

O/0409/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. 3835721

IN THE NAME OF
OLIVIA LOUISE POMA-MULLER

TO REGISTER THE FOLLOWING TRADE MARK (SERIES OF 3):



The
Bake Bar
BOOZY BAKES & COCKTAILS



The
Bake Bar
BOOZY BAKES & COCKTAILS



The
Bake Bar
BOOZY BAKES & COCKTAILS

IN CLASSES 29, 30, 32, 33

AND

IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 600002856

BY

MICHELLE WILDING

Background and pleadings

1. On 04 October 2022, Olivia Louise Poma-Muller (“the applicant”) applied to register the series of three trade marks shown on the cover page of this decision, in the UK (“the contested mark”). It was accepted and published in the Trade Marks Journal on 27 January 2023 in respect of a range of goods in classes 29, 30, 32 and 33.¹

2. On 26 April 2023, Michelle Wilding (“the opponent”) filed a notice of opposition on the basis of Section 5(2)(b) of the Trade Marks Act 1994 (“the Act”) under the fast track opposition procedure. The application was opposed in its entirety and the opponent relies on the following trade mark to support its claim:

Boozy Bakers

UK registration no: UK00003494636

Filing date: 28 May 2020

Date of entry in register: 28 August 2020

3. The following goods are relied upon in this opposition:

Class 30: *Cakes; Cake bars; Treacle cake; Cake mixes; Sponge cake; Cake pops; Iced cakes; Cake preparations; Chimney cakes; Chocolate cakes; Chocolate cake; Tea cakes; Frozen cakes; Powder (Cake-); Cake mixtures; Cake batter; Sponge cakes; Vegan cakes; Dough for cakes; Flavourings for cakes; Flavoring for cakes; Ice cream cakes; Petits fours (cakes); Chocolate covered cakes; Frosting [icing] (Cake-); Iced sponge cakes; Ice-cream cakes; Sponge fingers (cakes); Iced fruit cakes; Chocolate decorations for cakes; Mixtures for making cakes; Flavourings for cakes other than essential oils; Flavorings, other than essential oils, for cakes; Deep chocolate cake made with chocolate sponge; Flavourings, other than essential oils, for cakes; Cakes (Flavorings [flavourings] other than essential oils, for-); Muffins;*

¹ A full list of the goods is shown in the Annex.

Muffin mixes; Brownies; Brownie mixes; Chocolate brownies; Brownie dough; Frozen brownie dough.

4. By virtue of its earlier filing date of 28 May 2020, the above registration constitutes an earlier mark within the meaning of section 6 of the Act. As the earlier mark had not completed its registration process more than five years before the filing date of the application in issue, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all the goods it has identified without having to demonstrate use.

5. The opponent submits that 'Boozy Bakes' in the applicant's mark is identical to their own mark 'Boozy Bakers' and, as both undertakings offer the same goods and services, there is a high chance of confusion between the marks. The applicant filed a counterstatement denying the claims on the basis that neither the trade marks, nor the goods and services on offer, are similar enough to cause confusion.

6. Both the opponent and the applicant are unrepresented in these proceedings.

7. Rule 6 of the Trade Marks (Fast Track Opposition) (Amendment) Rules 2013, S.I. 2013 2235, disapplies paragraphs 1-3 of Rule 20 of the Trade Mark Rules 2008, but provides that Rule 20(4) shall continue to apply. Rule 20(4) states that: "(4) The registrar may, at any time, give leave to either party to file evidence upon such terms as the registrar thinks fit." The net effect of these changes is to require the parties to seek leave in order to file evidence in fast track oppositions. No leave was sought to file evidence in these proceedings.

8. 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. A hearing was neither requested nor considered necessary; however, the opponent filed written submissions in lieu. This decision is taken following a careful consideration of the papers.

Preliminary issues

9. I note that, in its statement of grounds, the opponent claims that the term 'BOOZY BAKES' in the applicant's mark is identical to the opponent's entire mark 'BOOZY BAKERS'.² However, the terms 'BAKES' and 'BAKERS' are separate dictionary defined terms with clearly different meanings. Therefore, while I recognise that there are similarities between the words, the degree of which will be explored within this decision, I disagree with the claim that they are identical.

10. In its written submissions, the opponent claims that its brand is recognised and makes reference to a number of sources which aim to demonstrate its business activities and popularity. However, as evidence supporting these claims has not been provided, I am unable to take into account submissions referring to the extent of use and public exposure of the mark. Consequently, when turning to distinctive character below, I can only consider the mark in relation to its inherent distinctive character. I also note, as the mark is less than 5 years old, proof of use is not required, and therefore the opponent had no obligation to provide such information.

11. In its statement of grounds and submissions in lieu, the opponent refers to the applicant's use of the hashtag '#boozybakes' in their online marketing,³ and use of 'Boozy Bakes' on their catering vehicles.⁴ However, I must highlight that these are not representations of the mark subject to these opposition proceedings. I must take account of the mark as applied for and, as such, these submissions will have no bearing on the outcome of this decision.

12. In its counterstatement, the applicant provides a table comparing the goods and services on offer by themselves and the opponent.⁵ However, I note that the goods and services listed do not match those named within the specifications of the competing marks which are relied upon in these proceedings. Reference to goods and

² Opponent's form TM7F, Q 12

³ Opponent's form TM7F, Q 12

⁴ Opponent's Submissions in lieu, Page 2 (only the cover page of the submissions in lieu has been paginated. I have therefore taken this to be Page 1, and inferred that the subsequent pages run consecutively from this page).

⁵ Applicant's Counterstatement, Page 2

services which are neither as registered nor *applied-for* will have no bearing on the goods and services comparison, and as such, I will make no further reference to them.

