

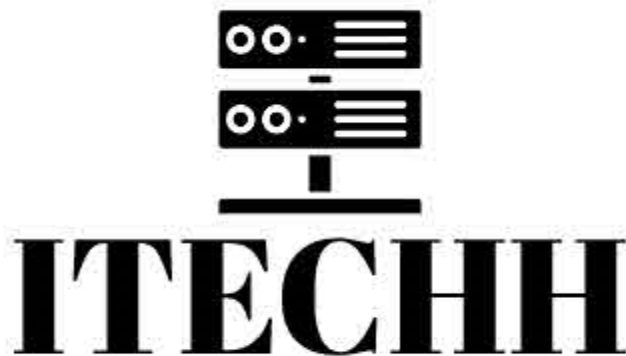
O/1168/23

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003807724

BY BEST-BRAND LIMITED

TO REGISTER:



AS A TRADE MARK IN CLASS 9

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. OP000435782

YOUR PHONE CARE LTD

BACKGROUND AND PLEADINGS

1. On 10 July 2022, BEST-BRAND LIMITED (“the applicant”) applied to register the trade mark on the cover page of this decision in the UK (“the applicant’s mark”). The application was published for opposition purposes on 29 July 2022. Registration is sought for goods in class 9 which are outlined in Annex A of this decision.
2. On 23 August 2022, the applicant’s mark was opposed by Your Phone Care Ltd (“the opponent”). The opposition is based on section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is reliant upon the following series of trade marks:

iTech (1 of 6 in series)

ITECH (2 of 6 in series)

i-Tech (3 of 6 in series)

i-TECH (4 of 6 in series)

itech (5 of 6 in series)

i-tech (6 of 6 in series)

UK registration no. 3754852

Filing date 15 February 2022; registration date 27 May 2022

Relying on all goods and services, as outlined in Annex B of this decision.

3. The opponent claims that the applicant’s mark is similar to its own and is to be registered for identical or similar goods. As such, the opponent claims that there is a likelihood of confusion on the part of the relevant public, which includes the likelihood of association. The applicant has filed a counterstatement denying the claims made.
4. Neither the applicant nor the opponent filed evidence however, the opponent did file written submissions. No hearing was requested and so this decision has been taken after careful consideration of the papers before me. I note that the applicant

is not professionally represented and the opponent is represented by Inbrandgible Limited.

5. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied on in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to the trade mark case-law of EU courts.

DECISION

Section 5(2)(b): legislation and case law

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

“(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 or association with the earlier trade mark.”

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

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

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

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

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

9. The opponent’s mark qualifies as an earlier trade mark under the above provisions. As the opponent’s mark had not completed its registration process more than five years before the application date of the applicant’s mark, it is not subject to proof of use pursuant to section 6A of the Act. Consequently, the opponent can rely upon all of the goods and services for which its mark is registered.

10. The following principles are gleaned from the decisions of the EU courts 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 B.V.* Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (“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-334/05P and *Bimbo SA v OHIM*, Case C-591/12P:

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

- (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

11. The applicant's goods are set out in Annex 1. The opponent's goods and services are set out in Annex 2.

12. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

"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".

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

- (a) The respective uses of the respective goods or services;
- (b) The respective users of the respective goods or services;
- (c) The physical nature of the goods or acts of service;
- (d) The respective trade channels through which the goods or services reach the market;
- (e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

14. The General Court confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T-133/05, that, even if goods (though it equally applies to services) are not worded identically, they can still be considered identical if the goods specified in the contested trade mark application are included in a more general category covered by a term under the earlier mark (or vice versa).

