

BL O/0488/25

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NUMBER 3,905,538 IN THE NAME OF DONGGUAN TOPSON ELECTRONIC TECHNOLOGY CO LTD

AND IN THE MATTER OF THE OPPOSITION UNDER NO 442,335 IN THE NAME OF ABSOLUT COMPANY AKTIEBOLAG

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF SUZANNE HITCHINGS (O/1160/24) DATED 5 DECEMBER 2024

DECISION

Introduction

1. This is an appeal from the decision of Suzanne Hitchings, for the Registrar, dated 5 December 2024 (O/1160/24). Absolut Company Aktiebolag opposed the application of Dongguan Topson Electronic Technology Co Ltd under sections 5(2)(b) of the Trade Marks Act 1994. The opposition was partially unsuccessful, and Absolut appeals the decision to this extent.
2. Dongguan Topson applied to register the mark ELUX (No. 3,905,538) in relation to goods in Classes 30, 32, 33. Absolut opposed all the goods in Classes 32 and 33 (and none of those in Class 30). The Hearing Officer dismissed the opposition in relation to the following goods:
 - Class 32
Powders used in the preparation of coconut water drinks; Sports drinks; Sports drinks containing electrolytes; Cola; Smoothies [fruit beverages, fruit predominating]; Waters [beverages]; Fruit flavored drinks; Fruit drinks; Fruit smoothies; Frozen fruit beverages; Beer; Vegetable drinks; Iced fruit beverages; Coffee-flavored beer; Fruit flavored soft drinks.
 - Class 33
Wine-based drinks; Wine-based beverages.
3. The Appellant relied on an earlier mark ELYX (No 2,564,081) and it managed to prove its use only in relation to Vodka in Class 33.

Standard of appeal

4. The standard of appeal is by way of review. Neither surprise at a Hearing Officer's conclusion nor a belief that the Hearing Officer has reached the wrong decision will suffice to justify interference in this sort of appeal. Before that is warranted, it is necessary for me to be satisfied that there was a distinct and material error of principle in the decision in question or that the Hearing Officer's findings were rationally

insupportable. The principles to be applied were summarised by Joanna Smith J in *Axogen Corporation v Aviv Scientific Ltd* [2022] EWHC 95 (Ch), [24] and in relation to findings of fact this should now be read in light of the summary of Arnold LJ in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2024] EWCA Civ 262, [110] and in terms of evaluative decisions the Supreme Court's guidance in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8, [49] where it stated that:

...on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

5. I also remind myself of Arnold LJ comments in *Extreme Networks Ltd v Extreme E Ltd* [2024] EWCA Civ 1386, [31] and the need for appellate modesty in reviewing a Hearing Officer's assessment of the similarity of goods or services.
6. When considering this appeal, and applying these principles, it is important to remember the high bar set.

Grounds of appeal

7. In summary, the Hearing Officer found the two marks to be confusingly similar where there was at least a low to medium degree of similarity between the goods they covered (Decision, [56]). But where the goods were dissimilar or there was a very low degree of similarity between them the Hearing Officer dismissed the opposition.
8. The issue in the appeal is therefore very simple. The Appellant argues that in light of the increasing presence of alcohol-free alternatives of products (including spirits) the Hearing Officer was wrong to find the goods set out above in paragraph 2 to be dissimilar from those covered by the Appellant's mark or for them to have a low degree of similarity only.

Similarity and alcoholic products

9. There have been a number of cases before the General Court dealing with the assessment of the similarity between alcoholic products and other beverages. Only one of these was mentioned by the Hearing Officer (although two of the cases listed below are not assimilated case law):
 - (i) T-296/02 *Lidl Stiftung & Co v OHIM* [2005] ECR II-563 (sparkling wine and non-alcoholic drinks were found to be more dissimilar than similar)
 - (ii) T-175/06 *Coca Cola v OHIM* [2008] ECR II-1055 (MEZZOPANE) (there was found to be little similarity between beer and wine)
 - (iii) T-430/07 *Bodegas Montebello*, EU: T:2009:127 (rum and wine were found to be dissimilar);
 - (iv) T-421/10 *Cooperativa Vitivinícola Arousana v OHMI* (ROSALIA DE CASTRO) [2011] ECR II-347 (a low degree of similarity were found between alcoholic and non-alcoholic beverages)
 - (v) T-278/10 *Wesergold Getränkeindustrie v EUIPO*, EU:T:2012:459 (a low degree of similarity was found between spirits and non-alcoholic beverages)