DECISION

13. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

Section 5(2)(b)

14. 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”.

15. 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 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

16. Section 60A of the Act provides:

“(1) For the purpose 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.”

17. In *Gérard Meric v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)*, Case T-133/05, the General Court (“GC”) stated:

“29 In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by the trade mark application (Case T-388/00 *Institut für Lernsysteme v OHIM – Educational Services* (ELS) [2002] ECR II-4301, paragraph 53) or when the goods designated by the trade mark application are included in a more general category designated by the earlier mark”

18. In comparing the respective specifications, all relevant factors should be considered, as per *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc.* where the Court of Justice of the European Union (“CJEU”) stated at paragraph 23 of its judgment:

“In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. Those factors include, inter alia, their nature, their intended

purpose and their method of use and whether they are in competition with each other or are complementary.”

19. Additionally, the relevant factors for assessing similarity were further identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281. Consideration should be taken of:

(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.

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

21. In *Les Éditions Albert René v OHIM*, Case T-336/03, the GC found that:

“61... The mere fact that a particular good is used as a part, element or component of another does not suffice in itself to show that the finished goods containing those components are similar since, in particular, their

nature, intended purpose and the customers for those goods may be completely different.”

22. Within the Form TM8 and counterstatement, the applicant admits that some of the goods within their specification are similar to the opponent’s goods. In CX02 BL O/393/19, Professor Phillip Johnson as Appointed Person stated as follows:

“Once such an admission is made it is deemed to be conclusively proved (a formal admission is sometimes called a “waiver of proof”: Phipson on Evidence (19th Ed), paragraph 4-03). This means neither party can lead evidence contrary to the admitted fact and, accordingly, a Hearing Officer cannot find a fact contrary to the admission (as doing so is the same as finding facts contrary to the evidence).”

23. As the applicant did not specify what degree of similarity it considers exists between the parties’ respective goods, I must still undertake a comparison in order to identify the degree of similarity between them.

24. The goods to be compared are set out below:

The opponent’s goods	The applicant’s goods
	<u>Class 29</u> <i>Milkshakes.</i>
<u>Class 30</u> <i>Cakes; Cake bars; Treacle cake; Cake mixes; Sponge cake; Cake pops; Iced cakes; Cake preparations; Chimney cakes; Chocolate cakes; Chocolate cake; Tea cakes; Frozen cakes; Powder (Cake-); Cake mixtures; Cake batter; Sponge cakes; Vegan cakes; Dough for cakes; Flavourings for cakes; Flavoring for cakes; Ice cream cakes; Petits fours</i>	<u>Class 30</u> <i>Alcoholic cakes; cocktail flavoured cakes; Cakes; Fruit cakes; Cake doughs; Cream cakes; Breakfast cake; Barm cakes; Cake powder; Millet cakes; Cake bars; Treacle cake; Candy cake; Cake flour; Almond cake; Moon cakes; Cake frosting; Cake mixes; Sponge cake; Cake Pops; Plum-cakes; Plum cakes; Iced cakes; Rice cakes; Cakes (Rice -);</i>

(cakes); Chocolate covered cakes; Frosting [icing] (Cake-); Iced sponge cakes; Ice-cream cakes; Sponge fingers (cakes); Iced fruit cakes; Chocolate decorations for cakes; Mixtures for making cakes; Flavourings for cakes other than essential oils; Flavorings, other than essential oils, for cakes; Deep chocolate cake made with chocolate sponge; Flavourings, other than essential oils, for cakes; Cakes (Flavorings [flavourings] other than essential oils, for-); Muffins; Muffin mixes; Brownies; Brownie mixes; Chocolate brownies; Brownie dough; Frozen brownie dough.

Cake preparations; Cake dough; Chimney cakes; Chocolate cakes; Chocolate cake; Tea cakes; Frozen cakes; Malt cakes; Cake icing; Powder (Cake -); Cake mixtures; Cake batter; Sponge cakes; Vegan cakes; Dough for cakes; Flavourings for cakes; Flavorings for cakes; Ice cream cakes; Petits fours [cakes]; Chocolate covered cakes; Frosting [icing] (Cake -); Frozen yogurt cakes; Iced sponge cakes; Ice-cream cakes; Candy cake decorations; Flapjacks [griddle cakes]; Sponge fingers [cakes]; Fruit cake snacks; Iced fruit cakes; Cake frosting [icing]; Icing for cakes; Chocolate decorations for cakes; Candy decorations for cakes; Mixtures for making cakes; Cake decorations made of candy; Cereal cakes for human consumption; Pastries, cakes, tarts and biscuits (cookies); Flavourings for cakes other than essential oils; Flavorings, other than essential oils, for cakes; Deep chocolate cake made with chocolate sponge; Chocolate-based fillings for cakes and pies; Flavourings, other than essential oils, for cakes; Custard-based fillings for cakes and pies; Dried sugared cakes of rice flour (rakugan); Cakes (Flavorings [flavourings], other than essential oils, for -); Muffins; English muffins; Muffin mixes; Brownies;

