O/0003/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004070179
BY SHENZHEN EARFUN TECHNOLOGY CO LTD TO REGISTER:

OpenJump

AS A TRADE MARK IN CLASS 9

AND

IN THE MATTER OF THE OPPOSITION THERETO
UNDER NO. 449586 BY
SHOKZ (SINGAPORE) PTE. LTD.

BACKGROUND AND PLEADINGS

1. On 1 July 2024, Shenzhen Earfun Technology Co Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK ("the applicant's mark"). The applicant's mark was published on 12 July 2024 and registration is sought for the following goods:

Class 9: Audio amplifiers; Earphones; Headphones; Portable media players; Wireless transmitters and receivers; Audio speakers; audio receivers; Audio equipment; Connection cables; USB cables; Loudspeaker cables; Decoders; Connector sockets (Electric -); Plugs, sockets and other contacts [electric connections]; Electronic decoders; Signal decoders; Apparatus and instruments controlling electricity; Electric power converters; Electric inverters; Soundbar speakers; Wireless headsets for smartphones; Wireless speakers; DC/AC inverters; Computer peripheral devices; Wireless computer mice; Power adapters; Keyboards; Wireless chargers; USB hubs; Wireless routers; Microphones; Noise cancelling headphones; Stereo headphones; Earbuds; Cabinets for loudspeakers; Horns for loudspeakers; Batteries and battery chargers; Smart watches; Audio cables; speakers.

2. On 9 September 2024, the applicant's mark was opposed by SHOKZ (SINGAPORE) PTE. LTD. ("the opponent"). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is reliant upon the following trade marks:

openjog
International Registration no. WO0000001611248
International registration date: 5 July 2021

Date of designation for protection in the UK: 5 July 2021
Date protection conferred in the UK: 6 July 2021
Relying on all goods, namely:

Class 9: Batteries; battery chargers; chargers for batteries; earphones; electronic memory devices; headphones; horns for loudspeakers; lithium ion batteries; megaphones; memory expansion modules; microphones; smartglasses; spectacles; virtual reality headsets; wireless speakers; MP3 players; bone conduction earphones.

("the opponent's first mark"); and

openjoy
International Registration no. WO0000001611063
International registration date: 5 July 2021
Date of designation for protection in the UK: 5 July 2021
Date protection conferred in the UK: 30 December 2021
Relying on all goods, being identical to those covered by the opponent's first mark.
("the opponent's second mark").

3. The opponent claims that the marks at issue are similar and that the goods at issue are either identical or similar. As such, it is claimed that there exists a likelihood of confusion between the marks.

4. The applicant filed a counterstatement wherein it accepted that the goods at issue were similar but, generally, denied the overall claim against it.

5. The applicant is represented by Pawel Wowra and the opponent is represented by ARCADE & ASOCIADOS. Neither party filed evidence but I note that the opponent did file written submissions during the evidence rounds. No hearing was requested and neither party filed written submissions in lieu of the same. This decision is taken after careful consideration of the papers.

6. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

PRELIMINARY ISSUE

7. It is noted that, in the present case, the Tribunal considered it appropriate to issue a preliminary indication in accordance Rule 19 of the Trade Marks Rules 2008. This is dated 13 December 2024 and I can confirm that it was given by a Hearing Officer other than myself. Preliminary indications are issued to give the respective parties an indication on a *prima facie* basis as to the likely decision in respect of the grounds of opposition, giving either party the opportunity to withdraw either the opposition or the application accordingly, without incurring costs. Preliminary indications are not binding and nor do they replace a full decision by a Hearing Officer. If either party does not accept the preliminary indication, it has the right to formally give notice to that effect by filing a form TM53. I note that in the present case, a form TM53 was filed meaning that these proceedings continued.

8. Whilst I would ordinarily refrain from looking at (or even mentioning) a preliminary indication, I note that the opponent's submissions make reference to it and to its outcome. As such, I have become aware of the outcome of the preliminary indication issued. I raise the point here because I wish to set out that, for the avoidance of doubt, the preliminary indication is, as above, in no way binding upon me and, further, it has no influence upon my decision, which will be made based on my own considerations of the various assessments I must make throughout. As a result, I will say no more about the preliminary indication.

DECISION

Section 5(2)(b): legislation and case law

9. Section 5(2)(b) of the Act reads as follows:

> "(2) A trade mark shall not be registered if because-
>
> (a) […]
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood or association with the earlier trade mark."

