O/0976/25

TRADE MARKS ACT 1994

IN THE MATTER OF THE TWO APPLICATIONS NO. 4027622
IN THE NAME OF APPLIED NUTRITION PLC
IN RESPECT OF THE TRADE MARK

Fuel your moment

IN CLASSES 5, 29, 30 & 32

AND

THE OPPOSITION THERETO UNDER NO. 448351
BY THG NUTRITION LIMITED

Background and pleadings

1. Applied Nutrition Plc ("the applicant") applied to register the trade mark no. 4027622 for the mark **Fuel your moment** in the UK on 18 March 2024. It was accepted and published in the Trade Marks Journal on 29 March 2024 in respect of goods in classes 5, 29, 30 and 32. These are set out in full later in this decision.

2. On 28 June 2024, THG Nutrition Limited ("the opponent") opposed the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). This is on the basis of its earlier UK comparable Trade Mark no. 909944752[1] for the mark FUEL YOUR AMBITION. This mark was filed on 10 June 2011, and registered on 19 October 2011. By virtue of its earlier filing date, this registration constitutes an earlier mark in accordance with section 6 of the Act.

3. In its TM7, the opponent states it relies upon all of its goods as registered. However, also within its TM7, the opponent only claims to have used its earlier mark in respect of certain goods in classes 5, 25, 29, 30 and 32. As this mark had been registered for a period of more than five years at the date on which the application was filed, it is subject to the use provisions set out in section 6A of the Act.

4. The opponent argues that the respective goods are identical and/or similar to a high degree, and that the marks are aurally, visually and conceptually similar to a high degree. As such, the opponent submits there is a likelihood of either direct or indirect confusion between the marks.

5. The applicant filed a counterstatement admitting identity or similarity in respect of some of the goods, but denying similarity between other goods. The applicant admits the marks coincide through the use of FUEL YOUR but submits that this element has been diluted and states that the opponent has no exclusivity in it. As such, the

[1] On 1 January 2021, the UK left the EU after the expiry of the transition period. Under Article 54 of the Withdrawal Agreement, the Registry created comparable UK trade marks for all right holders with an existing EU trade mark registrations. As a result of the opponent's EU trade mark being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and retains its original priority date.

applicant denies there will be a likelihood of confusion between the marks. The applicant has requested the opponent file proof of use of its goods relied upon.

6. Both sides file filed evidence in these proceedings. This will be summarised to the extent that it is considered necessary.

7. A shortform Hearing took place before me via video conference on 16 July 2025. The applicant is represented in these proceedings by Murgitroyd & Company and was represented at the hearing by Alan Fiddes of the same. The opponent is represented in these proceedings by HGF Limited. At the hearing, the opponent elected counsel, and was represented by Ms Ashton Chantrielle of 8 New Square.

8. 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.

Evidence

9. The opponent filed its evidence in chief in the form of a witness statement in the name of Mark Foster, Deputy General Counsel of the opponent. The statement introduces 25 exhibits namely Exhibit MF1 to Exhibit MF25. The statement is dated 11 November 2024 and goes to the use of the earlier mark.

10. The applicant filed its evidence in the form of a witness statement in the name of Holly Cameron, a Chartered Trade Mark Attorney at the applicant's representative firm. The statement introduces four exhibits, namely Exhibit HC1 to Exhibit HC4. The statement is dated 13 January 2025 and goes to the use of the wording FUEL YOUR by third parties, as well as to the opponent's use of the same.

11. The opponent filed its evidence in reply in the form of a witness statement in the name of Lauren Richardson, a Trade Mark Attorney at its representative firm. The

statement introduces 5 exhibits, namely Exhibit LR1 to Exhibit LR5. These go to the overlap in trade channels/target market and the sponsorship of similar teams and events by the opponent and the applicant, in addition to the different market sectors third parties using the FUEL YOUR wording are in, and to the lack of reliance placed on state of the register evidence in the Tribunal.

12. Whilst I do not intend to consider the evidence in full at this stage, I do find it appropriate to consider the evidence relating to the use and registration of the expression (and marks including the expression) FUEL YOUR by third parties, as filed by the applicant. I note firstly, that Exhibit HC1 provides evidence relating to the state of the register. The relevance of state of the register evidence was discussed in *Zero Industry Srl v OHIM*, Case T-400/06, in which the General Court ("GC") stated that:

> "73. As regards the results of the research submitted by the applicant, according to which 93 Community trade marks are made up of or include the word 'zero', it should be pointed out that the Opposition Division found, in that regard, that '… there are no indications as to how many of such trade marks are effectively used in the market'. The applicant did not dispute that finding before the Board of Appeal but none the less reverted to the issue of that evidence in its application lodged at the Court. It must be found that the mere fact that a number of trade marks relating to the goods at issue contain the word 'zero' is not enough to establish that the distinctive character of that element has been weakened because of its frequent use in the field concerned (see, by analogy, Case T-135/04 *GfK v OHIM – BUS(Online Bus)* [2005] ECR II-4865, paragraph 68, and Case T-29/04 *Castellblanch v OHIM – Champagne Roederer (CRISTAL CASTELLBLANCH)* [2005] ECR II-5309, paragraph 71). "

13. For the reasons set out above, I do not consider Exhibit HC1 to be of any relevance in these proceedings.

14. As outlined previously, Exhibit HC2-Exhibit HC3 provide evidence of use of the wording FUEL or FUEL YOUR by various entities when promoting their products. Some of these pages show use in relation to goods such as those relied upon under the earlier mark. However, there are a number of flaws with this evidence. Particularly,

I note that much of this evidence postdates the date the application was filed, and therefore does little to determine the position at the relevant date. Further, some prices of goods are shown in US Dollars, and therefore it seems reasonable to assume that not all of the evidence filed goes to the position on the UK market. This evidence does not, therefore, particularly assist the applicant in showing that, prior to the relevant date, the use of FUEL or FUEL YOUR was commonplace in the UK market for the goods and as such the UK consumer is accustomed to distinguishing between marks using such elements (i.e. the distinctive character of these elements had been reduced). That said, it does reinforce my existing view that the word fuel may be used in the English language in the context of consumable items, particularly when referring to products that may provide a source of long term or short term energy or endurance. As this evidence does little other than to reinforce my own view on this point, I do not intend to consider this further in this decision.

Proof of use

15. The relevant statutory provisions are as follows:

Section 6A:

"(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section "the relevant period" means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form (the "variant form") differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(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."

16. As the opponent's mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It reads:

"7.— (1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the "five-year period") has expired before IP completion day—

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day —

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM ; and

(b) the references in section 6A to the United Kingdom include the European Union".

17. Section 100 of the Act states that:

"100. 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."

18. 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 Bundervsvereinigung Kamaradschaft 'Feldmarschall Radetsky'*[2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Merken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C–720/18 and C–721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. 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]."

19. As outlined previously, whilst the opponent stated it relies upon all its registered goods within these proceedings, it only claims use in respect of a subset of these goods within its TM7. It is also this more limited list that has been outlined by Mr Foster in his witness statement relating to use. As the opponent has been put to proof of use by the applicant, I find it appropriate to consider this more restricted list of goods only when considering the use made of the opponent's mark, and I also consider only its reliance on the restricted list in the context of these proceedings as a whole. The restricted list of goods in respect of which the opponent claims use of its mark relied upon is as follows:

Class 5: Protein, carbohydrate, protein and carbohydrate or nutritional supplements; amino acid supplements, vitamin/mineral supplements, food supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being.

Class 25: Clothing.

Class 29: Protein-based nutritional drink mixes for use as a meal replacement; dried milk-based products for meal replacements; milk based beverages; protein based sports nutritional powdered mix composed of grains, soya or whey; all the aforesaid for use as aids to slimming, weight gain, muscle gain and well being.

Class 30: Flapjacks, caramel confectionery and caramel and hazelnut confectionery; flavourings for food and beverages; carbohydrate-based nutritional drink mix for use as a meal replacement; food supplements (non-medicated) being glucose confectionery; protein based confectionery, chocolate coated or plain.

Class 32: Isotonic beverages; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being; beverages for meal replacement and for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being.

20. Before considering the evidence of use filed by the opponent in full, I firstly intend to address one of the criticisms of the evidence raised by the applicant. This was set out in the skeleton arguments of Mr Fiddes, in the following terms:

> "7. It is the Applicant's submission that the Opponent has failed to establish in evidence that the Opponent THG Nutrition Limited has made use of the mark or has authorised another party to make use of the trade mark on which it relies, with its consent.
>
> […]
>
> 13. In this case the proof of use is provided by means of the Witness Statement of Mark Foster, Deputy General Counsel of "THG PLC". It is noted that the Witness Statement contains no explanation of the relationship between THG PLC and the Opponent, THG Nutrition Limited. It sets out no information relating to the acquisition of any rights in or to the mark in issue, which company/entity commenced use of the trade mark in issue, nor does it set out any agreements between any companies which relate to the use of the trade marks in issue. It fails to address the fundamental questions which would allow the Hearing Officer to decide whether the Opponent has made use of the mark in issue, or in the alternative whether the mark in issue is being used by a third party with its authorisation. It fails to set out the relationship between various entities referred to in the Witness Statement or how the Opponent comes to be the proprietor of the mark in issue."

21. Mr Fiddes goes on to identify a number of "deficiencies" relating to this point. On this point at the hearing, Ms Chantrielle submitted:

> "The starting point is paragraph 1. What Mr. Foster explains is that THG, or The Hut Group, is the parent company, and it owns two subsidiaries, one is thehut.com limited and one is CEND Limited. CEND Limited, and this is a matter that is not in evidence, this is a matter for looking at the register, CEND Limited was the previous owner of the trade mark and it was assigned to the Opponent in 2022 and that is on the register for the earlier mark. The Hut Group owned the proprietor of the mark until it was transferred to the Opponent, and it operates under three core businesses; one being THG Beauty, THG Nutrition and THG Ingenuity. Then he gives evidence based on the THG Nutrition Limited, which is the Opponent's records and his knowledge of the background. The reason that is relevant is because there is a point being made that, well, there is no evidence or there is no explanation as to whether use has been made by the Opponent and a lot of the use has been made before the Opponent was even incorporated. Insofar as you do take into account that evidence of incorporation, it is important to note that the test of genuine use is whether the use has been made by the proprietor or with the authority to use the mark. That is actually in my learned friend's skeleton argument in the case law on page 3. It is top of the page, at paragraph 115(i): "Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark."

