

O/0361/26

TRADE MARKS ACT 1994

IN THE MATTER OF REGISTRATION NO. UK00003873836  
IN THE NAME OF GRACE STONE  
FOR THE FOLLOWING TRADE MARK:

**Turbo Fresh**

IN CLASS 5

AND

AN APPLICATION FOR A DECLARATION OF INVALIDITY  
UNDER NO. CA000508415 BY  
BOOSTNATICS, LLC

## Background and pleadings

1. Grace Stone (“the proprietor”) is the owner of the trade mark shown on the cover page of this decision (“the contested mark”). The contested mark was filed on 02 February 2023 and registered on 21 April 2023 in respect of the following goods:

Class 5: Car air freshener; Car air fresheners; Air fresheners; Air freshener sprays; Air freshener refills; Air deodorizer; Air deodoriser sprays; Air deodorants; Car deodorants.

2. On 7 February 2025, Boostnatics, LLC (“the cancellation applicant”) applied to invalidate the contested mark in respect of all goods for which it is registered. The invalidation is brought under section 47 of the Trade Marks Act 1994 and is based upon section 5(2)(b). The cancellation applicant relies upon the following trade mark:

TURBO (“the earlier mark”)

UK registration no: UK801371706

Filing date: 16 August 2017; registration date: 22 January 2019

Priority date: 21 February 2017 (USA)

Relying on all goods being:

Class 3: Fragrances for automobiles.

3. The earlier mark is a comparable mark based on an earlier International Registration designating the EU (“IR”). On 1 January 2021, in accordance with Article 54 of the Withdrawal Agreement between the UK and the European Union, the UK IPO created comparable UK trade marks for all right holders with existing IR’s. These comparable marks enjoy the same filing and registration dates as their European counterparts.
4. The cancellation applicant submits that the contested mark and the earlier mark are highly visually, phonetically and conceptually similar and the goods of each

mark are either identical or highly similar. Taking this into account together with the concept of imperfect recollection, the cancellation applicant submits there is a strong likelihood of confusion between the marks, which includes a likelihood of association.

5. The proprietor filed a counterstatement submitting that no likelihood of confusion exists between the earlier mark and the contested mark due to their distinct overall impressions and the products being different.
6. The proprietor is unrepresented. The cancellation applicant is represented by Briffa. Neither party filed evidence in these proceedings. No hearing was requested and neither party filed written submissions in lieu of the same. This decision is taken following a careful perusal of the papers.
7. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

## **PRELIMINARY ISSUES**

### Honest Concurrent Use

8. In its counterstatement, the proprietor pleads the defence of honest concurrent use and submits that both trade marks should be allowed to coexist as they cater to different consumer needs within the automotive sector. The proprietor submits that the contested mark was chosen in good faith and independently developed and there has been no evidence reported of consumer confusion between their brand and the cancellation applicant's brand during the period the contested mark has been in active commercial use in the UK, since July 2023.
9. Whilst a claim of honest concurrent use may be a valid defence to invalidation proceedings brought under section 5(2)(b) of the Act, the proprietor has not filed

any evidence in these proceedings. Consequently, there is nothing before me to prove that there has been use by the proprietor, let alone use that points to the defence of honest concurrent use. I will therefore say no more about this point.

### Statement of Grounds

10. In paragraph 2 of the statement of grounds, the cancellation applicant states:

*“Boostnatics LLC (the “Cancellation Applicant”) holds registered trade mark rights in the UK trade mark no. UK00801371706 for “TURBO” in class 3 and “TINY VC” (the “Earlier Mark”).”*

11. The UK trade mark UK00801371706 is registered for “TURBO” not “Tiny VC”. The reference to “Tiny VC” appears to be an error. I will proceed with this decision on the basis that the earlier mark is “TURBO”, registration UK00801371706 as stated in the Form TM26(l) and as registered, and does not include “Tiny VC”.

