

O-880-22

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. 3527386

BY PRO GROUP HOLDINGS LTD

AND

OPPOSITION THERETO

UNDER NO. 422850

BY IAN MALONEY

Background and pleadings

1. This is an opposition against trade mark application number 3527386, shown below (“the contested mark”):

The image shows the word "SAVIOR" written in a bold, black, cursive script. The letters are thick and connected, with a prominent 'S' at the beginning and a large, sweeping 'R' at the end. The overall style is reminiscent of graffiti or a stylized signature.

2. The trade mark was applied for on 27 August 2020 by Pro Group Holdings Ltd (“the applicant”) and was published in respect of “clothing; headgear; hats” in class 25.

3. The application is opposed by Ian Maloney under s. 5(2)(b) of the Trade Marks Act 1994 (“the Act”). The opposition is directed against “clothing” only. Mr Maloney relies upon UK trade mark registration number 2372186 for the word “SAVIOUR”. Its filing date is 4 September 2004 and it was registered on 18 February 2005 for goods in classes 14 and 25; the goods relied upon for the opposition are “clothing” in class 25. It is said that use of the contested mark would give rise to a likelihood of confusion, including the likelihood of association.

4. The applicant filed a counterstatement in which it denied that there would be a likelihood of confusion. It also denied that the marks are identical and put Mr Maloney to proof of the use he says he has made of his trade mark.

5. Only Mr Maloney filed evidence. Neither party requested a hearing, nor did they file written submissions in lieu. This decision is taken following a careful reading of all of the papers.

6. The applicant is represented by Agile IP LLP. Mr Maloney is a litigant in person.

Preliminary points

7. Mr Maloney's trade mark has a status of "cancelled" on the register because it has been revoked for lack of genuine use. However, the effective date of the revocation was 14 December 2020. The relevant date for assessing the rights of the parties in this opposition is the filing date of the contested mark, namely 27 August 2020. As Mr Maloney's trade mark remained valid at the relevant date, he is entitled to rely upon his mark in this opposition.

8. In the notice of opposition, the response to the question "which goods or services covered by the earlier trade mark are relied upon for this opposition?" (i.e. question 1) is given as "clothing". However, Mr Maloney also states (at question 3a) that the trade mark has been used for other goods in its specification. Notwithstanding the latter statement, this decision will be based solely upon the goods identified as the basis of the claim in the notice of opposition, i.e. "clothing".

9. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. That is why this decision continues to refer to EU trade mark law.

Proof of use

10. Section 6A reads:

"(1) This section applies where

(a) an application for registration of a trade mark has been published,

(b) there is an earlier trade mark of a kind falling within section 6(1)(a), (aa) or (ba) in relation to which the conditions set out in section 5(1), (2) or (3) obtain, and

(c) the registration procedure for the earlier trade mark was completed before the start of the relevant period.

(1A) In this section “the relevant period” means the period of 5 years ending with the date of the application for registration mentioned in subsection (1)(a) or (where applicable) the date of the priority claimed for that application.

(2) In opposition proceedings, the registrar shall not refuse to register the trade mark by reason of the earlier trade mark unless the use conditions are met.

(3) The use conditions are met if –

(a) within the relevant period the earlier trade mark has been put to genuine use in the United Kingdom by the proprietor or with his consent in relation to the goods or services for which it is registered, or

(b) the earlier trade mark has not been so used, but there are proper reasons for non- use.

(4) For these purposes -

(a) use of a trade mark includes use in a form (the “variant form”) differing in elements which do not alter the distinctive character of the mark in the form in which it was registered (regardless of whether or not the trade mark in the variant form is also registered in the name of the proprietor), and

(b) use in the United Kingdom includes affixing the trade mark to goods or to the packaging of goods in the United Kingdom solely for export purposes.

(5)-(5A) [Repealed]

(6) Where an earlier trade mark satisfies the use conditions in respect of some only of the goods or services for which it is registered, it shall be treated for the purposes of this section as if it were registered only in respect of those goods or services.”