	<p><i>Brownie mixes; Chocolate brownies; Brownie dough; Frozen brownie dough.</i></p>
	<p><u>Class 32</u></p> <p><i>Cocktails, non-alcoholic; Non-alcoholic cocktails; Beer-based cocktails; Non-alcoholic beer-based cocktails; Non-alcoholic cocktail mixes; Non-alcoholic cocktail bases; Non-alcoholic fruit cocktails; De-alcoholized drinks; Alcohol free aperitifs; Non-alcoholic punches; Fruit beverages (non-alcoholic); Carbonated non-alcoholic drinks; Non-alcoholic fruit punch; Cordials [non-alcoholic]; Beverages (Non-alcoholic -); Non-alcoholic cordials; Non alcoholic aperitifs; Non-alcoholic punch; Smoothies [non-alcoholic fruit beverages]; Non-alcoholic fruit drinks; Non-alcoholic fruit extracts.</i></p>
	<p><u>Class 33</u></p> <p><i>Cocktails; Alcoholic cocktails; Alcoholic cocktail mixes; Prepared wine cocktails; Prepared alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic fruit cocktail drinks; Alcoholic cocktails in the form of chilled gelatins; Alcoholic aperitifs; Alcoholic extracts; Alcoholic punches; Alcoholic jellies; Low-alcoholic wine; Alcoholic energy drinks; Cordials [alcoholic beverages]; Alcoholic cordials; Alcoholic essences; Rice alcohol; Alcohol (Rice -); Alcoholic bitters;</i></p>

	<p><i>Alcoholic wines; Rum [alcoholic beverage]; Fruit extracts, alcoholic; Alcoholic fruit beverages; Alcoholic beverages of fruit; Sugarcane-based alcoholic beverages; Alcoholic egg nog; Alcoholic aperitif bitters; Low alcoholic drinks; Alcoholic fruit extracts; Beverages (Alcoholic -), except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages containing fruit; Pre-mixed alcoholic beverages; Alcoholic beverages, except beer; Fruit (Alcoholic beverages containing -); Alcoholic tea-based beverage; Alcoholic coffee-based beverage; Nira [sugarcane-based alcoholic beverage]; Alcoholic carbonated beverages, except beer; Alcoholic preparations for making beverages.</i></p>
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Class 29

Milkshakes.

25. In comparing *milkshakes* to the opponent's class 30 goods, I consider there to be an overlap in users at a very general level as the goods would be consumed by the general public. I also acknowledge that there is some overlap in trade channels, to the extent that they would be sold through supermarkets or establishments serving food and drinks. However, it is commonplace for these goods to be self-selected by the consumer, either from a shelf in a supermarket or restaurant, or from a menu. Such goods are rarely found in close proximity, and are instead usually located in either

different aisles of a supermarket, different shelves of a restaurant, or different sections of a menu. I consider the nature, method of use and intended purpose to differ. Milkshakes are a liquid beverage which are consumed by drinking. Their intended purpose is to quench thirst or for enjoyment. The opponent's goods, however, are solid foodstuffs or ingredients intended to make solid foodstuffs. They are consumed by eating and intended to satisfy hunger, or in the case of ingredients, used to make an edible food product which can satisfy hunger. I do not consider that there would be any competition between the goods. A consumer, seeking a beverage, will not logically select an edible good, or ingredient, as a replacement. In respect of complementarity, while I recognise that milkshakes are often consumed alongside goods such as cakes and brownies, I do not consider them indispensable or important to each other. I therefore consider these goods to be dissimilar.

Class 30

Alcoholic cakes; cocktail flavoured cakes; Cakes; Fruit cakes; Cream cakes; Breakfast cake; Barm cakes; Millet cakes; Cake bars; Treacle cake; Candy cake; Almond cake; Moon cakes; Sponge cake; Cake Pops; Plum-cakes; Plum cakes; Iced cakes; Rice cakes; Cakes (Rice -); Chimney cakes; Chocolate cakes; Chocolate cake; Tea cakes; Frozen cakes; Malt cakes; Sponge cakes; Vegan cakes; Ice cream cakes; Petits fours [cakes]; Chocolate covered cakes; Frozen yogurt cakes; Iced sponge cakes; Ice-cream cakes; Flapjacks [griddle cakes]; Sponge fingers [cakes]; Fruit cake snacks; Iced fruit cakes; Cereal cakes for human consumption; Deep chocolate cake made with chocolate sponge; Dried sugared cakes of rice flour (rakugan).

26. The term *Cakes* in the applicant's specification is self-evidently identical to the term *Cakes* in the opponent's specification. I consider the term *Cakes* to encompass any subvariety of cake and therefore the remaining terms listed above are identical as per the principle set out in *Meric*.

Cake mixes; Cake mixtures; Mixtures for making cakes.

27. I consider these terms identical to *Cake mixtures* listed in the opponent's specification. *Cake mixes and Mixtures for making cakes* are simply an alternative way of expressing the same term.

Cake doughs; Cake dough; Dough for cakes.

28. I find these terms identical to the opponent's *Dough for cakes*. Although the terms *Cake doughs; Cake dough* are expressed differently, they describe the same goods.

Cake preparations.

29. The opponent's term *Cake preparations* is explicitly named in both the opponent's and the applicant's specifications and are therefore identical.

Cake batter; Cake powder; Cake flour; Powder (Cake -); Chocolate-based fillings for cakes and pies; Custard-based fillings for cakes and pies.

30. I find the term *cake preparations* to include any type of preparation intended for use in making a cake. Therefore, under the principle set out in *Meric*, I consider the above goods to be identical.

Cake frosting; Cake icing; Cake frosting [icing]; Frosting [icing] (Cake -); Icing for cakes.

31. I consider the words frosting and icing to be used interchangeably to describe the same goods. Therefore, these terms are all alternative ways of expressing the same goods and are identical to the opponent's *Frosting [icing] (Cake-)*.

Flavourings for cakes; Flavorings for cakes; Flavourings for cakes other than essential oils; Flavorings, other than essential oils, for cakes; Flavourings, other than essential oils, for cakes; Cakes (Flavorings [flavourings], other than essential oils, for -).

32. I find these terms are self-evidently identical to the opponent's term *Flavourings for cakes*.

Chocolate decorations for cakes.

33. *Chocolate decorations for cakes* are identical to the opponent's term *Chocolate decorations for cakes*.

Candy cake decorations; Candy decorations for cakes; Cake decorations made of candy.

