O/0162/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 4148003
IN THE NAME OF ANTHONY BOWMAN
TO REGISTER THE FOLLOWING TRADE MARK:

FREEZY TREATS

IN CLASS 30

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 600003672
BY HJODIES WHOLESALE LTD

BACKGROUND AND PLEADINGS

1. Anthony Bowman ("the applicant") applied to register the trade mark **FREEZY TREATS** ("the applicant's mark") in the UK on 15 January 2025, under number 4148003. It was accepted and published in the Trade Marks Journal on 31 January 2025 in respect of the following goods:

> *Class 30:* *Sweets (candy), candy bars and chewing gum; Candy.*

2. On 29 April 2025, HJodies Wholesale LTD ("the opponent") opposed the application by way of the fast-track procedure. The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 ("the Act") and is directed against all the goods of the application.

3. The opponent relies upon its UK trade mark registration number 4062521, which is shown below ("the opponent's mark"):

4. The opponent's mark was filed on 12 June 2024 and became registered on 11 October 2024. It stands registered for the following goods, all of which are relied upon:

> *Class 30:* *Confectionery; Frozen confectionery; Candies; Sweets (candy), candy bars and chewing gum; Confectionery bars; all of the above limited to freeze dried confectionery.*

5. As the filing date of the opponent's mark is earlier than the filing date of the applicant's mark, the opponent's mark constitutes an earlier mark in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the application, it is not subject to the proof of use requirements specified within section 6A of the Act. As a consequence, the opponent may rely upon all of the goods identified without having to establish genuine use.

6. In its statement of grounds, the opponent contends that the applicant's mark is highly similar to the opponent's mark, and that the parties' goods are both confectionery products in class 30. On this basis, it argues that there exists a likelihood of confusion, including a likelihood of association

7. The applicant filed a counterstatement denying the ground of opposition.

8. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1 to 3 of rule 20 of the Trade Mark Rules 2008 but provides that rule 20(4) shall continue to apply. Rule 20(4) stipulates that "the Registrar may, at any time, give leave to either party to file evidence upon such terms as the Registrar thinks fit". The net effect of these changes is to require the parties to seek leave in order to file evidence in fast-track oppositions. No leave was sought in respect of these proceedings.

9. The opponent is professionally represented by Trama Legal s.r.o. and the applicant is represented by Kyle Tidey.

10. Rule 62(5) (as amended) states that arguments in fast-track proceedings shall be heard only if (i) the Office requests it, or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary. Only the applicant filed written submissions. This decision is taken following a careful perusal of the papers, keeping all submissions in mind.

Relevance of EU law

11. 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.

Section 5(2)(b)

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

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

13. Section 5A states: […] "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."

14. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*[1]*:*

(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

[1] [2025] UKSC 25

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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 greater 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; and

(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 and services

15. In *Gérard Meric v OHIM*[2], the General Court ("GC") confirmed that even if goods are not worded identically, they can still be considered identical if one term falls within the scope of another (or vice versa):

> "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."

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

The opponent's goods	**The applicant's goods**
Class 30: Confectionery; Frozen confectionery; Candies; Sweets (candy), candy bars and chewing gum; Confectionery bars; all of the above limited to freeze dried confectionery.	*Class 30: Sweets (candy), candy bars and chewing gum; Candy.*

17. In its statement of grounds, the opponent highlights that the parties' goods are both confectionery products in class 30, and that both parties' goods are mainly candies. In his submissions, the applicant "accepts the goods are alike by reason of their use and purpose (confectionary), price point and their similar distribution channels". However, he also submits that "this similarity is lessened by the fact that freeze dried confectionary is a specialised product with the confectionary market".

Sweets (candy), candy bars and chewing gum

18. The opponent's narrower term *sweets (candy), candy bars and chewing gum; all of the above limited to freeze dried confectionery* is incorporated within the applicant's wider term, which is not limited to freeze-dried confectionery. As the opponent's goods are included in the applicant's goods, they are identical under the principle in *Meric.*

[2] Case T-33/05

Candy

19. It is my view that this is the same as the opponent's term *candies; all of the above limited to freeze dried confectionery*, albeit in the singular form rather than the plural. The opponent's term is incorporated by the applicant's wider term (which is not limited to freeze-dried confectionery). I therefore find that they are identical on the principle outlined in *Meric*.

Average consumer and the purchasing act

20. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

21. In *Iconix Luxembourg Holdings SARL v Dream Paris Europe Inc & Anor*, [2025] UKSC 25, the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

> (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
>
> (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
>
> (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
>
> (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and

tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

22. 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*[3], Birss J (as he then was) described the average consumer in these terms:

> "60. The trade mark questions have to be approached from the point of view of the presumed expectations of the average consumer who is reasonably well informed and reasonably circumspect. The parties were agreed that the relevant person is a legal construct and that the test is to be applied objectively by the court from the point of view of that constructed person. The words "average" denotes that the person is typical. The term "average" does not denote some form of numerical mean, mode or median."

