

BL O/0121/25

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. UK00003740463 IN THE NAME OF RONIX (UK) LIMITED

AND IN THE MATTER OF OPPOSITION NO. OP00433024 THERETO BY DE LONGHI BENELUX S.A.

DECISION

Introduction

1. This is an appeal against the decision of James Hopkins, acting on behalf of the Registrar of Trade Marks dated 18 March 2024 (O-0229-24) in which the Hearing Officer rejected the opposition under sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 (“*the 1994 Act*”) and made no order as to costs (“*the Decision*”).
2. On 7 January 2022, Ronix (UK) Limited (“*the applicant*”) applied to register the trade mark **CHEFCHY** with respect to a range of goods in classes 7, 8, 11 and 21 (“*the contested mark*”).
3. On 28 March 2022, De Longhi Benelux S.A. (“*the opponent*”) partially opposed the contested mark under sections 5(2)(b), 5(3) and 5(4)(a) of the 1994 Act. The opposed goods were in classes 7 and 11.
4. For the purposes of the grounds of opposition under section 5(2)(b) and 5(3) the opponent relied upon its UK trade mark number 3438050 for the trade mark **CHEF** registered in respect of ‘*food mixers; attachments and accessories for food mixers*’ in class 7 (“*the earlier mark*”). The earlier mark was filed on 21 October 2019 and became registered on 20 March 2020.
5. For the purposes of its claims under section 5(4)(a) the opponent claimed that it had a protectable goodwill in relation to the sign **CHEF** which it is said that it had used in the UK since the 1950s. The goods for which the sign was said to have been used were ‘*food mixers and food preparation equipment and machines; attachments and accessories for the aforesaid goods*’.
6. The applicant filed a counterstatement in which it denied the grounds of opposition. Whilst the applicant conceded that the parties’ goods were similar, it denied that the competing marks were similar. The applicant also put the opponent to proof of its claimed reputation and goodwill.
7. The opponent was professionally represented by Mathys & Squire LLP. The applicant has no professional representation. Only the opponent filed evidence. A

hearing was not requested and neither party filed written submissions in lieu of attendance at the hearing. As the Hearing Officer noted both parties had filed written submissions in the course of the evidence rounds. The Decision was therefore made on the papers that were before the Hearing Officer.

The Hearing Officer's Decision

8. The Hearing Officer first considered the objection under section 5(2)(b) of the 1994 Act. Having set out the applicable legal principles the Hearing Officer found as follows.
9. That with respect to the goods in class 7:
 - (1) The opponent's '*food mixers*' were identical to the applicant's '*electric kitchen machines; kitchen machines; kitchen machines, electric*' (paragraph [23] of the Decision).
 - (2) The applicant's '*electric kitchen appliances for [. . .] mixing [. . .], electric appliances used in the kitchen for whisking; electric kitchen mixers; mixers [kitchen machines]*' are identical to the opponent's '*food mixers*'. If that was not correct the Hearing Officer regarded such goods as highly similar (paragraph [24] of the Decision).
 - (3) The applicant's '*electric kitchen tools; kitchen tools [electric utensils]; utensils (electric -) for stirring liquid, utensils (electric -) for mixing liquids; utensils (electric -) for blending liquids*' to be similar to between a medium and high degree to the opponent's '*food mixers; attachments and accessories for food mixers*' (paragraph [25] of the Decision).
 - (4) The applicant's '*kitchen knives (electric-); electric kitchen appliances for chopping, [. . .], pressing*' and the opponent's '*food mixers; attachments and accessories for food mixers*' are similar to a medium degree (paragraph [26] of the Decision).
10. That with respect to the goods in class 11 the respective goods were similar to a low degree (paragraph [27] of the Decision).
11. That the average consumer of the goods in issue was likely to be a member of the general public or a professional user, such as a restaurateur or a chef. Such consumers would exhibit at least a medium level of attention during the purchasing process. The purchasing process would typically involve a visual inspection of the goods or after viewing information online or in catalogues. However aural considerations were not discounted. See paragraph [30] of the Decision.
12. With regard to the inherent distinctive character of the earlier mark the Hearing Officer found at paragraph [33] of the Decision as follows:

33. The earlier mark is in word-only format and consists of the word 'CHEF', with no other elements. The word is an ordinary dictionary word used to refer to a cook. Given this meaning, the word is strongly allusive, if not descriptive, of the food preparation goods relied upon in these proceedings. As such, I find that the earlier mark possesses a low level of inherent distinctive character.

