

O-767-19

TRADE MARKS ACT 1994
IN THE MATTER OF
TRADE MARK APPLICATION NO. 3382870
BY ROCKET FOOD LIMITED
TO REGISTER

POCKET ROCKET

AS A TRADE MARK IN CLASSES 39 AND 43

AND

OPPOSITION THERETO
UNDER NO. 600001119
BY POCKET ROCKET LONDON LTD

Background and pleadings

1. On 13 March 2019, Rocket Food Limited (“the applicant”) applied to register the trade mark shown below under number 3382870:

POCKET ROCKET

2. The application was published for opposition purposes on 29 March 2019 for the following services:

Class 39	Food and drink delivery services; food and drink transportation services; food and drink packaging and storage services.
Class 43	Provision of food and drink; food and drink catering services; hospitality services [food and drink].

3. Pocket Rocket London Ltd (“the opponent”) filed a notice of opposition under the fast-track opposition procedure on 22 May 2019. The opposition, which is based upon section 5(2)(b) of the Trade Marks Act 1994 (“the Act”), is directed against all of the services in the application. The opponent relies upon the following UK trade mark:

Mark:



UK registration no. 3298510

Filing date: 21 March 2018

Registration date: 20 July 2018

Goods and services relied upon:

Class 29 Soya crisps.

Class 30 High protein snacks; high protein cookies, high protein brownies; high protein chocolate; chocolate bars; chocolate spreads; high protein chocolate bars; high protein crisps.

4. The opponent argues that there is a likelihood of confusion, including the likelihood of association, because the respective marks and the goods and services are similar. The applicant filed a counterstatement denying the grounds of opposition.

5. Rules 20(1)-(3) of the Trade Marks Rules ("TMR") (the provisions which provide for the filing of evidence) do not apply to fast track oppositions but Rule 20(4) does. It reads:

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

6. The effect of the above is to require parties to seek leave in order to file evidence (other than the proof of use evidence which is filed with the notice of opposition) in fast track oppositions. No leave was sought in respect of these proceedings.

7. Rule 62(5) (as amended) states that arguments in fast track proceedings shall be heard orally only if (i) the Office requests it or (ii) either party to the proceedings requests it and the Registrar considers that oral proceedings are necessary to deal with the case justly and at proportionate cost. Otherwise, written arguments will be taken. Only the applicant filed written submissions. A hearing was neither requested nor considered necessary.

8. The applicant is represented by Birketts LLP and the opponent is a litigant in person.

DECISION

Section 5(2)(b)

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

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

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

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

10. 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, international trade mark (UK) or Community trademark or international trade mark (EC) 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.

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b) subject to its being so registered.”

11. The trade mark upon which the opponent relies qualifies as an earlier trade mark under the above provisions. As this trade mark had not completed its registration process more than five years before the application date of the opposed application, it is not subject to the proof of use provisions under section 6A of the Act. The opponent can, as a consequence, rely upon all of the goods it has identified.

Section 5(2)(b) – case law

12. The following principles are gleaned from the judgments 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 OHIM*, Case C3/03, *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.

The principles:

(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 the 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 to mind the earlier mark, 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 will wrongly 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

13. When making the comparison, all relevant factors relating to the goods and services in the specification should be taken into account. In *Canon*, the CJEU stated at paragraph 23 of its judgment:

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

14. Guidance on this issue has also come from Jacob J. (as he then was) *British Sugar Plc v James Robertson & Sons Ltd* (the Treat case), [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

(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.

15. In *YouView TV Ltd v Total Ltd*, [2012] EWHC 3158 (Ch), Floyd J. (as he then was) stated that:

“[...] Trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise: see the observations of the CJEU in Case C-307/10 *The Chartered Institute of Patent Attorneys (Trademarks) (IP TRANSLATOR)* [2012] ETMR 42 at [47]-[49]. Nevertheless the principle should not be taken too far. Treat was decided the way it was because the ordinary and natural, or core, meaning of 'dessert sauce' did not include jam, or because the ordinary and natural description of jam was not 'a dessert sauce'. Each involved a straining of the relevant language, which is incorrect. Where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question”.

16. In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods. In *Boston Scientific Ltd v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-325/06, the General Court (“GC”) stated that ‘complementary’ means:

“[...] 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”.

17. In *Sanco SA v OHIM*, Case T-249/11, the GC indicated that goods and services may be regarded as ‘complementary’ and therefore similar to a degree in

circumstances where the nature and purpose of the respective goods and services are very different, i.e. chicken against transport services for chickens. The purpose of examining whether there is a complementary relationship between goods/services is to assess whether the relevant public are liable to believe that responsibility for the goods/services lies with the same undertaking or with economically connected undertakings. As Mr Daniel Alexander Q.C., sitting as the Appointed Person, noted in *Sandra Amelia Mary Elliot v LRC Holdings Limited* BL O/255/13:

“It may well be the case that wine glasses are almost always used with wine – and are, on any normal view, complementary in that sense - but it does not follow that wine and glassware are similar goods for trade mark purposes”,

whilst on the other hand:

“[...] it is neither necessary nor sufficient for a finding of similarity that the goods in question must be used together or that they are sold together”.