### Counterstatement

12. In their counterstatement, the proprietor submits that there are multiple registered trademarks containing the word “TURBO” across different industries, but particularly in the automotive and air freshener sectors. The proprietor submits that this demonstrates that “TURBO” is a widely used term that does not serve as a sole brand identifier and the combination of “TURBO” with other words (such as “Fresh”) is necessary to create a distinctive mark. The proprietor further submits that the UKIPO have previously allowed the coexistence of trademarks with common elements particularly when they are used for different types of products or when additional words create sufficient distinctiveness. While noted, this has no bearing on the assessment I am required to make. While evidence of other marks in the marketplace may assist in demonstrating that a mark has a weakened distinctive character due to its commonplace use, no evidence has been filed to that effect in these proceedings. As a result, the proprietor’s position in respect of this point is entirely unsupported.

13. In their counterstatement, the proprietor submits that their brand “Turbo Fresh” is made, marketed and sold solely within the United Kingdom via their own online store. The proprietor submits that the cancellation applicant is a company based in the United States and primarily sells products internationally via their online platforms. The proprietor states that there is no significant market overlap within the UK that would justify a likelihood of confusion. While noted, this is irrelevant here. When considering the likelihood of confusion under section 5(2)(b) the assessment must be based, in fact, on the concept of 'notional and fair use' which involves carrying out the comparison of the goods based on the specifications before me, not the goods effectively provided by the parties or the way in which they reach the market.<sup>1</sup>

## DECISION

14. Section 5(2)(b) of the Act has application in invalidation proceedings pursuant to section 47 of the Act. Section 47 of the Act reads as follows:

“47. (1) [...]

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground –

(a) there is an earlier trade mark in relation to which the conditions set out in sections 5(1), (2) or (3) obtain, [...]

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

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<sup>1</sup> *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06 at [66] and *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at [22]

(c) the use conditions are met.

(5) Where the ground of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

[...]

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed.

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

“5(2) A trade mark shall not be registered if because-

(a)...

(b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark”.

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

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

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

“(6)(1) In this Act an “earlier trade mark” means –

(a) a registered trade mark or international trade mark (UK) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks.

18. The earlier mark relied upon is deemed an earlier mark in accordance with the above provisions. While it was open for the proprietor to put the cancellation applicant to proof of use of its mark pursuant to section 47(2A) of the Act, it did not. Consequently, the cancellation applicant may rely upon all of its goods as identified.

19. 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 Pairs Europe Inc & Anor*, [2025] UKSC 25:

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

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

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

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

- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may, 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 great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; 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 the goods

20. The parties goods are as follows:

The cancellation applicant's goods	The proprietor's goods
<u>Class 3</u> Fragrances for automobiles.	<u>Class 5</u> Car air freshener; Car air fresheners; Air fresheners; Air freshener sprays; Air freshener refills; Air deodorizer; Air deodoriser sprays; Air deodorants; Car deodorants.

21. When making the comparison, all relevant factors relating to the goods in the specifications should be taken into account, as per *Canon*, where the Court of Justice of the European Union ("CJEU") stated at paragraph 23 of its judgement:

"In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary."

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;

- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;
- (f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

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

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut 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.”

24. Pursuant to section 60A of the Act, I am mindful of the fact that the goods may not be automatically found to be dissimilar simply because they fall in different classes under the Nice Classification.

25. The cancellation applicant submits that the goods are either identical or highly similar based on the *Canon* factors specified in their statement of grounds and, it is claimed that, where relevant, the distribution channels, the relevant public and the usual origin of the goods/services overlap.

26. The proprietor submits that their brand specialises exclusively in liquid spray car air fresheners, whereas the cancellation applicant’s brand focuses on automotive themed accessories such as socks, keychains and turbo shaped vent air fresheners. The proprietor submits that the differences in product categories and consumer perception further minimise any likelihood of confusion. They state that

both products are visually and physically different and the distinction in the nature and functionality of the product plays a significant role in ensuring that the marks can co-exist without consumer confusion. The proprietor further submits that the sales and customer bases of the marks operate within different commercial contexts as the proprietor's brand is made, marketed and sold solely within the UK via their own online store, whereas the cancellation applicant is a company based in the United States which primarily sells products internationally via their online platforms. The proprietor states there is no significant market overlap within the UK that would justify a likelihood of confusion.

