

O/0709/25

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00003858312
BY ORGANIC RESTAURANT MANAGEMENT LTD
TO REGISTER:



AS A TRADE MARK IN CLASS 43

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 440504 BY
SALT BREWING COMPANY LTD

BACKGROUND AND PLEADINGS

1. On 12 December 2022, Organic Restaurant Management Ltd (“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 27 January 2023 and registration is sought for the following services:

Class 43: Catering (Food and drink -); Food and drink catering; Catering of food and drink; Catering of food and drinks; Preparation of food and drink; Preparation of food and beverages; Fast food restaurants; Provision of food and drink in restaurants; Food preparation; Take-away food and drink services; Providing of food and drink; Providing food and drink; Takeaway food and drink services; Serving food and drinks; Providing food and beverages; Provision of food and beverages; Provision of food and drink; Hospitality services [food and drink]; Take-away food services; Food and drink catering for institutions; Decorating of food; Providing food and drink in bistros; Services for the preparation of food and drink; Food and drink preparation services; Takeaway food services; Food and drink catering for banquets; Catering for the provision of food and drink; Take-away fast food services; Providing food and drink for guests in restaurants; Serving food and drink for guests in restaurants; Catering for the provision of food and beverages; Providing food and drink in doughnut shops.

2. On 27 April 2023, the applicant’s mark was opposed by SALT Brewing Company Ltd (“the opponent”). The opposition is brought under sections 5(1), 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 (“the Act”). In bringing the opposition, the opponent relies on the following trade marks:

SALT

UK registration no. 3211087

Filing date 6 February 2017; registration date 30 June 2017

Relying on some services, namely:

Class 43: Bar services; bars; café services; cafés; catering (food and drink); pubs; restaurants; wine bars.

("the opponent's first mark"); and



UK registration no. 3350046

Filing date 1 November 2018; registration date 22 March 2019.

Relying on some services, namely:

Class 43: Bar services; bars; café services; cafés; catering (food and drink); pubs; restaurants; wine bars; serving beverages in brewpubs; provision of food and drink; restaurant services; pizza parlors; beer garden services.

3. The first mark is relied upon under all three grounds of the opposition. The second mark, however, is relied upon under section 5(2)(b) only. In respect of the 5(1) ground, the opponent's position is that the marks at issue are identical, so too are the services. Therefore, it is claimed that the applicant's mark should be refused registration. If the services are not identical then the opponent's position is that they are similar which, together with the identity of the marks means that there exists a likelihood of confusion under the section 5(2)(a) ground. Lastly, under the section 5(2)(b) ground, the opponent's position is that the marks are similar and that the services at issue are identical and/or similar. As a result, the opponent claims that there exists a likelihood of confusion between the marks.
4. The applicant filed a counterstatement wherein it denied the claims against it. In addition, the applicant requested that the opponent provide proof of use for its first mark.

5. Both parties filed evidence in chief. During the evidence rounds, both parties filed written submissions. In reply, I note that the opponent elected to file written submissions. A short form hearing took place before me on 9 July 2025, by video conference. The applicant was represented by Mr Joshua Marshall of 8 New Square. Mr Marshall was instructed by Solidum Solicitors, who have represented the applicant during these proceedings. The opponent was represented by Mr Seaghan Davey of 11 South Square. Mr Davey was instructed by Clarion Solicitors Limited, who have represented the opponent during these proceedings.
6. 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

7. The opponent's evidence came in the form of the witness statement of James Andrew Merrill dated 5 February 2024. Mr Merrill is the Financial Director of the opponent, a position he has held since March 2022. His statement is accompanied by 16 exhibits, being JAM1 to JAM16, and was adduced in order to demonstrate that the opponent has used its first mark.
8. The applicant's evidence came in the form of the witness statement of Ali Ahmad Buhendi dated 1 April 2024. Mr Buhendi is the owner of the applicant. His statement is accompanied by eight exhibits, being OM1 to OM3 and SA1 to SA5. The purpose of Mr Buhendi's evidence was to discuss the applicant's own use of its mark in other jurisdictions, its intention to sell to followers of the Islamic faith (being distinct from the opponent's intentions) and to comment upon the opponent's evidence.

