O/1209/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003984971

BY FIND YOURS BRANDS LTD

TO REGISTER THE FOLLOWING TRADE MARK:

FYR

IN CLASS 25

AND

IN THE MATTER OF OPPOSITION THERETO UNDER NO. 444809

BY THOMAS JONES

Background and Pleadings

1. On 28 November 2023, James Moore ('the Previously Registered Applicant') filed an application to register the following trade mark ('the Contested Mark'):

   FYR
   (Word Mark)

2. The application was published for opposition purposes in the Trade Marks Journal on 15 December 2023. Registration is sought in respect of the following goods:

Class 25 *Clothing; Knitwear [clothing]; Jackets [clothing]; Ready-to-wear clothing; Woolen clothing; Furs [clothing]; Clothing layettes; Layettes [clothing]; Garments for protecting clothing; Linen clothing; Headbands for clothing; Headbands [clothing]; Clothes; Gloves as clothing; Gloves [clothing]; Aprons [clothing]; Kerchiefs [clothing]; Jerseys [clothing]; Shorts [clothing]; Denims [clothing]; Cashmere clothing; Capes (clothing); Oilskins [clothing]; Gabardines [clothing]; Silk clothing; Clothing of leather; Leather clothing; Leather (Clothing of -); Parts of clothing, footwear and headgear; Belts [clothing]; Rainproof clothing; Waterproof clothing; Jackets being sports clothing; Visors [clothing]; Jackets (Stuff -) [clothing]; Stuff jackets [clothing]; Clothing for leisure wear; Bottoms [clothing]; Latex clothing; Woven clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Tops [clothing]; Weatherproof clothing; Clothing for cycling; Water-resistant clothing; Fabric belts [clothing]; Pockets for clothing; Sports jerseys and breeches for sports; Footwear for sports; Sports footwear; Sports jerseys; Sports shoes; Sports bras; Sports singlets; Sports jackets; Sports shirts; Sports wear; Sports socks; Sports vests; Clothes for sports; Boots for sports; Sports bibs; Sports garments; Sports caps; Sports overuniforms; Sports pants; Footwear not for sports; Articles of sports clothing; Combative sports uniforms; Footwear for sport; Footwear for use in sport; Sports clothing [other than golf gloves]; Moisture-wicking sports bras; Sports over uniforms.*

3. On 19 December 2023, the application was opposed by Thomas Jones ('the Opponent') based on section 5(2)(b) of the Trade Marks Act 1994 ('the Act'). The opposition is directed against the application in its entirety. It is noted that the Opponent has erroneously indicated that some goods are opposed, before proceeding to enumerate all of the class 25 goods for which registration is sought.[1] It is, therefore, clear that this is a full opposition. The Opponent relies upon the following earlier registration to oppose the application in its entirety:

   UK00003770464
   FYRE
   (Word Mark)

   Filing date: 26 March 2022

   Date of entry in register: 24 June 2022

   Registered for the following goods, all of which are relied upon:[2]

Class 25: Clothes; Clothing.

4. The Opponent claims that, inter alia, '[t]he combination of visual and phonetic similarities between the marks, the overlapping goods […] and potential impact on consumer perception establishes a clear likelihood of confusion'.[3]

5. The Previously Registered Applicant filed a Defence and Counterstatement in which it denied the claim against it in its entirety.

   Transfer of ownership of the application

[1] Form TM7 (Notice of opposition and statement of grounds), Q8.
[2] The Opponent has also erroneously indicated that 'some' of its goods are relied, before enumerating its entire registered specification.
[3] Form TM7, Q9.

6. On 12 September 2024, the Registry was informed of a transfer of ownership of the application, by assignment, from the Previously Registered Applicant to Find Yours Brands Ltd ('the Applicant') by way of Form TM16.[4] 1 May 2024 was provided as the date of the transfer of ownership. Recordal of the change of ownership was confirmed by the Registry on 15 July 2024.

7. On 5 November 2024, the Applicant confirmed the following undertakings in respect of the instant proceedings:

> That the Applicant:
> i. has had sight of any forms or evidence filed in the instant proceedings to date;
>
> ii. stands by the statements made by in the counterstatement, confirming that where the name of the Previously Registered Applicant appears, this should be read as though it is made in the Applicant's name;
>
> iii. is aware of and accepts liability for costs of the whole proceedings in the event that the opposition is successful.

