

O/0703/24

TRADE MARKS ACT 1994

**IN THE MATTER OF
TRADE MARK APPLICATION NO. 3828698
BY STONEGATE FARMERS LIMITED**

TO REGISTER THE TRADE MARK:

JOLLY PECKISH

IN CLASSES 29 AND 30

AND

**IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 437671
BY THE JOLLY HOG GROUP LIMITED**

Background and pleadings

1. On 12 September 2022, **Stonegate Farmers Limited** (“the applicant”) applied to register the trade mark displayed on the front cover of this decision in the UK, under number **3828698** (“the contested mark”). The contested mark was published in the Trade Marks Journal for opposition purposes on 23 September 2022. Registration is sought for the following goods:

Class 29: Eggs; Birds egg products; Egg yolks, egg products, dried eggs, liquid eggs, frozen eggs, powdered eggs, egg whites and dairy products, all for food; Scotch eggs; Prepared meals containing [principally] eggs; Spreads consisting mainly of eggs; Prepared dishes consisting primarily of fishcakes, vegetables, boiled eggs, and broth; Soups; Ready cooked meals consisting primarily of meat; Prepared meals consisting primarily of vegetables; Prepared meals and snack foods containing meat namely poultry, beef, lamb, pork; Prepared meals and snack foods containing poultry, beef, lamb or pork; Preserved, dried or cooked fruits and vegetables; Jams; Milk; Fruit preserves and vegetable preserves; Meat; poultry and game, none being live; Meat products, poultry products, game products; Fruit snacks; Potato snacks; Legume-based snacks; Meat-based snack foods; Potato-based snack foods; Cheese-based snack foods; Snack foods based on vegetables; Fruit- and nut-based snack bars.

Class 30: Sandwiches; Meat pies; Canned meat puddings; Sausage rolls; Quiche; Cereal-based savoury snacks; Pastries, cakes, tarts and biscuits (cookies); Breads.

2. On 23 November 2022, **The Jolly Hog Group Limited** (“the opponent”) filed a notice of opposition. The opposition is brought under Section 5(2)(b)¹ of the Trade Marks Act 1994 (“the Act”) and is directed against all the applied-for goods.
3. The opponent relies upon its comparable UK trade mark number 918282195,² **JOLLY** (“the earlier mark”). The earlier mark was registered on 18 December 2020 in respect of the following goods and services, all of which are relied upon for the purposes of this opposition:

Class 29: Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked vegetables; milk and milk products; edible oils and fats; soups and potato crisps; sausages; black pudding; white pudding; pork scratchings; meat burgers; prepared meals containing meat; prepared meals containing chicken; prepared meals containing bacon; prepared meals containing poultry; prepared meals containing game; prepared meals containing turkey; prepared meals containing duck; prepared meals containing vegetables; prepared meals containing meat substitutes; meat-based snack foods; vegetarian meats; vegetarian sausages; charcuterie; frozen meals consisting primarily of chicken; frozen meals consisting primarily of poultry; frozen meals consisting primarily of fish; frozen meals consisting primarily of meat.

Class 30: Coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; salt; mustard; vinegar; sauces (condiments); spices; sandwiches; pizzas, pies and pasta dishes; sausage rolls; pork

¹ The opponent originally sought to rely upon additional grounds, namely, s.5(3) and s.5(4)(a) as well as a number of different earlier marks. However, the opponent communicated to the Tribunal on 8 May 2022, that it wished to remove these additional grounds and marks, and confirmed its claim was now based solely on s.5(2)(b) of the Act and UK trade mark number 918282195.

² On 1 January 2021, the UK left the EU. Under Article 54 of the Withdrawal Agreement between the UK and the EU, the UKIPO created comparable UK trade marks for all right holders with an existing EUTM. As a result of the opponent's EUTM no. 18282195 being registered as at the end of the Implementation Period, a comparable UK trade mark was automatically created. The comparable UK mark is now recorded on the UK trade mark register, has the same legal status as if it had been applied for and registered under UK law, and the original EUTM filing date remains.

pies; apple sauce; meat gravies; prepared meals containing rice; prepared meals containing pasta; flavourings made from meat; vegan bread, pastry and confectionery; vegan cakes; vegan sauces (condiments); prepared vegan meals; vegan pizzas, vegan pies and pasta dishes; vegan sausage rolls; vegan gravies; vegan flavourings; mint sauce; barbecue sauce.

Class 43: Services for providing food and drink; catering services; temporary accommodation; restaurant, bar and catering services; booking and reservation services for restaurants; information, consultancy and advice in relation to the foregoing services.

4. The filing date of the opponent's mark is 3 August 2020, given the respective filing dates, the opponent's mark is an earlier mark in accordance with section 6 of the Act. However, as it had not been registered for five years or more at the filing date of the contested mark, it is not subject to the proof of use requirements specified within section 6A of the Act. Consequently, the opponent may rely upon all of the goods and services identified without having to demonstrate genuine use.
5. In its notice of opposition, the opponent contends that the competing trade marks are similar as a result of the applicant's mark containing the whole of the opponent's mark, and that the respective goods are identical or similar, leading consumers to believe that they are provided by the same undertaking, resulting in a likelihood of confusion.
6. The applicant filed a counterstatement denying the ground of opposition. The applicant concedes that some, but not all, of its goods are similar to the opponent's goods, however, it rejects any claim that the applied-for goods are identical or similar to the opponent's services. Further, whilst the applicant accepts that the competing marks both contain the word "Jolly", it denies that the overall levels of similarity are such that would give rise to a likelihood of confusion.
7. Only the opponent filed evidence in these proceedings. A hearing was requested and held before me, by video conference, on 22 November 2023. At the hearing the

opponent was professionally represented by Mr Victor Caddy of IAM The Victor LLP; the applicant has been represented throughout these proceedings by Novagraaf, however, neither the applicant nor its representative attended the hearing.

