O/0065/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 4073469

IN THE NAME OF BIG SHO'Z LTD

TO REGISTER THE FOLLOWING TRADE MARK:

smash master

IN CLASS 43

AND

THE OPPOSITION THERETO UNDER NUMBER 449734

BY SMASHBURGER IP HOLDER LLC

Background and pleadings

1. On 9 July 2024, Big Sho'z Ltd ("the applicant") applied to register the trade mark "smash master" in the UK. The mark was accepted and published in the Trade Marks Journal on 19 July 2024. The following services were filed under the mark:

> *Class 43: Take away food services; Take away food and drink services; Providing food and drink for guests; Providing food and drink; Providing of food and drink; Providing food and drink for guests in restaurants; Preparation of food and drink; Fast food restaurants; Take-away fast food services; Take-away food and drink services; Serving food and drink for guests in restaurants; Providing food and drink in bistros; Providing food and drink in doughnut shops; Serving food and drink for guests; Takeaway food and drink services; Services for the preparation of food and drink; Food and drink preparation services; Providing food and drink in restaurants and bars; Providing food and drink in Internet cafes; Food and drink catering; Catering of food and drink; Catering (Food and drink -); Provision of food and drink in restaurants; Services for providing food and drink; Preparation and provision of food and drink for immediate consumption; Food reviewing services [provision of information about food and drinks]; Providing of food and drink via a mobile truck; Serving food and drink in doughnut shops; Serving food and drink in Internet cafes; Food and drink catering for institutions; Provision of food and drink; Providing food and beverages; Serving food and drink in restaurants and bars; Food preparation; Preparation of food and beverages; Serving food and drinks; Hospitality services [food and drink]; Take-away food services; Rental of kitchen worktops for preparing food for immediate consumption; Catering for the provision of food and drink; Restaurant services for the provision of fast food; Takeaway food services; Catering of food and drinks; Food and drink catering for banquets; Food preparation for others on an outsourcing basis; Services for the provision of food and drink; Information, advice and reservation services for the provision of food and drink.*

2. On 19 September 2024, Smashburger IP Holder LLC ("the opponent") opposed the trade mark based upon Section 5(2)(b) of the Trade Marks Act 1994 ("the Act").[1] This is on the basis of its earlier UK trade mark:

SMASH

UK registration number: UK00003518954
Filing date: 4 August 2020
Registration date: 20 November 2020

Relying on all services, namely:

Class 43: Carry-out restaurants; catering; restaurant and bar services; self service restaurants.

3. By virtue of its earlier filing date, the above registration constitutes an earlier mark in accordance with section 6 of the Act. In accordance with section 6A of the Act, the earlier mark is not subject to proof of use. The opponent may therefore rely upon all the services for which its mark is registered.

4. In its pleadings, the opponent claims that the respective services are identical or similar and that the marks are similar. As such, the opponent submits there will be a likelihood of confusion between the marks, including a likelihood of association.

5. A defence and counterstatement was filed by Shoheb Majid on behalf of the applicant.[2] In the counterstatement, it is denied that there is any similarity between the marks and the services. The applicant also requested proof of use of the opponent's mark. However, as noted above, the earlier mark is not subject to proof of use in accordance with section 6A of the Act.

6. Neither party filed evidence. No hearing was requested and both parties filed submissions in lieu of a hearing. This decision is taken following a careful perusal of the papers.

[1] The opponent originally brought the opposition under 5(2)(b), 5(3) and 5(4)(a). On 14 March 2025, the opponent contacted the Tribunal by email to state that it would no longer be relying on the 5(3) and 5(4)(a) grounds. An amended TM7 was filed on 16 April 2025.
[2] Shoheb Majid appears to be an individual who works at Big Sho'z Ltd (the applicant).

7. The opponent is represented by Mishcon De Reya LLP. The applicant is represented by Shoheb Majid, though not in a professional capacity.

8. 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.

Decision

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

> "5(2) A trade mark shall not be registered if because-
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark".

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

> "5A 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. The following principles are gleaned from the decisions of the Court of Justice of the European Union ("CJEU") in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v OHIM*, Case C-3/03, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM*, Case C-591/12P.

The principles

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

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

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

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

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

(f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

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

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

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

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

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

Comparison of the services

12. In comparing the respective specifications, all relevant factors should be considered, as per *Canon*, where the CJEU stated at paragraph 23 of its judgment:

> "In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. 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."

13. 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.

14. In *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T- 133/05, the GC 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."