Representation

8. The Opponent is unrepresented. The Applicant is represented by Harper James.

The evidence rounds

9. No evidence has been admitted into the proceedings. Only the Opponent filed written submissions; i. during the evidence rounds, dated 3 November 2024; and ii. final submissions, together with a costs proforma, dated 16 June 2025.

10. A hearing was neither requested, nor considered necessary. I confirm that I have read all of the submissions, to which I will refer to the extent that they are relevant.

[4] Application to record a change of ownership.

RELEVANCE OF EU LAW

11. 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.

12. The following decision has been made after careful consideration of the case papers available to me.

DECISION

Earlier mark

13. In accordance with section 6A of the Act, the Opponent's mark is an earlier mark by virtue of its filing date, which precedes the filing date of the application.

The proof of use provisions

14. Section 6A of the Act provides that, in opposition proceedings, where the date on which the registration procedure of the earlier mark was completed more than 5 years prior to the filing date (or priority date) of the Contested Mark, the Opponent may be required to prove use of the earlier mark. In the instant case, section 6A is not engaged, because the earlier mark has been registered for less than 5 years at the date on which the application was filed. The Opponent is, therefore, entitled to rely on the full breadth of its registered specification.

Section 5(2)(b) opposition

Relevant legislation

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

> '5(2) A trade mark shall not be registered if because –

(a)…

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

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

Relevant case law

16. The following principles are derived from the decisions of the Court of Justice of the European Union ('CJEU') in *Sabel BV v Puma AG,* Case C-251/95; *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc,* Case C-39/97; *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel 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 C120/04; *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 they have kept in their mind, and whose attention varies according to the category of goods or services in question;

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

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

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

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

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

A note on fair and notional use

17. I am required to make the assessment of the likelihood of confusion notionally and objectively based on the Opponent's goods, as registered, and the Applicant's goods, in respect of which registration is sought, in accordance with the relevant case law. That assessment requires that I must not take into account the actual way that either party might have used their marks in the marketplace or aspects of their goods which cannot be determined upon inspection of the Register. Further, I must consider all of the circumstances in which the mark for which registration is sought might be used should it become registered[5].

Comparison of goods

18. 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 1975.'

19. In making an assessment between the competing goods, I bear in mind the decision of the General Court ('GC') in *Gérard Meric v Office for Harmonisation in the Internal Market,* Case T-133/05:

> '29. … the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by

[5] As per *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited,* Case C- 533/06, [66].

trade mark application (Case T-388/00 Institut für 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'.

20. The CJEU in *Canon*, Case C-39/97, stipulates that all relevant factors relating to the parties' goods and services must be taken into account:

'[23] 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'.

21. Goods or services will be found to be in a competitive relationship only where one is substitutable for the other.[6] In *Boston Scientific Ltd v OHIM*, Case T-325/06, the GC described 'complementary" in the following terms: '[...] there is a close connection between them, in the sense that one is indispensable or important for the use of the other in such a way that customers may think that the responsibility for those goods lies with the same undertaking'.[7] In *Kurt Hesse v OHIM*, Case C-50/15 P, the CJEU stated that complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity between goods.

22. Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281[8], identified the following factors for assessing similarity of the respective goods and services:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

[6] *Lidl Stiftung & Co KG v EUIPO*, Case T-549/14.
[7] Paragraph 82.
[8] *British Sugar Plc v James Robertson & Sons Ltd* [1996] R. P. C. 281, pp 296-297.

(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.

23. Goods (or services) may be grouped together for the purposes of assessment, as Geoffrey Hobbs QC (as he then was), sitting as the Appointed Person, said in *Separode Trade Mark*, at [5]:[9]

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

24. The goods to be compared are set out above at [2] and [3].

25. The Applicant has denied that the parties' goods are identical.[10] I refer back to my comments on notional use, according to which I must make a comparison of the goods as registered [17]. I also re-iterate the principle set out in *Meric,* according to which goods (or services) X and Y are identical if either category of goods (or services) encompasses the other [19]. I, therefore, respectfully disagree with the Applicant's statement. That said, I do not find all of the parties' goods to be

[9] BLO/399/10.
[10] Applicant's counterstatement, [3].

