

BL O/1143/25

IN THE MATTER OF THE TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3985788 IN THE NAME OF LOCKSLEY DISTILLING COMPANY LIMITED TO REGISTERE AS A TRADE MARK

Co-Lab

IN CLASS 33

AND IN THE MATTER OF AN OPPOSITION THERETO UNDER NO. 445824 BY 58 AND CO

AND IN THE MATTER OF AN APPEAL FROM THE DECISION OF S HITCHINGS (O/0623/25) DATED 8 JULY 2025.

DECISION

Introduction

1. This is an appeal by Locksley Distilling Company Limited ("**Appellant**") from decision O/0623/25 of Suzanne Hitchings ("**Decision**") concerning the opposition by 58 and CO ("**Respondent**") to the Appellant's application, filed on 29 November 2023 and published on 22 December 2023, to register the trade mark Co-Lab ("**Mark**") for the following goods ("**Goods**"):

Class 33: *Rum [alcoholic beverage]; Pre-mixed alcoholic beverages; Beverages (Alcoholic -), except beer; Alcoholic beverages, except beer; Alcoholic beverages (except beer); Grain-based distilled alcoholic beverages; Alcoholic cocktails; Alcoholic fruit beverages; Cordials [alcoholic beverages]; Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages containing fruit; Alcoholic aperitifs; Prepared alcoholic cocktails; Distilled beverages; Beverages (Distilled -).*

2. On 12 February 2024 the Respondent filed an opposition pursuant to ss. 3(1)(b) and 3(1)(d) of the Trade Marks Act 1994 ("**the Act**"). The opposition was directed against all the Goods.
3. Under s. 3(1)(b) the Respondent contended that the term "co-lab" or "collab" is an abbreviation of "collaboration" which is a very common term used to describe two or more brands working together on a project or product. It submitted that the Mark is not unique or distinctive.
4. Under s. 3(1)(d) the Respondent contended that a "co-lab" or "collab" product, or series of products, has been widely used in the drinks industry for years to describe two or more brands working together and that the term is generic and descriptive of the process.
5. The Appellant filed a counterstatement denying each of the Respondent's claims. The Respondent filed evidence. Neither party requested a hearing, and only the Respondent filed written submissions in lieu.
6. Ms S. Hitchings for the Registrar held that the opposition under s. 3(1)(b) was successful. On 5 August 2025 the Appellant filed a Notice to Appeal to the Appointed Person against the Decision under Section 76 of the Trade Marks Act 1994.

The Hearing Officer's decision

7. The Hearing Officer held as follows (in summary, and insofar as is relevant to this appeal):
 - a. The average consumer of the Goods will be the general adult UK alcohol-drinking public, including connoisseurs of such goods and specialists in trade, such as third party suppliers of the goods to retail or wholesale outlets or directly to establishments such as bars and restaurants.
 - b. The evidence relied upon by the Respondent was not sufficient to show that the sign "Co-Lab" has become customary in trade in the UK for the various alcoholic beverages in the Goods. The opposition based on s. 3(1)(d) accordingly failed.
 - c. The hyphenated phrase "Co-Lab" would not make a material difference in the perceptions of the relevant public of the goods who would assume that the Mark refers to goods which are borne of a collaboration between two or more entities. The term "Co-Lab" is accordingly origin neutral, and the Mark is unable to fulfil the essential function of a trade mark to indicate trade origin of the goods at hand. The opposition based on s. 3(1)(b) therefore succeeded.

Grounds of Appeal

8. The Appellant's Grounds of Appeal are as follows:
 - a. **Ground 1:** The Hearing Officer erred in law and/or principle when assessing the distinctiveness of the Mark;
 - b. **Ground 2:** The Hearing Officer in law and/or principle when considering the impact of the presentation of the Mark;
 - c. **Ground 3:** The Hearing Officer erred in law and/or principle by incorrectly imposing an interpretative process on the average consumer in respect of the Mark;
 - d. **Ground 4:** The Hearing Officer erred in law and/or principle by failing to assess the Mark by reference to the Goods.
9. The Appellant's Counsel expanded on the above in her skeleton and at the hearing. I am grateful to Ms Knott for her excellent written and oral submissions, which I found very helpful. The Respondent did not attend the hearing, nor did it file submissions in lieu.

