

BL No O/0113/23

TRADE MARKS ACT 1994

CONSOLIDATED PROCEEDINGS

IN THE MATTER OF TRADE MARK APPLICATION NOS 3545149 AND 3561329 FOR THE FOLLOWING
MARKS RESPECTIVELY:



bee baltic

IN THE NAME OF BEEBALTIC LTD

AND

BEE BALTIC

IN THE NAME OF PAULIUS CHOCKEVIČIUS

AND IN THE MATTER OF OPPOSITION THERETO UNDER NOS 423464 AND 424269 RESPECTIVELY

BY MARIUS KEMPELIS

AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON

BY THE OPPONENT

AGAINST A DECISION OF BEVERLEY HEDLEY

DATED 9 JUNE 2022

DECISION

Introduction

1. This is an appeal from a decision of Beverley Hedley, acting for the Registrar, dated 9 June 2022, in which she allowed UK trade mark registration number 3545149 (“the First Trade Mark”) applied for by BEEBALTIC LTD and UK trade mark number 3561329 (“the Second Trade Mark”) applied for by Paulius Chockevičius to proceed to registration for all of the goods included in both applications, namely:

THE FIRST TRADE MARK:



bee baltic

Class 04: Beeswax; Beeswax for use in further manufacture; Beeswax for use in the manufacture of candles; Beeswax for use in the manufacture of cosmetics; Beeswax for use in the manufacture of ointments.

Class 05: Bee pollen for use as a dietary food supplement; Propolis dietary supplements.

Class 20: Beehives; Beehives (Comb foundations for -); Beehives (Sections of wood for -).

Class 30: Honey; Natural honey; Honey (for food); Propolis [bee glue] for human consumption; propolis; Bee glue.

Class 31: Bee pollen (Raw -); Bee pollen (Unprocessed -).

THE SECOND TRADE MARK:

BEE BALTIC

Class 04: Beeswax; Beeswax for use in the manufacture of cosmetics; Beeswax for use in the manufacture of ointments; Candle assemblies; Candle torches; Candle wax; Candles; Candles (Christmas tree -); Candles (Perfumed -); Candles and wicks for candles for lighting; Candles and wicks for lighting; Candles containing insect repellent; Candles for absorbing smoke; Candles for lighting; Candles for night lights; Candles for use as nightlights; Candles for use in the decoration of cakes; Candles in tins; Aromatherapy fragrance candles; Bougies in the nature of wax candles; Christmas lights [candles]; Christmas tree candles; Christmas tree decorations for illumination [candles]; Church candles; Floating candles; Fragranced candles; Fruit candles; Musk scented candles; Nightlights [candles]; Perfumed candles; Scented candles; Special occasion candles; Table candles; Tallow candles; Tea light candles; Tealight candles; Votive candles; Wax for making candles; Wicks for candles; Wicks for candles for lighting; Beeswax for use in further manufacture; Beeswax for use in the manufacture of candles.

Class 05: Pine pollen dietary supplements; Bee pollen for nutraceutical use; Bee pollen for use as a dietary food supplement; Propolis dietary supplements; Propolis for pharmaceutical purposes.

Class 30: Honey; Honey [for food]; Honey glazes for ham; Honey substitutes; Honeycomb toffee; Honeys; Biological honey for human consumption; Breakfast cereals containing honey; Breakfast cereals flavoured with honey; Candies (Non-medicated -) with honey; Cereal preparations coated with sugar and honey; Helichrysum honey; Herbal honey; Herbal honey lozenges [confectionery]; Invert sugar cream [artificial honey]; Manuka honey; Natural honey; Natural ripe honey; Raw honeycombs; Sugar, honey, treacle; Sweet spreads [honey]; Sweets (Non-medicated -) being honey based; Truffle honey; Yuja-cha (Korean honey citron tea); Propolis; Propolis [bee glue] for human consumption; Propolis for food purposes; Raw honeycombs; Bee glue.

Class 31: Pollen [raw material]; Pollen [raw materials]; Bee pollen (Raw -); Bee pollen (Unprocessed -); Bee pollen being raw material for industrial use.

2. Marius Kempelis (“the Opponent” or “the Appellant”) opposed the applications. The opposition against the First Trade Mark was directed at all of the goods in Classes 5, 30 and 31

of the contested specification. The opposition against the Second Trade Mark was directed at all of the goods in Class 5 (with the exception of 'Pine pollen dietary supplements'), Class 30 (with the exception of 'Breakfast cereals containing honey; Breakfast cereals flavoured with honey' and 'Cereal preparations coated with sugar and honey') and Class 31 of the contested specification. The grounds of opposition were identical and were based on s.5(2)(b), s.5(3) and s.5(4)(a) of the Trade Marks Act 1994 ("the Act"). In support of the grounds under s.5(2)(b) and s.5(3) the Opponent relied on the following trade mark registration:

UK Trade Mark number 3143680



Filing date: 10 January 2016

Date of entry in register: 01 April 2016

Class 30: Herbal tea; raw honey; treacle; confectionery.

3. In support of the grounds under s.5(4)(a) the Opponent relied on use of the above UK trade mark and of the unregistered word mark BALTIC HONEY SHOP, both of which were said to have been used throughout the UK since 2014 in relation to 'Herbal tea; raw honey; treacle; confectionery' and 'Retail services in relation to honey'.
4. The two oppositions were subsequently consolidated.
5. Both parties filed evidence. The Applicants were represented at the hearing that took place on 17 March 2022 by Aaron Wood of Brandsmiths SL Limited. The Opponent was not represented at the hearing but filed written submissions in lieu.
6. As the earlier trade mark did not complete its registration procedure more than five years prior to the application date of the contested marks, it was not subject to the proof of use conditions under s.6A of the Act.

