



IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY LIST (ChD)
INTELLECTUAL PROPERTY ENTERPRISE COURT

Rolls Building
New Fetter Lane
London

Neutral Citation Number: [2024] EWHC 88 (IPEC)
Date: 24 January 2024

B e f o r e :

HER HONOUR JUDGE MELISSA CLARKE
sitting as a Judge of the High Court

B E T W E E N :

Claim No: IP-2022-000076

**(1) THATCHERS CIDER COMPANY
LIMITED**

Claimant

- and -

(1) ALDI STORES LIMITED

Defendant

Martin Howe KC and Beth Collett (instructed by Stephens Scown LLP) for the
Claimant
Stephanie Wickenden and Niamh Herrett (instructed by Freeths LLP) for the
Defendant

Hearing dates: 23 and 24 November 2023

JUDGMENT

Her Honour Judge Melissa Clarke:

INTRODUCTION

1. The Claimant (“**Thatchers**”) is a long-established cider and alcoholic beverage producer. It is the registered proprietor of UK trade mark number 3489711, for the below device mark, registered in respect of “*Cider; Alcoholic beverages, except beer*” all in class 33 (“the **Trade Mark**”):



2. Thatchers launched its canned cloudy lemon cider product in February 2020 (the “**Thatchers Product**”). Since then, it pleads, the Thatchers Product has been sold under and by reference to the Trade Mark, which is applied to the outside of the cans of Thatchers Product, used in advertising and promotion of the Thatchers Product, and is applied to the cardboard containers of 4-can packs of the Thatchers Product in a form which is either effectively identical to, or in which any differences do not substantially affect the identity of, the Trade Mark.
3. The Defendant (“**Aldi**”) is a supermarket chain which operates just under 1000 stores in the UK from which it sells, *inter alia*, its own brand alcoholic cider products (the “**Taurus**” range) and third party branded alcoholic cider products. Aldi launched a cloudy lemon cider

product (the “Aldi Product”) within its own brand Taurus range, sold as 4-can packs, in May 2022 in the following get-up:



THE CLAIM

4. Thatchers claims that Aldi has infringed the Trade Mark pursuant to sections 10(2)(b) and 10(3) of the Trade Marks Act 1994 (“TMA”) and it further claims in passing off. I note for convenience here that Thatchers does not bring a claim that the brand “TAURUS” infringes its word mark “THATCHERS”.
5. Mr Howe, Kings Counsel, together with his junior Ms Collett, appeared before me for Thatchers. Ms Wickenden, together with her junior Ms Herrett, appeared before me for Aldi. I am grateful to them all for their careful and comprehensive skeleton arguments, their helpful oral submissions, and for the note of evidence to assist me in closing, that Mr Howe KC generously credited to Ms Collett.
6. In its particulars of claim, Thatchers pleads that the overall appearance of the Aldi Product is highly similar to that of the Thatchers Product. Its case in relation to section 10(3) TMA is that the Court should infer that Aldi intentionally mimicked the

appearance of the Thatchers Product in designing the appearance of the Aldi Product, and in doing so, amongst other things:

- i) intentionally set out to cause a link in the minds of consumers between the two in order to encourage consumers to buy the Aldi Product; and
 - ii) took unfair advantage of, or caused detriment to, the distinctive character and repute of the Trade Mark, without due cause.
7. For its claims in infringement of the Trade Mark, it is necessary for Thatchers to identify the sign used by Aldi which is said to infringe the Trade Mark. This gives rise to a preliminary issue which I will deal with now.

What is the sign complained of?

8. In its particulars of claim, Thatchers defines the Aldi Product in paragraph 14 in the following terms:

“In or around June 2022, the Claimant became aware that the Defendant had started to sell a cloudy lemon cider product (“the **Aldi Product**”), an illustration of a 4-can pack of which appears below:



9. It complains in the particulars of claim about “*graphics on the cans and on the 4-can cardboard pack of the Aldi Product*”, the “*appearance on the Aldi Product*” and the “*graphics on the Aldi Product*”. It compares a physical appearance of a single can of the

Thatchers Product (rather than the Trade Mark said to be infringed) to a single can of the Aldi Product, and complains about the similarity of both cans. What it does not do, anywhere in the particulars of claim, is identify with any particularity what is the sign used by Aldi that it complains of as infringing the Trade Mark.

10. In its defence, Aldi raised this point, stating that Thatchers' references to "*graphics on*" and "*appearance of*" of the Aldi Product lacked sufficient particularity. Thatchers filed a Reply stating that its case "*related to the appearance of the Aldi Product as a whole, in comparison with the appearance of the Trade Mark and of the Thatchers Product as a whole*".
11. The matter came before His Honour Judge Hacon at a case management conference on 6 June 2023 in which both parties were represented by Counsel. The lack of definition of the sign complained of was raised by Aldi, and discussed. Aldi puts the transcript of that discussion before me. The result was the sign complained of ("**the Sign**") was defined at issue 2 of the list of issues for trial attached as Schedule 2 to the CMC Order ("**List of Issues**"), as "*the overall appearance of the Aldi Product, as defined in paragraph 14 of the Particulars of Claim*".
12. Mr Howe's attempts to explain what the Court should take as the sign complained by Thatchers take up 6 pages of the transcript of day 1. His submissions included:
 - i) That although the definition of Aldi Product in paragraph 14 of the particulars of claim, by which the Sign is defined in the List of Issues, is illustrated by a photograph of a 4-can pack, the Sign is defined by reference to the Aldi Product, not the photograph, so it is both the individual can and the 4-can pack of Aldi Product which are complained of;

- ii) It is not right to say that the Sign is used in three dimensions, rather it is simply placed on a curved surface when it is used on the can of Aldi Product, as is the Trade Mark which is also not a three-dimensional mark;
 - iii) The Sign appears twice around the circumference of the can, once on the front and once on the rear, as does the Mark when placed on a can;
 - iv) The Sign appears once on the front of the cardboard sleeve of the 4-pack of Aldi Product, although the Claimant accepts that is similar but not identical to how it appears on the individual can of Aldi Product;
 - v) The Sign also appears partially on the rear of the cardboard sleeve of the 4-pack of Aldi Product, although this is to a large part obscured by statutory labelling;
 - vi) The Sign complained of is the overall appearance of the Aldi Product, as defined, as a whole;
 - vii) In answer to a question from me about whether the Aldi Product (and so the Sign complained of) is a single can of the Aldi Product, Mr Howe responded “Yes”;
 - viii) However, he then elaborated, *“The ‘product’ is actually the liquid inside, strictly, but yes it is then provided in individual cans which are then put into four-packs”*;
 - ix) Mr Howe then held up an individual can of Aldi Product, facing me, saying *“That is what I am holding, facing my Lady is what we say the Sign is and what we have been proceeding on”*.
13. These are contradictory submissions in which the Sign is, variously said to be: both the 4-pack and the individual can of Aldi Product as a whole; a flat sign placed on the front and rear of an individual can

of Aldi Product; a flat sign put twice on the cardboard packaging of the 4-pack of Aldi Product (but different from the flat sign put on the front and rear of an individual can of Aldi Product); the overall appearance of the Aldi Product which is the individual can; and that seen on the front face of the individual can of Aldi Product.

14. Ms Wickenden objected to this in her opening, saying *“They have only ever said that they rely on the whole product, which caused us some confusion as the whole product is not usually considered a sign. They have had multiple opportunities to move away from that or clarify it, but they have always repeated that what they mean is the entirety of the [Aldi] Product is the Sign... that is what their pleaded case is. The pleaded case is the whole four-pack. If they want to say it is the whole can, then I am not going to take the point so strongly on that. But what my learned friend cannot do, and what he has just done, is stand up and say, “We complain of the sign as depicted on the front of this can and again on the back of the can and on the side of the packaging” when their pleaded case has always been that whole product is the Sign”*.
15. Ms Collett for Thatchers addressed me further on this point in closing, taking me to the draft list of issues which was before HHJ Hacon at the CMC, and also to the transcript of the CMC, before submitting that the Sign is the whole appearance of a single can of Aldi Product, and that was what the parties understood to be the case at the CMC. I am grateful to her for clarifying Thatchers’ position.
16. Nonetheless, this is unsatisfactory. As Mr Howe himself submitted during the course of his opening on this point, lists of issues at a CMC are not pleadings and are not meant to do the job of pleadings. I accept that the List of Issues is intended to record what Thatchers said at the CMC it meant by its pleadings, and it is, in my judgment,

only fair to hold it to that as that is the basis on which Aldi has prepared for this trial. The alternative is to find that if Thatchers has not identified in its pleaded case – and at trial - what is the sign complained of with sufficient particularity, it cannot succeed on trade mark infringement. Aldi has not sought to make that argument.

17. In my judgment that which is identified as the Aldi Product in paragraph 14 of the particulars of claim is a single can, not the 4-pack, and this can be discerned by the wording “*a cloudy lemon cider product (“the **Aldi Product**”), an illustration of a 4-can pack of which...”* (my underlining for emphasis). This must be a 4-can pack of Aldi Product, making the Aldi Product a single can. Ms Collett says there is support for this in the transcript of the CMC hearing and I accept there is. Accordingly the Sign is the overall appearance of a single can of the Aldi Product, and not merely one face of it.

THE DEFENCE

18. Aldi’s position is that it accepts that it used the Thatchers Product as a ‘benchmark’ when developing the Aldi Product, but denies infringement of the Trade Mark. If the Court finds that the requirements for section 10(2)(b) or 10(3) infringement are made out, Aldi relies on the defence provided by section 11(2)(b) of the Act. In relation to passing off, Aldi’s case is that none of the requirements of passing off are established. I note for convenience here that Aldi makes no counterclaim in invalidity of the Trade Mark.

THE LIST OF ISSUES

19. This is a trial on liability only. The List of Issues is:

Trade Mark Infringement

1. Does the Claimant have a reputation in the UK in relation to the Trade Mark?
2. Is the overall appearance of the Aldi Product, as defined in paragraph 14 of the Particulars of Claim (“the **Sign**”) similar to the Trade Mark?
3. If the answer to (2) is yes, does such similarity give rise to a likelihood of confusion pursuant to section 10(2) of the Trade Marks Act 1994?
4. Did the Defendant’s use of the Sign cause a link in the mind of the average consumer between the Sign and the Trade Mark?
5. Does the Defendant’s use of the Sign without due cause, take unfair advantage of, and/or is detrimental to the distinctive character and/or repute of, the Trade Mark pursuant to s.10(3) of the Trade Marks Act 1994?
6. Does the Defendant have a defence under s.11(2)(b) of the Trade Marks Act 1994?

Passing Off

7. Is the Claimant the owner of goodwill in the business of the sale of the Thatchers Product associated with the Trade Mark?
8. Has the Defendant passed off by making misrepresentations leading the public, or likely to lead the public, to believe that the Aldi Product is that of, licensed, or approved by, or otherwise connected in trade with the Claimant?
9. If so, have the said misrepresentations caused damage?