22. On this point, I firstly outline my understanding regarding some of the general points raised. Firstly, I agree with the parties that for the use of a mark to be considered genuine use within the meaning of the Act, this must be use by the proprietor or with its consent. This does not appear to be in dispute. I also understand that consent may be explicit or implied, and it may be inferred from the facts and circumstances of each case (even where there is no economic link between the third party using the mark).[2] Further, where a mark has been assigned to a new owner during the relevant period, such as is the case here, use prior to that change of ownership should have been by or with the consent of the owner of the mark as it stood at the relevant time. Finally, whilst parties may often choose to do so, where a change of ownership has been recorded in the proper way on the register (and this is unchallenged), parties are not

[2] See *Makro Zelfbedieningsgroothandel CV and others v Diesel SpA,* Case C-324/08

required to file explicit evidence that such a change of ownership took place, or the parties involved in the same. It is instead, open to me to consider the details of the earlier mark displayed on the UK IPO trade mark register, which includes details of any change of ownership previously recorded.

23. I note the first attempt to challenge whether the evidence provided shows use with the consent of the opponent was included within Mr Fiddes skeleton arguments. To support this challenge, Mr Fiddes attempted to introduce a Companies House document, relating to the incorporation of the current opponent in 2021. It is my view that it was inappropriate to raise this challenge for the first time within the skeleton arguments filed, and it was even less appropriate to attempt to introduce evidence on the point at that late stage. I do, of course, accept the burden is on the opponent to prove its case.[3] I also note the applicant has not *explicitly* accused the opponent of lying. However, Mr Fiddes' skeleton arguments do, in my view, highly allude to an element of either untruthfulness or inaccuracy in Mr Foster's statement. For example, in the "deficiencies" outlined by Mr Fiddes, he makes such statements as (my emphasis):

> "3) In paragraph 3 of his Witness Statement Mr Foster refers to "myprotein.com" a business which was established in 2004, and which began using the mark "FUEL MY AMBITION" in 2016. Mr Foster then refers to Exhibit MF3 which is an article making reference to myprotein, but which he claims in paragraph 4 of his Witness Statement is a reference to the Opponent. The article referred to in Exhibit MF3 is dated 4 September 2015, nearly 6 years prior to the incorporation of the Opponent."

24. Various other similar submissions are made by Mr Fiddes referring to the statements of Mr Foster, in which Mr Foster has referred to "the Opponent" in relation to use of the mark, and which according to Mr Fiddes, supposedly predate the incorporation of the Limited company which now owns the mark on the register. It is in my view, implied in these submissions that Mr Foster's statements simply cannot be accurate, considering the later date of incorporation of the opponent. I find this to be

[3] See *Awareness Limited v Plymouth City Council,* Case BL O/236/13

an attempt to challenge the truthfulness or accuracy of the evidence provided, by way of submissions and evidence filed for the first time with the skeleton arguments provided. It is not, in my view, fair of the applicant to wait until the final stages of the proceedings to challenge the veracity or accuracy of the evidence in this way. Clearly, the opponent was not provided with a proper opportunity to respond to this challenge, and a challenge of this nature should have, in the interest of fairness, been raised at the earliest opportunity.[4] There appears to be no reason why this challenge could not have been raised earlier, and further, no reason why the evidence filed in support of this challenge could not have been filed during the evidence rounds. Had the applicant done so, the opponent would have had the opportunity to respond on any issues raised, particularly regarding what Mr Foster meant by his reference to "the Opponent" in the witness statement in respect of evidence apparently predating its incorporation. As it stands, the opponent has been given no opportunity to respond or provide what may be an entirely credible explanation for the alleged inaccuracy (for example, if Mr Foster was simply referring to the business operating under THG Nutrition prior to its official incorporation). It is my view that the applicant's submissions and its late supporting evidence pointing towards any inaccuracy or untruthfulness within Mr Foster's statement should be dismissed on this basis alone. Without reason to doubt the statements made by Mr Foster, I take his statement to be an accurate representation of the use of the mark within the relevant period. It is from this starting point that I consider whether the opponent has evidenced that the use of the mark was by the opponent or with its consent.

25. In this instance, the opponent (or "proprietor" of the earlier mark) is THG Nutrition Limited. This party has owned the mark since 26 May 2022. Prior to this, I can see on the register that the mark was owned by Cend Limited. The evidence of use has been filed with the witness statement of Mark Foster, General Counsel for THG Plc. In this statement, Mr Foster explains Cend Limited is a wholly owned subsidiary of the parent

[4] This point on fairness has been brought into sharper focus by the Supreme Court's judgement in *TUI v Griffiths* [2023] UKSC 48. Although this case is ostensibly about unchallenged expert evidence, it also has a wider impact. The judgement makes it clear that evidence needs to be challenged by a party if it wishes to submit that it should not be accepted on a particular point.

company The Hut Group. He explains The Hut Group operates under three core businesses, one of those being "THG Nutrition". I note Exhibit MF2 provided explains "THG operates under three core businesses (THG Beauty, THG Nutrition and THG Ingenuity)". These are the same three businesses outlined by Mr Foster as operating under The Hut Group, and as such it seems reasonable to assume that THG stands for The Hut Group,[5] as was referenced by Ms Chantrielle at the hearing. Further, I also note this exhibit states "THG Nutrition includes Myprotein and its brand family".[6] Finally, I note Mr Foster, General Counsel for THG Plc explains he is duly authorised to make the statement on behalf of the opponent, and that the facts come from his own knowledge as well as the opponent's records to which he has full and complete access.

26. It is clear from the above that the current opponent, in addition to the previous proprietor of the earlier mark and indeed THG Plc for which Mr Foster works, are all part of the same group of companies. A mark being used by one entity and owned by another entity within a group of companies is not uncommon, and it is my view that this is the type of circumstance where consent between the parties may be inferred. It is therefore my view that considering the circumstances of the case as established in the evidence provided, particularly the obvious relationship between the previous proprietor of the mark, THG Plc and Mr Foster, the current opponent and by consequence operations under the Myprotein business, that it is inferred the use discussed and demonstrated within the evidence provided will have been by, or with the consent of the proprietor of the mark at the relevant time. There appears to be no real reason to doubt this from the evidence provided.

27. I therefore go on to consider the sufficiency of the evidence for showing genuine use of the mark on this basis.

28. At the hearing, I noted to Ms Chantrielle that the opponent did not appear to rely on the class 25 clothing when making a comparison between the opponent's and the applicant's goods. I asked if it was therefore necessary for the opponent to continue

[5] Although I note this entity is not THG Plc considering the different company numbers provided.
[6] Whilst I note this evidence is date from 31 May 2024, slightly after the relevant period, I also note an article dating from 4 September 2015 is provided at Exhibit MF3 which refers to The Hut Group and its Myprotein range at that time.

to rely on *clothing* and for me to consider its proof of use in relation to the same. Ms Chantrielle confirmed that the opponent does not need to rely on clothing and does not require me to assess the evidence of use in relation to the same. I will therefore proceed on the basis that the opponent's class 25 goods are no longer being relied upon within these proceedings.

29. As the earlier mark is a comparable mark, in accordance with schedule 2A of the Act previously set out, EU use up until the end of the transition period on 31 December 2020 will be relevant. However, I note the evidence of use in the EU for this period is limited, and the evidence focuses more heavily on use in the UK. As the UK will constitute a significant part of the territory in the period for which EU use is relevant, I also intend to focus my summary and assessment primarily on the UK evidence, whilst keeping in mind at all times that EU use may contribute towards a finding of genuine use for this period. The relevant period for proving use in these proceedings is between 19 March 2019 - 18 March 2024.

30. In his witness statement, Mr Foster explains how "Myprotein"[7] began using the earlier mark in 2016 for the goods outlined previously in this section. An article is provided about Myprotein referring to its success in Europe and to the UK brand achieving a Global safety standard at Exhibit MF3. However, this is dated 4 September 2015, a number of years prior to the relevant date, and makes no reference to the earlier mark.

31. A number of documents and articles referring to awards won by Myprotein and The Hut Group are provided at Exhibit MF5 and MF6, however, again no mention of the earlier mark is made.

32. Exhibit MF7 includes webpages from the Myprotein website. The first few pages are undated, but I note they refer to "Advent 2024". However, a further page which also refers to Advent 2024 reads "And make 2022 work for you". This page shows the earlier mark in the following context:

[7] Described in Exhibit MF2 as included within THG Nutrition.

Myprotein Bundles

Explore our Best Sellers

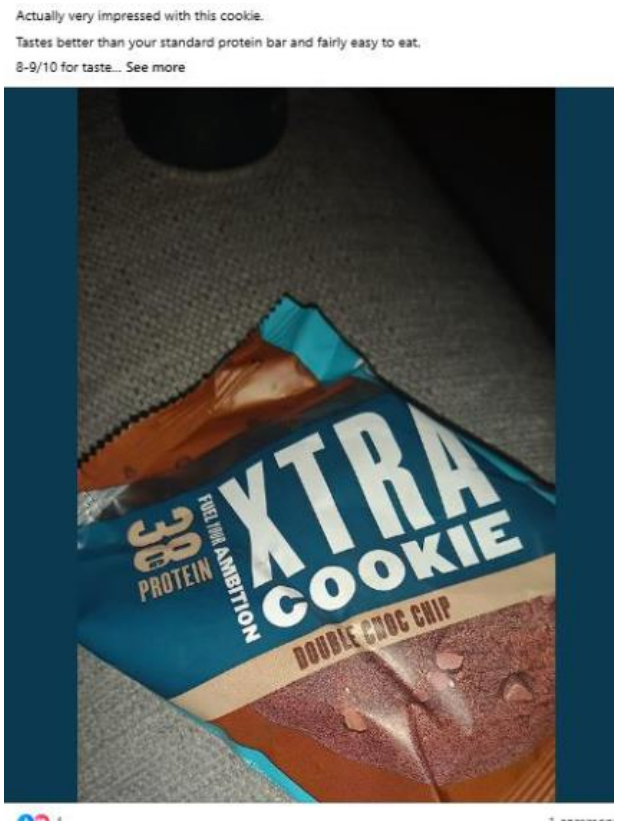
33. A further undated page shows what appear to be similar products to some of those shown above (the protein powder and shaker), with the earlier mark used in the product description. This is referred to as “Myprotein Fuel Your Ambition Performance Bundle (US)”. The product is listed as out of stock. There is a reference to free delivery on purchases over £45, making this page appear to be targeted at the UK, however, the reference in the product description to the US, and the fact the product is out of stock makes the territory within which these goods were available and sold somewhat unclear. A further image of what appears to be a protein shaker displaying the mark on the website is provided, with a price in GBP, however, the page shows the date 30 September 2024, outside of the relevant period.

