therefore the difference in colour is not relevant to the comparison.

71. In terms of visual similarity, the marks coincide to the extent that they share the same first word VITA. I bear in mind that, as a rule of thumb, the beginnings of marks tend to have greater significance as they are read first.[40]

72. The words SOY and GROW represent points of difference.

73. There are further differences in the overall stylisation and device elements of the marks. However, given my earlier findings that these elements have limited relative weight and are likely to be perceived as merely decorative, these differences are not sufficient to offset the visual similarity arising from the shared identical and first element VITA.

74. Overall, the marks are visually similar to a medium degree.

Aural comparison

75. The word VITA in the respective marks will be pronounced identically. The words SOY and GROW are points of aural difference, as such I consider the marks to be aurally similar to a medium degree overall.

Conceptual comparison

76. Whilst both parties are in agreement that VITA means life, and although I do not overlook that a proportion of the average consumer will perceive that meaning and derive that identical concept from it, I am not convinced, in the absence of evidence, that a majority proportion of the average consumer would understand the word in that way. They are just as likely to perceive it as an invented word without meaning or a word in a foreign language which they do not understand; alternatively, given the

[39] However, it is not appropriate to notionally apply complex colour arrangements to a mark registered in black and white. This is because it is necessary to evaluate the likelihood of confusion on the basis of normal and fair use of the marks, and applying complex colour arrangements to a mark registered, or proposed to be registered, without colour would not represent normal and fair use of the mark. See paragraph 5 of the judgment of the Court of Appeal in *Specsavers* [2014] EWCA Civ 1294 and *J.W. Spear & Sons Ltd v Zynga, Inc.* [2015] EWCA Civ 290, at paragraph 47.

[40] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02, paragraph 81

context of the relevant goods, they may perceive it as being coined from the ordinary words '**vita**min' or '**vita**lity' (given that the consumption of such goods may nourish them with essential vitamins and/or promote vitality). As such, I consider that a proportion of the average consumer may attribute the meanings of those ordinary words to VITA, rendering the marks conceptually identical in that respect.

77. However, to be relevant, a conceptual message must be capable of immediate grasp. I do not consider that to be the case in relation to the word VITA; consequently, there is also a likelihood that for another group of consumers the marks are conceptually neutral so far as that word is concerned, particularly if it is perceived as invented or a foreign word without a recognisable meaning.

78. The word SOY in combination with the leaf device impart a clear conceptual message in respect of the goods, namely soy-based and therefore plant-based products. This represents a point of conceptual difference, however, since it is also a descriptive meaning that concept is not particularly significant.

79. The word GROW, in the context of the goods, will likely convey the concept that the goods promote growth and development; in other words, it evokes a positive attribute of the goods. This concept is not particularly striking, but nevertheless represents a point of conceptual difference.

80. In circumstances where the consumer attributes the same meaning to the word VITA, the marks are conceptually similar overall to a medium degree. Where the marks are conceptually neutral so far as that word is concerned, they are conceptually dissimilar overall on account of the concepts conveyed by SOY and GROW; however, those conceptual differences are not particularly distinctive.

Distinctive character of the earlier trade mark

81. The degree of distinctiveness of the earlier mark is one of the factors that must be taken into account when assessing whether there is a likelihood of confusion. This is because the more distinctive the earlier mark, the greater the likelihood of confusion may be.[41]

[41] *Sabel v Puma*.

82. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*,[42] 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 1-2779, 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 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)."."

83. Whilst distinctiveness is assessed by reference to the mark as a whole, simply stating the overall level of distinctiveness of the earlier mark is not sufficient, it is the distinctive character of the component or components that are similar between the marks that is of particular relevance. In this regard, the Appointed Person in *Kurt Geiger v A-List Corporate Limited*[43] stated:

> "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

[42] Case C-342/97.
[43] BL O-075-13

confusingly similar, then the distinctiveness will not increase the likelihood of confusion at all. If anything it will reduce it.

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."