9. I do not intend to summarise the parties' evidence (or submissions, for that matter) 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 ISSUE

10. As set out above, the applicant raised a number of issues in its evidence regarding (1) its own use and (2) the intentions of the parties. In its skeleton argument prior to the hearing, the applicant did not pursue any lines of argument in respect of these points. I am grateful to Mr Marshall for not pursuing them as, having considered the applicant's evidence, I am of the view that the points raised are of no assistance. I say this because, firstly, the use discussed is in relation to jurisdictions outside the UK and given that the issue of confusion in these proceedings is based on the UK consumer, any use (or existence of earlier trade mark registrations) in Qatar, Saudi Arabia or the EU is not relevant. Secondly, the fact that the applicant targets consumers of the Islamic faith is not something that factors into my decision. I say this because my assessment must be based, in fact, on the concept of 'notional and fair use' which involves carrying out the comparison of the services based on the specifications before me, not the services effectively provided by the parties.¹

DECISION

Proof of use

11. As noted above, the applicant requested that the opponent provide proof of use for its first mark. Evidence to that effect was provided by the opponent. In the applicant's skeleton argument filed prior to the hearing, Mr Marshall conceded that the opponent had provided genuine use for some of the services in its specification, namely "bar services", "bars", "catering (food and drink)", "pubs" and "restaurants". As was the case above, I am grateful for Mr Marshall for this concession as upon

¹ *O2 Holdings Limited, O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06 at [66] and *Compass Publishing BV v Compass Logistics Ltd* [2004] RPC 41 at [22]

my own review of the evidence, I am of the view that the opponent has adequately demonstrated use for such services. At the hearing, Mr Davey sought to argue that the opponent should also be deemed to have used its mark for the remaining services, being “café services”, “cafés” and “wine bars”. While noted, I see no merit in these additional services. I say this for two reasons. Firstly, the services already conceded (such as “bars” and “restaurants”) are, in my view, sufficiently broad enough to cover the disputed terms so any comparison of such services would offer nothing further to the opponent. Secondly, the disputed terms are included in the opponent’s second mark’s specification in any event so their absence from the first mark’s specification has no consequence.

12. As a result of the above, I do not consider it necessary to undertake a complete review of the opponent’s evidence in order to reach a conclusion in respect of three essentially inconsequential terms. Therefore, I will proceed simply on the conceded position that the opponent’s first mark has been genuinely used for “bar services”, “bars”, “catering (food and drink)”, “pubs” and “restaurants”.

Sections 5(1) and 5(2): legislation

13. Sections 5(1) and 5(2) of the Act read 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.

(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, or

(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 or association with the earlier trade mark.”

14. 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.”

15. An earlier trade mark is defined in section 6 of the Act, the relevant parts of which state:

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

- (a) a registered trade mark or international trade mark (UK) 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.

16. The opponent’s marks qualify as earlier trade marks under the above provisions. As set out above, the opponent’s first mark was subject to proof of use. However, this decision proceeds in respect of the concession of the applicant meaning that the opponent’s first mark is deemed to have been genuinely used in respect of some services (being those discussed at paragraph 12 above). As for the opponent’s second mark, this is not subject to the use provisions so the opponent may, therefore, proceed to rely upon all of the services for this mark as highlighted in its notice of opposition.

Section 5(2) case law

17. The following principles are gleaned from the decisions of the Court of Justice of the European Union (“CJEU”) in *Sabel BV v Puma AG*, Case C-251/95, *Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc*, Case C-39/97, *Lloyd Schuhfabrik*

Meyer & Co GmbH v Klijsen Handel B.V. Case C-342/97, *Marca Mode CV v Adidas AG & Adidas Benelux BV*, Case C-425/98, *Matratzen Concord GmbH v 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:

- (a) The likelihood of confusion must be appreciated globally, taking account of all relevant factors;
- (b) the matter must be judged through the eyes of the average consumer of the goods or services in question, who is deemed to be reasonably well informed and reasonably circumspect and observant, but who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them he has kept in his mind, and whose attention varies according to the category of goods or services in question;
- (c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;
- (d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;
- (e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;
- (f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

- (g) a lesser degree of similarity between the goods or services may be offset by a great degree of similarity between the marks, and vice versa;
- (h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;
- (i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;
- (j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense;
- (k) if the association between the marks creates a risk that the public might believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

My approach

18.I will begin the substance of my decision by first considering whether the opponent's first mark and the applicant's mark are identical. I do so because it is a prerequisite of both sections 5(1) and 5(2)(a) that the marks be identical. If they are deemed to be identical then both grounds will proceed and I will move to consider the comparison of the services. However, if they are not deemed identical then the grounds will fall away and I will then proceed to consider the section 5(2)(b) ground only.