identical. Where I have found points of identity (whether frankly identical, synonymous or identical based on the principle in *Meric*) I set them out in the following table:

Earlier mark:	Contested Mark:
Clothing *Clothes*	*Clothing* *Clothes*
Clothing	*Knitwear [clothing]; Jackets [clothing]; Ready-to-wear clothing; Woolen clothing; Furs [clothing]; Clothing layettes; Layettes [clothing]; Garments for protecting clothing; Linen clothing; Headbands for clothing; Headbands [clothing]; Gloves as clothing; Gloves [clothing]; Aprons [clothing]; Kerchiefs [clothing]; Jerseys [clothing]; Shorts [clothing]; Denims [clothing]; Cashmere clothing; Capes (clothing); Oilskins [clothing]; Gabardines [clothing]; Silk clothing; Clothing of leather; Leather clothing; Leather (Clothing of -); Belts [clothing]; Rainproof clothing; Waterproof clothing; Jackets being sports clothing; Visors [clothing]; Jackets (Stuff -) [clothing]; Stuff jackets [clothing]; Clothing for leisure wear; Bottoms [clothing]; Latex clothing; Woven clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Tops [clothing]; Weatherproof clothing; Clothing for cycling; Water-resistant clothing; Fabric belts [clothing]; Sports jerseys and breeches for sports; Sports jerseys; Sports bras; Sports singlets; Sports jackets; Sports shirts; Sports wear; Sports socks; Sports vests; Clothes for sports; Sports bibs; Sports garments; Sports caps; Sports overuniforms; Sports pants; Articles of sports clothing; Combative sports uniforms; Sports clothing [other than golf gloves]; Moisture-wicking sports bras; Sports over uniforms.*

26. For the remainder of the opposed goods, I will make my comparisons applying the usual ‘Treat’ factors, which I have set out at [22].

Contested goods: *Footwear for sports; Sports footwear; Sports shoes; Boots for sports; Footwear for sport; Footwear for use in sport*

27. I have grouped the above terms together on the basis that all are types of footwear specifically worn for playing sport. I compare these goods to the Opponent's *Clothing.* Both parties' goods will be worn, albeit footwear, self-evidently, is necessary worn on the feet. The respective goods will share a broad purpose to the extent that both sports footwear and clothing (which covers, inter alia, clothing specifically for sports) will be worn for warmth, coverage or protection. However, the goods will often differ as to their particular functions. For example, specific footwear for hockey or rugby is 'spiked' in order to provide traction on the pitch to avoid slipping during play. Users will overlap to the broad and obvious extent that almost every purchaser of sports footwear will also be a consumer of clothing, whether or not the clothing is sportswear. There will be total user overlap in instances where the clothing purchased *is* sportswear. Trade channels will overlap given that sportswear stores, for example, typically sell both sports clothing and sports footwear. Methods of use will differ by virtue of the way in which the respective goods are worn. There is no competitive relationship between the goods, neither being substitutable for the other. I do not find a complementary relationship, either; neither party's goods being necessary or important for the other. The goods will be different in terms of their physical natures; footwear being different in appearance to clothing. All things considered, I find no more than a medium level of similarity between the goods.

Contested goods: *Parts of clothing* […]*; Pockets for clothing*

28. These goods comprise component parts for clothing. I compare them to the Opponent's *Clothing.* I bear in mind the case of *Les Éditions Albert René v OHIM*, Case T-336/03, in which 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.'

29. The respective goods will have different purposes. The main purposes of clothing are coverage, warmth/protection from the elements and adornment. Parts for clothing, including pockets, are intended for use as component parts for, or additions to, items of clothing. Methods of use will, therefore, be different. *Clothing* at large will be purchased predominantly by the general public. It is recognised that a smaller number of purchases will be made by professional consumers (for example, chef's whites, or staff uniforms for businesses). I find that the Applicant's goods would be purchased predominantly by professionals in the business of manufacturing or crafting clothing. I recognise that a number of purchases will be made by members of the general public who make, repair or customise their own clothing. I consider trade channel overlap to be unlikely, though not impossible. One would not ordinarily expect clothing and parts for clothing to be provided by the same undertaking. Where parts of/pockets for clothing are purchased by professionals manufacturing at scale, they would typically be bought from wholesalers or directly from the manufacturers of those parts. Where the Applicant's goods are sold to the general public, these will generally be via haberdashers or fabric shops. There is no competition between the parties' goods; neither being substitutable for the other. I do not find complementarity, either. Whilst parts for clothing are self-evidently necessary for the *construction* of garments, they are not of any use to the finished garment itself. Conversely, from the standpoint of the purchaser of, say, a shirt yoke or trouser pocket, the purchaser would not find a finished garment to be of any use in relation to their purchased goods. In the light of the foregoing, I find the parties' goods to be dissimilar. If I am wrong about that, then any level of similarity will be very low.