13. The Hearing Officer then went on to find on the basis of the evidence filed on behalf of the opponent that the distinctive character of the earlier mark had been enhanced by the relevant date with respect to the goods relied upon but given the low level of inherent distinctiveness this resulted in the distinctiveness of the earlier mark being no more than a medium level overall (paragraph [42] of the Decision)
14. With regard to the comparison between the competing marks, the Hearing Officer found that (1) there was a medium degree of visual similarity (paragraph [47] of the Decision); (2) there was a medium degree of aural similarity (paragraph [48] of the Decision); and (3) there was a medium degree of conceptual similarity (paragraph [49] of the Decision).
15. The conclusions that the Hearing Officer reached on the likelihood of confusion were set out in paragraphs [53] and [56] of the Decision as follows (footnotes excluded).

53. I acknowledge that that there is a moderate degree of similarity between the competing marks overall and that the sole element of the earlier mark is identically reproduced at the beginning of the contested mark. I also accept that the earlier mark is factually distinctive to a medium level. Nevertheless, the proposition that the beginnings of trade marks have more impact than their endings is a general rule that is not always decisive.³¹ In this case, there are differences between the competing marks which are not negligible. The contested mark contains an additional three letters, i.e. 'CHY'. These letters have no counterpart in the earlier mark but form part of the singular word which dominates the overall impression of the contested mark. I do not consider that these additional letters would be overlooked by the average consumer, whether encountered visually or aurally. Moreover, whilst there is an element of conceptual overlap between the competing marks, this stems from a meaning which describes or strongly alludes to the goods at issue in these proceedings. It is not, therefore, a distinctive similarity. Taking all of the above into account, it is my view that the differences between the competing marks are likely to be sufficient for the average consumer – paying at least a medium level of attention – to distinguish between them and avoid mistaking one for the other. I can see no reason why, even factoring in the principles of imperfect recollection and interdependency, the average consumer would mistake or misremember the invented word 'CHEFCHY' for the common

dictionary word 'CHEF' or vice versa. Accordingly, it follows that there will be no direct confusion, even in respect of identical goods.

...

56. Having regard to all the above principles, I do not believe that the average consumer, having noticed the differences between the competing marks, will assume that the opponent and the applicant are economically linked undertakings on the basis of the competing trade marks. I am unconvinced that the average consumer would assume a commercial association or licencing arrangement between the parties, or sponsorship on the part of the opponent, merely because of the shared word/letters 'CHEF'. This word is not so strikingly distinctive that the average consumer would assume that only the opponent would be using it in a trade mark. To the contrary, I have found that the word describes or strongly alludes to the goods at issue in these proceedings. Whilst I have found that the earlier mark is factually distinctive to a medium level, the word appears on its own in the earlier mark but as part of the invented word 'CHEFCHY' in the contested mark. As such, there is no sharing of an independent distinctive element which would give rise to this kind of indirect confusion. Moreover, the differences between the competing marks are not simple additions or removals of non-distinctive elements. Nor are the differences consistent with any logical brand extensions with which the average consumer would be familiar. I can see no reason why an undertaking would add an additional three (seemingly arbitrary) letters to an ordinary dictionary word, resulting in an invented word. The opponent claims that the letters 'CHY' form a "non-distinctive suffix" which qualifies the word 'CHEF'. However, it has not explained why or provided any evidence to support its claim. That is not my own understanding of the letters, and I am not persuaded by the opponent's bare assertion. Whilst acknowledging that the categories above are not exhaustive, to my mind there is no other basis for concluding that the average consumer would assume an economic connection between the parties on the basis of the competing marks. Rather, it is my view that the average consumer – paying at least a medium level of attention – would attribute the shared presence of the word/letters 'CHEF' to coincidence, particularly considering the message it conveys is descriptive or strongly allusive. Taking all of this into account, I do not consider there to be a likelihood of indirect confusion, even in relation to identical goods.

16. On the basis of those findings the Hearing Officer dismissed the section 5(2)(b) ground of opposition (paragraph [57] of the Decision).