Identity of the marks

19.In considering the present issue, I remind myself of the case of *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA*, Case C-291/00, wherein CJEU held that:

“54... a sign is identical with the trade mark where it reproduces, without any modification or addition, all the elements constituting the trade mark or where,

viewed as a whole, it contains differences so insignificant that they may go unnoticed by an average consumer.”

20. The effect of the above case law is that, technically, marks do not have to be presented in exactly the same way in order for them to be deemed identical. For example, use of the same word in an alternative stylisation (even if it is not covered by notional and fair use) may still be sufficient to give rise to a finding of identity. Further, additional figurative elements may be overlooked by consumers meaning that they are not capable of being points of visual difference. In the present case, the opponent argues that its first mark is capable of being presented in white and on a black circular background. Further, the opponent submits that the figurative differences (such as the shading within the word ‘SALT’ in the applicant’s mark and the Arabic lettering below this word) will go unnoticed. As for the applicant, I appreciate that it has conceded that there is a degree of similarity between all of the marks at issue, however, it denies that its mark is identical to the opponent’s first mark.

21. In considering the marks, I wish to first point out that while the opponent’s first mark, by virtue of being a word only mark, is capable of being presented in the same typeface used by the applicant, in white and on a black background, it does not extend to use on a circled background and neither does it cover the stylistic flourishes within the lettering in the applicant’s mark. These are, therefore, points of visual difference between the marks that are not covered by the notional fair use of word only marks. In respect of the Arabic lettering, I agree with the opponent that this will not be understood by the majority of consumers in the UK but this does not mean that they will be ignored.

22. In comparing the marks, I accept that the individual points of difference between the marks are of relatively little impact. That being said, that does not mean that the marks are identical. In the present case, I am of the view that when taking the marks as wholes, the culmination of the various points of difference are such that the consumer will notice them. Therefore, I find that the marks are not identical meaning that the opponent’s section 5(1) and 5(2)(a) grounds fail at the first hurdle.

23. I will now proceed to consider the section 5(2)(b) ground, beginning with a comparison of the services.

Comparison of services

24. The competing services are as follows:

The opponent's services	The applicant's services
<p><i>The opponent's first mark</i></p> <p><u>Class 43</u> Bar services; bars; catering (food and drink); pubs; restaurants.</p> <p><i>The opponent's second mark</i></p> <p><u>Class 43</u> Bar services; bars; café services; cafés; catering (food and drink); pubs; restaurants; wine bars; serving beverages in brewpubs; provision of food and drink; restaurant services; pizza parlors; beer garden services.</p>	<p><u>Class 43</u> Catering (Food and drink -); Food and drink catering; Catering of food and drink; Catering of food and drinks; Preparation of food and drink; Preparation of food and beverages; Fast food restaurants; Provision of food and drink in restaurants; Food preparation; Take-away food and drink services; Providing of food and drink; Providing food and drink; Takeaway food and drink services; Serving food and drinks; Providing food and beverages; Provision of food and beverages; Provision of food and drink; Hospitality services [food and drink]; Take-away food services; Food and drink catering for institutions; Decorating of food; Providing food and drink in bistros; Services for the preparation of food and drink; Food and drink preparation services; Takeaway food services; Food and drink catering for banquets; Catering for the provision of food and drink;</p>

	<p>Take-away fast food services; Providing food and drink for guests in restaurants; Serving food and drink for guests in restaurants; Catering for the provision of food and beverages; Providing food and drink in doughnut shops.</p>
--	--

25. When making the comparison, all relevant factors relating to the services in the specifications should be taken into account. In the judgment of the 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. At paragraph 29 of *Gérard Meric v Office for Harmonisation in the Internal Market*, Case T- 133/05, the General Court stated that goods (though it equally applies to services) in one party's specification can be considered identical where they are included in a more general category of the other party's specification.

28. The applicant's position at the hearing in respect of the services comparison was that they are either similar to a medium degree or identical. The applicant has not really offered a distinction between which of the applicant's services are identical and which are similar to a medium degree. I say this because the skeleton argument of the applicant only sought to breakdown what services in the opponent's specifications were considered identical or similar to a medium degree but did not breakdown its own services. While that may be the case, I am of the view that I can deal with the comparison of services relatively swiftly.