23. In the statement of grounds, the opponent highlights that the class 30 goods are "aimed at the public at large" and therefore submits that the level of attention paid by the average consumer "will not be higher than usual". In his submissions, the applicant argues that there is "a high degree of brand and product loyalty in confectionaries" and that the average consumer will pay "a reasonably high degree of attention" when selecting the goods.

24. The average consumer for the goods will be a member of the general public. The cost of purchase is likely to vary a little depending on the quality of the ingredients used within the products, but overall, the goods will be inexpensive. Overall, the goods are likely to be purchased on a frequent basis, and they may be bought by the average consumer either as part of their shop or as an impulse purchase. Several factors may influence the average consumer when purchasing the goods, such as the flavour, ingredients, and quantity. Furthermore, whilst the applicant argues that there is a high

[3] [2014] EWHC 439 (Ch)

degree of brand loyalty amongst consumers, it has submitted no evidence that this is the case or that consumers pay a higher degree of attention when purchasing the goods. I therefore disagree with the applicant and instead find that, based on these factors, the level of attention paid by the average consumer is likely to be low when purchasing the goods, particularly in the case of impulse purchasers.

25. The goods will be selected from general retail outlets or specialist outlets such as sweet shops, or their online equivalents. The customer will self-select the goods from the display shelves, or by selecting the image of their desired product if purchasing online. The visual component will therefore dominate the purchasing process, but I do not discount aural considerations, such as word-of-mouth recommendations from the staff or when placing verbal orders in a shop or over the telephone.

Comparison of marks

26. It is clear from *Sabel BV v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo SA v OHIM*[4]*,* that:

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

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

[4] Case C-591/12P

28. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
	FREEZY TREATS

29. In its statement of grounds, the opponent submits that "the dominant element in both signs is the word "FREEZY", which is identical and forms the principal component of each mark". In his submissions, the applicant accepts that the competing marks share the common element "FREEZY" but argues that the "TREATS" element is distinctive in the applicant's mark.

30. The opponent's mark consists of the word "FREEZY" in a blue bubble-style typeface with a white border around the letters. Beneath this are the words "FREEZE-DRIED" which are smaller in size and appear in orange. There is also some shadowing behind the word FREEZY which appears in shades of blue and red. The word "FREEZY" is defined by the Oxford English Dictionary as a rare word meaning "chilled almost to freezing". Although there may be certain individuals who recognise that it is a dictionary word, I do not consider them to constitute a significant proportion of average consumers. Rather, the average consumer is more likely to view it as an invented word based on the dictionary word FREEZE. Consequently, the word "FREEZY" is likely to be understood as alluding to the fact that the goods are frozen in some way. The compound word "FREEZE-DRIED" will be understood as describing the kind of goods based on its ordinary meaning, i.e. foodstuffs which have undergone the freeze-drying process. On this basis, due to both the larger size and allusive nature of the word (as opposed to being directly descriptive), it is my view that the word "FREEZY" is the dominant and distinctive component within the opponent's mark, and therefore it plays the greatest role in the mark's overall impression. The descriptive word "FREEZE-DRIED", the stylisation, the background shadowing, and the use of colour still contribute, but to a much lower degree.

The applicant's mark is a word mark consisting of the words "FREEZY TREATS" written in upper case. As stated above, the word "FREEZY" will be interpreted by the average consumer as allusive. The word "TREATS" is defined in several ways in the Oxford English Dictionary, including as "something highly enjoyable; a great pleasure, delight, or gratification". It is my view the word "TREATS" will be understood by the average consumer as being a promotional, non-distinctive reference to the class 30 goods. It is my view that the word "FREEZY" is the distinctive component within the applicant's mark, and therefore it plays the greatest role in the mark's overall impression.

Visual comparison

31. In its statement of grounds, the opponent states that the competing marks are visually highly similar, citing that "minor stylistic variations such as differences in font or typographical presentation are insufficient to counteract the similarity arising from the use of an identical dominant element".

32. In his submissions, the applicant highlights the marks' differences. He points to the marks' differing lengths, with the opponent's mark consisting of 17 letters and the applicant's mark consisting of 12 letters. He argues that the stylisation within the opponent's mark and additional words also distinguish the marks from each other, and therefore submits that the marks are visually dissimilar.

33. In addition to this, both parties have referred to the ways that the marks have been used in practice, as in the counterstatement, the opponent provides some examples which it purports are how the applicant is using his mark, and the applicant provides images in his submissions which he claims represent how the opponent is currently using its mark. However, the assessment of visual similarity should not take into account the purported current use of the mark. When assessing the likelihood of confusion in the context of registering a new trade mark, it is necessary to consider all the circumstances in which the mark might be used if it were registered (*O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06). As a result, even though the applicant has suggested the ways in which the opponent's mark is being used, my assessment must not be limited to that. As it would be inappropriate to factor in the current use of the opponent's mark in combination with additional or

differing components when assessing the marks' similarity, I have disregarded this point.