17. Turning to the section 5(3) ground of opposition, the Hearing Officer first set out the applicable legal principles. In making the required assessment under section 5(3) of the 1994 Act the Hearing Officer relied upon the earlier findings that had been made with respect to the section 5(2)(b) ground of opposition with respect to the similarity of marks, similarity of goods, the degree of the earlier marks distinctive character and the absence of any likelihood of confusion.
18. The Hearing Officer also found that the opponent had demonstrated, as of the relevant date, that the earlier mark had a moderate reputation in the United Kingdom in respect to *'food mixers, attachments and accessories for food mixers'*.
19. On the basis of these findings the Hearing Officer came to the following conclusions on the requirement for a 'link' to be made between the contested marks at paragraph [72] of the Decision as follows:

72. I acknowledge that the opponent has demonstrated that the earlier mark has a moderate reputation and that the distinctive character of the same has been enhanced above its inherent characteristics. Moreover, I accept that the earlier mark is entirely reproduced at the beginning of the contested mark, leading to visual, aural and conceptual similarities between the competing marks. Nevertheless, it is my view that the earlier mark will not be called to mind by the contested mark. To my mind, the difference created by the additional letters 'CHY' is too great and the distinctiveness of the word 'CHEF' is inherently too weak. This word is subsumed within the (invented) word 'CHEFCHY' in the contested mark. Although the presence of the shared word/letters leads the contested mark to evoke the meaning conveyed by the earlier mark, that meaning is descriptive or strongly allusive of the goods at issue. As such, when confronted with the contested mark, it is my view that the relevant public is likely to think of the meaning of the word itself, rather than the earlier mark. In other words, the shared use of 'CHEF' is likely to be attributed to a coincidental use of a descriptive or strongly allusive word. The distinctiveness of the earlier mark and the similarities between the competing marks are not sufficient to overcome this, even in relation to identical goods. If the earlier mark is brought to mind, it is my view that such a link will be too fleeting to result in any damage arising; it will constitute no more than a momentary bringing to mind. Any brief wondering about any connection would be swiftly dismissed due to the differences between the marks, resulting in the relevant public – exhibiting at least a medium level of attentiveness – concluding that these are two unconnected brands which happen to be using the word/letters 'CHEF' in different ways.

20. On the basis of these findings the Hearing Officer dismissed the section 5(3) ground of opposition (paragraph [73] of the Decision).

21. Whilst the Hearing Officer considered the section 5(4)(a) ground of opposition and dismissed that ground of opposition at paragraphs [74] to [84] of the Decision, it was quite rightly accepted before me that the appeal against those findings effectively followed the result of the appeal against the findings under section 5(2)(b) of the 1994 Act and I therefore say no more about it.

The basis of the appeal

22. A Form TM55P was filed on behalf of the opponent dated 15 April 2024. It was accompanied by an 8-page document containing 62 paragraphs which was headed Statement of Grounds.
23. Adopting the helpful notation from the Skeleton of Argument submitted by Mr Edwards on behalf of the opponent, the Grounds of Appeal can be categorised as follows:
- (1) Ground 1: errors in the assessment of the similarity of goods (Grounds of Appeal paragraphs 14 to 23).
 - (2) Ground 2: errors in the assessment of the average consumer (Grounds of Appeal paragraphs 24-25). Quite rightly, in the interests of proportionality this ground was not pursued at the hearing of the appeal.
 - (3) Ground 3: errors in the assessment of the distinctive character of the earlier mark (Grounds of Appeal paragraphs 26 to 28).
 - (4) Ground 4: errors in the assessment of the similarity of marks (Grounds of Appeal paragraphs 29 to 34).
 - (5) Ground 5: errors in the assessment of the likelihood of confusion (Grounds of Appeal paragraph 35 to 47).
 - (6) Ground 6: errors in the assessment of conflict under section 5(3) on the basis of the findings the subject to challenge under Grounds 1 to 5 above (paragraph 51 of the Grounds of Appeal) together with errors as to the assessment of reputation (paragraphs 48 to 50 of the Grounds of Appeal); and link (paragraphs 51 to 52 of the Grounds of Appeal). In addition, the opponent maintained that the Hearing Officer should have gone on to consider unfair advantage and detriment (paragraphs 53 to 54 of the Grounds of Appeal).
 - (7) Ground 7: this concerned the appeal against the findings rejecting the ground of opposition under section 5(4)(a) which as noted above was not pursued separately from the appeal against the findings under section 5(2)(b).
24. In a document headed Applicant's Response to the Notice Appeal dated 2 May 2024 the applicant made detailed submissions on the Decision. At the hearing it was confirmed, in my view rightly, on the basis of the contents of the Applicant's Response that the applicant's position was confined to maintaining that the Hearing Officer's decision was correct for the reasons that were given.

