O/0762/25

TRADE MARKS ACT 1994

IN THE MATTER OF TRADE MARK APPLICATION NO. UK3915448
BY INDI SUPPLEMENTS LTD
TO REGISTER THE TRADE MARK:

Body Bar

IN CLASS 29

AND

IN THE MATTER OF OPPOSITION THERETO
UNDER NO. 444095
BY DYNAMO 44 LIMITED

BACKGROUND AND PLEADINGS

1. On 25 May 2023, Indi Supplements Ltd ("the applicant") applied to register the trade mark shown on the cover page of this decision ("the contested mark") in the UK. The application was published for opposition purposes on 11 August 2023. Registration is sought for goods in Class 29.[1]

2. On 13 November 2023, Dynamo 44 Limited ("the opponent") filed a notice of opposition. The opposition was brought under sections 5(2)(a) and 5(2)(b) of the Trade Marks Act 1994 ("the Act"),[2] and was directed at all of the goods in the application.

3. The opponent relies upon UKTM no. 3623104 for the trade mark 'BODY BAR', which was applied for on 8 April 2021 and entered in the register on 29 October 2021. For the purpose of these proceedings the opponent relies upon all of the Class 30 goods for which the mark is registered.[3]

4. The opponent claims that the marks are identical or similar and that the goods covered by the marks are similar, resulting in a likelihood of confusion.

5. The applicant filed a defence and counterstatement denying that there exists a likelihood of confusion between the marks on the basis that the goods at issue are not similar.

6. The opponent's mark qualifies as an earlier mark under section 6(1) of the Act. As it had not completed its registration procedure more than five years before the application date for the contested mark, it is not subject to the use provisions contained in section 6A of the Act. Consequently, the opponent may rely upon all the goods for which the earlier mark is registered without having to establish genuine use.

[1] See the goods comparison.
[2] 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. See also Tribunal Practice Notice ("TPN") 2/2020 End of Transition Period – impact on tribunal proceedings.
[3] See the goods comparison.

7. The applicant is unrepresented; the opponent is represented by Beck Greener LLP.

8. Neither party filed evidence. No hearing was requested and only the opponent chose to file written submissions in lieu of a hearing. This decision is taken following a careful review of the papers before me.

PRELIMINARY ISSUE

9. In its counterstatement, the applicant points to the differing target markets/strategies of the respective parties and submits that this will prevent a likelihood of confusion. For the avoidance of doubt, I must carry out a notional assessment based upon the parties' respective marks and the goods contained in their specifications. The actual activities carried out by the parties are not relevant to my assessment.[4]

DECISION

Section 5(2): legislation and case law

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

> "5(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
>
> (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

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

the likelihood of association with the earlier trade mark."

11. The following principles are gleaned from the decisions of the EU courts 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 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. The average consumer is deemed to be reasonably well informed and reasonably circumspect and observant, but someone who rarely has the chance to make direct comparisons between marks and must instead rely upon the imperfect picture of them they have kept in their mind, and whose attention varies according to the category of goods or services in question;

c) the average consumer normally perceives a mark as a whole and does not proceed to analyse its various details;

d) the visual, aural and conceptual similarities of the marks must normally be assessed by reference to the overall impressions created by the marks bearing in mind their distinctive and dominant components, but it is only when all other components of a complex mark are negligible that it is permissible to make the comparison solely on the basis of the dominant elements;

e) nevertheless, the overall impression conveyed to the public by a composite trade mark may be dominated by one or more of its components;

f) however, it is also possible that in a particular case an element corresponding to an earlier trade mark may retain an independent distinctive role in a composite mark, without necessarily constituting a dominant element of that mark;

g) a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks and vice versa;

h) there is a greater likelihood of confusion where the earlier mark has a highly distinctive character, either per se or because of the use that has been made of it;

i) mere association, in the strict sense that the later mark brings the earlier mark to mind, is not sufficient;

j) the reputation of a mark does not give grounds for presuming a likelihood of confusion simply because of a likelihood of association in the strict sense; and

k) if the association between the marks creates a risk that the public will wrongly believe that the respective goods or services come from the same or economically-linked undertakings, there is a likelihood of confusion.

Identity of the marks

12. The marks to be compared are as follows:

Opponent's mark	**Applicant's mark**
BODY BAR	Body Bar

13. In *S.A. Société LTJ Diffusion v. Sadas Vertbaudet SA, Case C-291/00,* the Court of Justice of the European Union ("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."

14. Additionally, Mr Iain Purvis QC (as he then was), sitting as the Appointed Person in *Groupement Des Cartes Bancaires v China Construction Bank Corporation,* case BL O/281/14 found that:

> "It is well established that a 'word mark' protects the word itself, not simply the word presented in the particular font or capitalization which appears in the Register of Trade Marks.....A word may therefore be presented in a different way (for example a different font, capitals as opposed to small letters, or hand-writing as opposed to print) from that which appears in the Register whilst remaining 'identical' to the registered mark."