11. Section 100 of the Act is also relevant. It states that:

“100. If in any civil proceedings under this Act a question arises as to the use to which a registered trade mark has been put, it is for the proprietor to show what use has been made of it.”

12. In *Walton International Ltd & Anor v Verweij Fashion BV* [2018] EWHC 1608 (Ch) Arnold J (as he then was) summarised the law relating to genuine use as follows:

“114. [...] The CJEU has considered what amounts to “genuine use” of a trade mark in a series of cases: Case C-40/01 *Ansul BV v Ajax Brandbeveiliging BV* [2003] ECR I-2439, *La Mer* (cited above), Case C-416/04 P *Sunrider Corp v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [2006] ECR I-4237, Case C-442/07 *Verein Radetsky-Order v Bundervsvereinigung Kamaradschaft ‘Feldmarschall Radetsky’* [2008] ECR I-9223, Case C-495/07 *Silberquelle GmbH v Maselli-Strickmode GmbH* [2009] ECR I-2759, Case C-149/11 *Leno Marken BV v Hagelkruis Beheer BV* [EU:C:2012:816], [2013] ETMR 16, Case C-609/11 P *Centrotherm Systemtechnik GmbH v Centrotherm Clean Solutions GmbH & Co KG* [EU:C:2013:592], [2014] ETMR, Case C-141/13 P *Reber Holding & Co KG v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [EU:C:2014:2089] and Case C-689/15 *W.F. Gözze Frottierweberei GmbH v Verein Bremer Baumwollbörse* [EU:C:2017:434], [2017] Bus LR 1795.

115. The principles established by these cases may be summarised as follows:

(1) Genuine use means actual use of the trade mark by the proprietor or by a third party with authority to use the mark: *Ansul* at [35] and [37].

(2) The use must be more than merely token, that is to say, serving solely to preserve the rights conferred by the registration of the mark: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Leno* at [29]; *Centrotherm* at [71]; *Reber* at [29].

(3) The use must be consistent with the essential function of a trade mark, which is to guarantee the identity of the origin of the goods or services to the consumer or end user by enabling him to distinguish the goods or services from others which have another origin: *Ansul* at [36]; *Sunrider* at [70]; *Verein* at [13]; *Silberquelle* at [17]; *Leno* at [29]; *Centrotherm* at [71]. Accordingly, affixing of a trade mark on goods as a label of quality is not genuine use unless it guarantees, additionally and simultaneously, to consumers that those goods come from a single undertaking under the control of which the goods are manufactured and which is responsible for their quality: *Gözze* at [43]-[51].

(4) Use of the mark must relate to goods or services which are already marketed or which are about to be marketed and for which preparations to secure customers are under way, particularly in the form of advertising campaigns: *Ansul* at [37]. Internal use by the proprietor does not suffice: *Ansul* at [37]; *Verein* at [14] and [22]. Nor does the distribution of promotional items as a reward for the purchase of other goods and to encourage the sale of the latter: *Silberquelle* at [20]-[21]. But use by a non-profit making association can constitute genuine use: *Verein* at [16]-[23].

(5) The use must be by way of real commercial exploitation of the mark on the market for the relevant goods or services, that is to say, use in accordance with the commercial *raison d'être* of the mark, which is to create or preserve an outlet for the goods or services that bear the mark: *Ansul* at [37]-[38]; *Verein* at [14]; *Silberquelle* at [18]; *Centrotherm* at [71]; *Reber* at [29].

(6) All the relevant facts and circumstances must be taken into account in determining whether there is real commercial exploitation of the mark, including: (a) whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods and services in question; (b) the nature of the goods or services; (c) the

characteristics of the market concerned; (d) the scale and frequency of use of the mark; (e) whether the mark is used for the purpose of marketing all the goods and services covered by the mark or just some of them; (f) the evidence that the proprietor is able to provide; and (g) the territorial extent of the use: *Ansul* at [38] and [39]; *La Mer* at [22]-[23]; *Sunrider* at [70]-[71], [76]; *Leno* at [29]-[30], [56]; *Centrotherm* at [72]-[76]; *Reber* at [29], [32]-[34].