25. A hearing of the appeal took place via video link. Mr Henry Edwards instructed by Mathys and Squire LLP appeared on behalf of the opponent. Mr Abdul Bashir Salah made submissions on behalf of the applicant.

The Standard of Review

26. The Court of Appeal addressed the question of the standard of review on appeals in Lidl Great Britain Ltd v. Tesco Stores Ltd [2024] EWCA Civ 262 at [110] where Arnold LJ stated the position to be as follows:

The test on appeal

110. It is common ground that, in so far as the appeals challenge findings of fact made by the judge, this Court is only entitled to intervene if those findings are rationally insupportable: *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2] (v) (Lewison LJ). Equally, it is common ground that, in so far as the appeals challenge multi-factorial evaluations by the judge, this Court is only entitled to intervene if the judge erred in law or principle: compare *Magmatic Ltd v PMS International Group plc* [2016] UKSC 12, [2016] Bus LR 371 at [24] (Lord Neuberger of Abbotsbury) and *Actavis Group PTC EHF v ICOS Corp* [2019] UKSC 15, [2019] Bus LR 1318 at [78]- [81] (Lord Hodge) , and see *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [72]-[78] (McCombe, Leggatt and Rose LJJ) , which was cited with approval by the Supreme Court in *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8 at [49] (Lord Briggs and Lord Kitchen) .

27. See further the in the Supreme Court in Lifestyle Equities CV. Amazon UK Services Ltd [2024] UKSC 8 referred to by the Court of Appeal which likewise reaffirmed the approach to appeals of the kind at [46] to [50]. Of particular relevance are paragraphs [49] and [50] of the Judgement of Lord Briggs and Lord Kitchen JJSC which state as follows:

49. That does not, however, mean the appeal court is powerless to intervene where the judge has fallen into error in arriving at an evaluative decision such as whether an activity was or was not targeted at a particular territory. It may be possible to establish that the judge was plainly wrong or that there has been a significant error of principle; but the circumstances in which an effective challenge may be mounted to an evaluative decision are not limited to such cases. Many of the important authorities in this area were reviewed by the Court of Appeal in *In re Sprintroom Ltd* [2019] 2 BCLC 617, paras 72–76. There, in a judgment to which all members of the court (McCombe, Leggatt and Rose LJJ) contributed, the court concluded, at para 76, in terms with which we agree, that on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out the balancing exercise afresh but must ask whether the decision of the judge was wrong by reason of an

identifiable flaw in the judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take into account some material factor, which undermines the cogency of the conclusion.

50. On the other hand, it is equally clear that, for the decision to be “wrong” under CPR r 52.21(3), it is not enough to show, without more, that the appellate court might have arrived at a different evaluation.

28. Further in this connection it is to be observed that the Court of Appeal has explicitly confirmed in TVIS Ltd v. Howserv Services Ltd [2024] EWCA Ci 1103 at [31] that:

Since the judge’s conclusion that there was no likelihood of confusion involved a multi-factorial evaluation, this Court can only intervene if he erred in law or in principle: compare *Actavis Group PTC EHF v ICOS Corp* [2019] UKSC 15 , [2019] Bus LR 1318 at [78]-[81] (Lord Hodge) and see *Lifestyle Equities CV v Amazon UK Services Ltd* [2024] UKSC 8 , [2024] Bus LR 532 at [46]-[50] (Lord Briggs and Lord Kitchin).

29. I have kept these principles in mind when considering the present appeal.

Decision

30. I shall consider each of the Grounds that were maintained at the hearing before me in turn.

Ground 1: similarity of goods

31. Ground 1 of the appeal was advanced the basis of errors with respect to three different categories of goods in the applicant’s specification (two of the categories related to goods in class 7 and one to goods in class 11). In each case the comparison was with the ‘*food mixers; attachments and accessories for food mixers*’ in class 7 for which the earlier mark was registered.
32. Ground 1A: electric kitchen tools and utensils in class 7. The finding of the Hearing Officer was that there was between a medium and a high degree of similarity. On appeal it was maintained that the Hearing Officer should have found such goods were identical or alternatively highly similar.
33. Ground 1B: Electric kitchen knives and appliances for chopping in class 7. The finding of the Hearing Officer was a medium degree of similarity (paragraph [26] of the Decision). On appeal it was maintained that the Hearing Officer should have found such goods were highly similar or alternatively similar to a medium to a high degree.

