O/0576/24

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003513235
BY COOKE AQUACULTURE SCOTLAND LIMITED
TO REGISTER:

TRUE NORTH

AS A TRADE MARK IN CLASS 29

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 422888 BY
SCOTTISH SEAFOOD INVESTMENTS LIMITED

BACKGROUND AND PLEADINGS

1. On 17 July 2020, Cooke Aquaculture Scotland Limited ("the applicant") applied to register the trade mark on the cover page of this decision in the UK ("the applicant's mark"). The applicant's mark was published for opposition purposes on 23 October 2020 and registration is sought for the following goods:

Class 29: Seafood; frozen seafood; dried seafood; processed seafood; tinned seafood; salmon; fresh salmon (not live); smoked salmon; salmon fillets; canned salmon; marinated salmon; prepared salmon; chilled and frozen salmon; food products made from salmon; Scottish salmon; Orkney salmon; Shetland salmon; caviar; fish; cured and preserved fish; canned fish; fresh fish (not live); fish fillets; fish cakes; fish mousse; fish stock; fish paste; dried fish; salted fish; cooked fish; prepared fish roe; prepared meals consisting principally of fish; fish extracts; edible oils and fats; fish oils; shellfish (not live); pre-cooked fish and shellfish products.

2. On 25 January 2021, the applicant's mark was opposed by Scottish Seafood Investments Limited ("the opponent"). The opposition is based on sections 5(1) and 5(2)(a) of the Trade Marks Act 1994 ("the Act") and is reliant upon the following trade marks:

TRUE NORTH
EUTM registration no. 014059471
Filing date 14 May 2015; registration date 30 September 2015
Relying on all goods, namely:

Class 29: Salmon; salmon products; fresh salmon (not live); prepared salmon; smoked Scottish salmon; preserved salmon; prepared meals consisting principally of salmon; snack foods consisting primarily of salmon; chilled foods consisting predominantly of salmon; frozen salmon; dried Salmon; farmed salmon; smoked

salmon; smoked salmon products; hot smoked salmon; prepared meals consisting principally of smoked salmon; snack foods consisting primarily of smoked salmon; chilled foods consisting predominantly of smoked salmon; fish and shellfish; fresh fish and shell fish (not live); prepared fish and shellfish; smoked fish; preserved fish; prepared meals consisting principally of fish and/or shellfish; snack foods consisting primarily of fish and/or shellfish; chilled foods consisting predominantly of fish and/or shellfish; frozen fish and/or shellfish; dried fish and/or shellfish; farmed fish and/or shell fish.

("the opponent's EUTM"); and

TRUE NORTH
UK registration no. 3093954
Filing date 12 February 2015; registration date 10 July 2015
Relying on all goods, namely:

Class 29: Salmon; salmon products; fresh salmon (not live); prepared salmon; smoked Scottish salmon; preserved salmon; prepared meals consisting principally of salmon; snack foods consisting primarily of salmon; chilled foods consisting predominantly of salmon; frozen salmon; dried Salmon; farmed salmon; smoked salmon; smoked salmon products; hot smoked salmon; prepared meals consisting principally of smoked salmon; snack foods consisting primarily of smoked salmon; chilled foods consisting predominantly of smoked salmon.

("the opponent's UK mark")

3. At the time of filing its opposition, the opponent elected to rely on all of its goods. However, I note that the opponent's UK mark was subject to a revocation action under application number 503234. A decision in respect of the same was issued on 21 December 2021 under case number BL O/929/21. The outcome of that decision was the partial revocation of the opponent's UK mark with an effective date of 11 July 2015, being before the relevant date for the present proceedings

(17 July 2020). As such, the opponent is not permitted to rely upon all of those goods initially relied upon. However, the goods listed above survived the revocation action[1] and the opponent is, therefore, permitted to rely on them for the purpose of the present opposition.

4. In relying upon its UK mark, the opponent made a statement of use and made a claim that it has used its mark for the five years prior to the relevant date for "smoked salmon". In addition, the opponent also claims to have proper reasons for non-use during that time.

5. Under its section 5(1) ground, the opponent argues that the applicant's mark should not be registered on the basis that it is identical to the opponent's marks and is to be registered for identical goods. Alternatively under its section 5(2)(a) ground, the opponent's position is that the marks at issue are identical and that the goods at issue are either identical or similar. As such, there exists a likelihood of confusion between the marks.

