

BL O-150-20

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. 3357371
BY JAMIN SAUCES LIMITED**

TO REGISTER:

**JAMIN SAUCES
&
JAMMIN SAUCES**

**AS A SERIES OF TWO TRADE MARKS IN CLASSES 16, 29, 30, 31, 32, 33,
35 & 43**

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 415762
BY MRS LESA CROSS**

&

**TRADE MARK REGISTRATION NO. 3121582 IN THE NAME OF MRS LESA
CROSS AND A REQUEST FOR INVALIDITY THERETO UNDER NO. 502448 BY
JAMIN SAUCES LIMITED**

BACKGROUND & PLEADINGS

1. On 29 November 2018, Jamin Sauces Limited (“JSL”) applied to register **JAMIN SAUCES** and **JAMMIN SAUCES** as a series of two trade marks for goods and services in classes 16, 29, 30, 31, 32, 33, 35 & 43. The application was published for opposition purposes on 14 December 2018.

2. On 13 March 2019, the application was opposed by Mrs Lesa Cross under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). Mrs Cross indicates she is only opposing the following goods in class 29 of JSL’s application:

Class 29: Fruit jellies, jams, preserves, fruit preserve, fruit marmalades, lemon curd, cranberry sauce.

3. In her Notice of opposition, Mrs Cross indicates that she relies upon all the goods (i.e. jams, jellies, preserves in class 29) in UK trade mark registration no. 3121582 for a series of two trade marks i.e. **WE’RE JAMMIN’** and **WE’RE JAMMIN**. These trade marks were applied for on 10 August 2015 and entered in the register on 13 November 2015. In her Notice of opposition, Mrs Cross states:

“I was advised by the IPO in their letter dated 13th December 2018, that the trade mark of the applicant, Jamin Sauces Ltd, is regarded by them as being similar to my existing trade mark and that there may be a potential for conflict. For this reason, I filed form TM7A on 21st December 2018.

In response, Jamin Sauces Ltd issued an application for invalidity against me (No. CA000502448).

I would be prepared not to proceed further with my opposition, if Jamin Sauces Ltd would agree to a restriction of some of the goods listed in Class 29 of their application, by removing the following Items: Jams, Jellies, Preserves. This would hopefully avoid the possibility of any confusion between our two businesses.

In addition, I would require Jamin Sauces Ltd to withdraw their application of invalidity.”

4. JSL filed a counterstatement in which it stated:

“5. It is admitted that the Opponent's Trade Mark and the Applicant's Marks are visually, phonetically and conceptually highly similar, owing to the fact that they both share the word JAMMIN, which is the dominant and distinctive component of the trade marks in issue.

6. It is admitted that the goods and services in issue are identical or similar. Accordingly, it is admitted that a likelihood of confusion exists between the Opponent's Trade Mark and the Applicant's Marks.”

5. On 25 January 2019, JSL applied to declare Mrs Cross' registration mentioned above invalid. The application is also based upon 5(2)(b) of the Act, with JSL indicating that it relies upon the goods shown in paragraph 22 below in the following UK and European Union Trade Mark (“EUTM”) registrations:

UK trade mark registration no. 3039333 for a series of two trade marks i.e. **JAMIN SAUCES** and **JAMMIN SAUCES**. These trade marks were applied for on 24 January 2014 and entered in the register on 30 May 2014.

EUTM registration no. 13137153 for the trade mark **JAMIN SAUCES**. This trade mark was applied for on 1 August 2014 and entered in the register on 23 November 2018.

6. Mrs Cross filed a counterstatement, which consists, in essence, of a denial of the ground upon which the invalidation is based. Mrs Cross makes a number of comments to which I shall return below.

7. In these proceedings, JSL is represented by Trade Mark Wizards Limited; Mrs Cross represents herself. The proceedings have been consolidated. Although only Mrs Cross filed witness statements (accompanied by written submissions), JSL filed

written submissions during the evidence rounds. While neither party requested a hearing, JSL elected to file written submissions in lieu of attendance. I shall keep all of these written submissions in mind, referring to them to the extent I consider it necessary.