The Hearing Officer's Decision

7. The Hearing Officer made the following findings:

The goods

- The goods covered by the First Trade Mark and the Second Trade Mark were found to be either identical or similar to a medium degree to the goods covered by the Opponent's earlier trade mark.

The average consumer and the nature of the purchasing act

- The average consumer would either be a member of the general public or a business purchasing some of the goods for manufacture of other goods or for some other industrial purpose. They would pay a low to medium level of attention. The goods were likely to be sought out visually on websites and/or in bricks and mortar retail establishments, although the Hearing Officer did not discount the potential for aural use of the marks through verbal recommendations and/or discussions with sales representatives, for example.

Distinctive character of the earlier marks

- The Opponent's earlier mark had a low degree of inherent distinctiveness in relation to all of the goods covered, which had not been enhanced through use in relation to any of the goods covered by it.

Similarity between the marks

Visual similarity

- The earlier trade mark had no visual similarity at all to the First Trade Mark, or if the Hearing Officer was wrong on that, any similarity stemming from the common inclusion of the word BALTIC was very low indeed. The earlier trade mark was visually similar to a very low degree to the Second Trade Mark.

Aural similarity

- There was a low degree of aural similarity between the marks.

Conceptual similarity

- There was a medium degree of conceptual similarity between the marks.

Likelihood of confusion

- There was no likelihood of direct or indirect confusion.
8. Accordingly, the Hearing Officer found that the opposition failed under s.5(2)(b) of the Act.
 9. With respect to the opposition under s.5(3) of the Act, the Hearing Officer made the following findings:

Reputation

- The earlier mark did not have the requisite reputation at the relevant dates.

Link

- The relevant public would not make a link between the earlier trade mark and the contested marks. If the Hearing Officer was wrong, and a link would be made, any such link would merely remind consumers of another mark using the word 'BALTIC' to designate the geographical origin of the goods. Such a link was incapable of giving rise to any unfair advantage, nor was it capable of causing detriment to the distinctiveness of the earlier trade mark because that link would not cause confusion as to the source of the respective goods.
10. Accordingly, the Hearing Officer found that the opposition failed under s.5(3) of the Act.
 11. With respect to the opposition under s.5(4)(a) of the Act, the Hearing Officer found that it would be unlikely that a substantial number of the Opponent's customers would be misled into purchasing any of the Applicants' goods covered by the First Trade Mark or the Second Trade Mark in the belief that they were those of the Opponent.
 12. Accordingly, the Hearing Officer found that the opposition failed under s.5(4)(a) of the Act.
 13. The opposition therefore failed in its entirety.

The Appeal

14. On 7 July 2022, the Opponent filed a Notice of Appeal to the Appointed Person under s.76 of the Act.
15. At the hearing before me, which was held remotely on 17 November 2022, Kendal Watkinson instructed by Humphreys & Co appeared on behalf of the Appellant, and Aaron Wood of Brandsmiths SL Limited appeared on behalf of the Respondents.

Standard of review

16. It is well established that in order to interfere with the decision of the Hearing Officer I must be satisfied that there was a distinct and material error of principle in the decision or that the Hearing Officer was wrong. The relevant principles were set out in *Axogen Corporation v Aviv Scientific Limited* [2022] EQHC 95 (Ch) at [24]. An appeal is by way of review, not a rehearing. Neither surprise at a Hearing Officer's conclusion nor a belief that she or he has reached the wrong decision will justify interference. The decision of the lower court will be "wrong" if the judge makes an error of law, which might involve asking the wrong question, failing to take account of relevant matters or taking into account irrelevant matters. In the absence of an error of law, the appellate court would be justified in concluding that the decision of the lower court was wrong if the judge's conclusion was "outside the bounds within which reasonable disagreement is possible" (*Actavis Group* at [80]). In the case of a multifactorial assessment or evaluation, involving the weighing of different factors against each other, the appeal court should show a real reluctance, but not the very highest degree of reluctance, to interfere in the absence of a distinct and material error of principle. Special caution is required before overturning such decisions (*TT Education v Pie Corbett Consultancy* [2017] RPC 17 at [52(iv)], *REEF Trade Mark* [2003] RPC 5 at [28] and *Fine & Country Ltd v Okotoks Ltd* [2014] FSR 11 at [50]-[51]). I have borne those principles firmly in mind.

Grounds of Appeal

17. The Appellant relied on eight grounds of appeal at the hearing before me, but the major issue, which fed into several of the grounds of appeal, was the impression given by the word BALTIC in both marks. I will therefore begin by considering the Appellant's second ground of appeal.

Ground 2: Assessment of the inherent distinctiveness of the earlier trade mark

18. The Appellant submitted in its Skeleton Argument that the Hearing Officer erred in her assessment of the inherent distinctiveness of the earlier trade mark, in finding that "*the average consumer (i.e., the UK public) would understand the word BALTIC as being purely descriptive of honey, on the basis that the UK public would be aware of the geographical meaning of the word (i.e., that they would understand "Baltic" as simply indicating the geographical origin of the goods when used in relation to honey)*".

