

**DECISION OF THE CONTROLLER OF PATENTS, DESIGNS AND TRADE MARKS  
IN PROCEEDINGS UNDER THE TRADE MARKS ACT, 1996**

In the matter of an application for registration of Trade Mark No. 257632 and in the matter of an Opposition thereto.

**MARTEL GLOBAL WINES LIMITED**

**Applicant**

**LOCH LOMOND DISTILLERS LIMITED**


**Opponent**

**The Application**

1. On 7 July 2017 Martel Global Wines Limited, of Donovan House, Adelphi Court, The Long Walk, Dundalk, Ireland (hereinafter “the Applicant”) made application (No. 2017/01480) under Section 37 of the Trade Marks Act, 1996 (“the Act”) to register the words “NINE GLENS” as a Trade Mark in respect of “*Alcoholic beverages except beers*” in Class 33.
2. The application was accepted for registration and advertised accordingly under No. 257632 in Journal No. 2344 dated 18 October, 2017.
3. Notice of Opposition to the registration of the mark pursuant to Section 43 of the Act was filed on 17 January, 2018 by Loch Lomond Distillers Limited, of 12 Henrietta Street, London WC2E 8LH, United Kingdom (hereinafter “the Opponent”). The Applicant filed a counter-statement on 20 April, 2018 and evidence was, in due course, filed by the parties under Rules 20 and 21 of the Trade Marks Rules, 1996 (“the Rules”).
4. The Opponent did not find it necessary to file evidence in reply and both parties elected to file written submissions in lieu of attending at a Hearing. Acting for the Controller, I decided to dismiss the opposition and to allow the application to proceed to registration. The parties were notified of my decision by letter dated 15 July, 2019. I now state the grounds of my decision and the materials used in arriving thereat, in response to a request by the Opponent in that regard pursuant to Rule 27(2) of the Rules, dated 1 August, 2019.

**Grounds of the Opposition**

5. In its Notice of Opposition, the Opponent refers to its proprietorship of the following two European Union Trade Marks (EUTM’s):

Trade Mark No.	Trade Mark	Application Date	Goods
3231131	GLEN'S	18 June 2003	Alcoholic beverages, vodka, gin, white and dark rum.
3231107		18 June 2003	Alcoholic beverages, vodka, gin, white and dark rum.

6. The Opponent then raises objection to the application on the grounds that the Applicant's sign takes the Opponent's EUTM "GLEN'S" in its entirety such that, at the very least, the Applicant's sign is similar to a high degree with the Opponent's earlier trade marks. Furthermore, the goods covered by the opposed application are identical to those in relation to which the Opponent's trade marks have been used and are registered. The Opponent claims that as a consequence there exists a likely of confusion on the part of the average consumer, including a likelihood of association between the Applicant's sign and the Opponent's trade marks. Therefore, registration of the Applicant's sign would be contrary to the provisions of Section 10(2)(b) of the Act.

### **Counter-Statement**

7. In its Counter-Statement the Applicant states it is the proprietor of the EUTM NINE GLENS registered under No. 1370307 for goods in Class 33. That application was not opposed by the Opponent and has full effect in the EU, and its ownership of the EUTM entitles it to sell and market its goods within all EU Member States, including Ireland. The Applicant then goes on to refute all the claims made in the Opponent's Notice of Opposition.

### **Rule 20 Evidence**

8. Evidence submitted by the Opponent under Rule 20 consists of a Statutory Declaration and two supporting exhibits labelled "SPC1" and "SPC2" dated 18 July, 2018 of Sean Patrick Cummings, Registered Trade Mark Agent with Keltie Limited of Galway Technology Centre, Mervue Business Park, Galway. Mr Cummings repeats much of what was said in the Notice of Opposition. He presents legal argument as to how the parties respective marks and

goods are identical or highly similar and, as a result, there exists a likelihood of confusion on the part of consumers.

