o/0914/25

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 4035491 TO REGISTER IN THE UNITED KINGDOM:

Rhizo Shake

AND

RhizoShake

(SERIES OF TWO)

IN THE NAME OF PIETRO PERUGINO

AND

IN THE MATTER OF AN OPPOSITION THERETO UNDER NO 447471

BY RIZOBACTER ARGENTINA S.A.

BACKGROUND AND PLEADINGS

1. On 6 April 2024, Pietro Perugino ("the applicant") applied to register "Rhizo Shake" and "RhizoShake" as a series of trade marks in the United Kingdom, in respect of the following goods:

Biostimulants for plants; Microbial inoculants, other than for medical use (class 1)

2. The applicant's mark was published for opposition purposes on 19 April 2024 and, on 14 May 2024, RIZOBACTER ARGENTINA S.A. ("the opponent") filed a Notice of Opposition claiming that the mark should be refused, in its entirety, under section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). For the purpose of the opposition, the opponent relies upon the following trade mark series and the goods laid out below, for which it is registered[1]:

United Kingdom Trade Mark ("UKTM") 3933335

Rizobacter

Rizobacter

(series of two)

Adjuvants for use with fertilizers; agricultural chemicals; fertilizers (class 1)

Acaricides; algicides; biocides; fungicides; herbicides, preparations for destroying noxious plants, weedkillers; insecticides; pesticides; sterilizing preparations, soil-sterilising preparations; antiparasitic preparations (class 5)

Filing date: 13 July 2023

[1] The opponent's series is also registered for a number of services in class 35

Registration date: 13 October 2023

3. The opponent claims that the similarity between the respective trade marks coupled with the identity and/or similarity between the parties' goods would give rise to a likelihood of confusion on the part of the public, including a likelihood of association.

4. The applicant, in turn, denies that the parties' trade marks are similar and describes the respective goods as "distinct". The applicant also highlights that there is no evidence of actual confusion between the parties' marks, and asks that the opposition is dismissed.

5. The opponent is represented by FRKelly whilst the applicant is unrepresented. The opponent filed evidence during the course of the proceedings and, whilst neither party requested a hearing, the opponent did elect instead to file written submissions in lieu. This decision is taken following a careful perusal of the papers.

RELEVANCE OF EU LAW

6. 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 matter

Absence of confusion

7. I will briefly address the applicant's comments concerning an absence of any evidence of actual confusion. Specifically, in its counterstatement the applicant submits:

> "4. There is no evidence of actual confusion between the marks despite the concurrent use of the "Rhizo-" prefix in the industry."

8. Tribunal Practice Notice (“TPN”) 4/2009 states:

> “6. Parties are also reminded that claims as to a lack of confusion in the market place will seldom have an effect on the outcome of a case under section 5(2) of the Act.
>
> 7. In *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 Laddie J held:
>
> > “22. It is frequently said by trade mark lawyers that when the proprietor's mark and the defendant's sign have been used in the market place but no confusion has been caused, then there cannot exist a likelihood of confusion under Article 9.1(b) or the equivalent provision in the Trade Marks Act 1994 ("the 1994 Act"), that is to say s. 10(2). So, no confusion in the market place means no infringement of the registered trade mark. This is, however, no more than a rule of thumb. It must be borne in mind that the provisions in the legislation relating to infringement are not simply reflective of what is happening in the market. It is possible to register a mark which is not being used. Infringement in such a case must involve considering notional use of the registered mark. In such a case there can be no confusion in practice, yet it is possible for there to be a finding of infringement. Similarly, even when the proprietor of a registered mark uses it, he may well not use it throughout the whole width of the registration or he may use it on a scale which is very small compared with the sector of trade in which the mark is registered and the alleged infringer's use may be very limited also. In the former situation, the court must consider notional use extended to the full width of the classification of goods or services. In the latter it must consider notional use on a scale where direct competition between the proprietor and the alleged infringer could take place.'”

9. In *Rousselon Freres et Cie v Horwood Homewares Limited*[2], Warren J commented:

[2] [2008] EWHC 881 (Ch)

"99. There is a dispute between Mr Arnold and Mr Vanhegan whether the question of a likelihood of confusion is an abstract question rather than whether anyone has been confused in practice. Mr Vanhegan relies on what was said by Laddie J in *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at paragraphs 22 to 26, especially paragraph 23. Mr Arnold says that that cannot any longer be regarded as a correct statement of the law in the light of *O2 Holdings Ltd v Hutchison 3G Ltd* [2007] RPC 16. For my part, I do not see any reason to doubt what Laddie J says...)"

