

O/0507/26

TRADE MARKS ACT 1994

IN THE MATTER OF INTERNATIONAL REGISTRATION
DESIGNATING THE UK NO. 1693332
IN THE NAME OF AGELESS SCIENCES INC.:



IN CLASSES 5, 29, 30, 32 & 42

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 440600
BY NOVO NUTRITION LTD

Background and pleadings

1. On 9 February 2022, AgeLess Sciences Inc. (“the holder”) registered the international trade mark displayed on the cover page of this decision under no. 1693332 (“the IR”). With effect from the same date, the holder designated the UK as a territory in which it seeks to protect the IR under the terms of the Protocol to the Madrid Agreement. Protection of the IR in the UK is sought for goods and services in classes 5, 29, 30, 32 and 42. These are set out in full in the annex to this decision.

2. Details of the IR were published for opposition purposes on 3 February 2023. On 3 May 2023, Novo Nutrition Ltd (“the opponent”) opposed the IR under sections 5(2)(b) and 5(4)(a) of the Trade Marks Act 1994 (“the Act”).¹ For the purposes of its claim under section 5(2)(b), the opponent relies upon the following trade marks:

(i) **NOVO**

UK registration no. 3039826

Filing date: 29 January 2014

Registration date: 2 May 2014

(“the opponent’s first mark”)



(ii)

easy PROTEIN

UK registration no. 913747936

Filing date: 17 February 2015

Registration date: 3 July 2015

(“the opponent’s second mark”)

3. The opponent’s marks stand registered for goods in classes 29 and 30. Those relied upon for the purposes of the opposition are set out later in this decision.

¹ In addition to these grounds, the opponent originally sought to rely upon section 5(3) of the Act. However, at the hearing, Mr Bailey confirmed that this ground was no longer being pursued.

4. Each of the opponent's marks qualifies as an 'earlier trade mark' in accordance with section 6 of the Act.² As they had been registered for more than five years at the UK designation date of the IR, they are subject to the use requirements specified in section 6A of the Act.

5. The opponent contends that the IR is similar to each of its marks and that the parties' goods and services are identical or similar. On this basis, the opponent submits that there is a likelihood of confusion.

6. Under section 5(4)(a), the opponent claims that it has goodwill in relation to which it has used signs identical to its registered marks throughout the UK since April 2014.³ The signs are said to have been used in connection with *crisps, wafers, protein bars, cereals, chips*. The opponent contends that use of the IR would constitute passing off.

7. The holder filed a counterstatement denying the grounds of opposition. It also indicated that it would require the opponent to provide proof of use and goodwill in respect of its marks/signs.

8. Both parties are professionally represented; the opponent by Appleyard Lees IP LLP and the holder by Stevens, Hewlett & Perkins. Only the opponent filed evidence. A hearing was requested and held before me, by video conference, on 22 May 2025. The opponent was represented by Daniel Bailey of Appleyard Lees IP LLP. The holder elected to file written submissions in lieu of attendance.

Relevance of EU law

9. 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

² The opponent's second mark is a comparable mark based upon its EU trade mark no. 13747936. This mark was automatically created on 1 January 2021 in accordance with article 54 of the Withdrawal Agreement between the UK and EU. I note that this registration expired on 18 February 2025. However, it was then renewed by the opponent on 5 June 2025 in accordance with section 43 of the Act.

³ I acknowledge that, as the holder has highlighted, the opponent's pleaded position was that it had established goodwill in its marks, rather than its business. However, this is likely to represent a typographical error or an oversight which could easily be rectified. Whilst I have considered the merits of requiring an amended notice of opposition, I do not consider it to be necessary at this stage in the proceedings.

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.

Evidence

10. The opponent's evidence is given in the witness statements of Andrew Panaiotis Coulson, together with 10 exhibits (APC1-APC10), and Samuel Turton, together with nine exhibits (SJT1-SJT9). Mr Coulson is a founder and Director of the opponent. He provides the opponent's evidence of use. Mr Turton is a Trade Mark Attorney with the opponent's representatives. His evidence goes to the similarity of the goods and services.

11. I have taken all the evidence into account in reaching my decision and will refer to it below where necessary.

Preliminary remarks

12. Within its written submissions, the holder criticises the opponent for having not adduced any evidence as to its ownership of its marks. However, the opponent is not required to prove through evidence that it is the owner of the marks relied upon. Since the validity of the opponent's marks are not at issue in these proceedings, they must be considered validly registered marks (as per section 72 of the Act). Novo Nutrition Ltd is listed in the register as the registered proprietor of the marks relied upon, and this is the name which the opponent gave in its notice of opposition. The opponent's apparent failure to evidence its ownership of its marks will have no bearing on the outcome of this decision and I shall say no more about it.

Proof of use

13. The relevant statutory provisions are as follows:

“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.

(5)-(5A) [Repealed]

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

14. Moreover, section 100 of the Act states that:

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

15. Pursuant to the above provisions, the relevant period of assessing whether, or the extent to which, there has been genuine use of the opponent’s marks is the five-year period ending with the UK designation date of the IR, i.e. 10 February 2017 to 9 February 2022.

16. In *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247, Arnold LJ summarised the law relating to genuine use as follows:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratories Goemar SA* [2004] ECR I-1159, Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bunderversvereinigung 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 Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

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

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

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

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

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

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

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

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

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

The evidence

17. Mr Coulson gives evidence that he founded the opponent to fill what he perceived as a gap in the market for high-protein, healthier snack products, creating alternatives to mainstream snacks such as crisps and chocolate bars. He provides the following turnover figures for products sold under the 'NOVO' mark in the UK:

Year	Turnover
2019	In excess of £43,000
2020	In excess of £42,000
2021	In excess of £25,000
Total	In excess of £110,000

18. In support of these turnover figures, Mr Coulson provides invoices dated between 12 September 2019 and 12 April 2021.⁴ The invoices demonstrate the sale of “easy bars”, “high protein wafers”, “protein chips”, and “protein breaks” to customers based in Sutton Coldfield, Wiltshire, and Burton Upon Trent. The quantity of each product in each invoice ranges between 36 and 7,200. The invoices show use of the word ‘NOVO’/‘Novo’ in plain font and in the stylised font seen in the opponent’s second mark.

19. Mr Coulson has also provided printouts from the opponent’s website (novonutrition.net), obtained via the Wayback Machine and dated between 13 July 2016 and 24 January 2022.⁵ The opponent’s “protein bites”, protein chips, “Proteinos” (high-protein breakfast cereal), and protein wafers are visible throughout. The website featured use of the opponent’s second mark and the word ‘NOVO’/‘Novo’ in plain font during this time.

20. The opponent is said to have gathered a large following on social media. Mr Coulson says that, as of 15 May 2024, the opponent had the following number of followers:

⁴ Exhibits APC1-APC3

⁵ Exhibit APC4

Platform	Followers
X (formerly Twitter)	1,400
LinkedIn	813
Instagram	50,500
Facebook	123,000

21. In this connection, Mr Coulson provides evidence from these platforms. Firstly, Mr Coulson provides printouts from the 'novonutrition' Instagram account, showing posts dated between 12 June 2017 and 19 August 2020.⁶ From these printouts I note that, after sampling events at WHSmith stores in Manchester, Leeds and Sheffield in February and March 2020, 'NOVO' protein wafer bars were made available in over 500 WHSmith stores in the UK from August 2020. 'NOVO' protein chips and Proteininos also appear in the posts. The level of engagement with the posts is quite low, the highest being 1,044 likes.

22. In addition, Mr Coulson provides printouts from the 'Novo Nutrition' Facebook page, which Mr Coulson says was created in April 2013.⁷ Insofar as they relate to the relevant period, the printouts feature posts dated between 5 December 2017 and 25 October 2021, which show 'NOVO' protein wafer bars and protein breaks (chocolate bars). The protein breaks appear to have been made available on Amazon (UK) from 29 October 2018 and in BP petrol stations from 25 October 2021. Generally, the posts had quite a low level of engagement, though that dated 5 December 2017 had 5,900 likes. I also note the posts in which 'NOVO' products are pictured with boxer Ricky Hatton and bodybuilder/actor Arnold Schwarzenegger, but these are from before the start of the relevant period (14 June 2013 and 20 August 2015). The same is true of the post describing a price offer for 'NOVO' protein bites in Tesco stores (2 July 2014).

23. As for X, Mr Coulson provides printouts from the 'Novo Nutrition' account dated 13 September 2017, 10 October 2018, 14 October 2018 and 12 June 2021.⁸ Mr Coulson says that the account was created in 2013. 'NOVO' protein wafer bars, protein break bars and protein bites are shown. The posts have a very low level of engagement;

⁶ Exhibit APC5

⁷ Exhibit APC6

⁸ Exhibit APC7

other than the repost of a fitness influencer's post (which had 71 likes), likes and reposts of the posts were in single digits.

24. Finally with respect to social media, Mr Coulson has evidenced printouts from the 'Novo Nutrition' LinkedIn account.⁹ One announces the partnership with WHSmith regarding 'NOVO' easy bars, protein wafers and protein breaks. The other announces 'NOVO' products being available in BP petrol stations "across the north of the UK"; the opponent's protein wafers are pictured inside one such outlet, whilst 'NOVO' advertising can be seen outside. The posts are not clearly dated, though I note they include the references "5yr" and "2yr", respectively. Mr Coulson confirms in his narrative that the posts were from "over 5 years ago" and "over 2 years ago". Therefore, based on the date of his statement (26 May 2024), the posts are likely to be from around May 2019 and May 2022. The posts have a low level of engagement, with reactions in single digits.

25. Moreover, Mr Coulson has exhibited printouts from the STACK3D website (stack3d.com), which he describes as one which advertises and discusses protein supplements.¹⁰ The articles discuss 'NOVO' protein wafer bars (including one which refers to the opponent giving away 100,000 of them), easy bars (high-protein snack bars), and "protein squares" (wafer bars). The articles are not clearly dated but contain references to "3 years ago", "4 years ago" and "5 years ago". As such, based on the date of Mr Coulson's statement, the articles are likely to be from around May 2019, May 2020 and May 2021. The website is global in nature, and no figures have been provided as to how many internet users accessed the articles.

26. Finally, Mr Coulson provides what he refers to as marketing materials.¹¹ They relate to the opponent's attendance at two exhibitions to promote 'NOVO' products: BODYPOWER EXPO and FITCON. The latter took place in London in April 2017. Although it appears that 'NOVO' also had a stand at the former, it took place in May 2015, i.e. before the beginning of the relevant period. There are no details with respect

⁹ Exhibit APC8

¹⁰ Exhibit APC9

¹¹ Exhibit APC10

to how many individuals attend either of these exhibitions or how widely they are publicised.

Form of the marks

27. In its written submissions, the holder submits that the evidence shows no use of the opponent's first mark, being the word 'NOVO'. I disagree. Firstly, the word 'NOVO' in plain font was used on the opponent's website during the relevant period. For example, one of the button options at the top of the page is labelled "ABOUT NOVO". This is clearly use of the mark as registered and, therefore, use upon which the opponent may rely.

28. Moreover, the word 'Novo' was also displayed on the website, in plain font, during the relevant period. For instance, "A Novo Welcome" and "Novo asked the question [...]". There are also references to 'Novo' in the third-party articles. Although the entire word is not capitalised, the registration of a word-only mark provides protection for the word itself, not the form in which it is presented.¹² This is also use upon which the opponent may rely.

29. Further, the word 'Novo' is used in the product descriptions in the invoices. The holder has invited me to disregard this evidence because the consignee names have been redacted. In this regard, it submits as follows:

"[...] the evidence submitted under APC1-3 cannot be taken as evidence of sales made to an entity outside the Opponent organisation; the invoices could merely reflect moving of product around within the Opponent's own company structure or to distributors or for warehousing purposes from where onward transmission to an eventual product consumer takes place."

30. When introducing the invoices, Mr Coulson says that they "show sales of [...] goods under the NOVO mark to UK based customers". The holder is essentially

¹² See *La Superquimica v EUIPO*, Case T-24/17, *Dreamersclub Ltd v KTS Group Ltd*, BL O/091/19, and *PW Branding, Inc v Zabou Group Limited*, BL O/0234/25.

inviting me to disbelieve Mr Coulson in circumstances where none of Mr Coulson's evidence has been challenged. In my view, it is not appropriate to leave a challenge of this nature until the stage of final written or oral submissions; it leaves the opponent with no opportunity to respond to it. If the holder wished to challenge the invoice evidence and Mr Coulson's narrative surrounding it, the correct procedure would have been to do so in writing during the evidence rounds or to request cross-examination. As things stand, I have no reason to disbelieve Mr Coulson's evidence that the invoices reflect sales to customers. I reject the holder's criticism and find that use of the word 'Novo' within the invoices is use upon which the opponent may rely.