15. Further, in *Kurt Hesse v OHIM*,[3] the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*,[4] the GC stated that "complementary" means:

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

16. Finally, the judgement of Jacob J (as he then was) in *Avnet Incorporated v Isoact Limited* is also relevant:[5]

> "In my view, specifications for services should be scrutinised carefully and they should not be given a wide construction covering a vast range of activities. They should be confined to the substance, as it were, the core of the possible meanings attributed to the rather general phrase."

[3] Case C-50/15 P
[4] Case T-325/06
[5] [1998] F.S.R. 16.

17. With this in mind, the services for comparison are as follows:

Opponent's services:	**Applicant's services:**
Class 43: Carry-out restaurants; catering; restaurant and bar services; self service restaurants.	*Class 43: Take away food services; Take away food and drink services; Providing food and drink for guests; Providing food and drink; Providing of food and drink; Providing food and drink for guests in restaurants; Preparation of food and drink; Fast food restaurants; Take-away fast food services; Take-away food and drink services; Serving food and drink for guests in restaurants; Providing food and drink in bistros; Providing food and drink in doughnut shops; Serving food and drink for guests; Takeaway food and drink services; Services for the preparation of food and drink; Food and drink preparation services; Providing food and drink in restaurants and bars; Providing food and drink in Internet cafes; Food and drink catering; Catering of food and drink; Catering (Food and drink -); Provision of food and drink in restaurants; Services for providing food and drink; Preparation and provision of food and drink for immediate consumption; Food reviewing services [provision of information about food and drinks]; Providing of food and drink via a mobile truck; Serving food and drink in doughnut shops; Serving food and drink in Internet cafes; Food and drink catering for institutions; Provision of food and drink; Providing food and beverages; Serving food and drink in restaurants and bars; Food preparation; Preparation of food and beverages; Serving food and drinks; Hospitality services [food and drink]; Take-away food services; Rental of kitchen worktops for preparing food for immediate consumption; Catering for the provision of food and drink; Restaurant services for the provision of fast food;*

	Takeaway food services; Catering of food and drinks; Food and drink catering for banquets; Food preparation for others on an outsourcing basis; Services for the provision of food and drink; Information, advice and reservation services for the provision of food and drink.

Take away food services; Take away food and drink services; Take-away fast food services; Take-away food and drink services; Takeaway food and drink services; Take-away food services; Takeaway food services; Providing of food and drink via a mobile truck;

18. The above services all fall under the scope of the opponent's 'carry-out restaurants'. These services are therefore considered identical according to the principles set out in *Meric*.

Providing food and drink for guests; Providing food and drink; Providing of food and drink; Providing food and drink for guests in restaurants; Preparation of food and drink; Fast food restaurants; Serving food and drink for guests in restaurants; Providing food and drink in bistros; Providing food and drink in doughnut shops; Serving food and drink for guests; Services for the preparation of food and drink; Food and drink preparation services; Providing food and drink in restaurants and bars; Providing food and drink in Internet cafes; Provision of food and drink in restaurants; Services for providing food and drink; Preparation and provision of food and drink for immediate consumption; Serving food and drink in doughnut shops; Serving food and drink in Internet cafes; Provision of food and drink; Providing food and beverages; Serving food and drink in restaurants and bars; Food preparation; Preparation of food and beverages; Serving food and drinks; Hospitality services [food and drink]; Restaurant services for the provision of fast food; Services for the provision of food and drink

19. The above services all fall under the scope of the opponent's 'restaurant and bar services'. These services are therefore considered identical according to the principles set out in *Meric*.

Food and drink catering; Catering of food and drink; Catering (Food and drink -); Food and drink catering for institutions; Catering for the provision of food and drink; Catering

of food and drinks; Food and drink catering for banquets; Food preparation for others on an outsourcing basis

20. The above services all fall under the scope of the opponent's 'catering'. These services are therefore considered identical according to the principles set out in *Meric*.

Food reviewing services [provision of information about food and drinks]

21. The above services are most similar to the opponent's 'restaurant and bar services'. The above services relate to the reviewing of food at restaurants, while the opponent's services relate to the restaurants themselves. The nature and purpose of the services clearly differs. Users will overlap as consumers accessing restaurant reviews will also use restaurant services. There is no competition. The reviewing of food requires the provision of restaurant services. It is possible that restaurants could offer a service for reviewing their own food; however, this is not the typical situation. I am mindful of the comments in *Avnet* and have considered the range of activities that would be considered incidental to the core business of the provision of restaurant and bar services. However, while I do not find that providing food reviewing services is a core activity of restaurant and bar services, I acknowledge that there may be a small number of circumstances in which these services could be considered complementary by consumers, despite being different in nature. Despite this, taking all the factors into account, I find the above services dissimilar to the opponent's 'restaurant and bar services'.