34. The competing marks are visually similar as they both contain the six-letter word "FREEZY" as their first word. The competing marks differ visually as the opponent's mark contains the eleven-letter compound word "FREEZE-DRIED" as its second word, whereas the applicant's mark contains the five-letter word "TREATS" as its second word. The opponent's mark also contains the stylised bubble-style typeface, use of colour, and coloured shading behind the word "FREEZY". However, I bear in mind that the applicant's mark is a word-only mark and so could be used in any typeface. The beginnings of words tend to have more visual and aural impact than the ends[5] which, in my view, results in the visual difference created by the additional words at the end of the applicant's mark being slightly less significant. Bearing in mind my analysis of the marks' overall impressions, I am of the view that the marks are visually similar to a medium degree.

Aural comparison

35. In its statement of grounds, the opponent submits that the marks are aurally highly similar due to the shared word "FREEZY". It also argues that "it is unlikely that the relevant consumers will refer to them using all parts of the mark", meaning that they "will naturally shorten their reference to just one word and in both cases that would be "FREEZY"". In his submissions, the applicant rejects this line of argument and instead submits that the secondary element in the competing marks "will always be reviewed and verbalised by the average consumer when selecting the product in store so as to ensure they identify the relevant product".

36. In *Pensa Pharma v OHIM*[6] the GC at [107] stated that:

> "…the relevant public generally pays greater attention to the beginning of a sign than to the end. In those circumstances, that public will focus its attention on the element 'pensa' in the contested mark and not on the element 'pharma' in that mark. It may be presumed that that public, which generally tends to contract

[5] See paragraph 81 of *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02
[6] Case T-544/12

> long marks consisting of two words into a single word, will not pronounce the word 'pharma', inasmuch as that word is superfluous because of the nature of the goods and services covered by the contested mark, namely pharmaceutical goods and services."

37. Moreover, in *Onyinye Udokporo v Enrich International Ltd*[7]*,* Phillip Johnson as the Appointed Person followed the GC's approach, stating at [18] that:

> "Accordingly, it was open to the Hearing Officer to treat the word "LEARNING" as descriptive in relation to education-related services. And in light of this finding, it was likewise perfectly acceptable for the Hearing Officer to conclude that this element of the mark would not usually be verbalised."

38. It is my view that, as the words "FREEZE-DRIED" and "TREATS" are descriptive or non-distinctive in relation to the class 30 goods, the average consumer would not articulate these words when saying the marks. I am therefore of the view that the marks will be pronounced identically by consumers. However, whilst it is my view that the competing marks are therefore aurally identical, I note that the opponent has only pleaded that the marks are aurally similar, rather than aurally identical. On this basis, given the scope of the opponent's pleaded case, I will proceed on the basis that the marks are aurally similar to a very high degree instead.

39. If I am wrong in this finding, and the words TREAT and FREEZE-DRIED are pronounced, then it is my view that the marks are aurally similar as they both contain the identical two-syllable word "FREEZY" as their first word. Although the opponent's mark also contains the two-syllable compound word "FREEZE-DRIED" and the applicant's mark contains the one-syllable word "TREATS", the impact of these words is reduced due to them appearing at the end of the marks (as per *El Corte Ingles* cited above). Bearing in mind my analysis of the marks' overall impressions, I am of the view that the marks are aurally similar to a medium to high degree.

Conceptual comparison

40. In its statement of grounds, the opponent argues that "a conceptual comparison is not possible as neither sign has a conceptual meaning". In his submissions, the

[7] BL O/1141/25

applicant argues that the competing marks are conceptually dissimilar as the opponent's mark "refers broadly to the freeze-drying process" whereas the applicant's mark "refers to frozen confectionary". He also argues that the term "FREEZY" refers to "anything frozen".

41. The competing marks both contain the word "FREEZY". As previously explained, it is my view that the average consumer is likely to view it as an invented word based on the dictionary word FREEZE, and therefore, the word "FREEZY" is likely to be understood as alluding to the fact that the goods are frozen in some way. The marks differ conceptually due to the inclusion of the additional words "FREEZE-DRIED" (in the opponent's mark) and "TREATS" (in the applicant's mark). Due to the conceptual similarity arising out of the meaning that will be attributed to the word "FREEZY", the marks are therefore conceptually similar to a medium to high degree.

Distinctive character of the earlier trade mark

42. In *Lloyd Schuhfabrik Meyer & Co. GmbH* v *Klijsen Handel BV*[8], the CJEU stated that:

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

[8] Case C-342/97

originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

43. Registered trade marks possess various 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.

44. Although the distinctiveness of a mark can be enhanced by virtue of the use made of it, the opponent has not filed any evidence of use. As such, I have only the inherent position to consider.