34. Further images are also provided in this exhibit. These show a number of products, including those such as protein powders and a protein shaker, however, these images date from prior to the relevant period. There is also an image of vegan protein bars dated from 2 August 2019, however, the images are too small to make out whether the earlier mark features on the same. Further images showing the mark used on products such as protein powders, bars, shakes and syrup are provided, but the images are undated. In addition, further webpages are provided which are either undated or dated after relevant period. One of the undated pages shows what is referred to as a “Fuel Your Ambition Box” and shows protein powder, a protein shaker, protein maple syrup, a protein bar, a protein cookie and what appear to be supplements of some sort. I note that again, whilst this page is undated, there is reference in on the same to Advent 2024.

35. Exhibit MF8 provides screenshots of the Myprotein website provided by web archiving site the Wayback Machine. However, whilst these pages are dated, they are dated prior to the relevant period.

36. Pages from the Myprotein US website are provided at Exhibit MF9, dating from shortly after the relevant period. Also provided are social media pages and webpages that Mr Foster explains show products from the US, Europe, Australia and Singapore. Again, the pages date from shortly after the relevant period.

37. Exhibit MF10 provides pages from what Mr Foster describes as a “MYPROTEIN community group”. It appears to show social media pages related to this group. There is a reference to the earlier mark on this page where “Fuel Your Ambition Community group rules and regulations” are posted. Mr Foster confirms this community group ran “…for many years up until 2022”. Also this exhibit includes an image of a protein cookie, seemingly posted on social media and dated 2 February 2022. This shows the mark in the following format:



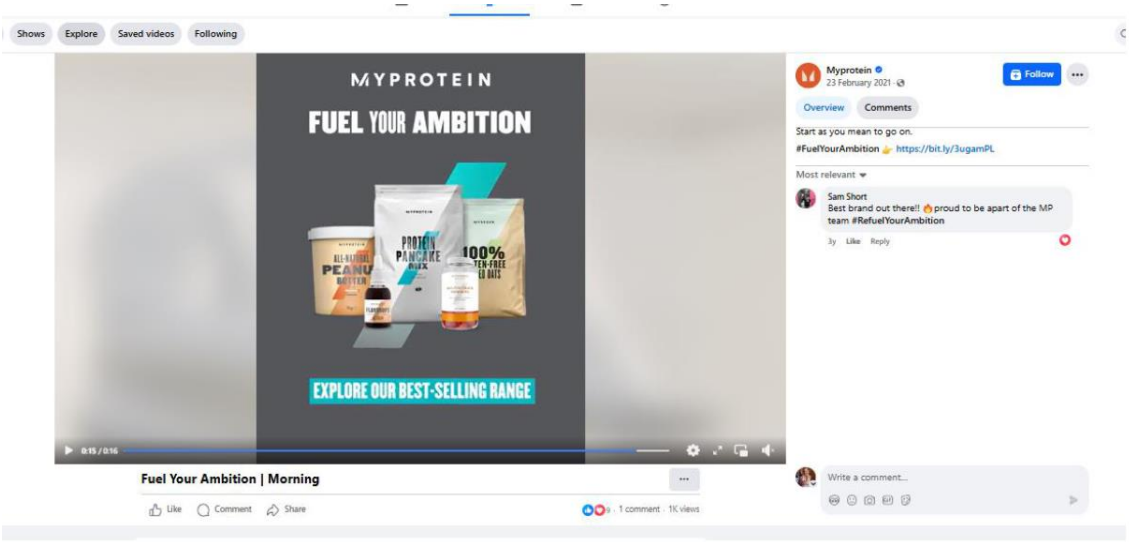
38. Further posts dating from 2021 and 2022 showing the mark used on packaging of energy drinks and on a box containing a protein bar, an energy drink and multivitamins are also shown at this exhibit. The mark is also shown on a posted advertisement next to what appears to be a protein powder and shaker. I note the reference to products now being in Morrisons, which indicates these may be targeted at the UK consumers.

39. Further Facebook pages are also provided at this exhibit. The printout of the pages itself is undated. These show the Facebook page has 2.3 million likes and 2.3 million followers, and there is a reference Myprotein UK. Again, the posts include an advert referencing the earlier mark placed next to what appear to be protein powders and a protein shaker dating from 2021. Further, a post dating from 15 October 2020 is provided showing the earlier mark running down the side of a bag of protein powder, as shown below:

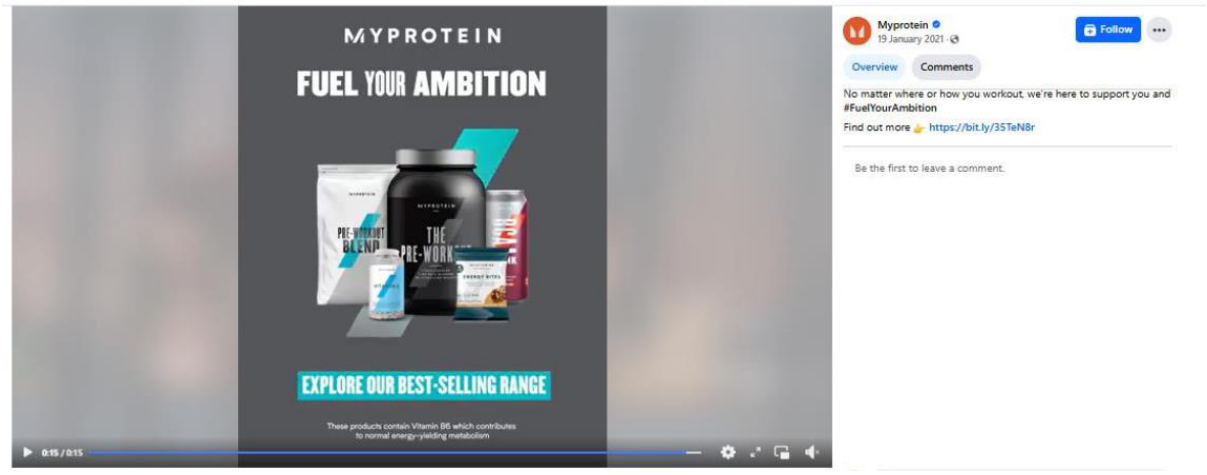
40. The post is captioned “How it started. How its going”. Due to the layout of the pictures provided, it is my view that the current packaging (when this was posted) will have been the one showing the earlier mark down the side.

41. Exhibit MF11 provides screenshots of videos that Mr Foster explains were posted on Facebook, TikTok and YouTube. The first is dated February 2021. Mr Foster

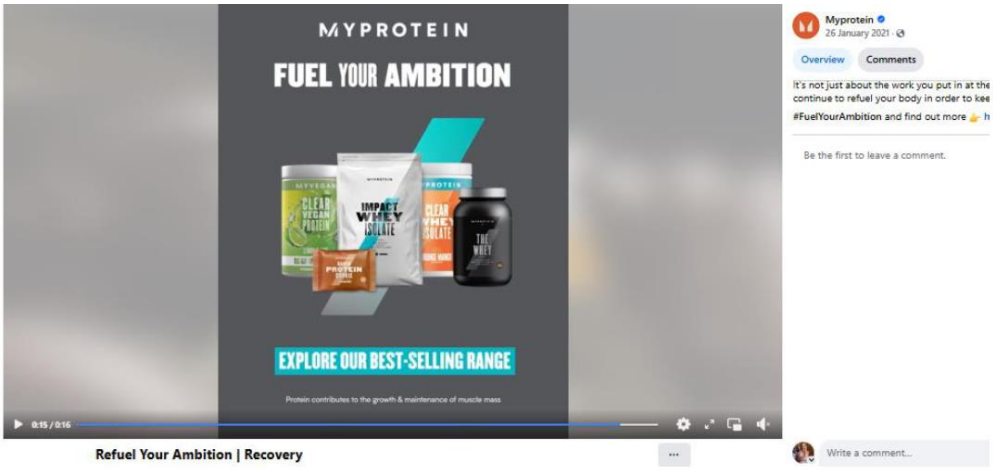
explains the video was created to show consumers what they can eat for breakfast, and the product range. A screenshot is provided from the video shows the mark used as below:



42. A second screenshot from a video dated a month earlier in January 2021 shows the following advertisement:



43. Another screenshot from a video dating slightly later in January 2021 shows the following:



44. All of the videos appear to have had roughly 1000 views.

45. More pages from social media are provided at Exhibit MF12. Mr Foster explains these show advertisements for their products under the earlier mark. More adverts such as those shown above are provided dating from 2021. An undated image of a protein brownie is provided. A YouTube video featuring a field boxing champion wearing clothing bearing the earlier mark under the larger MYPROTEIN mark are shown, but there is nothing to indicate the video is targeting the UK.

46. Various pages from X are provided Exhibit MF13, however, outside of the use as a hashtag, there is limited use of the earlier mark within the relevant period in the posts. I note at this stage that it does not seem to me that the use of the mark as a hashtag on these pages will necessarily be considered as use of a trade mark in relation to the goods. There are also further advertisements, again similar to those shown previously, in videos posted on the page dating again from January 2021.

47. Exhibit MF14 provides images of social media posts from of British gymnast Matt Whitlock OBE. In one post, dated January 2021, he holds a protein shaker showing the mark. In another, he holds a bag of protein powder, however, the earlier mark is not clearly visible on the same.

48. In his witness statement, Mr Foster explains that the opponent uses a variety of different Instagram accounts. He provides details of these including follower numbers

and posts. Although these numbers appear to be accurate at the date of the statement, they are not within the relevant periods necessarily. There are 14 accounts listed, all beginning with Myprotein or myprotein. 13 of these are then followed by what appears to be a two letter country code, such as fr, es, it, de etc. Many appear to therefore be EU accounts. Exhibit MF16 provides various posts from some of these accounts. There is a post from the "myprotein" account showing what appear to be bags of protein powder, and whilst not entirely clear, these appear to show the earlier mark down the side of the packets. This post dates from July 2020. There is also a number of other images showing a wider range of goods bearing the earlier mark, including protein shakers, flavour drops, protein powder, omega supplements, and protein bars, but either the date is not clear on these, or they are dated prior to the relevant date. Posts showing products bearing the earlier mark within the relevant date show protein powder.

49. Exhibit MF17 provides an article discussing a partnership between Myprotein and a premiership rugby team, but the article makes no reference to the earlier mark. It also provides an image promoting the Myprotein "FUEL YOUR AMBITION RACE". Mr Foster confirms this took place in 2021. The document references 4260 participants.

50. In his witness statement, Mr Foster confirms that newsletters sent out to customers in 2021 are provided at Exhibit MF18. Dates that emails were sent out are provided in the exhibit, and they run throughout January and February 2021. The earlier mark is displayed on a number of these newsletters, alongside goods such as protein powder and protein snacks, vitamin and mineral supplements and flavour drops, although not on the goods themselves. The number of consumers these were sent to and the territory of the same is not outlined.