8. As Mrs Cross' opposition to JSL's application is based exclusively upon the same trade mark which is itself the subject of cancellation by JSL, I shall deal first with JSL's application for cancellation. If JSL's application for cancellation is successful, Mrs Cross' opposition to JSL's application for registration will fall away.

Mrs Cross' statements

9. Mrs Cross filed three separate witness statements marked 1a, 2a, and 3a, all dated 2 August 2019. None of these statements were accompanied by exhibits. The main points emerging from these statements are as follows:

- The trade mark WE'RE JAMMIN' was first used by Mrs Cross in 2015;
- That trade mark has been used upon: Fruit jellies, jams, preserves, fruit preserve, fruit marmalades, lemon curd and cranberry sauce;
- That trade mark has been used on the goods mentioned within a twenty mile radius of postcode BS31 3EG;
- Since 2016, Mrs Cross' goods have won awards in the Taste of the West Awards;
- Since 2015, Mrs Cross' goods have won awards in the annual World Marmalade Awards competition;
- In August 2019, Mrs Cross' goods won an award in the Great Taste Awards;
- Her participation in these awards has helped her to promote her products to a wider audience beyond her immediate area;

- The trading names and the branding of both parties are distinctly different;
- Each party operates in completely separate geographical areas;
- There is no indication that JSL “is producing any of the goods in class 29 which [Mrs Cross] is producing...”.

10. In statement 1a, Mrs Cross states:

“11. I truly believe that as a result of the use made of it by myself, the mark WE'RE JAMMIN' is well known to buyers of sweet preserves in my local area and to discerning buyers further afield, and is uniquely associated with my trading name: We're Jammin', and that it distinguishes the sweet preserves sold by We're Jammin' from other sweet preserves.”

11. That concludes my summary of the evidence filed by Mrs Cross to the extent I consider it necessary.

DECISION

12. The relevant legislation insofar as these proceedings are concerned, is as follows:

“47(1)...

(2) Subject to subsections (2A) and (2G), the registration of a trade mark may be declared invalid on the ground-

(a) that there is an earlier trade mark in relation to which the conditions set out in section 5(1), (2) or (3) obtain, or

(b)...

unless the proprietor of that earlier trade mark or other earlier right has consented to the registration.

(2ZA)...

(2A) The registration of a trade mark may not be declared invalid on the ground that there is an earlier trade mark unless –

(a) the registration procedure for the earlier trade mark was completed within the period of five years ending with the date of the application for the declaration,

(b) the registration procedure for the earlier trade mark was not completed before that date, or

(c) the use conditions are met.

(2B)...

(2G) An application for a declaration of invalidity on the basis of an earlier trade mark must be refused if it would have been refused, for any of the reasons set out in subsection (2H), had the application for the declaration been made on the date of filing of the application for registration of the later trade mark or (where applicable) the date of the priority claimed in respect of that application.

(2H) The reasons referred to in subsection (2G) are-

(a) that on the date in question the earlier trade mark was liable to be declared invalid by virtue of section 3(1)(b), (c) or (d), (and had not yet acquired a distinctive character as mentioned in the words after paragraph (d) in section 3(1));

(b) that the application for a declaration of invalidity is based on section 5(2) and the earlier trade mark had not yet become sufficiently distinctive to support a finding of likelihood of confusion within the meaning of section 5(2);

(c)...

(3) An application for a declaration of invalidity may be made by any person, and may be made either to the registrar or to the court, except that-

(a) if proceedings concerning the trade mark in question are pending in the court, the application must be made to the court;
and

(b) if in any other case the application is made to the registrar, he may at any stage of the proceedings refer the application to the court.

(4)...

(5) Where the grounds of invalidity exist in respect of only some of the goods or services for which the trade mark is registered, the trade mark shall be declared invalid as regards those goods or services only.

(5A) An application for a declaration of invalidity may be filed on the basis of one or more earlier trade marks or other earlier rights provided they all belong to the same proprietor.

