O/0522/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004220804
IN THE NAME OF
KIRA&TINO E-COMMERCE LTD
TO REGISTER THE FOLLOWING TRADE MARK:

THERMO SCULPT

IN CLASS 5

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. OP600003829
BY TYRTLE LTD

Background and pleadings

1. On 18 June 2025, Kira&tino E-commerce ltd ("the Applicant") applied to register the trade mark shown on the cover page of this decision in the UK. It was accepted and published in the Trade Marks Journal on 04 July 2025 in respect of the class 5 goods set out in paragraph 15 of this decision.

2. On 03 October 2025, tyrtle ltd ("the Opponent") opposed the application under the fast track opposition procedure, based upon section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The Opponent relies upon the following mark:

Sculpt

UK trade mark no. UK00004099693
Filing date: 13 September 2024
Registration date: 06 December 2024
Relying upon goods in classes 32 and 33, as set out in paragraph 15 of this decision.

3. By virtue of its earlier filing date of 13 September 2024, the above registration constitutes an earlier mark within the meaning of section 6 of the Act. As the earlier mark had not completed its registration process more than five years before the filing date of the application in issue, it is not subject to the use provisions contained in section 6A of the Act. The Opponent can, therefore, rely upon all of the goods it has identified without having to demonstrate use.

4. The Opponent submits that the goods are highly similar and that the marks are visually and aurally highly similar, and conceptually identical.

5. The Applicant filed a counterstatement in which it denies the grounds of opposition.

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

The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit." The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions.

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

8. A hearing was neither requested nor considered necessary, and neither party filed written submissions in lieu. This decision is taken following a careful consideration of the papers.

9. The Applicant is self-represented; the Opponent is represented by Trama Legal s.r.o..

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

Preliminary Issues

11. The Applicant raised a point in its counterstatement that I intend to address as a preliminary issue. Before going any further into the merits of this opposition it is necessary to explain why, as a matter of law, the point raised will have no bearing on the outcome of this opposition.

12. The Applicant submits that it does not use the mark applied for in isolation, but rather in combination with its house mark 'SLIM ROOT'. However, it is important to note that my assessment of the likelihood of confusion must be based upon the

mark as applied for, namely 'THERMO SCULPT' and its notional and fair use in relation to the goods at issue."

Decision

Section 5(2)(b)

13. Section 5(2)(b) of the Act is as follows:

> "5(2) A trade mark shall not be registered if because-
>
> (a) …
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

14. 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 be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

Comparison of goods

15. The goods for comparison are as follows:

Opponent's goods	Applicant's goods
Class 32: Non-alcoholic drinks; Cola drinks; Juice drinks; Carbonated non-alcoholic drinks; Non-alcoholic fruit drinks; Isotonic non-alcoholic drinks; Isotonic drinks; Fruit drinks; Carbohydrate drinks; Guarana drinks; Energy drinks; Non-alcoholic malt drinks; Soft drinks; Sports drinks; Colas [soft drinks]; Vegetable drinks; Slush drinks; Non-alcoholic beverages; Beverages (Non-alcoholic -); Non-alcoholic vegetable juice drinks; Non-carbonated soft drinks; Cordials (non-alcoholic beverages); Carbonated soft drinks; Fruit-flavored soft drinks; Frozen fruit-based drinks; Low-calorie soft drinks; Non-alcoholic sparkling fruit juice drinks; Non-alcoholic beverages flavoured with coffee; Non-alcoholic carbonated beverages; Fruit juice drinks; Smoothies [non-alcoholic fruit beverages]; Non-alcoholic beer flavored beverages; Fruit flavored drinks; Fruit flavoured drinks; Non-alcoholic soda beverages flavoured with tea; Non-alcoholic beverages flavored with coffee; Coffee-flavored soft drinks; Cocktails, non-alcoholic; Non-alcoholic cocktails; Soft drinks flavored with tea; Sherbets [beverages]; Fruit flavoured carbonated drinks; Fruit beverages (non-alcoholic); Frozen fruit drinks;	Class 5: Food supplements; Dietary food supplements; Food supplements for dietetic use; Calcium tablets as a food supplement; Anti-oxidant food supplements; Dietary supplement drinks; Food supplements for veterinary use; Medicated food supplements; Bee pollen for use as a dietary food supplement; Food supplements for sportsmen; Vitamin and mineral food supplements; Dietary food supplements used for modified fasting; Dietary supplement drink mixes; Vitamin preparations in the nature of food supplements; Food supplements for medical purposes; Food supplements in liquid form; Nutraceuticals for use as a dietary supplement; Health food supplements made principally of vitamins; Nutritional supplement meal replacement bars for boosting energy; Antibiotic food supplements for animals; Health food supplements made principally of minerals; Powdered nutritional supplement drink mix; Food supplements for non-medical purposes; Nutritional supplement energy bars; Nutritional supplements for livestock feed; Powdered nutritional supplement energy drink mix; Health food supplements for persons with special