9. He notes that the EUTM cited by the Applicant in its Counter Statement is an EU designation of an International Registration, which itself is based upon the application that is the subject of these proceedings. Accordingly, it is manifest that the existence of this EUTM designation has no effect on the opposition at hand and that the Applicant is incorrect in its assertion that the existence of this designation provides the Applicant with an entitlement to sell and market its goods under the NINE GLENS trade mark within the EU. In any case, the EU designation post-dates the Opponent's earlier marks (attached at Exhibits "SPC1" and "SPC2") and as such the Opponent retains prior rights.

### **Rule 21 Evidence**

10. Evidence submitted by the Applicant under Rule 21 consists of a Statutory Declaration and fifty-nine supporting exhibits labelled "CMCK-TAB1" to "CMK-TAB59" dated 15 January, 2019 of Christopher McKinley, Director of the Applicant.
11. I will not systematically refer to all the material adduced by Mr McKinley as much of his evidence constitutes legal argument and some of the exhibits also relate to the legal argument. While I only mention specific elements of his evidence, I have considered fully all the materials lodged and gave appropriate weight and import to those parts that have probative value.
12. Mr McKinley states the Applicant could only find evidence that the Opponent has used the mark Glen's Vodka in Ireland in relation to vodka products and that such use is not sufficient to claim the Applicant's mark will be used on identical goods, because the Applicant intends to use its NINE GLENS mark on a variety of alcoholic products in Class 33, all of which require different and unique methods of production.
13. He disputes Mr Cummings's claim that the Applicant's mark takes the whole of the opponent's GLEN'S mark because the apostrophe in the opponent's mark denotes something in the possession of GLEN and not the plural of the geographical feature that is a glen.

14. Mr McKinley provides details of nearly 80 trade marks registered by the European Union Intellectual Property Office (EUIPO), over 390 trade marks registered by EU Member States' National Offices and over 600 trade marks registered elsewhere in the world, all of which contain the word "GLEN".
15. He says the Opponent has not provided any evidence to demonstrate it has used its GLEN'S mark in Ireland and that, accordingly, no Irish consumer has encountered any product bearing that mark in the Irish marketplace. He accepts the Opponent has furnished evidence to show use of its GLEN'S VODKA mark, but that is the only mark which consumers would associate with the Opponent's products.
16. Mr McKinley provides an in-depth analysis of the similarity between the respective marks and the likelihood of any confusion arising in the marketplace, which I need not reproduce here.

#### **Written Submissions**

17. The Opponent chose not to file evidence under Rule 22. Both parties elected to file written submissions in lieu of attending at a hearing, but neither filed written submissions in reply to the other side's submissions.
18. In his written submissions on behalf of the Opponent Mr Cummings fundamentally disagrees with the Applicant's position that the goods covered by the respective marks are not identical. He provides three EUIPO Opposition Division decisions wherein "Alcoholic beverages" was considered to be identical to all types of alcoholic drinks, except beer. Should any of the goods of the opposed application be deemed not to be identical to the goods of the Opponent's earlier marks, then they must be considered highly similar. The goods would be found in the same stores, sold through the same channels and purchased by the same consumers.
19. Unsurprisingly, Mr Cummings argued the marks, when compared from a visual and phonetic perspective are very similar. He argues the apostrophe in GLEN'S is unlikely to be noticed by the average consumer and pointed to a decision of the EUIPO Opposition Division wherein that office found there was similarity between the signs ANGEL'S ENVY and ANGELS. He also stated the Controller refused to protect Irish designations of International Registrations for RODNIK - on the basis of the earlier mark RODNIK'S; and for IBERICOS – on the basis of an earlier registration for IBERICO. However, in the case of

the latter Mr Cummings is incorrect as the IBERICOS mark was accepted and protected by this office.