Contested goods: *Parts of […] footwear and headgear*

30. Following my reasoning set out above at [29] regarding my comparison of part/pockets for clothing against clothing, it is my view that parts for footwear and

headgear are even farther removed from the Opponent's *clothing*. I find the parties' goods to be dissimilar.

31. Some similarity between the parties' goods and services is essential in order to find a likelihood of confusion between the parties' marks. In the case of *eSure Insurance v Direct Line Insurance,* [2008] ETMR 77 CA, Lady Justice Arden stated that:

> '49..... I do not find any threshold condition in the jurisprudence of the Court of Justice cited to us. Moreover, I consider that no useful purpose is served by holding that there is some minimum threshold level of similarity that has to be shown. If there is no similarity at all, there is no likelihood of confusion to be considered. If there is some similarity, then the likelihood of confusion has to be considered but it is unnecessary to interpose a need to find a minimum level of similarity'.

32. The opposition against the goods that I have found to be dissimilar, therefore, fails at this point. For ease of reference, the goods that I have found to be dissimilar are: *Parts of […] footwear and headgear*

33. Where I have made a finding of dissimilarity, followed by a back-up finding of a low level of similarity, those goods remain within scope.

34. For clarity, the opposition remains live for the following:

Clothing; Knitwear [clothing]; Jackets [clothing]; Ready-to-wear clothing; Woolen clothing; Furs [clothing]; Clothing layettes; Layettes [clothing]; Garments for protecting clothing; Linen clothing; Headbands for clothing; Headbands [clothing]; Clothes; Gloves as clothing; Gloves [clothing]; Aprons [clothing]; Kerchiefs [clothing]; Jerseys [clothing]; Shorts [clothing]; Denims [clothing]; Cashmere clothing; Capes (clothing); Oilskins [clothing]; Gabardines [clothing]; Silk clothing; Clothing of leather; Leather clothing; Leather (Clothing of -); Parts of clothing […]; Belts [clothing]; Rainproof clothing; Waterproof clothing; Jackets

being sports clothing; Visors [clothing]; Jackets (Stuff -) [clothing]; Stuff jackets [clothing]; Clothing for leisure wear; Bottoms [clothing]; Latex clothing; Woven clothing; Clothing for sports; Sports clothing; Leisure clothing; Athletic clothing; Tops [clothing]; Weatherproof clothing; Clothing for cycling; Water-resistant clothing; Fabric belts [clothing]; Pockets for clothing; Sports jerseys and breeches for sports; Footwear for sports; Sports footwear; Sports jerseys; Sports shoes; Sports bras; Sports singlets; Sports jackets; Sports shirts; Sports wear; Sports socks; Sports vests; Clothes for sports; Boots for sports; Sports bibs; Sports garments; Sports caps; Sports overuniforms; Sports pants; Footwear not for sports; Articles of sports clothing; Combative sports uniforms; Footwear for sport; Footwear for use in sport; Sports clothing [other than golf gloves]; Moisture-wicking sports bras; Sports over uniforms.

Average consumer and the purchasing act

35. The average consumer is deemed to be reasonably well-informed and reasonably observant and circumspect. The word 'average' denotes that the person is typical. 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 or services in question: *Lloyd Schuhfabrik Meyer,* Case C-342/97.

36. The vast majority of the goods at stake are items of clothing or footwear, which will be purchased predominantly by the general public. The purchasing act will be primarily visual with the goods being examined in physical stores, or images of them looked at by way of product listings online. I recognise that, in some cases, there will be an aural aspect to the purchasing process; by way of information sought from the seller's staff or word-of-mouth recommendations from others. Items of clothing cover a wide range of price-points; from a few pounds for a 'supermarket' T-shirt; to sums starting at about hundred pounds for many 'mid-market' garments; ranging to the high end 'couture' pieces available for vast sums. In my view, the level of attention paid would likely vary depending on the particular goods to be purchased. A wedding dress purchase would likely command a greater measure of attention than, say, a raincoat. Factors influencing the purchase

process will likely include, inter alia: size, fit and fabric composition. I find that, in most cases, the level of attention paid would likely be no more than medium.