- (vi) T-584/10 *Yilmaz v OHIM*, EU:T:2012:518 (tequila and beer were said to be dissimilar)
 - (vii) T-150/17 *Asolo Ltd v EUIPO*, EU:T:2018:641 (FLÜGEL)(alcoholic and energy drinks were found to be dissimilar)
 - (viii) T-378/17 *La Zaragozana v EUIPO*, EU:T:2018:888 (CERVISIA) (beer and non-alcoholic beer were said to be highly similar; whereas beer and non-alcoholic drinks were held to be averagely similar)
 - (ix) T-195/20 *Sociedade da Água de Monchique, SA v EUIPO*, EU:T:2021:601 (CHIC) (water and alcoholic beverages (except beer) were said to be dissimilar)
 - (x) T-437/22 *Vanhove v EUIPO*, EU:T:2023:246 (brandy and wine were found to have a low degree of similarity).
10. The Appellant relied heavily on the Grand Board of Appeal's decision in R 964/2020-G *ZORAYA*, 13 April 2022 which considered the evolution of the 0% ABV drinks (alcohol-free drinks) market. Further, considering the goods in issue it is also worth mentioning R 1720/2017-G *ICEBERG*, 21 January 2019 where the Grand Board found Vodka and non-alcoholic beverages to be dissimilar.
11. In the United Kingdom, there are also Appointed Person decisions considering the similarity between alcoholic products. In *BALMORAL TM* [1999] RPC 297 it was found that whisky and wine producers might be seen by the relevant public as made by the same undertaking (making particular reference to store branded products) and in *CALEDONIAN* (O/382/16) the Hearing Officer's decision that whisky and beer were similar to only a low degree was upheld (but it was also accepted that a finding the products were dissimilar would not have been open to challenge).
12. It is important to remember that the outcomes of all these cases are fact dependent and that they are not binding (in the strict sense) in relation to other cases involving similar pairs of goods. This is because the relevant public will be different (whether in terms of time or place) on the relevant date. There are, however, relevant considerations set out in all these decisions which may be applied in other cases.
13. First, the fact that spirits are mixed with soft-drinks (mixers) does not make the products complimentary (*Yilmaz*, [55]; *Wesergold*, [40]; *CHIC*, [53 to 55]), but it does mean there is a partial (but not significant) overlap between spirits and soft drinks (*Wesergold*, [32 and 33]).
14. Second, soft-drinks, water and (possibly) beer are drunk to quench the thirst (*Yilmaz*, [54]; *Wesergold*, [35 and 36]; *ROSALIA DE CASTRO*, [31]; the *CHIC* case takes a different view that low alcoholic drinks are not consumed to quench thirst, *CHIC*, [44]), but in any event spirits are not consumed to quench thirst (*Yilmaz*, [54]; *Wesergold*, [35 and 36]).
15. Thirdly, the methods of production for alcoholic drinks (and between alcoholic drinks and non-alcoholic drinks) differ and this is relevant to the similarity between them: *Mezzopane*, [64 and 69]; *Bodegas*, [29]; *Yilmaz*, [54]. Likewise, products which are

processed versions of each other might be more similar (eg wine and Brandy): *Vanhove*, [87].

16. Fourthly, the differences between the colour, aroma and taste of two alcoholic drinks suggests to consumers that they are different: *Mezzopane*, [65]; *Yilmaz*, [54].

17. Finally, the alcoholic content of the goods is a very relevant factor in determining the similarity of the goods: *Bodegas*, [32]; *Wesergold*, [31]; *CHIC*, [40 and 41]; *FLÜGEL*, [84]. However, a non-alcoholic version of an equivalent alcoholic drink is likely to be highly similar to it: *CERVISIA*, [20]. Nevertheless, the Grand Board highlighted that a drink's alcoholic content is only a factor in the assessment of similarity and is not determinative: *ZORAYA*, [68].

18. I will now turn to the goods in issue in these proceedings.

Sports drinks; Sports drinks containing electrolytes; Cola; Smoothies [fruit beverages, fruit predominating]; Waters [beverages]; Fruit flavored drinks; Fruit drinks; Fruit smoothies; Frozen fruit beverages; Vegetable drinks; Iced fruit beverages; Fruit flavored soft drinks.

19. The Appellant's submissions in relation to the goods in the heading are largely based on the fact that non-alcoholic versions of normally alcoholic products have become more common in the marketplace. In particular, the Appellant says the Hearing Officer's finding that the existence of 0% alcohol products meant that non-alcoholic carbonated beverages and non-alcoholic beverages containing fruit juices were similar to vodka to a low to medium degree (Decision, [27]) was right. Whereas, the Appellant submits, the Hearing Officer's conclusion that the more specific cola, fruit drinks, sports drinks & c are similar to vodka only to a very low degree was inconsistent with the earlier finding (Decision, [29]).