34. Ground 1C: Cooking appliances in class 11. The finding of the Hearing Officer was a low degree of similarity (paragraph [27] of the Decision). On appeal it was maintained that the goods were similar to at least a medium degree.
35. I do not accept the arguments put forward by the opponent. First no error of principle has been identified. The assessment of the degree of similarity between the goods and/or services in issue is a matter for the first instance tribunal. Nor in my view can it be said that it was not open to the Hearing Officer to make the assessment of similarity that he did in particular for the reasons set out in more detail below.
36. In connection with Ground 1A, the opponent criticised the Hearing Officer for finding that the goods in issue were not identical on the basis that the applicant's goods were typically handheld, and the opponent's goods were typically free-standing machines and attachments for free-standing machines. It is correct as the opponent has stated that there was no reference to "handheld" in the specification of the applicant's goods. However, first the Hearing Officer did not say that *all* the tools and utensils were handheld but rather used the word "typically". Secondly, a number of the submissions made before me appeared to disregard the use of the word "kitchen" which qualified the terms "tools" and "utensils" in parts of the specification. Thirdly, one of the ordinary meanings of the word "utensil" is a tool especially for household use and the ordinary meaning of the word "tool" typically refers to a handheld device or implement. Thirdly, I was not directed on this appeal to any evidence that had been filed by the opponent with respect to the identity/similarity of these goods. Against that background, in my view there is nothing to suggest that the approach that the Hearing Officer was such as to vitiate the conclusion that he reached.
37. With respect to Ground 1C, it was drawn to my attention that there was evidence in Exhibit JWAJ20 of a stand mixer that also had a cooker function. This was relied upon in support of the overlap between the nature and mode of use of food mixers and cooking appliances and the undertakings responsible for selling them and the Hearing Officer was criticised for having overlooked this evidence.
38. However, (1) two images of the stand mixer which had a cooker function was included in an exhibit containing a selection of prints of photographs from a John Lewis store and extracts from the John Lewis and Lakeland websites showing the offering of **CHEF** branded kitchen machines; (2) there was no evidence as to what the percentage sales of the **CHEF** branded kitchen machines had the cooker function; and (3) no reference to the kitchen machine product was made in either the witness statement Gary Johnston in the paragraph referring to the exhibit (see paragraph 32 of the witness statement) or in the document headed Submissions and Evidence in Support filed by the opponent.
39. I further note that there is no evidence filed on behalf of the opponent to support the contention made before me that the goods in Class 11 namely ovens and cooking appliances were likely to be produced by the same undertaking as food mixers or that this was common in the trade. The only reference would seem to be a single small

photograph of ‘Kenwood appliances’ as part of a single page chronology in a ‘Celebrating Fifty Years of Kenwood’ document which are said to be from the 1990s but they are difficult to make out and there is no other evidence relating to these items (although the skeleton of argument referred to a deep fat fryer and the reference was given to the aforesaid document it is not clear which page is said to show that appliance). No reference was given to any evidence to support the contention before me that the opponent supplies ovens.

40. Against this background it seems to me that it was open to the Hearing Officer to reach the conclusion that he did that the respective goods were similar to a low degree and the failure to explicitly refer to either the two pages of material relating to a stand mixer with a cooking function; or to the supply of ovens or cooking appliances by the opponent was not a material error.
41. Secondly, by parity of reasoning with the observations of Arnold LJ in paragraph [35] of TVIS Ltd v. Howserv Services Ltd (see further below), while it is conventional for first instance tribunals in trade marks cases to articulate their assessment of the degree of similarity between goods and/or services using words such as “high”, “medium” or “low”, there is no legal requirement for tribunals to do so. All that is required is for the tribunal to assess the nature and extent of any similarities. This is because what matters is not the verbal label that is applied, but whether the similarities in conjunction with the other factors which must be taken into account lead to a likelihood of confusion.
42. In the circumstances I reject Ground 1 of the Appeal.