6. The applicant has filed a counterstatement wherein it accepted that its mark was identical to the opponent's EUTM and that its goods, save for "edible oils and fats" were similar. Having said that, the applicant's counterstatement went on to discuss the fact that the opponent's EUTM was, at that time, subject to a pending revocation action at the EUIPO. I will discuss this issue further below. As for the opponent's reliance upon its UK mark, the applicant made reference to the revocation action that I have discussed at paragraph three above. Further, the applicant made a request that the opponent provide proof of use of its marks.

7. The applicant is represented by Lincoln IP and the opponent is represented by Murgitroyd & Company Limited. Both parties filed evidence in chief. The applicant also filed written submissions alongside its evidence. No hearing was requested and only the opponent filed written submissions in lieu. This decision is taken after a careful perusal of the papers.

[1] It is noted that decision O/929/21 was appealed and, via a decision of the Appointed Person under case number O/0202/23, that appeal was dismissed.

8. The provisions of the Act relied upon in these proceedings are assimilated law, as they are derived from EU law. Although the UK has left the EU, section 6(3)(a) of the European Union (Withdrawal) Act 2018 (as amended by Schedule 2 of the Retained EU Law (Revocation and Reform) Act 2023) requires tribunals applying assimilated law to follow assimilated EU case law. That is why this decision refers to decisions of the EU courts which predate the UK's withdrawal from the EU.

EVIDENCE

9. The opponent's evidence came in the form of the witness statement of Anjum Sheikh Bashir dated 24 July 2023. Anjum Sheikh Bashir is a Chartered Trade Mark Attorney at the opponent's representative firm and is, therefore, duly authorised to file evidence on the opponent's behalf. The witness statement is accompanied by four exhibits, being those labelled ASB1 to ASB4. It is noted that ASB1 and ASB2 contain copies of the first and second witness statements of Craig Colin Anderson and the witness statement of Cameron Matthew Brown and their exhibits. These additional statements were those filed in support of the opponent's defence in the revocation action numbered 503234, being those that I have discussed at paragraph 3 above. The purpose of Anjum Sheikh Bashir's evidence is to demonstrate use of the opponent's marks.

10. The applicant's evidence came in the form of the witness statement of Karen Veitch dated 21 September 2023. Ms Veitch is a Trade Mark Attorney at the applicant's representative firm and is, therefore, duly authorised to file evidence on the applicant's behalf. The statement is accompanied by three exhibits, being those labelled KV1 to KV3. The purpose of Ms Veitch's evidence appears to me to be targeted at (1) the nature of salmon, namely that it is a food consumed in large quantities by the UK public, (2) that sales of food and drink for home consumption actually increased during the pandemic[2] and (3) that the opponent's goods are not actually branded as 'TRUE NORTH'.

[2] Presumably filed with a view to disputing the opponent's claim to have proper reasons for non use.

11. I do not intend to summarise the parties' evidence or submissions in full here. However, I confirm that I have taken all filed documents into account and will summarise them to the extent that I deem necessary below.

PRELIMINARY ISSUES

12. Before proceeding to the main body of my decision, I consider it necessary to set out that while the UK has left the EU, the relevant date for these proceedings (which is the filing date of the applicant's mark, being 17 July 2020) is prior to IP Completion Day (being 31 December 2020) meaning that this decision must be based on the law as it stood at that date. At that time, the UK was still a Member State of the EU. As a result of the above and despite this decision post-dating the UK's departure from the EU, the opponent is duly permitted to continue to rely on its EUTM.

13. In addition to the above, I also consider it necessary to discuss the impact of the aforementioned EUIPO proceedings against the opponent's EUTM. On this point, I note that the applicant has provided the Tribunal with a copy of this decision.[3] Having considered that decision, I note that the opponent's EUTM was revoked in full.[4] While this may be the case, the effective date for that revocation is set out in paragraph 2 of the EUIPO decision as being 9 October 2020. The relevant date for these proceedings is, as above, 17 July 2020. Therefore, despite its revocation from 9 October 2020, the opponent's EUTM remains an earlier mark in accordance with section 6(1)(a) of the Act (as it stood at the relevant date). This means that the opponent's EUTM remains capable of being relied upon by the opponent in these proceedings.