20. He argued there are a number of marks in which the possessive apostrophe has been dropped to streamline the mark. This reinforces the contention that an apostrophe, or a lack thereof, is likely to go unnoticed by the average consumer of the goods concerned. By way of example he identifies DUNNES STORES, CURRYS, BOOTS, WALKERS, DEBENHAMS, CLARKS and others.
21. Conceptually, he argues, there is at least an average degree of similarity between the marks and that the inclusion of the substantially identical words GLEN'S and GLENS will result in the marks being associated with a similar meaning. In that regard he disagrees with the Applicant's arguments that the apostrophe changes the meaning of the word and how it will be perceived in the Applicant's mark.
22. Mr Cummings argues that, contrary to the Applicant's claims, the Opponent's marks possess a normal level of distinctiveness. He says that while the Opponent suggested a number of marks that contain the word "Glen" are used in respect of the food and drink industry, no evidence whatsoever was filed to support these claims, for example, by way of sales figures. However, he does argue that if it is found that GLEN / GLEN'S / GLENS is considered weak in distinctive character in respect of whisky, this does not mean it is weak in distinctive character in respect of vodka, gin and rum. And, he states, no evidence has been provided to show use of these words in respect of such goods. He argues that when all these points are considered there is a likelihood of confusion in the marketplace.
23. In his submissions on behalf of the Applicant Mr McKinley repeats much of what he said in his declaration filed under Rule 21. He emphasises that hundreds of registered trade mark across the world that contain the word "Glen".
24. Mr McKinley conducts a comprehensive comparison of the respective trade marks in terms of their visual, aural and conceptual similarities and argues that, notwithstanding there is some similarity between the marks - strictly confined to the word "Glen" - there is no likelihood of it resulting in any confusion in the marketplace.

25. He points to a number of opposition decisions of the Controller (namely, *LYNCH'S TULLAMORE BREW -v- TULLAMORE DEW*<sup>1</sup>; *TUB-ITS -v- TOPPITS*<sup>2</sup>; *HANDI-BAG -v- HANDIPAK*<sup>3</sup>; *LEXAM -v- PLEXTAM*<sup>4</sup> and *BUTLERS -v- THE BUTLER'S PANTRY*<sup>5</sup>) wherein the Controller found there was no likelihood of confusion between the respective parties' marks and argues the same outcome should result in these proceedings.
26. Mr McKinley argues the "Glen's" in the Opponent's marks must be taken to refer to the name of a person or family and not a place or geographical feature, which he argues is hugely significant.

### **Decision**

27. The relevant part of Section 10(2) of the Act, insofar as the present application is concerned, reads as follows:

*(2) A trade mark shall not be registered if because –*

*(a) .....*

*(b) it is similar to an earlier trade mark and would be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,*

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

28. As is evident from the wording of Section 10(2), the four basic requirements that must be met in order for an objection under it to succeed are that, (i) there must be "an earlier trade mark", (ii) the goods of the application must be identical with or similar to those in respect of which the earlier trade mark is protected, (iii) the mark applied for must be similar to that earlier trade mark, and, (iv) there must be a resultant likelihood of confusion on the part of the public.

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<sup>1</sup> Decision of the Controller dated 19 August 2015

<sup>2</sup> Decision of the Controller dated 29 November 2006

<sup>3</sup> Decision of the Controller dated 26 August 2015

<sup>4</sup> Decision of the Controller dated 26 February 2010

<sup>5</sup> Decision of the Controller dated 3 June 2010

29. The first of these conditions is clearly fulfilled. The Opponent's trade marks were filed at the EUIPO on 18 June 2003 and by virtue of Section 11(1)(b) of the Act, they are earlier trade marks as against the present application for the purposes of Section 10.
30. There is disagreement between the parties as regards whether the goods covered by the respective marks are identical, similar or dissimilar. The Applicant argues that its mark is to be used on nine different types of alcoholic beverage covered by Class 33 of the Nice Classification and that the Opponent has not provided any evidence that its earlier marks have been used on any alcoholic beverage other than vodka. The Applicant's argument on this point is irrelevant as a comparison between the goods must be conducted in respect of the goods for which the earlier marks are registered and the goods specified in the disputed application; not the goods for which any of the marks are used or are intended to be used. If the Applicant believed use by the Opponent of its earlier marks was confined to vodka, the Applicant could have sought to have the Opponent's EU trade marks revoked on the grounds of non-use in respect of all other types of alcoholic beverages except vodka.
31. At the relevant date the Opponent's marks were registered in respect of the "*Alcoholic beverages, vodka, gin, white and dark rum*" in Class 33 and the Applicant seeks registration for "*Alcoholic beverages except beers*" also in Class 33. It is obvious the respective goods are identical. Accordingly, the second condition has been met.

