O/0479/25

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE APPLICATION NUMBER 3947017

BY KESTREL INNOVATIONS LIMITED

TO REGISTER THE FOLLOWING MARK:

Zenギヤ

IN CLASS 25

AND

IN THE OPPOSITION THERETO

UNDER NO. 445165 BY

1148 COMPANY INC.

BACKGROUND AND PLEADINGS

1. On 18 August 2023, Kestrel Innovations Limited ("the applicant") applied to register the trade mark shown on the cover page of this decision in the UK ("the contested mark"). The contested mark was published for opposition purposes in the Trade Marks Journal on 10 November 2023 in respect of the following goods:

> **Class 25:** Clothing; Ready-to-wear clothing; Clothes; Jerseys [clothing]; Shorts [clothing]; Casual clothing; Clothing for leisure wear; Ready-made clothing; Latex clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Tops [clothing]; Water-resistant clothing; Beach clothing; Triathlon clothing; Men's clothing.

2. On 9 January 2024, the applicant's mark was opposed by 1148 Company Inc. ("the opponent"). The opposition is brought under section 5(2)(b) of the Trade Marks Act 1994 ("the Act").

3. The opponent relies upon the following mark which, in accordance with section 6 of the Act, is an earlier mark ("the earlier mark"):

Trade mark number: UK00905028626

Filing date: 20 April 2006

Registration Date: 16 June 2009

4. The opponent relies upon the following goods for which its mark is registered:

Class 25: Clothing, headwear.

5. In its notice of opposition, the opponent submits that the marks are "highly similar" and the goods against which the marks have been applied for/protected are identical/similar. As a consequence, the opponent submits that there is a likelihood of confusion between the marks.

6. The applicant filed a counterstatement denying the claims made. The applicant asserts that there are "substantive differences" between the respective mark which the opposition "fails to recognise".

7. The opponent is represented by Venner Shipley LLP. The applicant is not legally represented. Only the opponent filed evidence in support of its claim (which is discussed in further detail below). No hearing was requested and neither party chose to file submissions in lieu of a hearing. This decision is therefore taken following a careful consideration of all of the documents filed by the parties, which will not be summarised but will be referred to as and where appropriate during this decision.

PRELIMINARY ISSUES

8. It is noted that the earlier mark has been registered for more than five years at the date of application for the contested mark and so, in accordance with section 6A of the Act, the applicant could have requested proof of use of the earlier mark from the opponent. However, it is noted that no such request was made by the applicant in its Notice of Defence and Counterstatement, and I am not therefore required to consider this issue.

9. Whilst no such request was made by the applicant, it is noted that the opponent has filed a witness statement by Charles David Lam ("Charles Lam"), who is a director of the opponent and has held this position since approximately 2011. The witness statement includes evidence of the opponent's use of the earlier mark within the United Kingdom ("UK") prior to the date that the application for the contested mark was made. Whilst I will not be considering this evidence to

determine whether there has been genuine use of the earlier mark in the five years prior to the date of application for the contested mark because the applicant did not request proof of use, I will consider this evidence when determining whether the earlier mark has acquired any enhanced distinctive character through use.

DECISION

10. 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)

11. The opponent's opposition is based up section 5(2)(b) of the Act which stipulates the following:

> "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".

12. Section 5A of the Act stipulates that "Where grounds for refusal of an application for registration of a trade mark exist in respect of only some of the goods or services in respect of which the trade mark is applied for, the application is to be refused in relation to those goods and services only."

