

O-0111-23

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NO. UK00003661380
BY MATT MCAREE AND MATTHEW MCAREE TO REGISTER:**



AS A TRADE MARK IN CLASS 30

AND

**IN THE MATTER OF OPPOSITION THERETO UNDER NO. 429344
BY UNIPHAR SP. Z O.O.**

Background & Pleadings

1. On 28 June 2021, Matt McAree and Matthew McAree (jointly “the applicant”) applied to register the trade mark shown on the cover page of this decision in the United Kingdom. The applicant seeks registration for the following goods:

Class 30: Seasoned salt; Spiced salt; Salts, seasonings, flavourings and condiments.

The application was published for opposition purposes on 17 September 2021.

2. On 17 December 2021, UNIPHAR Sp. Z o.o. (“the opponent”) opposed the application in its entirety under section 5(2)(b) of the Trade Marks Act 1994 (“the Act”). For the purpose of the opposition, the opponent relies upon the following comparable mark and all goods for which it is registered, as laid out below:

United Kingdom Trade Mark (“UKTM”) 801384797



Filing date: 9 May 2017

Registration date: 20 June 2018

Priority date: 24 April 2017

Class 5: Salt, medicated; salts for medical purposes; dietetic substances for medical purposes; food supplements; nutritional supplements.

Class 30: Edible salt; flavorings and seasonings.

3. The opponent contends that there exists a likelihood of confusion, including a likelihood of association, on the part of the public, due to the similarity between the parties' respective marks and the similarity and identity between the respective goods.

4. In its counterstatement, the applicant contends that the respective goods are "very different products in completely different industries" with "completely different logos". The applicant denies that the opponent has grounds to state that the marks are similar in any way.

5. The opponent is represented by Haseltine Lake Kempner LLP, whilst the applicant is unrepresented. Neither party filed evidence during the evidential rounds and, on conclusion of the evidence rounds, both parties were given the opportunity to either request a hearing or file written submissions in lieu. Only the opponent elected to file such submissions and neither party requested a hearing.

6. 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 Trade Marks Act relied on in these proceedings are derived from an EU Directive. This is why my decision will continue to make reference to the trade mark case law of EU courts.

Preliminary matters

The nature of the respective goods

7. I note the applicant's submissions within its counterstatement regarding the parties' respective goods, specifically that:

"...these are very different products in completely different industries, with completely different logos. Mine is a seasoning salt containing a mixture of salt, herbs and spices. Theirs is some sort of medical salt and the fact that it is edible does not put it in the same industry as mine."

8. When assessing a likelihood of confusion, it is necessary to consider the potential for conflict between the applied for mark and the earlier trade mark in light of all relevant circumstances. 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 that when assessing the likelihood of confusion in the context of registering a new trade mark it is necessary to consider *all* the circumstances in which the mark applied for might be used if it were registered.¹ Differences between the goods currently provided by the parties are therefore irrelevant to the assessment I am required to make, except to the extent that those differences are apparent from the lists of goods they have tendered for the purpose of the registration of their marks.

9. In *Oakley v OHIM*, Case T-116/06, it is made clear that consideration of a likelihood of confusion is prospective and should not to be restricted to the current marketing or trading patterns of the parties:

“...since the particular circumstances in which the goods covered by the marks are marketed may vary in time, and depending on the wishes of the proprietors of the trade marks, the prospective analysis of the likelihood of confusion between the two marks... cannot be dependent on the commercial intentions, whether carried out or not – and which are naturally subjective –of the trade mark proprietors...”

10. It follows that I am required to make an assessment of the likelihood of confusion notionally and objectively, on the basis of the specifications (and marks) as they appear before me on the register.