15. For the purposes of considering the issue of similarity of goods, it is permissible to consider groups of terms collectively where appropriate. In *Separode Trade Mark*, BL O-399-10, Mr Geoffrey Hobbs QC, sitting as the Appointed Person, said:

“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.”¹

16. The following terms appear in both specifications and are self-evidently identical:

Mobile phones; Mobile phone covers; Mobile phone speakers; Mobile phone straps; Mobile phone cases; Mobile phone chargers; Mobile phone docking stations; Mobile phone battery chargers; Mobile phone screen protectors; Batteries for mobile phones; Chargers for mobile phones; Displays for mobile phones; Mobile phone ring holders; Straps for mobile phones; Software for mobile phones; Mobile phone ring stands; Cases for mobile phones; Keyboards for mobile phones; Application software for mobile phones; Flip covers for mobile phones; Holders adapted for mobile phones; Dashboard mounts for

¹ Paragraph 5

mobile phones; Stands adapted for mobile phones; Auxiliary batteries for mobile phones; Downloadable emoticons for mobile phones; Protective cases for mobile phones; Downloadable ringtones for mobile phones; Docking stations for mobile phones; Wireless headsets for mobile phones; Display modules for mobile phones; Auxiliary speakers for mobile phones; Carrying cases for mobile phones; Leather cases for mobile phones; Cases adapted for mobile phones; Downloadable graphics for mobile phones; Computer software for mobile phones; Mobile phone connectors for vehicles; Electronic game software for mobile phones; Computer application software for mobile phones; Downloadable software applications for mobile phones; Hands free devices for mobile-phones; Downloadable ring tones for mobile phones; Protective films adapted for mobile phone screens; Dustproof plugs for jacks of mobile phones; Smart phones; Ear phones; Cellular phones; Phone plugs; Cell phones; Phone cases; Mobile phone display screen protectors in the nature of films; Computer game software for use on mobile and cellular phones; USB flash drives with micro USB connectors compatible with mobile phones; Phone extension jacks; Wearable smart phones; Batteries for phones; Cell phone covers; Mobile app's; Display screen protectors in the nature of films for mobile phones; Computer programs and software for image processing used for mobile phones; Mobile apps; Mobile radios; Mobile software; Mobile telephones; Cell phone straps; Cell phone cases; Phone extension leads; Cell phone battery chargers; Phone covers [specifically adapted]; Headphones for smart phones; Mobile telephone batteries; Mobile application software; Downloadable mobile applications; Mobile telephone covers; Mobile hard drives; Educational mobile applications; Mobile telephone cases; Mobile communication terminals; Mobile telecommunications handsets; Mobile telecommunications apparatus.

17. The below terms of the applicant also appear in the opponent's specification. While they are worded slightly differently (for example, 'battery chargers for mobile phones' in the applicant's specification appears as 'mobile phone battery charges' in the opponent's), they are identical for the purposes of the present assessment:

Battery chargers for mobile phones; Carriers adapted for mobile phones; Devices for hands-free use of mobile phones; Internet phones; Devices for hands-free use of mobile phones; Internet phones; Displays for smart phones; Digital phones and Digital cellular phones.

18. I consider the applicant's terms *Computer software; Computer programs; Computer programmes; Computer software platforms; Computer interface software* and *Computer software [programmes]* to be broad terms that would encompass the opponent's *Computer software for mobile phones* and *Educational mobile applications*. On that basis, I consider them to be identical on the principle outlined in *Meric*.

19. The opponent's specification includes the term *Electronic game software for mobile phones*. I consider that this term would be encompassed by the applicant's *Computer games; Computer game programs; Computer game programmes; Computer programs for video and computer games; Downloadable computer games* and *Computer games*. These goods are therefore identical in line with *Meric*.

20. The applicant's term *Braille mobile phones* would be encompassed by the opponent's broader term *Mobile phones*. They are therefore identical in line with *Meric*.

21. I consider that the opponent's *Mobile telecommunications apparatus* would encompass the applicant's *Video phones* and *VOIP phones*. On that basis, I consider these goods to be identical in line with *Meric*.

22. The opponent's *Mobile communication terminals* would cover devices used to set up a mobile network. On that basis, I find that the opponent's *Mobile communication terminals* would encompass the applicant's *Computer networks; Computer network adapters; Computer network routers; Computer network bridges; Computer networking hardware*. These goods are therefore identical in line with *Meric*.

23. *Conference phones* are phones that allow several participants to dial in and take part in a phone call at once. There is a broad overlap in nature between these goods and the opponent's *Mobile phones* as broadly speaking, they are different types of phones. There is also some overlap in purpose insofar as the goods are used to make telephone calls however, I note that *conference phones* are primarily used to facilitate conference calls whereas mobile phones are not. The goods differ in terms of method of use. There may be a broad overlap in users however, I do not consider that these goods would share trade channels. I do not consider there to be any competition or complementarity between these goods. Considering these factors, I find there is a medium degree of similarity between the goods.