31. There is also use of the term 'Novo Nutrition' in the social media evidence and references to the same in the third-party articles. The holder submits that such use cannot be relied upon by the opponent because it references its company name (Novo Nutrition Ltd), rather than being use of 'NOVO' in a trade mark sense. Although 'Novo Nutrition' does form part of the opponent's company name, that is not determinative. In *Colloseum Holdings AG v Levi Strauss & Co.*, Case C-12/12, which concerned the use of one mark with, or as part of, another mark, the Court of Justice of the European Union ("CJEU") found that:

"31. It is true that the 'use' through which a sign acquires a distinctive character under Article 7(3) of Regulation No 40/94 relates to the period before its registration as a trade mark, whereas 'genuine use', within the meaning of Article 15(1) of that regulation, relates to a five-year period following registration and, accordingly, 'use' within the meaning of Article 7(3) for the purpose of registration may not be relied on as such to establish 'use' within the meaning of Article 15(1) for the purpose of preserving the rights of the proprietor of the registered trade mark.

32. Nevertheless, as is apparent from paragraphs 27 to 30 of the judgment in *Nestlé*, the 'use' of a mark, in its literal sense, generally encompasses both its independent use and its use as part of another mark taken as a whole or in conjunction with that other mark.

33. As the German and United Kingdom Governments pointed out at the hearing before the Court, the criterion of use, which continues to be fundamental, cannot be assessed in the light of different considerations according to whether the issue to be decided is whether use is capable of giving rise to rights relating to a mark or of ensuring that such rights are preserved. If it is possible to acquire trade mark protection for a sign through a specific use made of the sign, that same form of use must also be capable of ensuring that such protection is preserved.

34. Therefore, the requirements that apply to verification of the genuine use of a mark, within the meaning of Article 15(1) of Regulation No 40/94, are analogous to those concerning the acquisition by a sign of distinctive character through use for the purpose of its registration, within the meaning of Article 7(3) of the regulation.

35. Nevertheless, as pointed out by the German Government, the United Kingdom Government and the European Commission, a registered trade mark that is used only as part of a composite mark or in conjunction with another mark must continue to be perceived as indicative of the origin of the product at issue for that use to be covered by the term ‘genuine use’ within the meaning of Article 15(1).”

32. Guidance on this issue also came from Phillip Johnson, sitting as the Appointed Person, in *Lactalis McLelland Limited v Arla Foods AMBA*, BL O/265/22. He said:

“13. [...] While the law has developed since *Nirvana* [BL O/262/06], the recent case law still requires a comparison of the marks to identify elements of the mark added (or subtracted) which have led to the alteration of the mark (that is, the differences) (see for instance, T-598/18 *Grupo Textil Brownie v EU*IPO*, EU:T:2020:22, [63 and 64]).

14. The courts, and particularly the General Court, have developed certain principles which apply to assess whether a mark is an acceptable variant and the following appear relevant to this case.

15. First, when comparing the alterations between the mark as registered and used it is clear that the alteration or omission of a non-distinctive element does not alter the distinctive character of the mark as a whole: T-146/15 *Hypen v EUIPO*, EU:T:2016:469, [30]. Secondly, where a mark contains words and a figurative element the word element will usually be more distinctive: T-171/17 *M & K v EUIPO*, EU:T:2018:683, [41]. This suggests that changes in figurative elements are usually less likely to change the distinctive character than those related to the word elements.

16. Thirdly, where a trade mark comprises two (or more) distinctive elements (eg a house mark and a sub-brand) it is not sufficient to prove use of only one of those distinctive elements: T-297/20 *Fashioneast v AM.VI. Srl*, EU:T:2021:432, [40] (I note that this case is only persuasive, but I see no reason to disagree with it). Fourthly, the addition of descriptive or suggestive words (or it is suppose figurative elements) is unlikely to change the distinctive character of the mark: compare, T-258/13 *Artkis*, EU:T:2015:207, [27] (ARKTIS registered and use of ARKTIS LINE sufficient) and T-209/09 *Alder*, EU:T:2011:169, [58] (HALDER registered and use of HALDER I, HALDER II etc sufficient) with R 89/2000-1 CAPTAIN (23 April 2001) (CAPTAIN registered and use of CAPTAIN BIRDS EYE insufficient).

17. It is also worth highlighting the recent case of T-615/20 *Mood Media v EUIPO*, EU:T:2022:109 where the General Court was considering whether the use of various marks amounted to the use of the registered mark MOOD MEDIA. It took the view that the omission of the word “MEDIA” would affect the distinctive character of the mark (see [61 and 62]) because MOOD and MEDIA were in combination weakly distinctive, and the word MOOD alone was less distinctive still.”

33. In my view, using the word ‘Novo’ in conjunction with the (descriptive) word ‘Nutrition’ constitutes acceptable variant use of the opponent’s first mark as registered. The opponent’s mark, itself, is unaltered and continues to be the indicator of origin.

34. On the basis of the case law principles above, I am also of the view that use in the following figurative form, which was displayed on the website, on the packaging of the goods themselves, and on the flyer for the FITCON exhibition, is also acceptable variant use of the opponent's first mark:



35. As can be seen from *Colloseum* above, 'use' of a mark includes its use as part of another mark taken as a whole, providing the registered mark continues to be indicative of economic origin. To my mind, that is the case here. Although the word 'novo' is used in conjunction with the descriptive and/or promotional words 'easy PROTEIN', and is presented in a slightly stylised font with a small heart device within the letter 'O'/'o', it dominates the evidenced mark and continues to be the indicator of economic origin.

36. Even if the evidenced mark is not acceptable variant use of the opponent's first mark in the sense envisaged in *Colloseum*, I still consider it to be acceptable variant use as per *Lactalis*. The evidenced mark differs from the mark as registered in the addition of a slightly stylised font, colour, a background device, a small heart device, and the words 'easy PROTEIN'. The opponent's first mark consists of the word 'NOVO'. The distinctive character of the mark lies in the word itself. As such, the font in the evidenced mark must not be taken into account.¹³ Moreover, I do not consider the addition of the background device, colours or the small heart device materially alters the distinctive character of the mark as registered. In addition, the words 'easy PROTEIN' will be perceived in combination as a descriptive and/or purely promotional reference to the goods and, therefore, lack distinctive character.

37. As for the opponent's second mark, there is use of the mark as registered. As documented above, it was displayed on the website during the relevant period, can be

¹³ See *La Superquimica*, *Dreamersclub* and *PW Branding*, cited above.

seen throughout the evidence on the packaging of the goods themselves, and was used on the flyer for an exhibition during the relevant period. This is clearly use upon which the opponent may rely.

Sufficient use

38. The evidence demonstrates that the opponent's marks were presented on its website throughout the relevant period in conjunction with high-protein snack products. The invoices establish that such products were sold to customers in the West Midlands, Wiltshire and Staffordshire. Although the sales were not particularly widespread, geographically, or longstanding, they were relatively consistent and appear to indicate repeat custom. In addition to direct sales, the social media evidence suggests that 'NOVO' products were available in the UK through two national outlets (WHSmith and BP) during the relevant period.

39. Turnover figures have been provided which show that the opponent accrued over £110,000 during the relevant period. However, no details of the size of the relevant market have been provided, or of the share of that market held by goods sold under the opponent's marks. In the absence of such information, it is difficult to properly contextualise the turnover figures. On the face of it, they seem low, and it is my impression that there is a large market in the UK for high-protein snack products.

40. Moreover, no information has been provided as to any amounts spent on advertising or marketing in the UK, and the evidence of marketing activities itself is limited. That said, the opponent did at least promote 'NOVO' products at an exhibition in London during the relevant period. The opponent's social media accounts have a relatively low number of followers, and it is not possible to ascertain (i) how many of those individuals followed the social media accounts during the relevant period or (ii) what proportion of those individuals were based in the UK. Nonetheless, there is at least evidence of regular posts on multiple social media platforms during the relevant period.

41. Finally, whilst 'NOVO' products were discussed on a third-party website during the relevant period, it is not clear that this was a UK-facing website and there is no indication as to how many internet users read the articles.

42. An assessment of genuine use is a global assessment which involves looking at the evidential picture as a whole.¹⁴ Balancing all of the above, I am satisfied that the opponent has sufficiently demonstrated that it attempted to create and maintain a market for high-protein snack products under its marks during the relevant period.

Fair specifications

43. In *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834, Kitchin LJ (as he then was) set out the approach to be followed when considering partial revocation of a trade mark. The same approach is relevant when framing a fair specification. He said:

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

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

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

¹⁴ *New Yorker SHK Jeans GmbH & Co. KG v OHIM*, Case T-415/09

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

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

44. This approach was endorsed by the Supreme Court in *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, subject to the proviso that it must be seen in light of more recent guidance by the CJEU that the essential criterion to apply for the purposes of identifying a coherent subcategory of goods and services capable of being viewed independently is their purpose and intended use (for example, *Ferrari SpA v DU*, Joined Cases C-720/18 and C-721/18).

The opponent's first mark

45. In respect of class 29, the opponent claims genuine use of this mark in respect of *cooked vegetables in the form of crisps and high-protein content crisps; snack foods containing protein; crisps; high-protein content crisps; vegetable crisps; high-protein content vegetable crisps; crisps made from whey protein; potato snacks; high-protein content potato snacks; snack foods in flaked form being high-protein content.*

46. To my mind, there is no evidence of the opponent providing any potato- or vegetable-based food products. Although I consider that genuine use has been made in respect of the opponent's protein chips, none of the evidence indicates that they are made from potatoes or vegetables. In fact, Mr Coulson says that these are primarily made from soya flour. As such, I find that the opponent may not rely upon *cooked vegetables in the form of crisps and high-protein content crisps; vegetable crisps; high-protein content vegetable crisps; potato snacks; high-protein content potato snacks*.

47. For the same reasons, I find that the opponent may not rely upon *crisps made from whey protein*. Whilst the protein chips appear to be high-protein crisps, they appear to be made from soya flour, rather than whey protein. No other goods appear to have been offered under the opponent's mark which would fit this description.

48. Although *crisps* is a broader term than those considered above, and the opponent's protein chips seem to be *high-protein content crisps*, the crisps in this class are limited to those which are made from potatoes and other vegetables. Given that Mr Coulson says that the evidenced goods are primarily made from soya flour, and there being no other evidence of crisps being offered under the opponent's marks, I find that the opponent may not rely upon these terms either.

49. *Snack foods containing protein* is a fairly broad term. The evidence shows that, broadly speaking, the opponent provides high-protein snack foods. However, none of the goods for which there has been genuine use fall within this class. The opponent's easy bars and protein breaks (which appear to be high-protein snack bars, akin to chocolate bars), protein wafers and protein chips are all proper to class 30. As the opponent has not shown use in respect of any snack foods which would fall within class 29, this term may not be relied upon.

50. I have no submissions as to what goods are covered by the term *snack foods in flaked form being high-protein content*. In this class, they could be flakes of vegetables, fruits or meat, for instance. There is no evidence of any such goods being provided in connection with the opponent's marks. The opponent has not identified any parts of its evidence which feature any goods which could be covered by this term. In light of all this, I find that the opponent may not rely upon this term.

51. As for class 30, the opponent claims genuine use in respect of *preparations made from cereals; snack foods containing protein; cereal-based snacks; high-protein content cereal snacks; high-protein content cereal bars and cereal preparations; energy bars; high-protein content energy bars; high-protein content biscuits; wholewheat crisps; crisps made of cereals; rice crisps; snack food products made from soya flour; snack foods in flaked form being high-protein content.*

52. The opponent has demonstrated genuine use in respect of its easy bars, protein wafers, protein chips and protein breaks. Respectively, these are described in the evidence as chocolate caramel and caramel cookie flavoured protein bars; chocolate-covered, filled wafer bars; crisps made from soya flour; and chocolate-covered wafer bars. These products are all marketed as being high in protein. In my view, such goods would be fairly described by the average consumer as *snack foods containing protein* and the combination of these different snack products is sufficient for the purposes of reliance on this term.

