O/1192/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3975720
IN THE NAME OF NADIM RAZAQ
TO REGISTER THE FOLLOWING TRADE MARK:

Aqsa Cola

IN CLASS 32

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 445342
BY ZOHAIB SHAH

Background and pleadings

1. Nadim Razaq ("the applicant") applied to register the trade mark **Aqsa Cola** ("the applicant's mark") in the UK on 4 November 2023, under number 3975720. It was accepted and published in the Trade Marks Journal on 17 November 2023 in respect of the following goods:

> *Class 32: Soft drinks; Carbonated soft drinks; Non-carbonated soft drinks; Fruit-flavored soft drinks; Low-calorie soft drinks; Colas [soft drinks]; Soft drinks flavored with tea; Fruit flavored soft drinks; Fruit-based soft drinks flavored with tea; Low calorie soft drinks; Powders used in the preparation of soft drinks; Soft drinks for energy supply; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Carbonated non-alcoholic drinks; Non-alcoholic drinks; Cola drinks; Isotonic non-alcoholic drinks; Non-alcoholic fruit drinks; Juice drinks; Fruit flavoured carbonated drinks; Fruit drinks; Fruit flavoured drinks; Fruit flavored drinks.*

2. Zohaib Shah ("the opponent") opposes the trade mark on the basis of section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The opposition is directed at all the goods. This is on the basis of its UK trade mark number 3765025, **AQSA** ("the opponent's mark"). The opponent's mark was filed on 13 March 2022 and became registered on 3 June 2022. It stands registered for the following goods:

> *Class 32: Bottled drinking water.*

3. As the filing date of the opponent's mark is earlier than the filing date of the applicant's mark, the opponent's mark constitutes an earlier mark in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods identified without having to establish genuine use.

4. In the statement of grounds, the opponent argues that its goods are similar to the applicant's goods, and that the competing marks are similar due to the shared use of the word "Aqsa", resulting in a likelihood of confusion.

5. The applicant filed a counterstatement denying the ground of opposition.

6. Neither the opponent nor the applicant is professionally represented, although I note that the opponent was initially represented until 12 April 2024 by an individual named Sheriffa Ali. Only the opponent filed evidence in these proceedings. No hearing was requested. Neither party filed written submissions in lieu. This decision is taken following careful consideration of all the papers before me.

7. 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

8. The opponent's evidence consists of the witness statement of Zohaib Shah, dated 14 June 2024. There were no exhibits filed with the witness statement. The witness statement essentially consists of legal submission, rather than evidence of fact, and therefore I intend to treat it as such. I will refer to the witness statement below where necessary.

Preliminary issue

9. Although the applicant attempted to file a witness statement as evidence, it was not admitted into the proceedings as the applicant filed it during the opponent's evidence round. The applicant was notified of this on 27 September 2024. On 24 November 2024 the applicant was given a deadline to file evidence on or before 18 December 2024, but nothing further was submitted. The evidence rounds were therefore closed, and this was confirmed to the applicant on 25 January 2025.

Section 5(2)(b)

10. 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".

11. Section 5A states: […] "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."

12. I am guided by the following principles which 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

13. In *Canon*[1], the Court of Justice of the European Union ("CJEU") stated, at paragraph 23 of its judgment, that when considering whether goods are similar, all the relevant factors relating to the goods should be taken into account. The CJEU stated that those factors include their nature, intended purpose, method of use and whether they are in competition with each other or are complementary.

[1] Case C-39/97

14. The relevant factors identified by Jacob J. (as he then was) in *Treat*[2] 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.

15. In *Kurt Hesse v OHIM*[3], 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)*[4], the General Court ("GC") stated that "complementary" means:

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

16. In *Gérard Meric v OHIM*[5], the GC confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

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[2] [1996] R.P.C. 281
[3] Case C-50/15 P
[4] Case T-325/06
[5] Case T- 133/05

"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."