18. The opponent contends that although the applicant's 'products' are slightly different from the opponent's products, consumers and businesses would be confused, for instance with the applicant's canapés v the opponent's crisps. Whilst I note the submission, the specifications for which the applicant seeks protection are certain services in relation to food and drink, and not food and drink goods themselves. Therefore, the correct comparison is between the contested mark's services and the opponent's goods.

Provision of food and drink

19. I will first consider the phrase "provision of food and drink" in the applicant's specification with the opponent's goods in Class 30.

20. The phrase "provision of food and drink" is a broad term that encompasses all types of service for providing food and drink. Those services will include restaurants, cafés, sandwich or snack bar services.

21. My understanding of the word snack is that it is any morsel of food eaten between meals and high protein snacks are a category of nutritious snacks that are high in protein. As "high protein snacks" in the opponent's specification will include all the high protein products identified in the rest of the specification, that is where I will begin the comparison. The term "high protein snacks" can be construed widely. It suggests to me that it will include a range of snacks such as high protein cereal bars, high protein flapjacks or high protein balls.

22. There is an intrinsic difference between the nature and method of use of the applicant's services and the opponent's goods, as is the case with any goods and services. Although both relate to the consumption of food, the applicant's services are concerned with, for example, providing food and facilities for the consumption of food, which is not the same purpose as the opponent's foodstuffs, which are themselves to be consumed. I acknowledge that the opponent's goods are "high protein" snacks rather than snacks at large. However, I see no reason why such goods would not be available for purchase in a snack bar or a café. The users are the same. The goods and services may compete as the average consumer may either use the applicant's services (for example a snack bar or a café) to obtain snacks or buy them from a shop (or a gym). Therefore, I dismiss the applicant's argument that those consumers wanting to purchase high protein snacks will not approach the applicant as an alternative. I can also see potential complementarity between the goods and services. High protein snacks may be considered important for a snack bar or café service, and the average consumer who encounters those snacks at a snack bar or café may expect the same service provider to produce them. Considering all these factors, I conclude that the opponent's high protein snacks are similar to a medium degree to the applicant's services. I do not consider that the remaining goods in the opponent's specification offer the opponent any better position and I decline to consider them.

23. I accept that "provision of food and drink" is a broad category covering a range of services, some of which may not be similar to the opponent's goods. I will return to this point later in my decision.

Food and drink catering services; hospitality services [food and drink].

24. I now go on to compare the remainder of the applicant's specification in Class 43 with the opponent's goods in Class 30.

25. Both catering and hospitality services may be booked to serve drinks, meals or snacks at weddings, corporate or private events etc.

26. As mentioned earlier in this decision, the goods and services inherently differ in their nature, intended purpose and method of use. The average consumer will not choose a catering or a hospitality service to obtain high protein snacks; instead, as I mentioned earlier in this decision, they may buy them from a shop, snack bar or café. To my knowledge high protein snacks are not routinely included in a catering or hospitality menu; there is no evidence that that is the case. Therefore, I do not consider that the goods and services are complementary to the extent that one is indispensable for the use of the other or the average consumer would expect them to originate from the same source. The users may overlap. However, the mere fact that the potential customers coincide at a very superficial level does not, in itself, mean that there is an overall similarity between the goods and services. In the absence of any other factors that support a finding of similarity, I conclude that the opponent's high protein snacks are dissimilar to the applicant's services. I can see no reason why the other goods in the earlier specification would be similar to the applicant's services, for the same reasons as given above.

Food and drink delivery services; food and drink transportation services

27. The applicant's food and drink delivery and transportation services would be understood as delivering food to or transporting goods from one place to another for third parties. These terms would include, for example, restaurant or pizza delivery services.

28. The purpose, nature and method of use are all different from those of the opponent's high protein snacks. The users may be the same. I acknowledge the opponent's assertion that its goods are provided to gym/fitness events or directly to

customers. There is, however, no evidence on the point and selling one's goods at particular events is not the same as providing a delivery service in respect of those goods. The goods of the earlier specification are not prepared meals (such as pizzas) which might more commonly be delivered by the manufacturer/provider of, for example, takeaway or restaurant services. Therefore, even if the applicant's services were used to deliver or transport such goods, it is unlikely that the consumer would, given the particular goods at issue, expect that the same undertaking is responsible for the production of those goods. Therefore, the goods and services are not complementary. Nor are they in competition. The opponent's other goods put it in no better a position: the same reasoning as above applies, with even more force in respect of goods such as chocolate spreads which are not consumed on their own. There is no similarity.