34. I consider that the term 'candy' can also incorporate the term 'chocolate' as a subcategory, and therefore the terms *Candy cake decorations; Candy decorations for cakes; Cake decorations made of candy* are identical to *Chocolate decorations for cakes* under the principle set out in *Meric*. If I am wrong in this finding, with 'candy' being distinguishable from 'chocolate', I find that they are nevertheless similar. They have the same nature, being edible cake decorations with a high sugar content, and the same method of use and intended purpose; all being applied to cakes to enhance their aesthetic appearance. They would be sold via the same trade channels (in supermarkets or wholesalers), intended for the same users (the general public, or specialist bakers), and found on the same shelf in a supermarket. While I acknowledge that there is no complementarity between the goods as one is not indispensable, or important, to the other, I do consider them to be competitive. A consumer may choose between a candy decoration or a chocolate decoration when making a purchase. I therefore find the goods similar to a high degree.

Pastries, tarts, and biscuits (cookies).

35. I consider these terms similar to *cakes* in the opponent's specification. All take the form of sweet treats which will be consumed as a snack or dessert by members of the general public. They therefore overlap in nature, method of use, intended purpose and user. They are also likely to overlap in trade channels in that producers and retailers of pastries, tarts and biscuits are also likely to produce and sell cakes. Additionally, they will be found in the same bakeries or same sections of supermarkets with a degree of competition existing in the purchasing process. A consumer may elect to buy a cake instead of a pastry, tart, or biscuit, and vice versa. Taking all this into account, I find that these goods are similar to a medium degree.

Muffins; English muffins.

36. The term *Muffins* is expressly stated within both the opponent's specification and the applicant's and is therefore identical. Muffin is a term used to describe either a sweet treat or a type of small, round, sweet bread. The latter is often referred to as

an English muffin. As this is a type of muffin it must follow that the term *English muffins* is included within the term *Muffin* and is therefore identical under the principle set out in *Meric*.

Muffin mixes; Brownies; Brownie mixes; Chocolate brownies; Brownie dough; Frozen brownie dough.

37. These terms are all expressly named in both the opponent's and applicant's specification, therefore they are identical.

Class 32

Cocktails, non-alcoholic; Non-alcoholic cocktails; Beer-based cocktails; Non-alcoholic beer-based cocktails; Non-alcoholic cocktail mixes; Non-alcoholic cocktail bases; Non-alcoholic fruit cocktails; De-alcoholized drinks; Alcohol free aperitifs; Non-alcoholic punches; Fruit beverages (non-alcoholic); Carbonated non-alcoholic drinks; Non-alcoholic fruit punch; Cordials [non-alcoholic]; Beverages (Non-alcoholic -); Non-alcoholic cordials; Non alcoholic aperitifs; Non-alcoholic punch; Smoothies [non-alcoholic fruit beverages]; Non-alcoholic fruit drinks.

38. For the same reasons set out in paragraph 25 above, I consider that, while these goods overlap in users with the opponent's class 30 goods, they differ in nature, method of use and intended purpose. Further, the goods are neither complementary, nor competitive. As for the trade channels, whilst there is a small degree of overlap, they differ overall, as they would not be located in the same area, whether that be within a retail outlet, restaurant, or on a menu. I therefore find them dissimilar. For clarity, I also find the above applied for goods to be dissimilar to the opponent's class 30 term *cake flavouring* as none of the above terms would be added to a cake as a replacement for a flavouring.

Non-alcoholic fruit extracts.

39. I consider the above term is most similar to the opponent's term *Flavourings for cakes*. Both are concentrated liquid substances which are added to items for the purpose of giving a desirable flavour. I therefore find an overlap in nature. However, a disparity exists in that *flavourings for cakes* in Class 30 are intended as an ingredient

for making solid foodstuffs, whereas *non-alcoholic fruit extracts*, given their class heading in Class 32, are intended as an ingredient for making a beverage. There is therefore a difference in their specific method of use and intended purpose. While the goods will be sold via supermarkets, I consider it unlikely that they will be sold in close proximity to each other. *Flavourings for cakes* would be found in supermarket aisles selling products for baking whereas *non-alcoholic fruit extracts* would be found alongside non-alcoholic beverages and ingredients for making such. Given the specific method of use and intended purpose of the competing goods, they are unlikely to be in competition with each other as a consumer, looking to purchase a flavouring for a cake, is unlikely to select an extract for making a beverage. I also find no complementarity as neither of the goods are indispensable or important to the other, and I consider it unlikely that the average consumer would believe that responsibility for them lies with the same undertaking. However, I accept that there is an overlap in user, being the general public. Taking all this into account, I find these goods similar to a low degree.

Class 33

Cocktails; Alcoholic cocktails; Alcoholic cocktail mixes; Prepared wine cocktails; Prepared alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic fruit cocktail drinks; Alcoholic aperitifs; Alcoholic punches; Low-alcoholic wine; Alcoholic energy drinks; Cordials [alcoholic beverages]; Alcoholic cordials; Rice alcohol; Alcohol (Rice -); Alcoholic bitters; Alcoholic wines; Alcoholic fruit beverages; Alcoholic beverages of fruit; Sugarcane-based alcoholic beverages; Alcoholic egg nog; Alcoholic aperitif bitters; Low alcoholic drinks; Alcoholic beverages containing fruit; Pre-mixed alcoholic beverages; Fruit (Alcoholic beverages containing -); Alcoholic tea-based beverage; Alcoholic coffee-based beverage; Nira [sugarcane-based alcoholic beverage]; Alcoholic carbonated beverages, except beer; Alcoholic preparations for making beverages.