Comparison of the marks

37. 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 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.'

38. The marks to be compared are:

Earlier mark:	Contested Mark:
FYRE	FYR

39. Both marks are word marks. In this connection, I remind myself of the case of *LA Superquimica v EUIPO*,[11] at paragraph [39] in which it was held that:

> '[…] it should be noted that a word mark is a mark consisting entirely of letters, words or groups of words, without any specific figurative element. The

[11] Case T-24/17.

protection which results from registration of a word mark thus relates to the word mentioned in the application for registration and not the specific figurative or stylistic aspects which that mark might have. As a result, the font in which the word sign might be presented must not be taken into account. It follows that a word mark may be used in any form, in any colour or font type (see judgment of 28 June 2017, *Josel* v *EUIPO — Nationale-Nederlanden Nederland (NN)*, T-333/15, not published, EU:T:2017:444, paragraphs 37 and 38 and the case-law cited).'

Overall impression of the marks

40. The earlier mark comprises the single four-character word element 'FYRE'. I find that the word will be seen as unit. The overall impression will, therefore, reside in the sole word element of which the mark is comprised.

41. The Contested Mark comprises the sole word element 'FYR'. I consider the overall impression to rest in the whole.

Visual comparison

42. The Opponent has argued that the parties' marks 'share a striking visual (and phonetic) resemblance'.[12] It argues that 'the brevity and structure of the marks makes them visually similar'.[13]

43. The Applicant submits that the relatively short length of both marks enhances the impact of the difference between them; the point of difference being the presence of the 'E' in the Opponent's mark, which is absent from the Contested Mark.[14] On this basis, the Applicant denies that the marks are visually similar.

44. I agree that, in this case, the relative shortness of the marks is such that the difference in length of just one character will be readily perceived by the average consumer. However, I disagree that this visual difference is sufficient to render the marks visually dissimilar. I bear that the beginnings of words tend to have more

[12] Form TM7, [Q9].
[13] Opponent's written submissions dated 3 November 2024, [2.1].
[14] Applicant's counterstatement, [1].

visual and aural impact that their ends, although this is not an absolute rule.[15] My view is that the shared string of characters 'FYR', which form the beginning of the Opponent's mark, and the entirety of the Contested Mark, support a finding that there is at least a medium level of visual similarity between the marks.

Aural Comparison

45. The Opponent argues that '[t]he marks are pronounced identically due to their shared structure and letter combinations'.[16]

46. The Applicant argues that the Opponent's mark will be pronounced 'fire', whereas the Contested Mark will be articulated by enumerating each character as an initial, i.e. 'EFF-WHY-ARR'.[17]

47. I prefer the Applicant's argument. I agree that the Opponent's mark will likely be articulated in the same way as the English word 'fire'. I also agree that the Contested Mark would most likely be verbalised by pronouncing each character individually as though the mark were an acronym (for something unknown) or a trio of initials for a name. To my mind, it is unlikely that a UK consumer would be moved to pronounce 'FYR' as 'fire'. In my experience as an ordinary member of the English-speaking UK public, there are very few words within the English language that end in 'YR'. (One such example is 'martyr', which is articulated 'MAA-TUH')To my mind, the uncertainty over how to pronounce a three-character word ending in 'YR' would cause the average UK consumer to hesitate to treat it as a word. In my view, the easiest and most natural way to articulate the mark would be to 'spell out' each character.

48. However, in case some average consumers would articulate 'FYR' as 'fire', they would likely be insignificant in number.

[15] *El Corte Inglés, SA v OHIM,* cases T-183/02 and T-184/02
[16] Opponent's written submissions dated 3 November 2024, [2.1].
[17] Applicant's counterstatement, [2].

49. I find that a significant proportion of average consumers would articulate the parties' marks as 'fire' (FYRE) versus 'EFF-WHY-ARR' (FYR). Aurally speaking, I find that these differences do not support a finding of similarity between the marks. I find the marks to be aurally dissimilar.