Standard of review

10. The approach to be adopted in an appeal hearing has been laid down a number of times in case law, most recently in *Iconix Luxembourg Holdings SARL v. Dream Paris Europe Inc* [2025] UKSC 25 at §§94-95:

"94. It is perhaps obvious, and certainly an inevitable conclusion drawn from experience, that reasonable minds, and in particular reasonable judicially trained minds, each faithfully applying the relevant law and principles, will come to different conclusions about the answer to these multifactorial questions. While of course the decision of an appellate court trumps that of the court below, the law has imposed structured constraints designed to prevent a free for all in a higher court whenever a party (with the necessary resources) wishes to challenge the first instance decision of the trial judge. The reasons for these constraints are set out in a string of well-known authorities including,

in the intellectual property context, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, per Lewison LJ at para 114. The reasons there set out relevantly include the following:

- (i) The trial is not a dress rehearsal. It is the first and last night of the show.
- (ii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court.
- (iii) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

95. In *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8; [2024] Bus LR 532 this court reviewed those constraints in a trade mark context. After citing from the *Fage* case this court in a joint judgment said, at paras 49- 50:

"49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

50. On the other hand, it is equally clear that, for the decision to be 'wrong' under CPR r 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.""

11. Further guidance was provided in *Axogen v Aviv* [2022] EWHC 95 (Ch) at §24-25:

"24. Although I was referred to numerous cases on the subject (including *English v Emery Demibold & Struck Ltd* [2002] 1 WLR 2409, *REEF Trade Mark* [2003] RPC 5, *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, *Shanks v Unilever Plc* [2014] RPC 29, *TT Education Ltd v Pie Corbett Consultancy* [2017] RPC 17, *Apple Inc v Arcadia Trading Limited* [2017] EWHC 440 (Ch), *Actavis Group PTC v ICOS Corporation* [2019] UKSC 1671 and *NINEPLUS O/039/21*), the approach of the appeal court to a statutory appeal under section 76(1) of the TMA is uncontroversial. I bear the following principles, relevant to the issues before me, firmly in mind:

- i) The appeal is by way of a review, not a rehearing (see *TT Education Ltd v Pie Corbett Consultancy Ltd* (O/017/17) at [52(i)]);

- ii) The appeal court will allow an appeal where the decision of the lower court was "wrong" (see CPR 52.11). Neither surprise at a Hearing Officer's conclusion, nor a belief that he or she has reached the wrong decision suffices to justify interference (*NINEPLUS O/039/21* at [14]);
- iii) The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. Absent an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group* at [81]);
- iv) The approach required by the appeal court depends on a number of variables including the nature of the evaluation in question (*REEF Trade Mark* [2003] RPC per at [26]). There is a "spectrum of appropriate respect for the Registrar's determination depending on the nature of the decision" (*TT Education* at [52(ii)]), with decisions of primary fact at one end of the spectrum and multi-factorial decisions (of the type which the parties agree were made in this case by the Hearing Officer) being further along the spectrum.
- v) In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education* at [52(iv)], *REEF* at [28] and *Fine & Country* at [50]-[51]).
- vi) An error of principle is not confined to an error as to the law but extends to certain types of error in the application of a legal standard to the facts in an evaluation of those facts. The evaluative process is often a matter of degree upon which different judges can legitimately differ and an appellate court ought not to interfere unless it is satisfied that the judge's conclusion is outside the bounds within which reasonable disagreement is possible (*Actavis Group* at [80]).
- vii) Another variable to be taken into account will be "the standing and experience of the fact-finding judge or tribunal" (*REEF* at [26], *Actavis Group* at [78]). Expert tribunals are charged with applying the law in the specialised fields and their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts (*Shanks* at [28] citing the warning given by Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49).
- viii) The appellate court should not treat a judgment as containing an error of principle simply because of its belief that the judgment or decision could have been better expressed; "The duty to give reasons must not be turned into an intolerable burden" (see *REEF* at [29]). The reasons need not be elaborate. There is no duty on a judge, in giving her reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what she says shows the basis on which she has acted (*English* at [17], *Fage* at [115]). The issues the resolution of which were

vital to the judge's conclusions should be identified and the manner in which she resolved them explained (*English* at [19]).