17. The goods to be compared as follows:

The opponent's goods	The applicant's goods
Class 32: Bottled drinking water.	*Class 32: Soft drinks; Carbonated soft drinks; Non-carbonated soft drinks; Fruit-flavored soft drinks; Low-calorie soft drinks; Colas [soft drinks]; Soft drinks flavored with tea; Fruit flavored soft drinks; Fruit-based soft drinks flavored with tea; Low calorie soft drinks; Powders used in the preparation of soft drinks; Soft drinks for energy supply; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks; Carbonated non-alcoholic drinks; Non-alcoholic drinks; Cola drinks; Isotonic non-alcoholic drinks; Non-alcoholic fruit drinks; Juice drinks; Fruit flavoured carbonated drinks; Fruit drinks; Fruit flavoured drinks; Fruit flavored drinks.*

18. In the opponent's statement of grounds, the opponent submits that the goods are similar. In the applicant's counterstatement, the applicant submits that they sell an "entirely different product", highlighting that the opponent only manufactures water. Furthermore, the applicant also argues that their goods differ as the applicant's goods are only sold in cans, rather than in glass or plastic bottles.

19. So far as the applicant's claimed use of different packing materials is concerned, as per the CJEU judgement in *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*[6] (particularly paragraph 66), it is necessary to consider all the circumstances in which the applicant's mark might be used. Whilst I accept that the opponent's term specifies "bottled drinking water", the applicant's terms are not limited to only being sold in cans. As a result, even though the applicant has suggested that the opponent sells their products in different packing materials, my assessment must take into account only the opponent's mark and any potential conflict with the applicant's mark. Any differences between the actual goods provided by the parties, or differences in their packing materials, are not relevant unless those differences are apparent from the competing marks and their specifications.

20. For the purposes of comparing goods, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons.[7] I have therefore assessed the applicant's goods by dividing the terms into groups as per below.

> *Soft drinks; Carbonated soft drinks; Non-carbonated soft drinks; Carbonated non-alcoholic drinks; Non-alcoholic drinks.*

21. The Oxford English Dictionary defines "soft drink" as "a drink containing little or no alcohol". In my experience, water is included on soft drink menus in cafés and restaurants, and in soft drink sections within retail outlets. It is my view, the opponent's narrower term *bottled drinking water* is included in the applicant's wider terms relating to soft drinks. Therefore, I would have been inclined to find the goods identical under the principle in *Meric*. However, I note that the opponent has only pleaded that the goods are similar, rather than identical. Whilst I am of the view that these goods are identical, given the scope of the opponent's pleaded case, I will proceed on the basis that they are very highly similar instead.

> *Fruit-flavored soft drinks; Low-calorie soft drinks; Soft drinks flavored with tea; Fruit flavored soft drinks; Fruit-based soft drinks flavored with tea; Low calorie*

[6] Case C-533/06

[7] *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38

soft drinks; Fruit flavoured carbonated drinks; Non-alcoholic fruit drinks; Juice drinks; Fruit drinks; Fruit flavoured drinks; Fruit flavored drinks.

22. These goods are beverages which may have a relatively high percentage of water as one of their primary ingredients, but also contain additional ingredients such as fruit juices, sweeteners, and/or tea extracts. Their nature therefore overlaps with that of the opponent's *bottled drinking water*, as they are all sold as liquids. The users of the goods will be the general public, and the goods' purpose is to hydrate or refresh the user. They will be sold through the same trade channels, and are likely to be sold in similar places within those retail environments, such as the chilled drinks cabinet or in the ambient soft drinks section. They are unlikely to be seen as complementary to each other given that one is not important or essential for the other, but they may be in competition where consumers decide which beverage to consume. Taking all of these factors into account, I find that there is a medium to high degree of similarity between the goods.

Colas [soft drinks]; Cola drinks.

23. These drinks are typically sweetened (either with sugar or artificial sweeteners) and often caffeinated. Their nature overlaps as they are both liquids, but cola has additional ingredients. They may broadly have the same users, who will be the general public. Their purpose will overlap, given that both are used to hydrate or refresh the user. However, some users may specifically choose cola for the energy provided by the sugar and caffeine content. They will be sold through the same trade channels, and are likely to be sold in similar places within those retail environments, such as the chilled drinks cabinet or in the ambient soft drinks section. They are unlikely to be seen as complementary to each other given that one is not important or essential for the other, but they may be in competition where consumers are deciding which beverage to consume. Taking all of these factors into account, I find that there is a medium degree of similarity between the goods.