53. It is my understanding that cereals include crops grown for their edible grains, such as wheat rice and oats. Mr Coulson says that the protein chips are made from soya flour. There is no evidence of any other crisps being provided under the opponent's marks which are cereal based. Accordingly, it is my view that the opponent may not rely upon *wholewheat crisps; crisps made of cereals; rice crisps.*

54. There is also no evidence of the opponent providing what would be described by the average consumer as energy bars or biscuits. As such, the opponent may not rely upon *energy bars; high-protein content energy bars; high-protein content biscuits.*

55. The only product shown in the evidence to be made from soya flour is the opponent's protein chips. In my view, this is not sufficient for the purposes of reliance on the opponent's broad term *snack food products made from soya flour.* The latter would include many other soya-based snack foods which there is no evidence of the opponent providing. I find that the average consumer would fairly describe these goods as *crisps made from soya flour.*

56. In respect of *preparations made from cereals; cereal-based snacks; high-protein content cereal snacks; high-protein content cereal bars and cereal preparations*, it is firstly worth highlighting that soya is not a cereal, meaning that the opponent's protein chips do not fall within any of these terms. Moreover, the opponent's easy bars and protein breaks appear to be more akin to chocolate bars (albeit with lower sugar and more protein); there is no clear evidence that these goods contain cereals or anything upon which to base a finding that they would be fairly described as cereal snacks or cereal bars. As for the protein wafers, there is nothing in the evidence which would enable me to ascertain with any degree of certainty that these are made from cereals. In addition, these goods do not present as what would fairly be described as a cereal bar (typically being a bar-shaped snack made by compressing grains, nuts, seeds and the like, and held together by, for instance, a syrup or honey). The only product offered under the opponent's marks which is likely to be made from cereal is its Proteinios breakfast cereal. However, whilst these goods appeared on the website, in social media posts and on the FITCON flyer, there is no evidence that any such goods were actually sold during the relevant period. I am not satisfied that the evidence for the breakfast cereal is sufficiently solid to conclude that there has been genuine use in respect of them, such that the opponent could rely upon any of the aforementioned cereal-based terms. Even if I am wrong in my interpretation of the goods shown in evidence and whether they are made from cereals, I consider that they are adequately covered by the term *snack foods containing protein*.

57. Again, I have no submissions as to what goods are covered by the term *snack foods in flaked form being high-protein content*. In this class, it is possible that they would include flakes of cereals (likely with an added source of protein). I am unable to find any instances in the evidence of the opponent providing any goods in flaked form. Even the breakfast cereal does not appear to be. The opponent may not rely upon this term.

The opponent's second mark

58. In relation to class 29, the opponent claims genuine use of this mark in connection with *cooked vegetables in the form of crisps and high-protein content crisps; snack foods in the nature of crisps and containing soya protein and/or whey protein; crisps;*

*high-protein content crisps; vegetable crisps; high-protein content vegetable crisps; crisps made from whey protein; potato snacks; high-protein content potato snacks; snacks foods in flaked form in the nature of crisps and containing soya protein and/or whey protein.*¹⁵

59. I have already considered *cooked vegetables in the form of crisps and high-protein content crisps; crisps; high-protein content crisps; vegetable crisps; high-protein content vegetable crisps; crisps made from whey protein; potato snacks; high-protein content potato snacks* in the context of the opponent's first mark. My previous comments apply equally here. For the same reasons, none of these goods may be relied upon by the opponent.

60. Turning to *snack foods in the nature of crisps and containing soya protein and/or whey protein; snacks foods in flaked form in the nature of crisps and containing soya protein and/or whey protein*, whilst the opponent has shown use in respect of its protein chips, the crisps in class 29 are limited to those made from potatoes or other vegetables. Mr Coulson explains that this product is made from soya flour, not that they merely contain soya protein. As such, the opponent may not rely upon this term.

61. Turning to class 30, the opponent claims that the mark has been put to genuine use in respect of *snack foods containing protein; cereal-based snacks; high-protein content cereal snacks; high-protein content cereal bars and cereal preparations; energy bars; high-protein content energy bars; high-protein content biscuits; wholewheat crisps; crisps made of cereals; rice crisps; snack food products made from soya flour; snack foods in flaked form being high-protein content.*¹⁶

62. I have already considered all these terms in the context of the opponent's first mark. For the same reasons as given above, I find that the opponent may rely upon *snack foods containing protein; crisps made from soya flour.*

¹⁵ In addition, the opponent originally made a statement of use in respect of *foodstuffs in Class 29*. However, reliance on this term was withdrawn within Mr Bailey' skeleton argument.

¹⁶ A statement of use was also originally made for *foodstuffs in Class 30; preparations made from cereals*, but reliance on these terms was withdrawn within Mr Bailey' skeleton argument.

Conclusion on fair specifications

63. In light of all the above, I find that *snack foods containing protein; crisps made from soya flour* (class 30) represents a fair specification for both of the opponent's marks.

Section 5(2)(b)

Legislation and case law

64. Sections 5(2)(b) and 5A of the Act state as follows:

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

[...]

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

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

“5A Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only.”

65. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor* [2025] UKSC 25:

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

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

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

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

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

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

Comparison of goods and services

66. In *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, the CJEU stated, at paragraph 23, that:

“In assessing the similarity of the goods or services concerned, [...] all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.”

67. In *British Sugar Plc v James Robertson & Sons Limited* [1996] RPC 281, the relevant factors identified by Jacob J (as he then was) for assessing similarity also included the users of the goods and services and the trade channels through which they reach the market.

68. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*, Case T-325/06, the General Court (“GC”) stated that ‘complementary’ means:

“[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers

may think that the responsibility for those goods lies with the same undertaking.”

69. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in circumstances where the nature and purpose of the respective goods and services are very different. The purpose of examining whether there is a complementary relationship between goods and services is to assess whether the relevant public are liable to believe that responsibility for them lies with the same (or an economically connected) undertaking.

70. In *Gérard Meric v OHIM*, Case T- 133/05, the GC stated that:

“29. [...] goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark.”

71. Before proceeding with the comparison, I note that Mr Turton has provided copies of previous decisions to support the opponent’s claim that the parties’ goods and services are identical or similar (under nos. BL O/1132/22, BL O/0945/23, BL O/962/22 and BL O/514/19).¹⁷ Whilst I note the Hearing Officers’ findings in those decisions, particularly where goods in classes 5, 29, 30 and 32 are concerned, it is well established that previous decisions are not binding on the Registrar. I will proceed to conduct my own assessment of the goods and services, in accordance with the authorities outlined above.

72. Before doing so, I also note that Mr Turton has provided other evidence going to the goods and services comparison. Firstly, he provides an article from *BBC News* (17

¹⁷ Exhibits SJT1-SJT4

February 2022).¹⁸ At the outset, the writer reports that “manufacturers are adding protein to an ever-growing list of products”, including “snack bars, shakes, bagels, coffee and even bottled water”. However, the remainder of the article discusses protein supplements, and the pros and cons of a high-protein diet, in a general sense. It contains no details backing up that initial claim. I do not consider this to be compelling evidence that it is typical for goods such as those referenced to be enriched with protein.

73. Moreover, Mr Turton provides the following website evidence:

(i) A printout from Jimmy’s, showing an iced coffee created in conjunction with MyProtein.¹⁹

(ii) Printouts showing high-protein cookies, protein breadsticks, collagen hot chocolate powder and protein blondies offered for sale by Bulk; protein puddings and lactose-free cheese for sale by Asda; protein yoghurts for sale by Ocado; MyProtein ice cream for sale by Iceland; high-protein cereal for sale by Holland & Barratt; balanced meal pots for sale by Huel; Profusion protein bread offered for sale on Amazon (UK); and high-protein pasta pots for sale by GSN.²⁰

(iii) Printouts from Huel, showing ready-to-drink meal replacement drinks, nutrition bars, and high-protein meal replacement powders offered for sale.²¹

(iv) Further printouts from Bulk, showing protein powders, protein bars, vitamins, minerals and other sports nutrition products (such as electrolytes, amino acids and greens powders) offered for sale.²²

¹⁸ Exhibit SJT5

¹⁹ Exhibit SJT6

²⁰ Exhibit SJT6

²¹ Exhibit SJT7

²² Exhibit SJT8

(v) Printouts from MyProtein, showing protein powder, healthy snacks (such as protein crisps, natural peanut butter and protein bars) and vitamins offered for sale.²³

74. Firstly, none of this evidence is dated. As such, it cannot be relied upon as showing the position at the relevant date. There are other, more specific issues with the evidence. For instance, nothing in the printout at (i) actually establishes that the iced coffee is protein enriched, as claimed by Mr Turton. It simply shows that MyProtein and Jimmy's have co-branded an iced coffee product. Further, whilst the printouts at (v) show vitamins as well as protein products, the vitamins are actually offered under a different mark (MyVitamins). The high point of the evidence is that it appears to indicate that certain undertakings offer an extremely wide range of health and nutrition products, and that it is possible for certain foodstuffs to be formulated with a higher protein content than is usual. It falls short, in my view, of establishing that it is typical in trade for the featured goods to reach the market through shared trade channels or for them to be typically sold by the same undertakings.

Class 5

Dietetic foods [...]

75. Although the above goods are formulated for specific dietary requirements, there is an overlap in nature and method of use with the opponent's *snack foods containing protein* insofar as they are both food products, which may be in ready-to-eat form. There is also a broad overlap in intended purpose to the extent that they may both support the intake of particular nutrients or be consumed between meals. There is also an overlap in user. The respective goods may both reach the market through shared trade channels, such as in supermarkets and health stores, where they may be located in the same or similar sections. It is possible that they may also be produced by the same undertakings. For instance, an undertaking offering dietetic foods may also produce a range of health and diet-focused food products, including snack foods containing protein. Although the respective goods differ in their core uses, there is a

²³ Exhibit SJT9

limited degree of competition between them. This is because a consumer seeking protein supplementation could do so through specially formulated foods or the opponent's snack foods. The respective goods are not complementary. This is on the basis that they are neither important nor indispensable to one another. In light of all this, I find that there is between a low and medium degree of similarity between the respective goods.

Dietetic [...] beverages

76. The nature and method of use of the above goods differ from those of the opponent's *snack foods containing protein*, in that they are liquid products formulated for specific dietary purposes, rather than solid snack food products. The core purpose of the respective goods is not the same; the holder's goods are to support specialised diets, regulating or supplementing the intake of certain nutrients, whereas the opponent's goods are predominantly for alleviating hunger between meals. However, there is a broad overlap in purpose insofar as the opponent's goods may also be eaten to supplement one's protein intake. The respective goods may reach the market through overlapping trade channels, whereby they may be located in similar sections of supermarkets or health stores. It is also possible that some undertakings offering dietetic beverages may offer a range of health and diet-focused food products, including protein-focused snack foods. Users of the respective goods overlap. The holder's goods will not be consumed as snacks and, therefore, the respective goods are not directly interchangeable. However, they are competitive to the limited extent that a consumer seeking to supplement their protein intake may choose between a convenient protein snack or a protein beverage. The respective goods are not important or indispensable to one another and, as such, are not complementary. Overall, I find that there is a low degree of similarity between the respective goods.

Nutraceuticals for use as a dietary supplement, in particular for healthy ageing, lifespan extension, longevity; dietary and nutritional supplements, in particular for healthy ageing, lifespan extension, longevity; food supplements in particular for healthy ageing, lifespan extension, longevity; dietary supplements; dietary supplements for human beings [...]; dietary supplements for human consumption; dietary supplements in the form of capsules, pills, powder; dietary and nutritional

*supplements; dietary and nutritional supplements for endurance sports; dietary food supplements; food supplements; health food supplements; natural dietary supplements; nutraceuticals for use as a dietary supplement; nutritional supplements; protein dietary supplements; nutritional and dietary supplements, in particular for improving, reducing and preventing aging-related symptoms, improving general health, maintaining optimal health, improving health, reducing frailty, improving mobility, improving healthy joints, improving healthy cognition, improving heart health, improving bone health, improving musculoskeletal health, improving skin health, reducing wrinkles, reducing aging-related decline of skin function and health, improving gastro-intestinal health, improving and maintain vascular health, improving eye health; food supplements for non-medical use based on ingredients of animal origin; food supplements for non-medical use based on fruits; food supplements for non-medical use based on vegetables; food supplements for non-medical use based on dairy products; food supplements for non-medical use based on eggs; food supplements for non-medical use based on seafood; food supplements for non-medical use based on oils; food supplements for non-medical use based on ingredients of plant origin and plants and plant extracts; food supplements for non-medical use based on ingredients of plant origin*²⁴

77. The above goods broadly consist of food supplements. They are typically offered in the form of powders, capsules or tablets. Therefore, they clearly have a different nature to the opponent's *snack foods containing protein*. The respective goods also have a different method of use; the opponent's goods are eaten directly as food products, whereas the holder's goods are typically added to other foodstuffs or taken in measured quantities. The respective goods do not have the same core purpose. This is because the opponent's goods are eaten as a food product to alleviate hunger between meals, whereas the holder's goods supplement the diet. However, all the holder's goods are, or could be, for supplementing one's protein intake. In this regard, there is a broad overlap in purpose to the extent that the respective goods both provide protein to the consumer. Users of the respective goods overlap. The respective goods

²⁴ I acknowledge that some of these terms give indications as to the intended uses of the supplements, such as, for example, [...] *in particular for healthy ageing, lifespan extension, longevity*. However, none of them is limited to being only for those uses. This is because the words "in particular" do not limit the scope of protection. Rather, they merely introduce non-exhaustive examples. See, for example, *Häfele GmbH & Co. KG v OHIM*, Case T-336/09.

are likely to reach the market through overlapping trade channels, such as supermarkets and health stores. Whilst I acknowledge that it will not always be the case, the respective goods may be located in the same sections of those outlets (such as in sports nutrition sections, for example). This is particularly the case considering the holder's goods have, or could have, a protein focus. In addition, it is possible that undertakings offering protein food supplements could also offer protein-rich snack foods as part of their product range. Since the holder's goods will not be consumed to satiate hunger, the respective goods are not directly interchangeable. However, given the broad overlap in purpose, there is a limited degree of competition between them. For instance, a consumer seeking to supplement their protein intake may choose between a convenient protein snack or a protein supplement. The respective goods are not important or indispensable to one another and, as such, they are not complementary. Overall, I find that there is a low degree of similarity between them.