### **Comparison of the marks**

32. Turning to the third condition – similarity between the marks, I have compared the respective marks of the parties on the criteria of visual, aural and conceptual similarity and have attempted to make an overall assessment of the extent to which they should be regarded as similar or different. I stress this is an assessment of the overall impression the marks make on me, having put myself in the shoes of the average consumer of the goods for which the Applicant is seeking registration. Notwithstanding the detailed comparisons I make below I am mindful that the European Court of Justice has noted (*Sabel BV v Puma AG and Rudolf Dassler Sport Case C-251/95*)<sup>6</sup> that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. For this reason, the appreciation of the visual, aural and conceptual similarity of the marks must be based on the overall impressions given by them, rather than on specific points of detail that are likely to go unnoticed by the average consumer.

33. The disputed mark consists of two separate words - NINE and GLENS. The Opponents two earlier marks differ from each another in that one is simply the word GLEN'S and the other consists of the words GLEN'S VODKA and a figurative element that I take to be a family crest. The image of the crest is so poor I cannot make out the elements it is comprised of. It appears to contain the letters JG, two lions and some flags or pennants. It is clear to me that, from a visual and aural perspective, the Opponent's GLEN'S simpliciter mark is closer to the disputed mark than the Opponent's figurative mark. However, the disputed mark contains the word NINE which is not present in either of the Opponent's marks. Nonetheless, as all marks contain the word GLENS (albeit there is an apostrophe between the N and S in the Opponent's marks) there is clearly some degree of visual and aural similarity between the marks. Visually I find the disputed mark shares a medium level of visual similarity with the Opponent's GLEN'S word only mark and a low level of visual similarity with the Opponent's GLEN'S VODKA figurative mark.
34. I find the degree of aural similarity between the marks is along the same lines as the visual similarity. In my opinion the disputed mark shares a medium level of aural similarity with the Opponent's GLEN'S mark and a low-to-medium level of aural similarity with the Opponent's GLEN'S VODKA figurative mark. The Opponent's GLEN'S VODKA figurative mark is closer to the disputed mark than its proximity in visual terms on the basis that the figurative crest element including the visible verbal part of it (JG) does not, in my opinion, come into play when goods bearing the mark are being purchased or ordered.
35. Conceptually, the VODKA element of the Opponent's figurative mark is a direct reference to one particular kind of alcoholic drink for which the mark is registered. As such, it is descriptive and non-distinctive and can be completely disregarded for the purposes of examining conceptual similarity. I find the Opponent's figurative mark conveys a clear message that the origin of the goods bearing the mark is a family or person named GLEN. The coat of arms or family crest, and the apostrophe which signifies the possessive case, clearly point to this. I am satisfied the Opponent's word only mark GLEN'S also conveys the same message.
36. The Opponent argues the apostrophe is likely to go unnoticed and provides many examples of registered trade marks that contain names within which the apostrophe is dropped to

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<sup>6</sup> Paragraph 23 of decision dated 11 November, 1997



streamline the mark (e.g. Dunnes Stores, Boots and Clarks). This is true, but in these proceedings the Opponent's mark contains an apostrophe and I cannot ignore it.