Isotonic non-alcoholic drinks.

24. The goods' nature may broadly overlap with the opponent's *bottled drinking water* in that both are liquid beverages, but the applicant's goods are water-based drinks which have additional ingredients such as electrolytes and/or minerals added to aid

recovery after exercise. On this basis, whilst the goods' broad purpose also overlaps as both can be consumed for hydration or refreshment, some may select the applicant's *isotonic non-alcoholic* specifically for their recovery properties. They may broadly have the same users (who will be the general public). They will be sold through the same trade channels, and are likely to be sold in similar places within those retail environments, such as the chilled drinks cabinet or in the ambient soft drinks section. They are unlikely to be seen as complementary to each other given that one is not important or essential for the other, but they may be in competition where consumers are deciding which beverage to consume. Taking all of these factors into account, I find that there is a medium degree of similarity between the goods.

Soft drinks for energy supply.

25. These goods may be primarily made from water, but often have high caffeine levels, and are sweetened with sugar and/or sweetener. Their nature may broadly overlap with that of the opponent's *bottled drinking water* in that both are liquid beverages, but the applicant's goods have additional ingredients such as caffeine and sugar added to boost energy levels. Although the goods' broad purpose overlaps as both may be consumed for hydration or refreshment, some may specifically select the applicant's *soft drinks for energy supply* for their energy-boosting properties. The users of both overlap, but *soft drinks for energy supply* are often restricted by retailers to people over the age of 18 (although I acknowledge that adults are also the users of water). They will be sold through the same trade channels, and are likely to be sold in similar places within those retail environments, such as the chilled drinks cabinet or in the ambient soft drinks section. They are unlikely to be seen as complementary to each other given that one is not important or essential for the other, but they may be in competition where consumers are deciding which beverage to consume. Taking all of these factors into account, I find that there is a medium degree of similarity between the goods.

Powders used in the preparation of soft drinks; Concentrates for use in the preparation of soft drinks; Concentrates used in the preparation of soft drinks.

26. The applicant's goods are preparations and concentrates which are used to make beverages by diluting them with water. Their use and nature therefore differs from that

of the opponent's *bottled drinking water*, which is a finished product. However, whilst *powders used in the preparation of soft drinks* will be sold in solid form, there is some overlap in nature between the opponent's term and the concentrates, which will also be sold as liquids. In addition to this, whilst there is an overlap in the goods' broad purpose as both are ultimately used provide hydration or refreshment, the applicant's specific purpose is to be used within the preparation of a beverage. They will be sold through the same trade channels, but are likely to appear in slightly different places within those retail environments, given that *bottled drinking water* is likely be sold in the chilled drinks cabinet or in the ambient finished products soft drinks section, whereas the applicant's powder and concentrate goods are likely to be found in different sections relating to beverage preparation. Whilst the applicant's goods may be used in conjunction with the opponent's goods to make a beverage, consumers are unlikely to think that the responsibility lies with the same undertaking given the goods' differences in purpose, nature, and use. As such, it is my view that the goods are not complementary. I am also of the opinion that the goods are unlikely to be in competition with each other, given that people wishing to buy *bottled drinking water* as a finished product to drink are unlikely to substitute it with a preparation to make a drinkable finished product, and vice versa. Taking all of these factors into account, I find that there is a low to medium degree of similarity between the goods.

Average consumer and the purchasing act

27. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer*[8].

28. 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*[9], Birss J (as he then was) described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well

[8] Case C-342/97
[9] [2014] EWHC 439 (Ch)

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."