WITNESSES

20. Thatchers relies on the evidence of a single witness. Mr Christopher Milton was a director of Thatchers for over 14 years until 31 May 2023 and remains a consultant to Thatchers. He filed two witness statements dated 14 September 2023 and 13 October 2023, the latter in reply to the witness statement of Mr Watkins for Aldi. Mr Milton attended trial and was cross-examined by Ms Wickenden.

Mr Milton appeared to be a straightforward, credible and reliable witness who came to Court to assist it to the best of his ability. Ms Wickenden says Aldi makes no criticism of him at all.

21. Aldi raised in pre-trial correspondence, and at trial, objections to the admissibility of parts of Mr Milton's second witness statement. Ms Wickenden limited these admissibility objections in her oral submissions and after hearing these and the oral submissions of Mr Howe there seemed to be agreement with my expressed opinion that Mr Milton's evidence trespassed on areas for my judicial determination in parts of paragraph 13 (4th sentence onwards), paragraph 19 (3rd and 4th sentence) and paragraph 35 (3rd sentence, and 5th sentence onwards), and in the whole of paragraph 32. To the extent that it does, it is not admissible, and I have not taken account of this evidence. There remained a dispute about the admissibility of the second sentence of paragraph 8, but it seems to me that falls within admissible trade evidence of the type described by Birss J, as he then was, at [35] of *Robyn Rihanna Fenty v Acadia Group Brands Limited (T/A Topshop) (No.1)* [2013] EWHC 1945 Ch, [2013] FSR 37.
22. Aldi relies on the evidence of two witnesses. Mr Mark Watkins has been a Buying Director since September 2018 and has had responsibility for beer and cider products since January 2020. His witness statement is dated 15 September 2023. Mr Watkins addresses the history of Aldi's Taurus brand, Aldi's history of sales of cloudy lemon cider, and the development of the Aldi Product. Mr Watkins attended trial and was cross-examined by Mr Howe. In Thatchers' skeleton argument a number of points were raised about the adequacy of Aldi's disclosure, and whether adverse inferences should be drawn about the failure of Aldi to document what Mr Watkins says were a number of supermarket and retailer visits carried out as part of market research into the cider sector, the brief

given to the external designers working on the packaging of the Aldi Product, etc. In fact I have not been asked to make those inferences. Mr Watkins gave what I considered to be straightforward and honest evidence that as part of Aldi's lean and efficient business model it did not document retailer and market research visits and it mostly gave feedback to designers orally. Such correspondence as there was (and there are some emails in the trial bundles) have been disclosed. As Ms Wickenden pointed out in closing, Thatchers' argument in its skeleton that Aldi conducts its business deliberately so as to avoid creating a paper trail which it would have to disclose in litigation was not put to Mr Watkins and appears to have been abandoned.

23. Mr Howe for Thatchers submits that Mr Watkins was unwilling to make fair concessions and that I should treat his evidence in relation to the extent to which the Thatchers Product was used as a benchmark for the Aldi Product with scepticism and scrutiny, but does not submit that I should find that he was being untruthful, although he put this to Mr Watkins at various points of his cross-examination. Ms Wickenden asks me to remember that Mr Watkins is not a company director of Aldi (his job title notwithstanding), and he is not a trade mark lawyer. She submits that he came to Court to give honest evidence, he did his best under robust cross-examination, and he did make a number of fair concessions. I agree, and I accept his evidence as both credible and reliable. I thought Mr Watkins had a tendency to provide answers to questions that were not asked and in doing so avoid questions that were, but I do not think this was deliberate as after I had reminded him to listen to questions and answer them directly, he did so.
24. Mr Lloyd Lane is a solicitor at Freeths, who acts for Aldi in these proceedings. He filed a witness statement dated 8 September 2023. In that witness statement Mr Lane introduces publicly available

UKIPO documents, and private UKIPO correspondence with Thatchers' agents and high-resolution images which have been disclosed by Thatchers in these proceedings. He made himself available at trial but the Defendants had no questions for him and so he was not called and the facts in his evidence are unchallenged. Thatchers makes submissions about the relevance of his evidence to the issues, and as can be seen from the fact that I have not found it necessary to refer to Mr Lane's evidence other than in passing, I accept those submissions.

FACTUAL BACKGROUND

Thatchers

25. Thatchers is a company through which is operated a family-run business in the alcoholic beverages industry, which was established in 1904 at the family farm Myrtle Farm, Station Road, Sandford Winscombe, Somerset where it is still based. The current Managing Director, Martin Thatcher, is the great-grandson of the founder, William Thatcher. Mr Milton told the Court it was the largest family-run independent cider producer in the UK. Thatchers produces and sells apple and non-apple ciders under its own brand for the retail market, but also for sale in bars and pubs.
26. Mr Milton's evidence is that Thatchers has a continuous process of new product development ("NPD"), with more than twenty new cider-related products in development at any one time. As sales director, he was heavily involved in the NPD process for many products. As part of the NPD process, he said, there are weekly tasting sessions for members of the cider-making, marketing and executive teams to try different concepts and flavours of cider.

The Thatchers Product

27. Mr Milton's evidence is that in 2018 Thatchers produced only apple-based ciders. Thatchers' flagship apple cider, and the oldest product still on sale, is 'Thatchers Gold'. It also had, and still has, a cloudy cider called 'Thatchers Haze' and an apple-based pink cider, with the colour derived from the skin of red apples, called 'Thatchers Rosé'. At that time it had no presence or brand in fruit-flavoured (i.e., non-apple-based) ciders. It identified what it considered to be a gap in the fruit cider market for a citrus-based cider, at a time when there was an emerging trend for lemon-flavoured alcohol products generally, including lemon flavoured gin. Mr Milton accepted in cross-examination that Thatchers was not the first producer to make a lemon cider for the UK market, however.
28. Thatchers carried out a broad market analysis of lemon-flavoured drinks including non-cider products and both alcoholic and non-alcoholic drinks at an early stage of product development, to get a good overview of what existed in the marketplace, what was successful and what was not. I have seen some documentation evidencing that. Mr Milton said that some of the products on the market featured lemons and a yellow and green colour scheme and others did not. Excerpts from this market analysis showing other third-party beverages in the market at or shortly before the time of that analysis are contained in Figures 2, 3, 5 and 6 of the Annex to this judgment. Figure 4 depicts another third-party brand of lemon cider sold by Aldi, Alska.
29. Mr Milton says that Thatchers identified one possible concept which it tested in the trade, although that proved not to be popular. It identified another possibility within the NPD tasting process, and this was produced for internal feedback, which was positive. It produced a larger batch of around 25,000 litres which it took to the trade, resulting in what he described as extremely positive feedback and a number of commitments to buy, and following further

evaluation and Board approval, the Thatchers Product was launched in February 2020.

30. Mr Milton's unchallenged evidence is that the Thatchers Product is made with real lemon fruit juice and also a natural flavour, together with apple juice from dessert apples which gives a natural clouding effect to the resulting beverage. He said that although more expensive than using cider apples, this also gave a sweeter, fuller and more rounded mouthfeel. By contrast, he said, Aldi's Product label discloses that it contains no lemon juice but only citric acid and lemon flavouring, which is why it is labelled "cloudy lemon flavoured cider" instead of "cider with lemon juice". Mr Watkins agreed that was the case in cross-examination. Mr Milton said Aldi's product obtains its cloudiness (which he described as "unnatural and uniform") by use of a cloud stabiliser. This can be seen on the label of the Aldi Product.

The Trade Mark

31. Mr Milton said that as its first non-apple cider in over a century of trading, Thatchers was keen to produce branding for the Thatchers Product which was distinctive but fitted well within, and was instantly recognisable as being part of, the existing "brand family" of other Thatchers products. He described the key features of the brand look and feel across the existing range (which he described as the "structure and hierarchy" of the branding), whereby the wording "Family Cider Makers" is arched across the top, "Thatchers" has a prominent and large central position, there is a descriptor of the product immediately below, and a tag-line describing the product arched below that ("Zingy and Refreshing", in the case of the Thatchers Product). He said that was a recognised style specific to Thatchers amongst consumers and retailers. To the extent he is describing the large text "THATCHERS surrounded by an arc or

roundel of wording made up of “family cider makers” at the top and a tag-line at the bottom, I am willing to accept that those who are familiar with the Thatchers family of brands would recognise that as a specific style of Thatchers. I do not accept that the use of a prominent brand, followed by descriptive wording of what the product is (such as ‘Cloudy Lemon Cider’), followed by a tag line below that, is a recognised style specific to Thatchers. That can be seen on very many lemon-flavoured beverages on the market, including lemon cider beverages, illustrated at figures 2 to 6 to the Annex to this judgment, such as Brothers (which Mr Milton accepted was earlier in the market than the Thatchers Product), Lilley’s and Alska.

32. In cross-examination Mr Milton said that the Thatchers Product packaging was intended to be complementary but different to their other ciders, and as the market for a cloudy lemon cider was totally different to the apple-based ciders, they felt that they needed a bigger and bolder approach. He said the final version had a deliberately different overall look but retained some of the elements of the brand family, including the structure and hierarchy of the central elements. He points to the fact that Thatchers put red apples on the Thatchers Rosé product, and said that was chosen to communicate the difference between that and Thatchers Gold and Thatchers Haze, so they used images of lemons on the Thatchers Product to communicate that different ingredient in a consistent way. He accepted that Thatchers Gold and Thatchers Haze did not have images of apples on their packaging, and that although Thatchers Rosé had apples at the bottom right of the label, the Thatchers Product and the Trade Mark did not have lemons in that position. Mr Milton also pointed to fine horizontal lines in the background of each of the products in the brand as being a consistent motif. I will come back to that.

33. Despite its retention of some of the elements of the brand family in the packaging for the Thatchers Product, Mr Milton accepted in cross-examination that the overall look and aesthetic of the Thatchers Product was deliberately different to the other products in the Thatchers range, because of the departure they were making in making a non-apple cider for the first time. He agreed that Thatchers put lemons prominently on the packaging and the Trade Mark because “*We are communicating clearly through the packaging exactly what is in the product*”. He accepted that many lemon-flavoured beverages used lemons on their packaging for that reason.
34. Thatchers worked with external designers to reach the final design for the Thatchers Product which was eventually registered as the Trade Mark. Mr Milton said that in reaching the final design, Thatchers consulted with a number of retailers and also potential consumers about the overall look and feel of the packaging and the shelf stand-out. His evidence was that shelf-stand out was important because consumers will only look at products such as cider on a retailers shelf for a matter of a few seconds before deciding to buy. Mr Watkins also emphasised the importance of shelf stand-out, stating in cross-examination that a product which stood-out on the shelf would be more likely to be purchased. He also agreed that cider-buying decisions were made very quickly by consumers.
35. Mr Milton said that consumers scanning the shelves take cues from colour and shape, and he agreed with the contention put to him in cross-examination by Ms Wickenden that if they were looking for a product such as a lemon cider, they might be especially looking for the colour yellow, and possibly a more acid yellow than the softer yellows, ambers and golds which were often used across large elements of the beer and cider market. He said that yellow was a

predominant colour in Thatchers Gold, for example, but in his view the bright yellow on the Thatchers Product was distinctive enough for consumers to distinguish it from that. On further questioning, he agreed that in order for a consumer to distinguish between Thatchers' different yellow-coloured products, the lemons on the packaging and the very large words "Cloudy Lemon Cider" almost as large as the "THATCHERS" brand, would also play an important role.

