

**O/0870/24**

**TRADE MARKS ACT 1994**

**IN THE MATTER OF APPLICATION NO. 3678886**

**BY RASHID RAY**

**TO REGISTER**

**Pizzology**

**AS A TRADE MARK IN CLASS 43**

**AND**

**IN THE MATTER OF THE OPPOSITION THERETO**

**UNDER NO. 429267 BY**

**THE LITTLE BROWN BOX PIZZA, LLC**

## BACKGROUND AND PLEADINGS

1. On 8 September 2021, Rashid Ray (“the applicant”) applied to register **Pizzology** as a trade mark in the United Kingdom in respect of the following services:

Class 43

*Fast food restaurants; Fast-food restaurant services; Catering in fast-food cafeterias; Take-away fast food services; Restaurant services for the provision of fast food; Food preparation; Food sculpting; Contract food services.*

2. On 16 December 2021, the application was opposed by The Little Brown Box Pizza, LLC (“the opponent”). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) and concerns all the services for which registration is sought. The opponent is relying on UKTM No. 913112479, **PIEOLOGY**, which is a UK comparable mark with an application date of 24 July 2014 and a registration date of 16 December 2014. The mark is registered for the following goods and services, all of which are relied on:

Class 29

*Preserved, frozen, dried and cooked fruits and vegetables; salads.*

Class 30

*Flour and preparations made from cereals, bread, pastry and confectionery; pizza and sticks flavoured with butter, herbs or spices.*

Class 43

*Restaurant services.*

3. This mark qualifies as an earlier mark under section 6(1) of the Act. As the mark completed its registration process more than five years before the application date of the contested mark, it is caught by the proof of use provisions in section 6A of the Act. The opponent made a statement that the mark had been used in relation to all the goods and services for which it stands registered.

4. The opponent claims that the marks are similar, as they both share the same suffix. Further, the opponent claims that this suffix (“-OLOGY”) is the dominant and distinctive element of both marks as “PIZZ-” and “PIE-” are less distinctive in the context of the

goods and services in the specifications, which, the opponent maintains, are identical or highly similar. Consequently, the opponent claims that there is a likelihood of confusion on the part of the public.

5. The opponent had also opposed the application under section 5(3), but withdrew its reliance on this ground just before the hearing, which took place on 18 January 2024.

6. The applicant filed a defence and counterstatement denying the claims made and putting the opponent to proof of use of the earlier mark for the services in Class 43. The applicant states that he does not offer eat-in restaurant or bar services. He admits that both marks share a suffix but adds that this is a very common one in the food business. He claims that “PIZZ-” and “PIE-” share no visual or aural similarity and that the words have two completely different meanings in the UK. He states that he has carried out “*an independent survey*”, which showed that no one was confused.

7. At the hearing, which took place by videolink, the opponent was represented by Daniel Sullivan of Reddie & Grose LLP, while the applicant represented himself.

## **EVIDENCE**

8. The opponent’s evidence in chief comes from Stephen Ostaszewicz, Chief Financial Officer of The Little Brown Box Pizza, LLC, a position he has held since 1 March 2022. His evidence goes to the use and reputation of the earlier mark, the concept behind the name “Pieology”, and its “create your own pizza” model. Mr Ostaszewicz’s witness statement is dated July 2022. The incomplete date was not picked up earlier in the proceedings and I considered whether to request a properly dated witness statement. In the end, Mr Ostaszewicz’s evidence has not been determinative and so I took the view that I would not put the opponent to further cost.

9. The applicant’s evidence comes from Mr Ray, Managing Director of Pizzology Manchester Limited and the applicant for registration. His witness statement is dated 12 January 2023 and goes to the history of the business, the reason for choosing the name “Pizzology”, the meanings of the words “pie” and “pizza”, and the extent to which his business operates a “create your own pizza” model.

10. The opponent filed evidence in reply in the form of a witness statement dated 19 July 2023 from Mr Sullivan, a Trade Mark Attorney with the opponent's legal representative, Reddie & Grose LLP. His evidence goes to the use of the earlier mark in relation to a restaurant in Spain, the use in the UK of the word "pie" to refer to pizza, and the applicant's use of a "create your own pizza" model. Mr Sullivan also made a second witness statement dated 21 August 2023 which is a vehicle for a series of exhibits relating to the performance of the opponent, predominantly in the US.

## **PRELIMINARY ISSUES**

### *Survey evidence*

11. In paragraph 6 above, I noted that the applicant claims to have carried out a survey. He states that he has presented both marks to "*over 100 public members from a variety of nationalities and not one person was confused or mentioned the marks could be confusing*".

12. Survey evidence can only be adduced in Registry proceedings with the permission of the Hearing Officer. Such evidence is frequently flawed and so a party seeking permission to conduct a survey must advise the Hearing Officer of all the details, namely the purpose of the survey; the questions that are to be put; what those interviewed are to be shown; the nature of the population sample; the types of persons who will conduct the survey; the instructions that will be given to those people; the types of locations where the survey will be conducted; and whether it is intended that statistically based conclusions are expected to be drawn from the survey. In this instance, no permission was sought to conduct a survey, and so I shall not take it into account in my decision.

