**BL O/0102/26**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF**
**TRADE MARK APPLICATION NUMBER 3788704**
**BY MED FOOD WHOLESALE LTD**
**TO REGISTER THE FOLLOWING SERIES OF TRADE MARKS:**

# Medfood Taste and Beyond

# MEDFOOD TASTE AND BEYOND

**IN CLASSES 29 AND 30**

**AND**

**IN THE MATTER OF OPPOSITION THERETO**
**UNDER NUMBER 434944**
**BY GLORIA HAVENHAND (MRS)**

## BACKGROUND AND PLEADINGS

1. On 17 May 2022, Med Food Wholesale Ltd ("the applicant") applied to register in the UK the trade mark (series of two) shown on the cover page of this decision, under number 3788704 ("the contested mark"). The contested mark was published in the Trade Marks Journal for opposition purposes on 3 June 2022 in respect of the following goods:

Class 29: Hummus (chick pea paste); canned, cooked or otherwise processed tomatoes; preserves, namely meat, fish, fruit and vegetable preserves; crystallised fruit; vegetable oils; vegetables, cooked; blended oil (for food); fruits, tinned (canned); canned or bottles vegetables; caviar; vegetable puree; preserved, dried and cooked fruit, nuts and vegetables; canned processed olives; canned or bottles fruits; preserves, pickles; pickled vegetables; tinned tomatoes; processed olives; preserved, dried and cooked olives; edible oils and fats, canned fruits and vegetables; edible oils and fats including margarine; vegetables, dried; butter; fruit and vegetables all being preserved, dried, cooked or frozen; olives, preserved canned tomatoes; pickled fruits and vegetables, edible oils, olive oil, edible fats; canned cooked meat; tomato puree; tomato paste; sunflower oil for food; preserved fruit and vegetables; tomato juice for cooking; dried fruit and vegetables; soybean oil; jam and jellies; vegetable preserves; oil for food; fruit and vegetable paste. Packed pulses, yogurt and cheeses.

Class 30: Coffee, tea, cocoa and substitutes therefor; rice, pasta and noodles; tapioca and sago; flour and preparations made from cereals; bread, pastries and confectionery; chocolate; ice cream, sorbets and other edible ices; sugar, honey, treacle; yeast, baking-powder; salt, seasonings, spices, preserved herbs; vinegar, sauces and other condiments; ice (frozen water). Chocolate coated nuts. beverages with coffee, cocoa, chocolate

or tea base; cereals prepared for human consumption, for example, oat flakes, corn chips, husked barley, bulgur, muesli.

2. On 13 July 2022, Gloria Havenhand (Mrs), ("the opponent") filed a notice of opposition, partially opposing the application under section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). Within the TM7, the opponent indicated that the opposition is directed against the following goods in classes 29 and 30:

Class 29: Preserves, namely meat, fish, fruit and vegetable preserves; edible oils and fats, […]; edible oils and fats including margarine; […] edible oils, olive oil, edible fats;[1] jam and jellies; fruit and vegetable paste. Packed pulses, yogurt and cheeses.

Class 30: […] honey, […]; cereals prepared for human consumption, for example, oat flakes, corn chips, husked barley, bulgur, muesli.

3. The opponent relies upon the following trade mark:


UK registration number: 2474320

Filing date:7 December 2007

Registration date: 25 April 2008

[1] On the Form TM7 the opponent lists "edible oils and fats" as a term that is opposed. However, the applicant's specification does not contain a term that is solely for such. Therefore, I have decided to treat the opposition as though it is opposing all terms containing the words "edible oils and fats". However, this does not have a material impact on the decision for reasons that will become apparent.

For the purposes of these proceedings, under Q1 of the Form TM7 the opponent indicated that it wished to rely on the following goods for which the mark is registered, namely:

Class 29: Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats. Milk, powdered milk, flavoured jellied milks and whipped milk; milk products, namely milk desserts, yoghurts, drinking yoghurts, beverages consisting mainly of milk or dairy products; beverages consisting mainly of lactic ferments; milk drinks containing fruits; plain or aromatised fermented dairy products. Prepared meals and snacks whose main ingredients are proper to this class, (for example, soups and potato crisps).