(6) Where the registration of a trade mark is declared invalid to any extent, the registration shall to that extent be deemed never to have been made: Provided that this shall not affect transactions past and closed."

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

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

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

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

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.”

13. The trade marks relied upon by JSL at paragraph 5 qualify as earlier trade marks under the provisions of section 6 of the Act. As neither trade mark relied upon had been registered for more than five years at either the date the application for invalidation was filed or the date Mrs Cross’ trade marks were filed, they are not subject to the proof of use provisions. In those circumstances, JSL is entitled to rely upon all the goods it has identified in these trade marks without having to establish that genuine use has been made of them (I shall return to this point below).

Observations on Mrs Cross’ comments

14. As Mrs Cross explains, she filed an opposition against JSL’s trade mark application because the Trade Marks Registry (“TMR”) notified her that, in its view, JSL’s application for registration was similar to her trade marks and contained similar goods. Having been provided with that notification, Mrs Cross need not have taken any further action. The fact that she elected to file a Form TM7A and then formal opposition, strongly suggests she agreed with the TMR’s initial view. Although Mrs Cross filed a TM7A in similar circumstances in relation to a potential conflict with an unrelated third party which resulted in an amicable agreement, that is irrelevant, as is the fact that JSL did not attack that unrelated third party’s trade mark.

15. As an application for invalidation can be filed at any time following the registration of a trade mark, the fact that JSL did not seek to oppose Mrs Cross’

application when it was published also does not assist her. As she points out in her counterstatement, it appears that JSL only became aware of her trade mark registration when it received her Form TM7A. For a party whose rights are being attacked to retaliate by taking action against the rights being relied upon is, in my experience, fairly routine. Finally, the fact that JSL have not engaged with Mrs Cross to reach an agreement is a matter for them. JSL may have considered its position to be strong enough not to require compromise on its part.

16. Finally, Mrs Cross makes various comments in relation to the differing branding the parties use, the geographical locations in which they operate and the fact that her investigations suggest that JSL are not trading in the goods in Class 29 upon which they rely.

17. In *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06, the Court of Justice of the European Union (“CJEU”) stated at paragraph 66 of its judgment that when assessing the likelihood of confusion under Section 5(2) it is necessary to consider all the circumstances in which the trade mark applied for might be used if it were registered.

18. In *Devinlec Développement Innovation Leclerc SA v OHIM*, Case C-171/06P, the CJEU stated:

“59. As regards the fact that the particular circumstances in which the goods in question were marketed were not taken into account, the Court of First Instance was fully entitled to hold that, since these may vary in time and depending on the wishes of the proprietors of the opposing marks, it is inappropriate to take those circumstances into account in the prospective analysis of the likelihood of confusion between those marks.”

19. While I fully understand Mrs Cross’ arguments, they proceed on a misunderstanding of the comparison I am required to make. As neither party’s specification is limited in any way, the fact that the parties may operate in different geographical areas is not a factor I can take into account. Nor is it a relevant consideration that JSL may not have used its earlier trade marks upon all the goods

upon which it relies, because, as I explained above, those earlier trade marks are not subject to the proof of use provisions. In those circumstances, what I must do is compare the competing specifications and trade marks on the basis of notional and fair use.

Case law

20. The following principles are gleaned from the decisions of the courts of the European Union 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.

The principles:

(a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;

(b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;

(c) the average consumer normally perceives 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 greater degree of similarity between the marks, and vice versa;

(h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

(i) mere association, in the strict sense that the later mark brings 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 will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

My approach to the comparison

21. JSL relies upon UK and EUTM registrations. The goods relied upon by JSL are identical in both. However, the UK registration consists of a series of two trade marks one of which is the trade mark **JAMMIN SAUCES**. As that trade mark is, self-evidently, the closest to Mrs Cross' registration, it is upon the basis of that trade

mark I shall conduct the comparison. If JSL does not succeed in relation to that trade mark, it will be in no better position in relation to the other trade mark in the series or its EUTM which are identical i.e. **JAMIN SAUCES**.