14. As set out above, the applicant requested the opponent provide proof of use. The applicant did not appear to limit this request to just the opponent's UK mark so, for the avoidance of doubt, it is necessary to point out that even if the intention was for the request to be aimed at both marks, it is not applicable to the opponent's EUTM. I say this because for the proof of use provisions to take effect, an earlier

[3] Being cancellation number 46 678 C dated 8 June 2021.
[4] I note that this is also reflected on the EUIPO trade mark register.

mark must have been registered for five years ending with the date of the application for registration of an applicant's mark or, if applicable, the priority date of the same.[5] As the registration date for the opponent's EUTM is less than five years before the filing date of the applicant's mark, it is not subject to proof of use.

MY APPROACH

15. As discussed above, the opponent may proceed to rely on its EUTM. As this mark is not subject to proof of use, I intend to proceed in considering the opposition based on this mark only. I do so because if the opposition reliant upon this mark succeeds, the impact of the opponent's UK mark has no effect. Alternatively, if it fails, I am of the view that even if I am satisfied as to there having been genuine use (or proper reasons for non-use) of the opponent's UK mark, the reliance upon the same will follow the success of the EUTM.[6] If necessary, I will discuss this issue further at the conclusion of my decision.

16. For ease of reference going forward, I will refer to the opponent's EUTM as, simply, "the opponent's mark".

DECISION

Section 5: legislation

17. Section 5(1) of the Act reads as follows:

> "(1) A trade mark shall not be registered if it is identical with an earlier trade mark and the goods or services for which the trade mark is applied for are identical with the goods or services for which the earlier trade mark is protected."

18. Section 5(2)(a) of the Act reads as follows:

[5] See section 6A of the Act.
[6] On the basis that the opponent's marks are identical and registered for a very highly similar set of goods.

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

(a) it is identical with an earlier trade mark and is to be registered for goods or services 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 or association with the earlier trade mark."

19. Section 5A of the Act states as follows:

"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."

20. An earlier trade mark is defined in section 6 of the Act,[7] the relevant parts of which state:

"(6)(1) In this Act an "earlier trade mark" means –

(a) a registered trade mark, international trade mark (UK), European Union trade mark or international trade mark (EC) which has a date of application for registration earlier than that of the trade mark in question, taking account (where appropriate) of the priorities claimed in respect of the trade marks,

(2) References in this Act to an earlier trade mark include a trade mark in respect of which an application for registration has been made and which, if registered, would be an earlier trade mark by virtue of subsection (1)(a) or (b), subject to its being so registered."

[7] As it stood prior to IP Completion Day.

21. The opponent's mark qualifies as an earlier trade mark under the above provisions. As the opponent's mark had not completed its registration process more than 5 years before the date of the applications in issue, it is not subject to proof of use pursuant to section 6A of the Act. The opponent can, therefore, rely upon all of the goods for which its mark was registered as at the relevant date. While I appreciate that I have already set this out above, I repeat it here for the sake of completeness.

Identity of the marks

22. It is a pre-requisite of both section 5(1) and 5(2)(a) of the Act that the trade marks are identical. Plainly, the marks at issue are identical and this is a point that has been conceded by the applicant in its counterstatement. As such, the opposition may proceed.

Comparison of goods

23. The applicant has conceded that all of its goods, save for "edible oils and fats", are similar to the opponent's goods. This concession is such that it means that the section 5(2)(a) ground may proceed for all goods save for "edible oils and fats".[8] However, the concession as to similarity is of no real assistance to the section 5(1) ground. This is because in order for section 5(1) grounds to succeed, the goods at issue need to be identical. In the event they are not, the section 5(1) ground will fail. So while the proceedings will continue for all of the goods subject to the concession, I still consider it necessary to consider the goods comparison in the ordinary way in order to determine their level of similarity or identity (if applicable).