The applicant’s comments regarding the registration of its trade mark

11. I also take note of Mr McAree’s comments and frustration throughout the proceedings regarding what he understood to be earlier assurances offered by the registry indicating that his application would reach registration. On filing his counterstatement, for example, Mr McAree submits that “I have already been through

¹ At paragraph 66

the tribunal process and was advised by the tribunal advisor that my logo is completely unique and there is no reason why it wouldn't go through" and later "if anything but that happens I will be taking you to court for a full refund". In that regard, Mr McAree also expressed an intention to lodge a claim against the registry with the small claims court, if necessary, to secure a refund and reimbursement of any incurred legal fees. Mr McAree's comments were addressed in an official letter dated 6 June 2022, which read as follows:

"I acknowledge your comments regarding what you consider to be assurances from the Registry about the registration of your trade mark. It appears from the file that you discussed the possibility of adding distinctive elements to the words of your original trade mark application with the hearing officer at examination stage. The question at examination stage is whether the trade mark is able to function as a brand. The inclusion of figurative elements alongside descriptive or non-distinctive words is often part of that assessment and it is normal for examiners and examination section hearing officers to explain this to applicants, though they cannot give a concrete answer about a particular trade mark until an application is made.

The tribunal has a related role but it is a separate part of the registration process. Its function is to determine disputes between two parties. In this case, the opposition is based upon an earlier trade mark owned by the opponent. It is not the practice of the Registry, either examination section or tribunal section, to assure applicants that other trade mark owners will not object to the registration of trade marks. That is for the simple reason that the Registry cannot know what those trade mark owners might consider to be objectionable. I also note that, in relation to the present trade mark application, examination section did, in fact, advise you in their letter of 7 August 2021 that the examiner considered that there was a likelihood of confusion regarding the trade mark now relied upon by the opponent and that the opponent would be notified accordingly.

Regrettably, section 39 of the Trade Marks Act prohibits the alteration of trade marks (other than by limiting the list of goods and services) and there is no scope for amending your present trade mark application."

12. In the same letter, Mr McAree was subsequently provided with the relevant details regarding the registry's complaints procedure and advised that, as he had not indicated that he wished to withdraw the form TM53 filed following the issue of a preliminary indication, the tribunal infers that he wishes instead to proceed to the evidence rounds. Given the comprehensive explanation already provided to Mr McAree, reproduced above, I do not consider it necessary to say anything further on the matter.

Decision

13. Section 5(2)(b) of the Act states that:

“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.”

14. Under the provisions laid out in section 6 of the Act, the opponent's trade mark clearly qualifies as an earlier mark. In accordance with section 6A of the Act, as it had not completed its registration procedure more than five years prior to the filing date of the applicant's mark, it is not subject to the proof of use requirements. As a consequence, the opponent can rely upon its earlier mark and all goods for which it is registered without providing evidence of use.

Section 5(2)(b) - Case law

15. 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*

Klijnsen Handel B.V. Case C-342/97, Marca Mode CV v Adidas AG & Adidas Benelux BV, Case C-425/98, Matratzen Concord GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (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.

Comparison of goods

16. The goods to be compared are displayed in the table below:

Opponent's goods	Applicant's goods
Class 5: Salt, medicated; salts for medical purposes; dietetic substances for medical purposes; food supplements; nutritional supplements.	Class 30: Seasoned salt; Spiced salt; Salts, seasonings, flavourings and condiments.
Class 30: Edible salt; flavorings and seasonings.	

17. Each of the respective specifications includes *flavorings/flavourings* and *seasonings* in class 30. These goods are self-evidently identical.

18. In *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated that:

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

19. The above case makes clear that goods (or services) which are encompassed by a broader term in the competing specification are to be considered identical, even if they are not literally so. Applying that principle, I find the applicant’s *seasoned salt* and *spiced salt* encompassed by, and therefore identical to, the opponent’s *edible salt* (in the same class) and further find the opponent’s *edible salt* encompassed by the applicant’s *salts*. I find these goods identical.

20. That leaves the applicant’s *condiments* to be considered. In my understanding, a *condiment* refers to a food preparation intended to enhance or complement a particular dish and, as a term, would therefore encompass the opponent’s *edible salt* (for example), and the goods can therefore be deemed identical. If I am incorrect in that finding, I find the goods similar to at least a high degree. There is a high similarity in the goods’ use, and they will be selected by the same consumers. The goods’ nature will likely be similar, to some extent at least, they will reach the market through the same trade channels, will be sold in proximity and could share a competitive element.²

The average consumer and the nature of the purchasing act

21. 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 in question³. 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:

² *Treat case*, [1996] R.P.C. 281

³ *Lloyd Schuhfabrik Meyer*, Case C-342/97

“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.”