Conceptual comparison

50. The Opponent has not addressed the conceptual aspect of either mark. The Applicant has argued that the Opponent's mark 'FYRE' 'appears to be use of the old [E]nglish noun FYRE which today would be understood to mean 'fire''.[18]

51. I agree that some average consumers would likely perceive 'fyre' as a mis-spelling of the word 'fire'. I also find that a significant proportion of average consumers may see 'fyre' as an invented word, to which no particular meaning will attach.

52. As to the Contested Mark, the Applicant has stated that 'FYR is an abbreviation of the Applicant's brand Find Your Remedy.'[19] Whilst the Applicant does not explicitly argue that the average consumer would ascribe this specific meaning to the Contested Mark, it is appropriate to note that my conceptual assessment must be based on the mark as it appears. The wording for which the mark is said to be an abbreviation is not apparent from the representation of the mark. In my view, the mark 'FYR' will most likely be seen as an abbreviation for words, or, perhaps a name, unknown. If the Contested Mark can be said to have any concept at all, it is the concept of a string of alphabetic characters being an acronym for something unknown. This is nevertheless a concept, albeit not a terribly rich one.

53. In the light of the foregoing:

    i. for the group of average consumers who perceive 'FYRE' as a mis-spelling of 'fire', the parties' marks will be conceptually different;

[18] Applicant's counterstatement, [3].
[19] As above.

and

ii. for the average consumers who see ‘FYRE’ as an invented word (leaving aside the fact that, strictly speaking, no mark comprising a string of alphabetic characters can be truly devoid of concept - because the idea of a mere string of letters is itself a concept) the marks can be said to be more-or-less conceptually neutral.

54. Following my finding that the number of average consumers who might articulate ‘FYR’ as ‘fire’ would unlikely be significant, it follows that the number of average consumers who might perceive the marks as, respectively, a mis-spelling of ‘fire’ (FYRE) and an abbreviation of a mis-spelling of ‘fire’ (FYR) will also be insignificant. Furthermore, I consider the mental operation required to see ‘FYR’ as an abbreviation of ‘FYRE’, in turn, a mis-spelling of ‘fire’, to render such an interpretation virtually inconceivable.

Distinctive character of the earlier marks

55. 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)'.

56. Registered trade marks possess varying degrees of inherent distinctive character. Where a mark is suggestive or allusive of a characteristic of the goods or services, it tends to be low. Inherent distinctive character may range up to a high level for marks which consist of invented words with no allusive qualities.

57. The word element 'FYRE', neither describes nor alludes to the relevant goods. For the average consumers who perceive the mark as an invented word, the mark will have a high level of inherent distinctive character. For those who see the word as a mis-spelling of 'fire', the mark will still have a fairly high level of inherent distinctiveness.

58. In the absence of any evidence being filed, there is no finding to be made in respect of enhanced distinctiveness.

Likelihood of confusion

59. Confusion can be direct or indirect. Mr Iain Purvis Q. C., (as he then was) as the Appointed Person, explained the difference in the decision of *L.A. Sugar Limited v By Back Beat Inc*[20]*.* Direct confusion occurs when one mark is mistaken for another. In *Lloyd Schuhfabrik*[21], the CJEU recognised that the average consumer rarely encounters the two marks side by side but must rely on the imperfect picture of them that they have kept in mind. Direct confusion can therefore occur by imperfect recollection when the average consumer sees the later mark but mistakenly matches it to the imperfect image of the earlier mark in their 'mind's eye'. Indirect confusion occurs when the average consumer recognises that the

[20] Case BL O/375/10 at [16].
[21] *Lloyd Schuhfabrik Meyer and Co GmbH v Klijsen Handel BV* (C-34297) at [26].

competing marks are not the same in some respect, but the similarities between them, combined with the goods/services at issue, leads them to conclude that the goods/services are the responsibility of the same or an economically linked undertaking.

60. I must keep in mind that a global assessment is required taking into account all of the relevant factors, including the principles a) – k) set out above at [16]. When considering all relevant factors 'in the round', I must bear in mind that a greater degree of similarity between goods/services *may* be offset by a lesser degree of similarity between the marks, and vice versa.