Comparison of goods

22. The competing goods are as follows:

JSL’s goods	Mrs Cross’ goods
<p>Class 29 - All types of preserved, dried, cooked, frozen and otherwise processed fruits and vegetables; jellies namely meat, fish, fruit and vegetable jellies, calves' feet jelly; jams, compotes, preserves, fruit preserve, fruit marmalades, fig jam, cranberry sauce.</p> <p>Class 30 - spicy sauces, sauces (condiments); savoury sauces; ready-made sauces; sauces for food.</p>	<p>Class 29 - Jams, jellies, preserves.</p>

23. JSL’s specification in class 29 includes the word “namely”. The Classification Section of the Trade Mark’s Registry’s Work Manual states:

“Note that specifications including “namely” should be interpreted as only covering the named Goods, that is, the specification is limited to those goods. Thus, in the above “dairy products namely cheese and butter” would only be interpreted as meaning “cheese and butter” and not “dairy products” at large. This is consistent with the definitions provided in Collins English Dictionary which states “namely” to mean “that is to say” and the Cambridge International Dictionary of English which states “which is or are”.

24. The identical terms “jams” and “preserves” appear in both party’s specifications in class 29. JSL’s specification also includes, inter alia, “fruit jellies”. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court (“GC”) stated:

“29. In addition, the goods can be considered as identical when the goods designated by the earlier mark are included in a more general category, designated by 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”.

25. On the inclusion principle outlined in *Meric*, the term “jellies” in Mrs Cross’ specification would encompass, inter alia, JSL’s “fruit jellies”. The competing goods are, as a consequence, to be regarded as identical.

The average consumer and the nature of the purchasing act

26. As the case law above indicates, it is necessary for me to determine who the average consumer is for the goods at issue. I must then determine the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

27. In its submissions filed on 3 June 2019, JSL states:

“14. The goods in issue are ordinary consumer goods which are not especially costly and are bought by the general public fairly often. It is therefore submitted that the average consumer will display a low to moderate degree of attention. In terms of the purchasing process itself, visual considerations are likely to dominate, as the goods at issue will be selected by the consumer from the shelves of supermarkets and other self-service shops. Naturally, there may also be an oral aspect to the purchase, as a result of word-of-mouth recommendations or discussions.”

28. I agree with JSL that the average consumer of the goods at issue is a member of the general public. I further agree that such a consumer is most likely to select the goods at issue in the manner indicated while deploying what, in my view, will be a fairly low level of attention during that process.

Comparison of trade marks

29. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23) that the average consumer normally perceives a trade mark as a whole and does not proceed to analyse its various details. The same case also explains that the visual, aural and conceptual similarities of the 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 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.”

30. It would be wrong, therefore, artificially to 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. The trade marks to be compared are as follows:

JSL's trade mark	Mrs Cross' trade marks
JAMMIN SAUCES	WE'RE JAMMIN' WE'RE JAMMIN

31. By opposing JSL's application for registration under section 5(2)(b) of the Act, Mrs Cross is claiming that the similarity between the competing trade marks and goods will result in a likelihood of confusion. In its counterstatement, JSL admitted that was the case. However, in her counterstatement in the invalidation proceedings, Mrs Cross argues the opposite position. Although there is an obvious contradiction in the positions Mrs Cross has adopted, I will nonetheless consider the position on the basis that only an application for invalidation is before me.

32. Although both parties have made a range of submissions on this aspect of the case, I do not intend to record them all here. However, for the avoidance of doubt, I have considered all of these submissions and have taken them into account in reaching the conclusions which follow.

33. JSL's trade mark consists of the words JAMMIN and SAUCES presented in block capital letters. The word SAUCES will contribute to the overall impression JSL's trade mark conveys. However, notwithstanding Mrs Cross' submissions to the contrary, given its descriptive and non-distinctive credentials, even when considered in relation to the goods relied upon in class 29, the contribution that word will make to both the overall impression conveyed and the distinctiveness of JSL's trade mark is, in my view, at best, modest. Rather, it is the first word of JSL's trade mark i.e. JAMMIN that is likely to make by far the greatest contribution to both the overall impression it conveys and its distinctiveness.