40. Equally, I consider that the above terms are most similar to the opponent's term *Flavourings for cakes*. The opponent's goods are a concentrated liquid substance, used as an ingredient for making cakes, with the primary purpose of adding flavour. Further, as *flavourings for cakes* are found in class 30, whilst some may replicate the flavour of an alcoholic drink such as rum, they do not actually contain alcohol. In

contrast, the applicant's goods are alcoholic liquid substances which are either directly consumed or used for making beverages. Their primary purpose is for either refreshment, enjoyment, or as an ingredient for making a beverage. I acknowledge that certain types of alcoholic drinks may be added to products such as cakes to use as a flavouring, for example rum in rum cake and sherry/brandy in fruit cake, however, for the alcoholic drinks listed above, I do not consider them to be the type that would be added to cakes as a flavouring. I therefore consider the goods to differ in their nature, method of use and intended purpose. With regard to user, I acknowledge that there is an overlap in user as all goods will be purchased by the general public, however, a point of difference exists in that the applicant's goods, being alcoholic in nature, will be aimed solely at adults. While there is some overlap in trade channels at a very general level as all goods may be found in supermarkets, they would be located in different aisles and rarely found in close proximity to each other. The goods are also not indispensable or important to each other in such a way that a consumer would think that responsibility for them lies with the same undertaking. I therefore find no complementarity between them. In addition, I do not consider there to be any element of competitiveness between the goods as a consumer would be unlikely to choose these types of alcoholic beverages, or an ingredient intended to make an alcoholic beverage, over an ingredient to make a food product. Not least because the above goods are either a pre-made mix, carbonated, or diluted with a minimal amount of alcohol, and as such would be inappropriate to use as a substitute for a cake flavouring. Taking all of the above into account, I find the goods to be dissimilar.

Rum [alcoholic beverage]; Beverages (Alcoholic -), except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages, except beer.

41. As with the previous goods, I consider these terms most similar to the opponent's term *Flavourings for cakes*. For the same reasons as those stated in paragraph 40, I consider their nature, method of use, intended purpose and trade channels to differ. I also do not consider there to be any complementarity. Again, there is an overlap in user, being the general public, albeit with some difference in that the applicant's goods will be purchased solely by adults. However, unlike the previously compared alcoholic goods, these terms are either spirits, or include spirits, that are

more strongly concentrated. Whilst alcohol such as rum may be used as an ingredient to add flavour to cakes, so may foodstuffs such as bananas or carrots, and it does not mean that they are necessarily in competition with each other. Further, I acknowledge that cake flavourings would not be used as a substitute for a consumer wishing to purchase an alcoholic drink. I therefore find no competitive nature between the goods and, as such, I find the goods to be dissimilar.

Alcoholic cocktails in the form of chilled gelatins; Alcoholic jellies.

42. I will compare these goods to the opponent's *cakes* as I consider this term to be the most similar. The applicant's goods are semi-solid alcoholic foodstuffs, which are consumed for pleasure and intended as an alternative to an alcoholic beverage. Whilst the opponent's *cakes* are also foodstuffs, I consider them to differ in their form, appearance and substance. The intended purpose also differs, with cakes being intended to satisfy hunger, rather than as a replacement for an alcoholic drink. In addition, I find there to be some disparity in user with the applicant's goods being consumed solely by adults and the opponent's goods being available to the general public at large. In terms of trade channels, the applicant's goods would be sold by retailers who specialise in alcoholic products, rather than general supermarkets where *flavourings for cakes* would be sold. However, if I am wrong in this finding, and alcoholic gelatins and jellies are sold in general supermarkets, they would be found in different places and rarely in close proximity. The goods are also not important or indispensable to one another and it is unlikely that a consumer would expect the goods to derive from the same undertaking. As such, I find no complementarity between them. In addition, it would be unlikely that a consumer would choose an alcoholic jelly or gelatin over a sweet treat such as a cake, so I do not consider them competitive. Taking all this into account, I find the goods to be dissimilar.

Alcoholic extracts; Alcoholic essences; Fruit extracts, alcoholic; Alcoholic fruit extracts.

43. The above goods are extracts and essences which contain alcohol and may be added to other consumable liquids in order to create an alcoholic beverage. I also consider these terms most similar to the opponent's *Flavourings for cakes*. While all goods are concentrated liquid substances used for adding flavour, I find a notable point of difference in that the applicant's goods are alcoholic in nature. As I have

discussed above, whilst cake flavourings may be rum flavoured, they will not contain alcohol themselves. This leads to the goods differing in their nature, user, method of use and subsequent intended purpose. Unlike the opponent's *Flavouring for cakes*, the applicant's goods are purchased by adults or users within the drinks industry, and used as an ingredient for making alcoholic beverages. Whilst, in theory, they could be used as an alternative ingredient for flavouring cakes, in my view, without evidence to the contrary, this is not a typical practice, even for professional bakers. Therefore, I find that there would be no competitiveness between the goods. Further, given the alcoholic nature of the applicant's goods, they would be sold in different areas of a retail outlet. I also do not consider that one is indispensable or important to the other. I therefore find that there is no complementarity between them. Overall, taking all the above into account, I find these goods to be dissimilar.