Class 30: Honey; herbal honey; biological honey; propolis; products and/or preparations made from or including honey, propolis and royal jelly. Cereal preparations all included in Class 30

4. However, by virtue of its earlier filing date of 7 December 2007, the above mark constitutes an earlier mark in accordance with section 6 of the Act. As it was registered on 25 April 2008, more than five years prior to the date the contested mark was filed, this mark is subject to proof of use in accordance with section 6A of the Act. At Q3a of the Form TM7 the opponent confirmed use of the following goods only:

Class 29: Meat, fish, preserved, dried and cooked fruits and vegetables, jellies, jams, edible oils and fats, yoghurts.

Class 30: Honey, cereal preparations all included in class 30.

These are the only goods on which the opponent can rely as the mark is more than five years old and the opponent claims use of only these goods.

5. In its Form TM8, the applicant requested proof of use of all of these terms, save for, meat and fish.

6. In its notice of opposition, the opponent states that the competing trade marks are nearly identical and certainly similar to the applicant's mark, that there are many products which are the same and that there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier mark.[2]

7. The applicant filed a defence and counterclaim denying the grounds of the opposition.

8. Both parties are unrepresented. Only the applicant filed evidence during the evidence rounds. Neither party asked for an oral hearing, however the applicant elected to file written submissions in lieu.

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

**EVIDENCE**

10. The applicant's evidence comprises the witness statement of Mr Hamed Lotfi Ghahrodi, signed and dated 26 October 2023. Mr Hamed Lotfi Ghahrodi is the director at Medfood Wholesale Ltd. Mr Ghahrodi's statement is accompanied by 4 exhibits (2.1 to 2.6). The purpose of this evidence is to show longstanding use of its mark on the market.

[2] Form TM7, page 6, question 5.

11. Whilst the applicant's evidence and submissions will not be summarised here, I have taken them into consideration in reaching my decision and will refer to them below, as and where necessary.

**PRELIMINARY ISSUE**

12. The opponent filed evidence in relation to proof of use, but it was treated as inadmissible as it was not copied to the other side despite the opponent being granted additional time to do so. As such, the opponent cannot rely upon any of the goods that the applicant has requested proof of use for.[3] This happens to be all the terms for which use is claimed by the opponent other than meat and fish. The result of which, is that the opponent can only rely on the terms "meat" and "fish".

13. Even if the evidence had been admitted into proceedings, it is scant, consisting of a witness statement that only confirms when the mark was used and does not provide any context as to the extent of use and for which goods the mark has been used. The witness statement is accompanied by only five exhibits. Three of which are pictures of the olive oil with the earlier mark on them and the last two are described as delivery notes/invoices. One is dated in 2020 and the other in 2021. One showing the sale of 10 units of olive oil at a price unit of 6.5 totalling 65.00. The other is again for olive oil, 48 units, at a price unit of 5.50, totalling 264.00. The currency is not clear, but I assume it to be in pounds as the opponent's shop is based in Sheffield. Even at its highest, this evidence is not sufficiently solid for a finding of genuine use.

**DECISION**

**Section 5(2)(b)**

14. Sections 5(2)(b) and 5A of the Act state:

[3] See the Form TM8 Q7

"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.

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."

**Relevant Law**

15. 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 C-120/04, *Shaker di L. Laudato & C. Sas v OHIM,* Case C-334/05P and *Bimbo SA v OHIM,* Case C-591/12P.

The principles

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

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

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

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

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

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

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

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

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

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

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

**Comparison of goods**

16. All relevant factors relating to the goods should be taken into account, which include, inter alia:[4]

• the physical nature of the goods;

• their intended purpose;

• their method of use / uses;

• who the users of the goods are;

• the trade channels through which the goods reach the market;

• in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and

• whether they are in competition with each other (taking into account how those in trade classify the goods, for instance whether market research companies put them in the same or different sectors)

or

• whether they are complementary to each other. Complementary signifying that "there is a close connection between them, in the sense that one is

[4] See *Canon*, Case C-39/97, paragraph 23; and *British Sugar PLC v James Robertson & Sons Ltd.,* [1996] R.P.C. 281 – the "*Treat*" case.