### *The relevance of the services actually provided by the parties*

13. At the hearing, Mr Ray submitted that his establishment offered a very different service from those offered by the opponent. He provides takeaway and delivery services, rather than restaurant services where the diners consume their food at the premises. However, what is relevant for these proceedings is not the services that the applicant provides, but the services that are listed in the specification of the contested mark and for which protection is sought. These are broader than the services

described by Mr Ray. In the decision that follows, I will consider what is described as “fair and notional use” of the contested mark, i.e. what services it could fairly be used for, based upon the specification.

## **DECISION**

14. Section 5(2)(b) of the Act is as follows:

“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.”

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 departure from the EU.

### ***Proof of Use***

16. Section 6A of the Act is as follows:

“(1) This section applies where-

- (a) an application for registration of a trade mark has been published,
- (b) there is an earlier trade mark of a kind falling within section 6(1)(a),  
(aa) or (ba) in relation to which the conditions set out in sections 5(1),  
(2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section '*the relevant period*' means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if-

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non-use.

(4) For these purposes-

(a) use of a trade mark includes use in a form (the 'variant form') differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

*[(5) Repealed]*

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be

treated for the purposes of this section as if it were registered only in respect of those goods or services.

...”

17. As the earlier mark is a comparable mark, paragraph 7 of Part 1, Schedule 2A of the Act is also relevant. It is as follows:

“(1) Section 6A applies where an earlier trade mark is a comparable trade mark (EU), subject to the modifications set out below.

(2) Where the relevant period referred to in section 6A(3)(a) (the ‘five-year period’) has expired before IP completion day-

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A(3) and (4) to the United Kingdom include the European Union.

(3) Where [IP completion day] falls within the five-year period, in respect of that part of the five-year period which falls before IP completion day-

(a) the references in section 6A(3) and (6) to the earlier trade mark are to be treated as references to the corresponding EUTM; and

(b) the references in section 6A to the United Kingdom include the European Union.”

18. The case law on genuine use was summarised by Arnold LJ in *easyGroup Ltd v Nuclei Ltd & Ors* [2023] EWCA Civ 1247:

“105. The principles applicable to determining whether there has been genuine use of a trade mark have been considered by the CJEU in a considerable number of cases, the principal decisions being Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, Case C-259/02 *La Mer Technology Inc v Laboratoires Goemar SA* [2004] ECR I-1159, Case C-416/04 *Sunrider Corp v Office for Harmonisation in the Internal Market*

(*Trade Marks and Designs*) [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundersvereinigung Kamaradschaft 'Feldmarschall Radetsky'* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], Case C-609/11 *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], Case C-141/13 *P Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089], Case C-689/15 *W. F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434] and Joined Cases C-720/18 and C-721/18 *Ferrari SpA v DU* [EU:C:2020:854].

106. Ignoring issues which do not arise in the present case, such as use in relation to spare parts or second-hand goods and use in relation to a sub-category of goods or services, the principles may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Centrotherm* at [71]; *Leno* at [29]; *Ferrari* at [32].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Centrotherm* at [71]; *Leno* at [29]; *Gözze* at [37], [40]; *Ferrari* at [32].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14]. Nor does the



distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34]; *Leno* at [29]-[30], [56]; *Ferrari* at [33].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [72]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber at [32]*.”

19. The relevant period in which use must of the earlier mark must be shown for the Class 43 services is the five years ending with the date of application of the contested mark, i.e. 9 September 2016 to 8 September 2021.

*The opponent's evidence of use*

20. The opponent was founded in 2011, with its first restaurant in California. At the time of writing the witness statement, it had 118 restaurants in the US and had expanded into Mexico, China and Europe.

21. The European presence is accounted for by a restaurant in Madrid that was opened on 30 October 2018 and was closed as of 1 January 2021. Mr Ostaszewicz states that the opponent is looking to open further outlets and there is some evidence of plans to open a restaurant in the UK. These did not come to fruition and Mr Sullivan confirmed that the opponent was not relying on these plans to prove use of the earlier mark.

22. No turnover figures have been provided for the Madrid restaurant. The evidence consists of the following:

- An extract from TripAdvisor, showing that the restaurant has received 13 reviews;<sup>1</sup>
- An article from QRS Magazine website dated 22 March 2018 entitled “Pieology Pizzeria to expand into Spain, accelerate franchise growth”;<sup>2</sup>
- The company’s master order guide for Spain. This is undated;<sup>3</sup>
- An extract from the website [www.esmadrid.com](http://www.esmadrid.com), described as the “*Official website of Tourism of the city of Madrid*”, showing a listing for the opponent’s Madrid restaurant. The website says that it was last updated on 19 December 2018;<sup>4</sup>

---

<sup>1</sup> Exhibit SO6; Exhibit DS3.

<sup>2</sup> Exhibit SO6.

<sup>3</sup> Exhibit SO7.

<sup>4</sup> Exhibit DS1.