29. It is my view that the following services of the applicant are either self-evidently identical or identical under the principle outlined in *Meric* to the terms "restaurants" and "catering (food and drink)", which appear in both of the opponent's marks' specifications and "provision of food and drink" in the opponent's second mark's specification only:

"Catering (Food and drink -); Food and drink catering; Catering of food and drink; Catering of food and drinks; Preparation of food and drink; Preparation of food and beverages; Fast food restaurants; Provision of food and drink in restaurants; Food preparation; Take-away food and drink services; Providing of food and drink; Providing food and drink; Takeaway food and drink services; Serving food and drinks; Providing food and beverages; Provision of food and beverages; Provision of food and drink; Hospitality services [food and drink]; Take-away food services; Food and drink catering for institutions; Providing food and drink in bistros; Services for the preparation of food and drink; Food

and drink preparation services; Takeaway food services; Food and drink catering for banquets; Catering for the provision of food and drink; Take-away fast food services; Providing food and drink for guests in restaurants; Serving food and drink for guests in restaurants; Catering for the provision of food and beverages; Providing food and drink in doughnut shops.”

30. This leaves the applicant’s term of “decorating of food”. While I have my reservations as to the level of similarity between this term and the opponent’s services, I cannot ignore the concession of the applicant that all of its services are, at least, similar to a medium degree. As such, I am of the view that this service is similar to a medium degree with the services of the opponent that I have identified at paragraph 29 above.

The average consumer and the nature of the purchasing act

31. The case law, as set out earlier, requires that I determine who the average consumer is for the respective parties’ services. I must then decide the manner in which these services 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.”

32. The services at issue are those that will be selected by members of the general public at large. The services will be selected after the consumer views signage on the high street, promotional materials or after undertaking internet searches. As a

result, I find that the selection process for will be primarily visual but I do not discount an aural component playing a role by way of word-of-mouth recommendations.

33. The services will be selected on a frequent basis and will range in cost from cheaper services (such as fast-food restaurants, for example) to relatively expensive services (such as high-end restaurants). The factors that the consumer will consider when selecting the services will involve considerations as to the available selection of food and drink, dietary requirements, reviews and hygiene ratings. Even where the services at issue are expensive, I am of the view that the factors considered will remain relatively ordinary. As such, I am of the view that the services will be selected with a medium degree of attention, regardless of their price.

Comparison of the marks



34. It is clear from *Sabel 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 the trade marks, bearing in mind their distinctive and dominant components.

35. The CJEU stated at paragraph 34 of its judgment in Case C-591/12P, *Bimbo SA v OHIM*, that:

“... it is necessary to ascertain, in each individual case, the overall impression made on the target public by the sign for which registration is sought, by means of, inter alia, an analysis of the components of a sign and of their relative weight in the perception of the target public, and then, in the light of that overall impression and all factors relevant to the circumstances of the case, to assess the likelihood of confusion.”

36. It would be wrong, therefore, to artificially dissect the trade marks, although it is necessary to take into account the distinctive and dominant components of the marks and to give due weight to any other features which are not negligible and therefore contribute to the overall impressions created by the marks.

37. The respective trade marks are shown below:

The opponent's marks	The applicant's mark
<p style="text-align: center;">SALT ("the opponent's first mark")</p>  <p style="text-align: center;">("the opponent's second mark")</p>	

38. As alluded to above, the applicant has conceded that the marks at issue are all similar. In its skeleton argument, the applicant's stated position was that the marks are visually, aurally and conceptually similar to between a medium and high degree. Again, I am grateful to Mr Marshall for such submissions as, plainly, there is a degree of similarity between the marks. As for the opponent, its primary position in respect of its first mark was that it is identical to the applicant's mark. Failing that, however, it claims that the marks are similar to a high degree. As for its second mark, it also submits that the marks are similar to a high degree.

Overall impression

39. The opponent's first mark is a word only mark consisting of the word 'SALT'. There are no other elements to contribute to the overall impression of the mark, which

lies in the word itself. As for its second mark, this is a figurative mark which consists of a circular black and white device, within which sits the word 'SALT' in a black, slightly stylised and dissected typeface. The degree of dissection is limited as it has simply removed the horizontal line in the letter 'A'. Below the word are three small hexagons in black, grey and yellow. The word 'SALT' will dominate the overall impression of the mark with the hexagons and stylisation playing a lesser role. The circular device will simply be viewed as a border element and will, therefore, play a negligible role.