37. The Applicant pointed to many registered trade marks that contain the word GLEN for goods in Class 33, and it is clear from the Opponent's evidence that the word is frequently used in the branding of alcoholic drinks, particularly in respect of whiskey/whisky. So, while it is distinctive as from the goods, it is in no way unique, uncommon or particularly memorable when used on alcoholic beverages and I am satisfied the relevant class of consumers would recognise that to be the case. In that regard the word GLENS simpliciter (and I emphasise it is not the mark at issue here), which refers to a number of narrow secluded valleys, particularly in Scotland or Ireland, may encounter difficulties acquiring registration on relative grounds because of the many GLEN based marks.
38. However, the Opponent's marks include an apostrophe which has the effect of changing the conceptual meaning of the word from a geographical feature to a person or family name. I say this while appreciating that a geographical feature of a glen can be used in the possessive case, for example, the glen's slopes. The inclusion of a family crest in the Opponent's figurative mark ensures this could not be the case in respect of the Opponent's figurative mark. It is possible, but in my opinion highly unlikely, that consumers could perceive the Opponent's word only mark as conveying a clear message relating to the properties of a geographical feature.
39. In my opinion the apostrophe plays a significant role in the Opponent's word only mark. The Applicant has produced a list of dozens of registered European Union Trade Marks that are protected in Ireland for goods in Class 33 that contain the word GLEN. While I cannot comment on specific proceedings before other competent authorities, in my opinion, the inclusion of the apostrophe, which signifies the possessive case, serves to put distance between the Opponent's marks and these many other registered EU trade marks that contain the word GLEN. By the same measure the apostrophe puts similar distance between the Opponent's marks and the disputed mark in these proceedings. Accordingly, I reject the Opponent's attempts to downplay its significance.
40. I find the respective marks are conceptually very different. On the one hand the Opponent's mark conveys the message of alcoholic beverages that original from a person or family

named Glen and, on the other, the Applicant's mark conveys the clear message that it relates to an area (fictitious or otherwise) that contains nine glens.

41. Having completed a global assessment, in terms of the visual, aural and conceptual similarities I find that the Applicant's mark has a very low level of overall similarity with the Opponent's two earlier marks.

### **Likelihood of confusion**

42. The case now rests on whether that similarity is sufficient to come within the meaning of Section 10(2)(b) of the Act. The criteria against which that assessment should be made have been enunciated in a number of decisions of the European Court of Justice<sup>7</sup> in this area and they include the following:

- a. A lesser degree of similarity between the goods may be offset by a greater degree of similarity between the marks, and vice versa;
- b. The more distinctive the earlier mark, the greater will be the likelihood of confusion;
- c. In determining the distinctive character of the earlier mark, it is necessary to make an overall assessment of its capacity to identify the goods for which it is registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings;
- d. In making that assessment, account should be taken of the inherent characteristics of the mark; the market share held by it; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested in its promotion; the proportion of the relevant public which, because of the mark, identifies the goods as originating from a particular undertaking; and statements from chambers of commerce and industry and other trade and professional associations;
- e. A global appreciation of the likelihood of confusion must, as regards the visual, aural and conceptual similarity of the marks in question, be based on the overall impression

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<sup>7</sup> *Sabel BV –v- Puma AG and Rudolph Dassler Sport* (Case C-251/95) [1998] 1 CMLR 445; *Canon Kabushiki Kaisha –v- Metro-Goldwyn-Mayer Inc.* (Case C-39/97) [1999] 1 CMLR 77; *Lloyd Schuhfabrik Meyer & Co. GmbH –v- Klijsen Handel BV* (Case C-342/97) [1999] 2 CMLR 1343

created by them, and the importance to be attached to each of those elements must take account of the category of goods and the way in which they are marketed;

- f. The assessment must be made from the perspective of the average consumer who is deemed to be reasonably well-informed, observant and circumspect but who rarely has the chance to make a direct comparison of the marks and must rely on the imperfect picture that he has of them in his mind; and
- g. The likelihood of confusion must be appreciated globally, taking into account all of the factors relevant to the circumstances of the case.

43. I regard the Opponent's GLEN'S and GLEN'S VODKA logo marks as having an average degree of inherent distinctiveness. Nonetheless, they have the capacity to identify the goods for which they are registered as being those of a particular undertaking and thus to distinguish those goods from those of other undertakings.

44. The Opponent did not produce any evidence to show use of its marks and therefore there are no grounds to even suggest, let alone demonstrate, they have acquired additional distinctiveness through the use made of them.