36. Mr Milton was taken to a market research document disclosed by Thatchers and dated 10 October 2019, excerpts of which are in the Annex to this Judgment. He said this resulted from research carried out with consumers by Thatchers in conjunction with a retailer. He confirmed that the consumers were only commenting on the final form of the packaging of the Thatcher Product, and were told that they were being put together to test out the idea of a new fruit cider, but they were not shown or offered a taste of the liquid itself. The comments included "*Colour scheme and information looks fresh, appealing, lemony, looking forward to trying this cider*", "*Looks lemony, refreshingly modern and tasty*", "*It screams lemon but is not in your face...*". Mr Milton said overall the feedback was positive and showed that the packaging met the intention of communicating that the product was a zesty lemon cider. I accept that evidence. Mr Watkins also volunteered in his oral evidence that he thought Thatchers had done a really good job of using whole lemons in the Trade Mark to communicate to customers exactly what the Thatchers Product was.

Marketing and sales of the Thatchers Product

37. Thatchers trades primarily through supply of products to supermarkets and other retail outlets. It disclosed a table in its Particulars of Claim (which stands as evidence in IPEC) showing

that 98.8% of sales of the Thatchers Product were in retail outlets, of which 51.3% were supermarkets, 12.9% convenience stores and 34.6% were wholesale cash and carry outlets. I accept that evidence which was not challenged in cross-examination.

38. Mr Milton's evidence is that from August 2020 to August 2022 Thatchers invested in excess of £2.9m promoting the Thatchers Product through TV advertising, outdoor posters and billboards, brand experience/sampling and trade PR. He was questioned about that figure in cross-examination by reference to various disclosed invoices, in particular whether all of that spend did indeed relate to the Thatchers Product or other products produced by Thatchers, but was unable to give evidence about exactly how that figure was arrived at as he said it was produced by the Thatchers Director of Marketing and not by him. Nevertheless he said that he had sat in Thatchers Board meetings for 15 years, and that figure accorded with his knowledge and memory of what the Thatchers Board had agreed to spend on marketing the Thatchers Product in the relevant years. On the balance of probabilities, I accept that Thatchers did spend about £2.9m promoting the Thatchers Product in that time.
39. Mr Milton says that within this period Thatchers launched an online campaign for the Thatchers Product via Thatchers' social media accounts on Instagram, Facebook, X (formerly Twitter) and Linked-in, each of which have between 12,000 and 96,000 followers, which he said reached 13.86 million people. Aldi admitted this in the defence. He says that Thatchers also conducted a summer marketing campaign in 9 major cities in the UK and advertised outdoors in holiday destinations in South Wales and the South West, achieving a further 12 million impacts. He was not challenged on this in cross-examination, and I accept it.

40. Aldi admits that the Thatchers Product was named the World's Best New Launch Design for 2020 in the World Cider Awards, which Mr Milton said, without challenge, indicated consumer buying trends and interest.
41. I accept Mr Milton's evidence that since launch of the Thatchers Product to August 2023, Thatchers have sold 11.6m litres of the Thatchers Product amounting to £29.6m in sales at retail value (not including pubs and bars). He confirmed that Thatchers does not and has never supplied the Thatchers Product to Aldi, although Thatchers previously supplied apple cider products to Aldi. Aldi says that stopped in 2012.

Aldi and the Taurus range of ciders

42. Aldi is very well-known as a discount supermarket chain in the UK. It sells a range of cider products, including under its primary own-label cider brand 'Taurus'. It also sells third party ciders, including products from Strongbow, Alska and Orchard.
43. Mr Watkins says that the Taurus brand had been in use since he first started working for Aldi in 2013, and he describes it as "*successful and well-established*" by the time he became responsible for cider products in 2020. Since 2020, there has always been an apple cider known as Taurus Original, a pear variant known as Taurus Pear and a dark fruits variant known as Taurus Dark Fruits. There have also been seasonal flavour variants which vary from time to time. He says the seasonal variants are sold at a higher price point because they are flavours for which there are either no, or few equivalents sold by other retailers. He says that Aldi uses a single design toolkit as a starting point for design of all Taurus cans, so that they are consistent in their design, although they must also effectively communicate the characteristics of the particular product. I accept this evidence. A photograph showing the design of

packaging across the Taurus range of ciders is contained at figure 7 of the Annex to this judgment.

44. Mr Watkins says that from 2020 to 2022 Aldi sold third party cloudy lemon ciders: Brothers' Cloudy Lemon Cider in 4 x 400ml cans and Alska Cloudy Sicilian Lemon Cider in 3 x 330ml bottles. Both were successful for Aldi, reflecting the market trend for less conventional cider flavours. For that reason, he decided to introduce a cloudy lemon cider to the Taurus line as a seasonal variant, for launch in March 2022, although it was slightly delayed and first put on sale on 19 May 2022. He and his team worked with a third party cider producer, Aston Manor, to develop the liquid, and a third party design agency to develop the artwork for the packaging. I accept this evidence which was largely unchallenged.

“Benchmarking”

45. Mr Watkins evidence is that where Aldi sees a gap in the market and decides to develop a similar Aldi product, it will often identify a “benchmark” product which is usually a market leader. He says that will act as the quality barometer, as Aldi’s intention is to deliver a product of the same or better quality as the benchmark leading product. He said in developing the Aldi Product, he chose the Thatchers Product to be the benchmark.
46. Both parties’ witnesses agreed that in the arena of product development by retailers and manufacturers, the concept of benchmarking against an existing product is completely standard market practice, and has been for years. However, Mr Milton said that benchmarking goes beyond looking at quality, and involves looking at *“product development, design, looking at every aspect of the marketing mix... they will have looked at the brand leader in that market place and they will have looked at the most successful product and looked at everything else, in that order”*. It was put to

him in cross-examination that the fact that something may have been referred to as benchmarked, did not on its own inform what the product would look like, but Mr Milton disagreed, saying *“it is likely to inform you what the product would look like”* and he confirmed that he meant that he would expect there to be some visual resemblance if a project is benchmarked.

47. This was explored with Mr Watkins in cross-examination. Mr Watkins repeated that the benchmark was a benchmark for quality, and said that it was also used as a barometer for price, as Aldi’s aim was to produce a product of equivalent or better quality at a discounted price. He was asked whether the benchmark was also used to inform the packaging, and he initially said that it was not, that the packaging would reflect a much wider brief looking at the whole cider market but the lemon cider in particular. He said that was because the packaging was about conveying an Aldi product first and foremost, while communicating what the product is. Mr Watkins said that a wider review of the market looking at packaging would have been carried out by Aldi’s third party design consultants, the Black Eye Project.
48. This is not, in my view, supported by the evidence, which shows that during the development of the design of the Aldi Product with Black Eye Project and also with Aston Manor, the Thatchers Product was also being used as a benchmark for the packaging. Although there is relatively little in the way of documentary evidence arising from the Aldi side relating to design of the packaging, which I accept from Mr Watkins evidence is because the majority of the design decisions were communicated orally in accordance with Aldi’s deliberately lean and efficient business model, there are a number of paper design iterations and options produced by the Black Eye Project, and the only third party product which is illustrated in any of them is the Thatchers Product.

49. Mr Watkins said that he would have expected the team from Black Eye Project to have carried out supermarket visits and a market review, but accepted in cross-examination that he had no direct knowledge whether they did or not, and that it was possible that they had taken shortcuts in the interests of time. There is no evidence that they did so before me, and the documentation they produced illustrates and refers only to the Thatchers Product, so I find that they did not. Mr Watkins said in his written and oral evidence that he had carried out supermarket visits and market reviews of the cider sector very regularly, every week or two, in connection with the NPD which gave rise to the Aldi Product, but conceded in cross-examination, quite fairly in my view, that he now had no direct recollection of such visits, telling the Court that he had developed 50, 60 or 70 other projects since this one. He did, however, say that for every product that was put into an Aldi own-label, there would be store visits and a lengthy process of sampling and procurement of other products, to ensure he reached a position where he was happy Aldi were entering into the correct market, and I accept his evidence, which I think is truthful given the concession that he made that he cannot remember what he did, that it is likely he did the same while developing the Aldi Product.
50. Despite that finding, it seems clear from email communications from Mr Watkins and members of his team at Aldi that when making decisions about various design options and iterations, those decisions were being taken with the Thatchers Product as a reference point. The early iteration of the design was very much in the Taurus House style, with the “TAURUS” brand, the bulls head device and the swoosh in yellow, green and white. He said in his written evidence that he did not consider these early versions to do a good enough job of communicating the lemon flavouring or the more premium nature of the product, so he wanted a package design

that “*shouted lemon to consumers*” which would communicate more value, to reflect the higher price of seasonal flavours. For that reason he asked the Black Eye Project to add pictures of lemons, like Thatchers, because he thought what Thatchers were doing with lemons to communicate exactly what the Thatchers Product was excellent, and, subjectively, better than the Brothers Cloudy Lemon Cider, for example. Accordingly, the instruction came from Mr Watkins’ team to the Black Eye Project that they wanted to see “*a hybrid of Thatchers and Taurus*”, “*i.e. be a bit more playful, add lemons as per Thatchers*”. In my judgment, that is using the Thatchers Product as a benchmark for the packaging.

51. A number of design options came back, one using cut lemons, others using whole lemons. Mr Watkins accepted that he chose the option which was more similar to the Thatchers Product, with whole lemons. He said that his team member preferred it, and he happily embraced her view as he thought that whole lemons looked more like lemons when in whole form, rather than when depicted as sliced. Mr Watkins was asked by Mr Howe: “*Are you saying you were not influenced by the fact it would make it more similar to the Thatchers Product when your product landed on the shelves?*” to which Mr Watkins replied “*...it is absolutely right that they have whole lemons and therefore it is acceptable to infer that we would have preferred that based on that fact, but it was not the overriding factor in the decision. It would have been what do we think is right for our design at the time.*” In my judgment, that admission that one of the reasons he preferred the whole lemons was because that is what was on the Thatchers Product, is again evidence that Aldi was using the Thatchers Product as a benchmark for packaging.
52. Mr Watkins was asked about other changes that were made to get to the final design, in cross-examination. He conceded that the background of the can was made a lighter cream which brought the

colour closer to that of the Thatchers Product, but said that was done to increase the visual presence of the lemons. He said that he moved away from outlined, yellow lettering suggested by the external designers to a plain black font on “Cloudy” and “Cider” and yellow on “Lemon”. I have already noted that yellow is rather lost against the background, and can see that if the background colour had not been made a lighter cream it and the lemons would have been even less prominent. He said that he re-ordered the words “Cloudy” “Cider” and “Lemon”, because without those changes, that *“looked far more like Thatchers than we would ever want it to, which is exactly why at that point we instructed a change to move it away from the Thatchers Product”*.