19. The Hearing Officer's findings in respect of inherent distinctiveness were set out in paragraphs 33 to 35 of her Decision, as follows:

“33) The earlier mark consists of the words ‘BALTIC HONEY’ and ‘SHOP’ on a stylised circular device. The former words are positioned at the top of that device and the latter word at the bottom. Despite the separation of the words on the device, they naturally combine to form the unit, ‘BALTIC HONEY SHOP’. Within the circular device there is the image of a honey dipper being lifted out of honey (‘the honey dipper device’).

34) The applicants contend that the words BALTIC will merely be seen as an indication of the geographical origin of the goods i.e. those which come from the Baltic states. The opponent accepts that the word Baltic has the meaning of ‘relating to the Baltic sea or the countries surrounding it’ but points out that that word also has other meanings such as ‘very cold’. It denies that the geographical meaning will be perceived by the average consumer and submits that its mark is highly distinctive. My own view accords with the applicants. I consider it likely that the vast majority of average consumers will be aware of the geographical meaning of the word Baltic (of or relating to the Baltic states). The resulting message perceived by the average consumer, when faced with the opponent’s mark on its goods, is therefore likely to be that they come from the Baltic region/states. In my view, the proportion of consumers who do not perceive the mark in this way is likely to be so small so as not to represent a significant proportion of average consumers.

35) With the above conclusion in mind, I find that the words ‘BALTIC HONEY’ are descriptive of ‘raw honey’ which comes from the Baltic states. The word ‘SHOP’ adds some limited distinctiveness to those words. I find that the unit ‘BALTIC HONEY SHOP’, as a whole, is low in distinctiveness in relation to ‘raw honey’. Further, the honey dipper device is non-distinctive, of itself, in relation to ‘raw honey’ for obvious reasons and the stylised circular device elements are fairly banal. Overall, I find that the opponent’s earlier mark has a low degree of inherent distinctiveness in relation to ‘raw honey’.

36) Turning to the inherent distinctiveness of the mark in relation to the other earlier goods, the opponent’s ‘confectionery’, ‘treacle’ and ‘herbal tea’ are all goods which may have honey as a principal or key ingredient e.g. honey based sweets, honey citron tea or honey treacle. I find that the earlier mark is low in distinctiveness for these goods, for similar reasons to those given above.”

20. The Opponent submitted that there was no evidence to support the finding that the UK public would perceive the earlier mark as purely descriptive of geographical origin when used in relation to the Appellant's goods. Rather than there being any evidence that honey produced in the Baltic region would be described as Baltic honey, the Opponent submitted that its evidence showed that honey is usually described by type, such as Manuka, Buckwheat or Honeydew, rather than by geographical location.
21. While it is correct that there were examples of honey being described by type in that way in the evidence, there were also examples in the Opponent's own evidence of honey being described by geographical origin, such as The London Honey Company's 'British Honey' and '100% Pure New Zealand MGO 70+ Monofloral Manuka Honey'. The Respondents' evidence included print outs from websites selling honey described as British, Bulgarian, Canadian, Greek, Mexican, Spanish and Zambian honey in their names, as well as one example of honey sold as 'Natural Baltic Honey – Buckwheat Honey'.
22. The Opponent also submitted that there was no evidence to support the contention that the Baltic region is well known to the relevant UK public for producing honey and related goods. In my view, the lack of such evidence did not prevent the Hearing Officer from being entitled to conclude that the relevant public would perceive the use of the words BALTIC HONEY in the earlier trade mark as descriptive of honey originating from the Baltic regions. Even if the Baltic regions are not well known for producing honey, it is a perfectly reasonable assumption that someone seeing honey described as BALTIC HONEY would presume that the honey came from the Baltic region. As can be seen from paragraph 34 of the Decision set out above, the Opponent argued that the word BALTIC has more than one meaning, and could also mean "very cold". However, it is not obvious why honey would be described as being very cold, and the alternative geographical meaning of the word BALTIC is far more likely. I therefore agree with the Hearing Officer when she said that the proportion of consumers who would not perceive the mark in the geographical sense was *"likely to be so small so as not to represent a significant proportion of average consumers"*.
23. The Opponent also argued that the Hearing Officer focused too closely on the word BALTIC and failed to give due weight to the other elements of the earlier trade mark, including HONEY SHOP and the graphics, thereby failing to consider the earlier trade mark as a whole in her assessment of its inherent distinctiveness.
24. I do not accept this criticism of the Hearing Officer. She reminded herself that she was required to make an *"overall assessment"* by setting out the following paragraphs from the CJEU's

judgment in Case C-342/97 *Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV* in paragraph 32 of her Decision:

*“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).”.*

25. Having considered the effect of the word BALTIC in the earlier trade mark, she then dealt with the other elements of the earlier trade mark in relation to ‘raw honey’ in paragraph 35 of her Decision (which I set out above). Her use of the word “overall” in the concluding sentence demonstrates that she had considered the earlier trade mark as a whole. She then considered the inherent distinctiveness of the earlier trade mark in respect of the other goods in paragraph 36, and reached the same conclusion for similar reasons to those she had given in respect of ‘raw honey’.
26. Accordingly, I find that the Hearing Officer did not err in her assessment of the inherent distinctiveness of the earlier trade mark, so the appeal fails under Ground 2.
27. Ground 3: Enhanced distinctiveness through use
28. The Appellant submitted that the Hearing Officer failed properly to assess the evidence of use that had been filed by the Appellant in concluding that the earlier trade mark had not acquired enhanced distinctiveness through use.