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".[5] It is noted that complementarity means that there is an autonomous criterion capable of being the sole basis for the existence of similarity.[6]

17. When interpreting the terms in a specification, I bear in mind that it is necessary to focus on the core of what is being described and that trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. Nevertheless, the principle should not be taken too far and where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.[7]

18. In *SkyKick UK Ltd & Anor v Sky Ltd & Ors (Rev1)* [2024] UKSC 36, Lord Kitchin set out the proper approach to considering terms in specifications:

> "365. […] The correct approach, as a matter of principle, in considering a specification of services which is defined by terms which are not clear or precise, is to confine the terms used to the substance or core of their possible meanings: see, for example, *Reed Executive plc v Reed Business Information Ltd* [2004] EWCA Civ 159; [2004] RPC 40, at para 43. So too, if a specification of goods is defined by terms which are ambiguous, then it should be confined to those goods which are clearly covered. These principles are consistent with first, the requirement that the specifications of goods and services must be clear and precise so that others know what they can and cannot do; and secondly, general fairness because any ambiguity is the responsibility of the owner of the mark. If despite this, the words used are still unclear so that they cannot be interpreted, then it is

[5] *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82, see also *Sandra Amalia Mary Elliot v LRC Holdings Limited,* BL O/255/13
[6] *Kurt Hesse v OHIM*, Case C-50/15 P, se also *Sanco SA v OHIM*, Case T-249/11
[7] *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), paragraphs 11 - 12

permissible to disregard them. But, in my opinion, that will rarely be the case."

19. In *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

> "[…] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR) [2012] ETMR 42 at [47]- [49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question."

20. In *Avnet Incorporated v Isoact Limited* [1998] FSR 16, Jacob J (as he then was) said at [19]:

> "[…] definitions of services … are inherently less precise than specifications of goods. […] 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 attributable to the rather general phrase."

21. I bear in mind that it is permissible to group goods together for the purposes of assessment: *Separode Trade Mark*:[8]

[8] BL O/399/10

"The determination must be made with reference to each of the different species of goods listed in the opposed application for registration; if and to the extent that the list includes goods which are sufficiently comparable to be assessable for registration in essentially the same way for essentially the same reasons, the decision taker may address them collectively in his or her decision."

22. Further, in *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-133/05, the General Court ("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 für 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."

23. The goods to be compared are shown in the table below:

| Opponent's goods | Applicant's goods |
|---|---|
| Class 29:<br>Meat, fish. | Class 29:<br>Preserves, namely meat, fish, fruit and vegetable preserves; edible oils and fats, […]; edible oils and fats including margarine; […] edible oils, olive oil, edible fats; jam and jellies; fruit and vegetable paste. Packed pulses, yogurt and cheeses. |
| | Class 30:<br>[…] honey, […]; cereals prepared for human consumption, for example, oat flakes, corn chips, husked barley, bulgur, muesli. |

24. For the reasons I have discussed above, under the subheading 'preliminary issue', the opponent can only rely upon its earlier goods, "meat" and "fish".

Class 29

*Preserves, namely meat, fish […]*

25. I consider the above term to be a wide term that would encompass dried, salted, smoked and cured meats or fish, including for example smoked salmon or pastrami as well as tinned meats and fish such as corned beef or tuna. As such, I find the above goods are identical under *Meric* to the opponent's "*meat*" and "*fish*" goods in class 29 as the applied for goods would include various types of meat and fish. However, if I am wrong, the applied for term would also cover pâté, such as salmon pâté or chicken pâté which when compared with the opponent's terms would still be ***identical*** under *Meric*, as pâtés are still a type of meat or fish. Even if I am wrong still, the competing goods will nevertheless be ***highly similar.*** This is because despite pâtés differing in their precise nature to meat or fish, they are still both types of meat and fish that will be eaten by consumers for the purpose of a savoury protein source. Although I accept that these will be found in different precise areas of a supermarket or food store, they nevertheless are likely to be made by the same producers as meat or fish is the key source of both foods. Users will also overlap. Further, the goods are complementary as either meat or fish is needed to make the corresponding pâté, and it would be reasonable for consumers to expect them to originate from the same producers.