53. Mr Watkins was asked his opinion on similarity of other elements on the Sign and the Trade Mark, including the arrangement of fruit, the leaves etc, and also about concerns expressed by Aston Manor about the similarity of Aldi’s final design to the Thatcher Product, but of course similarity is a matter for the Court. Despite those concerns, Aldi signed off the design, saying in an email that it had been *“put through our legal team”* and approved. In relation to the final version of the can which became the Sign, Mr Howe put it to Mr Watkins that the reason that Aldi made the Aldi Product *“so similar”* to the Thatcher Product was so that it would call to mind the Thatchers Product and that would make it easier to sell to customers, because they would get something they would think equivalent to what they are already used to. Mr Watkins denied it. He said *“It is still clearly evident that the first thing you see is Taurus and the bull and the positioning of the swoosh. All still remain exactly as per design stage 1. It has had a number of iterations and changes, but it is still fundamentally an Aldi Taurus product. The first thing anybody will see is “TAURUS” and that was the intention”*. I will return to this in due course.

Use of the Sign

54. Mr Watkins' evidence is that the Aldi Product was never sold singly, as individual cans (and it is the individual can which is the Sign complained of), but only in 4-can packs within a cardboard sleeve. These 4-can packs were provided to Aldi Stores in shelf-ready packaging ("SRP"). These are shallow cardboard trays in which six units of the 4-can packs are placed, in a single layer. This can be seen in a photograph of the Aldi Product on the shop floor contained in the bundle and reproduced at figure 1 of the Annex to this judgment.
55. Mr Watkins says, and I accept, that the stores are supposed to simply place the SRP trays onto the shelf, and not decant them, although sometimes they do, as I saw in the photograph taken on the morning of trial.

Sales achieved by the Aldi Product

56. Mr Watkins has disclosed sales figures for various products within the Taurus range in 2021, 2022 and 2023 (year to date up to trial). That shows that Taurus Original cider as the biggest seller, with 3-years sales of 4-packs of cans at £19.5m and a further £15m in 2-litre bottles. Of the other 8 ciders in the range, Taurus Pear and Taurus Dark Fruit remained on sale for the whole of the period, and achieved 3-year sales in 4-packs of cans of £11.5m and £14.4m respectively. Taurus Cloudy Cider sold £1.3m in 2021 but was then discontinued so made minimal sales in 2022 and none in 2023.
57. Four ciders launched in 2022, including the Aldi Product with which I am concerned. That achieved £1.66m in sales in its first year of launch but only £0.6m of sales in 2023. Mr Watkins says, and I accept, that is because it was a seasonal variant, produced in limited quantities with the aim for it to sell-out within a period of months,

and it did sell out within 10 months of launch. The next most popular on launch in 2022 was Taurus Cherry, another seasonal variant intended to be a sell-out, with £0.8m of sales in 4-packs of cans in 2022 and £1m in 2023. No issue was taken with the figures provided, and I accept them.

58. No evidence has been put forward by Aldi in relation to any marketing spend or marketing efforts that have been carried out in promoting the Aldi Product. Mr Milton in his second witness statement describes the sales figures achieved by the Aldi Product of over £2.4m in 2 years (in fact, as Mr Watkins clarified, that was over £2.4m in 10 months) as *“astonishing considering Aldi appear to have made no investment in consumer marketing for this product”*. He says that it is unlikely that Aldi would have achieved those figures *“without Thatchers’ significant brand and marketing spend which drove consumer awareness of Cloudy Lemon. Apart from Aldi benefitting from Thatchers’ investment and effort promoting [the Thatchers Product], I also consider that Aldi’s Product, marketed at a lower price to [the Thatchers Product], has had a negative impact and diluted the premium price and brand image of [the Thatchers Product] in the minds of consumers”*. This appears to be the basis on which Thatchers runs its arguments on damage in relation to section 10(3) infringement.

59. In fact, looking at the sales figures for the Aldi Product in the context of the overall 3-year sales figures for the Taurus family of ciders as a whole as set out in tabular form in Mr Watkins’ first witness statement, I do not find them astonishing. Taurus was an established brand and in 2022, when the Aldi Product was launched, the sales achieved by the three regular flavours (Taurus Original, Pear and Dark Fruit) were over £16m in 4-can packs and a further £5m of Original in 2 litre bottles.

60. The Aldi Product sales over its short life in 2022-2023 at £1.6m in the 2022 sales seems to be (a) in proportion with the £1.4m sales of Taurus Cloudy Cider in 2021 with a run-off in 2022, when it was discontinued; (b) about the same level of sales over the same period of Taurus Rose, which was also discontinued in 2023, although that had also sold very well in 2021, and (c) although higher than another seasonal variant launched in 2022 and sold in 2022-23, Taurus Cherry, at £1.83m in total, I cannot see that this is disproportionately higher, given the popularity of lemon-flavoured drinks over cherry-flavoured drinks and in the context of the figures as a whole.

LAW

Trade Marks

61. Section 10 TMA provides so far as is relevant to this case:

(1) ..

(2) A person infringes a registered trade mark if he uses in the course of trade a sign where because –

a. The sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or

b. The sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) A person infringes a registered trade mark if he uses in the course of trade, in relation to goods or services, a sign which –

a. Is identical with or similar to the trade mark,

b.

where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes advantage of or is detrimental to the distinctive character or the repute of the trade mark.

(3A) Subsection (3) applies irrespective of whether the goods and services in relation to which the sign is used are identical with, similar to or not similar to those for which the trade mark is registered.

...

62. The parties agree that Brexit has not made any difference to the legal position in this case, as section 10 TMA has not been amended since Brexit took legal effect. Accordingly both pre- and post-Brexit legal authorities are relevant.

Section 10(2)(b) TMA infringement

63. The six requirements for infringement under section 10(2)(b) were stated by Arnold J (as he then was) in *Sky v SkyKick* [2018] EWHC 155 (Ch) at [285] (from *Comic Enterprises v Twentieth Century Fox Film Corp* [2016] EWCA Civ 41): (a) there must be use of a sign by a third party within the UK; (b) the use must be in the course of trade; (c) it must be without the consent of the proprietor of the trade mark; (d) it must be of a sign which is at least similar to the trade mark; (e) it must be in relation to goods or services which are at least similar to those for which the trade mark is registered; and (f) it must give rise to a likelihood of confusion on the part of the public. My finding that the sign complained of by Thatchers is the whole appearance of a single can of Aldi Product means there is no remaining dispute in relation to (a). There is no dispute that (b), (c) and (e) are satisfied. The areas of dispute for my determination are therefore whether the Sign is at least similar to the Trade Mark,

and whether use of the Sign gives rise to a likelihood of confusion on the part of the public.

64. In relation to likelihood of confusion, Kitchin LJ (as he then was) said at [87] of *Comic Enterprises* that “*in assessing the likelihood of confusion arising from the use of a sign the court must consider the matter from the perspective of the average consumer of the goods or services in question and must take into account all the circumstances of that use that are likely to operate in that average consumer’s mind in considering the sign and the impression it is likely to make on him. The sign is not to be considered stripped of its context*”.
65. “*Confusion*” for the purposes of section 10(2)(b) infringement, can arise in different ways. These include concepts usually referred to as ‘direct confusion’, ‘indirect confusion’ and ‘wrong way round confusion’ which were described by Arnold LJ recently in *Liverpool Gin Distillery Ltd v Sazerac Brands LLC* [2021] ETMR 57 as follows at [10] to [14]:

[10] It is well established that there are two main kinds of confusion which trade mark law aims to protect a trade mark proprietor against... The first, often described as “direct confusion”, is where consumers mistake the sign complained of for the trade mark. The second, often described as “indirect confusion”, is where the consumers do not mistake the sign for the trade mark, but believe that goods or services denoted by the sign come from the same undertaking as goods or services denoted by the trade mark or from an undertaking which is economically linked to the undertaking responsible for goods or services denoted by the trade mark.

...

[14] “Likelihood of confusion” usually refers to the situations described in paragraph 10 above. As this Court held in *Comic Enterprises*, however, it also embraces situations where consumers believe that goods or services denoted by

the trade mark come from the same undertaking as goods or services denoted by the sign or an economically linked undertaking (sometimes referred to as “wrong way round confusion”).

66. Kitchin LJ’s summary of key principles to be applied when assessing the likelihood of confusion at [52] of *Specsavers International Healthcare Ltd v Asda Stores Ltd* [2012] F.S.R. 19 are as follows:

- a) the likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- b) this must be judged through the eyes of the average consumer of the goods 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, in certain circumstances, be dominated by one or more of its components;
- f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and
- 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.

Section 10(3) infringement

67. In relation to the section 10(3) infringement claim, my finding on the question of similarity between the Trade Mark and the Sign will be important. The disputes which will remain for my determination if I am satisfied of similarity are:

- i) whether the Trade Mark has a reputation in the UK;
- ii) whether Aldi's use of the sign has taken advantage of, or is detrimental to, the distinctive character or repute of the Trade Mark.

68. Reputation must be assessed at the date on which the alleged infringer first started to trade under the sign complained of (per *Burgerista Operations GmbH v Burgista Bros Ltd* [2018] E.T.M.R.

16 at [54] – [59]) which it is not disputed is the date Aldi first offered the Aldi Product for sale: 19 May 2022.

69. If the Court is satisfied of section 10(2)(b) or section 10(3) TMA infringement, Aldi relies on a defence under section 11(2)(b) TMA. This provides:

(2) A registered trade mark is not infringed by –

a) ...

b) The use of signs or indications which are not distinctive or which concern the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,...

provided the use is in accordance with honest practices in industrial or commercial matters.

Passing off

70. The principles of passing off are well known. The elements necessary to reach a finding of passing off are the ‘classical trinity’ of that tort as described by Lord Oliver in the *Jif Lemon* case (*Reckitt & Colman Product v Borden* [1990] 1 WLR 491 HL, [1990] RPC 341, HL) namely goodwill or reputation; misrepresentation leading to deception or a likelihood of deception; and damage resulting from the misrepresentation.

71. The parties agree that if the claims in section 10(2)(b) and/or section 10(3) trade mark infringement are not made out, that is likely also to be an answer to the claim in passing-off.

ISSUES

I find it convenient to consider the issues relating to trade mark infringement out of the order in which they appear on the List of Issues. I will consider Issues 2 and 3 relating to section 10(2)(b) infringement first,

before going on to consider Issues 1 and 4 in relation to section 10(3) infringement.

Issue 2 - Is the overall appearance of the Aldi Product, as defined in paragraph 14 of the Particulars of Claim (“the Sign”) similar to the Trade Mark?