Food and drink packaging and storage services

29. Packaging and storage services refer to those services whereby products are packed and kept in a location. The goods in the earlier specification and the contested services differ in nature, intended purpose and method of use. The users are the same, though it is at a very high level of generality. The goods and services are not in competition. Although the opponent's foodstuffs are important for the applicant's food packaging and storage services, the consumer is unlikely to think that the goods and services are provided by the same undertaking. These goods and services are not similar.

The average consumer and the nature of the purchasing act

30. As the case law above indicates, it is necessary for me to determine who the average consumer is for the respective parties' goods and services. I must then determine the manner in which these goods and services are likely to be selected by the average consumer.

31. 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”.

32. The average consumer for the goods at issue is a member of the general public. The goods are likely to be subject to self-selection from retail premises, ranging from supermarkets to newsagents, and any online equivalents, where visual considerations will dominate. I do not, however, rule out an aural aspect to the selection. The average consumer may pay attention to factors such as ingredients or price. They may also read the nutritional label to check the protein content of such snacks. However, these goods are also likely to be relatively inexpensive and bought frequently. These factors suggest that the average consumer will pay a medium degree of attention in the purchasing process of the goods at issue.

33. As mentioned earlier in the decision, provision of food and drink is a broad category that includes all types of food and drink services, from cafés through restaurants to catering services. There will be a range of consumers for such services; for example, café services are likely to be used by members of the general public whilst catering or hospitality services may be booked by either member of the public or by professionals for corporate events. With that in mind, I consider that the average consumer of applicant’s service includes both professionals and the general public. The service providers are most likely to be chosen after perusal of the internet, from catalogues or brochures, or after viewing signage and the premises on, for example, a high street. Visual considerations are, therefore, also likely to dominate the selection process for the services. There may be aural considerations when the choice is made further to references or recommendations. The average consumer is likely to take into account factors such as the venue, type of cuisine or customer rating when selecting the services. Given the range of services encompassed by the term, the level of attention

will vary across the category. However, the consumer is likely to pay at least a medium degree of attention.

Comparison of marks

34. It is clear from *Sabel BV 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 marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“.....it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their 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, artificially to 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. The trade marks to be compared are as follows:

Applicant's trade mark	Opponent's trade mark
POCKET ROCKET	

37. The applicant's mark is comprised of the words "POCKET" and "ROCKET" both presented in an ordinary font. The mark has no additional stylisation. Both words contribute equally to the overall impression of the mark.

38. The components of the opponent's mark include the words "POCKET" and "ROCKET". Both words are presented in upper case without stylisation. A device element separates the two words. In my view some consumers are likely to see the device as a lightning bolt and some are likely to see it as a mere decorative element. The words and the device are shown in white and placed on a dark blue background. Although the device element and the blue background will not be ignored, it is the word elements that dominate the overall impression of the mark.

39. Visually, both marks include the identical two words presented in the same order. In comparing the marks, I note that fair and notional use would allow the parties to use the mark in any colour. Thus, a black and white version of a mark should normally be considered on the basis that it could be used in any colour¹. Therefore, the colour difference between the marks is not significant in my comparison as the applicant's mark may equally be used in white and on a blue background. With that in mind, the only relevant difference between the marks is the presence of the device element in the opponent's mark. Weighing up the similarities and differences, I consider that the marks are visually similar to a high degree.

40. I note the applicant's admission that the marks are aurally similar. However, I find that the marks are aurally identical: in an aural comparison, the consumer will not verbalise the device in the opponent's mark. Both words of the respective marks will be articulated identically.

41. In a conceptual comparison, the competing marks contain the identical words "Pocket" and "Rocket". The word combination is likely to be understood as an informal term that conveys the idea of being small but powerful. I consider that some average consumers may see the device element in the opponent's mark as a lightning bolt or electricity. The device, in that case, is likely to introduce a second conceptual element

¹ See paragraph 5 of the judgment of the Court of Appeal in *Specsavers* [2014] EWCA Civ 1294 and *J.W. Spear & Sons Ltd v Zynga, Inc.* [2015] EWCA Civ 290, at paragraph 47

to the opponent's mark. I, therefore, find that the marks are similar to a high degree. I also bear in mind that some consumers may perceive the device as a mere decorative element and will not attribute any conceptual meaning to it. For a concept to be relevant, it must be one capable of immediate grasp². The only concept that is likely to be factored in will be that contributed by the words in the mark. In that circumstance, I find that the marks are conceptually identical.