Relevance of EU law

8. 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.

Evidence and submissions

9. The opponent's evidence comprises the witness statement of Maxim Julius Kohn, dated 3 May 2023, together with Exhibits MJK-1 to MJK-7. Mr Kohn is a director of the opponent's company. The purpose of the evidence, as Mr Caddy stated at the hearing, is to support the 'case theory of commercial realities', which I understand to mean evidence of actual trade within the marketplace.
10. The applicant filed written submissions in the evidence rounds which, inter alia, addressed the evidence. The applicant chose not to attend the hearing but filed further written submissions in lieu, whilst the opponent filed a skeleton argument in advance of the hearing.
11. Whilst the parties' evidence and submissions will not be summarised here, I have taken them all into consideration in reaching my decision and will refer to them below, as and where necessary.

Preliminary issues

12. Throughout the hearing Mr Caddy referred to evidence showing how the competing marks are currently used on the market. As I commented at the hearing, the earlier mark has not yet been registered for five years or more and the contested mark is

not yet registered; as such, I must consider the marks in the context that they have been registered or applied for, rather than how each of the marks is actually used in practice. Therefore, I will not be considering the stylisation or word placement that either the applicant or the opponent uses on the market.

13. Further, I was invited during the hearing to consider how the mark “JOLLY” had been used in promotional marketing on social media,³ and how consumers had been educated to view the word “JOLLY” in different circumstances and in different contexts, such as, for example ‘tis the season to be jolly’, ‘have a jolly Christmas’, ‘for a jolly good father’, or ‘jolly good eggs’. It was argued that as consumers would be familiar with the different ways and contexts in which the word “Jolly” was used by the opponent, this would lead to greater consumer confusion between the competing marks as consumers would believe through the use of the word “Jolly” that the marks derived from economically linked undertakings. However, without further evidence it is impossible for me to determine the extent of this promotional marketing evidence. Without more information regarding, for example, the number of views from UK consumers or details of relevant market share, I am unable to reach this conclusion.

DECISION

Legislation

Section 5(2)(b)

14. Sections 5(2)(b) and 5A of the Act read as follows:

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

[...]

³ Exhibit MJK-2

(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”.

“5A 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.”

Case law

15. I am guided by the following principles which 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 and services

16. The goods and services to be compared are those outlined in paragraphs 1 and 3 of this decision.

17. All relevant factors relating to the goods should be taken into account, which include, inter alia:⁴

- the physical nature of the goods or acts of service;
- their intended purpose;
- their method of use / uses;
- who the users of the goods and services are;
- the trade channels through which the goods or services reach the market;
- in the case of self-serve consumer items, where in practice they are found or likely to be found in shops and in particular whether they are, or are likely to be, found on the same or different shelves; and
- whether they are in competition with each other (taking into account how those in trade classify goods and services, for instance whether market research companies put them in the same or different sectors)

or

⁴ See *Canon*, Case C-39/97, paragraph 23; and *British Sugar PLC v James Robertson & Sons Ltd.*, [1996] R.P.C. 281 – the “*Treat*” case.

- whether they are complementary to each other. Complementary signifying that “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”.⁵ Complementarity is an autonomous criterion capable of being the sole basis for the existence of similarity.⁶

18. When interpreting the terms in a specification, I bear in mind that it is necessary to focus on the core of what is being described and that trade mark registrations should not be allowed such a liberal interpretation that their limits become fuzzy and imprecise. Nevertheless, the principle should not be taken too far and where words or phrases in their ordinary and natural meaning are apt to cover the category of goods in question, there is equally no justification for straining the language unnaturally so as to produce a narrow meaning which does not cover the goods in question.⁷

19. Furthermore, I bear in mind the approach in *Sky v Skykick*,⁸ where Lord Justice Arnold set out the correct approach to interpreting broad and/or vague terms.

“...the applicable principles of interpretation are as follows:

(1) General terms are to be interpreted as covering the goods or services clearly covered by the literal meaning of the terms, and not other goods or services.

(2) In the case of services, the terms used should not be interpreted widely, but confined to the core of the possible meanings attributable to the terms.

(3) An unclear or imprecise term should be narrowly interpreted as extending only to such goods or services as it clearly covers.

⁵ *Boston Scientific Ltd v OHIM*, Case T-325/06, paragraph 82, see also *Sandra Amalia Mary Elliot v LRC Holdings Limited*, BL O/255/13

⁶ *Kurt Hesse v OHIM*, Case C-50/15 P, see also *Sanco SA v OHIM*, Case T-249/11

⁷ *YouView TV Ltd v Total Ltd* [2012] EWHC 3158 (Ch), paragraphs 11 - 12

⁸ [2020] EWHC 990, (Ch)

(4) A term which cannot be interpreted is to be disregarded.”

20. In *Gérard Meric v Office for Harmonisation in the Internal Market ('Meric')*,⁹ the General Court (“GC”) held that 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 and vice versa.

21. I acknowledge that the applicant reiterates within its most recent submissions that it accepts that there is some overlap between certain goods that it has identified within the table set out at paragraph 12.¹⁰ Whilst the applicant accepts that these goods are similar, it does not comment upon the degree of similarity. Therefore, I will proceed to conduct a full comparison for all the applied-for goods.