Average consumer

72. There is no dispute in this case as to who is the average consumer. That is a retail purchaser of alcoholic beverages, including cider.

73. In closing, Mr Howe sought to submit that I could take into account the view expressed in correspondence by Aldi’s third party manufacturer of the Aldi Product, Aston Manor, that the appearance of the packaging of the Aldi Product was “*incredibly close*” to that of the Thatchers Product as representing how consumers would view it. I decline to do so for two reasons. Firstly, because Aston Manor is not the average consumer, it is a manufacturer and packager of alcoholic drinks, including the Aldi Product. Secondly, because as I remarked to Mr Howe, Aston Manor had information which the average consumer would not have had. It knew at the time that Aldi was finalising the design of the Aldi Product that Thatchers had objected to the packaging of a cloudy lemon cider product of another supermarket. The average consumer would not.

Scope of assessment

74. Thatchers submits that the similarity of the Trade Mark and the Aldi Product is self-evident, whether one compares the Trade Mark with the Aldi 4-can pack or with an individual Aldi can. As I have found, the correct comparison is between the Trade Mark and the Sign, which is the overall appearance of an individual can of the Aldi Product. Mr Howe invited the Court to compare the physical

Thatchers Product which bears the Trade Mark with the Aldi Product, saying that will demonstrate conclusively the similarity of the Trade Mark and the Aldi Product. In my view, this is impermissible. Thatchers has chosen to plead its case such that I must compare a two-dimensional mark, being the Trade Mark (which is not the Thatchers Product) with a three-dimensional product, being the Sign (which is a single can of the Aldi Product). That is of itself a point of difference between the two.

75. Thatchers submits that it was Aldi's intention to produce a Sign which was similar to the Trade Mark and so it is not surprising that is what it has achieved. It sets out a number of matters which it says are "tell-tale points" of copying, including faint horizontal background lines in the Trade Mark, which are similar to those on the Sign, but this is not a copyright or a design case. It is a Trade Mark infringement action. I am satisfied that those lines are so faint that they would not be recalled as being present on the Trade Mark by the average consumer, who would also likely fail to perceive them on the Sign when picking the Aldi Product up off the shelf. Both witnesses conceded that, I believe, in oral evidence, and that is also my assessment. Mr Watkins, who was himself responsible for development to the Aldi Product, said that he had not noticed those faint lines on the Aldi Product until he read Mr Milton's second witness statement pointing them out, and I accept his evidence. In my judgment they are not a relevant point of similarity for this exercise because they are negligible.

Further submissions on similarity

76. Thatchers accepts that the "THATCHERS" brand is a dominant component of the Trade Mark. However, it submits:
- i) that although it has accepted in its pleadings that Aldi's brand name "TAURUS", considered as a word in isolation, is different

- from “THATCHERS”, they are visually similar as they begin and end with the same letters, and they form only one element of a composite Trade Mark and Sign (in fact the “TAURUS” brand and bulls head device appear twice on the Sign, once on the front and once on the back of the can);
- ii) the positioning of the lemons on the Sign is in the same configuration as the Trade Mark, save that the Sign has an extra lemon at the bottom right, both front and back;
 - iii) although Thatchers do not assert a monopoly on the words “Cloudy Cider Lemon”, the way the words are used and arranged within the Sign is similar to that of the Trade Mark;
 - iv) the entirety of the text of the Sign is arranged in a similar configuration to the entirety of the text on the Trade Mark, with:
 - a) the brand at the top on both,
 - b) then the words “Cloudy Lemon Cider” one above the other on the Trade Mark and “Cloudy Cider Lemon” one above the other on the front and back of the Sign,
 - c) then the tag-line “Zingy & Refreshing” followed by “Made with Real Lemons” on the Trade Mark echoed by “Made with” followed by “Premium Fruit” on the front and back of the Sign;
 - v) the colour scheme of both the Trade Mark and the Sign are highly similar, with the only colours being yellow, cream, black and green on both;
 - vi) although Thatchers does not assert a monopoly in putting pictures of lemons on lemon-flavoured cider, there are many ways that one can depict lemons without coming up with the

degree of closeness that Aldi has done, in choosing to use whole lemons rather than cut lemons, in using lemons with green leaves rather than the fruit alone, and in the way they have chosen to dispose of them within the overall arrangement of the Sign, which is similar to that of the Trade Mark.

77. Aldi submits that the only similarities actually particularised by Thatchers in the particulars of claim are the points made about the “THATCHERS” and “TAURUS” brand names, the positioning of those centrally, and the fact that the brand names are both in black font. It submits that the only elements which are arguably similar are the words “Cloudy” “Lemon” and “Cider”, the graphic designs of lemons and leaves which are, it submits, treated quite differently in the Trade Mark and the Signs, and the colours green and yellow being the colours of lemons and leaves. It submits these are either descriptive or decorative and lacking in inherent distinctiveness.

Determination

78. I am satisfied that the dominant elements of the Trade Mark are the central element made up of the “THATCHERS” brand with “CLOUDY LEMON CIDER” in large and decorative font underneath. Less dominant but also important are the whole yellow lemons with quite large green leaves disposed around the top and left edge; and the creamy-yellow colourway of the background.
79. The arc or roundel in the Trade Mark made up of the words “Family Cider Makers” at the top of the text and “Zingy and Refreshing” below are not negligible, in my view, but I doubt that the average consumer would bring the words to mind in his imperfect recollection. He might remember that there was something of the roundel about the Trade Mark, rather than exactly how that visual impression was created. Mr Milton’s evidence was that this arc and particularly the words “Family Cider Makers” were recognised by

consumers, but he accepted that was probably only when the Trade Mark was in front of them, and that if they were looking at the Thatchers Product on the shelf they would likely be unable to read it unless they already knew it was there. I think that is right.

80. In my view the “Made With Real Lemons” wording is negligible for the purposes of this comparison. It may well be important for labelling purposes and to indicate quality to someone standing with a can in his hand, deciding whether to purchase. However I am satisfied that it would not be called to mind by the average consumer, being lost in the imperfect recollection that he has of the Trade Mark. Accordingly the overall impression of the Trade Mark carried in the mind of the average consumer is, in my judgment, dominated by “THATCHERS CLOUDY LEMON CIDER” within something of a roundel, with the lemons, leaves and background colour playing important parts.

81. In my assessment the dominant elements of the Sign are the central element on the front and back of the can, which is made up of the bulls head device with the brand “TAURUS” beneath. Also important but not dominant are the yellow, green and gold ‘swoosh’ emanating from the bulls head device in a curved arc both upwards and downwards, also on the front and back of the can; the whole yellow lemons disposed around the top, bottom and left edge front and back; and the creamy yellow background. I do not find the green leaves to be as important in the Sign as the Trade Mark, in part because they are smaller and detached from the lemons and in part because there is additional green on the Sign relating to the swoosh, which to my mind makes the leaves of less importance visually, but they are not negligible. Nor are the words “Cloudy Cider Lemon” as dominant in the Sign as the equivalent words are in the Trade Mark, because they are in a smaller font which is not decorative, so look merely functional and descriptive. They are also not as

centrally placed, being on the lower portion of the Sign. In addition, the word “Lemon” is somewhat lost visually in yellow font on the cream background. The words “Made with Premium Fruit” are neither distinctive nor dominant.

82. I consider that the brand names THATCHERS and TAURUS are aurally and conceptually dissimilar. Visually, the first and last letters of each being the same brings a very small element of visual similarity but it is minimal, and the presence of the very distinctive bulls head device on the Sign underlines the conceptual and aural dissimilarity of those brands and in my judgment means that overall these dominant elements are dissimilar.
83. The swooshes on the Sign are important features which are not found on the Trade Mark and are a point of visual dissimilarity.
84. The cloudy lemon cider/cloudy cider lemon wording is visually similar, conceptually identical and aurally similar as they are the same words with the same meaning, but in a different order. However both are merely descriptive of the product to which the Trade Mark is applied/ which is within the Sign (being the can) and I am satisfied that the average consumer will understand that they have a functional use and are not operating as an indication of the source of the product. In addition, what makes this wording dominant in the Trade Mark (the size and decorative nature of font, its central positioning) is not replicated on the Sign, reducing the visual similarity, in my judgement.
85. The fact that whole lemons and green leaves are used on both the Trade Mark and the Signs is a point of visual similarity and conceptual identity, but in my view they are dealt with quite differently in:

- i) the style of the lemons, which are more realistically portrayed in the Trade Mark, with crosshatching and use of colour bringing an element of realistic three-dimensionality and shine to the surface of the lemons (similar in effect to that seen on the San Pellegrino Limonata sparkling soft drink, for example) which is lacking in the Sign, which depicts them in a flat almost cartoon-ish way;
 - ii) the arrangement of lemons, as the Trade Mark has four large lemons, two at the top and two at the left hand side, whereas the Sign has 5 on each of the front and back. Although each side of the Sign has two lemons at the top and two lemons at the left hand side as does the Trade Mark, these are smaller than in the Trade Mark, point in different directions, and the largest and most dominant lemon at each of the front and back of the Sign is at the bottom right, in a position where the Trade Mark has none;
 - iii) the treatment of the leaves, which in the Trade Mark are depicted as being attached to green stems or the lemons, and in the Sign are smaller, detached, falling and less dominant visually as I have described.
86. Accordingly, I consider these differences considerably decrease the importance or weight of similarity of the fact of lemons and leaves in the overall effect produced by the Trade Mark and the Sign when considered as a whole.
87. The creamy yellow background of both the Trade Mark and the Sign, although not identical is a point of visual similarity, as is the reduced colour palette identified by Mr Howe.

88. Finally, there is no arched wording giving the effect of a roundel in the Sign as there is in the Trade Mark, which is a point of dissimilarity between them.

Conclusion on Issue 2

89. Taking all of this into account, in my judgment the overall appearance of the Aldi Product, being the Sign, is similar to the Trade Mark, but to a low degree.

Issue 3 - If the answer to (2) is yes, does such similarity give rise to a likelihood of confusion pursuant to section 10(2) of the Trade Marks Act 1994?

90. I have the *Specsavers* principles firmly in mind. I must assess the likelihood of confusion through the eyes of the average consumer taking account of all relevant factors including the context in which the Sign is perceived by him.

Enhanced Distinctiveness of the Trade Mark

91. Thatchers has not pleaded, but submits, that the considerable use that Thatchers has made of the Trade Mark as described by Mr Milton in his witness evidence, leading to sales under the Trade Mark of the Thatchers Product worth £20.7m by retail value from launch to September 2022 (only a month after the relevant date), national recognition as evidenced by its social media engagements and consumer success as evidenced by its award, means that the court can be satisfied:

- i) that substantial goodwill has accrued to the Trade Mark by the relevant date (which I will return to in my consideration of Issue 1); and
- ii) it has obtained a higher level of distinctiveness, thereby increasing the risk of confusion.