Fruit-based soft drinks flavored with tea; Beer-based beverages; Non-alcoholic beverages flavoured with tea; Syrups used in the preparation of soft drinks; Root beers, non-alcoholic beverages; De-alcoholized drinks; Syrups for making fruit-flavored drinks; Non-alcoholic beverages flavored with tea; Fruit-flavoured beverages; Fruit juice beverages (Non-alcoholic -); Non-alcoholic fruit juice beverages; Kvass [non-alcoholic beverages]; Fruit-based beverages; Non-alcoholic fruit cocktails; Non-alcoholic beverages with tea flavor; Sorbets [beverages]; Fruit-flavored beverages; Sherbet beverages; Fruit flavored soft drinks; Syrups for making soft drinks; De-alcoholised drinks; Apple juice drinks; Syrups for beverages; Non-alcoholic syrups for making beverages; Syrups for making non-alcoholic beverages; Squashes [non-alcoholic beverages]; Energy drinks containing caffeine; Non-alcoholic flavored carbonated beverages; Sarsaparilla [non-alcoholic beverage]; Non-alcoholic malt beverages; Soft drinks for energy supply; Isotonic beverages; Non-alcoholic honey-based beverages; Honey-based beverages (Non-alcoholic -); Orange juice drinks; Non-alcoholic beers; Sports drinks containing electrolytes; Powders used in the	dietary requirements; Dietary supplemental drinks; Nutritional supplements; Dietary and nutritional supplements; Dietary supplements; Nutritional supplements for veterinary use; Liquid nutritional supplements; Dietary supplements for pets in the nature of a powdered drink mix; Liquid dietary supplements; Dietary supplements for animals; Powdered fruit-flavored dietary supplement drink mix; Dietary supplements for pets; Protein dietary supplements; Dietary supplements for medical use; Wheat dietary supplements; Nutritional drink mix for use as a meal replacement; Flaxseed dietary supplements; Feed supplements for veterinary use; Pollen dietary supplements; Mineral nutritional supplements; Mineral supplements for feeding livestock; Ground flaxseed fiber for use as a dietary supplement; Mineral dietary supplements for animals; Mineral dietary supplements; Dietary supplements consisting of vitamins; Dietary supplements and dietetic preparations; Food for diabetics; Yeast dietary supplements; Glucose dietary supplements; Propolis dietary supplements; Dietary supplements and dietetic preparations containing CBD oil; Flaxseed oil dietary supplements; Food supplements consisting of amino acids;

preparation of fruit-based drinks; Non-alcoholic beer-based cocktails; Iced fruit beverages; Beer-based cocktails; Non-alcoholic cocktail mixes; Ginger beer; Tonic water; Cider, non-alcoholic; Non-alcoholic cordials; Non-alcoholic beer; Flavored beer; Non-alcoholic cocktail bases; Malt beer; Malt syrup for beverages; Ginger ale; Syrups for lemonade; Dry ginger ale; Ginger juice beverages; Non-alcoholic grape juice beverages; Flavoured beers; Alcohol free cider; Low-alcohol beer; Shandy; Tonic water [non-medicated beverages]; Coffee-flavored beer; Lime juice cordial; Energy drinks [not for medical purposes]; Powders used in the preparation of coconut water drinks; Mineral water [beverages]; Low calorie soft drinks; Concentrates for making fruit drinks; Powders used in the preparation of soft drinks; Non-alcoholic drinks enriched with vitamins and mineral salts; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Fruit juice beverages; Fruit juice for use as beverages; Seltzer water; Water (Seltzer -); Soda water; Carbonated water; Cream soda; Aerated water [soda water]; Soda pops; Carbonated mineral water; Cola; Flavoured carbonated beverages;	Protein powder dietary supplements; Health-aid foods supplement containing red ginseng; Food supplements consisting of trace elements; Chlorella dietary supplements; Enzyme dietary supplements; Zinc dietary supplements; Health-aid foods supplements containing ginseng; Dietary supplements in powder form; Dietetic food adapted for veterinary use; Dietary supplements for humans.