(7) Use of the mark need not always be quantitatively significant for it to be deemed genuine. Even minimal use may qualify as genuine use if it is deemed to be justified in the economic sector concerned for the purpose of creating or preserving market share for the relevant goods or services. For example, use of the mark by a single client which imports the relevant goods can be sufficient to demonstrate that such use is genuine, if it appears that the import operation has a genuine commercial justification for the proprietor. Thus there is no *de minimis* rule: *Ansul* at [39]; *La Mer* at [21], [24] and [25]; *Sunrider* at [72] and [76]-[77]; *Leno* at [55].

(8) It is not the case that every proven commercial use of the mark may automatically be deemed to constitute genuine use: *Reber* at [32].”¹

13. In *Awareness Limited v Plymouth City Council*, BL O/236/13, Daniel Alexander Q.C., sitting as the Appointed Person, stated that:

“22. The burden lies on the registered proprietor to prove use [...]. However, it is not strictly necessary to exhibit any particular kind of documentation, but if it is likely that such material would exist and little or none is provided, a tribunal will be justified in rejecting the evidence as insufficiently solid. That is all the more so since the nature and extent of use is likely to be particularly well known to the proprietor itself. A tribunal is entitled to be sceptical of a case of use if, notwithstanding the

¹ Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 requires tribunals to apply EU-derived national law in accordance with EU law as it stood at the end of the transition period. The provisions of the Act relied upon in these proceedings are derived from an EU Directive. This is why this decision continues to make reference to EU case law.

ease with which it could have been convincingly demonstrated, the material actually provided is inconclusive. By the time the tribunal (which in many cases will be the Hearing Officer in the first instance) comes to take its final decision, the evidence must be sufficiently solid and specific to enable the evaluation of the scope of protection to which the proprietor is legitimately entitled to be properly and fairly undertaken, having regard to the interests of the proprietor, the opponent and, it should be said, the public.”

14. In *Dosenbach-Ochsner Ag Schuhe Und Sport v Continental Shelf 128 Ltd*, BL O/404/13, Geoffrey Hobbs Q.C., sitting as the Appointed Person stated that:

“21. The assessment of a witness statement for probative value necessarily focuses upon its sufficiency for the purpose of satisfying the decision taker with regard to whatever it is that falls to be determined, on the balance of probabilities, in the particular context of the case at hand. As Mann J. observed in *Matsushita Electric Industrial Co. v. Comptroller- General of Patents* [2008] EWHC 2071 (Pat); [2008] R.P.C. 35:

[24] As I have said, the act of being satisfied is a matter of judgment. Forming a judgment requires the weighing of evidence and other factors. The evidence required in any particular case where satisfaction is required depends on the nature of the inquiry and the nature and purpose of the decision which is to be made. For example, where a tribunal has to be satisfied as to the age of a person, it may sometimes be sufficient for that person to assert in a form or otherwise what his or her age is, or what their date of birth is; in others, more formal proof in the form of, for example, a birth certificate will be required. It all depends who is asking the question, why they are asking the question, and what is going to be done with the answer when it is given. There can be no universal rule as to what level of evidence has to be provided in order to satisfy a decision-making body about that of which that body has to be satisfied.

22. When it comes to proof of use for the purpose of determining the extent (if any) to which the protection conferred by registration of a trade mark can legitimately be maintained, the decision taker must form a view as to what the evidence does and just as importantly what it does not ‘show’ (per Section 100 of the Act) with regard to the actuality of use in relation to goods or services covered by the registration. The evidence in question can properly be assessed for sufficiency (or the lack of it) by reference to the specificity (or lack of it) with which it addresses the actuality of use.”

15. The relevant period for the assessment of genuine use is 28 August 2015 to 27 August 2020.

Evidence

16. The only witness is Mr Maloney himself, who filed a witness statement with 25 exhibits. He was not cross-examined. I have read all of Mr Maloney’s evidence. I will only refer to the relevant parts.