61. I will address direct confusion, first. I have found all but one of the Applicant's class 25 terms to have some level of similarity with the Opponent's goods; ranging from 'identical' to 'a very low level of similarity'. My view is that the net effect of the visual, aural and conceptual distinctions that I have identified is sufficient to overcome the identicality and similarity between the parties' goods. Although the marks differ by just one character, I bear in mind the case of *dm-drogerie markt GmbH & Co. KG v OHIM*[22] in which it was noted that where competing 'word' signs are relatively short, even a difference of one character can preclude a finding of high visual similarity. I have found the marks to be visually similar to at least a medium degree. However, the visual difference between them, i.e. the 'E' present in the earlier mark (comprising four characters) versus the Contested Mark (of three characters) where the 'E' is absent, will be readily noticed by the average consumer. It is the presence of the 'E' that moves the average consumer to articulate the Opponent's mark as 'FIRE'. I find that the structure of the Contested Mark 'FYR' (absent an 'E') is such that the average consumer is inclined to articulate the mark by enumerating each character, i.e. 'EFF-WHY-ARR'. In the instant case, therefore, the difference of just one character has a significant impact on the aural and conceptual aspects of the marks. Even where the marks are seen as more-or-less conceptually neutral, insofar as neither evokes any rich concept/meaning of note, there will still be a difference in the way that they are 'understood'. The perception of 'FYRE' as an invented word versus the perception of 'FYR' as initials for something/name

[22] Case T-304/10.

unknown nevertheless leads to a difference in how the marks are understood. I have found the earlier mark to have a high level of inherent distinctiveness. Whilst it is generally the case that the more distinctive an earlier mark is, the greater the likelihood of confusion, the conceptual considerations that I have set out, to my mind, point away from a likelihood of direct confusion. I find that the average consumer will unlikely confuse one mark for the other. There is no likelihood of direct confusion. I find this to be the case even where only a medium level of attention is paid during the purchasing process.

62. I now consider whether there is a likelihood of indirect confusion. In the case of *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, 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 the following at [16]:

> 'a finding of a likelihood of indirect confusion is not a consolation prize for those who fail to establish a likelihood of direct confusion'. Mr Mellor went on to say that, if there is no likelihood of direct confusion, 'one needs a reasonably special set of circumstances for a finding of a likelihood of indirect confusion'.

63. Arnold LJ emphasised that 'there must be a proper basis for concluding that there is a likelihood of indirect confusion given that there is no likelihood of direct confusion'.[23]

64. In *L.A. Sugar Limited v Back Beat Inc*[24] Mr Iain Purvis Q. C. (as he then was), as the Appointed Person, explained that:

> (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

[23] *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207.
[24] Case BL O/375/10

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)'.

65. I remind myself that a finding of a likelihood of indirect confusion should not be made merely because the competing marks share a common element.[25] I also bear in mind that the above-mentioned categories are not intended to be exhaustive.

66. The Opponent has argued that there is a likelihood that consumers would presume that goods bearing the mark 'FYR' were affiliated with, or endorsed by, 'FYRE'.[26]

67. I do not consider that the instant case aligns with any of the three categories identified by Mr Purvis. Even if the earlier mark were so strikingly distinctive that the average consumer was convinced that no other undertaking would be trading under it, my observations on the different ways in which the parties' marks would be understood rules this out. The marks are constructed in such a way that neither mark lends itself to division into more or less distinctive components, or elements suggestive of a brand extension. I can conceive of no other mental process by which the marks could be presumed to be brand variations or otherwise related brands. To my mind, there is no obvious commercial rationale for this to be so.

[25] Case BL O/547/17, [81.4].
[26] Form TM7, [Q9].

68. Taking all relevant matters into consideration, I am unable to find a proper basis for a finding that the parties' marks belong to the same or economically-related undertakings. I find that there is no likelihood of indirect confusion.

Conclusion

69. The opposition has failed in its entirety. Subject to a successful appeal, application UK00003984971 may proceed to registration in its entirety.

Costs

70. The Applicant is the successful party and is, therefore, entitled to a contribution to its costs based upon the scale published in Tribunal Practice Notice 1/2023, calculated as follows:

Preparation of counterstatement and consideration of opposition:	£250
Total:	£250

71. I, therefore, order Thomas Jones to pay to Find Yours Brands Ltd the sum of £250. 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 23rd day of December
N. Rhea Morris
For the Registrar