22. I further note the applicant’s position that merely because the goods in issue are all foodstuff this does not make the competing goods similar,¹¹ a point with which I agree.

Class 29

Soups; meat-based snack foods; meat; poultry and game, none being live; prepared dishes consisting primarily of [...] vegetables; prepared meals consisting primarily of vegetables; milk; [...] vegetable preserves; preserved, dried or cooked [...] vegetables.

23. The class 29 goods listed above are self-evidently identical to the opponent’s goods “soups [...]; meat-based snack foods; meat, [...], poultry and game; prepared meals containing vegetables; milk [...]; preserved, frozen, dried and cooked vegetables.

Ready cooked meals consisting primarily of meat; prepared meals and snack foods containing meat namely poultry, beef, lamb, pork; prepared meals and snack foods containing poultry, beef, lamb or pork;

⁹ Case T-133/05, paragraph 29.

¹⁰ Applicant’s written submissions, dated 20 November 2023

¹¹ Ibid, paragraph 8.

24. I understand a 'ready cooked meal' to be a ready meal or prepared meal that is prepared ready to be cooked either in the microwave or oven. As such, the above goods are either prepared meals or snacks that all contain various types of meat, consequently, I consider the above terms to be *Merici* identical to the opponent's term's "prepared meals containing meat" and/or "meat-based snack foods".

Meat products, poultry products, game products

25. I consider the above products to include the opponent's terms "*meat, [...] poultry and game*". For this reason, the competing goods are identical under the principle set out in *Merici*.

[...] Dairy products, all for food

26. The applied for goods would include the opponent's goods such as "milk and milk products", consequently, I find the goods are *Merici* identical.

Potato snacks; Potato-based snack foods; Snack foods based on vegetables.

27. I consider "snack foods based on vegetables" to include dried potatoes, as such the above goods would include the opponent's term "*[...] potato crisps*", as such they are clearly identical under *Merici*.

Prepared dishes consisting primarily of fishcakes, [...]

28. I understand prepared dishes to include frozen meals. As such, I consider the opponent's best case to rest with its term "*frozen meals consisting primarily of fish*". Whilst the competing terms are not identical as fish cakes and fish are not identical food products, in my view the terms are still highly similar. They overlap in nature, method of use and intended purpose, as they are all prepared meals that contain either fish or fish products, that are to be eaten for consumer convenience. As discussed, in my view, prepared dishes would include frozen meals, and as the primary ingredient contains a form of fish, it is likely that the goods will be found within the same areas of a food store or supermarket, i.e. the frozen meal aisle

under the fish section, and are likely to be produced by the same food manufacturers. The goods are not complementary; however, they are competitive as consumers could choose to purchase for their meal a prepared dish, frozen or otherwise, containing either fish or fishcakes. Users will also be the same.

Legume-based snacks

29. These would include snack foods such as crisps made out of legumes, such as lentil or chickpea crisps, as such there is some overlap between these foods and the opponent's goods "[...] *potato crisps*". Although they originate from different foodstuffs, they are both a type of crisp, which are consumed typically for snacking 'on the go' between meals. Therefore, there is an overlap in the nature, method of use and intended purpose. The trade channels will overlap as the competing goods will be found within the crisp aisle of a supermarket store; users would also be the same. These snacks are competitive as consumers would choose between either potato crisps or lentil crisps. However, the competing foodstuffs are not complementary as one is not essential to the consumption of the other. Overall, I find the goods to be similar to a high degree.

Scotch eggs

30. Within the opponent's skeleton argument, it is contended that "*scotched eggs*" are similar to the opponent's "*sausages; meat based snack foods; sausage rolls; pork pies*".¹² I agree that there is a degree of similarity between these goods. Scotched eggs are typically boiled eggs wrapped in sausage meat and breadcrumbs, they are cooked snack foods to eat 'on the go' for convenience, much like, cocktail sausages (covered by the opponent's term "*sausages*"), sausage rolls or pork pies. Therefore, there is an overlap in nature, method of use and intended purpose. Furthermore, these goods are in competition as consumers can choose between either a scotch egg or a pork pie to consume as savoury snacks for 'on the go'. It is highly likely that the same food company that offers savoury snacks such as scotch eggs would also offer pork pies and sausage rolls, they are also commonly located in the same sections of supermarkets. Users would also be the same.

¹² Table annexed to the opponent's skeleton argument for class 29 goods, column 3.

However, the goods are not complementary, as one is not essential for the other. Taking all the factors into consideration, I find the competing goods to be similar to a high degree.

Prepared meals containing [principally] eggs; prepared dishes consisting primarily of [...] boiled eggs, and broth

31. The above goods are all prepared meals which consist primarily of various foods. Consequently, there is some overlap between the *applied-for* goods and the opponent's terms "*prepared meals containing vegetables*" and "*prepared meals containing meat substitutes*". They overlap in nature, method of use and intended purpose, as they are all prepared meals, that are to be eaten for consumer convenience. Furthermore, although they each have different main ingredients, they are all ingredients that are suitable for vegetarians. The trade channels may overlap as the same manufacturing company that produces prepared meals may also produce meals with various main ingredients. Further, it is likely that the goods will be found in the same areas of a food store or supermarket, as they are all prepared meals that consist of a main ingredient that is suitable for vegetarians. Users would likely be the same. The goods are not complementary as they are not essential to the use of the other. The goods could be in competition with one another as it is likely that consumers, particularly vegetarian consumers, could choose between a prepared meal containing eggs, or prepared meals containing vegetables or meat substitutes. As a result, I find that the goods are similar to a medium degree.