Dietary supplement for eliminating toxins from the intestinal tract; dietary supplements for controlling cholesterol; dietary supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary supplements in the nature of weight loss powders; dietary and nutritional supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary and nutritional supplements used for weight loss; food supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; enzyme dietary supplements; enzyme food supplements; ketogenic dietary and nutritional supplements; ketogenic dietary and nutritional supplements used for weight loss; mineral food supplements; natural dietary supplements for the treatment of inflammations, oxidative stress, ageing, cancer, heart disease, arthritis, overweight, obesity and other age-related diseases; nutraceuticals for use as a dietary supplement for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; vitamin preparations; mineral food supplements; vitamin and mineral supplements; vitamin supplements

78. The above goods are also supplements. However, they either have different, specific uses to those considered above or at least do not appear to include goods

which are taken to supplement one's protein intake. Again, the nature and method of use of these goods and the opponent's goods differ. Moreover, the same overlap does not exist in terms of intended purpose. The evidence does not establish that it is typical in trade for these goods to reach the market through shared trade channels or by the same undertakings. Even where they are all sold through the same retail outlets, they are likely to be found in different sections of the same. Undertakings offering both sets of goods are likely to be confined to large undertakings who offer an extremely wide range of health-related goods. Such an overlap is far too general to conclude that the respective goods share trade channels. Given that the respective goods have different purposes, they are not in competition. Neither are they complementary, as they are not important or indispensable to one another. The respective goods may have overlapping users. However, that is not sufficient, in and of itself, to engage any meaningful similarity between the goods, overall. Taking all of the above into account, I find that the respective goods are dissimilar.

Health foods adapted for medical use, namely, dietetic foods in the nature of pasta, crackers, food bars

79. The above goods and the opponent's goods are both food products which will be consumed by mouth; to that extent, there are broad overlaps in nature, method of use and purpose. However, there is a significant distinction in that the holder's goods are formulated for medical or therapeutic uses; they will be eaten under medical guidance to manage health conditions or to meet specialised nutrition requirements, typically within a controlled or structured diet. Conversely, the opponent's goods are ordinary snack foods, albeit that they contain protein. To my mind, the holder's goods are likely to be sold through pharmacies, specialised health retailers, or within designated sections of larger retail outlets, whereas the opponent's goods ordinarily reach the market through more general retailers and health stores. Even in circumstances where they are sold in the same outlets, it is my view that they are unlikely to be found in the same sections or aisles. It is also the case that producers of ordinary snack foods are unlikely to offer specially adapted medical foods, or vice versa. Although the respective goods are both food products, they are not interchangeable. They fulfil different roles and a consumer is highly unlikely to select a protein snack over medically adapted foods, or vice versa. Accordingly, there is no competition between them. Since the

respective goods are not important or indispensable to one another, they are not complementary. Users may overlap at a very broad level, though the holder's goods are directed at individuals with specific medical or dietary needs, potentially under the guidance of a healthcare professional. Considering all of the above, I am of the view that the aforementioned overlaps are too superficial to result in any meaningful similarity between the respective goods, overall. I find that they are dissimilar.

Dietary supplements for [...] animals; dietetic foods adapted for veterinary use

80. These goods are designed specifically for animal consumption and have a different nature to the opponent's goods, which consist of ready-to-eat snack food products for humans. Even the holder's *dietetic foods adapted for veterinary use* are likely to differ in composition and ingredients, albeit that they are technically food products. The holder's goods are for feeding animals and meeting the particular needs of those animals, whilst the opponent's goods are for satiating (human) hunger between meals. The purpose of the respective goods, therefore, differs. The method of use of the respective goods is also distinct; the holder's goods will be fed to animals, or added to their food, and the opponent's goods will be eaten by humans. In addition, the respective goods do not share trade channels. The holder's goods are typically acquired through pet stores, veterinary professionals or specialist retail outlets, whereas the opponent's goods are commonly purchased through supermarkets and convenience stores. Even where the holder's goods are sold through the same outlets, they will not be located in the same sections as the opponent's goods. Clearly, there is no competition between the respective goods. Neither are they complementary; they are not important or indispensable to one another. Users may overlap to the extent that animal-owning members of the general public may purchase both. However, this is not sufficient, alone, for establishing any meaningful similarity between the respective goods, overall. They are dissimilar.

Pharmaceutical preparations for the treatment of skin disorders and skin conditions, kidney disease, heart disease, urology disorders, circulatory disorders, memory loss, fatigue, eye strain, eye disease, hearing loss, hair loss, sexual dysfunction

81. The above goods are pharmaceuticals, which typically come in the form of tablets, capsules, powders or creams. The nature of such goods is clearly different from that of the opponent's goods. The holder's goods are usually administered in controlled dosages, sometimes under medical advice or direction, whilst the opponent's goods are eaten as food products. As such, the respective goods are used in different contexts and have differing methods of use. The purpose of the holder's goods is to treat certain medical conditions. This is plainly different from the purpose of the opponent's goods, namely, satiating hunger between meals. Users may overlap insofar as both goods may ultimately be used by the general public. However, the holder's goods may also be purchased by medical professionals. There is no evidence that the respective goods typically reach the market through shared trade channels. The holder's goods are typically distributed through pharmacies or healthcare providers, such as general practitioners, whereas the opponent's goods are sold through retail establishments. Even in circumstances where the holder's goods are also sold in retail outlets, they are usually located in different sections of the same. There is no competition between the respective goods. Moreover, they are not complementary, since they are neither important nor indispensable to one another. Notwithstanding any broad overlap in user, I find that the respective goods are dissimilar.

Class 29

Animal or plant-based protein preparations for human consumption for non-medical purposes

82. In my view, the above goods refer to protein-based, processed powders and concentrates. They differ in nature to the opponent's *snack foods containing protein*, which are solid, ready-to-eat snack foods. Likewise, the method of use of the respective goods is generally likely to differ; the holder's goods are likely to require incorporation into other foodstuffs, whereas the opponent's goods can be consumed directly as finished products. That said, both goods are intended to provide protein to the consumer, albeit that the core purpose of the opponent's goods is to satiate hunger. Users are likely to overlap. The respective goods may both be sold by the same retailers and may be located in close proximity to one another, in nutrition or

healthy snack sections. There is a degree of competition between them insofar as a consumer could purchase one over the other to supplement their protein intake. However, I acknowledge that the goods are not direct substitutes for one another when considering the more general purpose of the opponent's goods as a snack food. I do not consider the respective goods to be complementary in the sense outlined in the authorities; they are not important or indispensable to one another. All in all, I find that there is a medium degree of similarity between the respective goods.

Dairy based food and beverages fortified with nutrients and/or dietary ingredients; vegetable-based food and food preparations fortified with nutrients and/or dietary ingredients; meat-based food and food preparations fortified with nutrients and/or dietary ingredients; fish-based food and food preparations fortified with nutrients and/or dietary ingredients; fruit-based dietetic foods for non-medical use; meat-based dietetic foods for non-medical use; vegetable-based dietetic foods for non-medical use; egg-based dietetic foods for non-medical use; dairy-based dietetic foods for non-medical use; seafood based dietetic foods for non-medical use; oil-based dietetic foods for non-medical use, plant-based dietetic foods for non-medical use

83. The above terms describe a range of fortified foodstuffs made from fruit, meat, vegetables, eggs, dairy, seafood, oil and plants. They may take a variety of forms, though there will be a broad overlap in nature and method of use with the opponent's *snack foods containing protein* where they consist of solid foodstuffs which can be eaten without further preparation. The respective goods overlap in purpose to the extent that they may both supplement nutritional intake, particularly where the holder's goods have a focus on protein. Users will overlap. The respective goods are likely to reach the market through shared trade channels, albeit that they may not always be located in the same sections of retail outlets. They may also be produced by the same undertakings. For instance, an undertaking offering a range of nutritionally enhanced foods may also offer protein-focused snack foods. There is a degree of competition between the respective goods, particularly where the holder's goods are formulated to increase one's protein intake. The respective goods are not complementary; they are not important or indispensable to one another. In light of all the above, I find that there is between a low and medium degree of similarity between the respective goods.

Desserts made with milk and desserts made with cream; yogurts; [...] other milk products

84. Although they may differ in precise composition, the above goods and the opponent's *snack foods containing protein* overlap in nature to the extent that they both are (or include) processed, edible foodstuffs. The respective goods also overlap in method of use in that both can be consumed without further preparation. In addition, there is a general overlap in intended purpose insofar as the respective goods may both be eaten as a convenient snack. However, the holder's goods may be more indulgent and eaten after meals or as an occasional treat. The respective goods also share users. Although the respective goods are both sold in the same retail environments, such as supermarkets, they are typically located in different sections thereof. That said, it is possible that the holder's yoghurts (particularly those with additional protein), may be produced by the same undertakings as the opponent's protein-focused snack foods. There is a degree of competition between the respective goods in that one could be selected over the other by consumer seeking a food product for quick consumption, though I accept that the opponent's goods are unlikely to be purchased instead of a dessert for post-meal consumption. The respective goods are not complementary; they are not important or indispensable to one another. Balancing all the above, I find that there is between a low and medium degree of similarity between the respective goods.

Milk, cream, butter, cheese [...]; milk substitutes; soya milk (milk substitutes)

85. The above goods consist of dairy products and their non-dairy alternatives. Although at least some are edible foodstuffs, they differ in nature when compared with the opponent's goods. Whilst ultimately, the respective goods will all be eaten, they also differ in their methods of use and intended purposes. The holder's goods are typically used for food or beverage preparation, whereas the opponent's goods are ready-to-eat snack products. Users are likely to overlap, though only at a general level. The respective goods are both sold in retail environments, such as supermarkets and convenience stores, though are likely to be located in different sections of the same. The respective goods are not in competition. For instance, a consumer is unlikely to select a snack product over milk, butter or cheese, or vice versa. Neither are the

respective goods complementary. They are generally not important or indispensable to one another. Even if the opponent's snack foods contained dairy ingredients, consumers are unlikely to believe that the same undertakings are responsible for both. In light of all this, I find that the respective goods are dissimilar.

Beverages made with milk

86. These goods and the opponent's goods clearly differ in nature and method of use; the holder's goods are liquid beverages which will be drunk, whereas the opponent's goods are solid snack food products which will be eaten. The core purposes of the respective goods are different; the holder's goods are for hydration and refreshment, whilst the opponent's goods are to satiate hunger and for snacking between meals. Users of the respective goods overlap at a general level. The respective goods are both sold in supermarkets and other retail establishments, though are not typically found in close proximity. There is no real competition between them; a consumer is unlikely to purchase a snack over a milk-based beverage, or vice versa, even though milk is technically a source of protein. Moreover, they are not important or indispensable to one another and, as such, are not complementary. Overall, I find that there is no material similarity between the respective goods. They are dissimilar.

Soups, concentrated soups, thick soups, bouillon cubes, stock, broths

87. Whilst these goods and the opponent's goods are both edible, they have different natures, methods of use and intended purposes. The holder's goods are liquid meal products or cooking bases, whereas the opponent's goods are finished, solid snack foods. Users of the respective goods are likely to overlap. However, this is based upon a very wide consumer base, i.e. the general public at large. The respective goods can all be purchased in the same retail environments, such as in supermarkets, but are likely to be located in different sections of those outlets. Since consumers are highly unlikely to substitute a soup or stock for a snack product, or vice versa, the respective goods are not in competition. Neither are they complementary; they are not important or indispensable to one another, and consumers are unlikely to believe that responsibility for both lies with the same undertakings. In light of all this, I find that the respective goods are dissimilar.

Vegetables and potatoes (preserved, frozen, dried or cooked), fruits (preserved, frozen, dried or cooked), mushrooms (preserved, dried or cooked), meat, poultry, game, fish and seafood products, all these products in the form of extracts, soups, jellies, spreads, canned products, cooked, deep-frozen or dehydrated dishes

88. These goods comprise a broad range of foodstuffs in a variety of different forms. Whilst they are all edible, they differ in nature when compared with the opponent's goods because they consist of ingredients, prepared meal components or complete meals, whereas the opponent's goods are ready-to-eat snack foods. In this connection, the core purpose of the respective goods also differs; whilst both sets of goods may ultimately satiate hunger, the holder's goods are predominantly intended for meal preparation or for use as part of a meal, whereas the opponent's goods are for convenient consumption between meals. The same distinction applies to method of use. The opponent's will be consumed directly, without further preparation. Conversely, the holder's goods are likely to require further preparation or cooking, and some will be specifically used as ingredients within cooking processes. Users will overlap, though only at a general level. The respective goods both reach the market through retail outlets, such as supermarkets. However, they are unlikely to be found in the same sections of the same. Notwithstanding any broad overlap in purpose, I do not consider the goods to be in competition. For example, a consumer is unlikely to select preserved vegetables over a protein snack, or vice versa. Neither are the goods complementary; they are not important or indispensable to one another. Even if the opponent's goods contain dried fruits, for instance, as an ingredient, consumers are unlikely to believe that responsibility for the respective goods lies with the same undertakings. Taking all of this into account, I find that the respective goods are dissimilar.