- An extract from the Restaurant Guru website, including photographs of, and information about, the restaurant;<sup>5</sup>
- An extract from the website madridfree.org, containing an article about the Madrid restaurant dated 16 January 2019;<sup>6</sup>
- Undated photographs of the restaurant in Madrid. They show price information in euros and the mark can be seen on signage, and T-shirts and caps worn by staff;<sup>7</sup> and
- A press release issued by the opponent concerning the opening of the Madrid restaurant.<sup>8</sup>

*Does the evidence show genuine use of the mark?*

23. At the hearing, Mr Sullivan submitted:

“... I would suggest that the hurdle for showing genuine use is not particularly high. The use does not have to be extensive but it just has to be objectively shown that the premises exist effectively in this case, the premises exist and were patronised.”<sup>9</sup>

24. For the use to be genuine, it must have been real commercial exploitation of the mark, in the course of trade, sufficient to create or maintain a market for the services at issue in the relevant territory during the relevant five-year period. Until 31 December 2020, that territory is the EU; after that, it is the UK.

25. In *Leno Merken BV v Hagelkruis Beheer BV*, Case C-149/11, the Court of Justice of the European Union (“CJEU”) noted that:

“36. It should, however, be observed that ... the territorial scope of the use is not a separate condition for genuine use but one of the factors determining genuine use, which must be included in the overall analysis and examined at the same time as other such factors. In that regard, the phrase ‘in the Community’ is intended to define the geographical market serving as

---

<sup>5</sup> Exhibit DS2.

<sup>6</sup> Exhibit DS4.

<sup>7</sup> Exhibit DS5.

<sup>8</sup> Exhibit DS6.

<sup>9</sup> Transcript, page 5.

the reference point for all consideration of whether a Community trade mark has been put to genuine use.

...

50. Whilst there is admittedly some justification for thinking that a Community trade mark should – because it enjoys more extensive territorial protection than a national trade mark – be used in a larger area than the territory of a single Member State in order for the use to be regarded as ‘genuine use’, it cannot be ruled out that, in certain circumstances, the market for the goods or services for which a Community trade mark has been registered is in fact restricted to the territory of a single Member State. In such a case, use of the Community trade mark on that territory might satisfy the conditions both for genuine use of a Community trade mark and for genuine use of a national mark.

...

55. Since the assessment of whether the use of the trade mark is genuine is carried out by reference to all the facts and circumstances relevant to establishing whether the commercial exploitation of the mark serves to create or maintain market shares for the goods or services for which it was registered, it is impossible to determine a priori, and in the abstract, what territorial scope should be chosen in order to determine whether the use of the mark is genuine or not. A *de minimis* rule, which would not allow the national court to appraise all the circumstances of the dispute before it, cannot therefore be laid down (see, by analogy, the order in *La Mer Technology*, paragraphs 25 and 27, and the judgment in *Sunrider v OHIM*, paragraphs 72 and 77).”

26. In *The London Taxi Corporation Limited v Frazer-Nash Research Limited & Ecotive Limited* [2016] EWHC 52, Arnold J (as he then was) reviewed the case law since *Leno* and concluded as follows:

“228. Since the decision of the Court of Justice in *Leno* there have been a number of decisions of OHIM Boards of Appeal, the General Court and

national courts with respect to the question of the geographical extent of the use required for genuine use in the Community. It does not seem to me that a clear picture has yet emerged as to how the broad principles laid down in *Leno* are to be applied. It is sufficient for present purposes to refer by way of illustration to two cases which I am aware have attracted comment.

229. In Case T-278/13 *Now Wireless Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* the General Court upheld at [47] the finding of the Board of Appeal that there had been genuine use of the contested mark in relation to the services in issue in London and the Thames Valley. On that basis, the General Court dismissed the applicant's challenge to the Board of Appeal's conclusion that there had been genuine use of the mark in the Community. At first blush, this appears to be a decision to the effect that use in rather less than the whole of one Member State is sufficient to constitute genuine use in the Community. On closer examination, however, it appears that the applicant's argument is not that use within London and the Thames Valley was not sufficient to constitute genuine use in the Community, but rather that the Board of Appeal was wrong to find that the mark had been used in those areas, and that it should have found that the mark had only been used in parts of London: see [42] and [54]-[58]. This stance may have been due to the fact that the applicant was based in Guildford, and thus a finding which still left open the possibility of conversion of the Community trade mark to a national trade mark may not have sufficed for its purposes.

230. In *The Sofa Workshop Ltd v Sofaworks Ltd* [2015] EWHC 1773 (IPEC), [2015] ETMR 37 at [25] His Honour Judge Hacon interpreted *Leno* as establishing that 'genuine use in the Community will in general require use in more than one Member State' but 'an exception to that general requirement arises where the market for the relevant goods or services is restricted to the territory of a single Member State'. On this basis, he went on to hold at [33]-[40] that extensive use of the trade mark in the UK, and one sale in Denmark, was not sufficient to amount to genuine use in the Community. As I understand it, this decision is presently under appeal and

it would therefore be inappropriate for me to comment on the merits of the decision. All I will say is that, while I find the thrust of Judge Hacon's analysis of *Leno* persuasive, I would not myself express the applicable principles in terms of a general rule and an exception to that general rule. Rather, I would prefer to say that the assessment is a multi-factorial one which includes the geographical extent of the use."