44. As some degree of similarity between the goods is necessary to engage the test for likelihood of confusion, my findings above mean that the opposition must fail against the goods within the application that I have found to be dissimilar,⁶ namely:

Class 29: *Milkshakes*

Class 32: *Cocktails, non-alcoholic; Non-alcoholic cocktails; Beer-based cocktails; Non-alcoholic beer-based cocktails; Non-alcoholic cocktail mixes; Non-alcoholic cocktail bases; Non-alcoholic fruit cocktails; De-alcoholized drinks; Alcohol free aperitifs; Non-alcoholic punches; Fruit beverages (non-alcoholic); Carbonated non-alcoholic drinks; Non-alcoholic fruit punch; Cordials [non-alcoholic]; Beverages (Non-alcoholic -); Non-alcoholic cordials; Non alcoholic aperitifs; Non-alcoholic punch; Smoothies [non-alcoholic fruit beverages]; Non-alcoholic fruit drinks.*

Class 33: *Cocktails; Alcoholic cocktails; Alcoholic cocktail mixes; Prepared wine cocktails; Prepared alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic fruit cocktail drinks; Alcoholic aperitifs; Alcoholic punches; Low-alcoholic wine; Alcoholic energy drinks; Cordials [alcoholic beverages]; Alcoholic cordials; Rice alcohol; Alcohol (Rice -); Alcoholic*

⁶ eSure Insurance v Direct Line Insurance, [2008] ETMR 77 CA, paragraph 49.

bitters; Alcoholic wines; Alcoholic fruit beverages; Alcoholic beverages of fruit; Sugarcane-based alcoholic beverages; Alcoholic egg nog; Alcoholic aperitif bitters; Low alcoholic drinks; Alcoholic beverages containing fruit; Pre-mixed alcoholic beverages; Fruit (Alcoholic beverages containing -); Alcoholic tea-based beverage; Alcoholic coffee-based beverage; Nira [sugarcane-based alcoholic beverage]; Alcoholic carbonated beverages, except beer; Alcoholic preparations for making beverages; Rum [alcoholic beverage]; Beverages (Alcoholic -), except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages, except beer; Alcoholic cocktails in the form of chilled gelatins; Alcoholic jellies; Alcoholic extracts; Alcoholic essences; Fruit extracts, alcoholic; Alcoholic fruit extracts.

Average consumer and the purchasing act

45. It is necessary for me to determine who the average consumer is for the goods deemed identical or similar, and the manner in which the goods are likely to be selected by the average consumer. Further to this, for the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods in question: *Lloyd Schuhfabrik Meyer, Case C-342/97*.

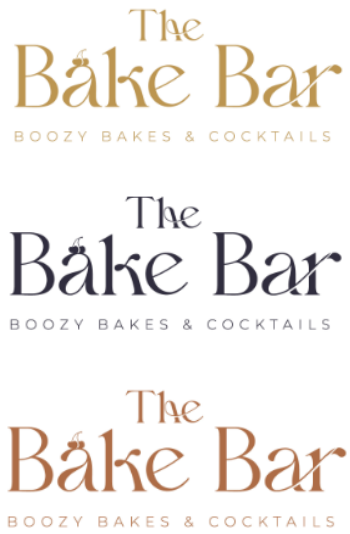
46. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

“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.”

47. The average consumer of the goods found to be identical or similar is likely to be a member of the general public, professional bakers or chefs, or businesses such as cafes and restaurants who may purchase the goods for onward sale to their customers. The goods are likely to be reasonably frequent purchases and priced at a relatively low cost. During the purchasing process a variety of factors are likely to be considered such as taste, flavour, or in the case of cakes and other baked goods, aesthetic appearance. The purchasing act will most likely take place by self-selection from the shelves in retail outlets, whilst in establishments such as bakeries, bars, restaurants and cafes the goods are often found behind a counter and selected by consumers following a visual inspection. The goods will also be viewed on menus, or on the web pages of online retailers. Consequently, visual considerations are likely to dominate the selection process, however, I do not discount an aural aspect to the selection process such as when requesting a particular item from a shop assistant, or from word-of-mouth recommendations. As a result of these factors, I find that no more than a medium degree of attention will be paid during the purchasing act.

Comparison of marks

48. The respective trade marks to be compared are shown below:

Earlier trade mark	Contested trade mark
<p>Boozy Bakers</p>	<p>(Series of 3)</p> 

49. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The Court of Justice of the European Union 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.”

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

Overall impression

51. The opponent’s earlier mark consists of the words ‘BOOZY’ and ‘BAKERS’. I consider the two words to form a unit taking on its own conceptual meaning which differs from the meanings of the terms in isolation. I therefore consider the overall impression to lie within the mark as a whole.

52. The applicant’s mark consists of a series of three figurative marks. Each mark within the series differs only in its colour, which I do not consider to make a material difference in this case, particularly as under the principle of fair and notional use, word-only marks, such as the opponent’s, protect the words themselves irrespective of simple colour patterns or font used.⁷ Consequently, I will proceed by referring to them in the singular, i.e. the contested mark, unless it becomes necessary for me to

⁷ Case T-24/17 *LA Superquimica v EUIPO* [2018], ECLI:EU:T:2018:668, paragraph 39 also see *Herno S.p.A. v Miss Sparrow Ltd*, O/645/21.

distinguish between them. The mark is comprised of the words 'THE BAKE BAR BOOZY BAKES AND COCKTAILS'. The words 'THE BAKE BAR' are presented in a stylised font with 'BAKE BAR' being larger in size and situated under the word 'THE'. Above the letter 'A' within the word 'BAKE' is the presence of what I identify as two cherries, conjoined by a stalk, situated directly on top of the letter. The central position and the large font size, leads to the eye naturally being drawn to the words 'BAKE BAR'. Positioned directly below this term are the words 'BOOZY BAKES AND COCKTAILS'. These words are presented in a standard upper-case font and are far smaller than the words above. I note that the opponent submits in their statement of grounds that the term 'BOOZY BAKES' is descriptive,⁸ and it appears to me that this is the intention of the applicant. They wish to inform the consumer that its intention is to supply baked goods containing alcohol, and cocktails. Taking this into account, I consider these words to play a lesser role within the mark. I therefore find that the dominant and distinctive element, lies within the words 'BAKE BAR'.