24. To my mind, *Computer game cassettes* in the applicant's specification are physical cassettes to be used in conjunction with a games console in order to play video games. I compare this term to the opponent's *Computer game software for use on mobile and cellular phones*. Whilst the physical nature of these goods differ, I note they are both broadly speaking games to be played on an electronic device. The purpose is the same however the method of use is different. I find there would be an overlap in users however the trade channels would differ with the former being purchased from a retail store or its online equivalent and the latter most likely being purchased from a mobile app store. There may be some degree of competition however, I do not consider there to be any complementary relationship between these goods. I consider these goods to be similar to a medium degree.

25. The applicant's terms *Computers; Computers and computer hardware; Notebook computers; Computer motherboards; Stick computers; Micro-computers; Computer modems; Trip computers; Computer interfaces; Computer hardware; Computer printer; Computer screens; Computer cables; Portable computers; Personal computers; Laptop computers; Computer daughterboards; Computer chipsets; Computer keypads; Quantum computers; Computer chips; Computer controllers; Process computers; Computer joysticks; Tablet computer; Computer peripherals; Mainframes [computers]; Computer mousepads; Computer stylus;*

Computer styluses; Computer buses; Computer buffers; Hardware (Computer); Computer monitors; Computer disks; Netbook computers; Laptops [computers]; Computer shareware; Computer groupware; Netbooks [computers]; Computer mainframes; Computer plotters; Computer firmware; Computer terminals; Computer cases; Computer databases; Computer systems; Computer mice; Computer mice; Computer mouse; Computer housings; Handheld computers; Computer apparatus; Communications computers; Computer memories; Mobile computers; Desktop computers; Computer diskettes; Computer touchscreens; Palmtop computers; Micro-computer; Computer servers; Wearable computers; Tablet computers; Computer tapes; Computer modules; Computer printers; Computer whiteboards; Computer discs; Computer cabling; Computer keyboards; Personal computers incorporating dietary aid computer software; Wearable computer peripherals; Wristband computer devices; Multifunction computer keyboards; Hand-held computers; Speakers for computers; Computer parallel ports; Computer peripheral apparatus; Computer peripheral equipment; Monitors [computer programs]; Computer carrying cases; Mouses for computers; Computer sub-assemblies and Trackballs [computer apparatus]; Computer utility programs for computer maintenance and Mobile data receivers are all different types of computers or computer peripherals. I compare these goods to the opponent's *Installation, repair and maintenance of computers and computer peripherals*. The competing terms differ in nature and purpose however I consider there would be an overlap in users and trade channels. Whilst there is no competition between the terms, I consider that they are important or indispensable to one another and I find this to be to the extent that users would believe that the same undertaking provides both the goods and services. On that basis I consider the terms to have a complementary relationship.² Weighing up these factors, I find there is a medium degree of similarity between these terms.

26. I now compare the applicant's terms *Computer software for testing vulnerability in computers and computer networks; Computer software for accessing computer networks; Computer programs for connecting remotely to computers or computer networks* and *Computer software downloadable from global computer networks*

² *Boston Scientific Ltd v OHIM*, Case T-325/06

to the opponent's *maintenance and repair of computer networks*. These goods differ in terms of nature and purpose to the opponent's maintenance and repair of computer networks however, I consider that users of the applicant's goods may seek out repair and maintenance services in relation to computer networks so on that basis, I consider there would be an overlap in users and trade channels. The goods and services do not share a competitive relationship. I find there is a degree of complementarity as the goods and services are important to one another and this is to the extent that users would believe that they are derived from the same undertaking. Considering these factors, I find the goods and services to be similar to a medium degree.

27. I consider the applicant's *Computer software for computer aided software engineering* to be a specialised software tool used for software development. There is a broad overlap in nature when compared to the opponent's *Mobile application software* as both terms concern software however, I find that the applicant's software would be used on computers instead of mobile phones. Whilst I recognise that the opponent's *Mobile application software* is a broad term, I do not consider that this software would extend to software used for computer software engineering. Further, there is no evidence on this point to suggest that such software would be found on a mobile phone and as such, there is no overlap in purpose or method of use. The users and trade channels would differ as the applicant's software is specialised whereas the opponent's would be for everyday use. There is no competition between the goods and no complementary relationship between the same. These goods are dissimilar.