10. Section 5A of the Act states as follows:

> "Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

11. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

> "(6)(1) In this Act an "earlier trade mark" means –
>
> (a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in

question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(aa) a comparable trade mark (EU) or a trade mark registered pursuant to an application made under paragraph 25 of Schedule 2A which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired;

(ab) a comparable trade mark (IR) or a trade mark registered pursuant to an application made under paragraph 28, 29 or 33 of Schedule 2B which has a valid claim to seniority of an earlier registered trade mark or protected international trade mark (UK) even where the earlier trade mark has been surrendered or its registration has expired.

[…]

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

12. Given their earlier filing dates, the opponent's marks qualify as earlier trade marks under the above provisions. Neither of the opponent's marks completed their registration processes more than five years prior to the filing date of the applicant's mark. As a result, the opponent's marks are not subject to the use provisions meaning that the opponent is entitled to rely on all of the goods for which its marks are registered.

13. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer*

Inc, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V*. Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

(d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

(e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a

composite mark, without necessarily constituting a dominant element of that mark;

(g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

(j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;

(k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Comparison of goods

14. The competing goods are as follows:

The opponent's goods	The applicant's goods
Class 9 Batteries; battery chargers; chargers for batteries; earphones; electronic memory devices; headphones; horns for loudspeakers; lithium ion batteries;	Class 9 Audio amplifiers; Earphones; Headphones; Portable media players; Wireless transmitters and receivers; Audio speakers; audio receivers; Audio

megaphones; memory expansion modules; microphones; smartglasses; spectacles; virtual reality headsets; wireless speakers; MP3 players; bone conduction earphones.	equipment; Connection cables; USB cables; Loudspeaker cables; Decoders; Connector sockets (Electric -); Plugs, sockets and other contacts [electric connections]; Electronic decoders; Signal decoders; Apparatus and instruments controlling electricity; Electric power converters; Electric inverters; Soundbar speakers; Wireless headsets for smartphones; Wireless speakers; DC/AC inverters; Computer peripheral devices; Wireless computer mice; Power adapters; Keyboards; Wireless chargers; USB hubs; Wireless routers; Microphones; Noise cancelling headphones; Stereo headphones; Earbuds; Cabinets for loudspeakers; Horns for loudspeakers; Batteries and battery chargers; Smart watches; Audio cables; speakers.

15. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

16. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark."

18. The opponent's submissions set out which goods it considers identical and those which it considers similar. In respect of similarity, the opponent's position is that the goods at issue are complementary and that they share purpose, trade channels and user. It is also claimed that the goods are competitive. As for the applicant, I have noted above that it has accepted that there is a degree of similarity between the goods. While this may be the case, it has not specified the degree of similarity it considers to exist. As a result, it remains incumbent on me to undertake a goods comparison in the ordinary way, albeit bearing the concession in mind.

Earphones; headphones; wireless headsets for smartphones; noise cancelling headphones; stereo headphones; earbuds; portable media players; audio equipment; audio speakers; soundbar speakers; wireless speakers; speakers; microphones; horns for loudspeakers; batteries and battery chargers; wireless chargers.

19. The above goods are all identical with, or are encompassed by various terms in the opponent's specification, namely "earphones", "headphones", "MP3 players", "wireless speakers", "microphones", "horns for loudspeakers", "batteries" and "battery chargers". As such, these goods are either self-evidently identical or identical under the principle outlined in *Meric*.

Audio amplifiers; audio cables; audio receivers.

20. The above goods are all those that can be used in conjunction with headphones. For example, in studios, a music profession will use the above goods as well as headphones to assist in the creation of music. That being said, this alone does not mean that the above goods are similar to the opponent's term of "headphones". On this point, I find that these goods clearly differ in nature, method of use and purpose. However, I am of the view that these goods share a degree of overlap in trade channels on the basis that they will likely be sought from the same undertakings and bought through the same distribution channels. Further, the goods will be selected by the same users. As a result, I am of the view that these

goods are similar to a low degree. In making this finding, I remind myself of the concession of the applicant.

Smart watches.

21. I consider that the closest comparator to the above goods is the opponent's term of "smartglasses". While different in nature, method of use and purpose, I consider that there is a degree of overlap in trade channels and user. I say this because an undertaking that produces and sells smart watches is likely to also produce and sell smartglasses. Further, the goods are likely to be sought by the same users. Taking this into account and, again bearing in mind the concession of the applicant, I find that these goods are similar to a low degree.

Connection cables; usb cables; plugs, sockets and other contacts [electric connections].