Ramune (Japanese soda pops); Flavored mineral water; Coconut water as beverage; Coconut water as a beverage; Sparkling water; Lemonade; Pineapple juice beverages; Orange juice beverages; Grape juice beverages; Frozen carbonated beverages; Bottled water; Aloe juice beverages; Carbonated waters; Cranberry juice; Lemon juice for use in the preparation of beverages; Apple juice beverages; Quinine water; Drinking water with vitamins; Lemon barley water; Water (Lithia -); Vitamin enriched sparkling water [beverages]; Flavoured mineral water; Grapefruit juice; Stout; Stouts; Pale ale; Coffee-flavored ale; Bock beer; Ale; Lager; IPA (Indian Pale Ale); Saison beer; Black beer [toasted-malt beer]; Black beer; Beer; Porter; Frozen hops for brewing beer; Flavored beers; India pale ales (IPAs); Dried hops for brewing beer; Malt wort; Barley wine [Beer]; Barley wine [beer]; Beer wort; Wheat beer; Ales; Lagers; Beers; Imitation beer; Root beer; Hop pellets for brewing beer; Root beers; Hops (Extracts of -) for making beer; Extracts of hops for making beer; Craft beer; Low alcohol beer; Beer and brewery products; Craft beers; Drinking water; Bottled drinking water; Drinking mineral water; Purified	

drinking water; Distilled drinking water; Mineral enriched water [beverages]; Green vegetable juice beverages; Isotonic beverages [not for medical purposes]; Protein-enriched sports beverages; Frozen fruit-based beverages; Functional water-based beverages; Aloe vera drinks, non-alcoholic; Water-based beverages containing tea extracts; Mineral water (Non-medicated -); Soya-based beverages, other than milk substitutes; Powders used in the preparation of fruit-based beverages; Vitamin fortified non-alcoholic beverages; Whey beverages; Beverages (Whey -); Non-alcoholic beverages containing fruit juices. <u>Class 33:</u> Wine-based drinks; Alcoholic fruit cocktail drinks; Wine coolers [drinks]; Alcoholic energy drinks; Rum-based beverages; Low alcoholic drinks; Cordials [alcoholic beverages]; Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic carbonated beverages, except beer; Wine-based beverages; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Beverages (Alcoholic -), except beer; Spirits [beverages]; Pre-mixed alcoholic beverages; Alcoholic cocktails; Pre-	

mixed alcoholic beverages, other than beer-based; Alcoholic beverages of fruit; Alcoholic fruit beverages; Cocktails; Gin; Whiskey; Whiskey [whisky]; Vodka; Flavored tonic liquors; Whisky; Rum; Tonic liquor flavored with japanese plum extracts (umeshu); Aperitifs with a distilled alcoholic liquor base; Tonic liquor flavored with pine needle extracts (matsuba-zake); Brandy; Alcoholic bitters; Vermouth; Malt whisky; Rum [alcoholic beverage]; Alcoholic aperitif bitters; Anisette [liqueur]; Blackcurrant liqueur; Alcoholic cocktail mixes; Bitters; Schnapps; Sugar cane juice rum; Baijiu [Chinese distilled alcoholic beverage]; Cherry brandy; Peppermint liqueurs; Absinthe; Alcoholic cocktails containing milk; Flavoured brewed alcoholic malt beverages, except beers; Rum infused with vitamins; Alcoholic cordials; Blended whisky; Anise [liqueur]; Rum punch; Japanese liquor flavored with pine needle extracts; Alcoholic seltzers; Alcoholic cocktails in the form of chilled gelatins; Flavored brewed alcoholic malt beverages, except beers; Aquavit; Tonic liquor containing herb extracts (homeishu); Aguardiente [sugarcane spirits]; Anisette; Digestifs [liqueurs and spirits]; Distilled spirits of rice (awamori); Distilled rice spirits [awamori]; Ginseng	

liquor; Liqueurs; Herb liqueurs; Extracts of spiritous liquors; Coffee-based liqueurs; Hard seltzers; Sweet cider; Dry cider; Cider; Alcoholic tea-based beverage; Alcoholic coffee-based beverage; Beverages containing wine [spritzers].	

16. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon,* Case C-39/97, the court stated at paragraph 23 that:

> "In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary.

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

> "(a) The respective uses of the respective goods or services;
>
> (b) The respective users of the respective goods or services;
>
> (c) The physical nature of the goods or acts of service;
>
> (d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be found in supermarkets and, in particular, whether they are or are likely to be found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance, whether market research companies, who of course act for industry, put the goods or services in the same or different sectors."

18. For the purposes of considering the issue of similarity of the goods, it is permissible to consider groups of terms collectively where appropriate: *Separode* Trade Mark, BL O-399-10.

19. While making my comparison, I bear in mind the comments of Floyd J. (as he then was) in *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch):

"12. … Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. … Nevertheless the principle should not be taken too far. ... Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

20. The Opponent submits that its class 32 specification covers a range of beverages with enhanced functionalities, designed to increase consumers' intake of vitamins, nutrients and minerals, which serve to improve health, fitness and overall well-being of the consumer.[1] They specifically identify the following goods as being highly similar to those in the application:

Isotonic beverages; non-alcoholic drinks enriched with vitamins and mineral salts; drinking water with vitamins; vitamin-enriched sparkling water

[1] Opponent's form TM7F and statement of grounds, paragraph 21.

[beverages]; protein-enriched sports beverages; functional water-based beverages; aloe vera drinks, non-alcoholic; vitamin-fortified non-alcoholic beverages.

21. On this point, the Applicant submits that although these beverages may claim functional qualities, they are neither marketed nor consumed in the same way as regulated nutritional supplements.[2] I bear in mind the submissions of both parties and will refer to these where appropriate in my comparison of the goods.

22. I also bear in mind that Section 60A(1)(a) of the Act provides that goods are not to be regarded as being similar to each other on the ground that they appear in the same class, nor dissimilar to each other on the ground that they appear in different classes under the Nice Classification.

Dietary supplement drinks; Dietary supplemental drinks; Nutritional drink mix for use as a meal replacement; Powdered nutritional supplement drink mix; Powdered nutritional supplement energy drink mix; Powdered fruit-flavored dietary supplement drink mix; Dietary supplement drink mixes.

23. The Applicant's above goods are nutritional or dietary supplements in the form of drinks and preparations for making drinks. Accordingly, I consider there to be a degree of similarity between the Applicant's goods and the Opponent's "vitamin fortified non-alcoholic beverages", "functional water-based beverages" and "protein-enriched sports beverages" in class 32. There is an overlap in nature and method of use as the goods are all drinks or drink mixes. There is also an overlap in user on a general level as the respective goods will all be used by members of the general public. However, the intended purpose of the goods differ as the Applicant's goods will be used for the specific dietary or nutritional purposes for which they are designed, while the Opponent's goods are primarily intended for hydration and/or refreshment.

[2] Applicant's TM8 and counterstatement, paragraph 13.

24. Although the goods may be available generally in the same retail outlets (such as supermarkets), they are unlikely to be positioned in the same aisles. I consider that the Applicant's nutritional and dietary supplements are likely to be positioned in the health and wellness aisle alongside other nutritional supplements, while the Opponent's beverages are more likely to be placed in the drink aisle alongside soft drinks and other non-alcoholic beverages. The Opponent submits that the goods at issue are commonly offered together in the marketplace under the same brand by the same undertakings.[3] However, I have no evidence before me to suggest that it is customary in trade for undertakings responsible for dietary and nutritional supplements to also provide non-alcoholic beverages (even where those beverages are fortified with vitamins or protein). I do not consider the goods to be in competition, nor do I consider the goods to be complementary in the way set out in caselaw. Overall, I consider the goods to be similar to between a low and medium degree.

Food supplements; Dietary food supplements; Food supplements for dietetic use; Calcium tablets as a food supplement; Anti-oxidant food supplements; Medicated food supplements; Bee pollen for use as a dietary food supplement; Food supplements for sportsmen; Vitamin and mineral food supplements; Dietary food supplements used for modified fasting; Vitamin preparations in the nature of food supplements; Food supplements for medical purposes; Nutraceuticals for use as a dietary supplement; Health food supplements made principally of vitamins; Nutritional supplement meal replacement bars for boosting energy; Health food supplements made principally of minerals; Food supplements for non-medical purposes; Nutritional supplement energy bars; Health food supplements for persons with special dietary requirements; Nutritional supplements; Dietary and nutritional supplements; Dietary supplements; Protein dietary supplements; Dietary supplements for medical use; Wheat dietary supplements; Flaxseed dietary supplements; Pollen dietary supplements; Mineral nutritional supplements; Ground flaxseed fiber for use as a dietary supplement; Mineral dietary supplements; Dietary supplements consisting of vitamins; Dietary supplements and dietetic preparations; Food for