28. As some degree of similarity between goods is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition must fail against the goods and services of the application that I have found to be dissimilar³, namely, *Computer software for computer aided software engineering*.

³ *eSure Insurance v Direct Line Insurance*, [2008] ETMR 77 CA, paragraph 49

The average consumer and the nature of the purchasing act

29. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods and services. I must then decide the manner in which these goods and services are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

30. The average consumer for the parties goods will consist of two separate groups, being members of the general public at large and professional users purchasing on behalf of a business undertaking. Goods such as downloadable mobile applications and protective films adapted for mobile phone screens are likely to be relatively low in price, or in some cases may be free and may be purchased reasonably frequently. Goods such as computers, computer monitors and mobile phones cover goods including those for the general public or professionals purchasing on behalf of a business undertaking these goods would be purchased less frequently. There are also services such as *Maintenance and repair of computer networks* and *Installation, repair and maintenance of computers and computer peripherals* that will be aimed at both sections of the average consumer base.

31. Both consumer groups will likely consider the suitability for their wants or needs, compatibility with other devices and ease of use and reliability during the purchasing process. Where the consumer of the goods and services comprises

the general public, I consider that a medium degree of attention will be paid during the purchasing process. Where the goods and services are purchased by professional consumers, the level of attention paid is likely to be slightly higher at an above medium level. This is on the basis that the selection of the goods or services is likely to be important to the running/success of their business.

32. For those goods and services selected by members of the public, I find that they will be available via physical retail stores or their online equivalents. For business users, the goods and services will be selected at specialist retailers, be that physical stores or online. For both consumer groups, the purchase/selection process will involve primarily visual considerations. However, I do not discount the aural element playing a role in the form of advice from sales representatives or word of mouth recommendations. I further acknowledge that the aural element may also be particularly heightened for business users who may speak to sales representatives more frequently.

Comparison of the marks

33. It is clear from *Sabel v Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade 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 trade marks must be assessed by reference to the overall impressions created by the trade marks, bearing in mind their distinctive and dominant components.

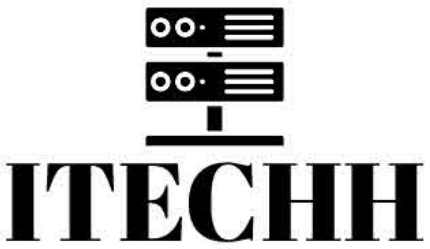
34. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

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

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

36. I note that the opponent relies upon a series of six earlier marks however, I consider the second mark in the series provides the opponent with its strongest case. In view of this, I will proceed by only considering the opponent's opposition under section 5(2)(b) of the Act in relation to its second mark in the series. For the avoidance of doubt, I will refer to this mark going forward as 'the opponent's mark'.

37. The respective trade marks are shown below:

The opponent's mark	The applicant's mark
ITECH	

38. I have submissions from the opponent in respect of the marks comparison. I do not intend to reproduce them here but I have taken them into account.

39. The opponent's mark is a word only mark that consists of the words 'ITECH'. There are no other elements that contribute to the overall impression of the mark, which lies in the word itself. The applicant's mark contains both figurative and word elements. This consists of the word "ITECHH" in a standard typeface. Above the wording is a figurative black and white device of what appears to be stacked network drives on a stand. Due in part to its size, positioning, in addition to it being the verbal element of the mark, I find that the overall impression is dominated by

the word element. The figurative element is decorative and plays a secondary role in the overall impression.

40. Visually, both marks overlap through their use of the wording "ITECH/ITECHH". I note the slight variation in spelling as the applicant's mark contains an additional "H" at the end of the word however, I consider this to be a fairly minor difference. A further point of difference is created by the use of a figurative element in the applicant's mark; this has no counterpart in the opponent's mark. Balancing the points of similarity and difference, together with my assessment of the overall impression of the marks, my view is that there is between a medium and high level of visual similarity between the marks.