Distinctiveness of the earlier mark

42. The distinctive character of the earlier mark must be considered. The more distinctive it is, either inherently or through use, the greater the likelihood of confusion (*Sabel BV v Puma AG*). 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

² See Case C-361/04 P *Ruiz-Picasso and Others v OHIM* [2006] ECR I-00643; [2006] E.T.M.R. 29.

commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51).”

43. As the opponent filed no evidence, I have only the inherent position to consider. The earlier mark is comprised of the words "Pocket" and "Rocket" together with a device element. I noted earlier that the words may be understood as something powerful but small. In relation to the opponent’s goods, it may be allusive of high energy food that is small enough to be carried in a pocket. I conclude that, as a whole, the earlier mark has lower than medium degree of distinctive character.

Likelihood of confusion

44. In *Waterford Wedgwood plc v OHIM – C-398/07 P* (CJEU), it was held that some similarity of goods is essential to establish a likelihood of confusion.

45. Having concluded that there is no degree of similarity between the opponent’s goods and the applicant’s food and drink catering services; hospitality services [food and drink] in Class 43 and food and drink delivery services; food and drink transportation services; food and drink packaging and storage services in Class 39, there can be no likelihood of confusion. Accordingly, the opposition against these services fails.

46. I must now consider the matter in relation to those services in the application where I have found a medium degree of similarity with the opponent’s goods i.e. provision of food and drink.

47. I am required to assess a likelihood of confusion based on a global assessment of all factors relevant to the circumstances of the case (*Sabel* at [22]). It is necessary for me to factor in the distinctive character of the earlier trade mark, as the more distinctive this trade mark is the greater the likelihood of confusion (*Sabel* at [24]). I must also have regard to 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 (*Canon* at [17]). I must also keep in mind the average consumer for the goods and services, the nature of the purchasing

process and that the average consumer rarely has an opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them he has retained in his mind (*Lloyd Schuhfabrik* at [26]).

48. Confusion can be direct (which occurs when the average consumer mistakes one mark for the other) or indirect (where the average consumer realises the marks are not the same but puts the similarity that exists between the marks/services down to the responsible undertaking being the same or related).

49. The difference between direct and indirect confusion was explained in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, by Iain Purvis Q.C., sitting as the Appointed Person, where he 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”.

50. In *Duebros Limited v Heirler Cenovis GmbH*, BL O/547/17, James Mellor Q.C., sitting as the Appointed Person, stressed that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, he pointed out that it is not sufficient that a mark merely calls another mark to mind. This is mere association not indirect confusion.

51. Earlier in the decision, I concluded:

- That the applicant's provision of food and drink is similar to a medium degree to the opponent's goods;
- That the average consumer will select the goods and services at issue by primarily visual means and will pay at least a medium degree of attention during that process;
- That the opponent's mark has lower than medium degree of distinctive character;
- That the marks are visually highly similar, aurally identical, and conceptually identical or highly similar, depending on how the device in the opponent's mark is perceived.

52. Despite the lower than medium degree of the distinctiveness of the earlier mark, I find that the high visual and conceptual similarity together with the aural identity between the marks is enough to cause direct confusion. Given the small size of the device element in the opponent's mark, the average consumer is likely to misremember the device and mistake one mark for the other, particularly when the effects of imperfect recollection are borne in mind. I also find that where the average consumer recalls the device element, he or she is likely to think that the marks are variant marks used by the same undertaking or economically linked undertakings to provide similar goods and services. It follows that confusion, both direct and indirect, is more likely where there is a conceptual identity between the marks.

53. I indicated, above, that the term "provision of food and drink" is a very wide term which encompasses services which are potentially not similar to the earlier goods. Indeed, I have found that both catering and hospitality services, which fall under the umbrella term, are dissimilar to the opponent's foodstuffs. The tribunal's letter of 12 August 2019 invited the applicant to file a fall-back specification, but no such fall-back has been received. I note from the applicant's written submissions that they are interested in catering services, which I have already held to be dissimilar services. In such circumstances, I do not consider it proportionate to offer the applicant another opportunity to file an amended specification.

Conclusion

54. The application will be refused in relation to:

Class 43: Provision of food and drink

55. The application will proceed to registration in relation to:

Class 39: Food and drink delivery services; food and drink transportation services; food and drink packaging and storage services.

Class 43: Food and drink catering services; hospitality services [food and drink].

Costs

56. Both parties have achieved a measure of success and the applicant is marginally more successful than the opponent. I award costs to the applicant on the following basis:

Preparing a statement and considering the other side's statement:	£200
Filing written submissions:	£300
Total:	£500

I consider it appropriate to reduce the costs awarded to Rocket Food Limited by 30% to reflect its partial success.

57. Accordingly, I order Pocket Rocket London Ltd to pay Rocket Food Limited the sum of **£350**. This sum is to be paid within twenty-one days of the expiry of the appeal period or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 13th December 2019

Karol Thomas

For the Registrar

The Comptroller-General