[...] cooked fruits [...]

32. The opponent has indicated that the above term is either identical or similar to its term "*apple sauce*" in class 30. The opponent states that these competing terms are similar in nature, intended purpose, method of use, interchangeability (competition), location in stores, relevant public and usual origin.¹³ I understand cooked fruits to include stewed apples or stewed pear. In this context I accept that there is some overlap in nature, method of use and intended purpose as they may

¹³ Table annexed to the opponent's skeleton argument for class 29 goods, column 11.

both be used as fillings for desserts. The distribution channels would also overlap as these goods are likely to be found within the same area of a food store or supermarket and users may be the same. They are interchangeable, and thus competitive in nature. However, they are not complementary, as one is not important for the use of the other. I consider the competing foodstuffs to be similar to a medium degree.

[...] dried [...] fruits [...]; Fruit snacks; fruit- and nut-based snack bar; cheese-based snack foods

33. The above goods are all ‘ready to eat’ snack foods that do not require any further preparation before consuming. The opponent claims that these goods are similar to the opponent’s various prepared meal terms and “meat based snack foods”.¹⁴ Focusing on the similarity between the above applied for goods and “meat based snack foods” I consider that there is a degree of overlap in the nature (in so far that they are all snack foods), method of use and intended purpose as although the specific food types differ, they are all snack foods to be consumed with convenience in mind typically whilst ‘on the go’. The goods may be in competition as consumers could choose between different snack foods. Users could also overlap. However, I am unconvinced that the competing snack goods will have the same trade channels due to the vastly different types of foods, instead it is far more likely that these goods will be found in different areas of food stores or supermarkets. Further, the goods are not complementary as they are not essential for the use of one another. Weighing up all the relevant factors, I find that these goods are similar to, at best, a medium degree.

34. However, if I am wrong in this finding, I further observe that the opponent states:

“A comparison of the Applicant’s goods and the Opponent’s services is less relevant in light of the identity and similarity of the goods of the respective marks, but it is noted that there is usually considered some (maybe low) similarity between foodstuffs and services for the provision of food. In this case, it is submitted in particular that the Applicant’s goods in the nature of prepared

¹⁴ Table annexed to the opponent’s skeleton argument for class 29 goods, column 16.

meals, snacks and food to go are similar to the services of the Opponent's mark."¹⁵

35. Therefore, I will now go on to compare the applied for goods listed above with the opponent's class 43 services: "*Services for providing food and drink*". Although the goods and services are intrinsically different in nature, and are used in different ways, the intended purpose of the goods and services overlap to the extent that the purpose of both is to satiate hunger or for enjoyment. Nevertheless, I accept that the primary purpose of the services differ insofar as their aim is to provide consumers with a choice of food and drink options. Moreover, the trade channels and the users may be the same. Furthermore, there is a degree of complementarity in that the goods are essential to the supply of the services, and in some circumstances, they may be provided by the same undertaking, leading consumers to reasonably believe that the same company is responsible for both. There is also a degree of competition in as much as consumers can choose to either visit a café where the food can be prepared for them to consume on site, or they can self-select the goods at a supermarket to enjoy 'on the go' or at home. Taking all the above factors into account I find that the goods and services have a medium degree of similarity.

Eggs

36. In relation to "eggs" the opponent argues:

*"[A] Source of animal protein, frequently purchased in competition with other forms of animal protein. They come from the same source as poultry producers. Similar to meat, fish, poultry and game, meat extracts and charcuterie. Similar in nature, intended purpose, method of use, interchangeability (competition), relevant public and usual origin."*¹⁶

Alternatively, the opponent claims that:

¹⁵ Opponent's skeleton argument, paragraph 12.

¹⁶ Table annexed to the opponent's skeleton argument for class 29 goods, column 1a.

“Also chefs’ ingredients. Usually displayed in supermarkets amongst cooking ingredients. Although not dairy products, eggs are traditionally classed (and still classified in this way on supermarket shelves and shopping websites) alongside milk and butter. Similar to milk and edible oils and fats (such as butter and margarine). Similar in nature, intended purpose, method of use, complementarity and relevant public.”¹⁷

In contrast to these submissions the applicant contends:

“The Opposed Goods here are eggs or ingredients, and not identical or similar to the Opponent’s Goods, bearing in mind the purposes, users, trade channels, physical natures and methods of use of the goods.”¹⁸

I observe that the applicant also states:

“UKIPO Registry practice is clear that services for providing food and drink in Class 43 are not similar to foodstuffs or prepared foods. There has been no evidence submitted by the Opponent of enhanced distinctiveness owing to use of the Earlier Mark, or for example that the Earlier Mark is used for a well-known restaurant, such that the average consumer would see the goods coming from the same undertaking as the services.”¹⁹

37. Whilst I note the submissions of both parties, I turn for authority to the decision of Ms Emma Himsworth Q.C., sitting as the Appointed Person, in the *Sainsbury’s top dog* case,²⁰ where it was held that meat fish and poultry in class 29 would include products which have been cooked, smoked or marinated, not just raw food goods, as such, it would include products that are ‘ready to eat’ as well as those that require no further processing before consumption. In my view the same reasoning can be applied to the above goods in so far as they can include both raw eggs as well as eggs that are hard boiled and de-shelled, i.e. in snack form ready for

¹⁷ Table annexed to the opponent’s skeleton argument for class 29 goods, column 1b.

¹⁸ Applicant’s submissions, dated 27 June 2023, table at paragraph 24.

¹⁹ Applicant’s submissions, dated 20 November 2023, paragraph 14.