10. Further, in *The European Limited v The Economist Newspaper Ltd*[3] Millett L.J. stated that:

"Absence of evidence of actual confusion is rarely significant, especially in a trade mark case where it may be due to differences extraneous to the plaintiff's registered trade mark."

11. On that basis, and particularly given that I have not been provided any evidence showing concurrent use of the parties' marks to determine the extent of the respective use, it seems clear that this line of defence can play no part in my consideration toward a likelihood of confusion. I am required to consider the matter notionally i.e. I must consider what the future position would be, taking into account the full breadth of the parties' specifications and marks as they appear before me on the register, regardless of whether or not there have been any identified instances of confusion to date.

EVIDENCE

12. The opponent's evidence comprises a witness statement from Mr Adam Flynn of FRKelly and two supporting exhibits. Mr Flynn's statement is dated 18 September 2024. I take the following from the opponent's evidence:

- Rizobacter is an Argentinian company operating in the field of agricultural microbiology, specialising in the optimization of crop growth worldwide. The company was born in 1983

[3] [1998] FSR 283

and its operation extends to over 45 countries including the UK, offering products such as seed treatments and fertilizers.

- Extracts from the opponent's website at Exhibit 1 show that Rizobacter is a member of the Bioceres family, with Bioceres described as "a global leader in agri-innovation".

- Exhibit 2 shows a range of products available to purchase via the opponent's website, including RizoOil and RIZOSPRAY Antifoam.[4]

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

DECISION

Section 5(2)(b)

14. Section 5(2)(b) of the Act reads 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."

15. Section 5A of the Act reads as follows:

> "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

[4] The opponent has made no suggestion that it wishes to rely upon a family of marks.

mark is applied for, the application is to be refused in relation to those goods and services only."

16. The opponent's mark clearly qualifies as an earlier trade mark pursuant to section 6 of the Act. Given that it had not been registered for more than five years before the application date of the opposed trade mark, it is not, therefore, subject to the proof of use provisions laid out in section 6A of the Act. As a consequence, the opponent may rely upon its mark and all goods it has identified without providing evidence of use.[5]

Section 5(2)(b) - case law

17. In making this decision, I bear in mind the following principles gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH,* Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P:

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

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

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

[5] I note that, in its counterstatement, the applicant has asked the opponent to provide evidence of use. For the reasons set out, and as already confirmed in an official letter of 19 July 2024, the opponent is not required to demonstrate use of its earlier mark.

(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

18. The competing goods are laid out at paragraphs 1 and 2 to this decision.

19. 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."

20. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

> (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.

21. In *Kurt Hesse v OHIM*,[6] the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM),*[7] the GC stated that "complementary" means:

> "...there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking."

22. The opponent contends as follows:

> "…the contested goods are identical and/or highly similar to the Opponent's goods in classes 01 and 05 of its earlier trade mark. The Opponent's goods in classes 01 and 05 may be broadly grouped into the following categories: **fertilisers, growing media and chemicals that can be used in agriculture, aquaculture, horticulture and forestry** and they share the same purpose of promoting plant health. They also share the same nature, producers, methods of use, distribution channels, sales outlets and are in competition with each other. Such goods have the same manufacturers and producers and can be used by a wide range of industries and individuals."[8]

23. In the absence of any submissions, I have nothing more than the applicant's comments on similarity made in its counterstatement, as shown below:

> "2. The Applicant's mark is not a microbial product and serves as a supplement to "RhizoBoost", part of the well-established brand portfolio including "RhizoTech".
>
> 3. The goods and services covered by "RhizoShake" are distinct from those of "Rizobacter", targeting different market segments and purposes."

[6] Case C-50/15 P
[7] Case T-325/06
[8] See paragraph 10 of the opponent's submissions in lieu

24. For the purpose of an assessment, it is permissible to group goods or services together where they are sufficiently comparable to do so.[9]

Biostimulants for plants; Microbial inoculants, other than for medical use.