40. The applicant's mark is a figurative mark that consists of the word 'SALT' in a standard white typeface on a black circular background. Within the lettering is a stylistic black flourish. Below the word 'SALT' is a number of Arabic letters. Given that the consumers will be unaware what the Arabic letters mean, I find that the overall impression of the applicant's mark will be dominated by the word 'SALT'. The Arabic letters will not go unnoticed but they will play a lesser role. As for the stylisation within the mark, this will play an even lesser role than the Arabic lettering. The background will be viewed simply as a banal element and will, therefore, play a negligible role in the overall impression of the mark.

Visual comparison

41. Visually, the marks all share the word 'SALT'. This is the dominant element of all marks. While the points of difference all play lesser (and varying) roles in their respective marks, they will still be noticed from a visual perspective. Even taking all of this into account, I am of the view that the common use of the word 'SALT' across the marks is such that gives rise to a finding that these marks are all similar to a high degree. For the avoidance of doubt, this finding applies to a comparison between the applicant's mark and both of the opponent's marks.

Aural comparison

42. There was some discussion at the hearing as to the Arabic lettering in the applicant's mark. I appreciate that some consumers who speak Arabic will understand what this means and be able to articulate it. However, I have nothing

to suggest whether these consumers represent a significant proportion of consumers in the UK. Without such, I am not willing to find that this element will be understood by a significant proportion of UK consumers and, therefore, I find that it will not be pronounced. This leaves the aural component of the applicant's mark as 'SALT'. As this is the sole aural element of both of the opponent's marks, I find that these marks are aurally identical.

Conceptual comparison

43. Given what I have said above in respect of the Arabic lettering, I find that it does not contribute to the concept of the applicant's mark. This means that the concept of the applicant's mark derives solely from the word 'SALT'. In the present case, I consider that consumers will more readily adopt the meaning of 'salt' in the context of a condiment that is used to season food as opposed to viewing it as the mineral sodium chloride. The word 'SALT' is also the sole conceptual element of the opponent's marks so regardless of whether it is understood as the condiment or the mineral, these marks will be viewed as conceptually identical.

Distinctive character of the opponent's marks

44. 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).”

45. 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 services, to those with high inherent distinctive character, such as invented words which have no allusive qualities. The opponent has filed evidence of use which will need to be assessed in order to determine whether it gives rise to a finding that the marks benefit from an enhanced degree of distinctiveness. Before doing so, however, I will consider the inherent position.

46. I consider that the distinctiveness of both of the opponent’s marks lies in the word ‘SALT’. As above, this will be an immediately recognised word. In the context of the services, I do not consider its use to be particularly remarkable and, on the contrary, I consider it to be somewhat allusive to the opponent’s services. This is on the basis that consumers will identify that the opponent’s services will offer food or drinks seasoned with salt. That being said, the applicant has conceded that the opponent’s marks are distinctive to a moderate degree (which I would ordinarily categorise as medium). In light of this, I will proceed on the basis that the opponent’s marks are inherently distinctive to a medium degree.

47. I turn now to consider whether the evidence is sufficient to give rise to an enhanced degree of distinctive character. In respect of this point, I appreciate that the applicant conceded that the evidence was sufficient to give rise to a finding of genuine use for the opponent’s first mark for some services. However, it did not concede that there exists any degree of enhanced distinctiveness. As for the opponent’s position, I remind myself that at the hearing, it was stated that the

concession as to the inherent position by the applicant was sufficient to get them over the line in terms of confusion.

48. As a result of the above, I do not consider it strictly necessary to undertake a full assessment of the opponent's evidence. That being said, I note that the use covers a turnover of approximately £12 million between 1 April 2019 and 31 March 2023. I note that four months' worth of this turnover will have fallen after the relevant date (being 12 December 2022). In addition, the opponent incurred an advertising spend of almost £47,000 between 29 March 2018 and 12 December 2022. While this is not an insignificant level of use, it is low in the context of the market at issue (being the hospitality sector for food and drink). Additionally, it is not particularly longstanding. Further, the turnover stems from just 10 SALT locations in total. I appreciate that two of these are in London, however, these venues opened just over one year prior to the relevant date so any use associated with these is likely to be on the lower end of the scale. As for the other eight venues, these all appear to be localised to the Yorkshire/Leeds area. I say this not as a criticism of the opponent but as an example as to why, together with the lower level of short-lived use, the evidence is insufficient to give rise to a finding that consumers across a substantial part of the UK would be aware of the opponent's brand. As a result, I find that the inherent position applies, namely that the opponent's marks are distinctive to a medium degree.