²⁰ BL O/044/16, paragraph 25 to 30

consumption. Therefore, the same reasoning/comparison applies as in paragraph 35 between snack food and the opponent's services in class 43.

Spreads consisting mainly of eggs

38. I note that with regard to the above applied for term the opponent states:

“A spread is a food that is spread onto foods such as breads and crackers to enhance flavour and palatability; Similar to meat extracts; (meat spreads like meat and pastes and pates), edible oils and fats (butter and margarine) preserved, frozen, dried and cooked vegetables (vegetable spreads, like red pepper jam, aubergine spread, roasted vegetable spread). Similar in nature, intended purpose and method of use location in stores, relevant public and usual origin.”²¹

39. I have taken note of the opponent's observations, however, for clarity, I understand a “meat extract” to be a highly concentrated meat stock used to add meat flavour in cooking, whether in a semi solid or powdered form. As such I do not consider this term to be similar to the applicant's “*spreads consisting mainly of eggs*”, which I understand to be an egg spread such as a sandwich egg spread. Rather, I consider this term to be most similar to the opponent's term “*preserved, frozen, dried and cooked vegetables*”. This is because as the opponent's skeleton argument identifies this term includes preserves in the form of vegetable spreads, such as aubergine or roasted vegetable. The competing goods are both pre-made foodstuffs that are used to spread on toast or bread for sandwiches. As such whilst they consist of primarily different ingredients, there is a degree of similarity in their method of use and purpose. There is an element of competition between the goods as consumers can choose between the egg spreads or vegetable spreads to add to toast or sandwiches. Users may overlap. However, the trade channels are not likely to be the same and the goods will most likely be found in different areas within a food store or supermarket. Neither do the goods share any complementarity. Overall, I consider these competing goods similar to a low degree.

²¹ Table annexed to the opponent's skeleton argument for class 29 goods, column 5.

Birds egg products; Egg yolks, egg products, dried eggs, liquid eggs, frozen eggs, powdered eggs, egg whites [...], all for food;

40. I understand the above terms to all be products made from eggs or that contain eggs. Their particular form means that they cannot be consumed outright but instead are used as ingredients in cooking or baking. In particular, the term “bird egg products” and “egg products” is an umbrella term that refers to all of the terms above, i.e. either part of an egg, such as egg whites, or egg yolks, or alternatively, whole egg such as liquid eggs, dried, eggs, powdered eggs or frozen eggs. I note the opponent submits in relation to these applied for goods, that they are “*Chefs’ ingredients. Usually displayed in supermarkets amongst cooking ingredients. Although not dairy products, eggs are traditionally classified (and still classified in this way on supermarket shelves and shopping websites) alongside milk and butter. Similar to milk and edible oils and fats (such as butter and margarine). Similar in nature, intended purpose, method of use, complementarity, and relevant public.*”²² In relation to “*milk*”, this is directly consumable, drank to quench thirst. In contrast, the applicant’s egg products are not directly consumable, but are ingredients that are used in either cooking or baking. Therefore, their specific nature, method of use and intended purpose differ. However, their trade channels may overlap in as much as farmers could provide both types of foodstuffs. I do not consider there to be any complementarity or competitiveness between the competing terms. Finally, the users may overlap. Consequently, overall, I find that the competing terms are similar to a low degree.

Preserved, [...] fruits [...]; jams; fruit preserves [...]

41. The above applied for goods are all types of jams and fruit preserves. In my view these are all types of spreads that have a similar method of use and intended purpose to “*preserved vegetables*” within the opponent’s specification. These goods are likely to be used in substitution for one another, as such there is an element of competition. Users are also likely to overlap. However, I accept they are

²² Table annexed to the opponent’s skeleton argument for class 29 goods, column 2.

likely to have separate trade channels. Neither are the goods complementary, as one is not essential to the use of the other. Overall, I consider these goods to have a low level of similarity. If I am wrong, then I still consider there to be similarity with the opponent's class 43 services, based on a degree of overlap in, trade channels, users and competition.

Class 30

Sandwiches; sausage rolls

42. The above goods in class 30 are clearly identical to the following goods within the opponent's class 30 specification: "sandwiches" and "sausage rolls".

Pastries, cakes, tarts and biscuits (cookies); Breads.

43. These goods include the opponent's terms "vegan bread, pastry and confectionery; vegan cakes". Therefore, the goods are identical under the principles of *Meric*.

Meat pies; Canned meat puddings

44. I understand the terms "*meat pies*" and "*meat puddings*" to be interchangeable. As such, I consider these terms to include the opponent's "*pork pies*" which is a type of meat pie. Consequently, these goods are *Meric* identical.

Quiche

45. I observe the opponent's submissions that a "*Quiche is a French tart consisting of a pastry crust, filled with savoury custard and pieces of cheese, meat, seafood and/or vegetables.*"²³ The opponent further submits that it "*Can be classified as prepared meals, food to go and/or foodstuffs of animal origin. Similar to pizzas, pies, prepared vegan meals, vegan pizzas and vegan pies of the earlier marks. Similar in nature, intended purpose, method of use, interchangeability (competition), location in stores, relevant public and usual origin.*"²⁴ However, I do

²³ Table annexed to the opponent's skeleton argument for class 30 goods, column 4.