92. It submits that this is further supported by Aldi identifying it as the market leader in the cloudy lemon cider space, and the ‘benchmark’ for the Aldi Product.
93. Aldi admit that the brand name THATCHERS has a strong reputation and enhanced distinctiveness, but submits that this makes it more difficult for inherently non-distinctive elements with which it is used in the Trade Mark, to acquire distinctive character, per *British Sugar Plc v James Robertson & Sons Ltd* [1996] R.P.C. 281 at p302:

“It is precisely because a common laudatory word is naturally capable of application to the goods of any trader that one must be careful before concluding that merely its use, however substantial, has displaced its common meaning and has come to denote the mark of a particular trader. This is all the more so when the mark has been used in conjunction with what is obviously taken as a trade mark”.

94. I accept that submission as a matter of law. For example, there is no evidence before me that the words “Cloudy Lemon Cider” which are inherently descriptive (and so inherently non-distinctive) have gained any distinctive significance arising from what I have found to be significant use of the Trade Mark, such that the average consumer would understand them to be an indication that goods with those words come from Thatchers. It is not Thatchers’ case that they have. Mr Howe was clear in his oral submissions that he does not claim for Thatchers any monopoly in those words nor, indeed, in the use of lemons and leaves on lemon cider.
95. However, Aldi takes that further. It submits that none of the Trade Mark is distinctive except the “THATCHERS” brand at the centre, because all of the remaining elements are either descriptive or decorative. It does not go so far as to say that all non-distinctive components should be disregarded, because it accepts the well-

established principle that consumers normally view marks as a whole. However, it submits, dominant and distinctive elements must be taken into account when comparing a mark and a sign. I accept that submission as correct as a matter of law. To show enhanced distinctiveness, Aldi submits, Thatchers would have to show that the non-distinctive elements of the Trade Mark have gained independent distinctive character so as to engage the principle in *Medion v Thomson* [2006] E.T.M.R and developed in *White and Mackay Ltd v Origin Wine UK Ltd* [2015] EWHC 1271 (Ch), [2015] F.S.R. 33 at [18] – [21] (set out below), and it submits that Thatchers has put no evidence before the court that they have:

18. The judgment in *Bimbo* [2014] E.T.M.R 41 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, orally 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 trademark 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.

96. I do not agree with that submission. As I have set out, Thatchers do not argue that any of the individual components (other than the “THATCHERS” brand) have gained distinctive significance independently of the whole. Mr Howe made clear in closing that the enhanced distinctiveness he argues for Thatchers attaches not to the individual elements but to the Trade Mark as a whole. In my judgment, as such, it falls into the second, not the first head described at [20] of *White and Mackay*, that “*the 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, but **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*” (my emphasis).

97. In my judgment, this is not a case where the average consumer would perceive all of the Trade Mark outwith the “THATCHERS” as having distinctive significance independently of the whole, as “THATCHERS” is the central and dominant component of the Trade Mark. Rather, the average consumer would perceive that the Trade Mark has a different and enhanced meaning to the “THATCHERS” brand solus, namely that it is distinguishing the Thatchers Product as being that brand’s cloudy lemon cider product rather than any

other product in the Thatchers family of ciders to which the “THATCHERS” brand is also applied. It is distinctive of the Thatchers Product as opposed to Thatchers Gold or Thatchers Haze, whilst still operating as a mark of origin of those goods. Accordingly, in my judgment, the authorities which Aldi put before me relating to three-dimensional marks (*Société de Produits Nestlé SA v Cadbury UK Ltd* (No 2) [2017] EWCA Civ 358) and colour marks (*Glaxo Wellcome v Sandoz Ltd* [2019] R.P.C. 27), are not relevant.

98. For that reason I reject Aldi’s argument that there is no evidence that the Trade Mark applied to cloudy lemon cider would be perceived by consumers as conveying any different brand origin to a plain packaging simply with the “THATCHERS” brand on it, because the descriptive and decorative graphic elements will not be relied upon as denoting origin when it is “THATCHERS” providing that guarantee. I find this a rather strangely worded argument, - perhaps because it is deployed in respect of the issue of reputation, which I will turn to, as well as enhanced distinctiveness. There is no reason why consumers would perceive the Thatchers Product in those two different packages – one with the Trade Mark upon it and one merely with “THATCHERS” upon it, as conveying any different brand origin, because there is no different brand origin. Both products, however packaged, originate from Thatchers. The question is whether there is any enhanced distinctiveness of the Trade Mark to the “THATCHERS” brand alone, and I have dealt with that above. That argument is also not supported by the evidence, in my judgment, including that of Aldi’s witness Mr Watkins. He told us that the design of packaging was important for improving the attractiveness of a product to customers, communicating what the product was, improving shelf stand-out and enhancing sales. He made clear that he thought Thatchers had done a really good job in its design of the Trade Mark. Consumers

who took part in a focus group arranged by Thatchers with Co-op thought the packaging with the Trade Mark on it looked fresh, lemony, zest and appealing and said they couldn't wait to try it. That cannot have been because of the "THATCHERS" brand on the front, in my judgment, but because of the Trade Mark as a whole.

99. For all those reasons I am satisfied that by the relevant date on which the Aldi Product, being the Sign, was first offered for sale, the Trade Mark had enhanced distinctiveness because of the extensive nationwide use that Thatchers had made of it.

Factors relevant to context

100. What I have gleaned from the evidence is relevant context for the average consumer in this case includes:
- i) that when he is buying Aldi Product, he is in an Aldi shop or on the Aldi online shop as these are the only two sales channels in the UK;
 - ii) because at the relevant date Aldi did not sell Thatchers products, and had not done so since 2012, when the average consumer is buying cider in store or on the website he does not have the opportunity to make a direct comparison between the Trade Mark and the Sign;
 - iii) the average consumer, who is reasonably well informed and observant, would know that Aldi sells third party brands in its stores, including third party ciders;
 - iv) accordingly although he would not expect to see the Thatchers Product in Aldi (as Thatchers had not been sold in Aldi for many years) he would not be surprised to see something which he perceived as or mistook to be the Thatchers Product, as he might believe it was a new introduction;

- v) the average consumer would pay an average level of attention to the products he is purchasing, but could be expected to browse for ciders and make a decision to purchase in a matter of a few seconds. Accordingly, he would be looking for visual cues from shelf stand-out, including colour, to draw his attention and encourage him to purchase.

101. On this last point of shelf stand-out, Thatchers submits that the shelf stand-out of the Aldi Product gives a clear overall impression of similarity to the Thatchers Product bearing the Trade Mark, in particular in its use of the limited colour palette of yellows and greens and the background of creamy-yellow and that this adds to the likelihood of confusion. Aldi says that colour palette is ubiquitous to lemon-flavoured drinks and I am satisfied that it is, and so it is not surprising that both parties have used it to distinguish their lemon cider product from their other, non-lemon products. In addition, Thatchers submit that they would have had no issue with the first version of the design for the Aldi Product, in the Taurus house style, which also had a palette of yellow, white and green on a creamy-yellow background. In contrast, Ms Herrett, who addressed me for Aldi on the likelihood of confusion in closing, relies on an image of the Aldi Product on the shelves of an Aldi store which is reproduced as figure 1 in the Annex to this judgment, and another image of Taurus products on the shelf taken on the morning of the second day of trial (but not including the Aldi Product which is no longer on sale). I accept these images give an idea of what the average consumer might see when perusing the cider shelves at Aldi and the overwhelming impression is of the Taurus brand. Of course every store on every day will look slightly different. I accept her submissions that:

- i) what portion of the Sign is visible to customers through the cardboard packaging of the 4-can pack is random. It is not

always the front or back of the sign: it might be the sides or the part with the statutory labelling information. This is because Aldi's producer does not have the machine that Thatchers have, which ensures that the front of Thatchers Product is always facing outwards;

- ii) whether decanted from the SRP tray or not, on the top of the cardboard packaging of each 4-pack is centrally placed the bulls head device, the "TAURUS" brand, and the words "Cloudy" "Cider" "Lemon" on three lines below, followed by the words "made with premium fruit" below that in smaller font. Accordingly, as can be seen by the photo at figure 1 of the Annex, when a consumer is looking down at the product on the shelf below his eyeline, the "TAURUS" brand and bulls head device are prominent;
- iii) when the Aldi Products in the cardboard 4-can pack are placed on the shelf in the SRP tray without decanting, as Aldi stores are instructed to do: (a) the SRP itself obscures 40% of the 4-can packs, but not the brand "TAURUS" and the bulls head device on the Signs within, where the front or back of the can is pointing outwards; and (ii) the lip of the SRP shows the Taurus branding prominently, being the "Swoosh" in white, "TAURUS" and the bulls head device, with "Cloudy Cider Lemon" less prominently underneath.

Evidence of confusion

102. There is no direct evidence of actual confusion of a direct or indirect nature, in my judgment. In terms of social media comment, Thatchers rely on a tweet from November 2022 referring to the Aldi Product, which says *"I saw it on @AldiUK Shelf and genuinely thought it was @thatchers_cider at first. (Luckily I don't like any cider flavoured with any fruit other than apples so wasn't going to*

buy it anyway... CIDER SHOULD TASTE OF APPLES!” I accept Aldi’s submission that this appears to be only a fleeting confusion which was quickly dispelled.

103. There is evidence of discussion of the Aldi Product and the Thatchers Product on social media. Some of that post-dates the launch of proceedings by Thatchers, which received publicity and caused discussion of the likelihood of confusion in various fora. That is not relevant for the purposes of assessing the likelihood of confusion as it amounts to commentary on the proceedings. Other examples make clear there is no confusion, for example in statements that the Aldi Product is a “*knock-off*” of Thatchers Product, or in comparing the taste of both products and expressing a preference, or in the post stating he had bought the Thatchers Product when he could not find stocks of the Aldi Product.
104. There is no evidence at all to support Thatchers’ pleaded allegation that “*consumers will be led to believe that the Aldi product is a supermarket own brand product which is made and supplied by the Claimant*”, in my judgment.
105. The fact that there is no real evidence of direct or indirect confusion, despite the very high volumes of sales of both the Aldi Product and the Thatchers Product, is a factor weighing against the likelihood of confusion, although not determinative of it.

Determination

106. I have found that there is a low similarity of the Trade Mark and Sign. Although I have found that the Trade Mark has gained some enhanced distinctiveness through use, I am satisfied that the principal dominating features of both marks are the “THATCHERS” brand on the Trade Mark and the “TAURUS” brand and bulls head device on the Sign which are dissimilar. Of those

elements of the marks where I have found some similarity, in relation to the colour palette I am satisfied that the use of the colour yellow on both cider products and lemon products is ubiquitous, and the use of lemons and lemon leaves on lemon-flavoured beverages including lemon ciders is very common.