22. The above goods are all those that can be used alongside "battery chargers" in the opponent's specification. While this alone does not mean that they are automatically similar, I do consider that the above goods share trade channels and user with the opponent's term. I say this because I consider it likely that an undertaking that sells battery chargers will also sell the plugs, sockets and cables to be used with the same and such goods will be sought by the same user. Further, the goods may be complementary as a plug or a cable will be important to the use of a battery charger and such a relationship will lead consumers to believe that they originate from the same undertakings.[1] As a result, I consider that these goods are similar to a medium degree.

Wireless transmitters and receivers; decoders; connector sockets (electric -); electronic decoders; signal decoders; apparatus and instruments controlling

[1] *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06

electricity; electric power converters; electric inverters; dc/ac inverters; power adapters; computer peripheral devices; wireless computer mice; keyboards; usb hubs; wireless routers.

23. I am of the view that the closest comparators to the above goods are the opponent's terms of "electronic memory devices" and "memory expansion modules". Some of these goods are somewhat technical in nature and, as such, I am not entirely sure what some of them actually cover. My initial view is that there may not necessarily be any meaningful degree of overlap between these goods due to the fact that they likely differ in nature, method of use, purpose and trade channels. That being said, I remind myself of the concession of the applicant. In light of this, I am bound to proceed that there exists some degree of similarity and given what I have said above, I conclude that these goods are only similar to a low degree.

The average consumer and the nature of the purchasing act

24. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. (as he then was) described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words

"average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

25. For the most part, the goods will be selected by the general public at large. That being said, there are some goods that will be selected by business users or professionals in the music industry. Regardless of the identity of the consumer, the goods will be available from a range of retailers, such as general retailers or more specific electronic retailers. In either scenario, the goods will be placed on shelves where they will be self-selected by the consumer. I also consider that the goods will be available online where they will be selected after the consumer views an image of them on a webpage. As a result, I find that the selection process for the goods at issue will be primarily visual. Saying that, I do accept that the aural component will play a role by virtue of discussions with sales assistants or word of mouth recommendations.

26. The goods at issue will vary in frequency and in cost. I say this because the various cable goods will be selected at low cost and with a relatively high degree of frequency, especially by the business/professional user. On the other end of the scale, some goods such as noise cancelling headphones will be selected on a less frequent basis and may come at a reasonably high cost. In between these two ends of the scale are a range of goods that will be moderately expensive and selected with a reasonable degree of frequency. Such goods include a range of wireless speakers or computer periphery devices such as keyboards and apparatus for controlling electricity. In light of this, I find that some goods may attract a relatively low degree of attention with consideration paid to price and compatibility (for cable goods) whereas the range of other electronic/technical goods will attract a medium degree of attention. For the avoidance of doubt, I find that even where the goods are more expensive, the factors considered will still be relatively ordinary. For example, noise cancellation headphones will attract consideration as to the sound quality, materials used, compatibility and power of

the noise cancellation features. In my view, such goods will be selected with a medium degree of attention.

Comparison of the marks

27. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

28. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

30. The respective trade marks are shown below:

The opponent's marks	The applicant's mark
openjog ("the opponent's first mark") openjoy ("the opponent's second mark")	OpenJump

31. I have comments from both parties as to the similarity of the marks at issue. I do not intend to reproduce those here but confirm that I have taken them into account in making the following comparisons.

Overall impression

32. The applicant's mark is a word only mark that consists solely of 'OpenJump'. I consider that this will be viewed as the conjoining of two words, being 'Open' and 'Jump'. The opponent's position is that the dominant element of all marks is the word 'Open'. While I appreciate that this is the first element of the applicant's mark and that beginnings of marks tend to have greater visual and aural impact when it comes to the comparison of such marks,[2] I see no obvious reason as to why this would automatically mean that 'Open' would dominate over the word 'Jump'. I say this because a word coming first does not automatically mean that it dominates over the second.[3] Such a conclusion would place undue weight upon the first word of a wide range of trade marks and this would be to the detriment of any succeeding words. In short, as neither word has any connection to the goods at issue, I find that they play an equal role within the mark itself. I, therefore, find that the overall impression of the applicant's mark lies in 'OpenJump', as a whole.