17. Mr Maloney says that his company, Saviour Projects Limited, has used the mark since February 2005. A press release from 2008 is provided in which “Saviour” is described as “an exciting new UK clothing brand for men.”² Mr Maloney’s evidence is that the business “has always been about limited edition apparel”.³

18. Four prints from saviour-online.com dated between March 2016 and July 2017 are in evidence.⁴ They all bear the sign “SAVIOUR” and the statement “SAVIOUR MENSWEAR ESTABLISHED 2001”. T-shirts, a cardigan, jackets, sweatshirts and polo shirts are mentioned. Prices are in sterling and there is a “buy now” button visible on the later three prints.

19. There are also three prints from lovefollowconquer.com (the site is said to have sold “Saviour” products in the relevant period, though it is not clear if the prints themselves are

² Exhibit IM1.

³ Maloney 1, §5.

⁴ IM2-IM5.

from that period) showing a “product certificate of authenticity” and packaging.⁵ “SAVIOUR” is visible on the former. On the latter, the website address is present and there is a statement that the product was made by Saviour Projects. Two of the prints mention “Saviour” branding appearing on the sleeve of the jacket. There is also a print from lovefollowconquer.com said to show a jacket on sale in the relevant period (which has the same indication about sleeve branding).⁶ I note, however, that it is out of stock in all sizes in all of the prints from this website.

20. Images of garment labels from the relevant period are in evidence.⁷ The word “SAVIOUR” is prominent in what appears to be a neck label and is present on a second label as part of the website address. Further images show “SAVIOUR” on neck labels and swing tags for a jumper, sweatshirt and t-shirt but none of these is dated.⁸

Assessment

21. As far as the form of the mark is concerned, I am satisfied that the mark has been used as registered: it is the plain word which appears on both the website and the labels. The more pertinent issue in this case is the sufficiency of any sales.

22. The case law summarised in the passage from *Walton* quoted above makes it clear that real commercial exploitation of the trade mark must be shown. Even in a case where the use is not sham, i.e. it is not use engineered solely to preserve the trade mark registration, the use must be more than trivial if it is to be considered genuine. An example of this can be seen in *Memory Opticians Ltd’s Application*, BL O/528/15, where Professor Ruth Annand, as the Appointed Person, upheld the decision to revoke the protection of the mark STRADA on the grounds that it had not been put to genuine use within the requisite 5-year period. There had in fact been sales of goods bearing the mark but these were very low in volume (circa 40 pairs of spectacles per year) and all the sales were local, from 3 branches of an optician. There was no advertising of goods under the mark,

⁵ IM6-IM8.

⁶ IM9.

⁷ IM10.

⁸ IM11-IM13. There is some similar evidence dated 2022, which is not relevant as it is outside the relevant period (IM14-IM20).

although the evidence indicated that they were only displayed in-store on occasion. The mark was said to have been applied to the goods via a sticker applied to the arms of a dummy lens. This level of use was held to be insufficient to create or maintain a market under the mark. Consequently, it was not genuine use

23. Turning to the present case, where proof of use is required it is typical to see evidence such as turnover figures, numbers of units sold and invoices showing the sale of goods to customers, whether retail or wholesale. There is none of that here. It is not necessarily fatal to the assertion of genuine use that there is no such evidence, if other material filed by the opponent is sufficient to show that there has been a real attempt to exploit the mark in the sector. However, there is very little evidence of other activity in this case. It amounts to four prints from Saviour Projects' own website from 2016-2017 and, at best, four prints from lovefollowconquer.com which concern one product. The prints from Saviour Projects' website appear to offer the facility to purchase the goods. The prints from lovefollowconquer.com are notionally a sales site, with prices displayed, but there are in fact no goods available for purchase. There is no context provided for the unavailability of the goods, so it is impossible to know how many products were sold to reach the 'sold out' status, or when or for how long the goods may have been available. Beyond these websites, there is no evidence of any advertising or promotional activity, whether in terms of traditional print advertising, web advertising or via social media. Mr Maloney does not give any sales figures at all, which is plainly information which should have been both available to him and relatively easy to provide. Taking the evidence as a whole, my view is that it does not establish that there has been genuine use of the mark for any goods.