- ix) In evaluating the evidence, the appellate court is entitled to assume, absent good reason to the contrary, that the first instance judge has taken all of the evidence into account (*TT Education* at [52(vi)])."
- 12. To the above should be added the judgment of the Court of Appeal in *Lidl Great Britain Ltd v. Tesco Stores Ltd* [2024] EWCA Civ 262, where Arnold LJ said at §110 "It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable".
- 13. I shall bear all the above in mind when reviewing the Decision.

Discussion

(1) The Hearing Officer erred in law and/or principle when assessing the distinctiveness of the Mark

- 14. The Respondent's argument under s. 3(1)(b) was that the Mark is one of a number of possible abbreviations of "collaboration", which is commonly used to describe the kind of goods and/or services borne out of a collaboration between two or more parties. Accordingly, the Mark is descriptive and thereby necessarily devoid of distinctive character.
- 15. The Hearing Officer's analysis is at §31, where she said:

"I note that in its counterstatement, the applicant denies that the term "co-lab" or "collab" is an abbreviation of "collaboration". It further denies that the abbreviations are very common terms used to describe two or more brands working together on a project or product. The applicant's mark is for the hyphenated words "Co-Lab" rather than either "colab" or "collab", as per the definitions provided by the opponent in exhibit CD01 as being abbreviations for the word "collaboration". In my view, the word "collaboration" itself is non-distinctive in relation to the goods at issue, merely referring to an arrangement where two or more entities work together, for example on a project or product, with the dictionary-defined abbreviations of collaboration being perceived in the same way. Further, I do not consider that the slightly unconventional presentation of the abbreviation in the applied-for mark to be strikingly different or unusual, or to require any mental effort to understand that the mark is an alternate or mis-spelling of "colab"/"collab". To my mind, the hyphenated presentation would not make a material difference in the perceptions of the relevant public of the goods who would still assume that the applicant's word mark refers to goods which are borne of a collaboration between two or more entities. As such, I consider the term "Co-Lab" to be origin neutral and therefore the mark as applied for is unable to fulfil the essential function of a trade mark to indicate trade origin of the goods at hand".

- 16. The Appellant contends that the Hearing Officer wrongly imposed a test that, for a mark to be distinctive it must be "strikingly different or unusual" or require "mental effort" to interpret it. Instead, the Hearing Officer should have asked the question laid down by Arnold J (as he then was), summarising the law and quoting from *Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v BORCO-Marken-Import Matthiesen GmbH & Co KG* (C-265/09 P) [2011] E.T.M.R. 4 in *Starbucks (HK) v British Sky Broadcasting Group Plc* [2012] EWHC 3074 (Ch); [2013] F.S.R. 29 at [90], namely: Can the Mark "serve to identify the product in respect

of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings”?

17. I agree with the Appellant. It seems to me that the Hearing Officer, in her analysis at §31, impermissibly worked backwards in order to reach her conclusion. Her analysis was, in terms:
- The word “collaboration” is non-distinctive in relation to the Goods;
 - “Colab”/“collab” would be recognised by the average consumer as an abbreviation of collaboration;
 - There would be no mental effort required to understand that the Mark is an alternate or mis-spelling of “colab”/“collab”;
 - Accordingly, the Mark is origin neutral.
18. Instead, the Hearing Officer should have started with the question “How would the Mark be perceived by the average consumer?”. This is not merely a matter of semantics - I agree with the Appellant’s argument that *“the Hearing Officer was led into error by her analysis of the dictionary definitions provided by the Respondent ... in particular the definition for “collaboration”. The Hearing Officer placed undue emphasis on the Definitions given the Goods in question and, in so doing, treated the Mark as if it were one and the same with the word “collaboration” in the mind of the average consumer”*. It is important, therefore, that the s. 3(1)(b) issue is approached by first asking the question set forth at the beginning of this paragraph, in order to ensure that the statutory question is answered without imputing knowledge or thought processes which the average consumer does not possess or would not undertake.
19. The first ground of appeal accordingly succeeds. It will therefore be necessary for me to reassess the distinctiveness of the Mark. I shall do so in the context of the second and third grounds of appeal.