26. As for the remaining goods applied for in classes 29 and 30. I see no reason why they are similar to the opponent's earlier goods "meat" or "fish". The remaining goods differ in nature, method of use, purpose and trade channels. The goods will not be in direct competition, neither are they complementary as one is not important or essential for the use of the other. Users may overlap to the extent that the general public may purchase the competing goods, however this is to such a generalised degree that it does not engage with similarity.

27. As some degree of similarity between the goods is necessary to engage the test for a likelihood of confusion under section 5(2)(b) grounds, my findings above mean that the opposition must fail against goods of the applied for mark that I have found to be dissimilar, namely:[9]

Class 29: Preserves, namely […], fruit and vegetable preserves; edible oils and fats, […]; edible oils and fats including margarine; […] edible oils, olive oil, edible fats; jam and jellies; fruit and vegetable paste. Packed pulses, yogurt and cheeses.

Class 30: […] honey, […]; cereals prepared for human consumption, for example, oat flakes, corn chips, husked barley, bulgur, muesli.

**The average consumer and the purchasing act**

28. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods. I must then determine the manner in which the goods 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 word "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

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

29. Due to the nature of the goods at issue, I find that the average consumer is likely to be the general public.

30. On average, the general public are likely to purchase the goods rather frequently, and the price of the purchase is likely to be relatively inexpensive. However, consideration will be given to factors such as quality, price, taste and nutrition when selecting the goods. Taking the above factors into account, overall, I find that the general public will demonstrate a medium level of attention in respect of the goods at issue. The goods are typically found in supermarkets and their online equivalents, where they will be self-selected and as such, visual considerations would dominate although I do not discount that aural considerations will play their part.

**Comparison of trade marks**

31. It is clear form *Sabel* 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. The CJEU states at paragraph 34 of its judgment in *Bimbo*, 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 relevant 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."

32. 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 trade 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.

33. The marks to be compared are as follows:

| The opponent's mark | The applicant's mark (series of two) |
|---|---|
|  | **(i)**<br>**Medfood Taste and Beyond**<br>**(ii)**<br>**MEDFOOD TASTE AND BEYOND** |

**Overall Impression**

34. The contested mark is a series of word only marks the only difference between them being the use of case. However, the difference in letter case between the series of marks does not make a material difference, this is because the registration of word-only marks provide protection for the words themselves, irrespective of whether they are presented in upper or lower case. As such I will deal with the mark as though it is one mark. The contested mark consists of the words 'Medfood Taste and Beyond', there are no other elements that contribute to the overall impression of the mark. In my view, the overall impression lies predominantly in the element "Med" as the element "food" will be seen as descriptive of the goods under the mark and as such play a lesser role. As for the words "Taste and Beyond", these will be perceived as a laudatory phrase promoting the goods under the mark, and therefore these words also have a lesser role although they are not entirely negligible.

35. The opponent's mark is a figurative mark that consists of the words "MED" beside which is a green cross device that is commonly used to represent pharmaceuticals or medicine. I note that above this is a dot; I have considered whether consumers would consider the device with the dot above it to represent the letter "i", however, I do not find this to be the case given the overall shape of the device. The letters 'MED' are presented in a slightly stylised font in bold black capital letters. The word 'foods' is found beneath the green cross device and is presented in a slightly stylised font in orange lower case. In my view, the overall impression rests in the word "MED" as an element of the mark that can be read, along with the pharmaceutical green cross device element. The word "foods" is entirely descriptive of the category of goods registered under the mark and as such plays a lesser role in the overall impression of the mark, however this is somewhat offset by being displayed in orange.