27. The General Court ("GC") restated its interpretation of *Leno* in Case T-398/13, *TVR Automotive Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (see paragraph 57 of that judgment). This case concerned national (rather than local) use of what was then known as a Community trade mark (now a European Union trade mark). Consequently, in trade mark opposition and cancellation proceedings the registrar continues to entertain the possibility that use of an EUTM in an area of the Union corresponding to the territory of one Member State may be sufficient to constitute genuine use of an EUTM. This applies even where there are no special factors, such as the market for the goods/services being limited to that area of the Union. Whether the use shown is sufficient for this purpose will depend on whether there has been real commercial exploitation of the EUTM, in the course of trade, sufficient to create or maintain a market for the goods/services at issue in the Union during the relevant 5 year period. In making this assessment I am required to consider all relevant factors, including (i) the scale and frequency of the use shown; (ii) the nature of the use shown; (iii) the services for which use has been shown; (iv) the nature of those services and the market for them; and (v) the geographical extent of the use shown. It does not necessarily follow from a finding of proven commercial use that such use is deemed genuine for the purposes of section 6A of the Act.

28. In *JUMPMAN Trade Mark*, BL O-222-16, Mr Daniel Alexander QC, sitting as the Appointed Person, considered the approach to evaluating genuine use in cases where there had been a significant volume of sales in a small part of the EU which represented only a tiny part of the overall market for those goods. However, here I do not even have any sales figures. Mr Sullivan accepted that they had not been made available but submitted that I should take account of the photographic evidence, which, it could be inferred, dated from the relevant period and the fact that the restaurant had been written about by third party publications. He continued:

“...Yes, the fact that there are no turnover figures is regrettable but at the same time in my view the evidence taken as a whole does clearly show that there was a restaurant in Madrid, the restaurant was called PIEOLOGY, the restaurant was run by the Opponent and it was patronised for at least a few years and, like I say, there are reviews dated from throughout the relevant period adduced.”<sup>10</sup>

29. The use of the mark is geographically confined to a single pizza restaurant in Madrid between 30 October 2018 and 1 January 2021. I am satisfied that the mark was used on the premises and that the restaurant was referred to by the mark on listings and review websites. I also note that there are 13 reviews on TripAdvisor. This does not seem to be a large number, although I accept Mr Sullivan’s caution about treating this figure as indicative of the number of customers. I have nothing to enable me to make any reasonable inferences about the proportion of restaurant customers likely to leave reviews. The reviews are dated February 2019 (2 reviews), April 2019 (2 reviews), May 2019, June 2019, July 2019 (2 reviews), August 2019, February 2020 (3 reviews) and November 2020.

30. In *easyGroup*, Arnold LJ followed his summary of the principles to be applied when assessing proof of use with the following paragraph:

“107. The trade mark proprietor bears the burden of proving genuine use of its trade mark: see section 100 of the 1994 Act and *Ferrari* at [73]-[83]. The General Court of the European Union has repeatedly held that genuine use of a trade mark cannot be proved by means of probabilities or suppositions, but must be demonstrated by solid and objective evidence of effective and sufficient use of the trade mark on the market concerned: see e.g. Case T-78/19 *Lidl Stiftung & Co KG v European Union Intellectual Property Office* [EU:C:2020:166] at [25]. It has also repeatedly held that the smaller the commercial volume of the exploitation of the mark, the more necessary it is for the proprietor to produce additional evidence to dispel any doubts as to the genuineness of its use: see e.g. *Lidl* at [33]. In *Awareness Ltd v*

---

<sup>10</sup> Transcript, page 7.

*Plymouth City Council* [2013] RPC 24 Daniel Alexander QC sitting as the Appointed Person said:

‘19. For the tribunal to determine in relation to what goods or services there has been genuine use of a mark during the relevant period, it should be provided with clear, precise, detailed and well-supported evidence as to the nature of that use during the period in question from a person properly qualified to know.

...

22. ... it is not strictly necessary to exhibit any particular kind of documentation but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal ... comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said the public.”

31. The question I must decide is whether use of the mark for a single pizza restaurant in Madrid between 30 October 2018 and 31 December 2020 (IP completion day) is sufficient to constitute genuine use of the mark in the EU. The absence of turnover figures makes it harder to assess that the use is such as is warranted in the economic sector to maintain or create a share in the market for pizza restaurant services. I agree with Mr Sullivan that turnover figures are not the only evidence that can support a finding of genuine use. However, the remaining evidence is fairly thin. The photographs show what appear to be customers in the restaurant, but these are undated. There is limited evidence from third parties: a listing on the Madrid tourism website that was last updated on 19 December 2018, 13 reviews from TripAdvisor



spread throughout the period, an article dated January 2019 on the website [madridfree.org](http://madridfree.org), and an extract from the Restaurant Guru website showing that the restaurant is permanently closed. I consider that the article from QSR magazine is aimed at business readers, rather than potential customers, as its focus is on the opponent's business strategy. Even so, it is not clear how many people in the EU are likely to have seen this article. There is also little evidence of promotional activity, such as advertisements or social media posts. Taking the evidence as a whole, I find that it does not show sufficient use to be warranted in the economic sector to create or maintain a share in the EU market for restaurant services, even if these were to be limited to pizza restaurant services.