²⁴ Ibid

not accept that the nature is similar to any extent beyond that they are foodstuffs for convenience, neither are the goods complementary as they are not important or essential to one another. However, I do accept that all of these goods could be considered quick and easy food consumed for convenience, as such, these foodstuffs have a similar intended purpose and method of use. As convenience foods they are likely to be found within the same area of a supermarket. Furthermore, there is an element of competition between these foodstuffs to the extent that consumers can choose between either a pie or a quiche. Users may also overlap. Overall, I consider the competing foodstuffs to be similar to between a medium and low degree.

Cereal-based savoury snacks

46. The opponent claims that the above goods are “Identical or similar to prepared meals containing rice, prepared meals containing pasta, and rice; tapioca and sago. Similar in nature, intended purpose, method of use, interchangeability (competition), location in stores, relevant public and usual origin”. I do not consider there to be any similarity between these foodstuffs identified by the opponent. However, I do consider there to be a degree of similarity between the above applied for goods and the opponent’s class 43 services; “services for the provision of food and drink”. This is for the same reasons as I have identified above for the class 29 snacks at paragraph 35. Consequently, I also find that there is a medium level of similarity between the applicant’s “*cereal-based savoury snacks*” and the opponent’s services.

The average consumer and the nature of the purchasing act

47. As indicated in the case law cited above, it is necessary to decide who the average consumer is for the parties’ goods or service and how they purchase them. “Average consumer” in the context of trade mark law means the “typical consumer.”²⁵ The average consumer is deemed to be reasonably well informed

²⁵ *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)

and reasonably observant and circumspect. 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.²⁶

48. At the hearing Mr Caddy for the opponent proposed that there would be three categories of relevant public, the general public, who it was suggested would pay a low degree of attention, the catering industry, and food retailers, both of whom would pay a high degree of attention and therefore would be the least likely to be confused. Mr Caddy confirmed that the category of consumers that were most likely to be confused would be members of the general public, with which I agree, however, for the reasons that I have set out below, I do not agree with the level of attention that it was suggested they would pay during the purchasing process.

49. Due to the nature of the goods and services at issue, I find that the average consumer will be either the general public or business users such as food retailers and café owners.

50. On average, the general public are likely to purchase the goods and services rather frequently, with the price of the purchase likely to be relatively inexpensive. However, consideration will be given to factors such as quality, price and taste when selecting the goods and services. As edible goods, consumers may also be alert to any ingredients that may potentially cause a reaction. Taking the above factors into account, whilst I accept that some snack foods would be purchased quickly and without a great deal of attention, overall, I find that the general public will demonstrate a medium level of attention in respect of the goods and services at issue. The goods are typically sold through a range of retail outlets, such as supermarkets, and in some cases their online equivalents where the goods will be self-selected. In the foregoing circumstances, visual considerations would dominate. Goods such as snack foods are also sold in hospitality settings such as in cafés and bakeries. In these environments, there may be an aural component to the selection process, such as requests to serving staff. However, even where the

²⁶ *Lloyd Schuhfabrik Meyer*, Case C-342/97.

goods are ordered in this way, the selection process would still be in the context of a visual inspection of the goods on a menu, or a board behind the counter for example, prior to the order being placed. As for the services, the purchasing process will be predominantly visual, with users selecting from a brochure, internet pages or after encountering the frontage of the provider's premises. As such, overall, the purchasing process would be primarily visual in nature, though I do not discount that aural considerations will play their part.

51. In relation to business users for the goods, such as a supermarket purchaser, or a café owner, the goods are likely to be purchased on a large scale, reasonably frequently in order to meet the demands of the business. Whilst business users for the services will most likely be corporate or other organisations that require catering for events or physical premises to host client dinners. As such, the cost of these purchases is likely to vary depending on the size of the order. Nevertheless, they are unlikely to be at the highest end of the scale. Business users will likely have similar considerations to the general public but will also have additional considerations as they are purchasing the goods and services on behalf of their customers or clients. Consequently, I find that business users will pay an above medium level of attention during the selection process. In relation to business users, the goods and services may be purchased through wholesalers or their online equivalent, or directly from the provider after viewing the products or services on its website. In each of these circumstances, the purchasing process will be predominantly visual, although I do not discount that in some circumstances there may be an aural component to the selection and purchase of these goods, for example, where discussions with sales representatives are involved.

Distinctive character of the earlier mark

52. The distinctive character of a trade mark can be measured only, first, by reference to the goods and services in respect of which registration is sought and, second, by reference to the way it is perceived by the relevant public. 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).”

53. 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 and services to those with high inherent distinctive character, such as invented words which have no allusive qualities. Dictionary words which do not allude to the goods and services will be somewhere in between. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion, since the more distinctive the earlier mark, the greater may be the likelihood of confusion.

54. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, Mr Caddy confirmed at the hearing that the opponent was not

relying on enhanced distinctiveness through use. Consequently, I have only the inherent position to consider.

55. The earlier mark is a word only mark which comprises the single word “JOLLY”. Despite the claim within Mr Caddy’s skeleton argument that Jolly does not have a meaning, this is contradicted by the reference at the end of the skeleton argument to the dictionary definition for the word Jolly. Indeed, at the hearing Mr Caddy rightly clarified that the word Jolly does have an easily identifiable meaning; it means happy or jovial. However, he explained in his submissions that it does not relate or allude to the goods or services relied upon. Mr Caddy, concluded that, overall, the earlier mark has a normal level of distinctiveness. I note that I have nothing from the applicant specifically addressing the level of distinctiveness of the earlier mark. Regardless, I agree with Mr Caddy’s submissions and find that the earlier mark possesses a medium level of distinctiveness.