[3] Opponent's form TM7F and statement of grounds, paragraph 21.

diabetics; Yeast dietary supplements; Glucose dietary supplements; Propolis dietary supplements; Dietary supplements and dietetic preparations containing CBD oil; Flaxseed oil dietary supplements; Food supplements consisting of amino acids; Protein powder dietary supplements; Health-aid foods supplement containing red ginseng; Food supplements consisting of trace elements; Chlorella dietary supplements; Food supplements in liquid form; Liquid nutritional supplements; Liquid dietary supplements; Enzyme dietary supplements; Zinc dietary supplements; Health-aid foods supplements containing ginseng; Dietary supplements in powder form; Dietary supplements for humans.

25. The Applicant's above goods are nutritional or dietary supplements, provided in a range of forms. Accordingly, I consider there to be a degree of similarity between the Applicant's goods and the Opponent's "vitamin fortified non-alcoholic beverages", "functional water-based beverages" and "protein-enriched sports beverages" in class 32. For the same reasoning set out in paragraph 23-24, I consider the goods overlap in user at a general level, but differ in purpose, are not in competition, and are not complementary in the way set out in caselaw. While the goods may be sold within the same retail establishments (such as supermarkets) I consider it unlikely that they will be positioned within the same aisles. The goods are a step further removed than those in paragraph 23-24 as they differ in nature and method of use. While the respective goods will all be consumed orally, the Opponent's goods are beverages to be drunk, whereas the Applicant's goods are provided in a range of forms (including powders, tablets, and bars) which will be eaten or swallowed. Overall, I consider the goods to be similar to a low degree.

Food supplements for veterinary use; Antibiotic food supplements for animals; Nutritional supplements for livestock feed; Nutritional supplements for veterinary use; Dietary supplements for pets in the nature of a powdered drink mix; Dietary supplements for animals; Dietary supplements for pets; Feed supplements for veterinary use; Mineral supplements for feeding livestock; Mineral dietary supplements for animals; Dietetic food adapted for veterinary use.

26. The Applicant's above goods are all supplements for animals. The Opponent's goods cover a range of alcoholic and non-alcoholic beverages, including "drinking water with vitamins" for human consumption. In view of this, the end user of the goods will differ (although the goods will be purchased by members of the general public, at a very general level). I consider that the Applicant's range of animal dietary/veterinary supplements differ in nature, method of use and purpose to the Opponent's "drinking water with vitamins". The trade channels differ as animal supplements will likely be provided through specialist pet retailers or veterinarians. Even where supplements for animals may be provided in supermarkets or general retailers, they will be sold in different departments, with supplements for animals positioned in the pet aisle, and water with vitamins positioned in the non-alcoholic drink aisle. I do not consider the goods to be in competition, as a consumer would not choose to purchase a supplement for animals in place of drinking water with vitamins for human consumption. I do not consider the goods to be complementary in the way set out in caselaw. Overall, I consider the goods to be dissimilar.

27. It is a prerequisite of section 5(2)(b) that the goods be identical or at least similar. As per *eSure*,[4] in relation to the goods which I have found to be dissimilar, as there can be no likelihood of confusion under section 5(2), I will take no further account of such goods, with the opposition failing to that extent. The opposition under section 5(2)(b) therefore fails at this juncture for the following goods:

Class 5:

Food supplements for veterinary use; Antibiotic food supplements for animals; Nutritional supplements for livestock feed; Nutritional supplements for veterinary use; Dietary supplements for pets in the nature of a powdered drink mix; Dietary supplements for animals; Dietary supplements for pets; Feed supplements for veterinary use; Mineral supplements for feeding livestock; Mineral dietary supplements for animals; Dietetic food adapted for veterinary use.

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

Average consumer and the purchasing act

28. As the case law above indicates, it is necessary to determine who the average consumer is for the goods at issue. I must then determine the manner in which the goods are likely to be selected by the average consumer.

29. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

30. In *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, 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;
>
> (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.

