O/0393/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 4250073

IN THE NAME OF

THEIA OPERATIONS & DEVELOPMENT LTD

TO REGISTER THE TRADE MARK:

IN CLASS 42

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600003797

BY PENSPEN THEIA LIMITED

Background and pleadings

1. On 15 August 2025, THEIA Operations & Development Ltd ("the Applicant") applied to register the trademark shown on the front page of this decision in the UK. The application was published for opposition purposes on 05 September 2025 and registration is sought for the following services:

> *Class 42- Development of software; Web page design services; Creation and maintenance of web sites; Design, development and implementation of software; Website development for others; Design and creation of web sites for others; Design and development of software for database management; Designing and developing web pages; Design and development of computer software; Consultancy relating to the design and development of computer software programs; Web site hosting services; Software development, programming and implementation; Product development.*

2. On 12 September 2025, under the fast track opposition procedure,[1] Penspen Theia Limited ("the Opponent") opposed the application in full under section 5(2)(b) of the Trade Marks Act 1994 ("the Act"). The Opponent relies upon the following trade mark:

THEIA

UK trade mark no. 3529003
Filing date 02 September 2020; registration date 05 February 2021.
Relying on all of its services, namely:

Class 42- Software as a service; not in the field of security and surveillance.

[1] Pursuant to The Trade Marks (Fast Track Opposition) (Amendment) Rules 2013.

3. By virtue of its earlier filing date, the Opponent's mark constitutes an earlier mark within the meaning of section 6 of the Act. As the mark had not completed the registration process more than five years before the relevant date (the filing date of the mark in issue), it is not subject to proof of use pursuant to section 6A of the Act. The Opponent can, therefore, rely upon all of the services relied upon without having to demonstrate use.

4. The Opponent claims that the marks at issue are highly similar and the respective services are identical or highly similar, giving rise to a likelihood of confusion.

5. The Applicant filed a counterstatement denying the claims made.

6. In these proceedings, the Opponent is represented by Forresters IP LLP. The Applicant is a litigant in person acting without legal representation.

7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that rule 20(4) shall continue to apply. Rule 20(4) states that:

> "(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit."

8. The net effect of the above is to require parties to seek leave in order to file evidence in fast-track oppositions. No leave was sought in respect of these proceedings.

9. Rule 62(5) (as amended) states that arguments in fast-track proceedings shall be heard orally 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 costs; otherwise, written arguments will be taken. A hearing was neither requested nor considered necessary.

10. Only the Opponent chose to file written submissions in lieu of a hearing. This decision is taken following careful consideration of the papers before me.

Preliminary issues

11. Within their counterstatement the Applicant has raised points that I intend to address as preliminary issues. Before going further into the merits of the Opposition, it is necessary to explain why, as a matter of law, these points will have no bearing on the outcome of this opposition.

12. The Applicant states that their trade mark "Serves a completely different function and audience. It is an incident and case management system designed for law enforcement and government agencies" and that the Opponent's trade mark "is used for pipe and drainage design".[2] The assessment I will carry out is a notional one and will be based upon how the services within the parties' respective specifications could be used and sold, and the circumstances in which the mark applied for might be used if it were registered.[3] How the parties' services are used and sold in practice (including which consumers they currently target) is not relevant to my assessment. Therefore, this submission does not assist the Applicant.

13. The Applicant also submits that "other mythological names- such as "Athena"- are used concurrently by multiple entities in the law enforcement and cybersecurity sectors without conflict. This reinforces the principle that mythological names are not inherently exclusive and coexist across distinct domains.".

14. The claim that other mythological names are concurrently used in the law enforcement and cybersecurity sectors does not assist the Applicant. As stated above, the decision I am required to make is based on a notional assessment of the likelihood of confusion and my assessment will be based on services within the parties' respective specifications, not the sectors they target in practice. Further, the submission that other mythological names are used in the market does not constitute evidence of how many such marks are in use nor does it clarify whether consumers have or have not been confused by the presence of such marks.[4]

[2] Applicant's form TM8 and counterstatement – Paragraph 4
[3] *O2 Holdings Limited & Anor v Hutchison 3G UK Limited*, Case C-533/06, paragraph 66.
[4] *Zero Industry Srl v OHIM*, Case T-400/06.

DECISION

15. 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)

16. Section 5(2)(b) of the Act is 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".

17. 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*, [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 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 services

18. In *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97, the Court of Justice of the European Union ("CJEU") stated at paragraph 23 of its judgment:

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

19. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

a) The respective users of the respective goods or services;

b) The physical nature of the goods or acts of services;

c) The respective trade channels through which the goods or services reach the market;

d) 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;

e) 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.