Likelihood of confusion

49. 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 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 services and vice versa. As I mentioned above, it is necessary for me to keep in mind the distinctive

character of the earlier registrations, the average consumer for the services 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 comparisons between trade marks and must instead rely upon the imperfect picture of them that they have retained in their mind.

50. In respect of the services at issue, I have found them to be identical or similar to a medium degree. The average consumer base is formed of members of the general public at large who will select the service by primarily visual means (although I do not discount an aural component) after having paid a medium degree of attention. I have found the marks at issue to be visually similar to a high degree and aurally and conceptually identical. Lastly, I have found that the opponent's marks possess a medium degree of inherent distinctive character.

51. Taking all of the above factors into account and bearing in mind the principle of imperfect recollection, I am of the view that it is likely that consumers will misremember or inaccurately recall the marks for one another. I say this because consumers, when looking to recall the marks, will pin their recollection on the word 'SALT', being the dominant element of both parties' marks. At the hearing, the applicant sought to argue that direct confusion would be avoided on the basis that consumers would remember the points of difference. While I appreciate the attempt to argue this point, I am of the view that the differences in the present case are paradigm examples of where direct confusion will occur. I say this because these points of difference are either relatively banal figurative elements or are likely to not be understood by the consumer (being the Arabic letters). The latter element is something that consumers will likely forget as they are unable to understand it. Consequently, I consider that there exists a likelihood of direct confusion between the marks.

52. For the sake of completeness, I will now proceed to consider indirect confusion. In doing so, I remind myself of the case of *L.A. Sugar Limited v By Back Beat Inc*, BL O/375/10, wherein Mr Iain Purvis Q.C., as the Appointed Person, explained that:

“16. Although direct confusion and indirect confusion both involve mistakes on the part of the consumer, it is important to remember that these mistakes are very different in nature. Direct confusion involves no process of reasoning – it is a simple matter of mistaking one mark for another. Indirect confusion, on the other hand, only arises where the consumer has actually recognized that the later mark is different from the earlier mark. It therefore requires a mental process of some kind on the part of the consumer when he or she sees the later mark, which may be conscious or subconscious but, analysed in formal terms, is something along the following lines: ‘The later mark is different from the earlier mark, but also has something in common with it. Taking account of the common element in the context of the later mark as a whole, I conclude that it is another brand of the owner of the earlier mark’.

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)”.

53. While the above examples in *L.A. Sugar* are noted, they are not intended to be treated as an exhaustive list of the only instances wherein indirect confusion occurs.

54. In the event that the consumer is able to accurately recall the marks for one another, I consider that indirect confusion will occur. This is on the basis that consumers will view both marks and consider that the word 'SALT' in all of the marks is the indicator of origin. The points of difference, if noticed, will simply be viewed as alternative marks used by the same undertaking in different contexts. For example, in the event that the Arabic letters are recalled in the applicant's mark, they are likely to be viewed as an indicator that the 'SALT' restaurant services have extended to offer Halal friendly food. In addition, the mere stylistic differences between the marks may be those which are attributed to the same undertaking for use in different contexts. On this point, the opponent's first mark, being word only, could be that which is used on promotional materials whereas the applicant's mark is one that is used on signage. Consequently, I consider that there exists a likelihood of indirect confusion between the marks at issue.

CONCLUSION

55. The opposition succeeds in its entirety and, subject to any successful appeal, the applicant's mark is refused registration for all of the services applied for.

COSTS

56. As the opponent has been successful, it is entitled to a contribution towards its costs, based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the opponent the sum of £1,800 as a contribution towards the costs of proceedings. The sum is calculated as follows:

Filing a notice of opposition and considering the applicant's counterstatement:	£300
---	------

Filing evidence:	£800
Preparation for and attendance at a hearing:	£600
Official fees:	£100
Total	£1,800

57.I therefore order Organic Restaurant Management Ltd to pay Salt Brewing Company Ltd the sum of £1,800. This 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 31st day of July 2025

A COOPER

For the Registrar