Ground 3: assessment of distinctive character

43. The appeal in this case is directed not to the finding that the earlier mark had a low level of inherent distinctive character but that taking into account the evidence of acquired distinctive character the overall distinctiveness of the mark was no more than a medium level.
44. What is maintained on this appeal is that the Hearing Officer overlooked certain items of evidence and had that evidence been taken into account he could and should have found that there was a high degree of acquired distinctive character.
45. As a preliminary observation, it was accepted on behalf of the opponent that the assessment of the level of acquired distinctive character was a multifactorial assessment. Therefore, this is a ground of appeal with respect to which the case law on the approach to be taken on appeal, set out above, is directly relevant.
46. In this connection, the opponent sought to rely upon the decision of Mr Simon Clark sitting as the Appointed Person in Chef Deluxe TM (O-125-24). This is not a decision that it would be appropriate for me to take into account in particular given that (1) neither I nor the applicant have any way of knowing whether the evidence filed in that case was ‘*essentially the same*’ as submitted by the opponent; and (2) this

is an appeal from the decision of the Hearing Officer and I am concerned with the approach that the Hearing Officer in this case took to the evidence that was before him. I therefore say not more about this.

47. In paragraph [42] of the Decision the Hearing Officer found as follows:

42. There is no evidence of the market share held by products sold under the earlier mark in the UK (global figures or figures relating to the 'KENWOOD' brand as a whole not being sufficient for this purpose). Moreover, no information regarding the amounts invested by the opponent in promoting the earlier mark have been provided. Nevertheless, the evidence shows that the 'CHEF' mixer and related attachments were launched in 1950, around 70 years before the relevant date. Evidence of advertisements featuring the mixers can be seen in the materials provided, which are said to have been from the 1950s and 1960s (a point which has not been challenged). 'CHEF' mixers and attachments can also be seen in brochures from 1996 and 2010 as well as in printouts from the website of the opponent's predecessors in title from 2017 and 2020. Although the evidence of actual use of the earlier mark does not confirm that such use has been intensive in the UK, it does suggest that the use has been regular and long-standing. Moreover, 'CHEF' products were available to purchase in major retailers with outlets across the UK, and the invoices show that actual sales were made to customers in a variety of areas, such as Hertfordshire, Glasgow, Somerset and London, prior to the relevant date. Accordingly, I consider the use shown to be significant in terms of its geographical reach. As for turnover, the evidence shows that, between 1988 and 1992, 'CHEF' products accrued over £120million for the opponent's predecessor in title, with the UK accounting for around one third of that figure. The confidential turnover figures also demonstrate significant sales of 'CHEF' branded products in years much closer to the relevant date. The turnover figures are supported by invoices sent to customers in this territory between 2009 and 2021. It is also clear that 'CHEF' products were regularly referred to and promoted via a variety of publications for over a decade before the relevant date; some of those were national in reach with significant readerships. Over a similar time period, 'CHEF' products won a number of design awards and received positive reviews from Which?. Taking all of the above into account, I am satisfied that the distinctive character of the earlier mark had been enhanced at the relevant date in respect of the goods relied upon. However, given its low level of inherent distinctiveness, I consider this to

result in the distinctiveness of the earlier mark being at no more than a medium level overall.

48. On this appeal I note that the evidence that is said to be overlooked is confined to finding of the Hearing Officer (1) that there was no evidence of the market share held by products sold under the earlier mark; and (2) that there was no information regarding the amounts invested by the opponent in promoting the earlier mark (see the first two sentences of paragraph [42] of the Decision set out above). There was no challenge to the other extensive findings in paragraph [42] on a wide variety of other matters. In particular there is no challenge with regards to the findings of the Hearing Officer with respect to sales data.
49. As a preliminary observation, what is quite rightly accepted by the opponent is that (1) it is the position within the UK that is relevant for the purposes of the assessment that the Hearing Officer was required to make; and (2) only materials that relate to the use of the earlier mark **CHEF** are relevant to the assessment of the acquired distinctiveness of that mark. Moreover, on this appeal there is no challenge to the finding by the Hearing Officer that the earlier mark had a low level of inherent distinctiveness.
50. With respect to the criticisms of the Hearing Officer's findings with respect to the evidence I should note from the outset that the opponent elected not to request a hearing and therefore the Hearing Officer was left to make his findings on the papers.
51. As to the evidence of the market share there were no figures of market share plainly expressed as such for the **CHEF** branded products. What is maintained on this appeal is that by combining together the percentage of sales figures attributed to **CHEF** branded products out of the total for Kenwood kitchen machines sales in the UK in one exhibit; with market research information by value and volume in another exhibit for Kenwood products worldwide the UK market share of **CHEF** branded products could be deduced.
52. However, it seems to me, first that it is far from clear that it is correct to say that such a deduction could be made. Second it is, at its lowest, surprising that the opponent seeks to maintain the Hearing Officer should have engaged in such an exercise when:
 - (1) The opponent did not request a hearing.
 - (2) Even in the skeleton of argument no specific figures for what the Hearing Officer should have found the market share to be is put forward. The extent of the submission was that the 'statistics suggest that Kenwood had a large market share both worldwide and in the UK for kitchen machines and that roughly 50% to 70% of this market share related to Kenwood Chef products.' The 'statistics' referred to were for global figures by market share by value and market share by volume; and the 'percentage' figures appear to have been produced on the basis of sales value in the UK.

