O/0996/26

TRADE MARKS ACT 1994

IN THE MATTER OF APPLICATION NO. UK00004133391

BY OMIS TECH LIMITED

FOR THE FOLLOWING TRADE MARK:

BUD MARRY

IN CLASS 34

AND IN THE MATTER OF OPPOSITION THERETO

UNDER NO. 453544

BY IMIRACLE (HK) LIMITED

BACKGROUND AND PLEADINGS

1. On 5 December 2024, OMIS TECH LIMITED ("the applicant") applied to register the trade mark shown on the cover page of this decision, in the UK. The application was published for opposition purposes on 21 February 2025, and protection is sought for the following goods:

Class 34: Electronic cigarette atomizers; Electronic cigarettes; Flavourings, other than essential oils, for use in electronic cigarettes; Inhalers for use as an alternative to tobacco cigarettes; Oral vaporizers for smokers; Smokeless cigarette vaporizer pipes; Smoking sets for electronic cigarettes; Flavored tobacco; Tobacco products; Tobacco substitutes not for medical purposes; Flavourings, other than essential oils, for tobacco; Liquid nicotine solutions for use in electronic cigarettes; Cigarette tobacco; Electronic nicotine inhalation devices.

2. On 10 April 2025, the application was opposed by Imiracle (HK) Limited ("the opponent") based upon sections 5(2)(b), 5(3) and 5(4)(a) of the Trade Marks Act 1994 ("the Act"). Under sections 5(2)(b) and 5(3) of the Act, the opponent relies upon the following trade mark:

LOST MARY

IR designating the UK no. 1616521
International registration date: 4 August 2021
Date of designation: 4 August 2021
Date of protection granted in the UK: 20 January 2022
Class 34: Cigarettes; cigarette tips; oral vaporizers for smokers; matches; lighters for smokers; cigarette filters; flavourings, other than essential oils, for tobacco; liquid solutions for use in electronic cigarettes; electronic cigarettes; cigarette cases.

3. Under section 5(2)(b) of the Act, the opponent relies upon all goods for which its mark is registered. The opponent claims that the marks are similar and the goods are identical or similar, with the result that there is a likelihood of confusion.

4. Under section 5(3) of the Act, the opponent claims to have a reputation for all of the goods for which its mark is registered. It claims that use of the applicant's mark, without due cause, would take unfair advantage of, and/or be detrimental to, the distinctive character and/or repute of the opponent's mark.

5. The opponent's mark qualifies as an earlier trade mark pursuant to section 6 of the Act.

6. Under section 5(4)(a) of the Act, the opponent relies upon the sign LOST MARY which it claims to have used throughout the UK since March 2022 in relation to "electronic cigarettes, including single-use, pre-filled electronic cigarettes, and vaping products".

7. The applicant filed a counterstatement denying that the marks are similar and putting the opponent to proof of its claimed reputation/goodwill.

8. Neither party requested a hearing, and neither filed written submissions in lieu. This decision is taken following a careful consideration of the papers.

EVIDENCE

9. The opponent filed evidence in the form of the witness statement of Youran Li dated 15 August 2025, which is accompanied by 6 exhibits (YL1 to YL6). Youran Li is Internal Legal Counsel for Imiracle (ShenZhen) Technology Co., Ltd, which is a wholly owned subsidiary of the opponent. This is a position Youran Li has held since 11 July 2023.

10. The applicant elected not to file evidence.

REPRESENTATION

11. The opponent is represented by Trademarkit LLP.

12. The applicant is represented by SADENIP LIMITED.

RELEVANCE OF EU LAW

13. 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.

DECISION

Section 5(2)(b)

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

> "5(2) A trade mark shall not be registered if because –
>
> (a)…
>
> (b) it is similar to an earlier trade mark and is to be registered for goods or services identical with or similar to those for which the earlier trade mark is protected
>
> there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the earlier trade mark."

15. Section 5A of the Act is as follows:

> "5A 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."