31. The average consumer of the goods at issue will be members of the general public. Various factors are likely to be taken into consideration during the purchasing process, including the cost, taste, quality, ingredients and suitability for the consumer's needs. Whilst I bear in mind that the purchase of nutrient/dietary supplements may be to address certain health issues, I would not expect the degree of attention to be at the highest end of the scale. Overall, I find that a medium degree of attention is likely to be paid during the purchase of the goods.

32. The goods will likely be self-selected from the shelves of retail outlets or their online equivalents. Given the process of selection, the visual impact of the marks is likely to play the greater role, though I do not discount the opportunity for aural recommendations to be made, for example, by word-of-mouth or from a sales person, etc.

Comparison of the marks

33. The respective trade marks pleaded under 5(2)(b) are shown below:

Opponent's trade mark	Applicant's trade mark
Sculpt	**THERMO SCULPT**

34. The Opponent's mark consists of the word 'Sculpt'. There are no other elements to contribute to the overall impression, which lies in the word itself.

35. The Applicant's mark consists of the words 'THERMO SCULPT', with no other elements to contribute to the overall impression. The Opponent submits that the word 'sculpt' is the distinctive element in the Applicant's mark, with the 'thermo' element simply characterising the nature of the Applicant's goods as being connected to heat or to react with heat.[5] The Applicant submits that 'thermo sculpt' will be understood as a combined phrase indicating a thermogenic product intended to help sculpt the body. While the parties' submissions both appear to accept that the word 'thermo' has some degree of allusive or descriptive meaning for goods with heat or thermogenic qualities, I do not consider it to be so descriptive that its role in the overall impression of the mark is negligible. Taking the submissions of both parties into account, I consider that neither word dominates the overall impression of the mark, which instead lies in the combination of the words.

36. Visually, the marks coincide in the word 'sculpt', which forms the entirety of the Opponent's mark, and appears at the end of the Applicant's mark. The additional word "thermo" at the beginning of the Applicant's mark acts as a point of visual difference. I bear in mind that the average consumer tends to pay more attention to the beginning of the marks.[6] Further, notional and fair use of the word marks would include use in both upper and lower case,[7] so the difference in letter case is irrelevant to the comparison. Overall, I consider that the marks are visually similar to between a low and medium degree.

[5] Opponent's form TM7F and statement of grounds, paragraph 13.
[6] *El Corte Ingles, S4 v OHIM*, Cases T-183/02 and T-184/02.
[7] *Bentley Motors Limited v Bentley 1962 Limited,* BL O/158/17.

37. Aurally, the marks coincide in the word “sculpt”, which will be pronounced in the ordinary way. The additional word ‘thermo’ at the beginning of the Applicant’s mark, which will also be pronounced in the ordinary way, creates a point of aural difference. Overall, I consider the marks are aurally similar to between a low and medium degree.

38. Conceptually, the ordinary dictionary word “sculpt” appears in both marks, which I consider the average consumer will recognise as referring to the action of forming something into a particular shape.

39. The word “thermo” in the Applicant’s mark introduces a point of conceptual difference. I consider the average consumer will apply the usual dictionary definition to this word, namely as relating to heat.

40. When considered as a whole, I do not consider that the words ‘thermo sculpt’ together give rise to any new conceptual meaning above that of the words themselves. While the combination of the words is slightly unusual, it has no obvious unitary conceptual meaning beyond being perceived as alluding to a sculpting process which uses, or is connected in some way to heat.

41. Overall, I consider the marks to be conceptually similar to a medium degree.

Distinctive character of the earlier trade mark

42. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In *Lloyd Schuhfabrik*, 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)."

43. Registered trade marks possess varying degrees of inherent distinctive character, being lower where they are suggestive or allusive of a characteristic of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use in relation to the earlier mark. Consequently, I have only the inherent position to consider.

44. The Opponent's mark comprises of the ordinary dictionary word "sculpt". The Applicant submits that the word 'sculpt' is low in distinctive character as it is a descriptive word commonly used in the fitness, weight-loss and body-shaping sectors.[8] While I consider that the word "sculpt", on goods that relate to weight loss or fitness, would be somewhat allusive, it is unclear how the Applicant's submissions are relevant to most of the Opponent's relied upon goods, being primarily alcoholic and non-alcoholic beverages.