- (3) The reference and evidence given with regard to the opponent being the number one seller for kitchen machines was a reference to Kenwood products generally.

It therefore does not seem to me that the criticism made of the Hearing Officer is a fair one.

53. Turning to the advertising spend. A single exhibit from the opponent's evidence is referred to on this appeal but again this relates to Kenwood products as whole and not to Kenwood **CHEF** products. Further it is of note that the witness statement of Gary Johnston which exhibits the material now relied upon for marketing spend, only relies upon the material in the exhibit to demonstrate market share and makes no reference to the marketing spend (see paragraph 29 of that statement). The Hearing Officer specifically notes the evidence in the context of market share see paragraph [39] of the Decision but unsurprisingly given the context makes no reference to the marketing spend detailed in the same document which in any event related to the Kenwood brand of products generally and not specifically those using the **CHEF** mark.
54. Having reviewed the materials upon which the opponent relies and having considered the unchallenged findings of the Hearing Officer in which he carefully sets out the evidence that was before him it does not seem to me that any material error has been identified such as to vitiate the finding of the distinctiveness being no more than a medium level overall.
55. In the circumstances I dismiss Ground 3 of the Appeal.

Ground 4: similarity of marks

56. With respect to the similarity of marks the findings of the Hearing Officer and the findings it is maintained by the opponent that should have been made are set out in the table below:

Type of Similarity	Finding of the Hearing Officer	Position of the opponent on appeal as to the correct finding
Visual	Medium degree of similarity	Highly similar
Aural	Medium degree of similarity	Highly similar
Conceptual	Medium degree of similarity	Identical or highly similar

57. I do not accept the arguments put forward by the opponent. First no error or error of principle has been identified. The assessment of the degree of similarity between a sign and a trade mark is a matter for the first instance tribunal. Nor in my view can it be said that it was not open to the Hearing Officer to make the assessment of similarity that he did.

58. In particular it seems to me that the points raised on behalf of the opponent fail to take into account or fail to properly take into account the findings by the Hearing Officer that the word **CHEFCHY** is an *‘(invented) word’* and *‘is an invented word with no recognised meaning’* which was accepted at the hearing before me to be the correct position; or that the Hearing Officer had addressed at each stage of the assessment of similarity the role of the letters CHEF at the start of the contested mark including in the context of the conceptual similarity finding that the presence of the four letters CHEF meant that consumers whilst unaware of the precise meaning of the work **CHEFCHY** would understand that *‘the mark is referring to a cook in some way’*.
59. Secondly, for the reasons explained in paragraph [35] of TVIS Ltd v. Howserv Services Ltd (above):

35. The second and more fundamental reason is that, while it is conventional for first instance tribunals in trade mark cases to articulate their assessment of the degree of visual and aural similarity between signs and trade marks using words such as “high”, “medium” or “low”, there is no legal requirement for tribunals to do so. All that is required is for the tribunal to assess the nature and extent of any similarities. This is because what matters is not the verbal label that is applied to the assessment, but whether the similarities in conjunction with the other factors which must be taken into account lead to a likelihood of confusion. It is possible for there to be no likelihood of confusion despite a relatively high degree of visual and aural similarity. Equally it is possible for there to be a likelihood of confusion despite a relatively low degree of visual and aural similarity. It depends on the other factors that are in play.