107. The evidence of confusion is lacking.
108. Mr Howe submits that the fact that Aldi's specific instruction to Black Eye after receiving the first iteration of the design, which he says plainly followed the Taurus house style and in relation to which Thatchers has no complaint, was to add lemons so that it was "*a hybrid of Thatchers and Taurus*", shows that Aldi intended to copy the Thatchers Product. Its later instructions and decisions about which options to take forward, he submits, meant that the design of the Aldi Product moved closer and closer to the Trade Mark as Aldi tried "*to sail as close to the wind as they could*", until it got too close for the comfort of Aldi's legal department, he infers, so that Mr Watkins made changes (to the wording and font of "Cloudy Lemon Cider" for example) to move it further away again. That may be exactly what happened during the design process, but I am concerned with the final design of the Aldi Product, being the Sign, and I have found that overall it has a low degree of similarity to the Trade Mark.
109. The question of intention comes into both an assessment of likelihood of confusion for section 10(2)(b) infringement and also unfair advantage for section 10(3) infringement. As Daniel Alexander QC sitting as a judge of the High Court put the difficulty in *PlanetArt LLC v Photobox Ltd* [2020] EWHC 713 (Ch), [2020] E.T.M.R. 35 at [38]:

"The difficulty with this aspect of law is not conceptual but arises because it is hard evidentially to disentangle a defendant's

intention to copy a claimant's business from an intention to benefit from the claimant's reputation and goodwill. In one sense any rival trader who is adopting similarities in approach and presentation of a business is intending to benefit from that but a court must be astute not to confuse that with the more specific intention to benefit from the reputation and goodwill of the registered trade mark".

110. Mr Alexander QC went on to remind himself of the observations of Kitchin J as he then was, in *Specsavers* at [115], who distinguished between a defendant who takes a conscious decision to live dangerously and one who intends to cause deception and deliberately seeks to take the benefit of another trader's goodwill. What Mr Howe describes Aldi did falls squarely, in my judgment, into Kitchin J's definition of the latter: "*He has appreciated the risk of confusion and has endeavoured to adopt a sign which is a safe distance away*". Kitchin J also notes that the ultimate question about whether the similarity between trade mark and sign is such that there exists a likelihood of confusion, "*...is one for the Court to determine in light of its global assessment of all material factors, of which the intention of the defendant... is only one.*" I will come back to *PlanetArt* in my consideration of intention to deceive in respect of section 10(3) TMA infringement.
111. I give significant weight to the context in which I must assess the likelihood of confusion, particularly what would be perceived by the average user when he is faced with the Aldi Product on the shelf. He will be scanning a shelf in which the Aldi Product comprising the Sign is placed within a 4-pack cardboard sleeve which, if viewed from above, presents the brand "TAURUS" and the bulls head device. The Aldi Product may, and mostly will, be set out on an SRP tray obscuring the Sign further and presenting the "TAURUS" brand, bulls head device and Taurus swoosh. It likely will be presented with many other "TAURUS" branded products, which may be on SRP trays or decanted from them.

112. The fact that the average consumer may look at the Sign and bring to mind the Trade Mark on the Thatchers Product is not sufficient for confusion. In my judgment, on a global assessment, there is no real likelihood that the average consumer, taking into account all these circumstances which are likely to operate in his mind and the impression that the Sign is likely to make on him, will be confused. Accordingly, the claim for infringement of the Trade Mark pursuant to section 10(2) TMA will be dismissed.

Issue 1 - Does Thatchers have a reputation in the UK in the Trade Mark?

113. Thatchers submits that the level of trade evidenced by Thatchers in the Thatchers Product bearing the Trade Mark means that this point should be inarguable. It points out that the threshold is a low one which it is not onerous to surmount, as the Courts have repeatedly noted, for example as discussed by HHJ Hacon at [61]-[64] of *Burgerista* who notes that the factors relevant to reputation and enhanced distinctiveness are the same, but the threshold for reputation in the context of section 10(3) TMA (or equivalent in the Directive in that case) is lower.

114. Aldi argues that any goodwill arising from trade in the Thatchers Product attaches to the “THATCHERS” brand, which is central to the Trade Mark, and not to the Trade Mark as a whole, for broadly the same reasons which I have set out in relation to enhanced distinctiveness.

115. I am not with Aldi. Let us remember what goodwill or reputation is. It is “the attractive force which brings in custom” (*IRC v Muller & Co Margarine Limited* [1901] AC 217). I do not accept that a plain can stamped with “THATCHERS” or “THATCHERS Cloudy Lemon Cider” is likely to have accrued as much in sales as the Thatchers Product has achieved with the Trade Mark applied to it, nor that it

could have been heavily promoted and subject to such wide engagement on social media in plain packaging as it has under the Trade Mark. That is a simply unrealistic submission, in my judgment. Once again, it is also not supported by Aldi's own evidence that improving the design of its packaging would improve the attractiveness of the Aldi Product to consumers, and enhance sales. That principle – which is surely a basic principle of marketing retail goods such as these – must equally apply to the Thatchers Product, which Mr Watkins thought did a very good job of using whole lemons in its design of the Trade Mark to communicate to customers exactly what the Thatchers Product was. That is why one of his team members emailed Aldi's third party packaging designers to say, “*add lemons as per Thatchers*”. He thought the presence of lemons was attracting custom. I agree.

116. For that reason I am satisfied that Thatchers had a reputation throughout the UK in relation to the Trade Mark by 19 May 2022.

Issue 4 - Did Aldi's use of the Sign cause a link in the mind of the average consumer between the Sign and the Trade Mark?

117. Thatchers adopts the law for the assessment of section 10(3) infringement from HHJ Hacon's summary in *Urbanbubble Limited et Ors v Urban Evolution Property Management Limited et Ors* [2022] E.T.M.R. 18, at [86] to [97]. Aldi cites *W3 Ltd v Easy Group Ltd* [2018] EWHC 7 (Ch), [2018] E.M.T.R. 40 at [294]. Both of these authorities rely on, *inter alia*, *Specsavers* at [120] and [121]. What is required of me is to consider whether use of the Sign gives rise to a link between the Trade Mark and the Sign in the mind of the average consumer, appreciated globally, having regard to all of the circumstances of the case. The fact that a Sign would call the Trade Mark to the mind of the average consumer, who is reasonably well

informed and reasonably observant and circumspect, is tantamount to the existence of such a link. There is no need for confusion.

118. Thatchers rely on evidence made in consumer comments on social media about the Aldi Product (“*a Thatchers Lemon cider rip off*”, “*my kids would call this a knock off brand*”, “*very good Thatchers cider rip-off*”, “*not quite Thatchers Lemon but for half the price there’s not much to complain about*” and “*Not as good as thatchers but still decent*”) and oral comments that Mr Milton says were made to Thatchers’ staff (although he does not particularise those comments, saying merely that they referred to the similarities between Thatchers Product and Aldi’s Product), and comments on social media about the Aldi Product) to support its case that the Court can be satisfied that the average consumer would draw a link in his mind between the Sign and the Trade Mark, per Arnold J (as he then was) in *W3 Ltd v EasyGroup Ltd* [2018] EWHC 7 (Ch), [2018] E.T.M.R. 40 at [294]:

“Whether the use of the sign gives rise to a link between the sign and the trade mark in the mind of the average consumer must be appreciated globally having regard to all the circumstances of the case: see *Adidas-Salomon v Fitnessworld* at [29]-[30] and *Specsavers* (CJEU) at [120]. The fact that the sign would call the trade mark to mind for the average consumer, who is reasonably well informed and reasonably observant and circumspect, is tantamount to the existence of such a link: see Case C252/07 *Intel Corp Inc v CPM United Kingdom Ltd* [2008] ECR 1-8823 at [60] and *Specsavers* (CJEU) at [121].”

119. Aldi submits that the average consumer would not draw such a link, because of the dissimilarity of the Trade Mark and Sign (but I have found they are similar), the lack of reputation in the Trade Mark (but I have found there is a nationwide reputation and, indeed, enhanced distinctiveness) and that “THATCHERS” has no

counterpart in the Sign (but I have found that it is a link between the whole Trade Mark and the Sign which is relevant).

120. Aldi further submits that evidence of consumers comparing the Aldi Product with the Thatchers Product is not sufficient as it only demonstrates a link between cloudy lemon cider products, and not the Trade Mark and the Sign. I accept that where, for example, that person has said that he couldn't find the Aldi Product so he had to buy the Thatchers Product instead, that is not evidence of the use of the Sign calling to mind the Trade Mark, as it appears from that comment that he did not see the Sign at all. It is evidence only of an acknowledgment that both products are cloudy lemon cider products that he is willing to drink. I also accept that comments which amount to an expression of preference in relation to the taste of the two products, such as "*not quite Thatchers Lemon but for half the price there's not much to complain about*" and "*not as good as thatchers but still decent*", are not evidence that the Sign itself, rather than the fact that he is assessing the taste of the Aldi Product which is a cloudy lemon cider, has caused a link in that consumer's mind with the Trade Mark.
121. However I am satisfied that there is some evidence, in comments about the Aldi Product being a "*rip off*" or "*knock off*" of the Thatchers Product, to support Thatchers' case. Those consumers would not make those comments if they merely thought that both were cloudy lemon ciders (of which there are others in the market). They appear to have seen the Sign, which is a can of the Aldi Product, and that has brought the Thatchers Product, which bears the Trade Mark, to mind.
122. Taking all the relevant circumstances into account, and standing in the shoes of the average consumer, who has the qualities that I have already set out and who holds his imperfect recollection of the Trade

Mark in his mind, I am satisfied on the balance of probabilities that seeing the Sign would call to mind the Trade Mark.

Issue 5 - Does Aldi's use of the Sign without due cause, take unfair advantage of, and/or is detrimental to the distinctive character and/or repute of, the Trade Mark pursuant to s.10(3) of the Trade Marks Act 1994?

123. Smith J reviewed the authorities and summarised the relevant principles in *Lidl Great Britain Ltd v Tesco Stores Ltd* [2023] EWHC 873 (Ch), [2023] E.T.M.R 30 at [73(15) – [73(27)]. I will not repeat her work here. I note that in respect of detriment I am concerned with the weakening of the Trade Mark's ability to identify the goods (in this case) for which it is registered, by use of the Sign (from *Intel* at [29]), and that detriment will be established where there is evidence of a change in the economic behaviour of the average consumer of the goods, or a serious likelihood that such change will occur in the future (per *Argos v Argos Systems Inc* [2018] EWCA Civ 2211).
124. With unfair advantage, I am concerned with whether Aldi has attempted, through use of the Sign which I have found to be similar to the Trade Mark (and which I have found has a reputation) to take advantage of, or ride on the coat tails of the Trade Mark in order to exploit it and gain a benefit from that reputation and the marketing efforts which have been made by Thatchers to promote it. (*L'Oréal SA v Bellure NV* (C-487/07) EU:C:2009:378, [2010] R.P.C. 1 at [41]).
125. In terms of an intention to take advantage of the trade mark's reputation and goodwill, this is neither required nor determinative, per Arnold J (as he then was) who reviewed the authorities relating to intentionality in *Jack Wills Ltd v House of Fraser Stores Ltd* [2014] F.S.R. 39 at [75] to [80]. Where there is no intention, it is sufficient if the objective effect of the use complained of is to enable the defendant

to benefit from the reputation and goodwill of the trade mark (see also *Sky v SkyKick* at [315]).