20. The General Court ("GC") confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T-133/05, 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 fur Lernsysteme v OHIM- Educational Services (ELS)* [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

21. Further, in *Kurt Hesse v OHIM*,[5] the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v OHIM*,[6] the GC stated that "complementary" means:

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

22. For the purposes of considering the issue of similarity of services, it is permissible to consider groups of terms collectively where they are sufficiently comparable to be assessed in essentially the same way and for the same reasons (see *Separode Trade Mark* (BL O/399/10) and *BVBA Management, Training en Consultancy v. Benelux-Merkenbureau* [2007] ETMR 35 at paragraphs 30 to 38).

23. The competing services are as follows:

Opponent's services	Applicant's services
Class 42- Software as a service; not in the field of security and surveillance.	**Class 42-** Development of software; Web page design services; Creation and maintenance of web sites; Design,

[5] Case C-50/15 P
[6] Case T-325/06

	development and implementation of software; Website development for others; Design and creation of web sites for others; Design and development of software for database management; Designing and developing web pages; Design and development of computer software; Consultancy relating to the design and development of computer software programs; Web site hosting services; Software development, programming and implementation; Product development.

Development of software; Design, development and implementation of software; Design and development of software for database management; Design and development of computer software; Software development, programming and implementation.

24. The above services are all concerned with the design, development and implementation of software. These services differ in their nature, intended purpose and method of use when compared to the Opponent's *software as a service; not in the field of security and surveillance,* which I understand to be a form of software that is licenced or rented, as opposed to software that is purchased outright. I do however consider there to be a degree of complementarity between the services, in that the Applicant's design and development may be important to the creation of the software offered through the Opponent's services to the extent that consumers believe that the responsibility for them lies with the same undertakings. The services may overlap in trade channels, where entities that design and develop software also provide the Opponent's Software as a service. There is also an overlap in the user of the services and a degree of competition between them where, for example, a user may select between a bespoke software product from a developer or access to software as a

service that is already on the market. Overall, I find the services to be similar to a medium degree.

Consultancy relating to the design and development of computer software programs

25. The Opponent's *software as a service; not in the field of security and surveillance* differs in nature, purpose and method of use to the Applicant's services. Applying the same reasoning as at paragraph 24 above, I find that there may be an overlap in the trade channels of the respective services. The Applicant's services will, in most instances, be provided to businesses and individuals that themselves develop and design software, however, I consider that there is some scope for these services to be provided directly to the end user of software or software as a service, for example where the user may contact the service provider to seek advice and information on their software needs. I also acknowledge that the Opponent's broad software as a service may be used by the same businesses and individuals that engage the Applicant's services. As such I consider that there may be some overlap in user. I do not consider the services to be in competition, nor are they complementary. Overall, I consider the services to be similar to a low to medium degree.

Web page design services; Creation and maintenance of web sites; Website development for others; Design and creation of web sites for others; Designing and developing web pages.

26. I understand the above to be services that entail the design, development and maintenance of web sites and pages. These services differ in their nature, trade channels and method of use when compared to the Opponent's *software as a service; not in the field of security and surveillance,* however it is possible that there may be some overlap in purpose, as the Opponent's broad term may encompass software as a service for the purpose of creating websites. As such there may also be an overlap in user and a degree of competition between the services, where users may choose between engaging the Applicant's services to develop and maintain a website, or purchasing the Opponent's software as a service to enable them to create their own.

I do not consider the services to be complementary. I find the services to be similar to a medium degree.

Web site hosting services.

27. Website hosting services entail the hosting of a website for users while retaining responsibility for the functioning and maintenance of the website. These services differ in their nature to the Opponent's *software as a service not in the field of security and surveillance*, however they may overlap in their purpose where the website hosting is offered through the Opponent's software as a service. As such I also consider that there may be some competition between them. There is a degree of complementarity between the services as website hosting services are important to the provision of software as a service, which, being a cloud-based service, must be hosted online. Consumers may therefore believe that the responsibility for the services lies with the same undertakings. The services may also share users and trade channels where undertakings providing software as a service also provide the hosting arrangements that enable that service to be made available. Overall, I find the services to be similar to a medium to high degree.

Product development.