29. The Hearing Officer summarised her conclusions on this issue in paragraphs 51 to 53 of her Decision:

“51) There is no evidence showing use in relation to ‘herbal tea, treacle or confectionery’. However, it is clear that jars of honey have consistently been sold since around 2014 bearing the earlier mark, initially by Mr Kumpelis as a sole trader, then later by BHL through its own website or, on the websites of others such as Amazon and ebay. However, the sales figures provided appear to me to be small. Mr Kumpelis states that he does not know the size of the relevant market. However, it is noted that the article in his own evidence entitled ‘What is raw honey?’ indicates that the UK consumes around 40,000 tonnes of honey per year. In this connection, Mr Chockevičius states the following:

‘The UK Honey market

The honey market in the United Kingdom is huge with lots of competitors and online retailers. I do not know the size of the honey market, but I note that the article Mr Kumpelis relies on at pages 1-7 of his exhibit says that in the UK we consume 40,000 tonnes of honey a year. There are just over 1016 kilos in a tonne which would make the annual UK consumption of honey over 40,600,000 kilos. Looking at the past 3 years sales for the BALTIC HONEY SHOP, it has a negligible market share (40,000 kilos out of 121,000,000 kilos sold). Even if only 5% of the sales are of raw natural honey as the article implies, the BALTIC HONEY SHOP’s market presence is still negligible.’

52) The opponent did not respond to this other than to maintain, in its submissions in lieu, that the sale of 40,000 jars of honey demonstrates enhanced distinctiveness. I agree with the applicants that the market share held by the opponent in relation to the honey market at large and indeed, the raw honey market, at the relevant dates (the filing dates of the contested marks), appears to have been very small for the reasons Mr Chockevičius gives above (bearing in mind that the opponent’s evidence indicates that each jar of the honey it has sold appears to weigh 1 kilo). Furthermore, the amount spent on advertising per year, of £4000, is also extremely small and there is little shown in the evidence of the nature of any advertising aside from posts on Facebook. The article from www.naturaler.co.uk from August 2021, describing the opponent’s honey as one of the most popular on the UK market, is also dated well

after the filing dates of the contested marks and, as such, I do not consider that it sheds light on the likely position at those dates.

53) I find that the evidence before me does not show that the earlier mark's inherent distinctiveness had been enhanced through use at the relevant dates in relation to any of the goods covered by it."

30. The Appellant correctly asserted that market share is only one of the factors to be taken into account when determining whether a trade mark has acquired enhanced distinctiveness through use. The Appellant submitted that the Hearing Officer apparently based her finding of no enhanced distinctiveness solely on the lack of market share in the relevant sector, without considering the other factors, such as the extent of promotional activity undertaken, the general exposure of the earlier trade mark, its longevity, and the fact that a mark can acquire distinctive character even though it is used by a small trader, as opposed to a large multinational company.
31. I do not agree with that assessment. In paragraphs 38 to 49 of the Decision the Hearing Officer summarised the Appellant's evidence. In addition to sales figures, it described how its products had been sold on its website and on other third party retail sites such as www.amazon.co.uk, www.ebay.co.uk and www.shopify.co.uk both historically, going back to 2014, and at the date of preparation of the evidence. It also included customer reviews, advertising spend of £4,000 (mostly on Google AdWord Campaigns), advertising on Facebook and Twitter since 2014, and advertising on Instagram since October 2018 (including website printouts).
32. Since market share is one of the factors to be taken into account, the Hearing Officer was entitled to take into account her conclusion that the Appellant's market share (which the Appellant had been unable to confirm himself) was very small based on the extrapolation of the sales figures. She expressly referred to the other factors in paragraph 52 such as advertising spend, which she found to be very small, the "little shown" in the evidence of the nature of any advertising, and declined to place any weight on an article about the Appellant's honey as it was dated well after the filing dates of the contested trade marks.
33. I therefore find that the Hearing Officer did not err in her assessment of the relevant factors, nor were her findings based on the evidence before her findings that no reasonable tribunal could have reached.
34. The appeal therefore fails under Ground 3.

Ground 4: Assessment of the similarities of the respective trade marks

35. The Appellant submitted in its Skeleton Argument that the Hearing Officer's finding that the common element BALTIC was descriptive and/or non-distinctive in relation to the relevant goods and therefore would not be paid much attention by the average consumer wrongly led her to the finding that the trade marks were not sufficiently similar. In addition, it was submitted that she also failed properly to assess the similarity of the marks in line with the established legal principles by finding a low degree of aural similarity between BALTIC HONEY SHOP and BEE BALTIC "*despite the fact that BALTIC is the longest word in both marks, forms the dominant element of the marks and will undoubtedly be emphasised when pronounced by the average consumer*". It was said that the Hearing Officer essentially discounted the commonality of the word BALTIC because of her finding of it being descriptive and/or non-distinctive, and that had she not fallen into error by discounting the importance of BALTIC in the respective marks, she would have found there to be a medium, if not high, degree of visual, aural and conceptual similarity between the marks.
36. I set out below the paragraphs from the Decision in which the Hearing Officer assessed the similarity of the respective marks:

"Overall impressions

56) The opponent's mark is made up of a number of elements. The first is the words 'BALTIC HONEY SHOP' (I consider that those three words naturally combine to form a unit for reasons already given). There is also, as noted earlier, the honey dipper device (a honey dipper being lifted out of honey) and the stylised circular device elements. In my view, it is the words 'BALTIC HONEY SHOP' and the honey dipper device (the latter having substantial visual impact, despite its lack of distinctiveness) that dominate the overall impression of the mark and roughly equally so. The circular device elements have the least dominance.