29. The average consumer for the goods will be members of the general public. The cost of purchase is likely to vary a little depending on the quality of the ingredients used within the products, but overall, the goods will be inexpensive. Overall, the goods are likely to be purchased on a frequent basis. Several factors may influence the average consumer when purchasing the goods, such as the quality of the ingredients and the nutritional information. Whilst checking for nutritional information such as calorie content or sugar levels may result in consumers paying a slightly higher level of attention than a low one, it is my view that the level of attention will not be especially high for these types of beverages given that they do not typically contain any of the common allergens for consumers to avoid. I therefore find that, based on these factors, the average consumer is likely to pay a low to medium level of attention when purchasing the goods. The goods will be selected from general retail outlets or their online equivalents, or places selling beverages such as cafés or restaurants. The customer will self-select the goods from the display shelves or from menus when in hospitality settings before making a verbal order, or by selecting the image of their desired product if purchasing online. The visual component will therefore dominate the purchasing process, but I do not discount aural considerations, such as word-of-mouth recommendations from the staff or when placing verbal orders in a café or restaurant.

Comparison of marks

30. 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 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 CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*[10], that:

[10] Case C-591/12P

> "…it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion."

31. 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.

32. The respective trade marks are shown below:

The opponent's mark	**The applicant's mark**
AQSA	Aqsa Cola

33. The opponent's mark is a plain word mark written in uppercase. As a word-only mark with no other elements, the overall impression lies in the word "AQSA".

34. The applicant's mark is also a plain word mark written in title case which states "Aqsa Cola". As "Aqsa" will be perceived by the average consumer as an invented term, it is the distinctive and dominant element within the applicant's mark. As the word "Cola" describes a type of soft drink, it will be seen as descriptive or allusive by the average consumer. Whilst it still contributes to applicant's mark's overall impression, it is to a much lesser degree.

Visual comparison

35. Neither party has commented specifically on the visual similarity between the competing marks.

36. The competing marks are similar because they both have the identical word "Aqsa"/"AQSA". Whilst the opponent's mark is written in uppercase whereas the applicant's mark is written in title case, the difference does not create a significant visual difference. This is because word marks are protected regardless of the case

type, as shown in *LA Superquimica v European Union Intellectual Property Office (EUIPO)*[11], in which the GC held at [39] that word-only marks protect the word or words contained in the mark in whatever case, colour or typeface. The difference in capitalisation between "AQSA" and "Aqsa" is therefore not significant. The marks differ as the applicant's mark contains the second word "Cola", which is not present in the opponent's mark. The beginnings of words tend to have more visual and aural impact than the ends[12], which, in my view, results in the visual difference created by the additional word 'Cola' being slightly less significant. Bearing in mind my analysis of the marks' overall impressions, I am of the view that the marks are visually similar to a high degree.

Aural comparison

37. Neither party has commented specifically on the phonetic similarity between the competing marks.

38. The competing marks are aurally similar as they both contain the word "Aqsa"/"AQSA". The competing marks differ as the applicant's mark contains the second word "Cola", which is not present in the opponent's mark. The beginnings of words tend to have more visual and aural impact than the ends as per *El Corte Ingles* cited above, which, in my view, results in the aural difference created by the additional word "Cola" being slightly less significant. Furthermore, in *Pensa Pharma v OHIM*[13] the GC at [107] stated that:

> "…the relevant public generally pays greater attention to the beginning of a sign than to the end. In those circumstances, that public will focus its attention on the element 'pensa' in the contested mark and not on the element 'pharma' in that mark. It may be presumed that that public, which generally tends to contract long marks consisting of two words into a single word, will not pronounce the word 'pharma', inasmuch as that word is superfluous because of the nature of the goods and services covered by the contested mark, namely pharmaceutical goods and services."

[11] Case T-24/17
[12] See paragraph 81 of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02
[13] Case T-544/12

39. Moreover, in *Onyinye Udokporo v Enrich International Ltd*[14], Phillip Johnson as the Appointed Person followed the GC's approach, stating at [18] that:

> "Accordingly, it was open to the Hearing Officer to treat the word "LEARNING" as descriptive in relation to education-related services. And in light of this finding, it was likewise perfectly acceptable for the Hearing Officer to conclude that this element of the mark would not usually be verbalised."