51. Details of a "Refuel your ambition" challenge run in 2021 are provided at Exhibit MF19, but I do not consider this use of the earlier mark.

52. Third party articles are provided at Exhibit MF23. Some of these discuss the launch of the FUEL YOUR AMBITION campaign and the launch of new products. However, there is nothing indicating that the majority of these are targeted at the UK (or EU) consumer. For example, the first article refers to "Republic day" and provides a quote

from the “Managing Director - India and Emerging Markets”, from a .com domain. The second, also on a .com domain, provides a quote from the same Managing Director. The third is also from a .com domain, and uses American English, such as a reference to “performance pants” when discussing leggings. A further article is then provided from a .com website, and all of the aforementioned articles use an American format for the date. However, there is an article from Woman’s Health that appears directed at the UK consumer and is dated 18 July 2018. This discusses healthy snacks to buy under £1.50, and shows a Myprotein Chocolate Chunk Flapjack. Whilst the article does not refer to the earlier mark, the image provided shows this on the product as below:

53. An article from November 2018 is provided from a website called Protein Hunter. This article appears to be targeted at both US and UK consumers as it makes reference to prices in both USD and GBP, and it provides an option to click to “Shop on MyProtein (UK & Europe)” or to “Shop on MyProtein (US)”. The following image showing the earlier mark under the MyProtein mark on protein powder is provided:

54. A blog post is then provided, but the date of the article and territory to which it is targeted is unclear. Next is an article discussing a protein shake, which shows the earlier mark on the same. Whilst I note from the article itself the territory to which it is aimed is unclear, I do note it appears to be posted on the same webpage as the article underneath, which references prices in GBP and appears therefore to be aimed at the UK. This article shows a rocky road protein bar also showing the earlier mark. However, the article is dated “6 years ago”, with the printout itself dated 7 November 2024. It therefore seems likely it dates from 2018, prior to the relevant date.

55. In his witness statement, Mr Foster explains that the opponent’s products are available to purchase in major supermarkets across the UK, including Asda and Sainsburys, as well as via Amazon. He also confirms that “three years ago” they launched their Myprotein area within Asda. At Exhibit MF24, images are provided showing a number of products for sale in the UK. However, most of the goods shown do not display the earlier mark on the same, or the images are too small to confirm whether they do. I note some of the listings do reference the earlier mark in the description of the products, or notes “from the manufacturer” for example as shown below, but it is my view this does not constitute use as a trade mark. This use does not appear to be such that the consumer would use the wording FUEL YOUR AMBITION to indicate the economic origin of the goods:

Description

High Protein Bar, with a Layer of Caramel and Soya Protein Crispies, Enrobed in a Dark Chocolate Coating. Dark Chocolate and Sea Salt Flavour, with Sugar and Sweetener.

20g Protein

1.5g Sugar

Fuel Your Ambition

This product is intended to be used alongside an active lifestyle and a balanced diet.

Not suitable for vegetarians.

From the manufacturer

MYPROTEIN

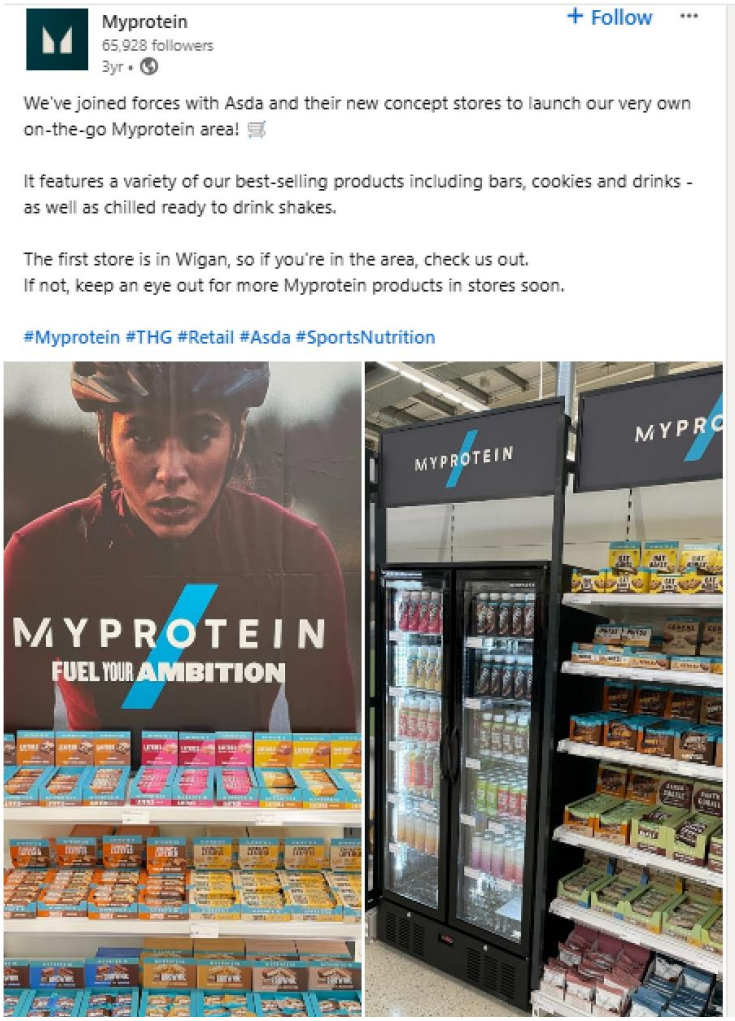
About Us

We're a sports nutrition brand, delivering a range of quality products including protein powder, vitamins and minerals, high-protein foods, snack alternatives, and performance clothing.

Founded in 2004, Myprotein is in Europe and based out of our Manchester offices we operate in over 70 countries through a diverse and dedicated team of staff, athletes, and active influencers. Every day we work to inspire people of all ages and genders to believe in their fitness potential, then fuel them to achieve it.

At Myprotein, our aim is to fuel the ambitions of people across the world — making the best in sports nutrition available to everyone, whatever their goal. We pride ourselves in providing a broad selection of products at exceptional value to power this, including a range of dietary needs including vegetarian, vegan, dairy-free and gluten-free, so any one can enjoy the benefits of high-quality nutrition.

56. Further, where the earlier mark is shown on the products, the images are often undated or date from outside of the relevant period. I do note however, that some of the social media posts showing the launch of goods in ASDA show the mark displayed on the posters within the stores, such as in the below:



57. Further, the mark is shown to be visible (albeit small) on a flavoured drink from, judging by the caption, the time of the ASDA launch as below:

58. In his witness statement, Mr Foster provides turnover figures relating to the global sales of goods under MYPROTEIN (which are largely irrelevant). In addition, he sets out figures which he describes as "[t]he annual turnover (£'s) under the FUEL YOUR AMBITION Mark between 2017 and 2021 in the UK". These figures are provided as follows:

Turnover (£'s)	2017	2018	2019	2020	2021
United Kingdom	£41,004,701	£43,738,309	£47,473,825	£60,420,178	£73,532,927

59. These figures are clearly very high. However, I note that in the paragraphs below these figures, Mr Foster provides additional figures. For ease of reference, I have set out the relevant section of Mr Foster's statement below:

14. From the above figures, it is clear that the mark has been used extensively by the Opponent over the Relevant Period and also beforehand, demonstrating that the Opponent has invested heavily in marketing the products bearing the trade mark.

15. In addition to the sales above, below are the sales of individual sales categories broken down into Units sold and Gross Revenue (£'s) between the date range of 1st January 2019 to 2024:

All product category figures:

Region	Units Sold	Gross Revenue
2020	35,958	£432,613
2021	42,305	£405,257
2022	2,480	£37,480
2023	182	£2,412
2024	-	£0
Grand Total	**80,925**	**£877,762**

Including clothing, protein powders and boxes:

Region	Units Sold	Gross Revenue
UK	28,556	£308,097
Asia	10,720	£137,865
Central Europe	8,152	£94,857
Southern Europe	8,326	£85,816
Western Europe	7,565	£73,478
DACH	3,948	£45,315
Balkans & Adriatics	4,616	£44,201
Eastern Europe	2,207	£23,925
Nordics	1,444	£20,294
Americas	1,964	£19,144
On Hold	2,549	£16,053
Australia	443	£3,937
Middle East	363	£3,702
India	72	£1,077
Grand Total	**80,925**	**£877,762**

60. Clearly, the figures provided above are significantly lower than the earlier figures, and are said to also relate to UK sales under the mark. Whilst I consider these figures initially to be confusing, I note Ms Chantrielle for the opponent provided an explanation relating to the same at the hearing. Ms Chantrielle submitted (my emphasis):

> "Then paragraph 13 is the annual turnover of products sold under the FUEL YOUR AMBITION mark in the relevant period. What we are looking at is figures in the region of 41 million, 60 million for 2020, 73 million for 2021.

In terms of products that were sold within the name and the title, that is what the tables in paragraph 15 relate to. It is actually easier to look at the last table first, which is the one that says "Sale of products that contain Fuel Your Ambition, the category code" …

[…]

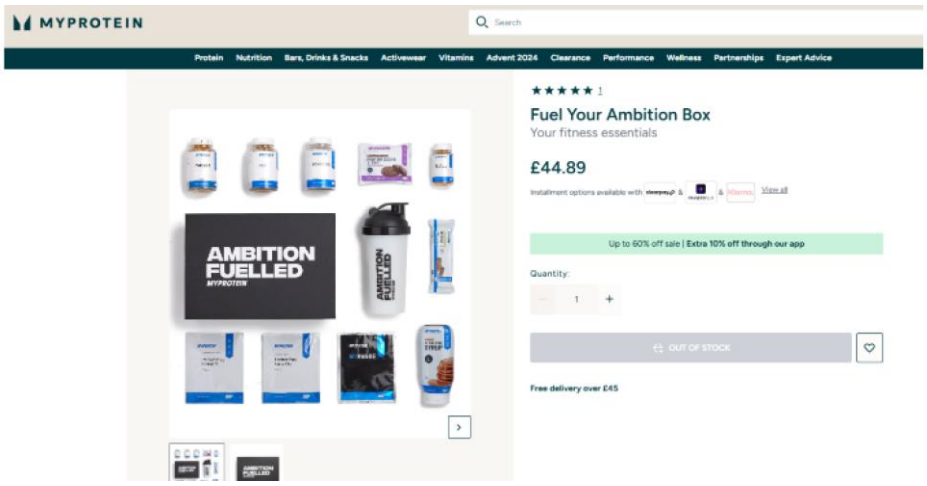
These are the products that have, as I showed you, the Fuel Your Ambition in the actual title. What you have here is you have units sold of each one. A lot of these are clothing, but you have Energy Bundle, Recovery Bundle, another Energy Bundle, Performance Bundle. There are 81,000 units sold of products with the name in the title. Then if you go back to the previous two tables, what you have is the split by year and the split by country. That is in the period of 2019 to 2024. The table has 2020-2024, and then you have in the UK it is 28,000. These are all the same 81,000 products, it is just split by country and split by year. In that period in the UK, there were 28,000 units sold, revenue of £308,000 of the products with the name in the title. That is the best that they could provide in terms of products with the name in the title, because there are other products that are sold under the mark but not necessarily with the product in the title, and that is what paragraph 13 relates to, so annual turnover of products under the FUEL YOUR AMBITION mark in that time period in the UK."