27. While the proprietor's comments are noted, I have explained above that I must compare the goods in the parties' specifications on the basis of the 'notional' coverage of the goods listed in the specifications, not those currently provided or intended to be provided. Any differences between the actual goods offered by the parties or the parties' marketing/trading styles will, as a matter of law, have no bearing on the outcome of my assessment of similarity between the goods in issue, unless those perceived differences are apparent from the specifications.

*Car air freshener; Car air fresheners; Car deodorants; Air fresheners; Air freshener sprays; Air freshener refills; Air deodorizer; Air deodoriser sprays; Air deodorants.*

28. Three of the above proprietor's goods are used to freshen or deodorise the air in cars. The remaining proprietors goods above are not limited in any way so could be used to freshen or deodorise the air in automobiles, which includes cars. The cancellation applicant's good "fragrances for automobiles" are used to improve / enhance the smell of automobiles. I consider that a car is a type of automobile and air fresheners, deodorisers and deodorants are usually fragranced. Taking these factors into account there is an overlap in the purpose of the goods as all of the goods at issue aim to provide, improve or freshen the scent in the user's car. "Fragrances for automobiles" may come in the form of sprays or refills resulting in an overlap in nature with the proprietors sprays and refills. Whilst there may be other different ways of providing the scent in the user's car meaning that there may be a difference in nature and method of use, the purpose overlaps. The goods belong to the same market sector of air fragrance and freshening products. They

satisfy the needs of the same consumers and are commonly sold in the same specialised shops and the same sections of supermarkets or department stores. Furthermore, the trade channels of the goods overlap as they will be provided by the same undertakings and be available via the same distribution channels. The goods clearly overlap in user. The goods are not complementary to each other as one is not essential for the other. However, there is likely to be a degree of competition between the goods as the consumer may select the proprietor's goods over the cancellation applicant's goods, and vice versa. Taking all of these factors into account, I find these goods to be similar to at least a medium degree.

### **The average consumer and the nature of the purchasing act**

29. 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.

30. In *Iconix Luxembourg Holdings SARL v Dream Pairs 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 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.

31. The cancellation applicant submits that the goods in question will primarily target the general public and given the goods at issue, the general public's degree of attention will be no more than average. The proprietor did not make any submissions in relation to the average consumer.

32. I agree with the cancellation applicant in that the goods at issue will be selected by the general public at large. The goods will be available via general or specialist retailers (such as supermarkets, department stores or automotive stores) and their online equivalent (where available). In physical stores, the goods will be displayed on shelves where they will be self-selected by the consumer. When the selection takes place online, the goods will be selected after viewing an image on a webpage. Clearly, the visual component will dominate such selection processes, though I do not discount the aural component entirely as suggestion may come from word-of-mouth recommendations or advice from sales assistants. Regardless of the importance of the aural component, the consumer will still view the goods.

The cost of the goods will range between low and moderate depending on the type and quality. The goods are likely to be purchased fairly regularly. Consumers will consider factors such as the quality, scent and value. Consequently, I find that somewhere between a low and medium level of attention will be paid during the selection process.

### **Comparison of marks**

33. 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.

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

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

35. 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.

36. The respective trade marks are shown below:

The earlier mark	The contested mark
TURBO	Turbo Fresh

37. The cancellation applicant submits that it is clear that the marks are highly visually, phonetically and conceptually similar. The cancellation applicant submits that the earlier mark is contained within the contested mark in its entirety. They state the dominant and distinctive element of the contested mark is "TURBO" because it forms the beginning part of the mark and will be more present in the mind of the average consumer. The latter part of the contested mark "Fresh" would be considered secondary and less distinctive, having a less important role. The cancellation applicant submits the word "Fresh" is descriptive of the purpose / kind of goods covered under the contested mark and therefore non-distinctive or distinctive to a very low degree. The cancellation applicant submits that as the comparison would be focused on the distinctive element of the contested mark and the earlier mark they are visually similar to a very high degree, almost identical. Phonetically, the cancellation applicant submits that the marks coincide in the earlier marks five letters.