24. The competing goods are as follows:

The opponent's goods	The applicant's goods
Class 29 Salmon; salmon products; fresh salmon (not live); prepared salmon;	Class 29 Seafood; frozen seafood; dried seafood; processed seafood; tinned

[8] Though it may still proceed for such goods if I deem them similar.

smoked Scottish salmon; preserved salmon; prepared meals consisting principally of salmon; snack foods consisting primarily of salmon; chilled foods consisting predominantly of salmon; frozen salmon; dried Salmon; farmed salmon; smoked salmon; smoked salmon products; hot smoked salmon; prepared meals consisting principally of smoked salmon; snack foods consisting primarily of smoked salmon; chilled foods consisting predominantly of smoked salmon; fish and shellfish; fresh fish and shell fish (not live); prepared fish and shellfish; smoked fish; preserved fish; prepared meals consisting principally of fish and/or shellfish; snack foods consisting primarily of fish and/or shellfish; chilled foods consisting predominantly of fish and/or shellfish; frozen fish and/or shellfish; dried fish and/or shellfish; farmed fish and/or shell fish.	seafood; salmon; fresh salmon (not live); smoked salmon; salmon fillets; canned salmon; marinated salmon; prepared salmon; chilled and frozen salmon; food products made from salmon; Scottish salmon; Orkney salmon; Shetland salmon; caviar; fish; cured and preserved fish; canned fish; fresh fish (not live); fish fillets; fish cakes; fish mousse; fish stock; fish paste; dried fish; salted fish; cooked fish; prepared fish roe; prepared meals consisting principally of fish; fish extracts; edible oils and fats; fish oils; shellfish (not live); pre-cooked fish and shellfish products.

25. When making the comparison, all relevant factors relating to the goods and services in the specifications should be taken into account. In the judgment of the Court of Justice of the European Union ("CJEU") in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "Those factors include, inter alia, their nature, their intended purpose and their method of use and whether they are in competition with each other or are complementary".

26. The relevant factors identified by Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, for assessing similarity were:

(a) The respective uses of the respective goods or services;

(b) The respective users of the respective goods or services;

(c) The physical nature of the goods or acts of service;

(d) The respective trade channels through which the goods or services reach the market;

(e) In the case of self-serve consumer items, where in practice they are respectively found or likely to be, found in supermarkets and in particular whether they are, or are likely to be, found on the same or different shelves;

(f) The extent to which the respective goods or services are competitive. This inquiry may take into account how those in trade classify goods, for instance whether market research companies, who of course act for industry, put the goods or services in the same or different sectors.

27. 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."

Salmon; fresh salmon (not live); smoked salmon; salmon fillets; canned salmon; marinated salmon; prepared salmon; chilled and frozen salmon; food products made from salmon; Scottish salmon; Orkney salmon; Shetland salmon.

28. All of the above goods are different types of salmon. Such goods are, plainly, either self-evidently identical or identical under the principle outlined in *Meric* with the opponent's terms of "salmon", "salmon products", "fresh salmon (not live)", "prepared salmon" and "smoked salmon".

Seafood; frozen seafood; dried seafood; processed seafood; tinned seafood; fish; cured and preserved fish; canned fish; fresh fish (not live); fish fillets; dried fish; salted fish; cooked fish; shellfish (not live); pre-cooked fish and shellfish products; prepared meals consisting principally of fish.

29. The above terms of the applicant are all broad goods that can cover products that consist of any type of fish or shellfish, be that prepared or not. These terms are either self-evidently identical or identical under the principle outlined in *Meric* with the opponent's equally broad terms of "fish and shellfish", "fresh fish and shell fish (not live)", "prepared fish and shellfish" and "prepared meals consisting principally of fish and/or shellfish".

Fish cakes.

30. Fish cakes are, in my view, either a prepared snack or prepared meal that consists primarily of fish or shellfish. As such, the above is a term that falls within the opponent's terms of "prepared meals consisting principally of fish and/or shellfish" and "snack foods consisting primarily of fish and/or shellfish". These goods are, therefore, identical under the principle outlined in *Meric*.

Fish mousse.

31. It is my understanding that fish mousse is a food that is commonly served chilled. As it is a food that is predominantly made of fish, I consider that it falls within the term of "chilled foods consisting predominantly of fish and/or shellfish" in the

opponent's specification. As a result, I consider that these goods are identical under the principle outlined in *Meric*.

Caviar; prepared fish roe.