61. I accept this explanation; however, I do not find it to be entirely clear what Mr Foster himself will consider goods sold "under" the earlier mark to include where this is not actually on the packaging of the goods themselves. It may refer to, for example, the sales of goods in ASDA, where the goods themselves may not include the earlier mark but where there is an advertisement nearby which does make reference to the same. However, if this is the sort of scenario Mr Foster is referring to, it is not clear from the evidence that this mark will always be viewed by the consumer when buying the goods. Further, it may include scenarios such as those shown in evidence, where the earlier mark is shown in the product description, in a manner that I do not consider to necessarily be use as a trade mark. Either way, I do not consider the extent to which the very large sales figures may be strictly attributed to goods sold under the earlier mark to be clear, for the purposes of finding genuine use of the earlier mark in relation

to the same. I am not inclined to disbelieve Mr Foster, however, considering how large the discrepancy is between these figures and those which Ms Chantrielle submits relate to goods actually bearing the earlier mark in the UK, I find it appropriate to take only the latter figures into account in this instance, whilst noting there will likely also be some additional sales of goods next to advertisements which bear the mark which may also count towards the picture of genuine use in this instance.

62. With consideration to my findings above, I find the sales figures over the five years of the relevant period to be relatively modest. Further, it is clear from the description of the same, and the rest of the evidence provided, that a portion of these figures will be in respect of the sale of clothing items, which are not relevant to my assessment. However, I note protein powder is clearly shown in the evidence to also be a key product, and one which bears the mark within the relevant period in the UK from the evidence provided. It is my view that it is therefore reasonable to assume that at least a reasonable portion of the unit sales for “clothing, protein powder and boxes” in the UK will be in relation to the same.

63. I note the unit sales provided also refer to the sale of “boxes”. At the hearing, Ms Chantrielle pointed me to an image at Exhibit MF7, previously described in the evidence summary above. This shows the image below of the “Fuel Your Ambition Box”:



64. As previously highlighted, the only reference to a date on this page is by way of the use of “Advent 2024”. It is possible this page therefore dates from somewhere near

the end of 2024,[8] and it is therefore not clear it is from within the relevant period. It therefore seems reasonable to assume that these are the types of goods that may constitute the "boxes" referred to in respect of the unit sales provided. However, being that there is very limited evidence of these boxes for sale throughout the evidence, and considering what is contained in the same may change overtime, it is very difficult to take from this how many boxes were sold in the relevant period, and what these boxes would have actually contained.

65. I note the evidence also shows a few examples of other products, including those such as protein cookies, bars and drinks bearing the earlier mark, for sale within the relevant period. Whilst these are not listed above in the unit sales provided by Mr Foster, they are also not excluded in the same. However, the evidence showing examples of these for sale in the UK (or EU) within the relevant period is fairly sparce overall. Considering the unit sales provided are already fairly limited overall, and it appears from the evidence that a significant portion of these sales will be attributable to the clothing, powders and "boxes" outlined, the actual number of unit sales of these goods bearing the mark is likely in the circumstances to be very limited.

66. In *Awareness Limited v Plymouth City Council,* Case BL O/236/13, Mr Daniel Alexander Q.C. as the Appointed Person stated that:

> "22. The burden lies on the registered proprietor to prove use..... However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the

[8] Although reference on another page showing this reference also refers to "2022" and therefore casts some doubt on this.

proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public."

67. I consider the above, and my assessment of the evidence which, whilst lengthy, includes a significant amount of material that is either undated, dated outside of the relevant date or unable to be attributed to sales in a particular territory, in addition to material that cannot be said to show use of the earlier mark itself. It is my view overall that the opponent has done enough to show genuine use of the earlier mark in respect of protein powders within the relevant period. However, the evidence provided in respect of the additional goods is simply too sparce to make a finding of genuine use in respect of the same. In my view, it should not have been difficult for the opponent to at least show these goods clearly and consistently for sale in the UK market (or EU market where applicable) during the relevant period, and the corresponding unit sales made in respect of the same. Whilst I note that no particular kind of documentation is required, it is my view that to make a finding that there has been genuine use of the mark in relation to these goods would require me to make too many unreasonable inferences in the circumstances.

68. With consideration to the specification relied upon, it is my view that the opponent has shown genuine use of goods that fall within the category of *protein supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being* in class 5. With the necessary regard to the perception of the average consumer and the purpose and intended use of the products in issue,[9] it is my view that this category constitutes a fair specification, with consideration to the goods for which genuine use has been shown. I therefore proceed on the basis of this limited specification only.

Decision

Section 5(2)(b)

[9] See *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2017] EWCA Civ 1834

69. Section 5(2)(b) of the Act is 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".

70. Section 5A of the Act is 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 mark is applied for, the application is to be refused in relation to those goods and services only."

The Principles

71. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG,* Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV,* Case C-425/98, *Matratzen Concord GmbH v 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.

> *The principles*
>
> (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 and services

72. 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 of its judgment 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".

73. 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.

74. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

> "… Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR) [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Each involved a straining of the relevant language, which is incorrect. 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."

75. 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 Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)***,** Case T-325/06, the GC stated that there is complementarity where:

> "...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".

76. In *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T- 133/05, the GC stated that:

> "29. In addition, the 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 fur 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".

77. With this in mind, the goods for comparison are as follows:

Earlier goods	**Contested goods**
Class 5: Protein supplements; all the aforesaid for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being	*Class 5: Mineral supplements; Nutritional supplements; Food supplements; Dietary supplements; Protein supplements; Homeopathic supplements; Calcium supplements; Prebiotic supplements; Herbal supplements; Colostrum supplements; Vitamin supplements; Probiotic supplements; Protein dietary supplements; Albumin dietary supplements; Medicated food supplements; Dietary food supplements; Liquid herbal supplements; Mineral food supplements; Propolis dietary supplements; Flaxseed dietary supplements; Yeast dietary supplements; Casein dietary supplements; Alginate dietary supplements; Pollen dietary supplements; Wheat dietary supplements; Mineral nutritional supplements; Liquid nutritional supplements; Linseed dietary supplements; Enzyme dietary supplements; Dietary supplemental drinks; Zinc dietary supplements; Liquid vitamin supplements; Vitamin supplement patches; Glucose dietary supplements; Lecithin dietary supplements; Dietary supplement drinks; Zinc supplement lozenges; Anti-oxidant supplements; Protein supplement shakes; Liquid dietary supplements; Chlorella dietary supplements; Mineral supplements to foodstuffs; Wheat germ dietary supplements; Dietary supplements for infants; Protein supplements for animals; Folic acid dietary supplements; Dietary supplements for animals; Vitamin and mineral supplements; Dietary supplements for humans; Soy protein dietary supplements; Nutritional*

	supplement energy bars; Dietary supplements for pets; Royal jelly dietary supplements; Flaxseed oil dietary supplements; Linseed oil dietary supplements; Anti-oxidant food supplements; Vitamin supplements for animals; Soy isoflavone dietary supplements; Food supplements for sportsmen; Fitness and endurance supplements; Activated charcoal dietary supplements; Dietary and nutritional supplements; Protein powder dietary supplements; Acai powder dietary supplements; Pine pollen dietary supplements; Dietary supplement drink mixes; Mineral dietary supplements for animals; Fodder supplements for veterinary purposes; Nutritional supplements for livestock feed; Nutritional supplements for veterinary use; Dietary supplements for controlling cholesterol; Mineral dietary supplements for humans; Antibiotic food supplements for animals; Food supplements for medical purposes; Dietary supplements for human beings; Dietary supplements consisting of vitamins; Feed supplements for veterinary use; Food supplements in liquid form; Mineral supplements for feeding livestock; Vitamin and mineral food supplements; Dietary supplements for medical use; Food supplements for veterinary use; Dietary supplements in powder form; Medicated supplements for animal feedstuffs; Dietary supplements and dietetic preparations; Food supplements for dietetic use; Powdered nutritional supplement drink mix; Powdered nutritional supplement energy drink mix; Dietary supplements consisting primarily of magnesium; Nutritional supplements consisting primarily of iron; Nutritional supplements consisting primarily of magnesium; Food supplements for non-medical purposes; Vitamin and mineral supplements for pets; Dietary supplements consisting primarily of iron; Nutritional

	supplements consisting of fungal extracts; Nutritional supplements consisting primarily of zinc; Calcium tablets as a food supplement; Medicated supplements for foodstuffs for animals; Dietary supplements consisting primarily of calcium; Dietary supplements with a cosmetic effect; Ganoderma lucidum spore powder dietary supplements; Food supplements consisting of amino acids; Food supplements consisting of trace elements; Natural dietary supplements for treating claustrophobia; Nutritional supplements consisting primarily of calcium; Dietary supplements promoting fitness and endurance; Health-aid foods supplements containing ginseng; Powdered fruit-flavored dietary supplement drink mix; Health food supplements made principally of vitamins; Dietary food supplements used for modified fasting; Health-aid foods supplement containing red ginseng; Health food supplements made principally of minerals; Vitamin supplements for use in renal dialysis; Nutraceuticals for use as a dietary supplement; Dietary supplements for human beings and animals; Herbal dietary supplements for persons special dietary requirements; Dietary supplements for humans not for medical purposes; Dietary supplements and dietetic preparations containing CBD oil; Nutritional supplement meal replacement bars for boosting energy; Vitamin preparations in the nature of food supplements; Health food supplements for persons with special dietary requirements; Dietary pet supplements in the form of pet treats; Bee pollen for use as a dietary food supplement; Ground flaxseed fiber for use as a dietary supplement; Nutritional supplements made of starch adapted for medical use; Preparations for supplementing the body with essential vitamins and microelements; Strengthening