Class 30

Plant-based dietic foods for non-medical use; plant extract- dietic foods for non-medical use

89. It is my understanding that 'dietic' foods are typically lower in sugar, calories or are tailored for some other dietary purpose. To my mind, the holder's goods are

constructed in a sufficiently broad way such that they could incorporate *snack foods containing protein*. This renders the respective goods identical in accordance with *Meric*. If that is not correct, the respective goods remain highly similar. This is because of the clear overlaps in nature, intended purpose, method of use, users and trade channels, as well as the competitive relationship between them.

Cereal bars, ready-to-eat cereals; cereal preparations

90. The nature, method of use and purpose of these goods and the opponent's *snack foods containing protein* overlap in that they are both (or both could be) solid, edible, food products which are consumed as snacks between meals or for convenience. They also share users. The respective goods are likely to reach the market through the same trade channels and be located in the same sections of retail outlets, such as in snack aisles. It is my view that there is a degree of competition between the respective goods; although their ingredients may differ, and the holder's goods may not have the same protein focus, a consumer could select a cereal bar over a protein bar, or vice versa, when seeking to purchase a snack. The respective goods are not complementary, since they are not important or indispensable to one another. In light of the above, I find that there is between a medium and high degree of similarity between the respective goods.

Bakery goods, pastries; biscuits, cakes, cookies, wafers

91. There is an overlap in nature between the above goods and the opponent's *snack foods containing protein* in that both are processed, ready-to-eat food products. There is also an overlap in method of use and intended purpose since both are likely to be consumed, without further preparation, for convenience or to satiate hunger between meals. The respective goods share users. Further, the respective goods reach the market through shared trade channels; they are all typically sold in retail outlets, such as supermarkets and convenience stores, where they are likely to be found in the same sections or in close proximity. They may, in some circumstances, be produced by the same undertakings. Although the holder's goods may not have the exact same composition as the opponent's goods, or have any particular focus on protein, there is a degree of competition between them; a consumer seeking a convenient snack may

choose one over the other. The respective goods are not complementary; they are not important or indispensable to one another. In light of all this, I find that there is between a medium and high degree of similarity between the respective goods.

Breakfast cereals, muesli, corn flakes

92. The above goods and the opponent's *snack foods containing protein* overlap in nature, method of use and purpose insofar as they are edible foodstuffs which can be quickly consumed, potentially as a snack, to deliver energy to the consumer. They may also contain similar ingredients. However, I appreciate that they differ in that the holder's goods are typically consumed as a meal and require the addition of milk, whereas the opponent's goods are typically eaten between meals as purchased. Users of the goods overlap. Although breakfast cereals and the like may be consumed as a snack, I do not consider the respective goods to be in direct competition. Neither are they complementary; they are not important or indispensable to one another. In my experience, it is not uncommon for the respective goods to reach the market through shared trade channels. Particularly where the holder's goods are fortified with additional nutrients or dietary ingredients, they may also be produced by the same undertakings. For example, the producer of protein bars may also offer breakfast cereals supplemented with protein. Overall, I find that there is a medium degree of similarity between the respective goods.

Desserts (included in this class), puddings

93. The above goods and the opponent's *snack foods containing protein* overlap in nature, method of use and intended purpose to the extent that they are all ready-to-eat food products which may be eaten as a convenient snack. However, the holder's goods tend to be more indulgent and eaten after meals or as an occasional treat. The respective goods also share users. Although the respective goods are both sold in the same retail environments, such as supermarkets, they are typically located in different sections thereof. There is a degree of competition between the respective goods in that one could be selected over the other by consumer seeking a food product for quick consumption, though I accept that the opponent's goods are unlikely to be purchased instead of a dessert or pudding for post-meal consumption. The respective

goods are not complementary; they are not important or indispensable to one another. Balancing the points of overlap against the differences, I find that there is between a low and medium degree of similarity between the respective goods.

Chocolate, chocolate products; chocolate-based preparations [...]; confectionery; sweetmeats; caramels

94. The above goods describe (or include) sugar- or cocoa-based, processed food products which are typically prepared for immediate consumption. Although they may differ in precise formulation or nutritional content, there is an overlap in nature, method of use and purpose with the opponent's *snack foods containing protein*. They can all be consumed as snacks, though I acknowledge that the opponent's goods may have more of a focus on satiating hunger than the holder's goods, which are typically consumed for pleasure. Moreover, the holder's goods have no protein focus. The respective goods have overlapping users. In addition, they typically reach the market through the same trade channels, such as supermarkets or convenience stores, where they may be located in the same sections. For instance, protein bars may be positioned alongside chocolate bars and the like in snack sections or point-of-sale displays. There is a degree of competition between the respective goods. Although the opponent's goods have a protein focus and the holder's goods are more for indulgence, a consumer looking for a snack between meals may select, for example, a protein bar over a chocolate bar, or vice versa. As the respective goods are not important or indispensable to one another, they are not complementary. Taking all of the above into account, I find that there is between a low and medium degree of similarity between the respective goods.

Coffee, coffee-based preparations and beverages; iced coffee; artificial coffee, artificial coffee-based preparations and beverages; tea, tea-based preparations and beverages; iced tea; malt-based preparations for human consumption; cocoa and cocoa-based preparations and beverages; chocolate-based [...] beverages

95. The above goods and the opponent's goods differ in nature in that the former are liquid beverages, or preparations for making beverages, and the latter solid snack foods. They also differ in method of use; the holder's will be drunk as beverages, or

made into a beverage, whereas the opponent's goods will be eaten. Whilst they could all be consumed for their taste, the core purpose of the respective goods is different; the holder's goods are for quenching thirst or creating a beverage, whereas the opponent's goods are for satiating hunger. There is no evidence that it is typical for undertakings who offer the holder's goods to also offer protein snack foods. Whilst they may all reach the market through the same retail outlets, they are likely to be located in very different sections of the same. There is no competition between the respective goods; a consumer would not purchase, for example, a protein bar over a coffee, or vice versa. Neither are the respective goods complementary. This is because they are not important or indispensable to one another. Users overlap in that both may be purchased by members of the public. It is my view that the aforementioned overlaps in method of use, purpose and user are not sufficient, individually or in combination, to engage any meaningful similarity between the respective goods. They are too general. Taking all the above into account, I find that the respective goods are dissimilar.

Coffee extracts; artificial coffee extracts; tea extracts

96. It is my understanding that these goods refer to concentrated extracts which are added to other food to impart flavour. They differ in nature when compared with the opponent's goods in that they are liquid or powdered additives, rather than solid snack foods. The method of use and purpose also differ insofar as the holder's goods will be added to other foodstuffs to impart flavour, whereas the opponent's goods will be consumed by mouth to satiate hunger. There is no evidence that it is typical for the respective goods to be offered by the same undertakings. Although they may all reach the market through large retail stores, they are likely to be located in distinct sections of those outlets. The respective goods are not in competition. Moreover, they are not important or indispensable to one another. Even if the opponent's snack foods were flavoured with the holder's goods (and, therefore, important in that regard), consumers are unlikely to believe that responsibility for them lies with the same undertakings. As such, they are not complementary. Users may overlap in that members of the general public may purchase snack foods and extracts for home baking, for instance. However, that is a very high level of generality. Overall, I find that the respective goods are dissimilar.

Bread

97. The above goods and the opponent's goods are both edible foodstuffs which are consumed for the same ultimate purpose: satiating hunger. However, the respective goods differ in nature, method of use and core purpose, since bread is typically used as part of, or as an accompaniment to, a meal, whereas the opponent's snack foods are for quick consumption between meals. The respective goods also differ in form and ingredients. The respective goods may both reach the market through large retail establishments, such as supermarkets. However, they are likely to be found in different sections of those outlets, which also offer an extremely wide range of varying products. As such, the fact that both may be purchased in supermarkets does not establish that the respective goods share trade channels. Although both goods can be eaten when hungry, I do not consider them to be in direct competition; a consumer is not likely to purchase bread over, say, a protein bar, or vice versa. The respective goods are not complementary. This is because they are not important or indispensable to one another. Users may overlap. However, this is based upon a very large consumer base, i.e. the general public. Overall, I do not consider the broad overlaps previously outlined to be sufficient to engage any material similarity between the respective goods. I find that they are dissimilar.

Chewing gum

98. Although technically an edible food product, the above goods differ in nature, method of use and intended purpose when compared with the opponent's goods. They are chewable products consumed for their flavour or for their breath freshening properties and are not typically swallowed. Conversely, the opponent's goods are ready-to-eat snack foods which are eaten for satiating hunger. Users may overlap, though only at a general level. The respective goods are both sold in retail outlets, such as supermarkets and convenience stores, but are typically located in different sections of the same. The respective goods are not interchangeable, and it is unlikely that a consumer seeking a snack product would choose chewing gum instead, or vice versa. As such, they are not in competition. Neither are they complementary; they are not important or indispensable to one another. In my view, the respective goods are dissimilar.

Rice, pasta, noodles

99. Although the above goods and the opponent's goods are both edible foodstuffs, they differ in nature and method of use in that the former are staple meal components, whereas the latter are ready-to-eat snack foods. There is a general overlap in ultimate purpose to the extent that the respective goods will be eaten by the consumer to satiate hunger. However, the core use of the holder's goods is meal preparation. Users of the respective goods overlap. The respective goods may reach the market through overlapping trade channels, such as in supermarkets or other large retail establishments. However, they are typically located in different sections of those outlets. The respective goods are not in direct competition; for instance, a consumer is unlikely to purchase rice over a protein bar, or vice versa. They are also not complementary. This is because the respective goods are not important or indispensable to one another. In my view, the broad overlaps described above in terms of purpose and user are not sufficient to engage any meaningful similarity between the respective goods, overall. Notwithstanding these overlaps, I find that they are dissimilar.

Rice-based food; flour-based food; cereal-based food; cereal based food fortified with nutrients and/or dietary ingredients

100. The above terms describe foodstuffs made from cereals. Considering their core meanings, they would cover staple meal components (such as rice and pasta) and rice-, flour- or cereal-based ingredients, rather than all food products made from them. In this regard, there is a broad overlap in nature with the opponent's goods to the extent that they are both edible foodstuffs. However, the opponent's goods are ready-to-eat snack foods, whereas the holder's goods are staple meal components and ingredients. There is a broad overlap in method of use and ultimate purpose insofar as the respective goods are both consumed for satiating hunger. However, the opponent's goods are snack foods, typically eaten between meals, whereas the holder's goods are used when preparing a meal. Users of the respective goods overlap, though this is at a very general level. They are also likely to reach the market through the same retail outlets, such as supermarkets, but are typically located in different sections thereof. The respective goods are not in direct competition, since

they are not interchangeable. Moreover, whilst rice, flour or cereals could be an ingredient of the opponent's snack food products, the respective goods are not complementary. This is because consumers would not believe that responsibility for both lies with the same undertakings. I do not consider any of the broad overlaps described above to be sufficient, either alone or in combination, to engage any meaningful similarity between the respective goods. Overall, I find that they are dissimilar.

Ices, water ices, sorbets, frozen confectionery, frozen cakes, ice cream, frozen desserts, frozen yogurts

101. The above goods and the opponent's goods overlap in nature and method of use insofar as they are processed, edible foodstuffs. However, they differ in that the holder's goods are frozen, and some may require preparation before consumption (such as allowing them to thaw or soften). There is a general overlap in purpose since the respective goods may all be eaten between meals as a snack. However, the holder's goods tend to be eaten after meals or as an occasional treat, and their core purpose is for pleasure or refreshment. The respective goods have shared users, though this is based upon a very wide consumer base, i.e. the general public. Both sets of goods will be sold in the same retail outlets, such as supermarkets or convenience stores, but are typically located in different sections of the same. Notwithstanding the overlap in purpose, I do not consider there to be any direct or meaningful competition between the respective goods. A consumer seeking a snack containing protein is unlikely to purchase a sorbet or frozen dessert instead, or vice versa. As the respective goods are not important or indispensable to one another, they are not complementary. To my mind, the broad overlaps described above are not sufficient to engage any meaningful similarity between the respective goods. Overall, I find that they are dissimilar.