45. The word GLEN'S dominates the Opponent's marks and it possesses some level of distinctiveness. In my opinion, neither of the two elements of the disputed mark dominates the other, nor is one any more distinctiveness than the other. Individually, neither element is particularly distinctive, but viewed as a whole (which is how I must consider the mark) the concept conveyed (a geographic area containing nine glens) is what bestows upon the mark a certain level of distinctiveness and distinguishes it from the Opponent's marks.

46. The goods at issue can be purchased legally only by persons of 18 years and over, so the average consumer for the present purpose is the average Irish adult. Alcohol is a product that is consumed on a habitual basis by the majority of those who use it and a high degree of brand loyalty can be assumed; in other words, by mature people who know what they want and can be expected to exercise a reasonable level of care and attention in making a selection.

## **Likelihood of confusion**

47. In applying those criteria to the facts of the present case, and for the reasons set out above, I regard the marks as having a low level of overall similarity. However, the goods covered by the Application (*alcoholic beverages*) are identical to those of the earlier registrations, which means a lower level of similarity between the marks could be deemed sufficient to declare a likelihood of confusion exists. Bearing this important consideration in mind I am satisfied nonetheless that the actual level of similarity between the marks falls well short of what is required in order for me to conclude that such a likelihood exists.

48. I have already found that the GLENS element does not dominate the Applicant's mark. I must also consider what the CJEU has to say in *LIMONCELLO*<sup>8</sup>, where in that case, in the context of considering the likelihood of confusion, and where there was one common element between two composite marks, the Court found at paragraphs 41-42 as follows:

*“41. ...assessment of the similarity between two marks means more than taking just one component of a composite trade mark and comparing it with another mark. On the contrary, the comparison must be made by examining each of the marks in question as a whole, which does not mean that the overall impression conveyed to the relevant public by a composite trade mark may not, in certain circumstances, be dominated by one or more of its components (see order in *Matratzen Concord v OHIM, paragraph 32; Medion, paragraph 29*).*

*42. As the Advocate General pointed out in point 21 of her Opinion, it is only if all the other components of the mark are negligible that the assessment of the similarity can be carried out solely on the basis of the dominant element.”*

49. The appropriate aural test concerns how the consumer processes what they see, hear and comprehend. It is whether the consumer, who is familiar with goods marketed under the Opponent's earlier marks and, having seen or heard of goods being marketed under the Applicant's later mark, is likely to believe the later goods are associated with the proprietor of the goods with which he is familiar. In making that call the consumer will be considering either purchasing the later goods, believing them to be of the standard he has come to expect of goods bearing the earlier mark, or avoiding the goods based on a previous bad experience of the goods sold under the earlier mark.

50. In light of the foregoing factors, I am required to make an overall assessment of the likelihood of confusion that may exist between the Opponent's earlier trade marks and the

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<sup>8</sup> OHIM v Shaker Case C-334/05 P -

Applicant's mark. The confusion in question may be direct confusion, whereby the Applicant's product is mistaken for that of the Opponent, or indirect confusion, whereby the Applicant's product is associated in the mind of the consumer with that of the Opponent and a common commercial origin is inferred.

51. In my opinion, a consumer who might be struck by the medium level of visual and aural similarity would also be struck by the complete lack of conceptual similarity. Because of the clear differences between the overall impressions given by the marks I am not persuaded that the average person who knew of an alcoholic beverage called GLEN'S would be caused to be confused if s/he were to encounter an alcoholic beverage offered for sale under the NINE GLENS brand. Nor, in my opinion, would the consumer make an association between the two products that would cause them to believe the products were from the same or an economically linked undertaking. That is not to say the latter may not bring the former to mind, just as a consumer of an alcoholic beverage bearing either of the Opponent's GLEN'S marks may be reminded of other famous "Glen" marks for alcoholic beverages such are Glenlivet or Glenfiddich. However, such a calling to mind does not constitute confusion that Section 10(2)(b) seeks to prevent.