Rental of kitchen worktops for preparing food for immediate consumption

22. The above services relate to the temporary provision of worktops for preparing food. I see no obvious reason why such services would overlap with or have similarity to any of the opponent's services, none of which relate to the rental of kitchen equipment or spaces. That both the above services and the opponent's services require kitchen worktops suitable for preparing food is not enough to establish any meaningful similarity. In the absence of any evidence or arguments from the opponent regarding this matter, I find the above services to be dissimilar to the opponent's services.

Information, advice and reservation services for the provision of food and drink

23. The above services are most similar to the opponent's 'restaurant and bar services'. The above services relate to providing information, advice and reservation services to restaurants, while the opponent's services relate to the restaurants themselves. The nature, users and purpose of the services clearly differ. There is no competition. The provision of information, advice and reservation services for restaurants requires the restaurant services themselves. It is possible that restaurants could offer information services for their own establishment, such as in the form of a blog; however, this is not the typical situation. I am mindful of the comments in *Avnet* and have considered the range of activities that would be considered incidental to the core business of the provision of restaurant and bar services. However, while I do not find that providing information, advice and reservation services is a core activity of restaurant and bar services, I acknowledge that there may be a small number of circumstances in which these services could be considered complementary by consumers, despite being different in nature. Despite this, taking all the factors into account, I find the above services dissimilar to the opponent's 'restaurant and bar services'.

Conclusion of goods and services comparison

24. There can be no likelihood of confusion in respect of section 5(2)(b) of the Act regarding the applicant's goods which were found to be dissimilar to the opponent's goods.[6] In light of my findings above, the present opposition fails against the following goods:

> *Class 43: 'Food reviewing services [provision of information about food and drinks]; Rental of kitchen worktops for preparing food for immediate consumption; Information, advice and reservation services for the provision of food and drink*

25. I will proceed against the goods that I have found to be identical or similar.

[6] *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA

Comparison of marks

26. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in 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."

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

28. The respective trade marks are shown below:

The opponent's earlier mark	**The applicant's contested mark**
SMASH	**smash master**

29. In its submissions in lieu, the opponent submits that "there is clear visual, aural and conceptual similarity". It also submits that the word "master" is laudatory, as it will be understood to mean 'top' or 'leading'.

30. In its submissions in lieu, the applicant submits that "the term "SMASH" is used widely in the food and hospitality industry, particularly in reference to a cooking method

involving pressing burgers onto a hot griddle. As such, it is descriptive and lacks inherent distinctiveness".

Overall impression

31. The opponent's mark is a word-only mark consisting of the word "SMASH". There are no other elements so this element is dominant.

32. The applicant's contested mark is a word-only mark consisting of the words "smash master". I note that the word "smash" is at the beginning of the mark where the consumer tends to pay more attention. However, the words hang together and, as such, I consider that both words are dominant in the mark.

33. The earlier mark consists of the word "SMASH" in uppercase letters, while the contested mark consists of the word in lowercase letters. As both marks are word marks, these differences in letter case do not amount to differences in the marks.[7]

Visual comparison

34. The visual similarity between the marks resides in the first word "smash". The visual difference resides in the contested mark's containing the second word 'master'.

35. Overall, I consider that the marks to have a medium visual similarity.

Aural comparison

36. Both marks comprise the dictionary word "smash". This word will be pronounced in the usual way. The applicant's contested mark further comprises the dictionary word "master", which will also be pronounced in the usual way. The marks therefore overlap aurally in the first syllable and differ where the applicant's contested mark further contains a second and third syllable.

37. Overall, I consider the marks to have a medium aural similarity.

Conceptual comparison

[7] Mr Iain Purvis QC, sitting as the Appointed Person in *Groupement Des Cartes Bancaires v China Construction Bank Corporation*, case BL O/281/14

38. The opponent's earlier mark consists only of the word 'SMASH'. This will likely be understood by the consumer to mean to flatten or to break into pieces. It may also be understood to mean something successful, such as in the term "smash hit", but I consider this unlikely in this context as it does not make grammatical sense in either mark. I accept the applicant's submission that this term can be used in the phrase "smash burgers", however, the services in question do not relate specifically to burgers; they relate broadly to restaurant, bar and catering services. As a result, I do not find the word "smash" to be descriptive or allusive of the services.

39. The contested mark further comprises the word "master", which will be understood to mean someone who is proficient at something, or the process of becoming proficient at something. The mark as a whole will be understood to mean someone who is proficient at flattening or breaking something. I agree with the opponent's submissions that the word "master" could be considered laudatory, leading the consumer to conclude that the entity is the best. However, as the two words hang together, the conceptual meaning of this second word is still significant to the overall impression of the mark.