32. As far as I understand it, caviar is a specific type of fish roe. It is also my understanding that roe is the term for fish eggs. I do not consider that fish eggs are the same as fish (in the same way an "egg" from a chicken wouldn't be considered identical to "chicken products") and, therefore, find that the above goods are not identical to any of the opponent's goods. While that may be the case, the concession of the applicant is such that I am required to find it similar to the opponent's goods. In my view, the closest term I can identify to the above terms is "chilled foods consisting predominantly of fish and/or shellfish". Such goods are similar in methods of use, purpose and user. I consider the natures differ as on the one side, the terms cover fish eggs whereas on the other, the term covers foods that consist of fish. As for trade channels, I have nothing to suggest that a producer of caviar would produce and sell other goods made of fish products. Lastly, there may be an overlap in user as the goods will be selected by members of the general public at large. In my view, these goods are similar to at least a medium degree.

Fish oils; fish stock; fish paste; fish extracts.

33. The above goods of the applicant are all different types of food products that are made primarily from fish or fish products. As far as I am aware, these goods are neither prepared meals or snacks but, instead, are ingredients used in cooking or accompaniments to other foods. As such, I do not consider the above goods to be identical to any of the opponent's goods, I do, however, consider that they are similar to goods such as "prepared fish and shellfish" and "prepared meals consisting principally of fish and/or shellfish". While the nature, methods of use and purpose of the goods may all differ, I consider that the goods overlap in trade channels and user. I say this because I consider it common for producers of the opponent's goods to also provide additional ranges of fish products and, further, such goods will be selected by the same consumer. As a result, I find that these goods are similar to a low degree.

Edible oils and fats.

34. While the above term is one that is not subject to the concession of the applicant, I see no reason why the same finding made in the above paragraph cannot be said to apply here. I say this because the above term is so broadly worded that it could cover edible fish oils and edible fish fats. Therefore, the same comparison made in respect of "fish oils" above applies here, namely that these goods are similar to a low degree with "prepared fish and shellfish" and "prepared meals consisting principally of fish and/or shellfish" in the opponent's specification.

Conclusion of the section 5(1) ground

35. As a result of the identity of the goods above, I hereby find that the opposition based on section 5(1) of the Act succeeds in respect of the following goods:

Class 29: Seafood; frozen seafood; dried seafood; processed seafood; tinned seafood; salmon; fresh salmon (not live); smoked salmon; salmon fillets; canned salmon; marinated salmon; prepared salmon; chilled and frozen salmon; food products made from salmon; Scottish salmon; Orkney salmon; Shetland salmon; fish; cured and preserved fish; canned fish; fresh fish (not live); fish fillets; fish cakes; fish mousse; dried fish; salted fish; cooked fish; prepared meals consisting principally of fish; shellfish (not live); pre-cooked fish and shellfish products.

36. The opposition under section 5(1) hereby fails in respect of those goods that are not identical. That being said, the opposition reliant upon section 5(2)(a) may still proceed in respect of the following:

Class 29: Caviar; prepared fish roe; fish oils; fish stock; fish paste; fish extracts; edible oils and fats.

The average consumer and the nature of the purchasing act

37. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties' goods. I must then decide the manner in which these goods are likely to be selected by the average consumer in the course of trade. In *Hearst Holdings Inc, Fleischer Studios Inc v A.V.E.L.A. Inc, Poeticgem Limited, The Partnership (Trading) Limited, U Wear Limited, J Fox Limited*, [2014] EWHC 439 (Ch), Birss J. described the average consumer in these terms:

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

38. The goods at issue are those that will be selected by members of the general public at large. They will be available via general retailers such as fish mongers and supermarkets and their online equivalents. In stores, the goods will be displayed on shelves where they will be self-selected by the consumer. A similar approach will apply to goods selected online as the consumer will select them after having seen an image of them on a website. In my view, the selection process for the goods at issue will be primarily visual but I do not discount an aural component playing a role.

39. The goods will be selected on a frequent basis and will range in cost from cheap goods (such as fish stock, for example) to relatively expensive goods (such as caviar, for example). The factors that the consumer will consider when selecting the goods will be relatively ordinary and will involve considerations as to flavour, ingredients, nutritional content and whether the goods are sustainably sourced. Regardless of whether the selection relates to cheap goods or relatively expensive ones, I am of the view that the factors considered remain relatively ordinary and in

line with what I have stated above. As such, I am of the view that the selection process for all of the goods at issue will attract a medium degree of attention.

Distinctive character of the opponent's mark

40. 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).
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> 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)."