22. The average consumer of the goods at issue here is likely to be a member of the general public. Members of the general public will generally self-select the goods from the shelves of a traditional retail establishment, such as a supermarket, or an online equivalent. This method of purchase suggests that the marks’ visual weight is the greatest, though I do not overlook the marks’ aural impact as the consumer may seek advice from a retail assistant, for example. The goods are typically inexpensive and purchased fairly frequently, with the consumer alive to factors such as ingredients and nutritional value. On balance, I find the average consumer likely to apply a fairly low degree of attention to its selection of the relevant goods.



Comparison of trade marks

23. 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 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.”

24. It would be wrong, therefore, 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.

25. The trade marks to be compared are displayed in the table below:

Opponent's mark	Applicant's mark
	

26. The opponent's mark is figurative, with a number of elements presented against a rectangular, dark red background. Toward the top of the box read the words (or word) Super Salt, in a standard font, with Super presented in yellow and Salt in white, and very little space between the two. Beneath those words, in a significantly smaller font, are the words 'salt plus' with a small horizontal line positioned either side. Sitting beneath those word elements, in a central position, the largest element of the mark is what will be recognised as a cross or plus shape, presented in yellow. The most dominant of the mark's components are the words 'Super Salt' and the cross or plus symbol, with the words carrying a greater weight. The mark's background is likely to be viewed as simply a stylistic choice and the words, and lines, beneath Super Salt are so small that their contribution to the mark's overall impression is likely to be negligible.

27. The applicant's mark comprises two words, amongst which is positioned a depiction of a diamond. Though there is only one letter 'S' in the mark, shared between the words, it spans both lines and the words, which are positioned one on top of the other, will readily be identified as 'SUPER SALT'. The marks' letters are presented in yellow and the typeface is fairly bold, creating a 3-dimensional effect on account of the shading applied to the letters. The mark's diamond depiction is intertwined beneath the mark's largest letter, S, and, whilst it makes a contribution to the mark's overall impression, its impression resides predominantly in its word elements.

28. Visually, the marks coincide in the words 'Super Salt', albeit with no space, or very little space, separating the words in the earlier mark, and only a single S in the latter. Both parties have also elected to present some, if not all, of their word elements in yellow. Aside from those similarities, the marks share little insofar as their visual characteristics are concerned. Keeping in mind what I have said regarding the marks' overall impressions, I find the visual similarity to be of no more than a medium degree.

29. The average consumer is unlikely to attempt to articulate the figurative elements in either mark⁴ and I find it highly unlikely that the words 'salt plus' in the earlier mark will be noticed, and are even less likely to be articulated aurally. With those factors in mind, each mark is likely to be articulated in the same three syllables; namely, SOO-PUR-SOLT. I find the marks are aurally identical.

30. For a conceptual message to be relevant it must be capable of immediate grasp by the average consumer.⁵ The word elements of each mark are ordinary, dictionary words with meanings which will be readily understood by the average consumer. 'Super' will be understood as a laudatory word indicating that something is excellent, or superior in some way, and 'salt' will be identified as a common seasoning. In combination, those words conceptually give an impression of salt which is, for an undisclosed reason, superior to a typical salt. The cross or plus symbol in the earlier mark plays a lesser role than its word elements. If it is recognised as a cross, this is generally synonymous with health or religion and, if it is recognised as plus, it will give

⁴ *Dosenbach-Ochsner AG Schuhe und Sport v OHIM*, Case T- 424/10

⁵ *Ruiz Picasso v OHIM* [2006] e.c.r.-I-643; [2006] E.T.M.R 29

an impression of something additional or an increase. Though I have considered whether the symbol will signal a health benefit of some kind, given what I have said regarding the meaning of the mark's word elements, I find the latter interpretation the most likely; a reinforcement of the goods sold under the mark offering something 'additional', yet unspecified, which renders them superior, for example. The words which I have found unlikely to be noticed on account of their size, 'salt plus', simply echo the sentiments of superiority. The later mark incorporates a depiction of a diamond which generally hints toward something which is rare, or at least valuable. Coupled with the word elements 'SUPER SALT', the image consequently serves to emphasise the impression of superiority or value. Weighing those findings, I consider the marks' conceptual similarity to be fairly high.