45. For the Opponent's goods which they have identified as having functional attributes relating to health and fitness (as set out in paragraph 20), such as "protein-enriched

[8] Applicant's TM8 and counterstatement, paragraph 4.

sports beverages", I consider that the mark is inherently distinctive to between a low and medium degree due to the allusive nature of the word 'sculpt'.

46. For the Opponent's remaining class 32 and 33 goods, which do not have a specific relation to health/fitness, I consider that the meaning of the word 'sculpt' has no obvious allusive or descriptive meaning. Therefore, taking all of the above into account, I consider the Opponent's mark to be inherently distinctive to a medium degree.

Likelihood of confusion

47. I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (*Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*); ii) the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (*Sabel BV v Puma AG*), and; iii) the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (*Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V*).

48. There are two types of confusion that may occur. Direct confusion is where the average consumer mistakes one mark for the other, while indirect confusion is where the average consumer recognises that the marks are different, but for some reason assumes that the later mark also identifies the goods or services of the owner of the earlier mark, or that the two undertakings are related: see *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, paragraph 16.

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

- I have found the parties' goods to be similar to between a medium and low degree.

- I have identified the average consumer to be a member of the general public, who will pay a medium degree of attention during the purchasing process for the goods at issue. I concluded that they will select the goods primarily by visual means, although I do not discount an aural component.
- I have found the marks to be visually and aurally similar to between a low and medium degree, and conceptually similar to a medium degree.
- I have found the earlier mark to be inherently distinctive to between a low and medium degree where the goods have a function or purpose related to health, wellbeing or fitness, and inherently distinctive to a medium degree where the goods have no obvious health, wellbeing or fitness attributes.

50. Taking all of the above into account, even bearing in mind the principle of imperfect recollection, I am satisfied that the parties' marks are unlikely to be mistakenly recalled as each other. Despite the shared 'sculpt' element, I do not consider this word plays an independent distinctive or dominant role in the Applicant's mark. The Applicant's mark starts with the word 'thermo', creating a point of visual, aural and conceptual difference between the parties' marks. I do not consider this word will go unnoticed by the average consumer, especially in view of its location at the beginning of the mark. Bearing in mind that the goods are only similar to between a medium and low degree, and that the marks are only visually and aurally similar to between a low and medium degree, I do not consider there to be a likelihood of direct confusion.

51. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis QC, (as he then was) 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)."

52. These three categories are not exhaustive; rather, they were intended to be illustrative of the general approach, as has been confirmed by the Court of Appeal. I recognise that a finding of indirect confusion 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: this is mere association not indirect confusion.[9]

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

53. Furthermore, in *Liverpool Gin*,[10] Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [16] that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

54. Having recognised the differences between the marks, I consider it unlikely that the average consumer will conclude that they originate from the same or economically linked undertakings. I do not consider the word 'sculpt' is so strikingly distinctive that consumers would assume only one undertaking would use it in their mark. This is especially the case bearing in mind that I found the word 'sculpt' to be inherently distinctive to between a low and medium degree in relation to goods relating to health, fitness or weight loss (the same goods for which I found there to be a degree of similarity). Equally, while the word 'thermo' may be allusive for goods relating to or using heat, I do not consider it to be non-distinctive, nor logical as a brand extension. While some of the Applicant's goods could potentially have thermogenic qualities, this is not obvious from its specification of goods. In view of the above, I consider that the average consumer would simply put the presence of the common element 'sculpt' in the marks down to coincidence rather than as an indication that there is an economic connection between the undertakings. Consequently, I do not consider that there exists a likelihood of indirect confusion.

Conclusion

55. The opposition under section 5(2)(b) of the Act has failed. Subject to any successful appeal against my decision, the application will proceed to registration.

[10] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207

Costs

56. The Applicant has been successful and is entitled to a contribution towards their costs based upon the scale published in Tribunal Practice Notice 1/2023. However, as the Applicant is not professionally represented, at the conclusion of the evidence rounds the tribunal wrote to the Applicant and invited them to indicate whether they intended to make a request for an award of costs. The Applicant was informed that, if so, they should complete a Pro Forma, providing details of their actual costs and accurate estimates of the amount of time spent on various activities associated with the proceedings. They were informed that "if the pro-forma is not completed and returned, costs, other than official fees arising from the action (excluding extensions of time) may not be awarded".

57. The Applicant did not file a completed Pro Forma. That being the case, and as no official fee has been paid by the Applicant, I make no award of costs in respect of these proceedings.

Dated this 22nd day of June 2026

Emma Rees
For the Registrar