25. I consider each of the applied-for terms against the opponent's *fertilizers*, which are proper to the same class. To my knowledge, broadly speaking, all goods will be used for, at least, a very similar purpose, insofar as all goods will be purchased with the intention of fostering plant growth or health, for example. The goods' users are likely to be the same and it seems reasonable to expect that the goods would reach the market via the same trade channels. Whilst the goods are likely to respectively comprise a fairly distinct combination of ingredients, there may be some limited opportunity for similarity in their physical nature. The goods are not necessarily indispensable to one another, though they may be used simultaneously and, particularly given the similarity in purpose, there may be a complementary relationship at play insofar as a single undertaking may offer both goods. Weighing all factors, I find the goods are similar to a high degree.

The average consumer and the nature of the purchasing act

26. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods are likely to be selected by the average consumer. In *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*[10], Birss J (as he then was) described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the

[9] *Separode Trade Mark*, BL O/399/10 (AP)
[10] [2014] EWHC 439 (Ch)

person is typical. The term "average" does not denote some form of numerical mean, mode or median."

27. I keep in mind the opponent's submissions concerning the identification of the average consumer. For the most part, it considers that the average consumer will be approaching its purchase from a professional perspective, citing examples such as farmers, professional landscapers and scientists. The opponent does acknowledge, however, that the consumer will also comprise "amateur gardeners seeking to maintain healthy plants, lawns and shrubs at home". To my mind, the average consumer of the goods at issue will indeed naturally comprise both professional bodies (such as landscapers) and members of the general public. The goods are likely to be self-selected from the shelves of a specialised retail outlet or online equivalent and will generally be advertised via fairly traditional means. The marks' visual impression is therefore likely to carry the greatest weight during the purchasing process, though I do not overlook the significance of the marks' aural impression, particularly as word-of-mouth recommendations may be shared amongst peers, for example. The consumer is likely to be alive to considerations such as compatibility as well as the benefits offered by the goods' respective ingredients. The cost associated with the relevant goods, to my knowledge, is not particularly high. Weighing all factors, generally speaking, I find it likely that the average consumer will apply a medium degree of attention, though I accept that this may be slightly higher in the case of a professional purchase, given that there is likely to be a greater degree of investment in play.

Comparison of trade marks

28. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components. The CJEU stated, at paragraph 34 of its judgment in *Bimbo SA v OHIM*,[11] that:

[11] Case C-591/12P

> "… 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."

29. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

30. The parties' marks are laid out in the table below:

Opponent's trade mark	Applicant's trade mark
Rizobacter **AND** Rizobacter **(series of two)**	**Rhizo Shake** **AND** **RhizoShake** **(series of two)**

31. The opponent relies upon a series of two figurative marks, as shown above. At the beginning of each mark is a device element which is a fairly simple geometric line that takes a form which is almost dimensionally evocative of a conical flask (though, to my mind, it will not be perceived in this way by a significant proportion of average consumers, more likely an arbitrary symbol). The marks' second element is a word of ten letters; Rizobacter. The font is unremarkable, with only the first letter capitalised. In the first mark, the word element is presented in a light blue colour and the device in blue and green. In the second series mark, both elements are presented in grey. In terms of an overall impression I find that, in each of the series marks, the word element is likely to carry the greatest weight, with the device element playing a much lesser role.

32. The applicant's series comprises two word-only marks; in the first series mark, Rhizo and Shake are presented as two distinct words (separated by a space), whilst in the second mark they are joined together to create a single word of ten letters (RhizoShake). Still, the separation of the words with a capital letter means the mark nonetheless lends itself to being considered as the two distinguishable elements "Rhizo" and "Shake". The marks' overall impression resides in either the combination of two words "Rhizo" and "Shake", or "RhizoShake" presented as a single word (but with two distinguishable elements).

33. I have considered the opponent's submissions regarding the nature of the marks' respective 'Shake' and 'Bacter' elements, reproduced below:

> "…it is submitted that consumers will interpret the "Shake" element in the contested trade (sic) as an instruction/reference to shake the product (it is common to have to shake these types of goods before use) while the "bacter" element in the Opponent's trade mark will be perceived as a reference to the descriptive term "bacteria" (such goods can often include plant growth promoting bacteria, commonly known as "PGBP")."

34. There is nothing before me to show that these lines of reasoning are commonly understood by the average consumer. It is not apparent from the applicant's specification that "shaking" is an integral component to the application of the goods themselves, nor am I minded to find that the average consumer will interpret "bacter" as a shortening of the term "bacteria", particularly as the articulation of "bacter" does not naturally allude to how 'bacteria' would typically be pronounced, though of course I acknowledge that b-a-c-t-e-r plainly represents the word's first six letters. The above submission therefore has no bearing on my initial findings regarding the marks' respective overall impressions.