32. This finding does not mean the opposition automatically fails. The opponent still has goods in Classes 29 and 30 that it may rely on, as the applicant did not request proof of use for these goods. The effect of not asking for such proof is that the opponent's statement of use for these goods is accepted.

### **Section 5(2)(b): the principles**

33. In considering the opposition, I am guided by the following principles, gleaned from the decisions of the CJEU in *SABEL BV v Puma AG* (Case C-251/95), *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc* (Case C-39/97), *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel BV* (Case C-342/97), *Marca Mode CV v Adidas AG & Adidas Benelux BV* (Case C-425/98), *Matratzen Concord GmbH v OHIM* (Case C-3/03), *Medion AG v Thomson Multimedia Sales Germany & Austria GmbH* (Case C-120/04), *Shaker di L. Laudato & C. Sas v OHIM* (Case C-334/05 P) and *Bimbo SA v OHIM* (Case C-519/12 P):

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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their

mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

g) a lesser degree of similarity between the goods or services may be offset by a 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

34. It is settled case law that I must make my comparison of the goods and services on the basis of all relevant factors. These include the nature of the goods and services, their purpose, their users and method of use, the trade channels through which they reach the market, and whether they are in competition with each other or are complementary: see *Canon*, paragraph 23, and *British Sugar Plc v James Robertson & Sons Limited (TREAT Trade Mark)* [1996] RPC 281 at [296]. As the GC said in *Boston Scientific Ltd v OHIM*, Case T-325/06, goods and services are complementary when

“82. ... there is a 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.”

35. The goods and services to be compared are shown in the table below:

Contested services	Earlier goods
	<p><u>Class 29</u>  <i>Preserved, frozen, dried and cooked fruits and vegetables; salads.</i></p>
	<p><u>Class 30</u>  <i>Flour and preparations made from cereals, bread, pastry and confectionery; pizza and sticks flavoured with butter, herbs or spices.</i></p>
<p><u>Class 43</u>  <i>Fast food restaurants; Fast-food restaurant services; Catering in fast-food cafeterias; Take-away fast food services; Restaurant services for the provision of fast food; Food preparation; Food sculpting; Contract food services.</i></p>	

36. Section 60A of the Act is as follows:

“(1) For the purposes of this Act goods and services-

(a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification;

(b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.

(2) In subsection (1), the ‘Nice Classification’ means the system of classification under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1979.”

37. In *Sky Plc & Ors v Skykick UK Ltd & Anor* [2020] EWHC 990 (Ch), Arnold LJ set out the following summary of the correct approach to interpreting terms in specifications:

“56. ...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

(4) A term which cannot be interpreted is to be disregarded.”

38. I shall bear these principles in mind as I compare the goods and services.

39. In *SEPARODE Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, stated:

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

*Fast food restaurants; Fast-food restaurant services; Catering in fast-food cafeterias; Take-away fast food services; Restaurant services for the provision of fast food.*

40. The contested services involve the preparation and supply of food to customers who consume it either in a restaurant, cafeteria or, in the case of take-away, in another venue. These restaurants, cafeterias and take-aways would include pizzerias and take-away restaurant pizza services serving the opponent’s *Pizza*, as well as establishments serving *Preparations made from cereals, bread, pastry and confectionery*. I find that there is a clear competitive relationship between the goods and services, which will be targeted towards the same users. The average consumer may choose to buy the opponent’s goods from a shop or from a takeaway service, or go out to eat them in a restaurant. There is an inherent difference between the nature of a good and the nature of a service, but they have a similar purpose in satisfying hunger. It is also possible that a restaurant might license its name for use on pizzas or pastry-based goods that can be heated and consumed at home. Consequently, I find that there is a medium degree of similarity between these services and the opponent’s *Preparations made from cereals, bread, pastry and confectionery* and *Pizza*.

*Food preparation*

41. As terms for services should not be interpreted too widely, I understand this term to cover the preparation of ingredients and dishes for third parties, who would use them to make further dishes or, in the case of ready-prepared dishes, cook them to serve to their own customers. An example would be a service providing ready-sliced vegetables and meat for a restaurant or takeaway service to use as pizza toppings. The users of the services are therefore different from the users of the opponent’s *Pizza* and they have a different purpose. I do accept that there is likely to be some overlap with the users of the opponent’s *Preserved, frozen, dried and cooked fruits and vegetables*.

There may also be some overlap in trade channels. I do not consider that the method of use would be the same, and do not find competition. However, in my view, there is some degree of complementarity as the goods are essential for the provision of the services and the average consumer is likely to expect them to come from the same undertaking. I find that the services are similar to a low to medium degree to *Preserved, frozen, dried and cooked fruits and vegetables*.