126. Unfair advantage requires a global assessment, taking into account all factors relevant in the circumstances of the case, including the strength of the Trade Mark's reputation, the degree of distinctive character of the mark, the degree of similarity between the marks at issue and the nature and degree of proximity of the goods or services concerned. It may also take account, where necessary, of "*the fact that there is a likelihood of dilution or tarnishment of the mark*" (*L'Oréal* at [44] and [45]).

Unfair Advantage

127. Thatchers submits that although it makes no complaint about Aldi's process of benchmarking a new product to a market leader *per se*, being standard practice for retailers to benchmark their products to the market leaders, choosing successful flavours and range as the successful brands, the branding should then have been matched to Aldi's own house style. The problem here, it submits, is that Aldi have significantly departed from the standard benchmarking process by not matching their own house style and deliberately choosing branding highly similar to the Trade Mark.
128. There are a number of things to be said in relation to this basic proposition, which Thatchers further elaborates in dealing with the issue of intention to deceive. The first is that this is not supported by the evidence. Thatchers' own evidence is that the well-understood and acceptable process of benchmarking looks at the benchmark in relation to all aspects, not just flavour and quality. Mr Milton was clear that benchmarking involves looking at "*product development, design, looking at every aspect of the marketing mix...*" including what the benchmark looked like, and that he would expect there to be some visual resemblance between the product which resulted and the

benchmark. The second is that I am not satisfied that Aldi has significantly departed from its house style. It has added lemons and lemon leaves to the Aldi Product to communicate the lemon-nature of the contents, but the bulls head device, the “TAURUS” branding, and the swoosh all remain intact in accordance with the established house style for the Taurus family of ciders.

129. I also remind myself that Mr Watkins said that Aldi added lemons to the Sign in part because Thatchers had, but mainly because lemons and lemon leaves (and particularly whole lemons, in his view) were very effective to communicate the fact to consumers that this was a lemon cider product. That second point is exactly the same reason given by Mr Milton to explain why Thatchers added lemons and lemon leaves to the design of the Trade Mark, to communicate to consumers that the Thatchers Product was a lemon cider, and not an apple-based cider like the rest of the Thatchers range. The Thatchers Product was produced following a market review in which Brothers’ Cloudy Lemon Cider, with its prominent lemon on the packaging, was one of the third party products considered. The fact that the Trade Mark alone communicated a zesty, fresh, lemoniness to Thatchers’ consumer focus group during the development of the Thatchers Product, was considered to be a success. No doubt the desire to communicate that a product is lemon-flavoured is also the reason why the producers of numerous other lemon-flavoured beverages, including lemon ciders, have added images of lemons, with and without their leaves, to the packaging of their products.
130. I considered in the context of likelihood of confusion Thatchers’ submission that the documentary evidence relating to Aldi’s design process, and Mr Watkins’ evidence of the changes that he required to be made from the first iteration of the design of the can of Aldi’s Product, should lead me to find Aldi had an intention, in designing the Sign, to benefit from Thatchers’ reputation and goodwill in the

Trade Mark. I have already found that in my judgment Aldi, through Mr Watkins, has endeavoured to adopt a sign which is a safe distance away. Returning to Mr Alexander KC's consideration of this problem in PlanetArt, he said at [80]:

“However, just as with trade mark infringement, some caution is needed in evaluating a defendant's intention. There is a fundamental difference between a defendant's intention to copy a claimant's business and a defendant's intention to represent falsely that it is or is connected with the claimant. While it may not always be easy to decide precisely what intention a defendant has, since that is rarely admitted by key witnesses and is usually concealed, it is important to make that distinction...”.

131. I note the warnings that Mr Alexander went on to make in that paragraph about the reliability of witness evidence in assessing a defendant's intention. However, in this case, in my judgment, Mr Watkins' evidence that his intention was that the Aldi Product should be clearly understood as a “TAURUS” branded cider is supported by the extensive use of the “TAURUS” brand, the bulls head device and the swoosh on the front and back of Sign as well as on those things which provide the context against which the Sign was intended to be seen by consumers, namely the cardboard packing of the 4-can pack and the SRP tray. It is also supported by the low degree of similarity of the Sign to the Trade Mark that I have found. On balance, I am satisfied that Aldi did not develop the Aldi Product, being the Sign, with an intention to take advantage of the goodwill and reputation in the Trade Mark.
132. Notwithstanding that finding, is the objective effect of the use of the Sign such to enable Aldi to benefit from the reputation and goodwill of the Trade Mark?
133. Mr Howe submits for Thatchers that I can be satisfied that the Sign caused a change in economic behaviour of customers, because the packaging of the Aldi Product was specifically designed to attract

more customers, and was changed from the first iteration of the design, being the house style, to do so. As I pointed out in closing, surely all design decisions in relation to the look of packaging, where not legally mandated, are intended to make the products more attractive to consumers and encourage sales. The question is whether the similarities that I have found that between the Sign and the Trade Mark have caused consumers to change their economic behaviour (a likelihood of change not being relevant in this case where the Aldi Product is no longer on the market). Thatchers have not satisfied me that is the case. I have stated that the evidence of the sales achieved by Aldi for the Aldi Product which is the Sign do not look disproportionate in relation to sales of other ciders in the Taurus Family. Mr Milton's evidence that they are astonishing and can only result from unfair advantage resulting from Thatchers' investment in the promotion and marketing of the Trade Mark amount to little more than supposition, in my judgment.

134. Taking the global view, therefore, although I have found that Trade Mark has reputation gained in the course of trade, and that the Trade Mark as a whole has an enhanced level of distinctiveness because of the level of that trade and the promotion and marketing of it by Thatchers, I have also found that it has a low level of similarity with the Sign, and those elements which I have found are similar are either not distinctive because they are descriptive (the text), or are ubiquitous (the limited colour palette) or are commonplace (the use of lemons and lemons on lemon-flavoured beverages). I am not satisfied of an intention to exploit the reputation and goodwill of the Trade Mark or that the use of the Sign has objectively had the effect of doing so. I have in mind my views on tarnishment which I will now go on to set out. In these circumstances, the claim in unfair advantage fails.

Detriment

135. Thatchers puts its case in detriment in two ways. The first relates to what it submits is the difference in taste between the Aldi Product and the Thatchers Product arising from their different composition. The second relates to what it submits is deceptive wording on the Aldi Product that it is made with premium fruit. I will take those in order.
136. I have conducted my own blind taste test as I was requested to do. I am no expert and have never tasted cloudy lemon cider before. I found the taste of the two products to be very similar, but I accept they are different.
137. Thatchers submits that it can be inferred from that difference, that some who buy the Aldi Product will like it and some will not. I accept that.
138. Thatchers submits that for those consumers who buy the Aldi Product and do not like it, given the link between the Sign and the Trade Mark which I have found, those consumers will perceive that the product sold under the Trade Mark will be affected, because it will be assumed to be the same as the Aldi Product when it is not.
139. Ms Wickenden for Aldi submits that a mere difference in taste between the Aldi Product and the Thatchers product is insufficient to establish a case of detriment to repute, and cites the summary of Kitchin LJ in *Comic Enterprises* at [119] discussing damage to reputation in the context of the CJEU case of *L'Oréal*. She submits that the CJEU's reference to a likelihood of detriment arising from the fact "*that the goods... offered by the third party possess a characteristic or quality which is liable to have a negative impact on the image of the mark*" is not made out.
140. I am with Aldi. I am not convinced by the argument that those consumers, who I have found are not confused between the Trade Mark and the Sign but have formed a link between the two, so they

know that they are drinking the Aldi Product, if they do not like the taste of it, will consider that makes the Thatchers Product sold under the Trade Mark a less attractive proposition. This is not a case, in my judgment, where the products are so significantly different that the taste of the Aldi Product is liable to cast the Thatchers Product sold under the Trade Mark in a negative light.

141. Thatchers further submits there is detriment to repute arising from the fact that although the Sign states that the Aldi Product is “Made from Premium Fruit”, it has no real lemon in it (although it does have real apples) and so this is deceptive to consumers. I spent some time with Mr Howe trying to understand how Thatchers put their case on this point. He submits that consumers who buy the Aldi Product knowing it is the Aldi Product, who rely on the statement that it is made from premium fruit as meaning that it is made with real lemons, but who later discover by reading the labelling on the back that it does not contain lemon juice but only ascorbic acid and lemon flavourings, may because of the link in their mind between the Sign and the Trade Mark, distrust the honesty of the claim on the Trade Mark that the Thatchers Product is made with real lemons.
142. I am not with Thatchers. It seems to me that if that situation should arise, the consumer may distrust Aldi, and learn a lesson about ambiguous tag-line wording and the need to check the label, but there is no reason to suppose that it will distrust Thatchers, when the wording on the Trade Mark is not ambiguous, and is supported by the information on the label on the back of the Thatchers Product.
143. For those reasons, the claim for section 10(3) TMA infringement fails.

Issue 6 - Does Aldi have a defence under s.11(2)(b) of the Trade Marks Act 1994?

144. This issue has fallen away given my determinations on s.10(2)(b) and s.10(3) TMA infringement.

Passing off

Issue 7 - Is Thatchers the owner of goodwill in the business of the sale of the Thatchers Product associated with the Trade Mark?

145. For the reasons that I have given in relation to reputation, I am satisfied that it does.

Issue 8 - Has Aldi passed off by making misrepresentations leading the public, or likely to lead the public, to believe that the Aldi Product is that of, licensed, or approved by, or otherwise connected in trade with Thatchers?

146. There is no evidence before me that any consumers believe that the Aldi Product is that of Thatchers, for example that is manufactured, or licensed, or approved by Thatchers. For the reasons that I have given when finding that there is no likelihood of confusion, I am satisfied that there is no misrepresentation that Aldi is connected in trade with Thatchers. Accordingly, the claim in passing off fails.

SUMMARY

147. I have found:

- i) Thatchers has a reputation in the UK in the Trade Mark;
- ii) The Sign has a low degree of similarity to the Trade Mark;
- iii) There is no likelihood of confusion;
- iv) Aldi's use of the Sign has caused a link in the mind of the average consumer between the Sign and the Trade Mark;

- v) Aldi's use of the Sign does not take unfair advantage of and is not detrimental to the repute of the Trade Mark;

148. Accordingly, Aldi has not infringed the Trade Mark under section 10(2)(b) or section 10(3) TMA and is not liable in passing off. The claim will be dismissed.

Annex

Fig 1: Photograph of Taurus Product on shelf in store



Figs 2-6: Third Party Lemon-Flavoured Beverages





Fig 7: Examples of other products in the Aldi Taurus range of ciders