[2] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02
[3] On this point, I note that there is case law that sets out that similar beginnings are not necessarily important or decisive. See *CureVac GmbH v OHIM,* T-80/08

33. The opponent's marks are word only marks, with the first being 'openjog' and the second being 'openjoy'. As was the case with the applicant's mark, I am of the view that the marks will be perceived as two conjoined words, being 'open jog' and 'open joy', respectively. I say this despite all letters in these marks being in lower case. Again, I see no reason why 'open' would dominate the overall impression of the marks and in reaching this conclusion, I rely on the same reasoning given above. As a result, I find that the overall impression of the opponent's marks lies equally across their conjoined words.

Visual comparison

34. Visually, all marks include the word 'Open' at their beginnings. As set out above, when comparing marks, their beginnings tend to have greater impacts on the marks. While I appreciate that this is only a general rule, I consider that in the present case, it does mean that the shared used of 'Open' as the first word in the marks is a considerable point of similarity. That being said, the marks differ in the presence of the words 'Jump', 'jog' and 'joy' which will not be ignored, especially given their roles in the overall impressions of their respective marks. While these words share the same first letter, they are still different words and the consumer will be aware of this. Overall, even bearing in mind the identical beginnings of the marks, the points of difference will contribute significantly and, as such, I am of the view that the marks at issue are visual similar to a medium degree.

Aural comparison

35. Aurally, the parties' marks will be pronounced as two words and in the ordinary way. The three marks consist of three syllables, with the first two being identical across them all. The last syllable in each mark, being 'Jump', 'jog' and 'joy', are not the same but I do appreciate that the pronunciation of the letter 'J' will be same throughout. That being said, the marks are all short marks from an aural

perspective. On this point, I accept that there is no special test for 'short marks',[4] however, the shortness of the marks in the present case means that consumers are more likely to notice the differences. Therefore, the difference created by the words 'Jump', 'jog' and 'joy' will be considerable. That being said, the shared first two syllables will not be ignored and, in my view, lead to a finding that these marks are aurally similar to an above medium (but not high) degree.

Conceptual comparison

36. As set out above, the applicant's mark will be viewed as two conjoined words. It is from these words that the concept of the mark will derive. The first word, being 'Open' will be understood as an ordinary dictionary word with well-known meanings, albeit in different contexts i.e. *something that is not closed*, *being ready for business* or *affording free passage*, for example.[5] As for 'Jump', this will again be perceived as a well-known dictionary word which means *to leap or spring clear of the ground or other surface*.[6] When viewed in combination, I do not consider that the applicant's mark will form any obvious meaning outside of the individual meanings of the words themselves. Turning to the opponent's marks, these will also be viewed as two conjoined words. The meaning of 'open' will be the same as above. As for 'jog' and 'joy', these will be understood as *to run or move slowly, especially for physical exercise*[7] and *a deep feeling of happiness*.[8] As was the case with the applicant's mark, I find that the opponent's marks will have no obvious meaning when the words are viewed in combination. Instead, the concept of the marks will derive from their individual words themselves.

37. In comparing the marks, I note that the concept associated with the word 'Open' will be common throughout them all. However, the meanings associated with the

[4] See paragraph 44 of *BOSCO*, BL O/301/20
[5] https://www.collinsdictionary.com/dictionary/english/open
[6] https://www.collinsdictionary.com/dictionary/english/jump
[7] https://www.collinsdictionary.com/dictionary/english/jog
[8] https://www.collinsdictionary.com/dictionary/english/joy

words ‘Jump’, ‘jog’ and ‘joy’ are entirely distinct and, therefore act as points of conceptual difference. Taking into account the overall impression of the marks, I see no reason why the shared concept associated with the word ‘Open’ is such that would give rise to any higher degree of similarity here. Instead, I am of the view that these marks are conceptually similar to a medium degree.

Distinctive character of the opponent’s marks

38. In *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV*, Case C-342/97 the CJEU stated that:

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

39. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of marks can be enhanced through use. The opponent has not pleaded that its marks have obtained an enhanced level of distinctiveness, nor has it filed any evidence to that effect. As a result, I only have the inherent position to consider.

40. The opponent's marks are both word only marks that are formed by the joining of two ordinary dictionary words, being 'open' and 'jog' in the first mark and 'open' and 'joy' in the second. As set out above, these words are all ordinary dictionary words. None of the words have any obvious connection to the goods relied upon so they cannot, therefore, be said to be descriptive or allusive of the same. That being said, they are not particularly remarkable as they are simply the conjoining of two ordinary dictionary words. Therefore, I do not consider that they attract a higher degree of distinctive character. Instead, I find that the distinctiveness of the opponent's marks sits at a medium degree.