Comparison of the marks

56. It is clear from *Sabel BV v. Puma AG* that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the trade marks must be assessed by reference to the overall impressions created by them, bearing in mind their distinctive and dominant components. The CJEU stated in *Bimbo SA v OHIM*, Case C-591/12P, that:

“34. [...] 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.”

57. It would therefore be wrong to artificially dissect the trade marks, although it is necessary to take into account their distinctive and dominant components and to

give due weight to any other features which are not negligible and therefore contribute to the overall impressions they create.

58. The respective trade marks are shown below:

Opponent's earlier mark	Applicant's mark
JOLLY	JOLLY PECKISH

Overall impressions

59. The earlier mark is a word-only mark which consists of the word “JOLLY”; therefore, the overall impression of the earlier mark lies in the word itself.

60. The contested mark is also a word-only mark, which is comprised of the words “JOLLY PECKISH”. There will be a significant proportion of consumers that might view these words as joining together to form a unit, in the same way that ‘jolly good’, ‘jolly tired’ or ‘jolly useful’ might. However, there will also be a significant proportion of consumers that will not recognise the formation of a unit in these words. For these consumers the overall impression rests predominantly within the word “JOLLY” with the word “PECKISH” having a lesser role given that it is allusive of the goods and services.

Visual comparison

61. The competing marks are visually similar as they both contain the identical word “JOLLY” which is the sole word in the earlier mark and the first word in the contested mark; however, the contested mark also contains the additional word

“PECKISH”. Taking into account the overall impressions, I find that the competing marks are visually similar to a medium degree.

Aural comparison

62. The earlier mark comprises two syllables, JOL/EE whilst the contested mark contains four syllables JOL/EE/PECK/ISH. Although the contested mark contains two additional syllables, the competing marks also clearly share two identical syllables which encompass the entirety of the earlier mark and are found at the beginning of the contested mark. Consequently, the marks are aurally similar to a medium degree.

Conceptual comparison

63. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.²⁷ The earlier mark, as discussed above, will be easily identifiable by its dictionary definition meaning happy or in high spirits. As for the contested mark, I have found above that a significant proportion of average consumers will view the mark as joining to form a unit. For these consumers the word “JOLLY” combines with the word “PECKISH” to form a different meaning as the word “JOLLY” qualifies the word “PECKISH”. In the same way that the words “jolly good”, “jolly busy” or “jolly useful” might. In my view, the words in combination will be perceived by these consumers as meaning “very or rather hungry”. For these consumers the marks will be conceptually dissimilar overall. However, I have also identified above that there will be another significant proportion of consumers that will not perceive the words as combining to form a unit. For these consumers the word “JOLLY” will have the same meaning that I have identified for the earlier mark, i.e. happy or high spirited. As for the word “PECKISH”, this will be understood according to its dictionary definition, meaning slightly hungry. Consequently, for these consumers there is a conceptual overlap in the word “JOLLY”. As such, for these consumers I find that there is a medium level of conceptual similarity between the marks.

²⁷ *Ruiz Picasso v OHIM* [2006] E.T.M.R 29.

Likelihood of confusion

64. Whether there is a likelihood of confusion must be assessed globally, taking into account a number of factors. One such factor 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. It is also necessary for me to keep in mind the distinctive character of the opponent's trade mark, the average consumer for the goods and services and the nature of the purchasing process. In doing so, I must be aware of 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.
65. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one trade mark for the other, while indirect confusion is where the average consumer realises the trade marks are not the same but puts the similarity that exists between the trade marks and goods or services down to the responsible undertakings being the same or related.
66. I have found either identity or a level of similarity ranging from high to low for the respective goods and services. The average consumer of the goods and services will be either the general public, who will pay a medium level of attention or business users that will pay an above medium level of attention. I have found that the purchasing process will be largely visual, however, I have not discounted aural considerations. I have found that for a significant proportion of consumers the earlier mark and the contested mark are visually, aurally and conceptually similar to a medium degree. I have also found that the earlier mark possesses a medium level of inherent distinctive character overall.
67. During the course of the hearing Mr Caddy pointed me towards the decision of Mr Geoffrey Hobbs (Q.C. as he then was) sitting as the Appointed Person in *Cardinal Place*,²⁸ in particular Mr Caddy relied on paragraph 17 of the decision. It was

²⁸ BL O-339-04

suggested that in applying this case, the important question was how much or how little the word “PECKISH” would be likely to contribute to the distinctive character of the mark “JOLLY PECKISH” taken as a whole. However, I do not understand that to be the key question; in fact, at paragraphs 18 and 19, Mr Hobbs held that the initial decision maker’s findings that the word ‘place’ within the composite mark ‘Cardinal Place’ was allusive and not particularly distinctive, effectively ignored the blend of meaning and significance produced by combining the words.²⁹ For further context, Mr Hobbs indeed concluded that as the word ‘Cardinal’ changed when it was followed by the word ‘place’, (i.e. ‘Cardinal’ solus had an ecclesiastical perception whilst ‘Cardinal Place’ referred to a location) this resulted in different conceptual meanings that would render the marks distinguishable and would allow them to be used concurrently without giving rise to a likelihood of confusion.³⁰ Indeed for clarity, had I found there to be only one section of average consumers (constituting a significant proportion) that viewed the mark as a unit, I would find this case to be on all fours with the *Cardinal* case. However, I also found above, that there is another section of average consumers (also constituting a significant proportion) that will not be familiar with the phrase “JOLLY PECKISH”, and as such, will not view the words as forming a unit but instead the word “JOLLY” within the composite mark to retain an independent and distinctive role, for these consumers this case does not apply and the meaning of the word “JOLLY” will not change.