41. Aurally, the opponent's mark will be pronounced in two syllables as EYE-TECH. Despite the additional H at the end of the applicant's mark, it will also be pronounced in the same way, rendering the marks aurally identical.

42. From a conceptual perspective, the opponent's mark, ITECH will be perceived as an abbreviation of the known English word 'technology' preceded by the letter I. Turning to the applicant's mark, I consider that the term "TECHH" will either be perceived as a fanciful misspelling of "TECH" or alternatively, the misspelling will be overlooked and again, the word will be seen as "TECH" preceded by the letter I. In the case of both marks, I consider that the letter "I" will serve to reinforce the idea of the technological nature of the goods and services. The figurative device in the applicant's mark will be seen as stacked network drives on a stand. Overall, I consider the marks to have a high degree of conceptual similarity.

Distinctive character of the opponent's mark

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

"22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the

goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).

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

44. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has not pleaded that its mark has obtained an enhanced level of distinctiveness nor has it filed any evidence to that effect. Therefore, I have only the inherent position to consider.

45. As previously outlined in the conceptual comparison, the average consumer will perceive the opponent’s mark as an abbreviation of the word “technology” preceded by the letter I. This is not directly descriptive of the goods and services at issue however, it does allude to a characteristic of the goods and services being related to technology in some way. Bearing that in mind, I consider the earlier mark has a low degree of inherent distinctive character.

Likelihood of confusion

46. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he or she has retained in their mind.

47. I have found the goods and services to range from being identical to dissimilar. I have found the average consumer for the goods and services to be both members of the public and business users who will select the goods by primarily visual means, although I do not discount an aural component. I have concluded that the average consumer will pay a medium degree of attention during the purchasing process. I have found the marks to be visually similar to a medium to high degree, aurally identical, and conceptually similar to a high degree. I found that the earlier mark has a low degree of inherent distinctiveness and that distinctiveness has not been enhanced through use.

48. I first note that the dominant and distinctive element of the marks (ITECH) is highly similar with the only difference being the additional letter H at the end of the wording in the applicant's mark. During the purchasing process, visual elements are likely to dominate though I acknowledge that aural considerations also apply, and the marks are aurally identical. There is a figurative element in

the applicant's mark which does have any counterpart in the opponent's mark however, I did not find this element to play a dominant role in the overall impression. Taking this into consideration along with all of the relevant factors, notwithstanding the average consumers medium level of attentiveness, the marks may be misremembered by way of imperfect recollection, and it is my view that the figurative element and additional letter H in the applicant's mark may be forgotten or go unnoticed. I therefore find that it is likely that the consumer may mistake one mark for the other and as such I find there is a likelihood of direct confusion.

49. I turn now to consider a likelihood of indirect confusion. I am reminded of the case of *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

"16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: 'The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark'.

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

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

distinctive in their own right ('26 RED TESCO' would no doubt be such a case).

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

(c) where the earlier mark comprises a number of elements, and a change of one element appears entirely logical and consistent with a brand extension ('FAT FACE' to 'BRAT FACE' for example)".

50. 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.

51. Firstly, I note that this situation is not one that appears to fall into the categories set out in *L.A. Sugar*, however, I remind myself that they were not intended to be exhaustive. Having previously concluded that there is a high degree of similarity between "ITECH" and "ITECHH" (and that the difference between them may be imperfectly recalled), I am of the view that even if average consumer recognises the differences in the stylisation of the marks they are still likely to imperfectly recollect the differences in spelling between the word elements. In those instances, it is my view that the differences between the word only mark and figurative mark would likely be attributed to a brand revamp rather than denoting goods from different undertakings. I consider that it is not uncommon for undertakings to undergo a brand 're-fresh' or 'brand-revamp' from time to time to accommodate changes in marketing considerations. Due to the aural identity and high conceptual similarity, I find that if the average consumer notices these

stylistic differences they will not, in this case, be put down to coincidence, but they will therefore regard the applicant's mark as an alternative stylisation of the opponent's mark. Consequently, I find there is a likelihood of indirect confusion.