84. In other words, it is necessary to determine in what the distinctive character of the earlier mark lies, so that the analysis can focus on those components that are common to, or similar between, the marks at issue. Only after that has been done can a proper assessment of the likelihood of confusion be carried out.

85. Registered trade marks possess varying degrees of inherent distinctive character, ranging from 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.

86. The Opponent makes no claim to enhanced distinctiveness through use of the earlier figurative VITASOY mark. The evidence filed (although focused on proving use of the VITA registration) nonetheless includes use of the word VITASOY in relation to a soy-based drink. Even taking that evidence into account, it does not assist the Opponent, because it is insufficiently detailed to assess the evidence-based considerations identified in *Lloyd Schuhfabrik*. In particular, there is a lack of meaningful financial information and the few invoices provided are redacted and show only total sales figures, without any breakdown by goods. Further, any use shown appears to be geographically limited, and the evidence of marketing is insufficiently solid. I therefore have only the mark's inherent distinctiveness to consider.

87. For the reasons already stated, it is the distinctiveness of the word VITA which is particularly relevant, since it is that word which the competing marks have in common.

88. Whether the average consumer perceives VITA as an invented word with evocative connotations, or as a foreign word meaning 'life', it possesses a high degree of inherent distinctive character because it is not an English word and does not convey a clear meaning in relation to the goods.

Conclusions on Likelihood of Confusion

89. In assessing the likelihood of confusion, I must adopt the global approach advocated by case law and take into account the fact that marks are rarely recalled perfectly, the consumer relying instead on the imperfect picture of them that they have kept in mind.[44] I must also consider the average consumer of the goods, the nature of the purchasing process and bear in mind that 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.[45]

90. Making an assessment as to the likelihood of confusion is a matter of considering the relevant factors from the viewpoint of the average consumer and determining whether they are likely to be confused. The global assessment is supposed to emulate what happens in the mind of the average consumer on encountering the later mark with an imperfect recollection of the earlier mark in mind. It is not a process of analysis or reasoning, but an impression or instinctive reaction.[46] The relative weight of the factors is not laid down by law but is a matter of judgement for the tribunal on the particular facts of each case.[47]

91. It is well established that direct confusion arises where the consumer mistakes one mark for the other; whereas indirect confusion arises where the consumer recognises that the marks are different, but because of their similarities, believes that the goods or services bearing the later mark come from the same undertaking, or from an economically linked undertaking.[48] For example, the consumer concludes that the later mark is another brand of the owner of the earlier mark because the marks share a

[44] *Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V.*, Case C-342/97, paragraph 27
[45] *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc*, Case C-39/97, paragraph 17
[46] *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81
[47] See paragraph 33 of the Appointed Person's decision in Case No. O/049/17, (*Rochester Trade Mark*).
[48] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, paragraph 10

common element.[49] Such instances may arise where, for example, the later mark simply adds a non-distinctive element to the earlier mark of the kind one would expect to find in a sub-brand or brand extension.[50] In *L.A. Sugar Limited v By Back Beat Inc*,[51] Mr Iain Purvis Q.C., as the Appointed Person, explained that instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:[52]

> "(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)."

92. With the exception of a few terms in the Applicant's Class 5 specification still under consideration, which I have found to be similar to the Opponent's goods, all remaining goods still in play are identical to those of the Opponent. The average consumer will predominantly select the goods visually, paying a medium degree of attention during the selection process.

93. As regards the dominant elements of the marks, I have found that these lie in the verbal components, in particular in the word VITA, rather than their stylisation. The

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[49] *L.A. Sugar Limited v By Back Beat Inc*, Case BL-O/375/10, paragraphs 16-17 wherein Mr Iain Purvis QC, sitting as the Appointed Person, dealt with the distinction between direct and indirect confusion. In *Liverpool Gin Distillery* Arnold LJ approved Mr Purvis's formulation but added at [12] that it is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition.
[50] Ibid.
[51] Ibid.
[52] In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ approved Mr Purvis's formulation but added at [12] that it is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition.

marks are visually and aurally similar to a medium degree overall; and where the consumer attributes the same meaning to the word VITA, the marks are conceptually similar overall to a medium degree; alternatively where the marks are conceptually neutral so far as that word is concerned, they are conceptually dissimilar overall on account of the clear concepts conveyed by SOY and GROW; but these conceptual differences are not particularly distinctive.