**Visual similarity**

36. Visually, the marks are similar to the extent that they both contain the element "MED", and the highly similar words food/foods. In the applied for mark this is found conjoined with the word "food" to make a single word, however this does not stop consumers from easily identifying these two elements. In contrast, in the earlier mark the element "MED" is on the line above the word "foods". The marks further differ as the applied for mark has the words "Taste and Beyond" which are absent from the earlier mark. The earlier mark also differs as it is a figurative mark that contains a pharmaceutical green cross device beside the "MED" element and the use of the colour orange for the word "foods". Taking into account the overall impression the marks are visually similar to a medium degree.

**Aural similarity**

37. The words "Taste and Beyond", in the applied for mark will merely be perceived as a laudatory phrase or commercial slogan, consequently, they are unlikely to be voiced by consumers. As for the earlier mark, I have discussed above, given the shape of the pharmaceutical green cross, in my view it will not be obvious to consumers, even with the presence of the green dot above it, that it is supposed to represent the letter "i". Therefore, when pronounced the respective marks both

contain two syllables. In the case of the opponent's mark MED-FOODS and in the case of the applied for mark MED-FOOD. The result of which is that they will be pronounced in an almost identical way with the only difference arising from the plural of the word food in the earlier mark. As such the competing marks are aurally highly similar.

**Conceptual similarity**

38. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including Ruiz Picasso v OHIM [2006] e.c.r.-I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer. Each mark contains the element "MED" and the highly similar words "food/foods". In the applied for mark, keeping in mind the goods which are all foodstuff that could reasonably be described as, or include, Mediterranean foods, the element "MED" will be understood as a short form of the word Mediterranean as "MED" can often be used to identify either the Mediterranean or Mediterranean cuisine. Particularly as the mark also contains the words "Taste and Beyond" which are unlikely to be used for foods that are good for one's health and address ones medical conditions. As for the earlier mark. Although this also contains the element "MED" this is unlikely to be viewed in the same way. Given the presence of the pharmaceutical green cross, the "MED" element is more likely to be perceived as a shortened form of the word medicine as "MED" is also commonly used to refer to such. The words food/foods will be understood in line with their dictionary meaning with the only difference being that one is plural. Overall, I consider that the marks are similar to a low degree due to the presence of the words "food/foods", albeit the conceptual overlap arises due to a weakly distinctive part of the mark which is merely describing the category of goods under the competing marks.

**Distinctive character of the earlier mark**

39. In *Lloyd Schuhfabrik Meyer* 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)."

40. 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, 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.

41. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, as discussed above, the opponent's evidence of use is not admissible. Even if it were admissible, (which it is not) given that it would not be solidly sufficient to find genuine use, as explained above, the evidence cannot possibly show enhanced distinctiveness which has a higher threshold. Consequently, I have only the inherent position to consider.

42. The earlier mark is set out above at paragraph 35. The word ‘foods’ will be understood as being descriptive of the type of goods for which the mark is registered. However, the “MED” element in combination with the pharmaceutical/medical green cross will be understood as referring to medicine, as I have mentioned above. Given that the goods are not particularly medical in nature as medical or nutritional foods and substances are instead found in class 5, I do not consider these elements to be descriptive of the goods, although I accept that it may be perceived as suggesting that the goods are healthy or good for you. Overall, I find that the mark possesses between a low and medium degree of enhanced distinctive character.

**Likelihood of confusion**

43. 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 opponent’s trade mark, 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 he has retained in his mind.

44. I have found the marks to be visually similar to a medium degree, aurally similar to a very high degree and conceptually similar to a low level overall, however with the dominant and distinctive elements of the mark being conceptually dissimilar. I have found the earlier mark to possess between a low and medium degree of inherent distinctive character, however I acknowledge that a weaker degree of distinctive

character does not preclude a finding of confusion.[10] I have identified the average consumer to be the general public who will pay a medium level of attention and the goods at issue to be identical, or if I am wrong similar to a high degree.