Relevant law

13. The following principles are gleaned from the decisions of the Court of Justice of the European Union ('CJEU') in *Sabel BV v Puma AG*,[1] *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,*[2] *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.*,[3] *Marca Mode CV v Adidas AG & Adidas Benelux BV*,[4] *Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) ("OHIM")*,[5] *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*,[6] *Shaker di L. Laudato & C. Sas v OHIM*[7] and *Bimbo SA v OHIM*[8]:

    (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 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 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

[1] Case C-251/95
[2] Case C-39/97
[3] Case C-342/97
[4] Case C-425/98
[5] Case C-3/03
[6] Case C-120/04
[7] Case C-334/05P
[8] Case C-591/12P

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 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 the goods and services

14. The parties' goods are as follows:

The earlier mark's goods	**The contested mark's goods**

Class 25 Clothing, headwear.	Class 25 Clothing; Ready-to-wear clothing; Clothes; Jerseys [clothing]; Shorts [clothing]; Casual clothing; Clothing for leisure wear; Ready-made clothing; Latex clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Tops [clothing]; Water-resistant clothing; Beach clothing; Triathlon clothing; Men's clothing.

15. The opponent submits that the "opposed goods are all types of clothing and are therefore identical to the clothing for which the earlier trade mark is protected", and that the goods against which the contested mark is applied for "are similar to the headwear for which the earlier mark is protected." The applicant's position on the similarity of the goods is unclear from the submissions made in its Counterstatement; it denies any claims of confusion, but does not admit or deny that the goods are identical or similar, confining its denials to lack of similarity between the marks. Since it has not denied the opponent's claims regarding identity or similarity between the goods, this claim is effectively admitted. However, in any event, it is clear from the following authority that the goods are identical because the opponent's term 'clothing' covers all of the applicant's goods. Specifically, the applicant's specification includes the same term 'clothing' and all of the other goods are all types of clothing. The General Court confirmed in *Gérard Meric v Office for Harmonisation in the Internal Market*,[9] that, even if goods or services are not worded identically, they can still be considered identical if one term falls within the scope of another or (vice versa):

> "29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by trade mark application (Case T-388/00 *Institut fur*

[9] Case T- 133/05

Lernsysteme v OHIM- Educational Services (ELS) [2002] ECR II-4301, paragraph 53) or where the goods designated by the trade mark application are included in a more general category designated by the earlier mark".

The average consumer and the nature of the purchasing act

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

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

17. I consider that the average consumer of the goods will be members of the general public or athletes (who will need to purchase specific sport clothing, athletic clothing, or triathlon clothing). Given the variety of the goods covered in the parties' specifications, the goods in issue are likely to vary in costs and frequency of purchase. In any event, I consider that the considerations of the average consumer during the purchasing process will be the same, and that the average consumer will consider the price, size, fit, quality, material and suitability of the goods during this purchasing process. Consequently, I consider that a medium degree of attention will be paid during the purchasing process for all of the goods.

18. The purchasing act is likely to be mainly visual for all of the goods, following selection from websites, shelves of retail premises and perusal of catalogues and

advertisements both in print and online. I do not, however, rule out that there may be an aural element to the process, as advice may be sought from a sales assistant or representative.

Comparison of marks

19. 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.

20. 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."

21. 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.

22. The respective trade marks are shown below:

The earlier mark	The contested mark

	Zenギャ

23. The opponent asserts that the marks are visually, aurally and conceptually highly similar. By contrast, the applicant asserts that there are substantive differences between the marks and, specifically, the "use of multilingual scripts", the "incorporation of a culturally significant symbol" and "the specifical and innovative way these elements are combined". However, as the case law I have set out at paragraph 13 establishes, the matter must be judged through the eyes of the average consumer of the goods in question in the UK and, for the reasons outlined in further detail below, I do not consider that the average consumer in this instance would have the level of appreciation or understanding of the use of multilingual scripts and culturally significant symbols that has been asserted by the applicant in its counterstatement.

Overall impression

24. The earlier mark contains the word "zen", which is stylised but easily identifiable. Above the word "zen" is a device, and both the word "zen" and the device are positioned within a stylised black square boarder. I am of the view that the average UK consumer would perceive the device as some sort of character from an East Asian language, though I do not consider that the average consumer would immediately understand the meaning of that device/character. Notwithstanding the size of the device, I am of the view that the word plays the dominant role in the overall impression of the earlier mark because consumers' attention will naturally be drawn towards the word element of the mark: the device appears abstract and not comprehensible compared to the word element.