16. As the earlier mark had not been registered for more than 5 years at the filing date of the application in issue, it is not subject to the use provisions in section 6A of the Act. Consequently, the opponent can rely upon all of the goods identified.

17. The following standard summary of the principles applicable to the assessment of the likelihood of confusion was approved by the Supreme Court in *Iconix Luxembourg Holdings SARL v Dream Pairs Europe Inc & Anor*, [2025] UKSC 25:

> (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, in certain circumstances, be dominated by one or more of its components;

(f) and beyond the usual case, where the overall impression created by a mark depends heavily on the dominant features of the mark, it is quite 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 might believe that the respective goods or services come from the same or economically linked undertakings, there is a likelihood of confusion.

Comparison of goods

18. There does not appear to be any real denial by the applicant that the goods are similar or identical; the counterstatement focuses upon the similarity of the marks and the goodwill/reputation of the earlier mark. Consequently, I do not understand the similarity/identity of the goods to be in issue.

19. In any event, the term *electronic cigarettes* appears identically in the specifications of both marks. Consequently, I will proceed on the basis that the goods are identical, as that represents the opponent's best case.

The average consumer and the nature of the purchasing act

20. The average consumer is deemed to be reasonably well informed and reasonably observant and circumspect. For the purposes 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 and services in question: *Lloyd Schuhfabrik Meyer,* Case C-342/97.

21. In *Iconix* (quoted above), the Supreme Court approved the comments of Arnold LJ in *Lidl Great Britain Ltd & Anor v Tesco Stores Ltd & Anor (Rev1)* [2024] EWCA Civ 262, where he pointed out that:

> (a) Consumers who are ill-informed or careless, or consumers with specialised knowledge or who are excessively careful are excluded from consideration;
>
> (b) The average consumer provides a standard which enables the courts to strike a balance between the competing interests involved, such as trade mark owners, their competitors and consumers;
>
> (c) The average consumer is neither a single hypothetical person nor a mathematical average; assessment from the perspective of the average consumer does not involve a statistical test. There is no single meaning rule and if, having regard to the perceptions and expectations of the average consumer, the court considers that a significant proportion of the relevant public is likely to be confused, a finding of infringement may properly be made;
>
> (d) Assessment from the perspective of the average consumer is intended to facilitate adjudication of trade mark disputes by providing an objective criterion, by promoting consistency of assessment and by and enabling courts and

tribunals to determine such issues so far as possible without the need for evidence;

(e) The average consumer's level of attention varies according to the category of goods or services in question; and

(f) the average consumer rarely has the opportunity to make direct comparisons between trade marks (or between trade marks and signs) and must instead rely upon the imperfect picture of the trade mark they have kept in their mind.

22. The average consumer for the goods is a member of the general public. The goods are likely to be purchased reasonably frequently and will not be particularly expensive. However, factors such as flavour and strength are likely to be considered. Consequently, I consider that a medium degree of attention is likely to be paid during the purchasing process.

23. In the UK, the purchasing process for tobacco goods is controlled by various regulations. I am not aware of the same restrictions applying to electronic cigarettes and related goods. Consequently, in my view, the goods are likely to be selected from the shelves of a retail outlet or online equivalent. Even where goods are displayed behind a counter, and so have to be requested from the shop assistant, the average consumer will still have sight of the product prior to purchase. Consequently, I consider the purchasing process to be predominantly visual. However, given the scope for requests being made of shop assistants, I do not discount the aural component.

Comparison of trade marks

24. It is clear from *Sabel BV v. Puma AG* (particularly paragraph 23)[1] 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

[1] C-251/95

components. 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."

25. It would be wrong, therefore, to dissect the trade marks artificially, 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.

26. The respective trade marks are shown below:

Opponent's trade mark	Applicant's trade mark
LOST MARY	BUD MARRY

27. The opponent's mark consists of the words LOST MARY in a capitalised, stylised font. The greatest role in the overall impression lies in the combination of these words, which combine to form a unit. The stylisation plays a lesser role.