	supplements containing parapharmaceutical preparations for prophylactic purposes and for convalescents; Dietary supplements for pets in the nature of a powdered drink mix; Delivery agents in the form of dissolvable films that facilitate the delivery of nutritional supplements; Delivery agents in the form of coatings for tablets that facilitate the delivery of nutritional supplements. *Class 29: Meat, fish, poultry and game; milk, yoghurt and milk products; edible oils and fats; edible oils derived from fish; eggs; jellies and jams; whey; milk shakes; protein and vitamin enriched milkshakes, yoghurts and milk based products.* *Class 30: Maltodextrins for nutritional use [other than medical];Cereal bars and energy bars; Cereal based energy bars; Muesli bars; Confectionery bars; Chocolate bars; Cereal bars; Oat bars; Candy bars; Cake bars; Ice cream bars; Chocolate-based bars; Cereal-based bars; Ice milk bars; Fruit ice bars; Chocolate-coated bars; Sesame candy bars; Milk chocolate bars; Filled chocolate bars; Chocolate coated nougat bars; Cereal-based snack bars; Bars based on wheat; Cereal based food bars; High-protein cereal bars.* *Class 32: Energy drinks; Energy drinks containing caffeine; Soft drinks for energy supply; Energy drinks [not for medical purposes]; Protein drinks; Vegetable drinks; Guarana drinks; Cola drinks; Fruit drinks; Isotonic drinks; Juice drinks; Drinking water; Carbohydrate drinks; Sports drinks; Slush drinks; Drinking waters; Soft drinks; De-alcoholized drinks; De-alcoholised drinks; Frozen fruit drinks; Orange juice drinks; Non-alcoholic drinks; Fruit flavoured drinks; Apple juice drinks; Drinking mineral water; Carbonated soft drinks; Fruit flavored drinks; Bottled drinking water; Colas [soft drinks]; Fruit juice*

	drinks; Drinking spring water; Distilled drinking water; Purified drinking water; Fruit-flavored soft drinks; Coffee-flavored soft drinks; Drinking water with vitamins; Non-alcoholic fruit drinks; Part frozen slush drinks; Low-calorie soft drinks; Fruit flavoured carbonated drinks; Protein-enriched sports beverages.

78. I note that, within its counterstatement, the applicant has made a number of admissions as to similarity or identity of the contested goods to those which the opponent has registered. However, considering the specification relied upon has been considerably narrowed following the assessment of proof of use, whilst I bear these in mind, it is my view that the applicant's statements should no longer be taken as a concession to the similarity and identity of the contested goods in the context of the present comparison, and I will proceed to conduct my own assessment of the similarity of the earlier goods as they currently stand and the contested goods.

Class 5

79. The contested trade mark includes the following goods in class 5:

> *Nutritional supplements; Food supplements; Dietary supplements; Protein supplements; Protein dietary supplements; Albumin dietary supplements; Dietary food supplements; Casein dietary supplements Liquid nutritional supplements; Dietary supplemental drinks; Dietary supplement drinks; Protein supplement shakes; Liquid dietary supplements; Dietary supplements for infants; Protein supplements for animals; Dietary supplements for animals; Dietary supplements for humans; Soy protein dietary supplements; Nutritional supplement energy bars; Dietary supplements for pets; Food supplements for sportsmen; Fitness and endurance supplements; Dietary and nutritional supplements; Protein powder dietary supplements; Dietary supplement drink mixes; Fodder supplements for veterinary purposes; Nutritional supplements for livestock feed; Nutritional supplements for veterinary use; Dietary supplements for human beings; Feed supplements for veterinary use; Food supplements in liquid form; Dietary supplements for medical use; Food*

supplements for veterinary use; Dietary supplements in powder form; Dietary supplements and dietetic preparations; Food supplements for dietetic use; Powdered nutritional supplement drink mix; Powdered nutritional supplement energy drink mix; Food supplements for non-medical purposes; Dietary supplements promoting fitness and endurance; Powdered fruit-flavored dietary supplement drink mix; Dietary food supplements used for modified fasting; Nutraceuticals for use as a dietary supplement; Dietary supplements for human beings and animals; Dietary supplements for humans not for medical purposes; Nutritional supplement meal replacement bars for boosting energy; Health food supplements for persons with special dietary requirements; Dietary pet supplements in the form of pet treats; Strengthening supplements containing parapharmaceutical preparations and for convalescents; Dietary supplements for pets in the nature of a powdered drink mix.

80. It is my view that the goods above all either are, will include, or will be included within, the goods under the earlier mark for which the opponent has maintained its protection in these proceedings. I therefore find all of the goods above identical to the earlier goods either self-evidently, or in accordance with the principles set out in *Meric*. I note at this stage for completeness, that the contested goods above include those such as supplements for veterinary use and supplements for medical use. I note the earlier goods are limited to protein supplements for use as aids to slimming, weight gain, muscle gain, energy, sports nutrition and well being. It is my view that there is no reason that these will not include protein supplements for use as aids to weight gain or weight loss in a medical or veterinary environment, and they will therefore be identical in accordance with *Meric* as I have previously outlined.

81. Next, I consider the following contested goods:

Dietary supplements with a cosmetic effect.

82. It is my view that these may include collagen supplements, which I understand to be a type of protein, for the purpose of improving the appearance of the skin. Whilst both the earlier goods and the contested goods may therefore both be a type of protein supplement, I do not consider that the purposes to which the earlier goods are limited

includes cosmetic effect. Whilst I understand some people may use supplements for weight loss or weight gain in order to improve their appearance, it is my view that to find the earlier goods to be those with a cosmetic effect would be to stretch the ordinary and natural meaning of the term. However, I note they will still share a similar nature, both being supplements, which may both include a type of protein. The method of use will likely be shared, as will the trade channels, with both likely to be sold in health and beauty stores for example. However, the purpose will be different, and the goods will not be complementary or in competition. Users will be shared to the general extent that both goods may be purchased by the general public. Overall, I consider the goods to be similar to a medium degree.

83. Next, I consider applicant's following goods in class 5:

> *Mineral supplements; Homeopathic supplements; Calcium supplements; Prebiotic supplements; Herbal supplements; Colostrum supplements; Vitamin supplements; Probiotic supplements; Liquid herbal supplements; Mineral food supplements; Propolis dietary supplements; Flaxseed dietary supplements; Yeast dietary supplements; Pollen dietary supplements; Wheat dietary supplements; Mineral nutritional supplements; Linseed dietary supplements; Enzyme dietary supplements; Zinc dietary supplements; Liquid vitamin supplements; Vitamin supplement patches; Glucose dietary supplements; Lecithin dietary supplements; Zinc supplement lozenges; Anti-oxidant supplements; Mineral supplements to foodstuffs; Wheat germ dietary supplements; Folic acid dietary supplements; Vitamin and mineral supplements; Royal jelly dietary supplements; Flaxseed oil dietary supplements; Linseed oil dietary supplements; Anti-oxidant food supplements; Vitamin supplements for animals; Soy isoflavone dietary supplements; Activated charcoal dietary supplements; Acai powder dietary supplements; Pine pollen dietary supplements; Mineral dietary supplements for animals; Dietary supplements for controlling cholesterol; Mineral dietary supplements for humans; Antibiotic food supplements for animals; Dietary supplements consisting of vitamins; Mineral supplements for feeding livestock; Vitamin and mineral food supplements; Medicated supplements for animal feedstuffs; Dietary supplements consisting primarily of magnesium; Nutritional*

supplements consisting primarily of iron; Nutritional supplements consisting primarily of magnesium; Vitamin and mineral supplements for pets; Dietary supplements consisting primarily of iron; Nutritional supplements consisting of fungal extracts; Nutritional supplements consisting primarily of zinc; Calcium tablets as a food supplement; Dietary supplements consisting primarily of calcium; Ganoderma lucidum spore powder dietary supplements; Food supplements consisting of amino acids; Food supplements consisting of trace elements; Natural dietary supplements for treating claustrophobia; Nutritional supplements consisting primarily of calcium; Health-aid foods supplements containing ginseng; Health food supplements made principally of vitamins; Health-aid foods supplement containing red ginseng; Health food supplements made principally of minerals; Vitamin supplements for use in renal dialysis; Herbal dietary supplements for persons special dietary requirements; Dietary supplements and dietetic preparations containing CBD oil; Vitamin preparations in the nature of food supplements; Bee pollen for use as a dietary food supplement; Ground flaxseed fiber for use as a dietary supplement; Nutritional supplements made of starch adapted for medical use; Preparations for supplementing the body with essential vitamins and microelements; Strengthening supplements containing parapharmaceutical preparations for prophylactic purposes.

84. The above goods are all dietary or nutritional supplements of some description. However, I do not consider these to be protein supplements, and there is no identity with the opponent's earlier goods. Considering the above are all types of supplements, there will be an overlap in nature to an extent, however, they will clearly differ in their key ingredient. I consider there may be an overlap in purpose to the extent that all of these goods may be used to supplement a person's diet to improve their general wellbeing, but considering the different ingredient it seems likely the specific purpose will differ, and the goods will not be in direct competition. Further, without further evidence on why these goods may be important or essential for one another, I see no reason to consider them complementary. I do note the method of use is likely to be shared, as are trade channels, with all of the goods likely to be sold in the supplement section of health stores. Users will be shared only to the extent that all of the goods

may be purchased by the general public. Overall, I find the above goods to be similar to a medium degree to those maintained by the opponent in these proceedings.

85. Next, I consider the following contested goods, still in class 5:

> *Medicated food supplements; Medicated supplements for foodstuffs for animals.*

86. I have noted previously that I found dietary supplements for medical and veterinary use to be identical to the earlier goods in accordance with *Meric*. However, this was on the basis that those may include protein supplements used in a medical context. However, I do not consider this to be true in respect of the above goods. The reason for this is that a medicated supplement will be one comprising of medications, rather than one simply for use in a medical context. This changes the nature of the goods insofar as the actual ingredients of the same are concerned, compared to those under the earlier mark. However, I consider that there will still be some overlap in nature on the basis that they are all supplements, and the method of use will likely overlap. Further, there may still be some overlap in trade channels, particularly where the earlier goods are used in a medical context, for example to help with the side effects of illness such as to encourage weight gain. The goods may therefore both be found in pharmacies or vets. The purpose will differ, but users may be shared. I do not consider the goods to be important or essential for one another to my knowledge, and I find it unlikely they will be in competition. Overall I find a low level of similarity between the goods.

87. Finally, I consider the remaining class 5 goods, those being:

> *Delivery agents in the form of dissolvable films that facilitate the delivery of nutritional supplements; Delivery agents in the form of coatings for tablets that facilitate the delivery of nutritional supplements.*

88. The above goods are not finished goods, but those which will likely be used in the manufacturing process for supplements. I consider these to differ in users, trade channels, nature, purpose and method of use to the goods relied upon. Further, they

are not in competition, and I do not consider them complementary. Overall, I find the above goods dissimilar to the earlier goods relied upon.