57) The first application naturally breaks down in to two separate elements. The first is a stylised representation of a bee surrounded by a plain hexagonal border. The second element is the words 'bee baltic'. In my view, those two elements contribute equally to the mark's overall impression given, in particular, their relative size and positioning.

58) *The second application consists of the words BEE BALTIC alone. I consider that the overall impression of the mark rests in the whole, with the word BEE appearing to qualify the following word, BALTIC.*

Similarity between the earlier mark and the first application

59) *Visually, the sole point of coincidence between the marks is that both contain the word BALTIC. In all other respects they are visually different. The additional words within the respective marks are very different and so too are the respective device elements. Viewing the marks as wholes, they are not visually similar or, if I am wrong, any similarity stemming from the common inclusion of the word BALTIC is very low indeed.*

60) *Aurally, the respective device elements in the marks will not be pronounced. The comparison is therefore between BALTIC HONEY SHOP on the one hand and BEE BALTIC on the other. Both marks clearly contain the word BALTIC which will be pronounced identically. However, that word appears first in the opponent's mark, followed by the two words HONEY SHOP. In the first application, the word BALTIC comes second, after the word BEE. Overall, I find a low degree of aural similarity between the marks.*

61) *Conceptually, I find that the opponent's mark immediately evokes the concept of a shop which sells Baltic honey. The honey dipper device merely reinforces that message. The words BEE BALTIC in the first application could be perceived as meaning 'to be Baltic' or as meaning 'a Baltic Bee' (I think the latter is more likely given the device of the bee which tends to lead one to perceive the latter concept more than the former). Either way, the marks are conceptually similar only to the general extent that they refer to something Baltic i.e. something which comes from the Baltic region/states. Overall, I consider there to be a medium degree of conceptual similarity between the marks.*

Similarity between the earlier mark and the second application

62) *Visually, again the only point of coincidence is the word BALTIC. None of the device elements of the opponent's mark are present in the second application and the other words, aside from the word BALTIC, in the respective marks are visually very different. I find there to be a very low degree of visual similarity between the second application and the earlier mark.*

63) Aurally, my findings in paragraph 60 above, apply equally to the second application. There is a low degree of aural similarity.

64) Conceptually, similar considerations apply as to those expressed in paragraph 61 above, with the exception that the device element of the bee is not present in the second application and therefore does not come into play in the conceptual comparison here. Nonetheless, I consider that the two possible meanings given in that paragraph are still the most likely way in which the second application will be perceived by the average consumer. I find a medium degree of conceptual similarity between the marks.”.

37. I have already found that the Hearing Officer did not fall into error in concluding that the word BALTIC would not be paid much attention by the average consumer due to its likely perception as an indication of geographical origin. With that in mind, I do not consider that the Hearing Officer made any error in her assessment of the visual, aural and conceptual similarities.
38. In terms of visual similarity, her statements in paragraph 59 of the Decision accurately describe the visual similarities and differences and her conclusion that they are not visually similar or, if she was wrong on that, any similarity stemming from the common inclusion of the word BALTIC is very low indeed, is one that a reasonable tribunal could have reached.
39. On aural similarity, the Appellant argued at the hearing before me that the Hearing Officer was influenced by her finding of descriptiveness/non-distinctiveness in the word BALTIC in concluding that there was only a low degree of aural similarity between the marks. However, nowhere in paragraph 60 is there any reference to the conceptual meaning of the word BALTIC so I reject that criticism of the Hearing Officer. I consider that her finding of only a low degree of aural similarity is one which a reasonable tribunal could have reached and is not one that I should interfere with, even if others (as Mr Wood for the Respondent conceded at the hearing before me) may have found a medium degree of aural similarity due to the common presence of the word BALTIC.
40. On conceptual similarity, I agree with the Hearing Officer’s findings for the reasons I have already given on the likely perception of the conceptual meaning of the word BALTIC by the average consumer.

41. Her findings in respect of the Second Trade Mark were consistent with her findings in respect of the First Trade Mark, so I find no error in her assessment of the similarities between the earlier mark and the Second Trade Mark for the same reasons.
42. I therefore find that the Hearing Officer did not err in her assessment of the similarities between the respective marks, and so the appeal fails under Ground 4.

Ground 5: Likelihood of direct or indirect confusion

43. The Fifth Ground of Appeal was that the Hearing Officer erred in finding no likelihood of direct or indirect confusion as a result both of an incorrect application of the relevant legal principles and *“on the basis of the culmination of her incorrect findings on inherent distinctiveness and enhanced distinctiveness of the Appellant’s Mark, and the level of similarity between the respective marks”*.
44. The Hearing Officer set out her findings on direct confusion in paragraphs 68 and 69 of her Decision, having previously set out the legal principles in paragraph 65, as follows:

“65) I must now feed all of my earlier findings into the global assessment of the likelihood of confusion, keeping in mind the following factors: i) the interdependency principle, whereby a lesser degree of similarity between the goods may be offset by a greater similarity between the marks, and vice versa (Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc); ii) the principle that the more distinctive the earlier mark is, the greater the likelihood of confusion (Sabel BV v Puma AG), and; iii) the factor of imperfect recollection i.e. that consumers rarely have the opportunity to compare marks side by side but must rather rely on the imperfect picture that they have kept in their mind (Lloyd Schuhfabrik Meyer & Co. GmbH v. Klijsen Handel B.V).