68. I acknowledge that both marks contain the identical word “JOLLY” at their beginnings, a position where the attention of consumers is usually directed. However, the marks differ both visually and aurally in length as the contested mark contains the additional word “PECKISH”. Although the marks overlap in the shared word “JOLLY”, the additional word in the contested mark creates a visual and aural difference that is unlikely to be overlooked. Therefore, despite some visual and aural overlap created by the commonality of the word “JOLLY”, in my view, this will be outweighed by the differences. Consequently, it is unlikely that the competing marks will be mistaken or misremembered for one another. Rather, the aforementioned differences are likely to be sufficient to enable consumers to differentiate between them. In my judgement, taking all the above factors into

²⁹ Ibid, paragraph 18

³⁰ Ibid, paragraph 19

account, the differences between the competing trade marks are likely to enable consumers, even those paying a medium level of attention, to avoid mistaking the marks for one another, notwithstanding the principles of imperfect recollection and interdependency. As a result, I find that there is no likelihood of direct confusion, even in relation to goods and services that are identical.

69. That leaves indirect confusion to be considered. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis K.C., as the Appointed Person, explained that:

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

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

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

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

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

70. These examples are not exhaustive but provide helpful focus.

71. I bear in mind that a finding of indirect confusion should not be made merely because the two marks share a common element. In this connection, it is not sufficient that a mark merely calls to mind another mark: this is mere association not indirect confusion. Furthermore, in *Liverpool Gin*,³¹ 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* (Case BL 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.

72. Whilst consumers will recognise the differences between the marks arising from the additional word in the contested mark, i.e. “PECKISH”, they will also identify the use of the common word “JOLLY”. At the hearing Mr Caddy submitted that the word “JOLLY” retained its independent distinctive character within the contested mark. His reasoning for this was that as the competing marks are both word only marks, notional and fair use means that the parties could use the “JOLLY” element slightly more prominently, in bigger text or even a different colour. Therefore, in these circumstances, it would be more likely that people would see it as having an independent function. I am unconvinced. Firstly, normal and fair use of a word mark includes use in upper and lower case letters in a standard font, and in a single colour other than the black in which the mark appears on the register. However, allowing for such variations should not change the basis of the comparison from

³¹ *Liverpool Gin Distillery and others v Sazerac Brands, LLC and others* [2021] EWCA Civ 1207

the word itself, so that the word mark is imagined with some form of artificial stylisation which then makes it more similar to the other mark. It is wrong to approach the required comparison by hypothesising a way of styling the word mark in a way which is extremely similar to the contested mark (whether by choice of font or the use of other forms of presentation) and asking whether confusion would be likely in such a case. It is the words themselves in word only marks that should be given consideration not how they may be styled. Consequently, I disagree with Mr Caddy's reasoning, nonetheless, I do accept that for the significant proportion of consumers that I have identified above, who are not familiar with the phrase "JOLLY PECKISH", the word "JOLLY" does retain its independent and distinctive role.³² In my view, where consumers see the word "JOLLY" as retaining its independence within the composite mark, this lends itself to the mark being perceived as a brand extension on the basis that "JOLLY" would be seen as a house mark and "PECKISH" as a sub brand for snack food, particularly as the identical common element is found at the beginning of the contested mark. As such, in my opinion, the word "PECKISH" in relation to foodstuff creates the impression of a sub brand of the "JOLLY" range, particularly for snack foods that are eaten 'on the go' when you are not feeling overly hungry. Taking all of the above into account, it is my view that this significant proportion of average consumers would assume a commercial association between the parties, or sponsorship on the part of the opponent, due to the use of the shared word "JOLLY", even where the goods and services are similar to only a low degree. Consequently, I consider there to be a likelihood of indirect confusion. I reach this finding acknowledging the words of Lord Justice Kitchen in *Interflora Inc & Anor v Marks and Spencer Plc (Rev 1)*,³³ "if, having regard to the perceptions and expectations of the average consumer, the court concludes that a significant proportion of the relevant public is likely to be confused such as to warrant the intervention of the court then it may properly find infringement",³⁴ and in the knowledge that a significant proportion of average consumers is a lower requirement than the majority.

³² See *Whyte and Mackay Ltd v Origin Wine UK Ltd and Another* [2015] EWHC 1271 (Ch), and *Medion v Thomson*, C-120/04

³³ [2014] EWCA Civ 1403.

³⁴ *Ibid*, paragraph 129.

Conclusion

73. The opposition under section 5(2)(b) of the Act has been successful in its entirety. Therefore, subject to any successful appeal against my decision, the application will be refused registration.

Costs

74. As the opponent has been entirely successful, it is therefore entitled to a contribution for its costs based upon the scale published in Annex A of the Tribunal Practice Notice 2 of 2016. Applying this guidance, I award the opponent the sum of **£1050**, which has been calculated as follows:

Preparing the notice of opposition and considering the counterstatement:	£200
Preparing evidence:	£250 ³⁵
Preparing for and attending a hearing:	£600 ³⁶
Total:	£1050

75. Accordingly, I hereby order **Stonegate Farmers Limited** to pay **The Jolly Hog Group Limited** the sum of **£1050**. This sum is to be paid within twenty-one days of the expiry of the appeal period, or within twenty-one days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 25th day of July 2024

Sarah Wallace
For the Registrar

³⁵ I have made a reduction from the guidance set out Annex A of the Tribunal Practice Notice 2 of 2016 on the basis that the applicant did not file any evidence for the opponent to consider.

³⁶ This is on the basis that the hearing did not last the full day with only one side in attendance and was limited to a single ground.