34. Mrs Cross' registration consists of a series of two trade marks both of which are presented in upper case. The only difference between them is the apostrophe symbol which appears above the letter "N" in the first trade mark in the series. As this punctuation symbol is, in my view, likely to go largely unnoticed by the average consumer, it matters not upon which trade mark in Mrs Cross' registration I conduct my assessment.

35. Mrs Cross' trade mark consists of the contraction WE'RE (meaning "we are") and the word JAMMIN. In my view, these words create a "unit" and it is in that unit the overall impression and distinctiveness lies.

Visual similarity

36. JAMMIN is the first word in JSL's trade mark and the second in Mrs Cross' trade mark. The competing trade marks differ to the extent that Mrs Cross' trade mark contains the contraction WE'RE as the first component and JSL's trade mark contains SAUCES as the second word. Weighing the relative importance of the similarities and differences, results in what I regard as an above medium degree of visual similarity between the competing trade marks.

Aural similarity

37. In my view, Mrs Cross' trade mark is most likely to be pronounced by the average consumer as WE-R JAM-MIN. Given my comments above about the descriptive and non-distinctive nature of the word SAUCES, it is highly likely that the average consumer may simply refer to JSL's trade mark as JAM-MIN. However, even if the average consumer also articulates the word SAUCES, the fact that the word JAM-MIN will be articulated first, results, once again, in an above medium degree of aural similarity between the competing trade marks.

Conceptual similarity

38. In her counterstatement, Mrs Cross states:

“We’re jamming is a shortened version of “We are jamming” i.e. We are making jam”. It is a verb, a “doing” word.

The mark "We're Jammin'" also provides, conceptually, not only the idea of a "doing" word: making jam, but also a chilled, musical, vibe, as "jammin'" refers to a social gathering for the purposes of a musical practice session. So, there is a double meaning to the phrase, We're Jammin'..."

39. In its submissions of 3 June 2019, JSL states:

“30...In this respect, the Cancellation Applicant submits that the trade marks will be perceived as the present participle of the verb "to jam", which is defined as, inter alia, "to improvise with other musicians, especially in jazz or blues"..."

40. Given the goods at issue includes “jam”, the significance of the letters “J-A-M-” in the word JAMMIN which appears in the competing trade marks is unlikely to be lost on the average consumer. I agree that when considered as a totality, Mrs Cross’ trade mark is most likely to be conceptualised by the average consumer as either an allusion to jam making or, more likely in my view, in the musical context she suggests. As the word SAUCES in JSL’s trade mark does not affect the position, its trade mark is most likely to be conceptualised in the latter manner. As the allusion to JAM is present in both parties’ trade marks as is the musical imagery, to a significant number of average consumers, the competing trade marks are, in my view, conceptually similar to a fairly high degree.

Distinctive character of the earlier trade mark

41. The distinctive character of a trade mark can be appraised only, first, by reference to the goods in respect of which registration is sought and, secondly, by reference to the way it is perceived by the relevant public – *Rewe Zentral AG v OHIM (LITE)* [2002] ETMR 91. In determining the distinctive character of a trade mark and, accordingly, in assessing whether it is highly distinctive, it is necessary to make an overall assessment of the greater or lesser capacity of the trade mark to

identify the goods for which it has been registered as coming from a particular undertaking and thus to distinguish those goods from those of other undertakings - *Windsurfing Chiemsee v Huber and Attenberger* Joined Cases C-108/97 and C-109/97 [1999] ETMR 585.

42. As JSL have filed no evidence of any use it may have made of its earlier trade mark, I have only its inherent characteristics to consider. Given my earlier comments about the word SAUCES and although containing a mild allusion to jam, the word JAMMIN also conveys the musical imagery I referred to above. Considered absent use, JSL's trade mark enjoys a medium degree of inherent distinctive character.