41. Registered trade marks possess varying degrees of inherent distinctive character, ranging from the very low, because they are suggestive or allusive of a characteristic of the goods or services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has not pleaded that its mark has obtained an enhanced level of distinctiveness but has filed evidence of use. Having said that, the evidence before me relates

predominantly to salmon fillets. Given the goods that remain relevant here (being those goods that are similar to the applicant's remaining goods, none of which cover salmon fillets), I see no reason to consider the issue of enhanced distinctiveness.[9] Therefore, I will only consider the inherent position.

42. The opponent's mark is a word only mark consisting of the words 'TRUE NORTH'. These words forms a unit and it is my understanding that the technical meaning behind the term relates to the direction pointing towards the geographic North Pole or some reference to the northernmost point on the rotational axis of the Earth. While this is noted, I am of the view that the majority of consumers will not know its exact meaning and will, instead, simply understand it as some reference to a direction on the compass. In my view, this is a known phrase and while it is not descriptive or allusive of the goods at issue, it is not particularly remarkable from a trade mark perspective. As a result, I consider that the opponent's mark is inherently distinctive to a medium degree.

Likelihood of confusion

43. Confusion can be direct or indirect. Direct confusion involves the average consumer mistaking one mark for the other, while indirect confusion is where the average consumer realises the marks are not the same but puts the similarity that exists between the marks and the goods and services down to the responsible undertakings being the same or related. There is no scientific formula to apply in determining whether there is a likelihood of confusion; rather, it is a global assessment where 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive character of the earlier mark, the average consumer for the goods and the nature of the purchasing process. In doing so, I must be alive to the fact that the average consumer rarely has the opportunity to make direct

[9] For the avoidance of doubt, even if I were to give it a full consideration, I do not consider the evidence is particularly compelling when it comes to the issue of enhanced distinctiveness.

comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

44. I have found the goods at issue under the section 5(2)(a) ground to be similar to a low degree. I have found the average consumer for the goods to be members of the general public at large who will select them via primarily visual means, although I do not discount an aural component. I have concluded that the average consumer will pay a medium degree of attention. Lastly, I have found the opponent's mark enjoys a medium degree of inherent distinctive character.

45. Taking all of the above factors into account, particularly given the identity of the marks at issue, I am satisfied that the average consumer would likely mistake the parties' marks for each other, even on goods that are similar to a low degree and even where the earlier mark is only viewed as distinctive to a medium degree. I am, therefore, satisfied that there will be a likelihood of direct confusion between the parties' marks for all of the goods at issue.

FINAL REMARKS

46. Even if I were to consider the opponent's UK mark, I do not consider that the result of the opposition would change the conclusion reached above. As alluded to above, if there is genuine use of the opponent's UK mark (or proper reasons for non-use) for "salmon fillets",[10] then there is likely to be a sufficient degree of similarity between such goods and the applicant's goods. Regardless of the degree of similarity for the goods, I consider that there would be a likelihood of confusion between the marks on the basis that they are identical. Alternatively, even if there is no genuine use for the opponent's UK mark, it will have no effect on the level of success achieved by the opponent's reliance upon its EUTM.

[10] Being the term that the opponent's statement of use relates to.

CONCLUSION

47. The opposition succeeds in full and the applicant's mark is hereby, subject to any successful appeal of my decision, refused registration for all of the goods applied for.

COSTS

48. As the opponent has succeeded, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 2/2016. In the present circumstances, I note that the evidence filed was, for the most part, simply a reproduction of evidence filed in separate proceedings. I do not consider that the opponent is entitled to recover its costs for filing such evidence. That being said, I will make a reduced award in respect of the evidence rounds for the costs associated with the evidence not filed previously and for considering the applicant's evidence. In the present case, I award the opponent the sum of £800 as a contribution towards its costs. The sum is calculated as follows:

Preparing the notice of opposition:	£200
Evidence rounds:	£200
Written submissions in lieu:	£300
Official fees:	£100
Total:	**£800**

90. I hereby order Cooke Aquaculture Scotland Limited to pay Scottish Seafood Investments Limited the sum of £800. The above sum should be paid within 21 days of the expiry of the appeal period or, if there is an appeal, within 21 days of the conclusion of the appeal proceedings.

Dated this 20th day of June 2024

A COOPER
For the Registrar