28. The applicant's mark consists of the words BUD MARRY. These are both dictionary words which do not have any meaning when used in combination. The words play a roughly equal role in the overall impression.

29. Visually, the marks coincide in that the letters that make up the second word in the opponent's mark also appear, in the same order, in the second word of the applicant's mark. However, there is an additional letter R in the applicant's mark. The first words

in the marks are also entirely different (LOST in the opponent's mark and BUD in the applicant's mark). I bear in mind that the applicant's mark is word only and could therefore be used in any font/case. Taking all of this into account, I find the marks to be visually similar to a low degree.

30. Aurally, the word MARY in the opponent's mark is likely to be pronounced MARE-REE. The word MARRY in the applicant's mark is likely to be pronounced MAH-REE. There is, therefore, some similarity between them. However, the words BUD and LOST will be pronounced completely differently. In my view, the marks are aurally similar to a low degree.

31. Conceptually, the opponent's mark consists of the words LOST MARY which will be understood as referring to a person called MARY who is (or has been) lost. The applicant's mark consists of two dictionary words, which will be given their ordinary meaning (the former having multiple possible meanings such as a flower bud or shortening of the term BUDDY and the latter referring to marriage). These words share no conceptual similarity with the opponent's mark. In my view, the marks are conceptually dissimilar.

Distinctive character of the earlier trade mark

32. 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 1-2779, 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)."

33. 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. The distinctive character of a mark can be enhanced by virtue of the use made of it.

34. The earlier mark consists of the words LOST MARY in stylised capitalised font. The first is an ordinary dictionary word, and the second is a fairly common name. In combination, the mark refers to a person called Mary who is (or has been) lost. There is no connection between the mark and the goods. In my view, the earlier mark has an average (or medium) level of inherent distinctive character.

35. The opponent has filed evidence relating to the use of the earlier mark. Youran Li states that the earlier mark was first used in the UK in March 2022 and has been used in relation to electronic cigarettes and liquid solutions for use in electronic cigarettes. The opponent's turnover in relation to LOST MARY products is as follows:

2023	£31 million
2024	£72.5 million

36. There are invoices in evidence which show use of the words LOST MARY in the product description, and the earlier mark at the top of the invoice.[2] Youran Li states that LOST MARY products accounted for approximately 30-35% of the disposable vape market in the UK during the period 2022 to 2024. Whilst I bear in mind that the market share and turnover figures provided relate to the whole of 2024, this is unlikely to be particularly material in this case given that the relevant date falls so late in that year. There is evidence of the earlier mark in use on products and websites (albeit not dated and some in a different colour way, i.e. white on a coloured background).

37. I bear in mind that the earlier mark has not been used for a particularly long period of time in the UK. However, clearly the use has been very intensive given the significant turnover figures and the opponent has benefitted from a significant market share leading up to the relevant date. In my view, the distinctiveness of the earlier mark has been enhanced to a high degree through use in relation to *electronic cigarettes*.

Likelihood of confusion

38. 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 them 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 marks may be offset by a greater degree of similarity between the goods, 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 comparisons between trade marks and must instead rely upon the imperfect picture of them that he has retained in his mind.

[2] YL3

39. I have found as follows:

a. I will proceed on the basis of identical goods.

b. The average consumer for the goods is a member of the general public, who will pay a medium degree of attention during the purchasing process.

c. The purchasing process is predominantly visual, although I do not discount an aural component.

d. The marks are visually and aurally similar to a low degree and conceptually dissimilar.

e. The earlier mark is inherently distinctive to a medium degree, which has been enhanced through use to a high degree.

40. Given that I have found the marks to be only visually and aurally similar to a low degree, and conceptually dissimilar, I can see no basis for concluding that one will be mistaken or misremembered as the other. Consequently, I find there to be no likelihood of direct confusion.

41. I will now consider whether there is a likelihood of indirect confusion. In *L.A. Sugar Limited v By Back Beat Inc*, Case BL O/375/10, 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)".