...

68) I will first consider the likelihood of direct confusion between the earlier mark and the second application. I have found that some of the respective goods are identical, some are similar to a medium degree. However, the earlier mark has only a low degree of distinctive character and the respective marks share only a very low degree of visual similarity, a low degree of aural similarity and a medium degree of conceptual similarity. Weighing all of these factors, I find that the average consumer is unlikely to mistake one mark for the other in relation to any of the goods at issue, despite the low to medium degree of attention that is likely to be paid [sic] during the

purchase (increasing the effects of imperfect recollection). There is no likelihood of direct confusion.

69) The likelihood of confusion between the earlier mark and the first application is even lower. This is because all of the same factors (as set out in the preceding paragraph) are applicable in assessing the matter in relation to the first application, with the exception that there is even less visual similarity between the earlier mark and the first application than between the former and the second application i.e. I found them to be not visually similar overall (or, if I am wrong, visually similar to a very low degree). Bearing this in mind, I find that the average consumer is unlikely to mistake the earlier mark for the first application or vice versa in relation to any of the goods at issue.”.

45. The Appellant submitted that the Hearing Officer wrongly assessed the likelihood of confusion on the “*low to medium*” degree of attention paid by the average consumer, rather than on the lowest degree of attention paid by the average consumer. The Hearing Officer’s reference to “*low to medium*” was a reference back to her findings in paragraph 31, where she said as follows:

*“31) The average consumer for the vast majority of the goods at issue is a member of the general public. However, goods such as ‘Bee pollen being raw material for industrial use’ are more likely to be purchased by businesses in the manufacture of other goods or for some other industrial purpose. The cost of the goods may vary but I would not expect any of the goods to be particularly expensive. For instance, a jar of unprocessed, raw honey may be higher than a jar of processed honey but even the former can be described as a low-cost purchase. The average consumer may take into account factors such as type, flavour, ingredients, whether the goods are processed or not and/or health benefits in relation to the goods at issue but generally speaking, I find that a **low to medium** level attention is likely to be paid. The goods are likely to be sought out visually on websites and/or bricks and mortar retail establishments. However, I do not discount the potential for aural use of the marks through verbal recommendations and/or discussions with sales representatives, for example.” (emphasis added).*

46. The Hearing Officer may have used the expression “*low to medium*” to suggest that the average consumer would pay a varying degree of attention, ranging from low for some goods to medium for others. Alternatively, she may have intended it to be a level of attention

equidistant between low and medium. There is nothing in the Decision to suggest that, on the former interpretation, the Hearing Officer did not consider and apply the lowest end of that range in her assessment. In any event, I was reminded of the observations of Iain Purvis KC sitting as the Appointed Person in *Greybox*, BLO/106/20 when he said at paragraph 23:

“This takes issue with the Hearing Officer’s view that the conceptual similarities between the marks were at a ‘fairly low level’. It is said that the conceptual similarity should have been found to be at least at a ‘medium’ level. I do not consider there is any great value in debating differences between ‘fairly low’ and ‘medium’ degrees of similarity in the context of the overall assessment of likelihood of confusion. Certainly, I do not consider that such fine distinctions can properly be characterized as errors of principle. They are at best simply disagreements about the precise ‘weight’ to be given to a factor in the overall assessment, something which the Courts have consistently rejected as a proper ground of Appeal.”.

47. The Appellant also submitted that the Hearing Officer assessed whether the marks themselves would be directly confused, when the correct legal approach for direct confusion was to consider whether the average consumer believed that they were buying the same product from the same origin, applying the principle of imperfect recollection. As can be seen from paragraph 65 of the Decision set out above, the Hearing Officer expressly referred to the need for her to take into account imperfect recollection. Further, in paragraph 68 (when she considered similarities between the earlier trade mark and the Second Trade Mark) she commenced the sentence which set out her conclusion by saying *“Weighing all of these factors”*, and in paragraph 69 (which considered the First Trade Mark) she again referred to *“all of the same factors”*. There is nothing to suggest that the Hearing Officer failed to take imperfect recollection into account when she reached her conclusions in paragraphs 68 and 69.
48. Finally, the Appellant submitted that the alleged descriptiveness or low distinctiveness of an earlier mark is just one of the factors to be taken into account in assessing the likelihood of direct confusion, which the Hearing Officer gave undue weight to, and that the BALTIC element was the dominant element in each mark and cannot be regarded as merely negligible. Again, I do not see anything in the Decision which suggests that the Hearing Officer gave undue weight to that factor, and I would refer again to what I said in the previous paragraph about the Hearing Officer’s express references to *“all of these factors”* in reaching her conclusions on direct confusion.

49. With respect to indirect confusion, the Appellant submitted that the Hearing Officer had taken the wrong approach at law, because the three categories of indirect confusion set out in *LA Sugar* were not intended to be exhaustive, and that there would be indirect confusion where the average consumer would consider products bearing the contested marks as originating from the same proprietor as products bearing the earlier trade mark, which the Appellant submitted was the case here. The Hearing Officer's findings in relation to the lack of distinctiveness of the earlier mark and the low level of similarity and her alleged failure to give due weight to all global factors were said to have been significant contributing factors to her finding of no indirect confusion.