52. The Opponent argued the word NINE will be viewed as a mere indication of quantity and that, as it is common for alcoholic beverages to be brought in quantities, it would not be unusual to ask for "9 GLEN'S Vodkas", and therefore, this will result in the word NINE going unnoticed by consumers. I reject this line of argument. I am completely satisfied the word NINE as used in the disputed mark will be seen as a numeric quantity but not as a quantity of alcoholic drinks. It will be understood to be a reference to a geographic area that contains a specific number of glens and it will be remembered for such. I am also satisfied that it would be most unusual for anyone to order 9 vodka drinks. While I am aware that participants in stag or hen parties could order a round of shots (or even vodka), most consumers would only attend such social occasions on a little more than a handful of occasions, if even that, in their lifetime. There may be other occasions that would result in 9 vodkas being ordered, but it would be more than a stretch to consider them as typical purchasing scenarios. In these proceedings it is the typical, not the theoretically possible, purchasing scenario that I must consider. In my opinion, ordering 9 vodkas does not fall into the typical bracket.

53. Clearly if the disputed mark contained a reference to a smaller number (say 2 or 3 glens) then it would not be as unique or memorable in terms of its geographical reference and it would be more likely to coincide with the number of drinks that could be ordered in a typical pub purchasing scenario. I find the use of the word NINE serves to reinforce the geographical reference and puts significant distance between it and the number of drinks that would be bought in a typical public house purchasing scenario.
54. Furthermore, the Opponent's arguments fails to recognise that many of the goods at issue in the instant application are ordered in pubs without any mention of a brand name. To use just a few examples, there are hundreds of brands of wines on the Irish market and no-one expects their preferred brand to be stocked in a pub. Accordingly, wine consumers are much more likely to ask the barperson for a glass of wine by grape type or combination of grape variety (e.g. merlot, pinot grigio, cabernet sauvignon, chardonnay) and will pay little or any heed to the brand they are served. In recent years there has been a marked increase in the number of gin brands on the market, but again, someone buying gin in a bar is not likely to expect the proprietor to stock a multitude of gin brands and the gin consumer is more likely to simply ask for a generic "gin and tonic" and accept whatever is put in front of him or her without even enquiring as to what brand of gin is in the class. Vodka, brandy, port and sherry are often purchased in pubs in exactly the same manner. In addition, most "*alcoholic beverages except beers*" are sold by the glass in bars and not by the bottle. So, consumers rarely have an opportunity in a pub to view the trade mark or label, or to handle the product bearing the trade mark.
55. Therefore, in my opinion, for the purposes of these proceedings, a much more appropriate typical purchasing scenario for "*alcoholic beverage except beers*" is that of the consumer buying such products in an off-licence or supermarket. It is only in these circumstances that the consumer typically buys an actual bottle of the product bearing the trade mark. And it is during the process of such a purchase that the consumer has a real opportunity to browse, handle, examine and compare the full range on offer and to discern one brand from another or be confused by the brands on offer.
56. In these circumstances I am completely satisfied that a consumer, who knows and has experience of the Opponent's GLEN'S marks on "*alcoholic beverages except beers*" and who then encounters the Applicant's NINE GLENS mark on equivalent goods would not be likely to be confused as to the origin of the two.

57. For all the reasons stated above, I have decided that the prior registrations of the Opponent's trade marks do not constitute grounds for refusal, under Section 10(2) of the Act, of the application to register NINE GLENS. Therefore, I have decided to dismiss the opposition and to allow the NINE GLENS mark to proceed to registration.

58. Before signing off, I think it appropriate to commend the Opponent for, most uniquely, limiting its opposition to a single ground based on Section 10(2)(b) of the Act, which the Opponent recognised was, in reality, the sole basis upon which it could hope to succeed. Although unsuccessful, by restricting its grounds of opposition in the manner it did and thereby allowing all parties involved to focus on a single issue, much time and effort was spared, for which I am grateful.

Dermot Doyle

Acting for the Controller

26<sup>th</sup> September 2019