Visual comparison

53. Both marks contain the identical word 'BOOZY', and the similar words 'BAKES' in the applicant's mark and 'BAKERS' in the opponent's mark. However, as I have identified, the words 'BOOZY BAKES AND COCKTAILS' play a lesser role within the applicant's mark due to their size and descriptive nature. Moreover, the competing marks differ in the stylised words 'THE BAKE BAR' which are not present within the opponent's mark, along with the figurative cherry device described above. I therefore find that the marks are, in their totality, visually similar to only a low degree.

Aural comparison

54. The opponent's mark consists of the words 'BOOZY BAKERS'. They would be given their normal everyday pronunciation consisting of four syllables. The applicant's mark contains the words 'THE BAKE BAR'. They would also be articulated using their normal, everyday pronunciation, and contain three syllables. There is a small degree of overlap between the terms in that they both contain the element 'BAKE'. The applicant's mark also contains the words 'BOOZY BAKES AND COCKTAILS'. If taken

⁸ Opponent's form TM7F, Q 12

as a whole, this would lead the applicant's mark to contain ten syllables in total and overlap with the opponent's mark with the use of the word 'BOOZY'. There is also a degree of aural similarity between the word 'BAKES' in the applicant's mark and 'BAKERS' in the opponent's mark. However, given the secondary role the phrase 'BOOZY BAKES AND COCKTAILS' plays in the applicant's mark, and its descriptive nature, I consider it highly unlikely that these words will be articulated. Taking all this into account, I find the marks aurally similar to no more than a low degree.

Conceptual comparison

55. The words 'BOOZY BAKERS' in the opponent's mark combine to form a concept of bakers who consume, or enjoy, large quantities of alcohol. The dominant element in the applicant's mark is the term 'BAKE BAR'. This is allusive to a counter in a food establishment which serves baked goods. The secondary words 'BOOZY BAKES AND COCKTAILS' are purely descriptive of the goods offered, i.e. baked goods which contain alcohol, and alcoholic drinks in the form of cocktails. However, I consider there to be a conceptual overlap stemming from the use of the words 'BAKERS' and 'BAKE' in the respective marks, as they both allude to the concept of baking and baked goods. Taking this into account, I find a low level of conceptual similarity between the marks.

Distinctive character of the earlier trade mark

56. 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 *WindsurfingChiemsee 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).”

57. 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 a high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has not filed any evidence to show that its mark has obtained enhanced distinctiveness, therefore, I have only the inherent position to consider.

58. As noted above, the words ‘BOOZY BAKERS’ combine to form the concept of bakers who consume, or enjoy, large quantities of alcohol. Given the nature of the goods at issue, being baked goods or ingredients used to make baked goods, I find that there is an element of allusiveness to this mark in that it refers to a characteristic of the bakers who make the goods. I therefore find that the mark possesses between a low and medium degree of distinctive character.

Likelihood of confusion

59. 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 of the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

60. Earlier in my decision I found the following:

- a) The respective goods range from being identical, and similar to between a low and high degree, depending on the goods.
- b) The average consumer is a member of the general public, professional bakers or chefs, or businesses such as cafes and restaurants.
- c) The goods will be purchased predominantly by visual means, although I do not discount an aural element to the purchasing process.
- d) No more than a medium degree of attention will be paid during the purchasing act.
- e) The marks are visually similar to a low degree.
- f) The marks are aurally similar to no more than a low degree.
- g) There is a low level of conceptual similarity between the marks.
- h) The opponent's mark is inherently distinctive to between a low and medium degree.

61. Taking all of the above into account, I consider the differences between the applicant's mark and the opponent's mark to be sufficient to avoid direct confusion. Whilst both marks contain the word 'BOOZY' and the similar words "BAKERS"/"BAKES", in the contested mark these are used in a descriptive manner and play a lesser role in the overall impression. Instead, the dominant and distinctive elements within the contested mark are the words 'BAKE BAR'. As for the similar words 'BAKERS'/'BAKE', found within the respective marks, the additional words within each

of the competing marks join to form distinct units which create a visual, aural and conceptual difference within the respective distinctive and dominant elements. These differences will prevent consumers from confusing the marks for one another.

62. I now go on to consider indirect confusion.

63. Indirect confusion involves recognition by the average consumer of the difference between the marks. Indirect confusion was described in the following terms by Iain Purvis Q.C. (as he was then) sitting as the Appointed Person in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10:

“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)."

64. Whilst I note that the examples set out by Mr Purvis are not exhaustive, I note the recent case of *In Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, wherein Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said at [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.

65. The common element in both marks is the word 'BOOZY' and given that it may be interpreted as a descriptive term, or at best, highly allusive in relation to the goods, I do not find it to be so strikingly distinctive that no other undertaking could use it. Rather, I consider that the use of the word 'BOOZY' will be seen as coincidental. I also do not consider the other elements within the applicant's mark to be non-distinctive. On the contrary, I find the term 'BAKE BAR' to be the dominant and distinctive element within the mark. The presence of these words is not of the kind that one would expect to find in a logical sub-brand or brand extension as they would change the conceptual message of the mark.

66. I therefore find that the average consumer would view the two marks as originating from different unconnected undertakings. While the *L.A. Sugar* examples cited above are not exhaustive, I do not consider that this case falls into any of them, nor can I see any basis for finding indirect confusion. Bearing all the above in mind, I do not consider there to be a likelihood of indirect confusion between the applicant's and the opponent's marks.

Conclusion

67. The opposition under Section 5(2)(b) of the Act has failed. Subject to any successful appeal against my decision, the application may proceed to registration for all its goods.

Costs

68. The applicant has been successful and is entitled to a contribution towards its costs. The applicant is unrepresented and submitted a completed cost proforma to the Tribunal on 15 August 2023 outlining the number of hours spent on these proceedings.