25. The contested mark also contains the word “Zen” which is followed by, what I consider the average consumer would perceive to be, characters from an East Asian language. As with the characters in the earlier mark, I do not consider that the average consumer would be able to immediately identify the meaning of these characters in the contested mark. Whilst I note that the applicant asserts that these characters are in fact a culturally significant symbol, I do not believe that the average UK consumer would understand or appreciate the cultural significance of these symbols/characters. On that basis, and on the basis that the characters are placed at the end of the mark and consumers tend to focus on beginning of marks (being where the point of similarity lies),[10] I consider that these characters play a lesser role in the overall impression of the device. Accordingly, I am of the view that the word “Zen” plays the greater role in the overall impression of the contested mark.

Visual comparison

26. Visually, both marks overlap in the presence of the word “zen”. Both marks also include what I consider would be perceived by the average consumer as characters from an East Asian language. Consequently, I do not accept the applicant’s submission that the marks lack similarity on the basis of the contested mark’s use of multilingual scripts.

27. Balancing the similar elements with those that look different, I consider the marks to be visually similar to a medium degree.

Aural comparison

28. As outlined above, I do not consider that the average UK consumer would be able to identify and therefore pronounce the elements of the marks that I have found are likely to be perceived as characters from an East Asian language. I therefore consider that the word “Zen” would be the only element of both marks that would be pronounced. In both instances, I see no reason why this would not

[10] *El Corte Inglés, SA v OHIM*, Cases T-183/02 and T-184/02

be pronounced in the usual way. Consequently, I consider the marks to be aurally identical.

Conceptual comparison

29. I do not consider that the stylised black boarder in the earlier mark has any conceptual meaning.

30. Further, as is outlined above, I do not consider that the average consumer would be able to identify and understand what I have determined are characters/symbols from an East Asian language in either mark. Again, I note that the applicant has asserted that the contested mark incorporates a culturally significant symbols (specifically, the applicant has described it as an 'enso,' symbol, which it asserts is a "revered emblem in Zen Buddhism"). However, I do not believe that the average UK consumer would understand or appreciate this cultural significance. I also note that the applicant has provided no evidence of this cultural significance or why this would be understood by the average UK consumer. Consequently, I am of the view that the only conceptual meaning in the marks is in the word "Zen", which I consider will be understood by the average consumer to be a reference to the form of Buddhist religion that is focussed on meditation, or a relaxed state of mind. As this is present in both marks, I find the marks to be conceptually identical. To the extent that the characters or symbols might be perceived as Eastern Asian, without being understood, this also means that the marks are conceptually identical.

Distinctive character of the earlier mark

31. The opponent asserts that "the earlier mark is inherently distinctive for the goods for which it is protected" but fails to elaborate on the basis of this assertion.

32. In its counterstatement, the applicant outlined why it considers the contested mark to be distinctive/"unique", but does not provide any submissions relating to the distinctiveness (or lack thereof) of the earlier mark. It therefore falls to me to consider the distinctiveness of the earlier in the ordinary way.

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

> "22. In determining the distinctive character of a mark and, accordingly, in assessing whether it is highly distinctive, the national court must make an overall assessment of the greater or lesser capacity of the mark to identify the goods or services for which it has been registered as coming from a particular undertaking, and thus to distinguish those goods or services from those of other undertakings (see, to that effect, judgment of 4 May 1999 in Joined Cases C-108/97 and C-109/97 *Windsurfing Chiemsee v Huber and Attenberger* [1999] ECR I-0000, paragraph 49).
>
> 23. In making that assessment, account should be taken, in particular, of the inherent characteristics of the mark, including the fact that it does or does not contain an element descriptive of the goods or services for which it has been registered; the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant section of the public which, because of the mark, identifies the goods or services as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations (see *Windsurfing Chiemsee*, paragraph 51)."