38. In its counterstatement, the proprietor submits that the marks are visually, phonetically and conceptually different. They submit that whilst the word "Turbo" is a shared element, the addition of the word "Fresh" in the contested mark creates a distinct overall impression, preventing consumer confusion. They state that "Fresh" is a key differentiating factor that signifies freshness, fragrance and scent, aligning with the proprietor's brand of selling liquid spray air fresheners. Additionally, the proprietor submits that "Turbo" is a commonly used term in the automotive industry and does not inherently indicate the origin of a specific brand on its own. The proprietor further submits that the presence of additional words in trademarks, especially in a descriptive or suggestive capacity, helps to distinguish them in the marketplace.

### Overall impression

39. The contested mark is a word only mark consisting of the words “Turbo Fresh”.

There are no additional elements to the contested mark and while the consumer does not artificially dissect trade marks, where a word is descriptive or allusive (as is the case with FRESH) it may be attributed less weight in the mark as a whole. Given this, I find that the word “Turbo” play the greater role in the overall impression of the mark.

40. The earlier mark is a word only mark consisting of the word “TURBO”. There are no additional elements to the mark and therefore the overall impression lies in the word itself.

### Visual comparison

41. As both marks are word only marks, they are protected for use in any case. As such, the use of different cases is not a point of consideration for the present assessment. Visually, the contested mark and the earlier mark overlap through the use of the word “Turbo”, which is the first word in the contested mark and the only word in the earlier mark. The marks differ in the presence of the word ‘Fresh’ in the contested mark. Regardless of its role within the mark, this point of difference will have an impact on the visual comparison of the marks. Overall, I am of the view that the shared use of the word “Turbo”, being the entirety of the earlier mark and the first word of the contested mark, (bearing in mind that consumers tend to focus on the beginning of marks),<sup>2</sup> is sufficient to result in a finding that the marks at issue are visually similar to a medium degree.

### Aural comparison

42. The earlier mark consists of two syllables and the contested mark consists of three syllables. Both will be pronounced in the ordinary way. Regardless of its role in the mark, ‘Fresh’ acts as a point of aural difference. In comparing the earlier mark and

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<sup>2</sup> *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

the contested mark, I am of the view that they are, aurally, short marks (being either two syllables or three syllables in length). While there is no special test for 'short marks',<sup>3</sup> I consider that the shortness of the marks at issue means that the average consumer is more likely to notice the differences. As a result, I find that the marks are aurally similar to a medium degree.

### Conceptual comparison

43. Conceptually, the cancellation applicant submits that the marks are conceptually highly similar if not identical. It submits that both marks have a well understood conceptual meaning and this meaning is identical. The proprietor submits that the marks are conceptually different.

44. The earlier mark consists solely of the word "TURBO" which is a dictionary word. I consider it likely that the majority of consumers will associate the word "TURBO" (in both marks) with engines or understand it to be short for turbocharger.

45. The contested mark consists of two words "Turbo Fresh". Both words are dictionary words. "Turbo" is the more distinctive part of the contested mark as the word "Fresh" is descriptive or allusive of the goods at issue and will play a lesser role in the mark as a whole. The word "Turbo" could be perceived as being slightly allusive of the goods given the goods are for use in automobiles/cars. However, I consider that consumers will associate the word turbo with engines or turbochargers in the first instance, and may only make a connection with cars or automobiles following an initial association with engines or turbochargers. Given how many steps removed this is, I consider that "Turbo" may be perceived as only being slightly allusive. Consumers may also associate "Fresh" with a range of scents.

46. The concept of both marks will be dominated by the words "Turbo" which evokes the idea of engines or turbochargers. However, this will be offset to a slight degree by the word "Fresh". While this additional word will not go unnoticed, due to its descriptive or allusive nature it will only act as a slight point of conceptual difference. As a result, I find the marks conceptually similar to a high degree.

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<sup>3</sup> See paragraph 44 of *BOSCO*, BL O/301/20

## **Distinctive character of the earlier mark**

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

“22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

48. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it. The cancellation applicant has not pleaded that its mark has obtained an enhanced level of distinctiveness and no evidence has been filed to that effect. As such, I only have the inherent position to consider.