#### *Food sculpting*

42. These services involve a particular type of food preparation, namely the artistic carving or shaping of food. The purpose of the services is to present food in a way that is aesthetically pleasing. It therefore differs from the purpose of the opponent's goods, which is to satisfy hunger. Although I have no submissions on the subject, it seems to me that the user of food sculpting services is likely to be a caterer and so I would expect there to be some overlap with the users of the opponent's goods, as caterers would use the foodstuffs such as *Flour and preparations made from cereals, bread, pastry and confectionery* to prepare their dishes. The nature and method of use of the goods and services are different, but I find it unlikely that there will be an overlap in trade channels. I do not consider that the goods and services are in competition or that there is complementarity. The overlap in user is, in my view, not sufficient for there to be any similarity between the goods and services.

#### *Contract food services*

43. In my view, the contested services involve catering services provided to a business or organisation for a certain length of time. There may be some overlap in the users, as the businesses or organisations may also purchase the Class 29 and 30 goods. The nature of the goods and services is, as I have already noted, inherently different, but I consider there is at least some overlap in purpose, as the services will be procured with the aim of feeding the business or organisation's customers or employees. Trade channels may also overlap, as the same undertaking could provide both *Contract food services* and the opponent's *Pizza* or *Preparations made from cereals, bread, pastry and confectionery*. Because the services are provided over time, I do not consider that there is competition between them and the opponent's goods. However, there is a degree of complementarity as the supplier of *Contract food services* may buy in some

of the opponent's goods, and the average consumer is likely to presume that the same undertaking is responsible for both the goods and the services. I find that there is a low degree of similarity between the goods and services.

44. Under section 5(2)(b), some similarity between the goods and services is essential for me to find a likelihood of confusion: see *eSure Insurance Limited v Direct Line Insurance Plc* [2008] EWCA Civ 842 at [49]. The opposition therefore fails with respect to *Food sculpting*.

### **Average consumer and the purchasing process**

45. The average consumer is deemed to be reasonably well informed and reasonably circumspect: see *Hearst Holdings Inc & Anor v A.V.E.L.A. Inc & Ors* [2014] EWHC 439 (Ch), at [60]. For the purposes 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 and services in question: see *Lloyd Schuhfabrik* at [26].

46. The average consumer of the goods is a member of the general public, although they will also be bought by trade customers. They will buy them from supermarkets, convenience stores, other food shops and wholesalers, either in person or online. They may also buy them from catering establishments such as cafeterias or take-away services. The average consumer is likely to see the mark, either on the goods, on signage, or on a website. They may also have seen advertisements on television, in print media, online or on billboards. Purchasing will therefore largely be a visual process. The goods will be bought fairly frequently and be inexpensive. I find the average consumer will be paying no more than a medium degree of attention, although in the case of a customers in the catering industry this may be slightly higher.

47. For the Class 43 services apart from *Food preparation* and *Contract food services*, the average consumer is a member of the general public who will purchase most of the services on a fairly frequent basis. The price of the services may vary. I consider that there will be occasions when the level of attention paid is low. This could occur when the consumer needs to find something to eat very quickly, which is more likely in the context of fast-food services than in other catering. Even so, the consumer is likely to take account of the range of options on the menu, the ingredients used, whether the service caters for the consumer's particular dietary requirements, and the

cleanliness of the premises. On balance, I find that the level of attention paid when purchasing these services will be somewhere between low and medium. During the purchasing process, the average consumer will see the marks in use on signage, on the premises or on the establishment's website. They may also have seen advertisements or reviews on social media, websites and printed publications. The purchasing process will largely be a visual one. However, I cannot ignore the aural element of the marks as the average consumer may receive word-of-mouth recommendations.

48. The average consumer of *Food preparation* and *Contract food services* will be a business. They will choose a provider after having browsed websites or printed promotional material, and they may also discuss services with sales representatives. Again, I consider that the purchasing process will largely be a visual one, with a lesser role of the aural aspect of the mark. The average consumer is likely to pay a medium to high degree of attention.

### **Comparison of marks**

49. It is clear from *SABEL* (particularly at [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 in *Bimbo* that:

“34. ... it is necessary to ascertain in each individual case, the overall impression made on the target public by the sign for which the 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.”

50. Artificial dissection of the marks would therefore be wrong, although it is necessary for me to take into account their distinctive and dominant components and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.



51. The respective marks are shown below:

<b>Contested mark</b>	<b>Earlier mark</b>
<b>Pizzology</b>	<b>PIEOLOGY</b>

52. Both marks are plain word marks. In *LA Superquimica v European Union Intellectual Property Office*, Case T-24/17, the GC held at [39] that such marks protected the word or words contained in the mark in whatever case, colour or typeface. Each mark will be seen as the name (or a shortened version of the name) of a foodstuff, followed by the suffix “OLOGY”. The overall impression of each of the marks lies in the combination of these two elements.

*Visual and aural comparison*

53. The contested mark is nine letters long and the earlier mark has eight letters. The contested mark differs from the earlier mark only in the substitution of the third letter of the earlier mark with a double “Z”. I find that the marks are visually highly similar.

54. I consider that the earlier mark would be pronounced as “PY-OLL-O-JEE” and the contested mark as “PEETZ-OLL-O-JEE”. The final three out of the four syllables are identical, and I note that both marks begin with the same letter. I find that they are aurally highly similar.