45. In its statement of grounds, the opponent does not address the inherent distinctiveness of its mark. In his submissions, the applicant argues that that the "inherent distinctiveness… is low". As previously stated, it is my view that the average consumer is likely to view it as an invented word based on the dictionary word FREEZE, and therefore, the word "FREEZY" is likely to be understood as alluding to the fact that the goods are frozen in some way. As such, I find that the opponent's mark in totality has a low to medium level of inherent distinctiveness.

Global assessment – conclusions on likelihood of confusion

46. 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 set formula for establishing a likelihood of confusion between marks; it is a global assessment where a number of factors need to be borne in mind.

47. One such factor is the interdependency principle, i.e. a lesser degree of similarity between the competing marks may be offset by a greater degree of similarity between the respective goods, and vice versa. As mentioned above, it is necessary for me to keep in mind the distinctive character of the opponent's mark, the average consumer for the goods, and the nature of the purchasing process. In doing so, I must be mindful

that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

48. In its statement of grounds, the opponent argues that the marks' visual and aural similarities mean that the applicant's mark "is, at the very least, likely to lead the relevant public (average consumers) to believe that the applicant's goods derive from the opponent or an economically linked entity". In his submissions, the applicant submits that there will be no likelihood of confusion due to the inclusion of the differing "TREAT" and "FREEZE-DRIED" elements.

49. Earlier in this decision I found that the applicant's goods are identical to the opponent's goods. The average consumer of goods will be the general public. The average consumer is likely to pay a low degree of attention when purchasing the goods. The goods will primarily be selected through visual means, although I do not discount an aural element to the selection process. I have found the marks to be visually similar to a medium degree, aurally similar to very high degree (in line with the opponent's pleadings) if the non-distinctive elements are not articulated, or a medium to high degree of aural similarity if the non-distinctive elements are articulated, and conceptually similar to a medium to high degree. The earlier mark has a low to medium level of inherent distinctive character.

50. Taking all these factors into account and being mindful of the role that imperfect recollection may play, I consider that the marks are likely to be misremembered or inaccurately recalled for one another. It is my view that the average consumer, when paying a low amount of attention when purchasing the goods, may only recall the most distinctive elements of the marks, being the word "FREEZY". It is my view that this would therefore lead to direct confusion. The identical nature of the goods is another factor in favour of this finding.

51. In case I am wrong in this finding, I now go on to consider indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*[9], Mr Iain Purvis Q.C., as the Appointed Person, explained that:

[9] BL O/375/10

“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).”

52. I bear in mind that these categories are not intended to be an exhaustive list. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors*[10], Arnold LJ approved Mr Purvis's formulation but added:

> "13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/219/16) at [16] 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'. I would prefer to say that there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion."

53. It is not sufficient that a mark merely calls to mind another mark (as per *Duebros Limited v Heirler Cenovis GmbH*[11]). This is mere association not indirect confusion. A finding of indirect confusion should not be made merely due to a shared element within marks. As per *L.A. Sugar Limited v By Back Beat Inc*[12] (set out above), indirect confusion should be identified in cases where the average consumer is likely to notice the differences between the competing marks but assume an economic link between the two undertakings based on their similarities.

54. It is my view that, even if consumers recognise the inclusion of the descriptive words "FREEZE-DRIED" and the other elements such as colour, the coloured shading, and the stylised typeface within the opponent's mark, and the non-distinctive word "TREATS" in the applicant's mark, these differences appear consistent with a brand variant or brand extension. This is particularly the case given the identical nature of the goods. The word "FREEZY" is the most distinctive element of the competing marks. I am of the view that consumers are likely to view the addition of the word "TREATS" within the applicant's mark as being a brand variant of the opponent's mark. It is not uncommon for brands to use word-only and logo versions of marks, in line with the stylisation used in the earlier mark. Consequently, I find that there exists the likelihood of indirect confusion.

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[10] [2021] EWCA Civ 1207
[11] BL O/547/17
[12] BL O/375/10

Conclusion

55. The opposition under section 5(2)(b) has been successful in its entirety. Subject to any successful appeal, the application will be refused registration.

Costs

56. The opponent has been successful and is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. As the opposition was brought under the fast-track procedure, the figures are capped. In the circumstances I award the opponent the sum of £350 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Filing a notice of opposition: £250

Official fees: £100

57. I therefore order Anthony Bowman to pay HJodies Wholesale LTD the sum of £350. The above sum should be paid within twenty-one days of the expiry of the appeal period or, if there is an appeal, within twenty-one days of the conclusion of the appeal proceedings.

Dated this 26th day of February 2026

K SERRAVALLE

For the Registrar