Class 29

89. Next, I consider the applicant's following goods in class 29:

> *Meat, fish, poultry and game; edible oils and fats; edible oils derived from fish; eggs; jellies and jams; whey; milk […]*

90. Whilst I have considered that both the earlier goods and the above goods might provide the consumer with a source of protein, I do not consider the above goods to be similar in nature to the contested goods, nor do I consider their purpose to be shared. The purpose of protein supplements will be to add concentrated protein on top of the consumers normal diet, without the need to consume large volumes of food. The purpose of the above goods will be primarily to satiate hunger, and also provide nutrients generally. I do not consider the goods to be complementary or in competition. I note that both may be consumed, both may be sold in supermarkets, and that users by way of the general public may be shared, but I consider this all to be too general for a finding of similarity between the goods. Overall, I find the above goods to be dissimilar to the earlier goods relied upon.

91. Next, I consider the remaining goods in class 29, those being:

> *protein and vitamin enriched milkshakes, yoghurts and milk based products; milk shakes; […] yoghurt and milk products;*

92. I consider that the above goods will not share a nature with the earlier goods, with one being in the form of supplements and the other in the form of yogurt of dairy products. However, I consider there will be an overlap in purpose between protein enriched products, and the earlier protein supplements. Both will be used to increase protein intake above the amount the consumer is getting from their regular diet. I also note consumers will be shared, particularly members of the public looking to increase their protein intake. There may also be a level of competition between the goods, with

consumers choosing between protein enriched foods such as the above, or protein supplements to enhance their diet. I do not consider the goods to be complementary, but trade channels including health shops and pharmacies will likely be shared, and the goods may sometimes be placed in the same areas of supermarkets where refrigeration is not required. Overall, I find the goods *protein and vitamin enriched milkshakes, yoghurts and milk based products* similar to the earlier goods to between a medium and high degree. Further, considering these goods are included within the more general categories of *milk shakes; […] yoghurt and milk products,* it follows I also consider these goods similar to the earlier goods to between a medium and high degree.

Class 30

93. I begin by considering the applicant's following goods in class 30:

High-protein cereal bars.

94. Again, I consider that the above goods will not share a nature with the earlier goods, with one being in the form of supplements and the other in the form of cereal bars. However, I consider there will be an overlap in purpose between high protein products, and the earlier protein supplements. Both will be used to increase protein intake above the amount the consumer is getting from their regular diet. I also note consumers will be shared, particularly members of the public looking to increase their protein. There may also be a level of competition between the goods, with consumers choosing between protein enriched foods such as the above, or protein supplements to enhance their diet. I do not consider the goods to be complementary, but trade channels including health shops and pharmacies will likely be shared, and the goods may sometimes be placed in the same areas of supermarkets. Overall, I consider these goods to be similar to the earlier goods to between a medium and high degree.

95. Further to the above, I consider the following goods may all include high protein cereal (or oat or muesli) bars:

Cereal bars and energy bars; Cereal based energy bars; Muesli bars; Cereal bars; Oat bars; Cereal-based bars; Chocolate-coated bars; Cereal-based snack bars; Bars based on wheat; Cereal based food bars.

96. I therefore also consider the above goods similar to the earlier protein supplements relied upon to between a medium and high degree.

97. Next, I consider the following contested goods in class 30:

Confectionery bars; Chocolate bars; Candy bars; Cake bars; Ice cream bars; Chocolate-based bars; Ice milk bars; Fruit ice bars; Sesame candy bars; Milk chocolate bars; Filled chocolate bars; Chocolate coated nougat bars.

98. I note firstly that, to my knowledge, it is not common place on the UK market for the types of bars above to be protein enriched, and without further evidence on this point, I am not willing to assume the same. Whilst I note the reference in the evidence to the opponent offering a protein brownie and cookie, I do not consider this evidence sufficient to find that the ordinary and natural meaning of the goods above will extend to protein enriched goods generally. It is my view that the goods above are for the purpose of providing a sweet snack and satiating hunger, and this purpose is not shared with the earlier goods. I do not consider the goods to be complementary or in competition, and I do not consider that the trade channels will be shared to any meaningful extent. Where both goods are sold in supermarkets, they will not be placed near each other on shelves. I do not find that the goods will be complementary or in competition, and the user will be shared only to the extent that both will be purchased by members of the general public. Both goods will be consumed, but I do not find these very general overlaps to be sufficient to find similarity between the goods. Overall, I consider the above goods to be dissimilar to those earlier goods relied upon.

Class 32

99. I begin by considering the applicant's following goods in class 32:

Protein drinks; Protein-enriched sports beverages.

100. I do not consider the above goods will share a nature with the earlier goods, with one being in the form of supplements and the other in the form of drinks. However, I consider there will be an overlap in purpose between protein enriched products, and the earlier protein supplements. Both will be used to increase protein intake above the amount the consumer is getting from their regular diet. I also note consumers will be shared, particularly members of the public particularly looking to increase their protein. There may also be a level of competition between the goods, with consumers choosing between protein enriched drinks such as the above, or protein supplements to enhance their diet. I do not consider the goods to be complementary, but trade channels including health shops and pharmacies will likely be shared, and the goods may sometimes be placed in the same areas of supermarkets. Overall, I consider these goods to be similar to the earlier goods to between a medium and high degree.

101. I also consider that the above goods will fall within the following categories in the applicant's class 32:

> *Sports drinks; Non-alcoholic drinks; Fruit flavoured drinks; Fruit flavored drinks.*

102. I therefore also consider these to be similar to the earlier goods to between a medium and high degree, for the reasons already set out above.

103. Next, I consider the applicant's following goods in class 32:

> *Vegetable drinks; Cola drinks; Fruit drinks; Juice drinks; Drinking water; Slush drinks; Drinking waters; Soft drinks; De-alcoholized drinks; De-alcoholised drinks; Frozen fruit drinks; Orange juice drinks; Apple juice drinks; Drinking mineral water; Carbonated soft drinks; Bottled drinking water; Colas [soft drinks]; Fruit juice drinks; Drinking spring water; Distilled drinking water; Purified drinking water; Fruit-flavored soft drinks; Coffee-flavored soft drinks; Drinking water with vitamins; Non-alcoholic fruit drinks; Part frozen slush drinks; Low-calorie soft drinks; Fruit flavoured carbonated drinks*.

104. I note firstly that it is my view the ordinary and natural meaning of the terms above do not extend to protein drinks. I do not consider that the nature or purpose of the

above goods will be shared with the opponent's goods, and I do not consider them complementary or to be in competition. The trade channels will not be shared to any meaningful extent. Whilst they will all be consumed, and whilst the consumers of both sets of goods will include members of the general public, this is not sufficient to find similarity between the same. I find the above goods dissimilar to those relied upon.

105. Next, I consider the following goods in class 32:

> *Energy drinks; Energy drinks containing caffeine; Soft drinks for energy supply; Energy drinks [not for medical purposes]; Guarana drinks; Carbohydrate drinks; Isotonic drinks.*

106. I consider that the above goods are all drinks containing something additional, and will promote benefits beyond the quenching of thirst alone. Whilst I have considered the fact that the user of these drinks might be shared with the user of the earlier goods, for example, a member of the general public participating in sports, it is my view that this is where any actual overlap ends. I do not consider the nature, method of use, or purpose will be shared. I find it unlikely there will be any significant overlap in trade channels, and I do not consider the goods complementary or in competition. Again, whilst all the goods may be consumed, this is far too general to base a finding of similarity on alone. Overall, even considering the possibility for shared users, it is my view that the above goods are dissimilar to the earlier goods relied upon.

107. To the extent that the goods are considered dissimilar, the opposition must fail at this stage.[10] The opposition will proceed in respect of the similar goods only.

Comparison of marks

108. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual

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

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. The Court of Justice of the European Union stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, 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."

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

110. The respective trade marks are shown below:

Earlier trade mark	**Contested trade mark**
FUEL YOUR AMBITION	Fuel your moment

111. The earlier mark comprises the three words FUEL YOUR AMBITION. These hang together to form a message, and it is my view the overall impression resides in the combination of the three words and the mark as a whole.

112. The contested mark comprises the three words Fuel your moment. Again, these hang together to form a message, and it is my view the overall impression resides in the combination of the three words and the mark as a whole.

Visual comparison

113. Visually, the marks coincide through the use of the two words FUEL YOUR. Both marks are filed as word marks which may be used in any ordinary combination of upper- and lower-case letters, and as such the use of different ordinary combinations of these do not add to the visual differences between the marks. The marks differ by way of the word at the end of each of the marks, those being AMBITION and MOMENT, which share no visual similarity. I note the beginnings of marks tend to have more impact both visually and aurally,[11] and overall, I find the marks visually similar to between a medium and high degree.

Aural comparison

114. Aurally, the marks coincide through the use of the initial two syllables and two words FUEL YOUR. They differ by way of the additional word in each, which comprises two syllables in the contested mark and three syllables in the earlier mark. The words MOMENT and AMBITION will be pronounced in the ordinary way, and do not bear any significant aural resemblance. Again, I consider that the beginning of marks tend to have more impact, and overall, I find the marks aurally similar to a medium degree.

Conceptual comparison

115. Conceptually, the earlier mark as a whole conveys a message instructing consumers to provide themselves with the “fuel” or sustenance for their ambition to grow or thrive. The contested mark as a whole conveys a message to the consumers about providing the “fuel” or sustenance to enjoy or enhance the moment they are in. To the extent that both marks convey to the consumer the idea of “fuel” or sustenance, they overlap conceptually. Overall, I consider the marks to be conceptually similar to a medium degree.

Average consumer and the purchasing act

116. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion,

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

it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

117. 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*, [2014] EWHC 439 (Ch), Birss J. 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 person is typical. The term "average" does not denote some form of numerical mean, mode or median."*

118. The average consumer of the opponent's goods will primarily be a member of the general public. The general public will likely consider factors such as quality, ingredients and protein content when purchasing the goods. These may be a fairly frequent purchase and will likely warrant a medium level of attention overall.

119. The applicant's identical and similar goods are likely to also be primarily purchased by the general public, who will again consider similar factors to those outlined above, including quality, ingredients and nutritional value. Again, the goods may be a fairly frequent purchase, and will likely warrant a medium level of attention overall. I note however, that medicated goods, or goods for medical use, will warrant a higher degree of attention due to the potentially severe consequences of purchasing the wrong goods.

120. I also consider there may also be a group of professional consumers, such as dieticians purchasing the goods to provide to clients, or those stocking retail stores. These consumers are likely to pay a slightly higher than medium level of attention, due to the increased liability that will come with their professional role. Again, those in the medical profession dealing with either medicated goods or goods for medical use will

likely pay a higher still level of attention due again to the severity of the potential consequences of providing the wrong goods to consumers.