Likelihood of confusion

41. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive

character of the earlier marks, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

42. I have found the goods at issue to be identical or similar. The average consumer base is formed of members of the general public and business or professional users who will select the goods via primarily visual means (though not discounting an aural component). In terms of the level of attention paid, I have found that regardless of the identity of the consumer, they will pay a medium degree of attention, though I appreciate that some goods may attract a lower degree of attention. I have found the marks to be visually and conceptually similar to a medium degree and aurally similar to an above medium (but not high) degree. Lastly, in terms of the distinctiveness of the opponent's marks, I have found them to be inherently distinctive to a medium degree.

43. Taking all of the above factors into account and even bearing in mind the principle of imperfect recollection, I do not consider that the marks at issue will be confused for one another. I appreciate that they share the same first word but consumers will not overlook the presence of the equally dominant second word, even when viewed on identical goods. In short, consumers will not pin their recollection of the marks at issue on the word 'Open' whilst neglecting the second word entirely. It is that second element that will create a sufficient enough distinction so as to avoid a likelihood of direct confusion. Consequently, I find that there exists no likelihood of confusion between the marks at issue, even where they are viewed on identical goods and in scenarios where the consumer pays a lower degree of attention.

44. I will now proceed to consider indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right (‘26 RED TESCO’ would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as ‘LITE’, ‘EXPRESS’, ‘WORLDWIDE’, ‘MINI’ etc.).

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

45. While the above examples in *L.A. Sugar* are noted, they are not intended to be treated as an exhaustive list of the only instances whereby indirect confusion occurs.

46. Further, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at paragraph 16 that "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion". Arnold LJ agreed, pointing out that there must be a "proper basis" for concluding that there is a likelihood of indirect confusion where there is no likelihood of direct confusion.

47. In considering the issue of indirect confusion, I do not consider that the shared use of the word 'Open' can be said to be the common use of an element so strikingly distinctive that consumers would believe that only one undertaking would use it. On this point, I remind myself that the opponent's marks only enjoy a medium degree of distinctive character and, in any event, that distinctiveness lies across the marks as wholes and does not vest in the word 'Open'. Even if it were, this is simply the use of an ordinary dictionary word so would not, in any event, be sufficient so as to satisfy category (a) of *L.A. Sugar* (cited above). In addition, I do not consider that the change of the second word of the marks, from 'jog' or 'joy' to 'Jump' would be viewed as an alteration that acts as a logical indicator of a sub-brand or brand extension in the way described by the case law I have set out above. I can envisage no scenario wherein 'Jump' is indicative of a type of sub-brand/brand extension of the overall 'Open' brand. Instead, I consider that the shared use of 'Open' would merely be viewed as the coincidental use of a common

English language word, followed by an entirely different and unconnected second word. On this point, I appreciate that the shared use of 'Open' on identical goods may call to mind the opponent's marks. However, this is mere association and not indirect confusion.[9] Lastly, I have set out above that the categories set out in *L.A. Sugar* are not exhaustive. However, the opponent has not provided me with any further scenario wherein confusion would occur. As such, I do not consider it appropriate (or fair to the applicant) for me to come up with any alternative circumstances of indirect confusion as it would involve me formulating the opponent's case on its behalf.[10] Consequently, taking all of this into account and bearing in mind the case law set out in the preceding paragraph, I do not consider that there exists a likelihood of indirect confusion, even when the marks are viewed on identical goods and in scenarios where the consumer pays a lower degree of attention.

CONCLUSION

48. The opposition has failed in its entirety and the applicant's mark may, subject to any successful appeal of my decision, proceed to registration for all goods.

COSTS

49. The opposition has failed in its entirety meaning that the applicant, as the successful party, is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the present case, the only stage of these proceedings that the applicant engaged with was the filing of its counterstatement. As such, I award the opponent the sum of £300 as a contribution towards its costs.

[9] *Duebros Limited v Heirler Cenovis GmbH,* BL O/547/17

[10] For the avoidance of doubt, in considering indirect confusion, I have given thought to a potential connection between 'OpenJump and 'openjoy' due to the well-known phrase of 'Jump for Joy'. Firstly, this point was not pleaded by the opponent. Secondly, I am of the view that any connection between the marks as a result of this phrase is too far removed and, if anything, it only gives rise to mere association which, as above, is not sufficient.

50. I hereby order SHOKZ (SINGAPORE) PTE. LTD. to pay Shenzhen Earfun Technology Co Ltd. the sum of £300. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 5th day of January 2026

A COOPER
For the Registrar