49. The earlier mark comprises the word "TURBO". As previously outlined in my comparison of the marks, this is short for "turbocharger" which is a dictionary word. Despite, "TURBO" being short for "turbocharger", I consider that the majority of consumers will understand the meaning of this word or associate it with engines. Given this, "TURBO" is slightly allusive of the goods on which the cancellation applicant relies (being "fragrances for automobiles") as the goods are for use in automobiles. Therefore, I consider that the consumer will make some connection between the word 'TURBO' and the goods relied upon, albeit not a striking one. Taking all of this into consideration, I am of the view that the inherent distinctiveness of the earlier mark is no more than medium.

### **Likelihood of confusion**

50. 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 and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

51. Whilst conducting a global assessment of the likelihood of confusion I must be aware of the fact that not all aspects of the respective marks will necessarily have the same impact. For example, the importance of the respective visual, aural and

conceptual aspects will be dependent on factors such as the way the goods at issue are marketed, and in which type of store/platform they are made available.

52. Throughout the course of this decision, I have found the respective goods to be similar to at least a medium degree. The average consumers are members of the general public at large, who will select the goods via primarily visual means (though I do not discount an aural component) after having paid between a low and medium level of attention during the purchasing process. I have found the marks to be similar to a medium degree from a visual and aural perspective. I have found the marks to be highly similar from a conceptual perspective and I have found the earlier mark to possess no more than a medium degree of inherent distinctive character.

53. Taking all of the above into account and bearing in mind the principle of imperfect recollection, I consider the present case represents an example of direct confusion. I base this finding primarily in reliance upon the identity between the sole element of the earlier mark being "TURBO" and the dominant part of the contested mark being "Turbo". I consider that the consumer would attempt to pin their recollection of the marks on the identical word "Turbo" and, as such, the word "Fresh" being descriptive or allusive of the goods is likely to be overlooked. As a result, I consider there exists a likelihood of direct confusion between the marks. Given that the dominant element of the marks (being that which the consumer will pin their recollection on) is identical, I am of the view that this finding applies despite the distinctiveness of the earlier mark being no more than medium.

54. In the event I am incorrect about this case being an example of direct confusion, I will now consider if 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)".

55. It is not sufficient that a mark merely calls to mind another mark: *Duebros Limited v Heirler Cenovis GmbH*.<sup>4</sup> This is mere association not indirect confusion.

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<sup>4</sup> BL O/547/17

56. The types of examples of indirect confusion as set out in *L.A. Sugar* (cited above) are not exhaustive. However, they are the most usual circumstances where indirect confusion may arise. In the present case, as the sole element of the earlier mark being “TURBO” and the dominant part of the contested mark being “Turbo” are identical, the present assessment of indirect confusion is focused on the consumer noticing the second word of the contested mark being “Fresh”. As “Fresh” is descriptive or allusive of the goods it plays a lesser role in the contested mark. I consider it likely that consumers would, when confronted by the parties’ marks, believe them to originate from the same or economically connected undertakings. “Turbo” is the only word in the earlier mark and will be seen as the indicator of origin for both marks. In my view, the addition of the word “Fresh” to the word “Turbo”, could be seen as a logical addition of a non-distinctive element to an earlier mark that consumers would consider to be consistent with a brand extension. For example, the contested mark will be seen as a sub-brand that offers a new range of “fresh” scents. Taking all of this into consideration, I consider there to be a likelihood of indirect confusion, even in circumstances where the goods are similar to at least a medium degree.

## **CONCLUSION**

57. The application for invalidation under section 5(2)(b) succeeds in full and, subject to any successful appeal, the contested mark will be declared invalid in its entirety and deemed as if it had never been applied for.

## **COSTS**

58. As the cancellation applicant has been successful in invalidating the contested mark, it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Note 1/2023. I note that the proprietor submitted in its counterstatement that as a sole UK based business owner, they do not have the financial means to pay legal costs or awards and respectfully request that no costs be awarded to the cancellation applicant. While noted, this is not a justification not to make a costs award in this instance. In the circumstances, I

award the cancellation applicant the sum of £450 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee:	£200
Preparing the application for invalidity and considering the counterstatement:	£250
<b>Total:</b>	<b>£450</b>

59. I therefore order Grace Stone to pay Boostnatics, LLC the sum of £450. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

**Dated this 29<sup>th</sup> day of April 2026**

**N Barratt**  
**For the Registrar**