Likelihood of confusion

43. In determining whether there is a likelihood of confusion, a number of factors need to be borne in mind. The first is the interdependency principle i.e. a lesser degree of similarity between the respective trade marks may be offset by a greater degree of similarity between the respective goods and vice versa. As I mentioned above, it is also necessary for me to keep in mind the distinctive character of JSL's trade mark as the more distinctive it is, the greater the likelihood of confusion. I must also keep in mind the average consumer for the goods, the nature of the purchasing process and 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 he has retained in his mind.

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

45. Earlier in this decision I concluded that:

- The competing goods are either literally identical or to be regarded as such;

- The average consumer of the goods at issue is a member of the general public who, whilst not forgetting aural considerations, will select such goods by predominantly visual means while displaying a fairly low degree of attention during that process;
- The competing trade marks are visually and aurally similar to an above medium degree and conceptually similar to a fairly high degree;
- JSL's earlier trade mark is possessed of a medium degree of inherent distinctive character.

46. The fact that, inter alia, the competing goods are identical and the average consumer will pay only a fairly low degree of attention during the purchasing process (thus making him/her more prone to the effects of imperfect recollection) are points in JSL's favour. Although the words in Mrs Cross' trade mark form a unit, one of the images it evokes i.e. the musical imagery, is similar to the imagery JSL's trade mark is also likely to evoke. That shared musical imagery is, in my view, likely to fix itself in the mind of the average consumer and in so doing will act as a "hook" to aid his/her recall. That similarity in concept combined with the above medium degree of visual and aural similarity between the competing trade marks leads to a likelihood of direct confusion, particularly when one considers the fairly low degree of attention paid by the average consumer when selecting the goods.

47. However, what if I am wrong and the differences between the competing trade marks is considered to be sufficient to avoid direct confusion? In that eventuality, I will go on and consider whether there is a likelihood of indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, Mr Iain Purvis Q.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.”

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

49. Even if contrary to my primary finding the average consumer notices the differences between the competing trade marks, the fact that they share the word JAMMIN (which is of medium inherent distinctiveness), is likely, in my view, to lead such a consumer to conclude that Mrs Cross’ trade mark is, for example, a variant brand of JSL’s or an undertaking linked to JSL. That will lead to indirect confusion.

Closing remarks

50. In reaching the above conclusions I have not overlooked Mrs Cross’s submissions in relation to a range of trade marks on the Trade Marks Register which consist of or contain the words “JAMIN”/”JAMMIN” or ”SAUCES” against which JSL have taken no action. As I mentioned earlier, that is a matter for JSL and does not assist her.

Conclusion in the invalidation proceedings

51. JSL’s application has succeeded.

Conclusion in the opposition proceedings

52. As Mrs Cross' opposition to JSL's application for registration is based exclusively on a trade mark registration which is to be declared invalid, her opposition falls away and I need say no more about it.

Overall conclusion

53. Subject to any successful appeal: (i) Mrs Cross' trade mark registration will be declared invalid and deemed never to have been made, and (ii) JSL's application for registration will proceed to registration.

Costs

54. Awards of costs in proceedings are governed by Annex A of Tribunal Practice Notice ("TPN") 2 of 2016. As JSL has been successful, it is entitled to a contribution towards the costs it has incurred. Keeping the guidance in that TPN in mind but reminding myself of the savings in time which would have resulted from the proceedings being consolidated and the degree of repetition in JSL's submissions, I award costs to JSL on the following basis:

Preparing the Application for invalidation, reviewing the Notice of opposition and filing a counterstatement in the opposition proceedings:	£300
Reviewing Mrs Cross' statements:	£200
Written submissions (x3):	£300
Official fee (invalidation):	£200
Total:	£1000

55. I order Mrs Lesa Cross to pay to Jamin Sauces Limited the sum of **£1000**. 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 10th day of March 2020

C J BOWEN

For the Registrar