45. Whilst the competing marks both contain the element "MED" due to the other elements of the marks this will be perceived in different ways. In the earlier mark, the presence of the green pharmaceutical/medical cross found in the earlier mark will lead consumers to understand the letters "MED" as referring to medicine. Whilst in the applied for mark the presence of the additional words "Taste and Beyond", along with the word "food" after the letters "MED", will lead consumers to believe that "MED" is referring to Mediterranean. Especially as the words "Taste and Beyond" do not typically lend themselves to describe foods that are consumed for medical reasons. Despite the use of the same or highly similar elements, i.e. "MED" and "foods/food" these are elements that by themselves are not particularly distinctive. Therefore, in my view the different conceptual hooks that arise when the marks are considered as a whole outweigh any visual or aural similarities.[11] Further, the visual differences between the marks are enough to prevent consumers from misremembering them. Those being, mainly, the presence of a green pharmaceutical/medical cross that gives the earlier mark it's meaning, but also the use of colour in the earlier figurative mark, and in the applied for mark the words "Taste and Beyond" which although play a lesser role are not negligible. These differences are enough for consumers to distinguish between the marks regardless of how similar the competing goods are. Therefore, I do not consider there to be a likelihood of direct confusion even on identical goods.

46. I will now go on to consider indirect confusion. I acknowledge that a finding of indirect confusion should not be made merely because the two marks share a common element. Furthermore, it is not sufficient that a mark merely calls to mind another mark:[12] This is mere association not indirect confusion.

[10] See *L'Oréal SA v OHIM*, Case C-235/05 P
[11] *The Picasso Estate v OHIM*, Case C-361/04 P
[12] *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17

47. Indirect confusion was described in the following terms by Iain Purvis QC (as he then was), sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*:[13]

> "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 recognised 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.).

[13] BL O/375/10

(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)."

48. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [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.

49. Having recognised the differences between the marks, I consider it unlikely that the average consumer will conclude that they originate from the same or economically linked undertakings. In my view, the element "MED" and the words "food/foods" are not particularly distinctive by themselves. Food(s) is obviously descriptive of the goods provided under the marks and the element "MED" by itself is also fairly non distinct. Indeed, in the earlier mark it is the use of the element "MED" in conjunction with the green pharmaceutical/medical cross device that gives the earlier mark its distinctiveness and provides a different conceptual meaning. Therefore, there would be no logical reason why a company would remove this device as it would lose its conceptual meaning and its distinctiveness. For this reason, the removal of this element is not simply the removal of a non-distinctive element as it is crucial to the overall impression of the earlier mark. Instead, the use of the element "MED" and the highly similar words "food/foods" will be seen as merely coincidental, particularly when the marks are viewed as a whole. Therefore, I do not consider the competing marks to be seen as a logical brand extension, sub brand or brand variant of one another. Further, the additional differences in the earlier figurative mark, the overall get up, i.e. the use of the positioning and colours used will further deter consumers from believing that the marks are a logical brand extension or sub-brand. Consequently, overall, I do not consider there to be a likelihood of indirect confusion, even for identical goods.

## CONCLUSION

50. The opposition under section 5(2)(b) has failed. Therefore, the mark may proceed to registration.

## COSTS

51. As the applicant has been successful, it is therefore, entitled to a contribution towards its costs. As the applicant is unrepresented, it was invited by the Tribunal on 21 May 2025 to indicate whether it intended to make a request for an award of costs in the event that it was successful, and if so, it was requested to complete a costs proforma including accurate estimates of the number of hours spent on a range of given activities relating to defending the proceedings. The consequences of not filing a costs proforma were also explained. The deadline for providing the costs proforma was 18 June 2025. However, the applicant failed to file a completed cost proforma with the Tribunal. Consequently, no award for costs will be made.

**Dated this 9th day of February 2026**

**Sarah Wallace**
**For the Registrar**