Honey and honey substitutes; sugar; natural sweeteners

102. The above goods and the opponent's goods differ in nature in that the former are commonly in liquid, powdered or granulated form, whereas the latter are ready-to-eat snack foods which are typically in the form of solid bars, bites or crisps. Moreover, the

respective goods differ in method of use and intended purpose. This is because the holder's goods are typically used to sweeten or flavour other foodstuffs, or used as an accompaniment to other foodstuffs, whilst the opponent's goods are ready-to-eat snack foods which are consumed for convenience. Users may overlap, though only at a very general level. I acknowledge that the respective goods are both sold in the same retail outlets, such as supermarkets. However, they are likely to be found in different sections of the same. The respective goods are not in competition; they are not substitutable. Neither are they complementary. Although honey or sugar may be used as ingredients in certain snack products, consumers are unlikely to believe that responsibility for them both lies with the same undertakings. Taking all of the above into account, I find that the respective goods are dissimilar.

Yeast

103. I understand yeast to be a rising agent, typically sold in powdered or granulated form, used as an ingredient in the preparation of foodstuffs. The nature, method of use and intended purpose of this good differs from the opponent's goods, in that the latter are ready-to-eat food products which are commonly sold in solid form. At a broad level, the respective goods may share overlapping users, though the holder's goods may also be purchased by professionals in the food industry. The respective goods may both be sold in large retail establishments, such as supermarkets. However, they are unlikely to be found in close proximity. The respective goods are not in competition. For example, a consumer looking to purchase yeast for the purposes of making baked goods will not purchase snack foods instead. Whilst it is possible that yeast may be used as an ingredient in some of the opponent's snack foods, the respective goods are not complementary. This is because consumers are unlikely to think that the same undertakings are responsible for both. Considering all the above, I find that the respective goods are dissimilar.

Class 32

Non-alcoholic beverages; isotonic beverages; energy drinks; whey beverages; non-alcoholic beverages (containing vitamins); protein-enriched sports beverages; beverages fortified with nutrients and/or micronutrients and/or macronutrients (not for

medical purpose); cereal based beverages fortified with nutrients and/or dietary ingredients

104. The above goods and the opponent's *snack foods containing protein* differ in nature and method of use because the former are liquid beverages and the latter solid snack foods. The purpose of the respective goods is also different for the most part; the holder's goods are predominantly for hydration, whereas the opponent's goods are for satiating hunger. However, there is an overlap in purpose to the extent that the holder's goods have (or include those which would have) clear nutritional purposes, as do the opponent's protein-focused snack foods. The respective goods share users. Moreover, they are likely to reach the market through overlapping trade channels; within retail outlets such as supermarkets, the respective goods may all be located in the same sports nutrition sections. It is also possible that undertakings who offer protein bars, for instance, will also offer protein-enriched or whey beverages. There is a limited degree of competition between the respective goods; a consumer seeking to supplement their protein intake may choose between a convenient protein snack or a protein beverage. The respective goods are not complementary; they are not important or indispensable to one another. All in all, I find that there is a low degree of similarity between the respective goods.

Non-alcoholic fruit juice beverages; beverages made with lactic ferments; soya-based beverages, other than milk substitutes; lactic fermented beverages; soya-based beverages; non-alcoholic malt beverages; malt-based beverages; vegetable juices

105. Again, the nature and method of use of these goods differs from the opponent's goods. Insofar as I understand it, the same overlap in purpose does not exist between these goods and the opponent's goods as there was with those considered above. Users may still overlap, though only at a general level. Whilst these goods may also reach the market through retail outlets such as supermarkets, they are not likely to be found in the same sections of the same as the opponent's goods. These goods are less likely to be located in sports nutrition sections along with protein-focused snack foods because it is less clear that they have any identifiable nutritional benefit. The respective goods are not in competition; a consumer is unlikely to select any of these beverages over the opponent's goods, or vice versa. Moreover, they are not

complementary; the respective goods are not important or indispensable to one another. In light of all the above, I find that the respective goods are dissimilar.

Non-alcoholic fruit extracts; extracts and essences and other preparations for making non-alcoholic beverages

106. The above goods are not beverages per se. Rather, they consist of liquid or concentrated extracts and the like which are diluted, added to other liquids or require some form of further processing to produce finished beverages. The opponent's goods, on the other hand, are ready-to-eat, solid snack foods which are consumed to satiate hunger. Therefore, the respective goods clearly differ in nature, method of use and intended purpose. There is an overlap in user insofar as members of the general public may purchase both, though the holder's goods may also be targeted at beverage producers. The respective goods may both be sold in the same retail environments, such as in supermarkets. However, that is not sufficient for concluding that they share trade channels; the respective goods are likely to be located in entirely different sections of those outlets. Given that the respective goods have entirely different purposes, they are not in competition. Neither are they complementary; they are not important or indispensable to one another. Taking all of the above into account, I find that the respective goods are dissimilar.

Class 42

Services for determining the age [of] a person or animal via biomarkers²⁵

107. The nature, method of use and intended purpose of these services are entirely different from those of the opponent's goods. There is no evidence that the respective goods and services are typically provided by the same undertakings or otherwise reach the market through overlapping trade channels. Given the specialist, scientific nature of the holder's services, to my mind, it is highly unlikely. Plainly, there is no competition between the respective goods and services. Moreover, as they are not

²⁵ Although the designated term is actually *services for determining the age or a person or animal via biomarkers*, this is clearly a typographical error.

important or indispensable to one another, they are not complementary. It is possible that users may overlap, insofar as members of the general public who purchase snack foods may also seek the holder's services. However, this is a very high level of generality which is, in my view, insufficient for the purposes of establishing any similarity between the respective goods, overall. In light of all this, I find that the respective goods and services are dissimilar.

Conclusion on goods and services comparison

108. Some degree of similarity between goods and services is necessary to engage the test for likelihood of confusion; if there is no similarity at all, there is no likelihood of confusion to be considered.²⁶ My findings above mean that the opponent's claim under section 5(2)(b) must fail in relation to the following goods and services:

Class 5: Dietary supplement for eliminating toxins from the intestinal tract; dietary supplements for controlling cholesterol; dietary supplements for [...] animals; dietary supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary supplements in the nature of weight loss powders; dietary and nutritional supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary and nutritional supplements used for weight loss; food supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; enzyme dietary supplements; enzyme food supplements; ketogenic dietary and nutritional supplements; ketogenic dietary and nutritional supplements used for weight loss; mineral food supplements; natural dietary supplements for the treatment of inflammations, oxidative stress, ageing, cancer, heart disease,

²⁶ *eSure Insurance v Direct Line Insurance* [2008] ETMR 77 CA, paragraph 49

arthritis, overweight, obesity and other age-related diseases; nutraceuticals for use as a dietary supplement for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; vitamin preparations; mineral food supplements; pharmaceutical preparations for the treatment of skin disorders and skin conditions, kidney disease, heart disease, urology disorders, circulatory disorders, memory loss, fatigue, eye strain, eye disease, hearing loss, hair loss, sexual dysfunction; health foods adapted for medical use, namely, dietetic foods in the nature of pasta, crackers, food bars; dietetic foods adapted for veterinary use; vitamin and mineral supplements; vitamin supplements.

Class 29: Vegetables and potatoes (preserved, frozen, dried or cooked), fruits (preserved, frozen, dried or cooked), mushrooms (preserved, dried or cooked), meat, poultry, game, fish and seafood products, all these products in the form of extracts, soups, jellies, spreads, canned products, cooked, deep-frozen or dehydrated dishes; milk, cream, butter, cheese [...]; milk substitutes; beverages made with milk; soya milk (milk substitutes); soups, concentrated soups, thick soups, bouillon cubes, stock, broths.

Class 30: Coffee, coffee extracts, coffee-based preparations and beverages; iced coffee; artificial coffee, artificial coffee extracts, artificial coffee-based preparations and beverages; tea, tea extracts, tea-based preparations and beverages; iced tea; malt-based preparations for human consumption; cocoa and cocoa-based preparations and beverages; chocolate-based [...] beverages; sugar; chewing gum; natural sweeteners; bread, yeast; ices, water ices, sorbets, frozen confectionery, frozen cakes, ice cream, frozen desserts, frozen yogurts; honey and honey substitutes; rice, pasta, noodles; cereal-based food; rice-

based food; flour-based food; cereal based food fortified with nutrients and/or dietary ingredients.

Class 32: Non-alcoholic fruit juice beverages; non-alcoholic fruit extracts; beverages made with lactic ferments; soya-based beverages, other than milk substitutes; extracts and essences and other preparations for making non-alcoholic beverages; lactic fermented beverages; soya-based beverages; non-alcoholic malt beverages; malt-based beverages; vegetable juices.

Class 42: Services for determining the age [of] a person or animal via biomarkers.

Average consumer

109. As the authorities indicate, I must determine who the average consumer is for the parties' goods and how they are likely to be selected. The average consumer is deemed to be reasonably well informed, observant and circumspect.²⁷

110. In *Iconix*, 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, where he pointed out that:

(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;

²⁷ *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

(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 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

(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.

111. The similar goods at issue are likely to be purchased by members of the general public. Overall, they are likely to be purchased relatively frequently, for ongoing supplementation or consumption. The level of attentiveness is likely to vary from cheap snacks and beverages purchased 'on the go', to more considered purchases such as supplements which have an effect on the body. When selecting general foodstuffs, it will be somewhere in between, with the average consumer considering ordinary factors such as taste and dietary requirements. However, none of the goods will require a particularly considered thought process. Overall, it is my view that the average consumer will demonstrate between a low and medium level of attention during the purchasing process. The goods are typically sold in retail environments, such as supermarkets and health stores, and their online equivalents. They will be self-selected by the average consumer after being viewed on shelves or displays, or in images on websites. Therefore, the purchasing process is likely to be predominantly visual in nature. However, I do not discount aural considerations entirely, given that

the average consumer may seek advice from sales assistants or receive word-of-mouth recommendations.

Distinctive character of the earlier marks

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

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

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

113. Registered trade marks possess varying degrees of inherent distinctive character. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; the more distinctive the earlier mark, the greater the likelihood of confusion.

114. The distinctiveness of a mark may be enhanced through use. However, at the hearing, Mr Bailey confirmed that the opponent was not advancing a claim that its marks have enhanced distinctive character. As such, I have only the inherent position to consider.

115. The opponent's first mark is in word-only format and consists of the word 'NOVO'. As there are no other elements, the distinctiveness of the mark lies in the word itself. The word 'NOVO' does not have any obvious meaning. Rather, it appears to be an invented word. Therefore, it possesses a high level of inherent distinctive character.

116. The opponent's second mark is a figurative mark comprising a number of elements, the most prominent of which is the word 'novo', presented in a slightly stylised, white font. Within the last letter appears a small, green heart device. These elements are presented on a grey background. Beneath appear the words 'easy PROTEIN', the former in green and the latter in grey. Again, the word 'novo' appears to be an invented word, whereas 'easy PROTEIN' is likely to be perceived as a descriptive and/or promotional indication that the opponent's snack foods offer a simple way to consume protein. The font, colours and heart device are likely to be perceived as mere decoration. The distinctive character of the mark overwhelmingly lies in the word 'novo'; the other elements do not materially increase the distinctiveness of the mark above that provided by this word. As this is, itself, highly distinctive, I find that the opponent's second mark has a high level of inherent distinctive character, overall.

Comparison of trade marks

117. It is clear from *Sabel BV v Puma AG*, Case C-251/95, that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. This case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. In *Bimbo SA v OHIM*, Case C-591/12P, the CJEU stated (at paragraph 24 of its judgement) 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.”

118. Therefore, it would be wrong to artificially dissect the marks. However, 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 hence contribute to the overall impressions created by the marks.

119. The marks to be compared are as follows:

The IR	The opponent's first mark
	NOVO
	<p data-bbox="874 1189 1326 1223">The opponent's second mark</p> 

My approach

120. As was accepted by Mr Bailey at the hearing, the opponent's first mark represents its best case. This is because the opponent's second mark has additional visual elements which render it less similar to the IR than its first mark. Moreover, the goods of the opponent's marks are identical, whilst its second mark is no more distinctive than its first. If there is no likelihood of confusion between IR and the opponent's first

mark, reliance on its second mark will not improve its position. As such, I will proceed from this point onwards on the basis of the opponent's first mark only.

Overall impressions

121. The opponent's mark is in word-only format and consists of the word 'NOVO'. As there are no other elements, the overall impression lies in the word itself.

122. The IR is a figurative mark comprised of two elements. At the top of the mark appears a large device representing two overlapping circles with mixed shading. Below this element appears the word 'NOVOS' in a standard typeface. Although the eye is naturally drawn to elements of marks which can be read,²⁸ given the relative size and positioning, it is my view that the device and the word 'NOVOS' dominate the overall impression in roughly equal measure. The font used is unremarkable and plays a minimal role, if any.