50. The Hearing Officer set out her findings on indirect confusion as follows:

"70) I now turn to consider whether there is a likelihood of indirect confusion. In L.A. Sugar Limited v By Back Beat Inc, Case 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)".

71) 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.

72) Furthermore, it is not sufficient that a mark merely calls to mind another mark: Duebros Limited v Heirler Cenovis GmbH, BL O/547/17. This is mere association not indirect confusion.

73) The common element between the earlier mark and the [sic] each of the applicants' marks is the word 'BALTIC'; this is not a word which is "so strikingly distinctive" for reasons already explained. Neither of the applicants' marks simply adds "a non-distinctive element to the earlier mark". As to whether the marks at issue are likely to fall within Mr Purvis' category (c), I do not consider that either of the applicants' marks would be considered to be logical and consistent with a brand extension of the earlier mark. I also cannot see that there is likely to be any other kind of mental process on the part of the consumer that is likely to lead them to believe that the respective goods come from the same or linked undertaking(s). To my mind, the very most that can be said is that the common inclusion of the word 'BALTIC' may result in one mark bringing to mind the other mark but, even then, only in such a way that the average consumer is merely likely to believe that unrelated undertakings both happen to be selling goods from the Baltic region/states."

51. I reject the suggestion that the Hearing Officer limited her review to the three categories of indirect confusion set out in *LA Gear*. It is correct that, while the Hearing Officer referred to the Court of Appeal's judgment in *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*, she did not expressly refer to the following paragraph from Arnold LJ's judgment, which immediately followed his quotation of paragraphs 16 and 17 from *LA Gear* set out above:

"12. This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition. For example, one category of indirect confusion which is not mentioned is where the sign complained of incorporates the trade mark (or a similar sign) in such a way as to lead consumers to believe that the goods or services have been co-branded and thus that there is an economic link between the proprietor of the sign and the proprietor of the trade mark (such as through merger, acquisition or licensing)."

52. However, that paragraph immediately precedes the paragraph from Arnold LJ's judgment, which the Hearing Officer summarised in paragraph 71 of her Decision, so it would be surprising if paragraph 12 were not also in her contemplation. Indeed, it is apparent from paragraph 73 of her Decision that the Hearing Officer was alert to the need not to limit her consideration to the three examples given in *LA Gear* since, having gone through each of them and rejected their application in this case, she continued:

"I also cannot see that there is likely to be any other kind of mental process on the part of the consumer that is likely to lead them to believe that the respective goods come from the same or linked undertaking(s)."

53. In my judgment, this sentence demonstrates that the Hearing Officer did not limit her deliberations to the three categories set out in *LA Gear*, as the Appellant alleged. In light of my earlier rejection of the other grounds of appeal, there was no error by the Hearing Officer in concluding that consumers would not believe that the respective goods came from the same or a linked undertaking so that there was no likelihood of indirect confusion.

54. The appeal therefore fails under Ground 5.

Ground 6: Assessment of the earlier mark's reputation and the finding of no link

55. I set out below the paragraphs from the Hearing Officer's Decision which dealt with reputation and a link for the purposes of the opposition under s.5(3) of the Act:

“Reputation

75) The evidence before me shows use only for honey prior to the relevant dates. Bearing in mind my earlier comments regarding the use that has been made of the earlier mark for those goods and, in particular, the small sales figures (for the general honey market and the ‘raw honey’ market) and advertising expenditure, I find that the earlier mark did not have the requisite reputation at the relevant dates, as per Case C-375/97, General Motors [1999] ETMR 950. The grounds under section 5(3) must therefore fail. However, in case I am wrong, I will go on to consider the issues of link and damage.

Link

76) Whether the public will make the required mental ‘link’ between the opponent’s mark and the first and/or second applications must take account of all relevant factors. The relevant factors identified in Case C-252/07, Intel [2009] ETMR 13 are:

i) The degree of similarity between the conflicting marks

I have already assessed this under section 5(2)(b). Insofar as the first application is concerned, there is no visual similarity or, if I am wrong, only a very low degree of visual similarity, a low degree of aural similarity and a medium degree of conceptual similarity. Turning to the second application, there is a very low degree of visual similarity, a low degree of aural similarity and a medium degree of conceptual similarity.

ii) The nature of the goods or services for which the conflicting marks are registered, or proposed to be registered, including the degree of closeness or dissimilarity between those goods or services, and the relevant section of the public

The respective goods are either identical or similar to a medium degree for both of the applications. They [sic] relevant public is the general public who will pay a low to medium degree of attention during the purchase.

iii) The strength of the earlier mark’s reputation

If I am wrong to have found that the earlier mark did not have a qualifying reputation at the relevant dates for honey or raw honey, then any such reputation must be small.

iv) The degree of the earlier mark's distinctive character, whether inherent or acquired through use

The earlier mark has a low degree of distinctiveness even allowing for the use that has been made of its [sic] prior to the relevant dates.

v) Whether there is a likelihood of confusion

There is no likelihood of confusion.

77) Having considered all the above factors, I find that the relevant public would not make a link between the earlier mark and the applicants' marks. Further, even if I am wrong, and those factors would lead to a link, any such link would merely remind consumers of another mark using the word 'BALTIC' to designate the geographical origin of the goods. Such a link is incapable of giving rise to any unfair advantage. That is fair competition, not taking unfair advantage. Further, any such link is also not capable of causing detriment to the distinctiveness of the earlier mark because that link would not cause confusion as to the source of the respective goods. Therefore, I see no reason why the relevant public would have more difficulty identifying the goods marketed under the opponent's mark."