34. Distinctiveness is a scale along which marks of various types sit. A mark which is allusive of the goods or services will have less distinctive character than one that is not; dictionary words will be less distinctive than words which are entirely fanciful. However, all will turn on the particular facts.

35. In the present case, as noted above, I consider that "zen" will be understood by the average consumer to be a reference to the form of Buddhist religion that is focussed on meditation, or a relaxed state of mind. Whilst this is a dictionary word, there is no obvious connection in meaning between the word "zen", which I have determined as the dominant element of the earlier mark, and the goods

for which the earlier mark is protected. As such, the earlier mark, when considered in its totality, can be said to be inherently distinctive to a medium degree.

Enhanced distinctiveness: the evidence

36. The distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, and such enhanced distinctiveness may affect the likelihood of confusion between that mark and a later mark including the same, or a similar, element. In this instance, the opponent asserts that the earlier mark "has acquired distinctiveness as a consequence of prolonged use." In support of its position, the opponent filed a witness evidence signed by Charles Lam by way of a statement of truth (the "witness statement").

37. In summary, the witness statement states that the opponent's goods have been sold bearing the earlier mark in the UK prior to the filing date of the opposed application. In support of this statement, the witness statement included confirmation of the amount that the opponent had made in sterling from selling clothing and headwear in the UK with the earlier mark printed on it (the "product") during the period 2020 to 19 August 2023. Specifically, Charles Lam states that:

    a. in 2020 the opponent sold £3,530 worth of product;
    b. in 2021 the opponent sold £8,458 of its product;
    c. in 2022 the opponent sold £40,252 of its product; and
    d. between 1 January 2023 to 19 August 2023 the opponent sold £16,926 of its product.

38. Within the witness statement Charles Lam also states that the opponent's goods are advertised and sold in store and online through its UK stockists, which includes the London based retailer Bolt, and the Sheffield based retailer Clobber Calm.

39. Alongside the witness statement, the opponent filed five exhibits titled CDL1 to CDL5:

a. Exhibit CDL1 consists of a number of undated photographs of shirts and jeans with the opponent's earlier mark applied to them. In his witness statement Charles Lam has stated that the goods shown in the photographs were all sold/offered for sale to consumers in the UK before the filing date of the opposed application.

b. Exhibit CDL2 consists of screengrabs from Bolt's Instagram page. The first screengrab confirms that Bolt has two stores in London (229-231 Kingsland road and 1 Bouverie Road). There are then two screengrabs of posts made on 6 January 2022 and 24 September 2022 which reference "Bzen" and "bzenclothingbrand". However, neither of these posts evidence specific use of the earlier mark.

c. Exhibit CDL3 consists of 5 screengrabs from Clobbercalm social media covering the period 30 October 2021 to 10 February 2023. All of these screengrabs reference "bzenclothingbrand", "bzenclothing" or "bzen" but, once again, do not incorporate the earlier mark.

d. Exhibit CDL4 consists of a number of photographs of what Charles Lam states is a 2002 issue of "men's file" magazine, which does include an article referencing the Bzen clothing brand. However, yet again, there is nothing legible in exhibit CDL4 which would evidence actual use of the contested mark, just that the Bzen brand had been established at the date of publication of that specific issue, which is over twenty years prior to the relevant date (18 August 2023).

e. Exhibit CDL5 consists of screen grabs from various websites[11] which provide further information on the Men's file publication. In summary, this evidence describes Men's file as a "British magazine" which was

[11] https://seconsunrise.se/products/men-s-file-magazine-issue-22
https://www.theobsessive.co.uk/mens-file-1
https://www.koreropress.com/the-best-of-mens-file/
https://www.psbooks.co.uk/best-of-mens-file#:~:text=Men's File magazine was founded,century clothing%2C cars and motorcycles

"founded in 2008" (however, it is noted that this is inconsistent with the statement of Charles Lam that the issue exhibited at CDL4 is from 2002).