CONCLUSION

52. The opposition has partially succeeded and, subject to any appeal, the application is refused all goods except: *Computer software for computer aided software engineering*

COSTS

53. Both parties have achieved a level of success but the opponent significantly more-so than the applicant. Awards of costs in proceedings commenced after 1 July 2016 are governed by Annex A of Tribunal Practice Notice ('TPN') 2 of 2016. Using that TPN as a guide, I award the opponent the sum of £600 as a contribution towards the cost of the proceedings. The sum is calculated as follows:

Official fee:	£100
Preparing a statement and considering the other side's statement:	£200
Filing submissions:	£300

54. I therefore order BEST-BRAND LIMITED to pay the sum of £600 to Your Phone Care Ltd. 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 12th day of December 2023

Catrin Williams
For the Registrar

Annex 1- Applicant's Goods

Class 9: Computers; Computers and computer hardware; Notebook computers; Computer motherboards; Stick computers; Micro-computers; Computer modems; Trip computers; Computer interfaces; Computer hardware; Computer printer; Computer screens; Computer cables; Portable computers; Personal computers; Computer software; Computer programs; Laptop computers; Computer daughterboards; Computer chipsets; Computer keypads; Quantum computers; Computer chips; Computer controllers; Process computers; Computer networks; Computer joysticks; Tablet computer; Computer peripherals; Mainframes [computers]; Computer mousepads; Computer stylus; Computer styluses; Computer buses; Computer buffers; Hardware (Computer -); Computer monitors; Computer disks; Computer programmes; Netbook computers; Laptops [computers]; Computer shareware; Computer groupware; Netbooks [computers]; Computer mainframes; Computer plotters; Computer firmware; Computer terminals; Computer cases; Computer databases; Computer systems; Computer mouses; Computer mice; Computer mouse; Computer housings; Handheld computers; Computer apparatus; Communications computers; Computer memories; Mobile computers; Desktop computers; Computer diskettes; Computer touchscreens; Palmtop computers; Micro-computer; Computer servers; Wearable computers; Tablet computers; Computer tapes; Computer games; Computer modules; Computer printers; Computer whiteboards; Computer discs; Computer cabling; Computer keyboards; Computer software for testing vulnerability in computers and computer networks; Computer utility programs for computer maintenance; Computer software for accessing computer networks; Computer programs for connecting remotely to computers or computer networks; Computer software downloadable from global computer networks; Personal computers incorporating dietary aid computer software; Computer programs for video and computer games; Computer software for computer aided software engineering; Computer network bridges; Wearable computer peripherals; Computer software [programmes]; Wristband computer devices; Computer game cassettes; Multifunction computer keyboards; Hand-held computers; Educational computer software; Downloadable computer games; Speakers for computers; Computer network adapters; Computer parallel ports; Computer peripheral apparatus; Computer peripheral equipment; Monitors [computer programs]; Computer network routers;

Computer networking hardware; Computer interface software; Computer carrying cases; Computer game programs; Computer game programmes; Mouses for computers; Computer software platforms; Computer sub-assemblies; Trackballs [computer apparatus]; Mobile phones; Mobile phone covers; Mobile phone speakers; Mobile phone straps; Braille mobile phones; Mobile phone cases; Mobile phone chargers; Mobile phone docking stations; Mobile phone battery chargers; Mobile phone screen protectors; Batteries for mobile phones; Chargers for mobile phones; Displays for mobile phones; Mobile phone ring holders; Straps for mobile phones; Software for mobile phones; Mobile phone ring stands; Cases for mobile phones; Keyboards for mobile phones; Application software for mobile phones; Flip covers for mobile phones; Holders adapted for mobile phones; Dashboard mounts for mobile phones; Stands adapted for mobile phones; Auxiliary batteries for mobile phones; Downloadable emoticons for mobile phones; Protective cases for mobile phones; Downloadable ringtones for mobile phones; Docking stations for mobile phones; Wireless headsets for mobile phones; Battery chargers for mobile phones; Display modules for mobile phones; Auxiliary speakers for mobile phones; Carrying cases for mobile phones; Leather cases for mobile phones; Cases adapted for mobile phones; Downloadable graphics for mobile phones; Computer software for mobile phones; Mobile phone connectors for vehicles; Carriers adapted for mobile phones; Electronic game software for mobile phones; Computer application software for mobile phones; Downloadable software applications for mobile phones; Hands free devices for mobile-phones; Downloadable ring tones for mobile phones; Protective films adapted for mobile phone screens; Dustproof plugs for jacks of mobile phones; Devices for hands-free use of mobile phones; Internet phones; Digital phones; Video phones; Smart phones; Ear phones; Cellular phones; Conference phones; Phone plugs; VOIP phones; Cell phones; Phone cases; Mobile phone display screen protectors in the nature of films; Digital cellular phones; Computer game software for use on mobile and cellular phones; USB flash drives with micro USB connectors compatible with mobile phones; Phone extension jacks; Wearable smart phones; Batteries for phones; Cell phone covers; Mobile app's; Display screen protectors in the nature of films for mobile phones; Computer programs and software for image processing used for mobile phones; Mobile apps; Mobile radios; Mobile software ;Mobile telephones; Cell phone straps; Cell phone cases; Phone extension leads; Cell phone battery chargers; Phone covers [specifically adapted]; Headphones for smart phones; Mobile telephone