28. I understand the above to be a broad term concerned with the development of new products. These services plainly differ in nature and purpose to the Opponent's *software as a service; not in the field of security and surveillance.* The respective trade channels will not overlap, although there may be an overlap in user. The services are not in competition, although there is a degree of complementarity between them, as a software as a service product may be created and brought to market as a result of product development. Overall, I find the services to be similar to a low degree.

The average consumer and the nature of the purchasing act

29. As the case law above indicates, it is necessary to determine who the average consumer is for the services at issue. I must then determine the manner in which the services are likely to be selected by the average consumer.

30. 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 services in question: *Lloyd Schuhfabrik Meyer*, Case C-342/97.

31. 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.

32. The average consumer of the services at issue will predominantly be a business or professional user, although I do not discount that it may also include members of the general public. Due to the range of services at issue, the cost and frequency of purchase is likely to vary. Various factors will be considered in the purchasing process such as the reputation of the service provider, the cost of the services and suitability for the consumer's particular requirements. Consequently, I consider that at least a medium level of attention will be paid during the purchasing process. However, I recognise that a higher level of attention may be paid, particularly for the services where a bespoke product is being developed.

33. The services are likely to be encountered through a website, directory of services or an advertisement, although in some cases they may be encountered at the physical premises of the service provider or a retailer. As such the purchasing process will be predominantly visual, however I recognise that there may also be an aural component where services are engaged following consultation with a provider or where word of mouth recommendations play a role.

Comparison of marks

34. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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 trade marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

36. The marks to be compared are as follows:

Opponent's Mark	Applicant's Mark
THEIA	

37. The Opponent's mark is a figurative mark consisting of the word "THEIA" in a simple stylised font. The letters T, H, E and A are navy in colour, the I is light blue. The letters E and A feature a slightly heavier degree of stylisation, with the central bar of each forming a point directed towards the I. While the mark has a degree of stylisation, I consider that the overall impression will be dominated by the word "THEIA", with the stylisation playing a lesser role.

38. The Applicant's Mark is a figurative mark comprising the word "THEIA" in a simple, blue font, and a device element described by the Applicant as a "triangular

symbol".[7] The device is positioned above the word "THEIA" and is comprised of three shapes, positioned to form a triangle. The shapes are coloured in a gradient in shades of blue, green, yellow, orange and pink. At the center is a blue circular device element resembling a fingerprint.

39. It is established that in the case of a mark consisting of both word and figurative elements, the word elements must generally be regarded as more distinctive than the figurative elements, or even as dominant, since the relevant public will keep in mind the word elements to identify the mark concerned, with the figurative elements being perceived more as decorative elements.[8] With this in mind, I find the word "THEIA" to play the greatest role in the overall impression of the mark. Despite its position above the word, I consider that the triangular device will make a lesser contribution, although it will not be overlooked.

Visual comparison

40. Visually, the marks coincide in the shared word "THEIA". The marks differ in their stylisation and the presence of the device element in the Applicant's mark. While I have found the stylisation and device element in the respective marks play a lesser role, they still create a visual difference in the marks. As such, I find the marks to be visually similar to a medium degree.

Aural comparison

41. The device element included in the Applicant's mark will play no part in the aural comparison, I therefore consider that the word "THEIA" will be the only element to be articulated in each mark. As such the marks are aurally identical.

Conceptual comparison

[7] Applicant's form TM8 and counterstatement- Paragraph 1
[8] *Migros-Genossenschafts-Bund v EUIPO – Luigi Lavazza (CReMESPRESSO),* Case T-189/16, paragraph 52

42. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer. This is highlighted in numerous judgments of the GC and the CJEU including *Ruiz Picasso v OHIM* [2006] ECR I-643; [2006] E.T.M.R 29. The assessment must, therefore, be made from the point of view of the average consumer.

43. The conceptual message of the Opponent's mark will be conveyed by the word "THEIA", with the stylisation playing no role in the concept of the mark. The Applicant submits that "Theia" is a name rooted in classical mythology, referring to a Titaness from ancient Greek tradition".[9] Within their written submissions the Opponent states that they agree that "Theia" is a term originating in mythology, however they contend "that the average consumer is not always knowledgeable of the meaning of words that are used as trade marks. And, regardless of whether or not the average consumer in this matter would be aware of any meaning, the marks are identical in terms of words".[10]

44. I agree with the Opponent's submissions. While I acknowledge use of the name "Theia" in classical mythology, I am not convinced that the average consumer will be aware of these origins, but will instead likely recognise the word "THEIA" as a forename.