Assessment of Evidence

40. The opponent has provided evidence which would indicate that its brand "BZen" was marketing and selling goods in the UK prior to the date of the application of the contested mark. However, as outlined above, the evidence falls short of evidencing that it was actively using the earlier mark prior to the application of the contested mark. It simply evidences that the brand "BZen" clothing had been established at that time. The evidence also falls short of clearly identifying when it started marketing its goods in the UK.

41. Further, in the context of what is undoubtedly a huge market, the sales figures summarised in paragraph 37 above are very small, and only span a period of three years. The opponent has also only been able to evidence two stockists of its product, and only one instance of their product being advertised in a publication; none of which show the earlier mark. This evidence is insufficient to show that the earlier mark had come to the attention of enough UK average consumers to establish that its distinctive character had been enhanced through use at the relevant date

Likelihood of confusion

42. 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 down to the responsible undertakings being the same or related.

43. 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 vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and 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 they have retained in their mind.

44. I have determined that all of the goods in issue are identical and that the average consumer will be members of the general public at large or athletes who will select the goods by predominantly visual means, although I do not discount aural considerations. I have also concluded that the average consumer will pay a medium degree of attention during the selection process.

45. I have found the marks to be visually similar to a medium degree, and aurally and conceptually identical, and that the earlier mark possesses a medium degree of inherent distinctive character, but that the opponent has failed to evidence that it has established an enhanced level of distinctive character.

46. Taking all of these factors into account and bearing in mind the principle of imperfect recollection, I find that there is a likelihood of direct confusion. While I appreciate that there are some presentational differences, I consider these to be offset by the fact that the goods are identical and the marks are visually similar to a medium degree, and aurally and conceptually identical. As such, the presentational differences will be misremembered, especially in light of the principle of imperfect recollection and the fact that consumers rarely have the opportunity to compare marks side by side. As a result, I consider that there exists a likelihood of direct confusion between the marks.

47. For the avoidance of doubt, I will proceed to consider indirect confusion. In doing so, I remind myself of the comments of Iain Purvis KC, sitting as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*:[12]

[12] 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 recognised that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

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

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

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

(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).”

48. I have borne in mind that the examples given by Mr Purvis are not exhaustive. Rather, they were intended to be illustrative of the general approach.[13]

49. In Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors,[14] Arnold LJ referred to the comments of James Mellor KC, 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.

50. I note that the marks overlap in their use of their word "Zen" (which I have found to be the dominant element of both marks) and characters which I have determined the average consumer would determine to be characters from an East Asian language. If I am wrong in my determination that an average consumer may overlook the visual differences between the marks, I consider it likely that, upon seeing two marks featuring the word 'Zen' and characters from an East Asian language on identical goods, consumers would expect that the owners of such marks are the same or related, and that the use of alternative characters would be seen merely as a brand extension or brand variation. Consequently, I find there to be a likelihood of indirect confusion between the applicant's mark and the opponent's mark.

CONCLUSION

51. The opposition succeeds in full and, subject to any successful appeal of my decision, the application is refused registration.

[13] See Duebros Limited v Heirler Cenovis GmbH, BL O/547/17 at paragraphs [81] to [82]
[14] [2021] EWCA Civ 1207

COSTS

52. The opponent has been successful and is entitled to a contribution towards its costs in line with the scale set out in Tribunal Practice Note 1/2023. In the circumstances, I award the opponent the sum of £350 as a contribution towards the cost of the proceedings. I have not made an award for the evidence as it was of no assistance in reaching my decision. The sum is calculated as follows:

Official fee:	£100
Preparing a notice of opposition & considering the other side's statement:	£250
Total:	**£350**

53. I therefore order Kestrel Innovations Limited to pay 1148 Company Inc. the sum of £350. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 29th day of May 2025

B HARTLAND

For the Registrar