(2) The Hearing Officer erred in law and/or principle when considering the impact of the presentation of the Mark

(3) The Hearing Officer erred in law and/or principle by incorrectly imposing an interpretative process on the average consumer in respect of the Mark

20. I shall consider these grounds together as they concern related issues.
21. In ground 2, the Appellant contends that the Hearing Officer erred in law and/or principle when she held that the *“hyphenated presentation”* of the Mark *“would not make a material difference in the perception of the relevant public”*, such that the Mark is *“origin neutral”*. It contends that the error is two-fold. First, it submits that her approach contravenes the principle that a mark needs to be considered as a whole, rather than dissected. Secondly, that that finding is inconsistent with her earlier findings (in relation to the s. 3(1)(d) opposition) that various evidenced usages of signs including the term “Co-Lab” would be perceived by the average consumer as trade mark use.
22. Ground 3 concerns the Hearing Officer’s analysis of the dictionary definitions of “collaboration” filed and relied upon by the Respondent. She held that (1) “collaboration” is non-distinctive for the Goods; (2) the *“dictionary-defined abbreviations of collaboration”* would be *“perceived in the same way”*; and (3) the Mark would be understood as an *“alternate or mis-spelling”* of

- “colab”/ “collab”*. The Appellant contends that the Hearing Officer’s approach was erroneous for three reasons. First, that this approach fails to consider the presumed expectations of the Mark by the average consumer who is deemed to be reasonably well-informed and reasonably observant and circumspect. These presumed expectations – the perception of the average consumer – cannot encompass a conceptual interpretation which requires mental acrobatics.
23. Secondly, it submits that the Hearing Officer incorrectly elided the steps necessary for the average consumer to perceive the Mark as an abbreviation of “collaboration”. To reach the meaning assigned to the Mark by the Hearing Officer, the average consumer would have to:
- a) ignore the specific typographical arrangement of the Mark as *“Co-Lab”*;
 - b) ignore the hyphen in the Mark so as to perceive it as *“colab”*;
 - c) understand and associate *“colab”* with *“collab”* as an alternate spelling or misspelling of the same;
 - d) understand and recall *“collab”* as an abbreviation of *“collaboration”*;
 - e) link the dictionary definitions for *“collaboration”* with the Goods and, in so doing, ignore the specific content of the definitions.
24. The Appellant contends that the above is simply not a realistic consideration of how the average consumer would perceive the Mark and its capacity to distinguish the Goods.
25. Thirdly, the Appellant contends that the Hearing Officer’s treatment of the definitions relied upon by the Respondent failed to take into account the fact that they (and their supporting examples) refer primarily to a partnership in the context of the music, social media, and/or fashion industries. It contends that those meanings have no relevance to the Goods.
26. Dealing with the final sub-ground of ground 3 first, I disagree. In my view, “collaboration” is an ordinary English word. Whereas the examples provided by the Respondent may have related to sectors which are far removed from those of the Goods, the word “collaboration” would be equally understood by the average consumer, used in the context of the Goods, to *“an arrangement where two or more entities work together, for example on a project or product”* (§31 of the Decision).
27. The first and second sub-grounds of ground 3 accord with what I say at §§17-18 above. The Hearing Officer’s analysis was in my view incorrect because it worked backwards from the conclusion, rather than considered how the average consumer would perceive the Mark on the Goods.
28. I now turn to the first sub-ground of ground 2, concerning the impact of the hyphen in the Mark. Ms Knott submitted during the hearing that the terms *“Co-Lab”* and *“colab”/“collab”* are as distinct as *“Co-Op”* (i.e. the chain of supermarkets) and *“coop”* (as in chicken coop). I agree entirely. Whereas visually the only difference is the hyphen, the average consumer would pronounce the “co” in *“Co-Lab”* to rhyme with *“slow”*, whereas in *“colab”* it would be pronounced with a hard “k”, as in *“coffee”* or *“computer”*. Conceptually, I consider that the average consumer would regard the Mark as referring to a collaborative project between two laboratories. Such a meaning has no descriptive character in relation to the Goods. Whereas I agree with the Hearing Officer that *“colab”/“collab”*, used on the Goods, would bring to mind an arrangement between two entities to manufacture the Goods, the addition of the hyphen (perhaps unusually) makes a fundamental difference to the average consumer’s perception.