40. Whilst I acknowledge the comments made in *Purity Wellness Group Ltd v The Stockroom (Kent) Ltd*[15], by Philip Harris as the Appointed Person, where he said at [31] that "Descriptiveness does not of itself render an element negligible or aurally invisible", he also stated that the terms in question had "a unitary character". This differs from the immediate case, and I do not find that this is the case with the applicant's mark. As the word "Cola" is descriptive or allusive in relation to class 32 beverages, it is my view that the average consumer would not articulate the word "Cola" when saying the mark. Taking this into account, I find that the marks are aurally identical.

Conceptual comparison

41. Neither party has commented specifically on the conceptual similarity between the competing marks, nor offered a meaning for the word "AQSA"/"Aqsa". I cannot find a definition for the word in the Oxford English Dictionary or the Cambridge Dictionary. It is considered that the average consumer of the class 32 goods would not assign a conceptual meaning to the word "AQSA"/"Aqsa" as it is unlikely to be understood by the average consumer in the UK. It is therefore my view that the average consumer will interpret the word "Aqsa"/"AQSA" in both marks as an invented word with no meaning. This shared word is therefore conceptually neutral. The marks differ conceptually due to the inclusion of the additional word "Cola" in the applicant's mark. The Oxford English Dictionary defines the word "cola" to be both "a sweet, brown, carbonated non-alcoholic drink flavoured with kola nuts or a similar flavouring and often containing caffeine". As such, the word will be interpreted as a descriptive term for a type of beverage. Whilst this is directly descriptive of a type of beverage in relation

[14] BL O/1141/25
[15] BL O/115/22

to the applicant's cola products and soft drinks, it is my view that it would also be understood as a descriptive reference to the flavour of other beverages, as well as being allusive of beverage drinks generally. Insofar as the marks convey any concept, they are conceptually dissimilar. However, given that the sole differing element is descriptive or allusive of the class 32 goods, it is my view that it is not a significant dissimilarity.

Distinctive character of the earlier trade mark

42. In *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV*[16], the CJEU stated that:

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee* v *Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

43. Registered trade marks possess various degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic

[16] Case C-342/97

of the goods, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

44. Although the distinctiveness of a mark can be enhanced by virtue of the use made of it, the opponent has not filed any evidence of use. As such, I have only the inherent position to consider.

45. In the applicant's counterstatement, the applicant argues that the word "AQSA is a very generic name". As stated previously, neither party has offered a meaning for this word, and I cannot find a definition for the word in the Oxford English Dictionary or Cambridge Dictionary. Furthermore, the applicant has not filed any evidence to demonstrate that it is generic or why. I therefore reject this line of argument. Instead, it is my view that the average consumer in the UK will understand the word as an invented term with no specific meaning. As such, I find that the opponent's mark has a high level of inherent distinctiveness.

Global assessment – conclusions on likelihood of confusion

46. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no set formula for establishing a likelihood of confusion between marks; it is a global assessment where a number of factors need to be borne in mind.

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

48. In the opponent's statement of grounds, the opponent argues that the inclusion of "Aqsa" in the applicant's mark will cause confusion amongst consumers. In the applicant's counterstatement, the applicant argues that by including the word "Cola" in their mark, it gives a "very clear distinction" and therefore "does not necessarily imply confusion among consumers".

49. Earlier in this decision I found that the applicant's goods range from being similar to a low to medium degree to being very highly similar to the opponent's goods. The average consumer will be a member of the general public. The average consumer will pay a low to medium degree of attention when purchasing the goods and services. The goods will primarily be selected through visual means, although I do not discount an aural element to the selection process. I have found the marks to be visually similar to a high degree, aurally identical, and, insofar as the marks convey any concept, they are conceptually dissimilar. However, as the differing element is descriptive of the goods, the conceptual dissimilarity is not significant. The overall impression of the opponent's mark lies exclusively in the word "AQSA". In the applicant's mark, the word "Aqsa" is the distinctive and dominant element, with the descriptive or allusive word "Cola" playing a much smaller role in the mark's overall impression. The opponent's mark has a high level of inherent distinctiveness.