Forms

69. The applicant has claimed 1 hours 45 minutes for preparing/filing a Notice of Defence. Under 'preparing evidence/written submissions', 3 hours 15 minutes has been claimed for preparing arguments for defence and 4 hours 30 minutes for researching other trademark opposition cases. As no separate evidence or written submissions were received after the Notice of Defence, I find that the time spent on these activities would have taken place during the preparation of the Notice of Defence. Therefore, I have collectively considered these claims. The issues were relatively simple and the form was not particularly lengthy or complex. As such, a total of 9 hours 30 minutes seems disproportionate and, instead, I award a total of 8 hours. The applicant has also claimed 30 minutes for considering forms filed by the other party, which I consider reasonable.

70. The applicant has claimed 30 minutes for seeking legal professional advice. However, the applicant has been unrepresented throughout these proceedings and no legal representatives have been appointed. As such, in the circumstances, the cost of seeking legal advice is not recoverable.

71. In relation to hours expended, I note that The Litigants in Person (Costs and Expenses) Act 1975 (as amended) sets out the minimum level of compensation for litigants in person in court proceedings at £19 per hour. I see no reason to award anything other than this. I therefore award costs to the applicant on the following basis:

Filing Form TM8 (Notice of Defence) and counterstatement and considering the forms filed by the other party.

(8.5 hours x £19) = £161.50

TOTAL: £161.50

72. I therefore order MICHELLE WILDING to pay OLIVIA LOUISE POMA-MULLER the sum of £161.50. 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 03rd day of May 2024

Nicola Janoo

For the Registrar

Annex

Class 29: Milkshakes.

Class 30: *Alcoholic cakes; cocktail flavoured cakes; Cakes; Fruit cakes; Cake doughs; Cream cakes; Breakfast cake; Barm cakes; Cake powder; Millet cakes; Cake bars; Treacle cake; Candy cake; Cake flour; Almond cake; Moon cakes; Cake frosting; Cake mixes; Sponge cake; Cake Pops; Plum-cakes; Plum cakes; Iced cakes; Rice cakes; Cakes (Rice -); Cake preparations; Cake dough; Chimney cakes; Chocolate cakes; Chocolate cake; Tea cakes; Frozen cakes; Malt cakes; Cake icing; Powder (Cake -); Cake mixtures; Cake batter; Sponge cakes; Vegan cakes; Dough for cakes; Flavourings for cakes; Flavorings for cakes; Ice cream cakes; Petits fours [cakes]; Chocolate covered cakes; Frosting [icing] (Cake -); Frozen yogurt cakes; Iced sponge cakes; Ice-cream cakes; Candy cake decorations; Flapjacks [griddle cakes]; Sponge fingers [cakes]; Fruit cake snacks; Iced fruit cakes; Cake frosting [icing]; Icing for cakes; Chocolate decorations for cakes; Candy decorations for cakes; Mixtures for making cakes; Cake decorations made of candy; Cereal cakes for human consumption; Pastries, cakes, tarts and biscuits (cookies); Flavourings for cakes other than essential oils; Flavorings, other than essential oils, for cakes; Deep chocolate cake made with chocolate sponge; Chocolate-based fillings for cakes and pies; Flavourings, other than essential oils, for cakes; Custard-based fillings for cakes and pies; Dried sugared cakes of rice flour (rakugan); Cakes (Flavorings [flavourings], other than essential oils, for -); Muffins; English muffins; Muffin mixes; Brownies; Brownie mixes; Chocolate brownies; Brownie dough; Frozen brownie dough.*

Class 32: *Cocktails, non-alcoholic; Non-alcoholic cocktails; Beer-based cocktails; Non-alcoholic beer-based cocktails; Non-alcoholic cocktail mixes; Non-alcoholic cocktail bases; Non-alcoholic fruit cocktails; De-alcoholized drinks; Alcohol free aperitifs; Non-alcoholic punches; Fruit beverages (non-alcoholic); Carbonated non-alcoholic drinks; Non-alcoholic fruit punch; Cordials [non-alcoholic]; Beverages (Non-alcoholic -); Non-*

alcoholic cordials; Non alcoholic aperitifs; Non-alcoholic punch; Smoothies [non-alcoholic fruit beverages]; Non-alcoholic fruit drinks; Non-alcoholic fruit extracts.

Class 33: *Cocktails; Alcoholic cocktails; Alcoholic cocktail mixes; Prepared wine cocktails; Prepared alcoholic cocktails; Alcoholic cocktails containing milk; Alcoholic fruit cocktail drinks; Alcoholic cocktails in the form of chilled gelatins; Alcoholic aperitifs; Alcoholic extracts; Alcoholic punches; Alcoholic jellies; Low-alcoholic wine; Alcoholic energy drinks; Cordials [alcoholic beverages]; Alcoholic cordials; Alcoholic essences; Rice alcohol; Alcohol (Rice -); Alcoholic bitters; Alcoholic wines; Rum [alcoholic beverage]; Fruit extracts, alcoholic; Alcoholic fruit beverages; Alcoholic beverages of fruit; Sugarcane-based alcoholic beverages; Alcoholic egg nog; Alcoholic aperitif bitters; Low alcoholic drinks; Alcoholic fruit extracts; Beverages (Alcoholic -), except beer; Alcoholic beverages (except beer); Alcoholic beverages except beers; Alcoholic beverages (except beers); Alcoholic beverages [except beers]; Alcoholic beverages containing fruit; Pre-mixed alcoholic beverages; Alcoholic beverages, except beer; Fruit (Alcoholic beverages containing -); Alcoholic tea-based beverage; Alcoholic coffee-based beverage; Nira [sugarcane-based alcoholic beverage]; Alcoholic carbonated beverages, except beer; Alcoholic preparations for making beverages.*