20. Essentially, the Appellant submits that because "cola" is a "non-alcoholic carbonated beverage" both goods should have had the same assessment of similarity in relation to vodka, and the Appellant makes similar points in relation to the other goods mentioned above where they are subsumed within the broader term.

21. I do not accept this submission. Where broad terms are used in a specification those terms may encompass a wide range of different goods. Indeed, there may be two goods both of which are within the scope of the broad term, but which are still considered to be dissimilar to each other. For instance, alcoholic beverages would be identical to rum in Class 33. But in *Bodegas* rum and wine were found to be dissimilar despite both being subsumed within the term alcoholic beverages.

22. The Appellant refers to *ZORAYA* where the Grand Boards said that the similarity between spirits and non-alcoholic beverages should be at least low: *ZORAYA*, [84]. Even though the views of Grand Board are not binding, I do not think the Grand Board goes far beyond the General Court's decision in *Wesergold*. Nevertheless, I accept that within the full reach of the term "non-alcoholic beverages" there will be something which is similar to a low degree to spirits. However, this does not mean that everything within the scope of the term "non-alcoholic beverages" is necessarily similar to spirits.

In any event, the Hearing Officer did find cola, fruits drinks, sports drinks & c to be similar to vodka to a very low degree and this seems to comply with the guidance in *ZORAYA* and to be in accord with *Wesergold*.

23. Even if I am wrong in this respect, I do not think the Hearing Officer's decision can be seen as rationally insupportable or wrong in principle. A finding that in the United Kingdom the similarity between these goods is slightly lower than in certain EU Member States is entirely rational. As I highlighted above, a finding by the court as to the similarity of goods is based on the facts before the court as to the local marketplace on the relevant date, and only the principles derived from earlier cases can bind (or even provide guidance) to Hearing Officers.

24. I therefore uphold the Hearing Officer's decision in respect of these goods.

Powders used in the preparation of coconut water drinks

25. The Appellant accepts that powders used in the preparation of coconut water drinks are a step further away from vodka than those goods discussed immediately above. I entirely agree with this conclusion. Therefore, in light of my earlier finding, I do not think the Hearing Officer's decision can be criticised in respect of these powders.

Beer; coffee-flavored beer

26. In relation to beer & c, the Appellant criticised the Hearing Officer for giving too much weight to the fact that Vodka and beer had different modes of production when she found that beer was similar to vodka to a very low degree (Decision, [28]). The method of production is clearly a relevant factor, but it is not decisive. However, there are many other reasons why beer is different from vodka beyond how it is produced. For instance, beer might be drunk to quench thirst whereas spirits are not consumed for this purpose. The alcoholic content is very different between vodka and beer. While I upheld a finding of low similarity between beer and whisky in *CALEDONIAN*, I accepted that a finding of dissimilarity would have been supportable in light of *Yilmaz*. I therefore dismiss the appeal in relation to these goods.

Wine-based drinks; wine-based beverages

27. Finally, the Appellant criticised the Hearing Officer's finding that vodka was similar to wine-based drinks and wine-based beverages to only a very low degree (Decision, [34]). The Appellant makes the point that Vodka cocktails can include wine and this was not considered by the Hearing Officer. I accept that some cocktails include wine, but in light of the various decisions concluding that mixers are not complementary to spirits I am not sure that taking this factor into account would have made a material difference.

28. Furthermore, both *BALMORAL* and *Vanhove* suggested whisky and brandy respectively were similar to some degree to wine, while on the other hand, in *Bodegas* it was suggested that rum and wine were entirely dissimilar. My view is that vodka is likely to be further away from wine than any of the spirits mentioned above as it is always a clear spirit (and only some types of rum are clear). Indeed, I believe the Hearing Officer would have been entitled to find vodka and wine-based drinks to be

dissimilar (see *CALEDONIAN*, [26]). Therefore, in my view there can be no criticism of a finding that there is a very low degree of similarity between the goods. I therefore uphold the Hearing Officer's finding in this respect as well.

Conclusion

29. I therefore dismiss the appeal in its entirety and uphold the Hearing Officer's decision.

30. The Respondent did not take part in the proceedings and so I make no order as to costs.

-PHILLIP JOHNSON
THE APPOINTED PERSON
29 May 2025

Representation:

For the Appellant: Kirsten Gilbert (of Marks and Clerk LLP)

The Respondent did not appear.