40. The concept conveyed by the word "smash" acts as a point of conceptual similarity between the marks. However, the additional word "master" in the contested mark and its combined meaning with the word "smash" acts as a significant point of conceptual difference. Overall, I find the marks to have a below medium conceptual similarity.

Average consumer and the purchasing act

41. As the case law above indicates, it is necessary to determine who the average consumer is for the respective parties' services. I must then determine the manner in which the services are likely to be selected by the average consumer. 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. 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."

42. The services at issue will all be used by the general public. These consumers will pay a medium degree of attention during the purchasing process. The services related to catering will also be used by professionals. These consumers will also pay a medium degree of attention during the purchasing process. In both cases, consideration will be given to pricing, the quality of the food and drink provided and the quality of the hospitality provided.

43. The food provision services at issue will primarily be accessed in a physical restaurant. The takeaway services will be accessed either online, where they will be viewed on webpages, or over the phone, having viewed the services in a brochure. Catering and food preparation services may also be accessed online or over the phone, having viewed the services in a brochure. In all circumstances, verbal recommendations may be given by sales associates. I therefore consider that visual considerations will play a major role in the purchasing process, with aural considerations playing a smaller role.

Distinctive character of the opponent's mark

44. 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 *WindsurfingChiemsee* 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)."

45. 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/services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. There is no evidence regarding the use of the earlier mark. Consequently, I have only the inherent position to consider.

46. The earlier mark consists of the word "smash", which does not directly describe or strongly allude to the services or to their characteristics. As a common dictionary word, it has a medium degree of inherent distinctiveness.

GLOBAL ASSESSMENT – Conclusions on Likelihood of Confusion

47. 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 (or services) and vice versa (*Canon* at [17]). It is necessary to keep in mind the distinctive character of the opponent's trade mark, the average consumer of the goods and the nature of the purchasing act. 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 (*Lloyd Schuhfabrik* at [26]).

48. 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 services down to the responsible undertakings being the same or related.

49. Earlier in this decision, I found the services to be either dissimilar or identical. I found the marks to have a medium visual and aural similarity. I found the marks to have a below medium conceptual similarity. I found the opponent's earlier mark to possess a medium level of inherent distinctive character for the relevant services. I identified the average consumer to be either members of the general public or professionals, both paying a medium degree of attention. I found that the services would be selected primarily by visual means, with aural considerations playing a smaller role.

50. As noted above, 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 (*Lloyd Schuhfabrik* at [26]).

51. Taking all of the above factors into account, I am satisfied that the average consumer would not overlook the second word "master" in the contested mark. Consumers would therefore not directly mistake the parties' marks for each other, even on identical services. I therefore do not find a likelihood of direct confusion between the parties' marks for any of the contested services.

52. I will therefore proceed to consider whether there is a likelihood of indirect confusion, whilst reminding myself that, as James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16], "a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion".

53. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, 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)."

54. Earlier I found that both words of the contested mark "smash master" contribute equally to the impression of the mark and that the words hang together to result in the concept of someone who is proficient at breaking or flattening something. Considering this combined meaning and the overall impression of the mark, I do not consider in

this instance that either of the words of the contested mark has distinctive significance independently of the whole.

55. In the present proceedings, the earlier mark has a medium degree of distinctive character. I do not consider the earlier mark to be so distinctive that the consumer would assume that no one else other than the opponent would be using the word “smash” in a trade mark. Additionally, considering the combined meaning of the contested mark, I particularly do not consider that consumers would make that assumption in this context. Despite the overlap in the word “smash”, the significant conceptual difference between the marks would lead consumers away from any confusion between the marks.

56. I consider that a consumer who is aware of the opponent’s earlier mark may note the use of “smash” in both marks. However, I do not see any logical reason for the consumer to conclude that the “smash master” mark is another brand of the owner of the earlier mark, or a brand extension. I find it likely that any consumers noticing the use of “smash” in both the opponent’s earlier mark and the contested mark would assume that the marks represented goods or services deriving from two different entities and simply put the use of “smash” in both (if noticed) down to coincidence.

57. I therefore do not consider there to be a likelihood of indirect confusion between the parties’ marks for any of the contested services.

Final Remarks

58. The opposition has been unsuccessful and, subject to any successful appeal, the contested mark will proceed to be granted protection in the UK.

COSTS

59. The applicant has achieved success in these proceedings and is therefore entitled to a contribution towards its costs. However, the applicant is not professionally represented and did not submit a Tribunal Cost Pro-Forma. I therefore award no costs in these proceedings.

Dated this 28th day of January 2026

K HARBACH

For the Registrar