121. The goods will primarily be purchased visually, being on the shelves in health stores, pharmacies and supermarkets, as well as the online equivalents. However, I consider that word of mouth recommendations may play a part in the purchasing process, and some goods may be over the counter purchases, and so I cannot complete discount the aural considerations.

Distinctive character of the earlier trade mark

122. In *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV,* 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 *WindsurfingChiemsee* v *Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

123. The earlier mark is not allusive or directly descriptive of the goods themselves. However, it is my view that it is somewhat laudatory, and in the context of the goods the earlier mark offers a promotional message to consumers suggesting that the goods will help them to be more ambitious and achieve their goals. I consider that registered marks must be afforded a level of distinctiveness.[12] Overall, by virtue of the combination of the three words and the mark as a whole, I find it to hold a relatively low degree of inherent distinctiveness in the context of the goods.

[12] *Formula One Licensing BV v OHIM,* Case C-196/11P

124. I note the opponent has filed evidence in these proceedings, and as such, I will consider whether the distinctive character of the earlier mark has been enhanced through use. When considering enhanced distinctive character, it is the perception of the UK consumer at the relevant date, that being the filing date of the contested application, that is key.

125. I note the opponent's evidence, and I note it clearly has a very successful business under its Myprotein brand. However, I noted previously that there is a considerable disparity between the figures provided in Mr Foster's statement relating to "goods sold under the mark" and the units of sales and turnover over relating to "goods bearing the mark" as identified by Ms Chantrielle. As I have previously set out, the actual extent of the use of the earlier mark is not therefore entirely clear. However, from what I am willing to take from the evidence, use of the earlier mark is clearly far more limited than the opponent's use of the Myprotein brand, and where it is shown to be used in the evidence, the use does not always constitute use as a trade mark as I have previously outlined. In my view, taking the lower sales/unit figures into account, whilst these are sufficient to show proof of use in respect of some of the goods relied upon, the evidence provided does not suffice to show that the distinctiveness of the earlier mark will have been enhanced through use.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

126. Prior to reaching a decision under section 5(2), I must first consider all relevant factors, including those as set out within the principles A-K at paragraph 71 of this decision. I must view the likelihood of confusion through the eyes of the average consumer, 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 they have kept in their mind. I must consider the level of attention paid by the average consumer, and consider the impact of the visual, aural and conceptual similarities of the marks by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. I must consider that the level of distinctive character held by the earlier mark will have an impact on the likelihood of confusion. I

must remember that the distinctiveness of the common elements is key.[13] I must keep in mind that a lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks, and vice versa. I must also consider that how the goods are obtained may have a bearing on how likely the consumer is to be confused.

127. In respect of section 5(2)(b) of the Act, there are two types of confusion that I may find. The first type of confusion is direct confusion. This occurs where the average consumer mistakenly confuses one trade mark for another. The second is indirect confusion. This occurs where the average consumer notices the differences between the marks, but due to the similarities between the common elements, they believe that both products derive from the same or economically linked undertakings.[14]

128. In *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17, Mr James Mellor Q.C. (as he then was), as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls to mind another mark. This is mere association not indirect confusion.

129. In this instance, I found the goods to range from identical to dissimilar. I found the marks to be visually similar to between a medium and high degree, aurally similar to a medium degree, and conceptually similar to a medium degree. I found the earlier mark to hold a relatively low degree of inherent distinctive character, and I did not consider this had been enhanced through the use of the same. I found the average consumer would primarily comprise members of the general public who will pay a medium level of attention to the majority of the goods, but a higher level where these are medicated. I also found a further group of professional consumers who will pay an above medium level of attention to the goods generally, and an even higher level of attention to the same where they are medicated.

[13] See *Kurt Geiger v A-List Corporate Limited*, BL O-075-13, in which Mr Iain Purvis Q.C. as the Appointed Person pointed out that the level of 'distinctive character' is only likely to increase the likelihood of confusion to the extent that it resides in the element(s) of the marks that are identical or similar.
[14] *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10

130. I note at this stage that a low level of distinctive character does not preclude a likelihood of confusion.[15] However, considering all of the relevant factors, and notwithstanding the identity of some of the goods, it is my view that the differences between the marks, that being the use of AMBITION in one and MOMENT in the other, are too significant to go unnoticed or be misremembered in this instance. I therefore do not consider there to be a likelihood of direct confusion between the marks in this instance.

131. I therefore move on to consider the likelihood of indirect confusion. In *L.A. Sugar* (cited above) Mr Iain Purvis Q.C. (as he then was), as the Appointed Person set out three examples of when indirect confusion may occur as below:

> 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)."

132. I note that the examples above were intended to be illustrative and are not exhaustive. I also keep in mind *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, in which Arnold LJ referred to the comments of

[15] See *L'Oréal SA v OHIM*, Case C-235/05 P

James Mellor Q.C. (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.

133. Further, I also consider *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), in which Arnold J. (as he then was) considered the impact of the CJEU's judgment in *Bimbo,* Case C-591/12P, on the court's earlier judgment in *Medion v Thomson.* The judge said:

> "18 The judgment in *Bimbo* confirms that the principle established in *Medion v Thomson* is not confined to the situation where the composite trade mark for which registration is sought contains an element which is identical to an earlier trade mark, but extends to the situation where the composite mark contains an element which is similar to the earlier mark. More importantly for present purposes, it also confirms three other points.
>
> 19 The first is that the assessment of likelihood of confusion must be made by considering and comparing the respective marks — visually, aurally and conceptually — as a whole. In *Medion v Thomson* and subsequent case law, the Court of Justice has recognised that there are situations in which the average consumer, while perceiving a composite mark as a whole, will also perceive that it consists of two (or more) signs one (or more) of which has a distinctive significance which is independent of the significance of the whole, and thus may be confused as a result of the identity or similarity of that sign to the earlier mark.
>
> 20 The second point is that this principle can only apply in circumstances where the average consumer would perceive the relevant part of the composite mark to have distinctive significance independently of the whole. It does not apply where the average consumer would perceive the composite mark as a unit having a different meaning to the meanings of the separate

components. That includes the situation where the meaning of one of the components is qualified by another component, as with a surname and a first name (e.g. BECKER and BARBARA BECKER).

21 The third point is that, even where an element of the composite mark which is identical or similar to the earlier trade mark has an independent distinctive role, it does not automatically follow that there is a likelihood of confusion. It remains necessary for the competent authority to carry out a global assessment taking into account all relevant factors."

134. In her skeleton arguments, Ms Chantrielle set out the opponent's arguments on indirect confusion in the following terms:

"40.2. The distinctive element of the Earlier Mark is the phrase FUEL YOUR AMBITION, with more attention being paid at the beginning of the phrase. Allowing for the concept of imperfect recollection, there is a likelihood of consumers being indirectly confused into believing that the goods of the Applicant are those of the Opponent or provided by some undertaking linked to it.

40.3. The shared or common element in the marks is inherently distinctive to a high degree, further enhanced by the significant use made of the Earlier Mark the average consumer will be indirectly confused. The use of a FUEL YOUR followed by a word to promote and sell the goods in question is quite an unusual and arbitrary choice and not one that would be immediately obvious. It is perfectly plausible that the average consumer of, having been exposed to the Earlier Mark, will assume that the contested mark is simply an extension or evolution of the Opponent's earlier brand. The average consumer could consider, for example, that FUEL YOUR MOMENT is the slogan for the sister brand of the Opponent's MYPROTEIN brand. That consumer will have an expectation that the goods provided under the marks come from the same, or an economically linked undertaking."

135. I have considered the submissions above. I have already stated that I do not consider the distinctive character of earlier mark to have been enhanced in respect of the goods, and that inherently, I found it to be distinctive to a relatively low degree. I agree with Ms Chantrielle submission that the distinctiveness of the earlier mark is in the phrase FUEL YOUR AMBITION, but not with the submission that the shared or common element FUEL YOUR is inherently distinctive to a high degree. Whilst I accept that more attention tends to be paid towards the beginning of marks, as I have noted previously, I do not consider that the word AMBITION will be mistaken or misremembered for the word moment in the earlier mark, and this has been dismissed in my finding of direct confusion. Further, I note for completeness at this stage, that just because more attention may be paid towards the beginning of marks, this does not mean the element FUEL YOUR will be separated from the word AMBITION and deemed to play an independent distinctive role within the phrase.

136. In my view, my considerations in respect of indirect confusion between these two marks come down to whether, upon viewing the marks, the consumer will consider it more likely that the use of the element FUEL YOUR in both marks is an indication that the marks derive from the same economic origin, or whether this is instead use of two somewhat similar but fairly simple marks conveying promotional messages, used in connection with goods deriving from different entities, both of which happen to start with the wording FUEL YOUR. On balance, it is my view that the latter of these scenarios is more likely. In reaching this conclusion, I have considered Ms Chantrielle's submission that the use of a FUEL YOUR followed by a word to promote and sell the goods in question is quite an unusual choice. As I have set out previously, I do not consider the evidence provide by Ms Cameron for the applicant particularly helpful on this point. However, it is nonetheless my view that regardless of how many other companies have or have not been shown to already use FUEL or FUEL YOUR in relation to their own goods, it does not stop use of FUEL YOUR from appearing fairly ordinary in the context of the goods. Whilst I note that for those consumers particularly familiar with the opponent's earlier mark, the use of the applicant's mark might bring this to mind, this is not enough for a finding of indirect confusion. Considering all the relevant factors, and keeping in mind that I must afford all registered marks some level of distinctive character and that a relatively low level of

distinctiveness does not preclude a likelihood of confusion, it is nonetheless my view that there will be no indirect confusion between the marks in this instance.

137. At this stage, I note for completeness the opponent's evidence relating an overlap in trade channels and target market between itself and its goods and the applicant's. Whilst this has been considered, I note it makes no difference to my findings above, which have been made on the basis of identical goods and therefore the possibility for an overlap in trade channels and target market on that basis.

Final Remarks

138. The opposition has failed in its entirety. Subject to any successful appeal, the application will therefore proceed to registration in respect of all of the relevant goods.

COSTS

139. The applicant has been successful and is entitled to a contribution towards its costs. In the circumstances I award the applicant the sum of £1600 as a contribution towards the cost of the proceedings, in accordance with Tribunal Practice Notice ("TPN") 1/2023. The sum is calculated as follows:

Considering the TM7 and preparing and filing the TM8:	£300
Considering the evidence and preparing and filing evidence:	£700
Preparing for and attending a hearing:	£600
Total:	**£1600**

140. I therefore order THG Nutrition Limited to pay Applied Nutrition Plc the sum of £1600. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 20th day of October 2025

R. Le Breton

For the Registrar