45. The Applicant's mark comprises the word "Theia" and a triangular decorative device. The fingerprint symbol contained within the triangular device will be recognised as just that by the average consumer, and therefore will likely convey a conceptual message of security or personal identification, etc. The shared word "THEIA" will be assigned the same conceptual meaning as in the Opponent's mark. As such the only conceptual difference between the marks is created through the device element contained in the Applicant's mark, which, as previously stated, I have found to play a lesser role in the overall impression. As such, I consider the marks to be conceptually similar to between a medium to high degree.

Distinctive character of the earlier mark

[9] Applicant's form TM8 and counterstatement- Paragraph 3
[10] Opponent's written submissions in Lieu- Paragraph 6 (iii)

46. The distinctive character of a trade mark can be appraised only, first, by reference to the services in respect of which it is registered and, secondly, by reference to the way it is perceived by the relevant public. In *Lloyd Schuhfabrik*, 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)."

47. 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 and 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 Opponent has not pleaded that its mark has obtained an enhanced level of distinctiveness through the use made of it, nor has it filed any evidence of use. Therefore, I have only the inherent distinctiveness of the mark to consider.

48. As discussed above, the Opponent's mark is a single word in a stylised font, which will likely be recognised by the average consumer as a forename which is neither descriptive nor allusive of the services in question. As such I find the earlier mark to be distinctive to a medium degree.

Likelihood of confusion

49. There is no simple formula for determining whether there is a likelihood of confusion. I must make a global assessment of the competing factors (*Sabel* at [22]), keeping in mind the interdependency between them i.e. that a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective services and vice versa (*Canon* at [17]) and considering the various factors from the perspective of the average consumer. In making my assessment, I must bear in mind 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 he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

50. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and the services down to the responsible undertakings being the same or related.

51. Earlier in this decision I concluded that:

- The similarity of the competing services varies between a low to high degree;
- The average consumer for the services will predominantly comprise business or professional users, although may also include members of the general public, who will pay at least a medium level of attention during the purchasing process (although it may be higher in some instances);
- The purchasing process will be predominantly visual in nature, though aural considerations are not discounted;

- The marks are visually similar to a medium degree, aurally identical and conceptually similar to between a medium to high degree.
- The Opponent's earlier mark holds a medium degree of inherent distinctiveness.

52. Taking all of the above into account, even bearing in mind the principle of imperfect recollection, I consider that the parties' marks are unlikely to be mistakenly recalled or misremembered as each other. While the marks coincide in the shared word "THEIA", I do not consider that a consumer paying at least a medium level of attention during the purchasing process will overlook the triangular device in the Applicant's mark, which while playing a lesser role in the overall impression, is not negligible, and contributes visually and conceptually. As such, I do not consider there to be a likelihood of direct confusion.

53. I will now go on to consider whether there is a likelihood of indirect confusion.

54. In *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, Mr Iain Purvis Q.C. (as he then was), 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. Further, I note the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors [2021] EWCA Civ 1207,* wherein Arnold LJ referred to the comments of James Mellor Q.C. (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at paragraph 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.

56. Keeping in mind the competing factors in my decision and the principle of interdependency between them, it is my view that when confronted with the parties' marks, consumers will recognise the shared "THEIA" element and would make a connection between the marks. I am of the view that even if the average consumer notes the differences in the stylisation and the addition of the triangular device in the Applicant's mark, they could reasonably attribute these to a brand extension or revamp rather than denoting similar services from different undertakings. I consider that it is not uncommon for a brand to undergo a "re-fresh" or "revamp" of their branding to accommodate changing market conditions. As such, the average consumer will not attribute the difference between the marks to coincidence but will assume that there is an economic connection between the undertakings.

Consequently, I consider there to be a likelihood of indirect confusion between the marks.

Conclusion

57. The opposition under section 5(2)(b) of the Act has succeeded. Subject to any successful appeal, the application is refused in full.

Costs

58. As the Opponent has been fully successful, they are entitled to a contribution towards their costs. Awards of costs in proceedings commenced on or after 1 February 2023 are governed by Annex A of Tribunal Practice Notice ('TPN') 1 of 2023. Taking account of that scale, I award the Opponent the sum of £700, calculated as follows:

Preparing a statement and considering the other side's counterstatement:	£250
Filing written submissions:	£350
Official fee:	£100
Total:	**£700**

59. I therefore order THEIA Operations & Development Ltd to pay the sum of £700 to Penspen Theia Limited. 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 7th day of May 2026

Jacob Robinson

For the Registrar