*Conceptual comparison*

55. There is no dispute that “PIZZ-” in the contested mark would be understood to be a shortening of “PIZZA”.

56. Mr Sullivan submitted that the word “PIE” would be seen by the average consumer as a reference to pizza, and that the dominant and distinctive aspect of the earlier mark is the suffix. Mr Ray disagreed that “PIE” would have this meaning for the UK consumer. In his witness statement, Mr Ostaszewicz says that the use of the word “PIE” to refer to a pizza is common only in the US, but that UK consumers would be aware of its use in a song by Dean Martin (“That’s Amore”) or in *The Godfather* films

or *The Sopranos* TV series. However, he has given me no specific references.<sup>11</sup> Mr Sullivan adduces a Just Eat listing for Slab City Pizzas, based in Tooting in London. This states that “*Our pies [are] served square*”.<sup>12</sup> He also provides information about a restaurant in Manchester called American Pies that serves Chicago-style deep pizzas.<sup>13</sup> However, I am not persuaded, on the basis of the evidence of two restaurants and unspecified references to the use in popular song, film and television, that the average consumer in the UK would understand “PIE” to refer to anything other than a savoury or sweet dish with a pastry lid.

57. Mr Ostaszewicz states that the suffix “-OLOGY” is a reference to the creation of pizza and the science behind that creation.<sup>14</sup> He refers to the definition of the suffix in the Merriam Webster dictionary as “*a branch of knowledge or science*”.<sup>15</sup> This dictionary is an American one and so its usefulness in explaining how the UK average consumer would understand a term is sometimes limited. However, in this case, the definition accords with its use in British English. Mr Ray states that his inspiration for using the suffix in the contested mark was the location of his first outlet, near to Salford University: “*The name is well suited to the University area as ‘ology’ is referred to studying.*”<sup>16</sup> In my view, the average consumer would be aware of the suffix as used in academic subjects such as Biology. The earlier mark would bring to the mind of the average consumer the concept of the study, knowledge or science of pies (in the sense outlined in the previous paragraph), while the contested mark would carry the concept of the study, knowledge or science of pizzas. Consequently, I find that the marks are conceptually similar to a medium degree.

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

58. Distinctive character is a measure of how strongly a mark distinguishes the goods or services of one undertaking from those of others. The factors that I must take into account in assessing the level of distinctive character were set out by the CJEU in *Lloyd Schuhfabrik Meyer*.

---

<sup>11</sup> Paragraph 20.

<sup>12</sup> Exhibit DS7.

<sup>13</sup> Exhibit DS8.

<sup>14</sup> Paragraph 21.

<sup>15</sup> Paragraph 8.

<sup>16</sup> Witness statement, paragraph 11.

“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).”

59. Registered trade marks possess varying degrees of inherent distinctive character from the very low, because they are suggestive of, or allude to, 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 the mark can be enhanced by the use that has been made of it. As there is no evidence that the mark has been used in the UK, which is the relevant territory for these purposes, I have only the inherent position to consider.

60. Mr Ray submitted that the “-OLOGY” suffix is not distinctive because it is widely used in the UK. In his witness statement, he referred to food establishments called Waffology and Dessertology, but gives no further information about these.<sup>17</sup> The one example that is supported by documentary evidence is a US business operating under the sign “Pizzology”. In the absence of evidence about how these businesses are present on the market, I am unable to find that the distinctiveness of the suffix has been reduced by its use.

61. The earlier mark describes some *preparations made from ... pastry* where these preparations are pies. The combining of the allusive element with the suffix to coin a new word gives the earlier mark a medium degree of distinctive character. Where the word “PIE” does not describe the goods the opponent may rely on, the inherent distinctive character of the earlier mark is high.

---

<sup>17</sup> Paragraph 23.

## Conclusions on the likelihood of confusion

62. Making an assessment of the likelihood of confusion is a matter of considering the relevant factors from the viewpoint of the average consumer of the goods and services at issue and determining whether they are likely to be confused. When doing this, I am required to bear in mind that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely on the imperfect picture of them that they have in their mind. This means that the global assessment emulates what happens in the mind of the average consumer on encountering the later mark with an imperfect recollection of the earlier mark in mind. There is no law setting out precisely what weight should be attached to each of the factors or providing a formula that can be applied to any set of circumstances. However, I am required to take account of the interdependency principle, 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 goods and services or vice versa.

63. There are two types of confusion: direct and indirect. In *L.A. Sugar Limited v Back Beat Inc*, BL O/375/10, Mr Iain Purvis QC, sitting 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 recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark.’”

17. Instances where one may expect the average consumer to reach such a conclusion tend to fall into one or more of three categories:

(a) where the common element is so strikingly distinctive (either inherently or through use) that the average consumer would assume that no-one else but the brand owner would be using it in a trade mark at all. This may apply even where the other elements of the later mark are quite distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

(b) where the later mark simply adds a non-distinctive element to the earlier mark, of the kind which one would expect to find in a sub-brand or brand extension (terms such as 'LITE', 'EXPRESS', 'WORLDWIDE', 'MINI', etc.).

64. (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)."