35. I find the parties' series marks are sufficiently similar (to one another) that a single finding concerning the marks' visual, aural and conceptual similarity is appropriate.

36. Visually, the parties' series marks coincide in their first letter "R" as well as letter sequence "i-z-o" which represents the second, third and fourth letters in the opponent's series marks and the third, fourth and fifth letters in the applicant's series marks. Whilst I accept that the remaining letters in the respective marks include an "a" and an "e", there is little *tangible* similarity in the remaining elements of the parties' marks. The device element positioned at the beginning of the opponent's series marks creates a point of visual distinction, as does the adoption of colour in the first of the marks, though registration of a word-only mark would naturally allow for its presentation in a variety of standard colours and typefaces. I also take into account that the spacing applied to the first of the applicant's marks creates a difference visually when compared to the single word element in the opponent's marks. Weighing all factors, including the identity in the marks' first letter 'R' and letter series I-Z-O, and being mindful of my findings concerning the marks' overall impression, I find the visual similarity is between a low and medium degree.

37. As the consumer is unlikely to articulate, or to attempt to articulate, the device element in the opponent's series, I need only consider the degree of aural similarity between "RIH-ZO-BAC-TER" or "RY-ZO-BAC-TER" (depending on how the consumer elects to articulate it) and "RY-ZO-SHAKE". The latter articulation of the opponent's marks will naturally take the parties' marks closer together in aural terms on account of an identical first syllable, though even where the first articulation is adopted, the marks' first syllable is nonetheless at least highly similar. The marks differ in their entirety, aurally, by one syllable (the earlier mark comprising four syllables and the contested mark three syllables) and there is little similarity in the marks' respective BAC-TER and SHAKE elements.. Keeping in mind that, generally speaking, the beginnings of marks tend to have a greater impact on the consumer[12], and allowing for variation in the articulation of the earlier mark, I find the aural similarity is between a medium and fairly high degree.

38. The marks' conceptual impressions must be considered from the perspective of the average consumer. Beginning with the opponent's series marks, I am not aware of a readily retrievable definition of its word element "Rhizobacter". Whilst I have considered the opponent's submission regarding the mark's "bacter" element insofar as it will be

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

viewed as a reference to bacteria, and this may indeed have been the intention, it is not to my knowledge a well-known shortening of the word, and I have nothing before me to indicate that the average consumer would readily interpret it in this way. The mark's word, in its entirety, will likely be viewed as an invented word, with no retrievable meaning. As I have found the device element will be perceived by the significant proportion of consumers as an arbitrary symbol, it is unlikely to contribute any conceptual value. In the applicant's series, Shake is distinct by virtue of either spacing or capitalisation. This element within the mark will evoke a tangible and well-known concept for the average consumer, for the most part describing a physical action of rapidly moving an object back and forth (though I accept that it can also be used colloquially to describe consumable goods such as milkshakes, for example). Again, whilst I keep in mind the opponent's submissions on the matter, I am not aware that 'Shake' has a clear association with the goods for which registration is sought and will therefore not necessarily be perceived as a descriptive element of lesser weight. It does, however, introduce a conceptual message which has no counterpart in the opponent's series marks, which I have found will offer no retrievable meaning. On this basis, the marks do not share any conceptual similarity.[13]

Distinctive character of the earlier trade mark

39. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*[14], the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR 1-2779, paragraph 49).

[13] Even if I had found that the device element in the opponent's mark introduced a conceptual meaning, it is not one which would be replicated in the applicant's series and, therefore, I would still reach the finding that the marks did not share any conceptual similarity.
[14] Case C-342/97

> 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 promotion of 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)."

40. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods and services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it.

41. In the absence of any substantive evidence showing the use made of the earlier mark, I have only its inherent position to consider. In each series mark, I have found that Rizobacter will carry the greatest weight, and that it will be viewed as an invented word. The mark's device plays a lesser role and, whilst it is not a negligible element, I do not consider it to have any meaningful impact on the marks' inherent distinctiveness. Given that I have found the mark to have no descriptive nor allusive connotations, and that Rizobacter will be interpreted as an invented word, I find each of the opponent's series marks to enjoy a fairly high degree of inherent distinctiveness.