Distinctive character of the earlier trade mark

31. 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. 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).”

32. Registered trade marks possess varying degrees of inherent distinctive character. These range from the very low, such as those which are suggestive or allusive of the goods or services for which they are registered, to those with high inherent distinctive character, such as invented words. Dictionary words which do not allude to the goods or services will typically fall somewhere in the middle. The degree of distinctiveness is an important factor as it directly relates to whether there is a likelihood of confusion; generally, the more distinctive the earlier mark, the greater the likelihood of confusion. The distinctive character of a mark may be enhanced as a result of it having been used in the market.

33. Given that the opponent has not made a pleading of enhanced distinctiveness, and in the absence of evidence showing the use made of the earlier mark, I have only its inherent distinctiveness to consider. The mark is comprised of a background, a figurative element and a number of word elements (though I have found some likely to go unnoticed). I have found the mark’s word elements ‘Super Salt’ to play the greatest part in the mark’s overall impression which, together, create somewhat of an alliterative effect. Still, when considered against the goods relied upon for the purpose of the opposition, those words play a fairly descriptive role and, overall, I find them lowly distinctive. Though they make a contribution, the mark’s additional elements such as its background will likely be seen as a decorative inclination and the plus or cross symbol portrayed within the mark is not particularly remarkable and the notion of an ‘addition’, or of providing something extra, reinforces what is already implied by the adjective ‘Super’. I have already concluded that the mark’s additional word elements are unlikely to be noticed by the average consumer but, even if the consumer were to recognise the words, they contribute little in terms of the mark’s distinctiveness. Weighing all considerations, I find the earlier mark inherently distinctive to a fairly low degree.

Likelihood of confusion

34. 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 the opponent's trade mark, as the more distinctive it is, the greater the likelihood of confusion.

35. When considering the impact of distinctive character, I keep in mind *L'Oréal SA v OHIM*⁶, where the CJEU found that:

“45. The applicant's approach would have the effect of disregarding the notion of the similarity of the marks in favour of one based on the distinctive character of the earlier mark, which would then be given undue importance. The result would be that where the earlier mark is only of weak distinctive character a likelihood of confusion would exist only where there was a complete reproduction of that mark by the mark applied for, whatever the degree of similarity between the marks in question. If that were the case, it would be possible to register a complex mark, one of the elements of which was identical with or similar to those of an earlier mark with a weak distinctive character, even where the other elements of that complex mark were still less distinctive than the common element and notwithstanding a likelihood that consumers would believe that the slight difference between the signs reflected a variation in the nature of the products or stemmed from marketing considerations and not that that difference denoted goods from different traders.”

36. In *Nicoventures Holdings Limited v The London Vape Company Ltd*⁷, judgement was given in a UK trade mark appeal to the High Court in England and Wales. An application had been made to register the mark shown below in relation to electronic cigarettes.

⁶ Case C-235/05 P

⁷ [2017] EWHC 3393 (Ch)



37. It was opposed on the basis of the following earlier mark, which was registered for the same goods.



38. The registrar upheld the opposition, finding that the marks were highly similar and the goods identical. In these circumstances, the low distinctiveness of the elements VAPE and CO was found to be insufficient to avoid a likelihood of confusion. However, the appeal to the High Court was upheld.⁸ The judge explained that the nature of the marks' common elements needed to be considered and that, where the common elements are found to be descriptive and non-distinctive, it is necessary to focus on the impact this has on the likelihood of confusion. Whilst it does not preclude such a likelihood, it does weigh against it. The judge instructed that the matter be reconsidered bearing in mind the *White and Mackay* principle.