15. Accordingly, it is self-evident that the marks are identical.

Comparison of goods

16. Section 60A of the Act provides:

> "(1) For the purpose of this Act goods -
>
> (a) are not to be regarded as being similar to each other on the ground that they appear in the same class under the Nice Classification.
>
> (b) are not to be regarded as being dissimilar from each other on the ground that they appear in different classes under the Nice Classification.
>
> (2) In subsection (1), the "Nice Classification" means the system of classification under the Nice Agreement Concerning the International

Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, which was last amended on 28 September 1975."

17. 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 CJEU in *Canon*, Case C-39/97, the court stated at paragraph 23 that:

> "In assessing the similarity of the goods or services concerned, as the French and United Kingdom Governments and the Commission have pointed out, all the relevant factors relating to those goods or services themselves should be taken into account. 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."

18. Guidance on this issue has also come from Jacob J. (as he then was) in the *Treat* case, [1996] R.P.C. 281, where he identified the factors for assessing similarity as:

> (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.

19. The competing goods are as follows:

Opponent's goods	Applicant's goods
Class 30 Coffee, instant coffee; ground coffee; coffee in liquid form; tea, cocoa, sugar, rice, tapioca, sago, artificial coffee; flour and preparations made from cereals; bread and pastry; pasta and noodles; chewing gum; confectionery; bon-bons; sweets; chocolate; chocolates; pastries; honey, treacle; yeast, baking powders; salt, mustard; vinegar, sauces; spices; desserts; prepared meals containing predominantly pasta or rice; ice, ices and ice cream; frozen desserts; foods and beverages prepared from the aforesaid goods not included in other classes.	Class 29 Fruit- and nut-based snack bars; Superfood based snack bars; Nut and seed-based snack bars; Snack food (Fruit-based -); Fruit-based snack food; Organic nut and seed-based snack bars; Vegetable-based snack food; Nut-based snack foods; Nut-based food bars; Nut-based meal replacement bars; Fruit-based meal replacement bars; Vegetable-based snack foods; Fruit based snack foods Fruit snacks.

20. With regard to the similarity of the goods, in its counterstatement the applicant submits:

> "There are no goods in the Indi Specification which are either listed, nor similar to, any goods in the Opposing Specification. The Indi Specification is drafted to be specific to the snack products sold or planned to be sold by Indi. The Opposing Specification lists many different products but does not include any snack products or products similar to snack products. On this basis, we would argue that the goods to which the two marks are to be applied are not similar."

21. With regard to the similarity of the goods, the opponent submits:[5]

> “The goods claimed in the Application are […]. snack foods and would all include, for instance “snack bars” even where “bars” is not expressly stated. These goods are classified in Class 29 because they are each expressly fruit, nut and vegetable based snacks and snack bars.
>
> The goods specified in the Registration are […]. It is plain that "preparations made from cereals;" would include cereal-based snacks, including for instance, cereal-based snack bars. Such snack foods are not categorically different from the vegetable, fruit, and nut-based snacks listed in the Application and in fact, might often be indistinguishable - cereal-based snacks and snack bars will often contain for instance, seeds, nuts and dried fruit for additional flavouring and nutrition yet still properly be classified in class 30.
>
> Similar considerations to those above apply equally to the terms "rice" and "flour" listed in the Registration. In combination with the term "foods prepared from the aforesaid goods not included in other classes;" such goods would include for instance snack foods and bars prepared from "rice" such as "puffed rice" snacks and snack bars, as well as those prepared from "flour".
>
> The goods of the Application are also similar to "confectionery". Snack bars which might be sweetened, whether with natural sweeteners such as fruit or vegetables, or otherwise, will often be indistinguishable from and properly called confectionary. That applies notwithstanding the fact that they happen to be classified in class 30.
>
> In view of the foregoing, as a matter of common sense, the goods in question are highly similar.”

[5] Written submissions in lieu of a hearing, dated 30 December 2024, paragraph [9].

Fruit- and nut-based snack bars; Superfood based snack bars; Nut and seed-based snack bars; Snack food (Fruit-based -); Fruit-based snack food; Organic nut and seed-based snack bars; Vegetable-based snack food; Nut-based snack foods; Nut-based food bars; Vegetable-based snack foods; Fruit based snack foods; Fruit snacks

22. The above contested goods are all snack foods/snack bars. Broadly speaking, a *snack* refers to a small amount of food eaten between meals which is often ready-to-eat, requiring very little, if any preparation. On this basis, I am of the view that *chocolate, chocolates* and *confectionery,* contained in the opponent's specification, may also be eaten as a snack. As such, I find that there is a degree of similarity between the opponent's goods and the above contested goods. The goods at issue can have a similar purpose, can be sold through the same trade channels, may be found in the same aisle of a retail establishment, and can target the same end consumers. Furthermore, the goods may have a competitive nature, given that consumers wishing to have a *snack,* can choose, for example, whether to purchase the applicant's *fruit- and nut-based snack bar* or the opponent's *chocolate.* Accordingly, I find the goods at issue to be similar to a medium degree.