29. I am bolstered in this by the Hearing Officer’s own analysis of actual uses of the words “co-lab”/”colab” in relation to the s. 3(1)(d) opposition. The Hearing Officer considered a number of examples of “co-lab” or “collab” used on labels in the alcoholic drinks industry, which were relied upon by the Respondent. She concluded that in each case, the term was being used as a trade mark, rather than descriptively. As the Appellant contends, in many of the examples the term “co-lab” or “collab” was only lightly stylised, for example as below. It is accordingly difficult to see why, in the context of the s. 3(1)(b) opposition, she came to the opposite conclusion.



30. Also relevant is the additional argument relied upon by the Appellant in relation to ground 1, namely that “the Hearing Officer erred by failing to take into account the *context* of use of the Mark”. The Appellant cites paragraph 10-084 of *Kerly’s Law of Trade Marks and Trade Names 17th Ed.*:

“Court of Justice judgments on ordinary word marks tend to be concerned with arts 3(1)(c)/7(1)(c) and arts 3(1)(d)/7(1)(d). The views of the Court of Justice as regards ordinary word marks for the purposes of art.3(1)(b) are usually to be found in judgments dealing with more unconventional marks, which proceed on the basis that the average consumer is accustomed to making assumptions about the origin of products when they see a word mark (which is not descriptive or generic) or, for that matter, a figurative mark. In this regard, the context in which the mark is assessed is all-important. The in-built assumption¹¹⁹ seems to be that word and figurative marks will be seen by the average consumer in the place on the goods where they normally expect to see a trade mark.”

(Appellant’s emphasis).

31. It is noteworthy that when analysing actual examples of use on labels on alcoholic drinks the Hearing Officer held that it was trade mark use. She should also have concluded that the Mark, when used in the normal place on alcoholic drinks, i.e. on the labels, would convey origin significance to the average consumer.

32. The second and third grounds accordingly succeed.

(4) The Hearing Officer erred in law and/or principle by failing to assess the Mark by reference to the Goods

33. The Appellant contends that instead of assessing the distinctive character of the Mark by reference to the precise Goods, she simply referred to “*the goods at issue*” and “*the goods at hand*” in the abstract, at §31 of the Decision. I do not consider there is anything in this point. If the Hearing Officer was correct in her finding that the Mark would be perceived as meaning “collaboration”, that is (as I say at §26 above) an ordinary English word which would be equally descriptive across the range of Goods. In that regard, the Goods are all very similar – alcoholic drinks – and therefore considering them as a group rather than individually was justified in this instance.

34. I dismiss this fourth ground of appeal.

Conclusion

35. The appeal succeeds. Application No. UK00003985788 by Locksley Distilling Company Limited shall proceed to grant.

Costs

36. Clearly, the Appellant has been the successful party in this appeal. In accordance with the scale costs in TPN 1/2023, I order that the Respondent should pay the Appellant the sum of £1,500.

37. As for the costs below, the Hearing Officer ordered that the Appellant should pay the Respondent £1,400. I set that costs order aside. The Appellant did not file evidence or written submissions below, however it did file a counterstatement, for which I award £250, and it will have had to consider the Respondent’s evidence, for which I award a further £500.

38. Accordingly, the Respondent must pay the Appellant the sum of £2,250 within 21 days of this decision.

Dr. Brian Whitehead

6 December 2025

Representation

Ms Becky Knott of Counsel, instructed by Barker Brettell LLP, for the Appellant

The Respondent did not participate in the appeal