Likelihood of confusion

42. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and/or services, and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of the

opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion. Conversely, the less distinctive it is, the lower the likelihood of confusion.

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

44. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*[15], where he explained that:

> "16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very 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

[15] Case BL O/375/10

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)".

45. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*,[16] Arnold LJ approved Mr Purvis's formulation but added:

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

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

47. Throughout the course of my decision, I have found the parties' marks are visually similar to between a low and medium degree, aurally similar to between a medium and fairly high degree and, conceptually, the marks do not share any similarity. The average consumer will comprise both members of the general public and professional entities generally paying a medium degree of attention (though it may be higher in some circumstances). The marks' visual impression is likely to carry the greatest weight in the

[16] [2021] EWCA Civ 1207

selection process, though I do not discount the significance of the marks' aural impressions. The series marks relied upon by the opponent enjoy a fairly high degree of inherent distinctiveness. The parties' respective goods are highly similar.

48. I begin by considering a likelihood of direct confusion. As the case law makes clear, this is simply a matter of the consumer mistaking one mark for the other. Notwithstanding any similarity between the parties' respective Rhizo- and Rizo- elements, and that generally the beginning of marks have more of an impact on the consumer, the marks' remaining elements share little meaningful similarity which is, to my mind, unlikely to be overlooked, even when considered in respect of highly similar goods. Furthermore, the 'Shake' element in the applicant's series will convey an immediately recognisable concept which will allow the average consumer to readily differentiate between the marks; on repeat purchase, for example, the consumer would acknowledge the presence and/or absence of an identifiable element in 'Shake'. The device element in the opponent's series also creates a point of visual differentiation. Whilst I do take into account the fairly high degree of inherent distinctiveness enjoyed by the opponent's series marks, and I acknowledge that it is likely that the spelling of the marks' respective Rhizo and Rizo elements will be misremembered, keeping in mind my findings regarding the marks' overall impression(s) and weighing all considerations, I dismiss a likelihood of direct confusion. The similarity between the marks is simply not sufficient to lead the average consumer to erroneously mistake one for the other.

49. I turn now to consider a likelihood of indirect confusion. To my mind, the common element in the parties' marks is the similar sequence of letters R-H-I-Z-O and R-I-Z-O. Given that not a particularly high degree of attention is likely to be applied to the purchase, the high degree of similarity between these respective elements will likely give rise to the effects of imperfect recollection and the average consumer will not accurately recall the spelling adopted in either sequence. This is particularly likely given that neither represents an identifiable word with which the average consumer will be familiar. Whilst this may be enough for one mark to call the other to mind, this is mere association[17]; indirect confusion requires *a proper basis*. In the earlier marks I have not found that "bacter" will be recognised as a distinct element or that it will be attributed any less weight than its preceding *Rizo*. Even where the similar letter series is identified,

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

and is believed to be identical, the marks' respective remaining word elements (*bacter* and *Shake*) are not consistent with what the average consumer would be inclined to interpret as a brand extension or sub-branding scenario. The words are not lowly distinctive to an extent that the average consumer will naturally be inclined to conclude that the originating undertakings are the same or related, as identified in the second example in *L.A. Sugar* and, whilst the Rizo/Rhizo sequence in the respective marks will be perceived as an invented or meaningless series of letters, the sequence is not what I would consider "strikingly distinctive" in the sense that only one undertaking would be making use of it. Having carefully considered the present circumstances, I can see no additional basis to support a finding of indirect confusion, or a likelihood thereof.

Conclusion

50. The opposition under section 5(2)(b) is unsuccessful. Subject to any successful appeal against my decision, the application will proceed to registration.

Costs

51. The applicant has been successful and is entitled to a contribution toward its costs. Awards of costs in respect of proceedings commenced on or after 1 February 2023 are governed by Annex A of Tribunal Practice Notice ("TPN") 1/2023. In accordance with that TPN, I award costs to the applicant as follows:

Reviewing the Notice of Opposition and preparing a counterstatement:	£300
Reviewing the opponent's evidence:	£200[18]
Total:	**£500**

[18] I have taken into account the nature and substantiveness of the opponent's evidence. The applicant did not file any evidence nor submissions in reply.

52. I hereby order RIZOBACTER ARGENTINA S.A. to pay Pietro Perugino the sum of £500. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 29th day of September 2025

Laura Stephens
For the Registrar