Nut-based meal replacement bars; Fruit-based meal replacement bars

23. In general, meal replacement bars are designed to substitute a regular meal. They provide a balanced mix of protein, carbohydrates, fats, vitamins, and minerals, etc. They are often used for weight management or as a convenient, on-the-go option, in instances where a full meal is not possible, such as during travel or busy workdays, etc. Accordingly, I am of the view that there is a degree of similarity between the contested goods and the opponent's *prepared meals containing predominantly pasta or rice.* The goods at issue can be in competition with each other given that consumers can choose whether to purchase the opponent's *prepared meals containing predominantly pasta or rice* or the applicant's *nut or fruit-based meal replacement bars*, for example. The goods have a similar purpose, can be sold through the same trade channels, target the same end consumers and be sold in the same retail outlets, though I acknowledge that they are unlikely to be sold from the same shelves. Overall, I find the goods at issue to be similar to a medium degree.

The average consumer and the nature of the purchasing act

24. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purpose of assessing the likelihood of confusion, it must be borne in mind that the average consumer's level of attention is likely to vary according to the category of goods or services in question (see *Lloyd Schuhfabrik Meyer*, Case C-342/97.

25. 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."

26. The average consumer for the parties' goods at issue will be a member of the general public. The goods are everyday foodstuffs which are likely to be purchased frequently, at low cost. The main focus of attention will be use and flavour, although some attention may be paid to allergy information, calories, fat and salt content, etc. The goods will be purchased primarily visually, selected from the shelves of a retail outlet or from an online equivalent. That said, I do not discount that there may be an aural component to the purchase of the goods given that advice may be sought from a sales assistant. I find that the average consumer will pay a medium degree of attention during the purchasing process.

Distinctive character of the earlier mark

27. In *Lloyd Schuhfabrik Meyer*, 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 Alternberger* [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)."

28. 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, to those with high inherent distinctive character, such as invented words which have no allusive qualities.

29. Although the distinctiveness of a mark can be enhanced by virtue of the use that has been made of it, the opponent has not filed any evidence of use in relation to its mark. Consequently, I have only the inherent position to consider.

30. The opponent's registration consists of two recognisable dictionary words, namely 'BODY BAR'. The word *body* will likely be perceived as reference to, inter alia, *the*

physical structure and substance of a human being, animal, or plant;[6] and *bar* will likely be perceived as, inter alia, *an oblong piece of solid material* (such as a bar of soap, or a chocolate bar, etc). In combination, whilst the words 'BODY BAR' are not directly descriptive, in terms of the food goods at issue, I find that they may be perceived as allusive in relation to, for example, nutritional food in bar form, that is good for the body. I am reminded that invented words usually have the highest degree of distinctive character, whereas words which are descriptive of the goods relied upon normally have the lowest. Accordingly, as I am of the view that the words 'BODY BAR' may have an allusive nature in relation to some of the goods, overall, I find that the earlier mark has a low to medium degree of inherent distinctive character.

Likelihood of confusion

31. 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 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 goods may be offset by a greater degree of similarity between the marks and vice versa. 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 act. 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 he has retained in his mind.

32. Earlier in this decision, I found that:

- The marks are identical.

[6] www.collinsdictionary.com/dictionary/english/body

- The parties' goods are similar to a medium degree.

- The average consumer for the goods at issue is the general public who will pay a medium degree of attention during the purchasing process.

- The purchasing process will be predominantly visual, although I do not discount an aural component to the purchase.

- The earlier mark is inherently distinctive to between a low to medium degree. On this point, it is acknowledged that a weaker degree of distinctive character in an earlier mark does not preclude a finding of confusion.[7]

33. Taking all the above factors into account, in particular, the fact that the marks are identical, I find that there is nothing to assist the average consumer in distinguishing between them, therefore I consider that the marks are likely to be mistakenly recalled or misremembered as each other. Consequently, I consider that there is a likelihood of direct confusion.

CONCLUSION

34. The opposition under section 5(2)(a) of the Act is successful. Therefore, the applicant's mark is hereby, subject to any successful appeal of my decision, refused registration.

35. The opponent's case under section 5(2)(b) puts it in no better position than its case under section 5(2)(a). Consequently, in light of my findings above, it is not necessary for me to consider this ground.

COSTS

36. As the opponent has succeeded, it is entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice ("TPN") 1/2023. In the

[7] See *L'Oréal SA v OHIM*, Case C-235/05 P

circumstances, I award the opponent the sum of £750 as a contribution towards the costs of the proceedings. The sum is calculated as follows:

Official fee:	£100
Preparing a notice of opposition and considering the counterstatement:	£300
Written submissions in lieu :	£350
Total:	**£750**

37. I therefore order Indi Supplements Ltd to pay Dynamo 44 Limited the sum of £750. 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 19th day of August 2025

Sam Congreve
For the Registrar