24. The consequence of my finding on use is that UK2372186 may not be relied upon in these proceedings. As there is no other basis for the opposition, the action must fail.

25. Notwithstanding the above, I will briefly give my views on the substance of the s. 5(2)(b) claim. I will assume for this purpose, contrary to my primary finding, that genuine use has been shown for "clothing".

Section 5(2)(b)

26. 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.”

27. Section 5A is also relevant and reads:

“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.”

28. The following principles are gleaned from the decisions of the EU courts in *Sabel BV v Puma AG*, Case C-251/95, EU:C:1997:528, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, EU:C:1998:442, *Lloyd Schuhfabrik Meyer & Co GmbH v Klijsen Handel B.V.* Case C-342/97, EU:C:1999:323, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, EU:C:2000:339, *Matratzen Concord GmbH v OHIM*, Case C-3/03, EU:C:2004:233, *Medion AG v. Thomson Multimedia Sales Germany & Austria GmbH*, Case C-120/04, EU:C:2005:594, *Shaker di L. Laudato & C. Sas v OHIM*, Case C-334/05P, EU:C:2007:333, and *Bimbo SA v OHIM*, Case C-591/12P, EU:C:2016:591:

(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 will wrongly believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Comparison of goods

29. The contested goods are “clothing”. They are self-evidently identical to the earlier goods.

The average consumer and the nature of the purchasing act

30. The average consumer is a legal construct deemed to be reasonably well informed and reasonably circumspect: *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) at [60]. For the purposes 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 and services in question: *Lloyd Schuhfabrik*.

31. The average consumer for clothing is a member of the general public. The goods are regular though not everyday purchases and the consumer will pay some attention to factors such as the type, fit, style and colour of garments. There will be a medium level of attention. In terms of the selection process, this is likely to be mainly visual, with clothing chosen from the shelves and rails of retail premises or their online equivalents.⁹ I do not discount that there may be an oral component, arising, for example, from interaction with sales assistants.

Distinctive character of the earlier trade mark

32. In *Lloyd Schuhfabrik*, 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

⁹ See, for example, *New Look Limited v OHIM*, joined cases T-117/03 to T-119/03 and T-171/03 (GC).

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).”


33. The earlier mark is the single word “SAVIOUR”. It is meaningless for the goods and has a medium degree of inherent distinctive character. The evidence in these proceedings is, for the reasons given above, wholly inadequate to establish that the mark is known to a significant part of the public. It has not acquired any additional distinctiveness through use.

Comparison of trade marks

34. The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details: *Sabel* (particularly paragraph 23). *Sabel* also explains that the visual, aural and conceptual similarities of the marks must be assessed by reference to the overall impressions created by the marks, bearing in mind their distinctive and dominant components. The CJEU stated at paragraph 34 of its judgment in *Bimbo*, 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.”

35. It would be wrong, therefore, artificially to dissect the marks, although it is necessary to take into account their distinctive and dominant components. Due weight must be given to any other features which are not negligible and therefore contribute to the overall impressions created by the marks. The marks to be compared are:

Earlier mark	Contested mark
SAVIOUR	

36. The overall impression and distinctiveness of the earlier mark is contained in the word “SAVIOUR”.

37. The filing information indicates that the applicant considers the contested mark to be the word “SAVIOR” but what matters is how the average consumer will perceive the mark. The letters “S”, “A” and “R” are visible. The remaining letters are not clear. In the middle of the mark, there is what may be a “V” but it has an additional line to the right. If one looks closely, there is what may be an “i” and what appears to be a “u” or possibly an “o”. However, I consider that this kind of close analysis of the mark amounts to an artificial dissection and would not be the process undertaken by the average consumer. The mark is not, in my view, clearly either the word “SAVIOUR” or “SAVIOR”. The average

consumer is likely to recognise certain letters but will not identify a word with any degree of certainty. Accordingly, the overall impression of the later mark is of a highly stylised mark which includes some known letters but where the presentation is equally important. The mark will not be seen as the word “SAVIOR” in a stylised form.