batteries; Mobile application software; Mobile data receivers; Downloadable mobile applications; Mobile telephone covers; Mobile hard drives; Educational mobile applications; Mobile telephone cases; Mobile communication terminals; Mobile telecommunications handsets; Mobile telecommunications apparatus; Displays for smart phones.

Annex 2- Opponent's Goods and Services

Class 9: Mobile phones; Mobile phone straps; Mobile phone covers; Mobile phone speakers; Mobile phone cases; mobile phone chargers; Mobile phone chargers; Mobile phone docking stations; Mobile phone battery chargers; Mobile phone screen protectors; mobile phone screen protectors; mobile phone ring holders; mobile phone ring stands; Straps for mobile phones; Batteries for mobile phones; Chargers for mobile phones; Displays for mobile phones; Mobile phone ring holders; Software for mobile phones; Mobile phone ring stands; Cases for mobile phones; Keyboards for mobile phones; Holders adapted for mobile phones; Application software for mobile phones; Flip covers for mobile phones; Docking stations for mobile phones; Wireless headsets for mobile phones; Display modules for mobile phones; Auxiliary speakers for mobile phones; Carrying cases for mobile phones; Leather cases for mobile phones; Cases adapted for mobile phones; Downloadable graphics for mobile phones; Dashboard mounts for mobile phones; Stands adapted for mobile phones; Auxiliary batteries for mobile phones; Downloadable emoticons for mobile phones; Protective cases for mobile phones; Downloadable ringtones for mobile phones; Computer software for mobile phones; Mobile phone connectors for vehicles; Electronic game software for mobile phones; Computer application software for mobile phones; Downloadable software applications for mobile phones ;Hands free devices for mobile-phones; Downloadable ring tones for mobile phones; Protective films adapted for mobile phone screens; Dustproof plugs for jacks of mobile phones; Ear phones; Cellular phones; Smart phones; Mobile phone display screen protectors in the nature of films; Phone plugs; Cell phones; Phone cases; Computer game software for use on mobile and cellular phones; Cell phone covers; USB flash drives with micro USB connectors compatible with mobile phones; Computer programs and software for image processing used for mobile phones; Display screen protectors in the nature of films for mobile phones; Wearable smart phones; Batteries for phones; Phone extension jacks; Mobile radios; Mobile apps; Mobile software; Mobile app's; Mobile computers; Mobile telephones; Cell phone straps; Cell phone cases; Phone extension leads; Cell phone battery chargers; Phone covers [specifically adapted];Headphones for smart phones; Mobile telephone cases; Downloadable mobile applications; Mobile telephone covers; Mobile hard drives; Educational mobile applications; Mobile

telecommunications handsets; Mobile telecommunications apparatus; Mobile communication terminals; Mobile telephone batteries; Mobile application software.

Class 37: Repair of computers; Computer repair services; Repair of damaged computers; Repair of computer hardware; Computer installation and repair; Maintenance and repair of computers; Repair or maintenance of computers; Maintenance and repair of computer networks; Installation and repair of computer hardware; Maintenance and repair of computers [hardware]; Installation, repair and maintenance of computers and computer peripherals; Computer hardware (Installation, maintenance and repair of -); Installation, maintenance and repair of computer hardware; Repair and maintenance of computer and telecommunications hardware.