Visual comparison

123. The competing marks are visually similar in that they share four letters in the same order, i.e. 'NOVO'. These letters comprise the entirety of the opponent's first mark and the first four letters of a co-dominant element of the IR. The only difference between the word elements is the addition of the letter 'S' at the end of the word in the IR. In this connection, I remind myself that the ends of marks tend to have less visual impact than their beginnings.²⁹ The particular font used in the IR does not create any significant difference. This is because the protection of word-only marks provides protection for the words themselves in any font type.³⁰ The competing marks are visually different insofar as the IR contains a device; this element co-dominates the overall impression of the IR but has no counterpart in the opponent's first mark. Bearing in mind my assessment of the overall impressions, I find that there is a medium degree of visual similarity between the competing marks.

²⁸ *Wassen International Ltd v OHIM*, Case T-312/03

²⁹ *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

³⁰ *LA Superquímica, SA v EUIPO*, Case T-24/17

Aural comparison

124. The average consumer will make no attempt to articulate the device in the IR. As such, the comparison is between the words 'NOVOS' and 'NOVO'. As both appear to be invented words, the average consumer may attempt a variety of pronunciations. In my view, the most likely of these for the IR is "NO-VOS" (with two short "O" sounds) and, for the opponent's first mark, "NO-VOE" (with the first "O" sound being short and the second elongated). The competing marks both consist of two syllables. The first syllable is identical, and the beginnings of marks tend to have more aural impact.³¹ The second syllables slightly differ. The competing marks also differ due to the "S" sound at the end of the IR. Overall, I am of the view that there is between a medium and high degree of aural similarity between the competing marks.

Conceptual comparison

125. For a concept to be relevant, it must be capable of immediate grasp by the relevant consumer.³² In its written submissions, the holder states that "there is a sense that" 'NOVO' means 'new'. However, it does not elaborate on this. It provides no reason as to why that would be the case and there is no evidence to substantiate this line of argument. To my mind, in accordance with my finding as to its inherent distinctive character, the opponent's first mark is likely to be perceived as an invented word with no meaning. The same is true of the word 'NOVOS' in the IR. The device in the IR, which consists of overlapping circles, is decorative and conveys no real semantic content, over and above representing geometric shapes. Accordingly, the conceptual position is effectively neutral.

Likelihood of confusion

126. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. One such factor is the interdependency principle, i.e. a lesser degree

³¹ *El Corte Inglés*

³² *The Picasso Estate v OHIM*, Case C-361/04 P

of similarity between the competing marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's first mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be mindful that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

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

128. Earlier in this decision, I concluded as follows:

- The parties' goods are identical or similar to at least a low degree;
- The average consumer of the goods is a member of the general public, who will demonstrate between a low and medium level of attention, overall;
- The purchasing process will be predominantly visual in nature, though aural considerations will play their part;
- The opponent's first mark possesses a high level of inherent distinctive character;
- The overall impression of the opponent's first mark lies in the word 'NOVO';
- The device and the word 'NOVOS' dominate the overall impression of the IR in roughly equal measure;

- The conceptual position being neutral, the competing marks are visually similar to a medium degree and aurally similar to between a medium and high degree.

129. I recognise that there are differences between the competing marks, namely the addition of the letter 'S' at the end of the shared letters 'NOVO' and the device in the IR. I also acknowledge that, as the holder has submitted, the opponent's mark is only four letters long. However, whilst I accept that differences may have greater impact in shorter marks, there is no special test for 'short' marks.³³ Considering the distinctive character of the opponent's first mark and the levels of overall visual and aural similarity between the competing marks, it is my view that the differences may not be sufficient to distinguish them from one another. The competing marks share four letters in the same order. These letters comprise the entirety of the opponent's first mark and appear at the beginning of a co-dominant element of the IR. Neither mark offers a concept which could assist with differentiating them. The only difference between the verbal elements of the marks is the additional letter 'S' at the end of the IR, a position which tends to have less impact. I am of the view that these verbal elements are highly likely to be mistaken for one another. Further, whilst the device co-dominates the overall impression of the IR, this is due to its size and positioning; it is still likely to be perceived as decorative and offers no real semantic content. To my mind, the average consumer may also misremember whether the word 'NOVO'/'NOVOS' is accompanied by a geometric device. Taking all the above into account, as well as the principle of imperfect recollection, I am of the view that the average consumer, even when paying a medium level of attention, may not recall the respective marks with sufficient accuracy to differentiate between them. Consequently, I find that there is a likelihood of direct confusion. I should add that I consider this to be the case regardless of the level of similarity between the goods. Factoring in the interdependency principle, the distinctive character of the opponent's first mark and the overall levels of similarity between the competing marks offset the low level of similarity between the goods (where applicable).

³³ *Robert Bosch GmbH v Bosco Brands UK Limited*, BL O/301/20, paragraph 43

130. If I am wrong in this finding, I now go on to consider indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Iain Purvis QC, sitting as the Appointed Person, explained that:

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

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

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

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

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

131. These three categories are not exhaustive. Rather, they were intended to be illustrative of the general approach.³⁴ However, indirect confusion has its limits; such a finding should not be made merely because the competing marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark.³⁵ It has also been emphasised that there must be a proper basis for finding indirect confusion.³⁶

132. Imperfect recollection is not only applicable to direct confusion; it is also relevant when considering indirect confusion.³⁷ In this connection, it is my view that, even if the average consumer is able to discern some difference between the competing marks, it remains highly likely that the words ‘NOVO’ and ‘NOVOS’ will be misremembered or inaccurately recalled as one another. This is for the same reasons as outlined previously. The former comprises the entirety of the opponent’s first mark. The latter is a dominant element of the IR and plays an independent distinctive role. As an invented word, ‘NOVO’ is so strikingly distinctive that consumers, having perceived the words ‘NOVO’ and ‘NOVOS’ as identical, are likely to assume that only the opponent would be using it in a trade mark. Further, although the device in the IR is roughly as dominant as the word, this is due to its relative size and placement; merely consisting of overlapping geometric shapes, the difference created by the addition of this device is likely to be perceived as a variation of the opponent’s first mark with an additional decorative embellishment. For example, the opponent’s mark may be seen as the version used where plain wording is required, whilst the IR may be seen as the version used on packaging or in advertising materials. In light of all this, I am satisfied that the average consumer, even paying a medium level of attention, is likely to assume a commercial association between the parties due to the presence of the

³⁴ As was confirmed by the Court of Appeal in *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207, paragraph 12.

³⁵ *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

³⁶ See the Court of Appeal’s comments in *Liverpool Gin Distillery*, paragraph 13.

³⁷ As was confirmed by Simon Clark, sitting as the Appointed Person, in *Rituals International Trademarks B.V. v Natsal, Inc.*, BL O/0116/26.

highly similar words 'NOVO' and 'NOVOS'. Accordingly, I find that there is a likelihood of indirect confusion. Again, for the sake of completeness, I record here that this finding applies irrespective of the level of similarity between the goods. This is because, taking account of the interdependency principle, the distinctive character of the opponent's first mark and the overall levels of similarity between the competing marks are, in my view, sufficient to counteract the low level of similarity between the goods (where applicable).

Conclusion

133. The opponent's claim under section 5(2)(b) is partially successful.

Section 5(4)(a)

Legislation and case law

134. Section 5(4)(a) of the Act states as follows:

“(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented-

(a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,

(aa) [...]

(b) [...]

A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of an “earlier right” in relation to the trade mark.”

135. Subsection (4A) of section 5 states:

“(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application.”

136. In *Discount Outlet v Feel Good UK* [2017] EWHC 1400 IPEC, Her Honour Judge Melissa Clarke, sitting as a deputy Judge of the High Court, conveniently summarised the essential requirements of the law of passing off as follows:

“55. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the Jif Lemon case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL), namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation. The burden is on the Claimants to satisfy me of all three limbs.

56. In relation to deception, the court must assess whether “a substantial number” of the Claimants’ customers or potential customers are deceived, but it is not necessary to show that all or even most of them are deceived (per *Interflora Inc v Marks and Spencer Plc* [2012] EWCA Civ 1501, [2013] FSR 21).”

137. As no evidence has been filed by the holder to show that its mark has been used, the relevant date for the purposes of the opponent’s claim is the filing date of the IR, namely 9 February 2022.³⁸

Goodwill

138. The concept of goodwill was explained in *Inland Revenue Commissioners v Muller & Co’s Margarine Ltd* [1901] AC 217 (at 223-224):

³⁸ *Advanced Perimeter Systems Limited v Multisys Computers Limited*, BL O/410/11, paragraph 43

“What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start.”

139. I have already found that the evidence provided by the opponent demonstrates genuine use of two registered marks identical to the signs relied upon under this ground. For the same reasons, I am satisfied that the opponent has established that its business in high-protein snack products enjoyed a relatively small, but nevertheless protectable, level of goodwill at the relevant date. I am also satisfied that the signs were distinctive of that goodwill. Under section 5(2)(b), I concluded that a fair specification was *snack foods containing protein*. Under this ground, the opponent relies upon *crisps, wafers, protein bars, cereals, chips*. Considering my previous assessment of the evidence, I find that the opponent’s goodwill extends to *high-protein crisps, high-protein wafers, protein bars, high-protein chips*.

Misrepresentation and damage

140. In *Neutrogena Corporation and Another v Golden Limited and Another* [1996] RPC 473, Morritt LJ stated that:

“There is no dispute as to what the correct legal principle is. As stated by *Lord Oliver of Aylmerton in Reckitt & Colman Products Ltd. v. Borden Inc.* [1990] *R.P.C.* 341 at page 407 the question on the issue of deception or confusion is

“is it, on a balance of probabilities, likely that, if the appellants are not restrained as they have been, a substantial number of members of the public will be misled into purchasing the defendants’ [product] in the belief that it is the respondents’ [product]”

The same proposition is stated in *Halsbury’s Laws of England* 4th Edition Vol.48 para 148. The necessity for a substantial number is brought out also in *Saville*

Perfumery Ltd. v. June Perfect Ltd. (1941) 58 R.P.C. 147 at page 175; and *Re Smith Hayden's Application* (1945) 63 R.P.C. 97 at page 101.”

141. Later in the same judgment, it was stated that:

“[...] for my part, I think that references, in this context, to “more than *de minimis*” and “above a trivial level” are best avoided notwithstanding this court's reference to the former in *University of London v. American University of London* (unreported 12 November 1993). It seems to me that such expressions are open to misinterpretation for they do not necessarily connote the opposite of substantial and their use may be thought to reverse the proper emphasis and concentrate on the quantitative to the exclusion of the qualitative aspect of confusion.”

142. In *Lumos Skincare Limited v Sweet Squared Limited and others* [2013] EWCA Civ 590, Lloyd LJ commented on the paragraph above as follows:

“64. One point which emerges clearly from what was said in that case, both by Jacob J and by the Court of Appeal, is that the “substantial number” of people who have been or would be misled by the Defendant's use of the mark, if the Claimant is to succeed, is not to be assessed in absolute numbers, nor is it applied to the public in general. It is a substantial number of the Claimant's actual or potential customers. If those customers, actual or potential, are small in number, because of the nature or extent of the Claimant's business, then the substantial number will also be proportionately small.”

143. In my view, the present ground takes the opponent no further than its section 5(2)(b) ground. In *Marks and Spencer PLC v Interflora* [2012] EWCA (Civ) 1501, Lewison LJ cast doubt on whether the test for misrepresentation for passing off purposes came to the same thing as the test for a likelihood of confusion under trade mark law. He pointed out that it is sufficient for passing off purposes that “a substantial number” of the relevant public are deceived, which might not mean that the average consumer is confused. However, considering the Court of Appeal's later judgment in *Comic Enterprises Ltd v Twentieth Century Fox Film Corporation* [2016] EWCA Civ

41, it seems doubtful whether the difference between the legal tests will (all other factors being equal) produce different outcomes.³⁹ This is because they are both normative tests intended to exclude the particularly careless or careful, rather than quantitative assessments.

144. I have already found that there is a likelihood of confusion between the IR and a registered mark identical to the opponent's 'NOVO' sign in respect of some of the designated goods (namely, those which were similar). I acknowledge that the goods to which goodwill extends are not the same as those relied upon under section 5(2)(b): *high-protein crisps, high-protein wafers, protein bars, high-protein chips* is a narrower range of goods than *snack foods containing protein*. However, the former fall within the latter, and my previous findings of similarity would apply for the same reasons. All other factors are equal. For the same reasons as there would be a likelihood of confusion, I find that a substantial number of members of the public would be deceived into believing that the similar goods provided under the IR and the opponent's 'NOVO' sign are offered by the same or economically linked undertakings. In such circumstances, I consider that damage through diversion of sales is entirely foreseeable.