38. Although both marks contain the letters “S”, “A” and “R”, there is a difference because the letters in the middle of the contested mark are not distinguishable. There is also the matter of the significant stylisation in the contested mark which goes beyond normal typefaces. The marks have a low degree of visual similarity.

39. The earlier mark will have its conventional pronunciation. The later mark is unlikely to be articulated at all. However, for completeness, whilst I think it highly unlikely that the average consumer would attempt to articulate certain letters perceptible in the contested mark, even if they did, the pronunciation of individual letters is not similar to the pronunciation of a whole word. In both cases, the marks are aurally dissimilar.

40. The word “SAVIOUR” means someone who saves or rescues someone (or something). It has a more specific meaning of Christ but I think it unlikely that this meaning will be at the forefront of the average consumer’s perception in the absence of a definite article. The later mark will not be perceived as a word and has no concept. The marks are conceptually different.

Likelihood of confusion

41. In determining whether there is a likelihood of confusion, all of the above factors need to be borne in mind. They must be considered globally (*Sabel*), from the perspective of the average consumer. In making my assessment, I must keep in mind 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 (*Lloyd Schuhfabrik*). The factors considered above have a degree of interdependency (*Canon*): for example, 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.

42. Confusion can be direct or indirect. The difference between these two types of confusion was explained in *LA Sugar Limited v Back Beat Inc.*, BL O/375/10, where Iain Purvis Q.C., sitting 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)”.

43. In *Liverpool Gin Distillery Ltd & Ors v Sazerac Brands, LLC & Ors* [2021] EWCA Civ 1207, Arnold LJ referred to the comments of James Mellor QC (as he then was), sitting as the Appointed Person in *Cheeky Italian Ltd v Sutaria* (O/219/16), where he said 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.

44. Even though the goods are identical, there are significant differences between the trade marks. I do not consider it likely that the average consumer would confuse the marks. The conceptual difference points away from confusion and the low degree of visual similarity is insufficient to cause the consumer to think that the marks are the same. The absence of any meaning in the contested mark makes it unlikely that the average consumer would think it a variant of the earlier mark. I accept that if the contested mark were seen as a stylised version of the word “SAVIOR” the position might well be different but I have found that it would not be so perceived. Absent a common or related conceptual meaning there is, in this case, nothing else in the marks to suggest to the consumer that the undertakings using the marks may be the same or related. There is no likelihood of confusion, whether direct or indirect.

Conclusion

45. The opposition has failed. The application will proceed to registration for all of the goods in its specification.

Final remarks

46. Mr Maloney has filed some evidence concerning the way in which the applicant’s mark has been used, principally showing that it has been used on social media with the plain word “Saviour”.¹⁰ I have not referred to that evidence in this decision because it is irrelevant. The decision before me is only concerned with the contested trade mark

¹⁰ IM22-IM23. The other prints do not show the contested mark.

application and the earlier trade mark: it would be improper for me to take any other marks used by the applicant into account.

Costs

47. The applicant has been successful and is entitled to an award of costs, based on the published scale.¹¹ In making the award, I bear in mind that the applicant has not engaged in these proceedings since it filed a defence and that Mr Maloney's evidence was very light. I award costs to the applicant as follows:

Considering the notice of opposition and filing a defence:	£200
Considering Mr Maloney's evidence:	£400
Total:	£600

48. I order Ian Maloney to pay Pro Group Holdings Ltd the sum of **£600**. This sum is to be paid within 21 days of the expiry of the appeal period or within 21 days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 11th day of October 2022

Heather Harrison

For the Registrar

The Comptroller-General

¹¹ Tribunal Practice Notice 2/2016.