56. With respect to the assertion that the Hearing Officer should have found that the Appellant's mark had the requisite reputation pursuant to s.5(3) of the Act, the Appellant relied on its submissions under Ground 3. Since there was no evidence of use of the earlier mark in respect of any goods other than raw honey before the Hearing Officer, her conclusion that the earlier mark did not have the requisite reputation in respect of goods other than honey cannot be questioned. With respect to her review of the evidence relating to the Appellant's use of the earlier mark in relation to honey for the purposes of demonstrating an enhanced reputation through use, I rejected the Appeal under Ground 3 on the basis that her findings, based on the evidence before her, were findings which a reasonable tribunal could have reached. For the same reasons, based on her review of the evidence of use, and in particular her conclusions that the sales figures were "small", the market share for both honey and raw honey appeared to be "very small", that the advertising spend was "extremely small" and that there was "little shown in the evidence of the nature of any advertising aside from posts on Facebook", it would not justify my interference with her conclusion that the Appellant had not demonstrated the requisite reputation.

57. With respect to the Hearing Officer's finding that there was no link, Ms Watkinson submitted at the hearing before me that the Hearing Officer had been influenced by her "*incorrect finding*" of the way in which the UK public would perceive the word BALTIC when used in relation to honey, and that any reasonable hearing officer would recognise that a link would arise in the mind of the average consumer who was faced with two honey products, both sold under a mark containing the word BALTIC. I reject that criticism for the reasons I have given earlier when I found no error by the Hearing Officer in concluding that the average consumer would perceive the word BALTIC as descriptive of the geographical region. I do not consider that the Hearing Officer's analysis set out in paragraphs 76 and 77 of the Decision contains any error of principle.

58. The appeal therefore fails under Ground 6.

Ground 7: Misrepresentation

59. In reliance on the Appellant's ground that the Hearing Officer erred in finding no misrepresentation for the purposes of the opposition under s.5(4)(a) of the Act, Ms Watkinson submitted to me at the hearing that this error was based on the Hearing Officer's earlier incorrect finding that the word BALTIC would be viewed as non-distinctive when used in relation to honey and honey-related products. I have already rejected the appeal against that finding, so I see no reason to interfere with the Hearing Officer's conclusion that it was unlikely that a substantial number of the Appellant's customers would be misled into purchasing any of the Respondents' goods covered by either the First or the Second Trade Mark in the belief that they were those of the Appellant for the same reasons that the Hearing Officer gave when considering the likelihood of confusion.

60. The appeal therefore fails under Ground 7.

Ground 1: Assessment of the degree of similarity between 'raw honey' and 'honey substitutes'

61. Before I come to Ground 8, I will briefly set out my decision on Ground 1. While it has no bearing on the outcome in light of the appeal having failed on all of the other grounds, I will deal with since it was argued before me.

62. Under this ground, the Appellant alleged that the Hearing Officer made an error in applying the law when she found that 'raw honey' only had a medium degree of similarity to 'honey substitutes'.

63. The Hearing Officer set out her findings on this issue in paragraph 25 of her Decision:

“25) While their ingredients may differ, the nature of ‘raw honey’ and ‘honey substitutes’ may be similar and their intended purpose and methods of use will be the same. They are also likely to be in competition and share trade channels. I find a medium degree of similarity between the applicants ‘honey substitutes’ and ‘raw honey’.”.

64. The Appellant submitted that in light of the Hearing Officer’s findings in that paragraph, she should have determined that there was a high, as opposed to medium, degree of similarity between ‘raw honey’ and ‘honey substitutes’. At the hearing before me, Ms Watkinson submitted that as a substitute for honey, *“it must by its very nature be highly similar to raw honey”*. In my view, that is too narrow an interpretation. A honey substitute might be another type of sweetening substance used in cooking in place of honey that bears no resemblance to honey. For example, chickpea water is used as a substitute for egg in vegan cooking, yet the two products are very different from each other.

65. I therefore do not consider that the Hearing Officer’s finding that ‘raw honey’ has a medium degree of similarity with ‘honey substitutes’ is one that no reasonable tribunal could have reached.

66. The appeal therefore fails under Ground 1.

Ground 8: The totality of all errors led to a decision that no reasonable hearing officer could reach

67. Ms Watkinson described this ground as a *“catch-all”* ground, with the seven errors of law and/or principle identified in the other seven grounds having created *“a snowball effect”* causing the Hearing Officer to reach a decision which no reasonable hearing officer could have reached. The Appellant’s Skeleton Argument explained that the cumulative effect under this ground would apply if *“no error is substantial enough in and of itself as to render the Decision unsound”*.

68. Since I have found no error made by the Hearing Officer, the appeal fails under Ground 8.

Conclusion

69. As the Appellant has not identified any material errors in the Hearing Officer’s Decision, the appeal fails and is dismissed.

Costs

70. Since the appeal has been dismissed, the Respondents are entitled to a contribution towards their costs of the appeal. I will therefore make an order that the Appellant pay to the Respondents a contribution of £800 towards the costs of the appeal, in addition to the payment of £2,000 ordered by the Hearing Officer, to be paid within 21 days of the date of this decision.

Simon Clark

The Appointed Person

2 February 2023

Representation:

Appellant: Kendal Watkinson instructed by Humphreys & Co

Respondent: Aaron Wood of Brandsmiths SL Limited