42. In my view, whilst I bear in mind that these categories are not exhaustive, there is no proper basis for a finding of indirect confusion in this case. The distinctiveness of the earlier mark is clearly a factor in the opponent's favour. However, the enhanced distinctiveness of the earlier marks lies in the combination of the words LOST MARY. The distinctiveness of the earlier mark will only serve to increase the likelihood of confusion to the extent that it resides in the element of the marks that are identical or similar.[3] In this case, the application is simply too different from the earlier mark for the average consumer to conclude that they would indicate a common or related origin,

[3] *Kurt Geiger v A-List Corporate Limited,* BL O-075-13

even when used on identical goods and accounting for the enhanced distinctiveness. Consequently, I find there to be no likelihood of indirect confusion. As there is no confusion for identical goods, it follows that there will also be no confusion for any goods in the application that are only similar to the opponent's goods.

43. The opposition based upon section 5(2)(b) of the Act is dismissed.

Section 5(3)

44. Section 5(3) of the Act states:

> "5(3) A trade mark which -
>
> > (a) is identical with or similar to an earlier trade mark, […] shall not be registered if, or to the extent that, the earlier trade mark has a reputation in the United Kingdom and the use of the later mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or repute of the earlier trade mark."

45. Section 5(3A) of the Act states:

> "Subsection (3) applies irrespective of whether the goods and services for which the trade mark is to be registered are identical with, similar to or not similar to those for which the earlier trade mark is protected."

46. I can deal with this ground relatively quickly. Whilst I bear in mind that the tests for enhanced distinctiveness and reputation are different, the factors relevant to both are the same. For the same reasons given above, I find that the opponent had a strong reputation for *electronic cigarettes* at the relevant date. However, in my view, the marks are simply too distant for a link to be made in the mind of the relevant public, even when they are used on identical goods. Notwithstanding the strength of the opponent's reputation, I can see no reason why the mark BUD MARRY (which consists of two words that have an entirely different concept to the unitary concept in the earlier mark) would bring the earlier mark to mind.

47. The opposition based upon section 5(3) of the Act is dismissed.

Section 5(4)(a)

48. Section 5(4)(a) of the Act states as follows:

> "5(4) A trade mark shall not be registered if, or to the extent that, its use in the United Kingdom is liable to be prevented -
>
> a) by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade, where the condition in subsection (4A) is met,
>
> aa)…
>
> b) …
>
> A person thus entitled to prevent the use of a trade mark is referred to in this Act as the proprietor of "an earlier right" in relation to the trade mark."

49. Subsection (4A) of section 5 of the Act states:

> "(4A) The condition mentioned in subsection (4)(a) is that the rights to the unregistered trade mark or other sign were acquired prior to the date of application for registration of the trade mark or date of the priority claimed for that application."

50. Again, I can deal with this ground relatively swiftly. Whilst the opponent plainly had goodwill in the UK for electronic cigarettes, it is well established that the test for misrepresentation is unlikely to produce a different outcome from the test for likelihood of confusion. Certainly, I believe that to be the case here. Given the distance between the applicant's mark and the opponent's sign, I can see no reason why a misrepresentation would occur and, consequently, there can be no damage.

51. The opposition based upon section 5(4)(a) of the Act is dismissed.

CONCLUSION

52. The opposition is unsuccessful and, subject to appeal, the application may proceed to registration.

COSTS

53. The applicant has been successful and is, therefore, entitled to a contribution towards its costs based upon the scale published in Tribunal Practice Notice 1/2023. In the circumstances, I award the applicant the sum of **£800** calculated as follows:

Considering the Notice of opposition and preparing a counterstatement	£300
Considering the opponent's evidence	£500
Total	**£800**

54. I therefore order Imiracle (HK) Limited to pay OMIS TECH LIMITED the sum of **£800**. This sum is to 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 10th day of November 2026

S WILSON
For the Registrar