65. In *Liverpool Gin Distillery Limited & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ commented that:

"12. This is a helpful explanation of the concept of indirect confusion, which has frequently been cited subsequently, but as Mr Purvis made clear it was not intended to be an exhaustive definition.

13. As James Mellor QC sitting as the Appointed Person pointed out in *Cheeky Italian Ltd v Sutaria* (O/291/16) at [16] 'a finding of 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."

66. Earlier in my decision, I found that:

- With the exception of *Food sculpting*, the contested services are similar to goods covered by the earlier mark to a medium, low to medium, or low degree;
- The average consumer would be either a member of the general public or an organisation;
- The purchasing process would be largely a visual one and the average consumer would pay a medium degree of attention, although this would be slightly lower in scenarios where the average consumer was an individual with an urgent need for something to eat and slightly higher where the average consumer was a business;
- The distinctive character of the marks resides in the combination of a word denoting an item of food with the suffix “-OLOGY”;
- The marks are visually and aurally highly similar, and conceptually similar to a medium degree;
- The earlier mark has a medium degree of inherent distinctive character for pies and a high degree of inherent distinctive character for the remaining goods.

67. Mr Sullivan submitted that there was a very strong likelihood of direct confusion, although this submission was made on the basis that the opponent was able to rely on services that were identical to the contested services.

68. I shall consider the restaurant and similar services first. While I have found the marks to be visually highly similar and the purchasing process to be largely visual, the global assessment is not a “tick-box” exercise. I have already found that the average consumer would perceive each mark as a particular food item, i.e. a pizza or a pie, combined with the suffix “-OLOGY”, and that the UK consumer would understand these to be different foods. Each mark has, in my view, a clear conceptual hook that I consider would counteract the visual similarity between them. The average consumer

is deemed to be reasonably circumspect even where the level of attention paid is fairly low. I find that there is no likelihood of direct confusion.

69. Mr Sullivan submitted at the hearing that, if the average consumer were not directly confused, they would believe that the contested mark was a brand extension of the opponent, namely a restaurant serving “*potentially slightly different food*”.<sup>18</sup> A finding of indirect confusion should not be made simply because the two marks have an element in common: see *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, at [81.4]. I remind myself that the average consumer does not analyse trade marks, but there must be some basis on which they have made the assumption that underpins indirect confusion. The earlier mark is registered for *Pizza*, but I do not see that it is a logical brand extension to alter the (in this case) highly distinctive “PIEOLOGY” to the less distinctive “PIZZOLOGY” to indicate diversification into the restaurant and takeaway business. I did not find that the distinctive character of the earlier mark was “-OLOGY” on its own. The earlier mark is also registered for *Preparations made from ... pastry*, which would include pies. In my view, the average consumer would not consider that it would be a logical commercial strategy for a piemaker to open restaurants serving different types of food, including pizzas. At most, the earlier mark might be called to mind, but that is mere association, not confusion: see *Duebros* at [81.3.3].

70. In my view, the same rationale applies with respect to *Contract food services*. I found that the average consumer would pay a greater degree of attention, and that the services were similar to only a low degree. In my view, there is no likelihood of direct or indirect confusion.

71. As with *Contract food services*, I found that the average consumer of *Food preparation* would be paying a greater degree of attention. I also found that the services were similar to the goods covered by the earlier mark to a low to medium degree. For the reasons I have already set out, I do not consider that there would be a likelihood of direct confusion. The contested mark would, in my view, be a logical brand extension for a business selling *Preserved, frozen, fried and cooked fruits and*

---

<sup>18</sup> Transcript, page 11.

*vegetables* offering a service preparing toppings for pizzas. I find there is a likelihood of indirect confusion for *Food preparation*.

## **OUTCOME**

72. The opposition is partially successful, and Application No. 3678886 may proceed to registration for the following services:

### *Class 43*

*Fast food restaurants; Fast-food restaurant services; Catering in fast-food cafeterias; Take-away fast food services; Restaurant services for the provision of fast food; Food sculpting; Contract food services.*

73. Registration is refused for the following services:

### *Class 43*

*Food preparation.*

## **COSTS**

74. Both parties have enjoyed some success in these proceedings, with the greater part going to the applicant, who is entitled to a contribution towards his costs. As the applicant is a litigant in person, he was invited to complete a proforma detailing the time spent on various activities associated with the opposition. I sought clarification of this information at the hearing and the time recorded was 30 hours, which is divided as follows:

*Completing and considering official forms: 2 hours*

*Defence statements and exhibits: 25 hours*

*Document preparation: 3 hours*

I consider that these amounts are reasonable. In addition, I would allow 1 hour for the hearing.

75. The sum to be awarded per hour is analogous to that set out in the Civil Procedure Rules, Part 46, which is currently £19 per hour. This would result in a sum of £589, but I consider that it is reasonable to reduce this to £550 to reflect the fact that the applicant was not wholly successful.



76. I therefore order The Little Brown Box Pizza, LLC to pay Rashid Ray the sum of £550. This 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 9<sup>th</sup> day of September 2024**

**Clare Boucher  
For the Registrar,  
Comptroller-General**