145. I do not consider that these findings extend to the dissimilar goods and services.⁴⁰ Whilst I acknowledge that there is no requirement for the parties to be operating in a common field of activity, it is still a highly relevant consideration. Proving a likelihood of confusion and any resulting damage where there is no common field of activity is a heavy burden.⁴¹ No evidence going to misrepresentation has been filed. Although the dissimilar goods and services could all loosely be described as relating to health or food, it is my view that any overlap this creates between the parties' respective fields of activity is tenuous. To my mind, the level of goodwill in the opponent's business is not sufficient to overcome the distance between the parties' goods and services, notwithstanding the overall levels of similarity between the opponent's sign and the IR. Even in circumstances where a lower level of attention is exhibited, I do not consider

³⁹ Although this was an infringement case, the principles are equally applicable to section 5(2) of the Act: *Soulcycle Inc v Matalan Ltd* [2017] EWHC 496 (Ch).

⁴⁰ Those outlined at paragraph 108.

⁴¹ *Harrods Limited v Harrodian School Limited* [1996] RPC 697 (CA)

that a substantial number of members of the public will be deceived into purchasing the holder's goods and services in the mistaken belief that they are the goods of the opponent. There will be no misrepresentation in respect of these goods and services and, therefore, there is no risk of damage. The opponent's figurative sign (equivalent to its second mark) does not improve its position. This is because it is less similar to the IR.

Conclusion

146. The opponent's claim under section 5(4)(a) is partially successful.

Overall outcome

147. The opposition under sections 5(2)(b) and 5(4)(a) has been partially successful. Subject to any appeal against this decision, protection of the IR in the UK will be refused in respect of the following goods:

Class 5: Nutraceuticals for use as a dietary supplement, in particular for healthy ageing, lifespan extension, longevity; dietary and nutritional supplements, in particular for healthy ageing, lifespan extension, longevity; food supplements in particular for healthy ageing, lifespan extension, longevity; dietary supplements; dietary supplements for human beings; dietary supplements for human consumption; dietary supplements in the form of capsules, pills, powder; dietary and nutritional supplements; dietary and nutritional supplements for endurance sports; dietary food supplements; food supplements; health food supplements; natural dietary supplements; nutraceuticals for use as a dietary supplement; dietetic foods and beverages; nutritional supplements; protein dietary supplements; nutritional and dietary supplements, in particular for improving, reducing and preventing aging-related symptoms, improving general health, maintaining optimal health, improving health, reducing frailty, improving mobility, improving healthy joints, improving healthy cognition,

improving heart health, improving bone health, improving musculoskeletal health, improving skin health, reducing wrinkles, reducing aging-related decline of skin function and health, improving gastro-intestinal health, improving and maintain vascular health, improving eye health; food supplements for non-medical use based on ingredients of animal origin; food supplements for non-medical use based on fruits; food supplements for non-medical use based on vegetables; food supplements for non-medical use based on dairy products; food supplements for non-medical use based on eggs; food supplements for non-medical use based on seafood; food supplements for non-medical use based on oils; food supplements for non-medical use based on ingredients of plant origin and plants and plant extracts; food supplements for non-medical use based on ingredients of plant origin.

Class 29: Milk products; desserts made with milk and desserts made with cream; yogurts; animal or plant-based protein preparations for human consumption for non-medical purposes; dairy based food and beverages fortified with nutrients and/or dietary ingredients; vegetable-based food and food preparations fortified with nutrients and/or dietary ingredients; meat-based food and food preparations fortified with nutrients and/or dietary ingredients; fish-based food and food preparations fortified with nutrients and/or dietary ingredients; fruit-based dietic foods for non-medical use; meat-based dietic foods for non-medical use; vegetable-based dietic foods for non-medical use; egg-based dietic foods for non-medical use; dairy-based dietic foods for non-medical use; seafood based dietic foods for non-medical use; oil-based dietic foods for non-medical use, plant-based dietic foods for non-medical use.

Class 30: Chocolate, chocolate products, chocolate-based preparations; confectionery, sweetmeats; bakery goods, pastries; biscuits,

cakes, cookies, wafers, caramels, desserts (included in this class), puddings; breakfast cereals, muesli, corn flakes, cereal bars, ready-to-eat cereals; cereal preparations; plant-based dietic foods for non-medical use; plant extract- dietic foods for non-medical use.

Class 32: Non-alcoholic beverages; isotonic beverages; energy drinks; whey beverages; non-alcoholic beverages (containing vitamins); protein-enriched sports beverages; beverages fortified with nutrients and/or micronutrients and/or macronutrients (not for medical purpose); cereal based beverages fortified with nutrients and/or dietary ingredients.

148. The IR will become protected in the UK in respect of the following goods and services, against which the opposition has failed:

Class 5: Dietary supplement for eliminating toxins from the intestinal tract; dietary supplements for controlling cholesterol; dietary supplements for animals; dietary supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary supplements in the nature of weight loss powders; dietary and nutritional supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary and nutritional supplements used for weight loss; food supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; enzyme dietary supplements; enzyme food supplements; ketogenic dietary and nutritional supplements; ketogenic dietary and nutritional supplements used for weight loss; mineral food supplements; natural dietary supplements for the treatment of inflammations, oxidative stress, ageing, cancer, heart disease,

arthritis, overweight, obesity and other age-related diseases; nutraceuticals for use as a dietary supplement for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; vitamin preparations; mineral food supplements; pharmaceutical preparations for the treatment of skin disorders and skin conditions, kidney disease, heart disease, urology disorders, circulatory disorders, memory loss, fatigue, eye strain, eye disease, hearing loss, hair loss, sexual dysfunction; health foods adapted for medical use, namely, dietetic foods in the nature of pasta, crackers, food bars; dietetic foods adapted for veterinary use; vitamin and mineral supplements; vitamin supplements.

Class 29: Vegetables and potatoes (preserved, frozen, dried or cooked), fruits (preserved, frozen, dried or cooked), mushrooms (preserved, dried or cooked), meat, poultry, game, fish and seafood products, all these products in the form of extracts, soups, jellies, spreads, canned products, cooked, deep-frozen or dehydrated dishes; milk, cream, butter, cheese; milk substitutes; beverages made with milk; soya milk (milk substitutes); soups, concentrated soups, thick soups, bouillon cubes, stock, broths.

Class 30: Coffee, coffee extracts, coffee-based preparations and beverages; iced coffee; artificial coffee, artificial coffee extracts, artificial coffee-based preparations and beverages; tea, tea extracts, tea-based preparations and beverages; iced tea; malt-based preparations for human consumption; cocoa and cocoa-based preparations and beverages; chocolate-based beverages; sugar; chewing gum; natural sweeteners; bread, yeast; ices, water ices, sorbets, frozen confectionery, frozen cakes, ice cream, frozen desserts, frozen yogurts; honey and honey substitutes; rice, pasta, noodles; cereal-based food; rice-based

food; flour-based food; cereal based food fortified with nutrients and/or dietary ingredients.

Class 32: Non-alcoholic fruit juice beverages; non-alcoholic fruit extracts; beverages made with lactic ferments; soya-based beverages, other than milk substitutes; extracts and essences and other preparations for making non-alcoholic beverages; lactic fermented beverages; soya-based beverages; non-alcoholic malt beverages; malt-based beverages; vegetable juices.

Class 42: Services for determining the age of a person or animal via biomarkers.

Costs

149. As both parties have achieved what I regard as a roughly equal measure of success, I direct that both parties should bear their own costs.

Dated this 15th day of June 2026

**James Hopkins
For the Registrar**

Annex

Goods and services of the IR (no. 1693332)

Class 5: Nutraceuticals for use as a dietary supplement, in particular for healthy ageing, lifespan extension, longevity; dietary and nutritional supplements, in particular for healthy ageing, lifespan extension, longevity; food supplements in particular for healthy ageing, lifespan extension, longevity; dietary supplement for eliminating toxins from the intestinal tract; dietary supplements; dietary supplements for controlling cholesterol; dietary supplements for human beings and animals; dietary supplements for human consumption; dietary supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary supplements in the form of capsules, pills, powder; dietary supplements in the nature of weight loss powders; dietary and nutritional supplements; dietary and nutritional supplements for endurance sports; dietary and nutritional supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; dietary and nutritional supplements used for weight loss; dietary food supplements; food supplements; food supplements for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention of other age-related diseases; enzyme dietary supplements; enzyme food supplements; health food supplements; ketogenic dietary and nutritional supplements; ketogenic dietary and nutritional supplements used for weight loss; mineral food supplements; natural dietary supplements; natural dietary supplements for the treatment of inflammations, oxidative stress, ageing, cancer, heart disease, arthritis, overweight, obesity and other age-related diseases; nutraceuticals for use as a dietary supplement; nutraceuticals for use as a dietary supplement for healthy ageing, lifespan extension, longevity, reducing inflammation, risk of cancer and heart disease, and prevention

of other age-related diseases; dietetic foods and beverages; nutritional supplements; vitamin preparations; mineral food supplements; protein dietary supplements; nutritional and dietary supplements, in particular for improving, reducing and preventing aging-related symptoms, improving general health, maintaining optimal health, improving health, reducing frailty, improving mobility, improving healthy joints, improving healthy cognition, improving heart health, improving bone health, improving musculoskeletal health, improving skin health, reducing wrinkles, reducing aging-related decline of skin function and health, improving gastro-intestinal health, improving and maintain vascular health, improving eye health; pharmaceutical preparations for the treatment of skin disorders and skin conditions, kidney disease, heart disease, urology disorders, circulatory disorders, memory loss, fatigue, eye strain, eye disease, hearing loss, hair loss, sexual dysfunction; health foods adapted for medical use, namely, dietetic foods in the nature of pasta, crackers, food bars; dietetic foods adapted for veterinary use; vitamin and mineral supplements; vitamin supplements; food supplements for non-medical use based on ingredients of animal origin; food supplements for non-medical use based on fruits; food supplements for non-medical use based on vegetables; food supplements for non-medical use based on dairy products; food supplements for non-medical use based on eggs; food supplements for non-medical use based on seafood; food supplements for non-medical use based on oils; food supplements for non-medical use based on ingredients of plant origin and plants and plant extracts; food supplements for non-medical use based on ingredients of plant origin.

Class 29: Vegetables and potatoes (preserved, frozen, dried or cooked), fruits (preserved, frozen, dried or cooked), mushrooms (preserved, dried or cooked), meat, poultry, game, fish and seafood products, all these products in the form of extracts, soups, jellies, spreads, canned products, cooked, deep-frozen or dehydrated dishes; milk, cream, butter, cheese and other milk products; milk substitutes; beverages made with milk; desserts made with milk and desserts made with cream;

yogurts; soya milk (milk substitutes); animal or plant-based protein preparations for human consumption for non-medical purposes; soups, concentrated soups, thick soups, bouillon cubes, stock, broths; dairy based food and beverages fortified with nutrients and/or dietary ingredients; vegetable-based food and food preparations fortified with nutrients and/or dietary ingredients; meat-based food and food preparations fortified with nutrients and/or dietary ingredients; fish-based food and food preparations fortified with nutrients and/or dietary ingredients; fruit-based dietic foods for non-medical use; meat-based dietic foods for non-medical use; vegetable-based dietic foods for non-medical use; egg-based dietic foods for non-medical use; dairy-based dietic foods for non-medical use; seafood based dietic foods for non-medical use; oil-based dietic foods for non-medical use, plant-based dietic foods for non-medical use.

Class 30: Coffee, coffee extracts, coffee-based preparations and beverages; iced coffee; artificial coffee, artificial coffee extracts, artificial coffee-based preparations and beverages; tea, tea extracts, tea-based preparations and beverages; iced tea; malt-based preparations for human consumption; cocoa and cocoa-based preparations and beverages; chocolate, chocolate products, chocolate-based preparations and beverages; confectionery, sweetmeats; sugar; chewing gum; natural sweeteners; bakery goods, bread, yeast, pastries; biscuits, cakes, cookies, wafers, caramels, desserts (included in this class), puddings; ices, water ices, sorbets, frozen confectionery, frozen cakes, ice cream, frozen desserts, frozen yogurts; honey and honey substitutes; breakfast cereals, muesli, corn flakes, cereal bars, ready-to-eat cereals; cereal preparations; rice, pasta, noodles; cereal-based food; rice-based food; flour-based food; cereal based food fortified with nutrients and/or dietary ingredients; plant-based dietic foods for non-medical use; plant extract-dietic foods for non-medical use.

Class 32: Non-alcoholic beverages; non-alcoholic fruit juice beverages; non-alcoholic fruit extracts; beverages made with lactic ferments; soya-based

beverages, other than milk substitutes; extracts and essences and other preparations for making non-alcoholic beverages; lactic fermented beverages; soya-based beverages; non-alcoholic malt beverages; malt-based beverages; isotonic beverages; energy drinks; vegetable juices; whey beverages; non-alcoholic beverages (containing vitamins); protein-enriched sports beverages; beverages fortified with nutrients and/or micronutrients and/or macronutrients (not for medical purpose); cereal based beverages fortified with nutrients and/or dietary ingredients.

Class 42: Services for determining the age of a person or animal via biomarkers.