50. Taking all these factors into account and being mindful of the role that imperfect recollection may play, I consider that the marks are likely to be misremembered or inaccurately recalled for one another. It is my view that the average consumer, when paying a low to medium amount of attention when purchasing the goods, may overlook the use of the term "Cola" in the applicant's mark given that it is descriptive or allusive in relation to beverages. As this descriptive or allusive word is the only point of difference between the marks, it is my view that this would therefore lead to direct confusion. It is considered that the marks' visual and aural similarities, the high level of distinctiveness of the opponent's mark, and the similar nature of the goods are factors which support this finding. Whilst the marks are conceptually dissimilar in that their shared word "AQSA"/"Aqsa" is conceptually neutral and the additional word "Cola" in the applicant's mark has its own concept, it is considered that this is not sufficient to enable the average consumer to differentiate between the marks given that the additional word is descriptive or allusive. The average consumer is more likely

to retain and recall the identical (and highly distinctive) word “AQSA”/“Aqsa”. It is my view therefore that there exists a likelihood of confusion, notwithstanding the fact that the descriptive word “Cola” is missing from the opponent’s mark.

51. If I am wrong in this finding, I now go on to consider indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*[17], Mr Iain Purvis Q.C., as the Appointed Person, explained that

> “16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.
>
> 17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:
>
> > (a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).
> >
> > (b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand

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or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI' etc.).

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

52. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*[18], Arnold LJ approved Mr Purvis's formulation but added:

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

53. It is not sufficient that a mark merely calls to mind another mark (as per *Duebros Limited v Heirler Cenovis GmbH*[19]). This is mere association not indirect confusion. A finding of indirect confusion should not be made merely due to a shared element within marks. As per *L.A. Sugar Limited v By Back Beat Inc*[20] (set out above), indirect confusion should be identified in cases where the average consumer is likely to notice the differences between the competing marks but assume an economic link between the two undertakings based on their similarities.

54. It is my view that even if consumers recognise the inclusion of the descriptive or allusive word "Cola" within the applicant's mark, this appears consistent with a brand variant or brand extension. The word "Aqsa" dominates the overall impression of the applicant's mark and is highly distinctive. I am of the view that consumers are likely to view the addition of the descriptive or allusive word "Cola" within the applicant's mark as being added to the opponent's house mark "AQSA". Consumers may therefore view

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this difference within the applicant's mark as a brand variant or brand extension of the existing house mark "Aqsa", and therefore assume a commercial association between the parties on the basis that the applicant's mark may be seen as a variant or extension of the house brand "AQSA" which informs consumers of what goods are offered under the mark. Furthermore, I am of the view that the word "AQSA"/"Aqsa" is so strikingly distinctive that the average consumer would assume that only the opponent is using it in a trade mark, as per the first category of instances identified in *LA Sugar.* Consequently, I find that there exists the likelihood of indirect confusion. I find this even in relation to goods which have a lower level of similarity due to the interdependency principle and the identical nature of the shared distinctive element.

Final remarks

55. The opposition under section 5(2)(b) has been successful in its entirety. Subject to any successful appeal, the application will be refused registration.

Costs

56. As the opposition has been successful, ordinarily the opponent would be entitled to an award of costs. However, as it has not instructed professional representatives, it was invited by the Tribunal to indicate whether it intended to make a request for an award of costs, including accurate estimates of the number of hours spent on a range of given activities relating to defending the proceedings. It was made clear by letters dated 25 January 2025 and 17 May 2025 that, if the pro-forma was not completed by 25 February 2024, and then later 16 June 2025, costs (other than official fees) may not be awarded. The opponent did not return a completed pro-forma to the Tribunal and, on this basis, no costs are awarded other than the official fees arising from the action (excluding extensions of time). I have therefore awarded the following:

Official fees: £100

57. I therefore order Nadim Razaq to pay Zohaib Shah the sum of £100. 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 22nd day of December 2025

K SERRAVALLE

For the Registrar