94. As to the distinctive character of the earlier mark, I have found that the component common to the competing marks (which is the element of particular relevance), namely the verbal element VITA, possesses a high degree of inherent distinctiveness.

95. My findings as to the inherent distinctiveness of the word VITA apply equally to the Applicant's mark. In the Applicant's mark the word VITA likewise appears as the first verbal element and, in line with my findings above, will be perceived independently from the word GROW.

96. Taking all of the above factors into consideration, and allowing for imperfect recollection, whilst bearing in mind the principle of interdependency, I find that, notwithstanding the marks' shared common element and my finding that the majority of the goods are identical, the average consumer is unlikely to be directly confused, particularly given that they will be paying a medium degree of attention when selecting the goods.

97. That said, I find there is a *"proper basis"*[53] for a finding of indirect confusion when taking into account all the relevant factors. My reasoning is as follows. Whilst the word GROW is not on par with the word SOY, in that it is allusive rather than descriptive in nature, its clear and readily understood concept, which alludes to positive qualities of the goods, is likely to be perceived as indicating a VITA brand variant rather than having independent trade mark significance. For example, the average consumer may view SOY and GROW as additions to the VITA brand used to denote different product lines of the same goods, such as the earlier mark indicating food and beverages made from or containing soya beans, and the contested mark indicating food and beverages

[53] See *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, paragraph 81.

that have been fortified to promote growth, nutrition or overall wellbeing. The differences in stylisation are likely to be attributed to marketing choices distinguishing those product ranges, rather than to separate trade origins, particularly given the identity of the goods in question. I therefore confirm my finding that a likelihood of indirect confusion exists.

OUTCOME

98. The opposition under section 5(2)(b) of the Act is partially successful. Subject to any appeal, contested trade mark application number 4041631 shall proceed to registration only in respect of the following Class 5 goods listed below; registration shall be refused for the remainder of the applied-for goods, which are set out in Annex 1 to this decision for ease of reference.

Class 5

Greases for medical purposes; Mustard oil for medical purposes; Medical preparations; Digestives for pharmaceutical purposes; Cod liver oil; Dietetic foodstuffs for medical purposes; Dietetic food adapted for medical use; Medicines for human purposes; Food for babies; Pharmaceutical sweets.

COSTS

99. The Opponent has been partially successful and is therefore entitled to an award of costs based on the contributory scale set out in Tribunal Practice Notice 1/2023. In the circumstances I award the Opponent the sum of £600, taking into account an appropriate reduction in order to reflect the partial success. This sum is calculated as follows:

Official fee	£100
Preparing the Statement of Grounds and considering the Counterstatement	£200
Preparation of evidence	£300
TOTAL	**£600**

100. I therefore order AOUNGO INTERNATIONAL TRADING LIMITED to pay Vitasoy International Holdings Limited the sum of **£600** within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 3rd day of June 2026

Daniela Ferrari
For the Registrar

Annex 1

Goods for which registration shall be refused

Class 5

Medicinal beverages; Nutritional supplements; Medicinal tea; Protein dietary supplements; Dietary supplements for human beings; Dietary supplements with a cosmetic effect.

Class 30

Coffee; Cocoa; Milk chocolate; Tea; Molasses for food; Royal jelly; Oat porridge; High-protein cereal bars; Cereal based foodstuffs for human consumption; Sugars; Oatmeal; Oat-based food for human consumption; Cereal bars.

Class 32

Beer; Aerated water [soda water]; Nut and soy based beverages; Alcohol free beverages; Fruit juice; Lemonade; Fruit-based beverages; Non-alcoholic fruit juice beverages; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic cocktails; Carbonated water; Soda water; Dilutable preparations for making beverages; Powders for effervescing beverages; Drinking waters; Water enhanced with minerals; Vegetable juice.