60. In the circumstances I reject Ground 4 of the Appeal.

Ground 5: likelihood of confusion

61. The primary errors that were identified with respect to the Hearing Officer’s decision on the likelihood of confusion were based upon the findings on distinctive character and similarity of marks. Insofar as that separate grounds of appeal were advanced in respect to these points, they have already been rejected for the reasons set out above.
62. Further the suggestion that the Hearing Officer considered the question of confusion on the basis that the earlier mark had low distinctive character is not correct. It is clear from the text of both paragraph [53] and [56] of the Decision that the Hearing Officer appreciated that the *‘earlier mark was factually distinctive to a medium degree’*.
63. It is also suggested that the Hearing Officer did not consider the likelihood of confusion with respect to the different goods in issue. I do not regard this as a material error given that it is clear that the Hearing Officer considered the position

with respect to identical goods (i.e. the best case from the point of view of the opponent) as he expressly states in the last line of paragraphs [53] and [56] of the Decision. Moreover, given that the Hearing Officer was approaching the assessment from the view point of identical goods it goes without saying that the Hearing Officer was proceeding on the basis that such goods would be encountered by consumers in the same retail environment as one another and the fact that this was not expressly referred to in the Decision cannot be regarded as a material error.

64. I should again emphasize that the evaluation that the Hearing Officer was required to make in assessing a likelihood of confusion required him to make a realistic appraisal of the net effect of the similarities and differences between the marks and the goods in issue, giving the similarities and differences as much or as little significance as the relevant average consumer, who is taken to be reasonably well-informed and reasonably observant and circumspect, would have attached to them at the relevant point in time.
65. The Hearing Officer did what he was required to do. There is no suggestion at all that the Hearing Officer erred in his approach to the legal principles to be applied. As noted above in order to maintain the required distance between the role of decision taker at first instance and the decision taker on appeal, it is necessary for the Tribunal to proceed on the basis that the Decision below should stand unless the matters on which the opponent relies are sufficient to establish that the Decision is vitiated by error. Moreover, for the Hearing Officer to be characterised as ‘wrong’ it is “*not enough to show, without more, that the appellate court might have arrived at a different evaluation*”: Lifestyle Equities (above) at paragraph [50].
66. I have reviewed the Hearing Officer’s findings on the likelihood of confusion in the light of each of the opponent’s criticisms. Having done so I am satisfied that matters referred to by the opponent do not reveal any substantive mistakes and cannot be taken, individually or together, to establish that the finding of no likelihood of confusion under section 5(2)(b) of the 1994 Act is liable to be set aside. In the premises it was in my view, open to the Hearing Officer to come to the conclusion that he did for the reasons that he gave.
67. In the circumstances Ground 5 is dismissed.

Ground 6: section 5(3)

68. The arguments put forward in support of the appeal against the findings relating to the ‘link’ under section 5(3) both in the skeleton of argument and in the course of submissions before me were, appropriately in the context of the present appeal, based upon the preceding grounds all of which have been dismissed. It is therefore not necessary for me to go on to consider separately either the issue of ‘link’ or the issues of unfair advantage and detriment to the distinctive character of the earlier mark.

69. Nonetheless, in the light of the criticisms made by the opponent, I have considered the conclusions that the Hearing Officer reached on the issue of ‘link’ in paragraph [72] of the Decision, and it seems to me that these were all conclusions which it was open to the Hearing Officer to reach on the basis of his earlier findings supported by the materials that were before him.

Conclusion

70. In the premises, it does not seem to me that the opponent has identified any error of principle or material error in the Hearing Officer’s Decision. Moreover, it is not in my view appropriate to interfere with the evaluations that the Hearing Officer made in reaching the decision that he did. In the result the appeal fails and is dismissed.
71. Since the appeal has been dismissed the applicant is entitled to a contribution towards its costs. As the applicant has not instructed professional representatives I will invite the applicant to indicate whether it wishes to seek an order for costs and, if so, to provide to me by no later than **4pm on 4 March 2025** a statement including estimates of the number of hours spent with respect to its conduct of the appeal and in particular reading the Form TM55P, preparing the Applicant’s Response to the Notice of Appeal and preparing for and attending the hearing of the appeal.
72. In the event that no statement is filed on behalf of the applicant by **4pm on 4 March 2025** no costs will be awarded with respect to the appeal.
73. It is noted that no costs of the proceeding below were awarded to the applicant by the Hearing Officer on the basis that no relevant statement was filed by the applicant as recorded in paragraphs [87] and [88] of the Decision.

EMMA HIMSWORTH KC

Appointed Person

11 February 2025