39. The *Whyte and MacKay* principle referred to is a reference to an earlier judgment of the High Court in England and Wales⁹, in which another judge concluded that:

“...what can be said with confidence is that, if the only similarity between the respective marks is a common element which has low distinctiveness, that points against there being a likelihood of confusion.”

40. Neither of the judgments of the High Court go quite so far as to exclude the likelihood of confusion where the only element in common between two marks is one that lacks distinctive character. The level of distinctive character of an element which is common to both marks is but one element in the global assessment of the likelihood of confusion. Consequently, even where the level of distinctive character of the element in question is low, other factors in the required global assessment, such as

⁸ EWHC 3393 (Ch)

⁹ [2015] EWHC 1271 (Ch)

the identity of the goods or services and/or a high level of overall similarity between the marks, may still justify a finding that there is a likelihood of confusion.

41. 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.

42. I take note of the comments made by Mr Iain Purvis Q.C., as the Appointed Person, in *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, where he 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. To make the assessment, I must adopt the global approach advocated by the case law whilst taking account of my earlier conclusions. I also bear in mind that the average consumer rarely has the chance to make direct comparisons between trade marks and, instead, must rely upon the imperfect picture of them retained in its mind.

45. I will begin by considering a likelihood of direct confusion. Whilst I keep in mind that I have attributed a fairly low degree of inherent distinctiveness to the opponent's mark, I have also found that the parties' marks are registered for, or seek registration for, identical (or at least highly similar) goods and that the average consumer will likely apply a fairly low degree of attention to its selection. In regards the marks' respective overall impressions, I have found that each resides predominantly in the word elements 'Super Salt / SUPER SALT'. I have found the marks' visual similarity of no more than a medium degree, their conceptual similarity fairly high and concluded that they are aurally identical. Whilst I balance those findings against the degree of attention likely to be applied to the consumer's purchase, what the average consumer will likely recall, having previously purchased either of the parties' goods, is that the mark was 'a Super Salt mark'. In approaching a re-purchase, for example, the

consumer may not readily recall the nature of the marks' figurative embellishments which could lead it to mistakenly select the goods sold under the competing mark, erroneously believing it to be the same as what it had previously purchased. In short, notwithstanding the fairly low distinctiveness of the earlier mark (including the low level of distinctiveness attributed to its word elements), in my view, direct confusion may arise particularly on the basis that the respective goods are identical, each mark's overall impression lies predominantly in the expression 'Super Salt' and the average consumer will likely apply a fairly low degree of attention to its selection of the relevant goods.

46. As I have found a likelihood of direct confusion, it is not strictly necessary for me to go on to consider a likelihood of indirect confusion. However, if I were to express a brief opinion on the matter, I find that the average consumer would be minded to conclude that the parties' marks originate from a shared or related undertaking. Having identified that the respective trade marks are not the same, the consumer will nevertheless recognise that the words 'Super Salt' are retained in each mark and simply the aesthetic elements of the marks are altered. Differences of that nature, particularly in respect of identical or highly similar goods, would likely lead the average consumer to conclude that a single brand has simply reconsidered or updated its visual identity. Irrespective of the earlier mark's inherent distinctiveness, I find the likely outcome that the average consumer will indirectly confuse the marks, believing them to originate from a single, or at least economically related, origin, on account of their common element.

Conclusion

47. The opposition has succeeded and, subject to any successful appeal, the application will be refused.

Costs

48. The opponent has succeeded and is entitled to a contribution towards its costs. Awards of costs are governed by Annex A of Tribunal Practice Notice ("TPN") 2/2016. In accordance with that TPN, I award costs as follows:

Filing a Notice of Opposition (official fee):	£100
Preparing a Notice of Opposition and considering the counterstatement:	£250
Preparing written submissions in lieu of a hearing:	£250
Total:	£600

39. I order Matt McAree and Matthew McAree to pay Uniphar SP. Z O.O. the sum of £600. 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 2nd day of January 2023

Laura Stephens
For the Registrar